

**ACCESS TO JUSTICE IN KENYA: A CRITICAL APPRAISAL OF THE ROLE OF THE
JUDICIARY IN ADVANCEMENT OF LEGAL AID PROGRAMS**

ERIC KYALO MUTUA

REG NO: 62/74881/2014

Supervisor: Dr. Nancy Baraza

**RESEARCH PROJECT SUBMITTED IN PARTIAL FILFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE MASTERS OF LAWS DEGREE OF THE
UNIVERSITY OF NAIROBI**

DECLARATION

I hereby declare that this thesis is my original work and has not been presented in any university or college to be accredited or for an award of any degree. All sources and materials used in the preparation of the research project have been duly acknowledged.

ERIC KYALO MUTUA

G62/74881/2014

Signed

APPROVAL

This thesis is submitted for examination with my approval as University Supervisor

Dr. NANCY BARAZA

University of Nairobi

Signed

DEDICATION

This project is dedicated first, to the Almighty God who gave me the strength to complete this study. Secondly, I dedicate this project to my father Kennedy Kyalo for the support he has accorded me in the period of this research.

ACKNOWLEDGEMENT

My sincere gratitude goes to my project supervisor Dr Nancy Baraza for taking the time and giving advice and timely assistance throughout the preparation of this project proposal. I would wish to acknowledge my family for their support both financial and psychological. Finally I would wish to appreciate the University of Nairobi fraternity for granting me the opportunity to complete my research project and as well the Office of Director of Public Prosecutions for the opportunity granted unto me in a bid to conduct this research.

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LIST OF ABBREVIATIONS

ACODE-Uganda	Advocates Coalition for Development and Environment-Uganda
ACHPR	The African Charter on Human and Peoples Rights
ADR	Alternative Dispute Resolution
AG	Attorney General
CoK	Constitution of Kenya
CJ	Chief Justice
FIDA	Federation of Women Lawyers
GAATW	Global Alliance Against Traffic in Women
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IELRC	International Environmental Research Centre
J.S.D	Doctor of Juridical Science
KLRC	Kenya Law Reform Commission
LSK	Law Society of Kenya
NHRC	National Human Rights Commission
NORAD	Norwegian Agency for Development Cooperation
NYU	New York University
TDRM	Traditional Dispute Resolution Mechanism
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNODC	United Nations Office of Drugs and Crimes
WIPO	World Intellectual Property Organization
WLEA	Women and Law in East Africa

LIST OF NATIONAL LAWS

Arbitration Act

Civil Procedure Act, Chapter 21 of the Laws of Kenya, Civil Procedure Rules 2010

Children's Act No. 8 of 2001

Constitution of Kenya, 2010

Criminal Procedure Code (CPC)

Evidence Act, Chapter 80 of the Laws of Kenya

HIV/AIDS Prevention and Control Act

Judicature Act,

Kadhis Court Act

Law of Contract Act

Law Reform Act

The Law Society of Kenya Act, Chapter 18 of the Laws of Kenya

Limitation of Actions Act

LIST OF INTERNATIONAL LEGAL INSTRUMENTS

Universal Declarations of Human Rights (UDHR) General Assembly Resolution 217(III) A 10th
December 1948

International Covenant on Civil and Political Rights (ICCPR) General Assembly Resolution
2200 A (XXI) 16th December 1966

The Convention on the Rights of the Child General Assembly Resolution 44/25 November 1989

The African Charter on Human and Peoples Rights (ACHPR) OAU Doc. CAB/LEG/67/3 rev 5
21 I.L.M 1982

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in
Africa AHG/Resolution 240 (XXXI)

The Dakar Declaration Resolution UN Security Council Resolution 1325

Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa

The Lilongwe Declaration

Kyiv Declaration

ABSTRACT

The purpose of this study is to bring to light that access to justice is a fundamental right which no person should be denied as per the Constitution on Kenya 2010. However access to justice cannot be realized if the people do not know if they have any rights that can be violated.

This study has been conducted in Kenya and has been chosen purposefully due to the fact that huge number of Kenyans go ahead with life having their fundamental rights and freedoms violated and due to their ignorance to the law have no avenue to seek justice and the few that know of some rights cannot afford legal representation or legal advice to any level. This study seeks to emphasize on the role the judiciary is playing in the cure of this misfortune through legal aid and awareness. The study looks at the current existing policy, legal, regulatory and institutional framework in adequately advancing judiciary backed legal aid and awareness programmes and what measure if any can be taken in enhancing the promotion of the same to the desired level.

This study employed field and desk research which was quite appropriate for this study since it sought to analyze factors associated with certain occurrences and outcomes.

CHAPTER ONE

BACKGROUND TO THE STUDY

1.0 INTRODUCTION

This chapter will discuss the background and context of this study comprising, inter alia, the statement of the problem, research objectives, hypothesis, justification, study limitations and the scope of the study.

1.1 BACKGROUND

Never before has the Kenyan dream of substantive realization of the wider access to justice been so real and apparent than after the enactment of the new Constitution 2010. The new Constitution guarantees public right to being accorded a fair trial and hearing and access to justice. It's noteworthy that these rights form the fundamental limbs of legal aid and that implies volunteered delivery of legal aid and awareness to people who can't pay for legal representation in court and have access to the court and its system.¹ Legal aid and awareness is thus generally viewed as key in delivering access to justice through making sure that there is equality before the law, that one is accorded the right to legal representation of their choosing and that one will have a fair trial before a court of law.² It is commonly understood to mean free and or sponsored assistances to suitable individuals, majorly the deprived and weak as being a gateway in the improvement of their access to justice. In a much broader context, access to justice covers the following; accessibility of courts, court fees, language of court proceedings to include interpretation, participation of the public when it comes to matters concerning the administration of justice as well as ease of access to disabled people and more so information accessibility.³

Extensive advocacy and lobby for legal aid and awareness and access to justice began earnest in Independent Kenya on the 9th July 1973 with the establishment of Kituo Cha Mashauri by a group of legal practitioners that were dedicated to assisting the less privileged and the deprived

¹Alan W. Houseman & Linda E. Pearle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, pp. 10 and 29. Center for Law and Social Policy, November 2003

²Regan, Francis et al (1999), *The Transformation of Legal Aid: Comparative and Historical Studies*. Oxford University Press. pp. 89-90.

³FIDA Kenya, "*The Peoples Version Informal Justice System*" (2011), which defines access to justice as '*the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards*'; "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011

people who couldn't pay for legal services.⁴ The country's first ever legal aid center's name was changed in 1989 to Kituo Cha Sheria. Its founding operational mission was to among other goals, encourage the underprivileged, vulnerable and sidelined persons to efficiently have access to justice and also to understand their fundamental human rights through advocacy, schmoozing, awareness raising, legal aid and awareness, legal tutoring, legal assistance and legal inquiry. The Organization's efforts and projects are supported by development partners' funding. The establishment of Kituo cha Sheria heralded a massive transformation in the public legal aid and awareness superstructure. Several such organizations were established soon after and all played key role in creating public awareness through robust and extensive civic education especially in the run-up to the referendum that saw the overwhelming support and passage of new Constitution in 2010. It is notable that while the success of these institutions in offering legal aid before the enactment of the new Constitution cannot be gainsaid, their mission still remains incomplete considering the number of Kenyans still ignorantly suffering constitutional rights violations oblivious of the remedies and recourses available to them.⁵

Most Kenyans are unaware of their fundamental rights and freedoms despite access to justice being an indispensable variant to full and comprehensive realization of the rule of law ideal. This coupled by the ineffective and discouraging structuring of the judiciary in a manner that doesn't facilitate equal and easy access to justice did not make the situation any better. Court fees remain unreasonably elevated to the common person and for others the legal amenities inexcusably high-priced.⁶ This has prompted the civil society and government to take measures and establish certain means for teaching the common person what their rights are and assisting in the quest for justice access in a bid to promote equal access to justice. Despite best of efforts, the government's contribution is still very minimal and doesn't cover persons who can't afford legal services. It only offers legal assistance to those that have been charged with murder, as well as

⁴ Kituo Cha Sheria, "Creating Legal Awareness in Kenya," The organisation gets support across the country from Volunteer Advocates in terms of their professional services. KITUO's services are provided to the poor and marginalized through various strategies, which include but not limited to provision of legal advice, legal representation, litigation, and community mobilisation and organisation. KITUO's headquarters is in Nairobi but has a branch office in Jogoo Road and a regional office in Mombasa.<<http://www.kituogetheria.or.ke/>> accessed May 29, 2015.

⁵ Patricia Kameri-Mbote, et al, *Kenya: Justice Sector and the Rule of Law*, (2011) International Environmental Law Research Centre (IELRC); Johannesburg: Open Society Initiative for Eastern Africa.
<<http://www.ielrc.org/content/a1104.pdf>> accessed May 29, 2015.

⁶ *ibid*

restrictive legal assistance to a minor/child who has been charged with an offence who has no alternative to legal help.⁷

Even before enactment of the new constitution 2010, the then existing legal frameworks clearly spelt out the role of the judiciary in legal advancement. The Civil Procedure Act for instance made provision for pauper briefs i.e. in situations whereby people who did not have adequate means could employ the courts seeking to be permitted to have their matters heard as paupers. However, success of such requests was fully depended on the accessibility of legal practitioners willing and ready to take up pauper such briefs. This then prompted various non-governmental organizations and caucus groups to come to the aid of the disadvantaged through the establishment of a dependable database of lawyers agreeable to pauper brief requests though in as much as their efforts immensely supplemented those of the courts, the organizations encountered several organizational, geographical and logistical challenges including that they didn't have a countrywide presence.

No law has better and clearly provided for a streamlined judicial involvement in legal aid and awareness than the new Constitution 2010. It recognizes and advances access to justice and views it as fundamental basic right and designates the government, in particular, the judicial arm as the prefect of this function. For instance, Article 22 obligates the Chief Justice to create regulations that provide for the rights of the common people to approach the courts and to pursue the implementation of their rights or their fundamental freedoms which may either be denied, been dishonored or been infringed or is being threatened. Article 22 (3) ensures there are no elements that hinder access to justice when implementing one's Bill of Rights through guaranteeing that no levies are asked for instituting court cases, by eliminating the condition of proving *locus standi*, by minimizing procedural bureaucracies, by accommodating institution of court cases on the premise of unofficial papers and even by permitting experts to turn up as friends of court where deemed essential. It is instructive to note that the constitutional role of the courts in providing legal aid is not strictly direct per se. Its involvement in enforcement of some of the fundamental rights and freedoms especially those that are essential in empowering a citizen to pursue legal recourse perfectly falls within the realms of legal aid or empowerment.⁸

⁷“Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution”, A Report of a Study Commissioned by the Kenya Civil Society Strengthening Program, 2011, pp.67-68

⁸ FIDA Kenya, “*The Peoples Version Informal Justice System*” (2011)

Article 35 effectively grants every person the right of accessing any and all evidence possessed by the prosecution and any evidence possessed by other parties that is needed for the carrying out and fortification of any of their rights and fundamental liberty. Further, the court can intervene in enforcing a citizen's right through the alteration and removal of any false or deceptive evidence which could affect them.⁹ Rights, more so those affecting access to information are essential in the enhancement of access to justice as the community has a right to access any and all the evidence they will require so as to commence a court case and even defend themselves.

The new Constitution 2010 supports legal aid measures advanced under the Civil Procedure especially with regards to case administration. Article 49, Article 50 and Article 51 provide for the rights of arrested people, the right to fair trial and the rights of those people that have been detained and have been detained in confinement or incarcerated. The Constitution of Kenya Article 50 extends the courts the courtesy to permit an intercessor in assisting an accuser or an defendant to effectively correspond with the courts. Thus has led to ensuring every person has access to criminal justice in judicial arrangement.¹⁰ The tragedy of this provision is that it tends to lean more towards criminal litigation than it does towards civil matters which almost always seek to serve the general public good. Whereas the Civil Procedure aggressively advocates the concept of pauper briefs, the requirements that underlie the provisions make it almost impossible for an undoubtedly indigent citizen to qualify. First, the Act defines a pauper to generally include people who don't possess or have the ways to enable them to shell out the fees recommended by the law for commencing and prosecution of a court case.¹¹ The difficulty and technicality in this provision lies in the fact that the person intending on instituting the lawsuit is required to be lay open to thorough and very arduous assessments done by court so as to prove they are paupers and be allowed to pursue justice. This is firstly embarrassing to the paupers who have to declare and broadcast before all and sundry their indigence and it is also peripheral and time consuming especially in cases when the reliefs sought are extremely urgent. Secondly, the court pays very little attention to the merits of the pauper's plea and more on his financial ability to sustain the same. Finally, is notable that whereas the court fees are initially waived at the time of institution

⁹ Constitution of Kenya, Article 35

¹⁰ Article 50 (2) (h) provides for the right of every accused person "to have an advocate assigned [...] by the State and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly". However, the Constitution leaves undefined the meaning of "substantial injustice" and given its fairly recent inauguration, jurisprudence is correspondingly scarce on the matter.

¹¹ The Civil Procedure Act, Civil Procedure Rules, Order 33

of such lawsuits, the litigant is obligated to pay back the same if and when the compensation they receive from the lawsuit is enough to cater for the foregone legal debts.¹²

The most prominent and doubtlessly robust open advocacy for legal aid advancement courtesy of the judiciary is Article 159 of the Kenyan Constitution 2010. It clearly espouses that the judicial power that vests in and is exercisable by the courts is derived from the people and can only be exerted in compliance, in consonance with the principles that justice be done to all persons regardless of their standing; that justice won't be deferred; that alternate methods of disagreement determination including mediation, including reconciliation, including arbitration, including traditional dispute resolutions will stand effectively fostered subject to the limitations provided in the Constitution; that justice is to be effectively administered without unwarranted concern to bureaucratic technicalities; and finally the fundamental rationales and the functions of the Constitution of Kenya 2010 be protected and encouraged. One of the key principles that give the judiciary a doubtlessly broad latitude to effectively promote legal aid and awareness is the requirement that tribunals and courts in general in exercise of their judicial function and judicial authority should promote and protect alternative dispute resolution. This principle acknowledges the workload the judiciary currently has and allows it to empower and effectively so, exercise prefect over the existing alternative judicial processes to ensure Kenyans not only access justice even in the most assumingly mundane of cases but also in the most complex of disputes in a manner and a process that is not repugnant to justice and morality.¹³

Section 77 of the Children's Act stipulates for court aided legal aid to children. It orders the court to mandate for effective legal assistance to a child brought before a court of law where the child in not represented.¹⁴It enforces duty on Parliament to settle expenses arising from and supplementary to such representations.¹⁵ Section 183 obligates the state under the aegis of the court to offer legal support to a minor who is in dispute with the laws and if they are unable to obtain one. Successful implementation of these provisions of the law has been lacking to say the very least.¹⁶ Courts are still very insensitive to the needs of those who do not have legal

¹²Nanjala, C. (2013). Determinants of effective legal Aid service delivery in Kenya. *International Journal of Social Sciences and Entrepreneurship*, 1 (5), 271-288

¹³ Constitution of Kenya 2010, Art.159(3)

¹⁴Children's Act (No. 8 of 2001), s. 77(1)

¹⁵ Ibid, s. 77(2)

¹⁶Oketch-Owiti & Wesselink (2007), *Legal Education and Aid Programme; A Pilot*, RoK

representation even if the persons may have been educated on the legal process to represent themselves by the legal aid providers and actors. The language commonly used by the court is unreasonable complex, intimidating and inexcusably harsh according to such self-representing litigants. The demeanor of the presiding judicial officers as well as the artificial environment created in respect thereof is quite off-putting, dismissive and tensing. The sum total of all these negative experiences result in many poor Kenyans withdrawing their cases or failing to pursue justice altogether. To an extent this could logically explain the rising cases of crimes in the country as prefer taking the law into their own hands instead of referring their disputes to courts for adjudication.

The general perception that the adversarial practice of the court proceedings most often than pitches the poor verses the rich is somehow real considering the aforementioned misgivings of the process. The weak and the poor people often shy away from such intimidating and belittling confrontations even if that means withdrawing their cases altogether. It is instructive to note that even where the weak or the poor win they are seldom often restored to their peaceful state as before thanks to threats or intimidation and sometimes harm from the rich and more powerful. The net effect of this has been seen in many citizens shying away from acclaiming their rights and staying completely ignorant of the recourse they may have. Others don't even recognize their rights have been at all violated let alone their right to report such violations. This leads to many giving inclination to the traditional justice systems over the mainstream judicial processes. Interestingly, these entities are generally considered fast, less rigorous, simple, impartial and have the capabilities of restoring the complainant to their before peaceful and quiet state. The challenge is that most of these cultural institutions work unmonitored and as such may result in outcomes that are considerably if not usually repugnant to justice and morality a perfect example is on matters touching on sexual offense in particular defilement cases, most traditional justice systems have compensation options in such matters and this is to a level not in per with the rights of a child for instance.

On a positive note though, our courts are now intensifying their efforts in educating the members of the public on the operational mechanics of the mainstream judicial process as well as opening themselves to public scrutiny in a bid to restore general public confidence as well as create awareness. The courts now regularly conducts most of the high profile and public interest cases

through live coverage. This has in then created public awareness of the court procedures and processes and has seen many Kenyans now access justice through this once reviled institution. Further, publications and periodicals highlighting various legal issues by the judiciary has resulted in many Kenyans appreciating their rights and the responsibility the judiciary plays in safeguarding them against illegal unlawful violations. Judicial Reforms have transformed the judiciary into an open, transparent, litigant-centric and fairly dependable institution that is not only reactive in its approach in terms of handling cases brought before it but also proactive in terms of creating general public awareness on the fundamental rights and freedoms as well as prevailing legal dilemma.

This research, while cognizant of the phenomenal progress made by the judiciary in advancement of legal aid and awareness, contends that more can be done and seeks to unearth and underscore measures that can be effectively adopted, streamlined and institutionalized to make the judiciary an even more effective institution in legal awareness education.

1.2 STATEMENT OF THE PROBLEM

As discussed hereinbefore, legal aid and awareness isn't just a fundamental human right but also an indispensable prerequisite to the implementation and gratification of further human rights comprising a person's right to a fair trial and a justifiable resolve. Legal aid represents a significant safeguard that goes a long way to ensuring equality and faith by the public in the dispensation of justice. As such the concept of legal aid is very broad and aims at contributing to the elimination of most if not all hindrances and barricades which prejudice and restrict the people in their quest for accessing justice by offering legal aid and awareness to persons who are incapable of affording legal represent in court and retrieve to the judicial practice.¹⁷

Observers and other human rights experts have for a long time unanimously argued and underlined that legal aid and awareness as a catalyst of accessing justice for all shouldn't be limited to the claim to free of charge legal succor and representation in just cases of a criminal nature but should be stretched wide enough to encompass delivery of legal aid and assistance in any judicial and any extrajudicial procedure geared towards effective determination of fundamental rights and obligations. International Legal Instruments as well as domestic laws

¹⁷ United Nations Special Rapporteur, "Legal Aid, A Right in Itself" available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&>> accessed May 29, 2015

have been very prominent in providing that states should bear the fundamental primary obligation of adopting and authenticating all measures appropriate in fully realising their rights to legal assistance and awareness for any person in its precinct and as such vassal to its extent of power. The tragedy has been a fatal assumption that the state is synonymous with the executive despite the existence of other arms of government; judiciary and parliament.¹⁸ Other arms of the government such as the judiciary can effectively come up with measures that can help create wide legal awareness and contribute to wider access to justice.

This study has noticed and seeks to confirm through extensive inquiry the actual active participation of the judiciary in advancement of legal aid and awareness. It's cognizant of the fact that this role has in the past been predominantly indirect and legally sanctioned especially with regards to pauper briefs and representation of children. Even then it was more obligatory than willful. This study contends that whereas judicial reforms in place have been relatively effective in ensuring judiciary plays an active role in creating awareness as to its operational and functional processes, a lot still needs to be done not just by the judiciary as the focal point of this study but also other institutions actively involved in legal aid to ensure Kenya's general population not only appreciates the rule of law in its entirety but also lives by it.

1.3 JUSTIFICATION OF THE STUDY

The common adage goes, 'Ignorance of the law is no defense'. One fundamental flaw with this rather universally popular misconception in practice is that very few people are aware of their fundamental rights and freedoms let alone their right to acclaim or seek enforcement of those rights. It is ironical thus that this adage applies only in criminal offences and cannot be put forward as a defense yet no one talks about lack of general public awareness as to political, social and cultural rights. This interesting double standard approach to enforcement of the law is what necessitates legal aid and awareness campaigns.

The judiciary has for years without number been the subject of revulsion, hate and scorn not just from the general public but also from the unexpected quarters including the executive and parliamentary arms of government who are supposedly aware of its key roles and

¹⁸ ibid

functions.¹⁹This has not been made any better by the fact that courts have for a long time closed themselves to the public. The most probable and logical explication this misgiving rests in the fact that the general public including the law makers and the executive are blissfully unaware of the legal functions, responsibilities and obligations of the judiciary. This general lack of awareness does not just apply to the roles of the judiciary but also with regards to the legislations quickly minted by parliament.

The former Chief Justice Dr Willy Mutunga remarked that legal assistance and awareness needs not just target deprived persons, it should also target the elite who more often than not make decisions oblivious of legal ramifications.²⁰He cited the recent attacks by political class on the judiciary as a manifestation of lack of awareness as to the roles of the courts. He stated thus:

Legal awareness appears lowest among holders of public office, thus requiring the LSK to urgently expand its legal awareness programmes to the elite as well. Civic education is required both for the masses as it is for the elite. Recent attacks on the Judiciary suggests that the elite does not understand how court processes work, or if they do, they still need to be educated on why they need to respect those same processes. Those who hold public office must be reminded that momentary ego trips against the Constitution and the law often produce expensive errors. Officious postures of intransigence against the law ultimately only deliver a costly invoice to the ordinary citizen. A lawyer's professional responsibility does not die or end at the door of politics or power. Advocates have a lifelong rendezvous with destiny regardless of where they are: in practice, on the bench, in business, in independent commissions, or in church service. The fidelity to professional ethics is a permanent duty.

The foregoing explains why the judiciary created the judicial open week to facilitate interaction between judiciary and members of the public as to their role, duties and obligations in administration of justice. The judiciary has partnered with other institutions comprising the L.S.K, Attorney General Chambers, the legal Aid Organisations such as Kituo Cha Sheria, I.C.J and also Cradle to develop a preliminary National Legal Aid Scheme that cognizance to

¹⁹Remarks by the Hon. the Chief Justice at the launch of the LSK Legal Awareness Week at Milimani Law Courts, Nairobi on October 27, 2014

²⁰ ibid

guarantee more Kenyan citizen get access to legal aid and awareness services.²¹The programme is steered in 6 different sections i.e. The Family Division of the Nairobi High Court, The Moi University Law Clinic, The Nairobi Children’s Court, The Nakuru Juvenile Justice, The Madiany Paralegal Advice Office and Mombasa Capital Offences. Amenities that are to be offered by the experimental programme will comprise legal awareness and legal aid, legal guidance, legal support and legal exemplification, recommendation to facility providers, alternative dispute resolution such as mediation, reconciliation and charitable small claims settlement. This programme is meant to as well offer adept facilities take account of household counseling, creation of modest legal cognizance information, legal study and propagation.²²

This study notes that whereas efforts have been made by the judiciary towards creating general public awareness, more still needs to be done. It deeply explores measures that can be adopted by the institution to further promote legal aid especially as regards availability of alternative dispute resolution to the people. This is done while cognizant of the fact that currently over 54,000 cases are filed annually at the High Court and considering the country currently has just a little over 100 judges dispensation of justice through the mainstream courts is quite a stretch. Even if these judges are to sit everyday seven days a week the cases will require an average of 3 to 4 years to complete. This is again not to mention the fact that almost an equal number of cases are filed annually.²³In advocating for alternative dispute resolution mechanisms (ADR) the courts are effectively participating in legal awareness creation.

In a bid to facilitate judiciary-backed legal aid and awareness, the Judiciary has established a detailed Judiciary Transformation Framework which seeks to among other things to generate general public awareness as to the functions and procedures of the judiciary.²⁴The Framework

²¹Soft-Kenya, “Legal Aid in Kenya” available at <<http://softkenya.com/law/legal-aid/>> accessed May 29,2015

²² ibid

²³The Chief Justice had the following to say as regards backlog of cases and the role of judiciary in promoting alternative forms of dispute resolution. “[...] said, there is also need to take stock of our situation. Even at 7,000 members, the number of lawyers is inadequate to serve a population of over 40 million Kenyans. A recent study by the Judiciary’s Performance Directorate in 2012/2013 found that Kenyans filed about 54,000 cases in the High Court alone. The Judiciary has 90 High Court judges, which means that, on average, each judge has 600 cases from one year alone. Even if all the 90 judges were sitting throughout the year without weekends and holidays, they would take about three years to conclude one year’s matters. We can draw similar parallels for the other courts. This situation is not sustainable. It is the reason Kenyan needs more judges, magistrates and lawyers; but it is also the reason the Judiciary is encouraging alternative dispute resolution mechanisms. I commend the Law Society for initiating processes to embrace alternative dispute resolution in consonance with Article 159 of the Constitution.

²⁴ The Judiciary, *Judiciary Transformation Framework 2012-2016*, available at <www.judiciary.go.ke/.../Judiciary's%20Tranformation%20Framework-fv...> accessed May 30, 2015

features four transformational pillars which include a people focused delivery of impartiality, transformative Management, structural Philosophy, and dedicated and motivated workforce, sufficient fiscal means and corporeal substructure and yoking technical knowhow as a justice enabler. The common person aimed justice deliverment transformational pillar for instance appreciates the need for judiciary to be actively involved in legal awareness creation. It is mostly founded on Article 159 of the Kenyan Constitution 2010 which affirms as follows; judicial authority is originated from the Kenyan people, it is bestowed on the Judiciary. It shadows that this deputized power ought to be implemented for the advantage of the Kenyan people. Underneath this Stalwart the Judiciary underscores that it will practice approaches targeted to generating a legal organization which ensures equivalence of all persons before the law and fair and just legal progression. The approaches under this Pillar are further grouped in 3 Main Outcome Areas i.e access to provision of justice, people centered and public arrangement, and investor commitment. The judiciary in developing the framework acknowledges the constitutional pledge of equivalent fortification of the law for every citizen. This framework postulates that the Judiciary as the custodian of justice in the country is duty-bound to initiate and take steps and measures to effectively reduce difficulties that hinder public access to information and to courts and also make straightforward court procedures in a manner that every ordinary litigant can comprehend and efficiently partake in the court process. By ensuring equal safeguard of the law, the Kenyan Constitution 2010 demands that the Judiciary shouldn't just eradicate hurdles to accessing justice but should also take efficient steps to guarantee that the court goes on to be open and accessible to persons seeking help from it. Captivating these actions in turn serves the purpose of progressing the swift delivery of justice and reducing the people's isolation from the judicial system.²⁵

It however remains to be seen whether these aspirations are achievable. This research keenly and critically investigates the measures and steps taken by the courts to realize this otherwise noble aspirations. It not only underscores the failures and successes of the programme but also comes up with tangible proposals that will ensure robust participation of the judiciary in legal aid advancement. This study is effectively justified by the practical concern that despite several measures adopted by judiciary in promoting legal aid and awareness in collaboration with other

²⁵ ibid

like-minded stakeholders, legal awareness and legal aid access and thus access to justice still remains a thorny and unfulfilled issue.

1.4 RESEARCH OBJECTIVES

As highlighted and explained hereinbefore, the primary objective of this research is to carefully interrogate the role of the Judiciary in advancement of legal aid programs in Kenya. It carefully analysed the country's existing policy, legal, regulatory and institutional framework in respect of the same with the primary view to gauging its effectiveness in ensuring, securing, defending and guaranteeing fundamental rights and freedoms of the citizenry especially their rights to accessing justice, fair trial and their rights to legal representation. In that respect, it (the research) specifically aimed at:

1. Identifying and singling out the weaknesses of the existing laws and policies in ensuring, advancing and supporting judiciary-backed legal aid initiatives and establishing whether there are mechanisms in place to effectively help the courts participate in legal awareness creation.
2. Carefully gauging and assessing the existing mechanisms of judiciary-supported legal aid programmes with the view to proposing clear and concise but practically realistic and less combative approach to ensuring the same is not only effective but also qualitative and keenly analysing the measures, if any, that the judiciary has taken in an attempt to effectively meet and realize its constitutional obligations of ensuring ease of access to justice to all Kenyans and more specific legal aid and awareness.
3. Determining how the existing Kenyan policy, legal, regulatory and institutional framework on judiciary-backed legal aid compares with the most progressive, future-looking legal and policy practices of developed jurisdictions, especially Netherlands, USA and Singapore and ascertaining what best practices the country could borrow from them in order to effectively promote involvement of the judiciary in legal aid and legal awareness creation
4. Proposing measures that can be effectively adopted by the country's judiciary to facilitate promotion and provision of legal aid and legal awareness creation.

1.5 RESEARCH QUESTIONS

This study is conscious and alive to the underlying point that realization of access to justice as one of the basic rights and fundamental freedoms that are assured under the Kenyan Constitution 2010, it's a progressive process. It is also aware that whereas the right to fair hearing and trial are expressly provided for in the law, facilitation of the same by the court within the realms of legal aid scheme and arrangement is not specifically provided for. There is thus no existing mechanism that can be used to qualitatively interrogate involvement of the judiciary in public legal awareness creation. This does not imply however that the courts have not made any steps towards facilitating legal aid. In fact as indicated before, it has thanks to the Judiciary Transformation Framework, forged alliances with other institutions and organisations in educating Kenyans on their rights and fundamental freedoms. It has also organized several judiciary open weeks where the members of the public have had a rare chance of interacting with the judges and magistrates and the legal system in general. This study sought to conclusively answer the following questions:

1. How effective is the existing policy, legal, regulatory and institutional framework in adequately advancing judiciary-backed legal aid and awareness programs and what measures, if any, has the judiciary taken to effectively meet and realize its constitutional obligations of ensuring ease of access to Justice?
2. What measures, if any, has the judiciary taken in encouraging public and community participation in administration of justice and how effective is the collaboration between judiciary and other human rights organizations when it concerns the realization of justice and its ease in access, in advancement of legal aid and awareness across the country?
3. How do the existing Kenyan policy, legal, regulatory and institutional framework on judiciary-backed legal aid programmes compare with the most progressive, future-looking legal and policy practices of jurisprudentially developed countries?
4. What best practices can the Kenyan Judiciary borrow from other best practices to effectively promote legal aid or promote legal awareness in a bid to facilitate ease of access of justice?

1.6 LIMITATION OF THE STUDY

This research effectively employed interview and in-depth review of existing literature as its primary method of information gathering and data collection. In its effort to get conclusive answers to the research questions as well as meet the above outlined objectives, this study encountered the following limitations:

1. Inadequate local literature specifically comprehensively and exhaustively addressing the subject under study.
2. Limitation or challenge of interviewee self-selection bias, that is, some of judicial officers being politically correct in their responses by giving misleading or untruthful information or better still, failing or declining to respond to the questions asked.

1.7 LITERATURE REVIEW

In her research paper ‘**The Determinants Of Effective legal Aid Service Delivery in Kenya**’,²⁶ Christine Nanjala strongly argues that access to justice as a concept though widely accepted and acknowledged by several and obvious legal actors, continues to draw numerous debates especially with close regards to its applicability. She says in Kenya for instance, access to justice has almost always been employed and used in a manner that makes its doubtlessly synonymous with legal aid. Nanjala notes however, that from the human rights approach and perception, provision of legal aid services can be viewed as a positive declaration and acknowledgment of the rights of the indigent, this brings about equality and non-discrimination before the law. She observes with a lot of concern that the much perceived nexus between provision of legal aid services and effective realisation and enjoyment of human rights cannot be clearly founded. Her research bears in mind the undisputable benefits and significance of accessing justice and more so accessing legal aid and awareness as an integral and indispensable aspect of the same and seeks to look at the key determinant of potent legal aid facilities as offered by various actors in Kenya. Her study commences through a relatively hurried setting and light description of legal aid and awareness and briefly captures both relevant local and international legal, regulatory and policy frameworks and instruments that underpin legal aid as fundamental aspect of human rights advancement. She looks at the funding ability of legal aid service providers and interrogates the accessibility and awareness as key determinant of the impact of legal aid service provision channel. Nanjala specifically looks into four common aspects and concludes that indeed these aspects are fundamental to the effective delivery of legal aid services.

Nanjala critically analysis the aforesaid legal framework, dissects the practice to establish viability and makes recommendations as to what state, private and individual actors can do achieve the intended purposes. She opines that legal literacy and nothing else should be the major and fundamental guiding goal and aim to service providers actively engaged in public awareness creation and literacy campaigns. She urges the government to review, strengthen and safeguard fundamental freedoms and human rights especially right to accessing justice through clear, precise and dependably accurate legal and policy framework. This encompasses expansion

²⁶Nanjala, C. (2013). Determinants of effective legal Aid service delivery in Kenya. *International Journal of Social Sciences and Entrepreneurship*, 1 (5), 271-288

of legal aid services to include advocacy for alternative dispute resolution, integration of paralegals within the judicial framework, enhancement of the capacity of the service providers, direct and effective consultation with L.S.K to incentivize lawyers actively engaged in *pro bono* legal services as well as mobilize funds and other resources for related programmes.²⁷

Whereas Nanjala's discourse on legal aid and awareness as being a salient attribute of accessing justice is doubtlessly instructive however she specifically looks at legal aid within the context and lenses of access to justice and uses the two respects almost interchangeably. She for instance notes that legal aid takes the lead in providing justice for the poor and argues further that where nations have flopped is observing at legal aid and awareness via the view of litigation in that social justice is rendered accessible through bureaucratic justice. She wonders why the dispute persist being similar from the vastly established and sophisticated legal aid and awareness systems such as the U.K to the still growing system as that in Kenya. Her prominent concern lies in the tendency of legal aid institution to focus much more on quantity than on quality. While this study widely acknowledges and applauds Nanjala's research as insightful and eye-opening, it emphatically notes that the same while highly informative, is introductory. This study goes beyond the concerns of quality and quantity to those of effectiveness with a lazar focus on the judiciary. It critically underscores and analyzes the role of the judiciary in advancing legal aid especially under the new constitutional dispensation.

This study also reviewed Kariuki Muigua's, '**Improving Access To Justice: Legislative and Administrative Reforms Under The Constitution.**'²⁸ In this writing, Kariuki carefully and critically analyses the legislative and administrative reforms set out under the new constitution in a deliberate attempt to bolster accessing justice as a fundamental right and freedom in Kenya. He notes that whereas the notion of access to justice widely involves the delivery of dispute determination mechanism that are inexpensive, nearby and guarantee quick justice whose process and processes are comprehended and appreciated by consumers, the Kenyan notion and practice of the same has for years without number been bedeviled by a multiplicity of hurdles such as high legal fees, geographical location, financial reliance, lack of efficacious remedies,

²⁷Nanjala (n27)

²⁸Kariuki Muigua, PhD., LL.M, LL.B (Hons) Nairobi, FCI Arb, FCPSK, MKIM and Lecturer at the University of Nairobi.

use of legalese, a backlog of cases that basically delay justice, acute absence of consciousness on alternative disagreement determination and traditional dispute determination mechanisms.²⁹ Kariuki notes however that generally, the broader and widely acknowledged context of accessing justice and legal aid and awareness covers issues that deal with accessibility of courts as arbiters. This covers the language used in court procedures comprising elucidation (interpretation) services, issues relating to court charges, participation of the public and involvement in justice administration, user-friendliness to disabled people and information availability. He argues that even with the shortcomings of the country's general approach to legal aid, awareness and accessing justice, there is hope in successful implementation of the Constitution of Kenya 2010.

He also argues that thanks to the new constitution, accessing justice is a part of the guaranteed and safeguarded human rights and fundamental freedoms. He specifically cites Article 48 that obligates the state to undertake measures geared towards ensuring justice for all persons. By providing that where legal fees are applicable, the same must be reasonable enough not to obstruct access to justice, this Editorial effectively enhances accessing justice by every Kenyan especially those that are poor and more so marginalized communities. He further notes that in a bid to effectively implement this provision to make the same a reality Schedule five of the Constitution mandates the parliament enact legislation in respect thereof. He laments however that this was only misgiving of the law, despite the clear latitude given to parliament to enact the same, very little has so far happened. Kariuki also cites articles 22, 35, 47, 49, 50, 51 and 159 of the constitution 2010 as the most progressive Articles in terms of legal aid and general access to justice is concerned. Article 22 for instance mandates the Chief Justice to create significant guidelines that stipulate for the rights of people to accessing courts and seeking the implementation of their fundamental rights and freedoms as per the Bill of rights that have been denied, been dishonored, been overstepped or is being endangered with an infringement, denial or violation.

Kariuki posits that in clearly specifying that “*Justice shall be done to all, irrespective of status*” Article 159 of the constitution restates that fundamental right of all people to enjoy accessing justice as is guaranteed by Article 48 of the constitution. He argues that similarly effectively reflects the essence of Article 27(1) of the constitution that provides that “*every person is equal*

²⁹Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012).

before the law and has the right to equal protection and equal benefit of the law". He reiterates that effective realisation of justice for all requires that the concerns and the needs of the poor people and the vulnerable people in the society be captured and acknowledged in legislations, policies, programs and strategies from the very onset to avoid a situation where the same fall through the cracks of judicial reforms. This he does by carefully and critically analyzing the existing legal and policy framework governing access to justice as a fundamental freedom. He proposes review of several laws that directly deal with effective implementation and realisation of access to justice to be in sync with the Kenyan constitution 2010. They include the Civil Procedure Act, The Criminal Procedure Code, The Evidence Act, The Children's Act, The Law Reform Act, The Limitation of Actions Act, The Judicature Act, The Kadhis' Courts Act, The HIV and AIDS Prevention and Control Act, The Law of Contract Act, The Arbitration Act among others.

Finally, Kariuki makes several recommendations which he believes if implemented will facilitate the realisation of access to justice as a fundamental freedom and right. He for instance cites the requirement for ratification of legislation to create provisions for usage of ADR and TDRM in determination of disputes and appropriate linkage of the same with the court.³⁰ He also proposes, among other things the review of procedural obstacles comprising some evidential rules used in courts, the construction of the court infrastructure in a manner that would enable those with disabilities have ease of access, the simplification of the language of the courts to enable even the most illiterate access justice, the training and tutorials aimed at equipping the judges, that magistrates and the other court officials with relevant knowledge and abilities in carrying out their obligations resourcefully and civic education mostly amongst the deprived people and the susceptible people that are centered in the bucolic areas, places in which there are not so many legal clinics, activism groups and civic instructors that support and expand their existence.

Kariuki's study is of immense importance to this research as it critically looks at the reforms that need to be pipelined in the judiciary to make access to justice a right a reality. This study notes that whereas most of the propositions captured in Kariuki's article are progressive and future-looking, most of them have been implemented by the judiciary thanks to the *Judiciary Transformation Framework 2012-2016*. Unlike Kariuki's, this study sought to conduct extensive

³⁰Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution", Paper Presented during the Training of Magistrates and Judges in Lake Baringo Soi Lodge on 3rd -8th September 2012.

and thorough analysis on the influence of those programmes on access to justice. It critically assesses the viability of these propositions and recommends accordingly. It notes that most of these propositions tend to support the argument that the judiciary can contribute immensely to legal aid service provision.³¹

According to Kameri-Mbote³² and Migai Akech³³ legal aid is an integral component of access to justice is essential to the realisation of the rule of law principle but sadly most Kenyans regrettably stay unconscious of fundamental rights and freedoms that belong to them whereas the courts are functionally designed in a manner which seldom facilitates equivalent justice access.³⁴ They both argue that substantial realisation of access to justice as a right through legal aid and awareness calls for several far reaching adjustments and changes to the infrastructural and operation framework of the entire judicial sector. They note that mundane and manageable factors such as distance should not qualify as a limiting factor to access to justice in Kenya. They then go ahead and cite North Eastern Kenyan courts as living and practical examples of how distance can be a major clog in the wheel of justice as in these areas people walk an average of 500 kilometers just to access justice and considering that they might have more important and urgent needs the inhabitants are more often than not faced with a battle between the immediate of needs and pursuit of formal justice. They are always inclined give formal justice a wide-birth. In a fashion and manner similar to Kariuki Muigua, Mbote and Akech recommend several changes and adjustments that they believe are essential to advancement of legal aid, awareness and accessing justice as a fundamental human right. These include that bodily amenities of the courts be created to be more user-friendly to people who have physical disabilities and other susceptible

³¹Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution”, A Report of a Study Commissioned by the Kenya Civil Society Strengthening Program, 2011, pp.67-68

³²Professor Patricia Kameri-Mbote is currently the Dean of The University of Nairobi, School of Law and a Founding Research Director of IELRC and the Programme Director for Africa. She studied law at the University of Nairobi, the University of Warwick, the University of Zimbabwe and pursued her doctoral studies at Stanford Law School, Stanford University. She is also an Advocate of the High Court of Kenya. Kameri-Mbote has also taught international environmental law at the University of Kansas. She is a member of the IUCN Commission on Environmental Law, a board member of the Advocates Coalition for Development and Environment (ACODE-Uganda) and Women and Law in East Africa (WLEA). She has consulted for many international and national agencies including the World Bank, United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the World Intellectual Property Organisation (WIPO), the Norwegian Agency for Development Cooperation (NORAD) and the government of Kenya

³³ Professor Migai Akech is currently a lecturer at the University of Nairobi he hold an LL.B. (First Class Hons, University of Nairobi), LL.M. (Cambridge), LL.M. (Trade Regulation) (NYU School of Law), J.S.D. (NYU School of Law)

³⁴Patricia Kameri-Mbote, et al, *Kenya: Justice Sector and the Rule of Law*, (2011)International Environmental Law Research Centre (IELRC); Johannesburg: Open Society Initiative for Eastern Africa

clusters of people, that courts dispense substantive justice without unwarranted concern to bureaucratic technicalities, that regulations of practice of Kadhi courts be established and ratified to standardize the procedures and systems of the courts and that court guidelines and exercises are reviewed regularly to guarantee that they are well-organized and modest.

This study notes that while there is an admittedly urgent need for implementation of various recommendations such as those advanced by Kameri-Mbote and Akech to realize access to justice for all, there is an equally urgent need to carefully interrogate the actual contribution of those already implemented in making this right a reality. The Judiciary has for instance endeavoured since 2012 to implement several institutional, operation and structural reforms geared towards making the courts more accessible to the public. These efforts have cumulatively yielded benefits as many Kenyans including those with disabilities now have literal access to justice. Further the judiciary thanks to the Transformation Framework has embarked on a relatively ambitious exercise of conducting nationwide legal aid under the aegis of the judiciary open weeks. During such fora the members of the public get to openly interact with judicial officers and staff. That way they get to learn more not only about the courts' operations but also on their rights to appear before such courts to reclaim any of their right that has been denied, abused, violated or threatened with abuse or violation. This study is deeply aware of this advancement and unlike Kameri-Mbote and Akech, sought to understand the nexus that exists between these efforts and their actual translation to more access with the view to proposing even more-thought out judiciary-specific approaches.

1.8 THEORETICAL FRAMEWORK

This study is doubtlessly buttressed and reinforced by the basic and fundamental Constitutional postulation that the state by whatever name called is morally obliged as a matter of duty to ensure, promote, protect, guarantee and jealously safeguard the fundamental rights and freedoms of its citizenry. By its very nature accessing justice qualifies as a fundamental right. It's been defined generally to include the capability of people to pursue and find a cure through official or unofficial institutions of justice, and especially in compliance to basic human-right principles.³⁵

³⁵Global Alliance Against Traffic in Women (GAATW), "The Right to Access to Justice," (2015) available at <http://www.gaatw.org/atj/index.php?option=com_content&view=article&id=105&Itemid=116> accessed May 31, 2015

It's noteworthy that access to justice a basic human-right intersects with human-rights in numerous means including the fact that it's a fundamental basic human-right as is established in Article 8 of the Universal Declaration of Human Rights (UDHR) which basically asserts that; *“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”* Further, this right is normally a gateway to fortification, recognition and enjoyment of further fundamental rights and freedoms. It's noteworthy however, that for this right to accessing justice should be freely and satisfactorily enjoyed by the citizenry, concerned states and governments must strictly endeavour to protect and safeguard additional rights including the right to all evidence and information, safety, discretion and confidentiality.

In order for any state or society to function and more so properly, a fair and efficacious system for assurance and provision of justice is crucial. Doesn't just effectively grasp persons, comprising state representatives responsible for their activities, but it also places standards of behavior and conduct for erstwhile inhabitants and should thus made accessible especially to those that are utterly underprivileged or the acutely vulnerable. Access to justice can be realized through several universally accepted and legal instruments-backed approaches including legal and legal awareness creation. No institution can arguably best promote legal as an aspect of access to justice better than the very institutions people approach to seek justice. Involvement of the judiciary in legal aid programmes and initiatives either directly or in collaboration with other like-minded human rights institution is more likely to result in quick and more effective realisation of this right than if the same is done by other unrelated institutions. This research believes the human rights approach best explains the role of judiciary in public legal awareness creation. It notes that whereas international legal instruments provide that the government is obligation to uphold and guard the privileges of its citizenry, they do not specifically qualify which are is best responsible in respect of the same. The judiciary as the arbiter in human rights related disputes as well as other legal non-human rights disputes is undoubtedly best placed to realize this daunting task.

1.9 STUDY HYPOTHESIS

A number of assumptions and presumptions underpinned this study. They include:

1. The existing policy, legal and institutional framework do not adequately address, secure, protect and safeguard the right of access to justice as it is a human right and fundamental freedom
2. The government of Kenya has not adequately taken measures to effectively meet and realize its Constitutional duty and obligation to ensure access to justice as a fundamental human right isn't only promoted, protected and upheld but it is also safeguarded.
3. The existing measures put in place by the government to facilitate realization of access to justice as a universal right through legal aid and awareness creation is utterly inadequate and still leaves many disadvantaged and poor Kenyans highly vulnerable to unabated violations thanks to ignorance.
4. Despite having crafted an elaborate Judiciary Transformation Framework that clearly outlines its role in promotion of access to justice through legal aid among other transparency measures, the Judiciary is yet to realize its audacious goal.
5. Judiciary-backed or sponsored legal aid programmes more often than not yield better returns in terms of legal awareness creation than those run by the regular human rights organizations primarily on the premise that 'who better learn the law and your rights from than the judge?'
6. Kenya can best learn about participation of the judiciary in legal aid and legal awareness creation programmes from the English judiciary.

1.10 RESEARCH METHODOLOGIES

In order to accurately and exhaustively answer the research questions, fulfill the study obligations and thoroughly test the research hypothesis, this study employed both field and desk research:

This involved interrogation of secondary Sources/Library Research. Some of these include: the relevant statutes, commentaries, Articles, sessional papers, policies, text books and journal articles. The research had access to material and data from Constitutional as well as statutory bodies and specialized institutions for instance the National Human Rights and Commission and also Civil Society Organizations such as Kituo Cha Sheria. The library and electronic research method were used in the collection of secondary information from sources such as publications, case law and court records, archives and information resource centers. The study thus also

involved desk analysis of various texts and materials. Select comparative case studies were adopted for identifying international best practices. Web based research also formed a useful source of data for analysis in the study.

This research also employed open ended interviews as a method of data collection primarily because the information gathered through such process is considerably as credible as it is relatively accurate and first hand thus almost free of bias. This study interviewed the following groups of persons and individuals:

1.11 CHAPTER BREAKDOWN

This study's contents are contained in four chapters as follows:

Chapter One offers the basis of the study and it comprises of the background information, the statement of the problem, justification of the study, research objectives, limitation of the study, literature review, theoretical framework, study hypothesis and research methodology.

Chapter Two entails the status of judiciary backed legal aid programs, it views the existing international legal instruments, regional legal instruments and declarations and the local legal framework on legal aid

Chapter Three focuses on the comparative legal aid practices with selected countries i.e. That of Netherlands, U.S.A and Singapore and the lessons that Kenya can learn.

Chapter Four covers the findings, recommendation and conclusions.

CHAPTER TWO

STATUS OF JUDICIARY-BACKED LEGAL AID PROGRAMES

2.0 INTRODUCTION

In order to contextualize the role of judiciary in legal awareness creation and legal aid programs it is imperative to critically understand the supporting operating legal and policy frameworks. This Chapter interrogates local, regional and international legal and policy instruments that underpin legal aid and awareness as an important component of access to justice.

2.1 INTERNATIONAL LEGAL INSTRUMENTS

It is notable that the global recognition that access to justice is a critical element of legal aid has consistently gained currency over the years. The UDHR¹ is recognizably the first international convention to acknowledge the individual's entitlement to equivalence afore the law and more so equivalent fortification of the law devoid of any prejudice. Several conventions, regional and international as well as local country laws followed the same and have adopted provisions on legal aid. The Constitution of Kenya 2010 for instance provides that common regulations of international law will form a portion of Kenyan law² and that any agreement or resolution ratified by Kenya will form a portion of the Kenyan law³. There are several international legal instruments on legal aid and access to justice that have been ratified by Kenya and include the following:

2.1.1 UNIVERSAL DECLARATIONS OF HUMAN RIGHTS

Though the Universal Declarations of Human Rights isn't lawfully compulsory a tool per se, its stipulations are deemed to form part of the international customary law and are accorded due regard especially in cases and situations that call for interpretation of other international human rights instruments. It clearly identifies access to justice and freedom from discrimination as some of the fundamental rights that all individuals are entitled to. Equality before the law and unimpeded access to an autonomous, fair and absolutely unbiased judicial course as a right of the

¹ The Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), 10 December 1948.

² The Constitution of Kenya (CoK), Article 2(5).

³ Ibid, Art. 2(6).

person is also expressly guaranteed.⁴ Article 11(1) of the Declaration sets in general terms, as a common acceptable level of achievement for all persons and all states and that every person accused of a criminal offence ought to be provided with every means required for his or her defense. To this end it is clear that the role of the court in realization of these rights of the individual is a facilitative one. This is articulately stated in Article 25 of the Constitution of Kenya 2010 that mandates the Chief Justice to create guidelines for court procedures that will ensure courts are strictly guided by rules of natural justice in the discharge of their judicial mandate. The constitution of Kenya 2010 is also express that lack of such facilitative rules of procedure doesn't regulate the right of people to initiate court cases as well as have their legal issues attend to and resolved by a competent court of law.⁵

It is significant that while the UDHR strongly advocates and affirms for equality and access to justice to being a fundamental human basic right albeit by implication, especially with reference to an accused person, it does not expressly define its understanding of the phrase "all the guarantees necessary for his defense" therefore presenting very petite enlightenment on the function of legal aid and awareness in criminal justice. Further, it isn't specific to legal-aid and awareness as an integral aspect of access to justice in matters of civil nature.

2.1.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Unlike the Universal Declarations of Human Rights, the ICCPR is legally binding and clearly identifies a number of measures all member states are required to take upon to properly guide criminal prosecutions.⁶ Article 14 for instance obligates member states to ensure that the accused is always afforded reasonable time and resources for the planning of their argument and to correspond with a legal representative of their choosing. ICCPR further provides that the person who has been accused of any offence reserves the privilege to be tried in their attendance, to be able to defend themselves against the proffered charges either personally or via legal representation of their choice and they should be properly educated and in the clearest of ways possible of his right to be provided with legal-aid and help assigned to them if they have no access to any especially in a matter where that significance of justice necessitates.⁷

⁴ UDHR, Art. 10.

⁵ CoK, art. 22(3) (iv).

⁶ Kenya ratified the covenant on May 1, 1972.

⁷ International Covenant on Civil and Political Rights (ICCPR), art.14 (3) (b), (d).

Since Article 14 merges several guarantees with varying scopes of application, it is regarded as fairly complex especially from an implementation standpoint view.⁸ For instance is that whereas the accused is entitled to legal representation of his choosing as a central requirement, this right is practically subject to various limitations and challenges especially where the state is obligated to provide such assistance.⁹ In that case the unfettered exercise of free will is compromised despite the conventional general understanding that the desires of the accused person are always taken into consideration in legal representation allocation.¹⁰ The discretion accorded the state to determine where and when not to afford an accused legal representation primarily on the basis of the likelihood of injustice being done in the absence of such representation is quite lofty, considering the state is almost always the accuser in most matters. This unclarified but required intervention by states is doubtlessly open to abuse. ICCPR does not clarify offences and cases which could cause a nations responsibility to guarantee legal-aid and awareness without charge to an individual. It is notable however, that the United Nations Human Rights Committee offered guidance with regards to this requirement. It stated that an accused person charged on a capital offence such as murder must be afforded legal representation at all trial stages and that the selected legal representation must always be in effective representation of the accused. It also clarified in *Reid vs. Jamaica*¹¹ that states which by whatever reason hinders effective representation of such accused persons then those states are in violation of the Convention.¹² In other words, every member state is duty-bound to ensure that indigents and the vulnerable people are offered with effective legal representation for free in very critical criminal related cases, more so if the suspected person seems to have a decent probability for a very efficacious appeal, further than the capital offences matters, it's impossible to articulate in overall what types of matters are encompassed by this regulation.

⁸ 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.

⁹ UN Human Rights Committee, *Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981 (29 March 1984), U.N. Doc. CCPR/C/OP/2 at 148 (1990).

¹⁰ UN Human Rights Committee, *Wright and Harvey vs. Jamaica*, Communication No 459/1991, 27 October 1995 and UN Human Rights Committee, *Reid vs. Jamaica*, Communication No 250/1987, 20 July 1990.

¹¹ Communication No 250/1987, 20 July 1990.

¹² UN Human Rights Committee (n 9), para. 38.

It is noteworthy that ICCPR informed several prerequisites of the Constitution of Kenya 2010 especially with regards to rights of the suspected person to just trial¹³ and access to justice. Most of these provisions depend on the proactiveness of the judiciary to be realized and Judicial officers in providing and sustaining a trial environment that is not only just but is seen to be just in the eyes of the law help in effective realization of these rights. Though not directly credited, judicial officers are doubtlessly the leading legal aid providers in any adversarial trial process. This they do not only in properly guiding judicial proceedings but also in promptly notifying the accused person of their fundamental rights and liberties regarding trials. The judiciary open countrywide Marches Week is one such forum where the members of the judiciary get actively engaged in legal aid directly with members of the public.¹⁴ During this time, the judiciary gets to open up to the public; explain how it works; and gets feedback from the people on how to improve its services.¹⁵

2.1.3 THE CONVENTION ON THE RIGHTS OF CHILD

The Convention On The Rights of the Child is another international legal instrument that effectively guides and informs various local legal frameworks on rights of the child, specifically the Children's Act of 2001. It prescribes specific requirements to legal aid wherever the accused is a child. Article 40 obligates every state party to ensure that a child accused of a criminal offence is properly, punctually and directly informed of the charges preferred against them, where suitable, via their custodians, get legal-aid and help in planning and demonstration of their defence. Under the Convention¹⁶, an accused subject/child also has a right to have their cases determined expeditiously via an impartial and autonomous court or judicial body of competent

¹³ Article 49 (1) provides that an arrested person has the right-(a) to be informed promptly, in language that the person understands, of-(i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent; (b) to remain silent; (c) to communicate with an advocate, and other persons whose assistance is necessary; (d) not to be compelled to make any confession or admission that could be used in evidence against the person; (e) to be held separately from persons who are serving a sentence; (f) to be brought before a court as soon as reasonably possible, but not later than- (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

¹⁴ The Judiciary, 'JUDICIARY MARCHES WEEK: Taking Justice to the People (August 21st- 25th 2012).

¹⁵ Willy Mutunga, 'The Kenyan Judiciary is becoming accessible, modern and efficient' *CapitalFM* (Nairobi, 21 August, 2012) <<http://www.capitalfm.co.ke/eblog/2012/08/21/the-kenyan-judiciary-is-becoming-accessible-modern-and-efficient/>> accessed 30 July 2015.

¹⁶ The Convention on The Rights of the Child.

jurisdiction. The law¹⁷ is clear that a subject²/child accused of a crime should always be given necessarily legal assistance unless it is shown that there exist circumstances where such assistance would not be in the best of their interest.

This Convention effectively recognizes the facilitative role the judiciary plays in realization of these critical rights of the child. The burden of conducting individual case assessments and evaluations to determine whether legal representation serves the best interest of the accused minor primarily rests with the courts or respective judicial bodies. Its (the courts) involvement acts not just as a facilitator but also as an accelerator of legal aid and thus access to justice to the accused child. It is noteworthy that just like many other pro-legal aid Conventions discussed before, the Convention on The Rights of The Child admittedly limits the rights of children to legal aid to criminal matters. It does not extend similar benefits to civil and commercial cases involving minors.

2.2 REGIONAL LEGAL INSTRUMENTS

Besides the international conventions and treaties discussed before, Kenya is also party to a couple of local arrangements and instruments that strictly obligates every subscribing member state to offer legal aid in circumstances where the same is reasonably necessary for the interest of justice. Some of these pro legal-aid regional human right treaties and conventions include: The African Charter on Human and Peoples Rights (ACHPR), The African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

2.2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR)

Commonly recognized as “the Banjul Charter”¹⁸, African Charter On Human And Peoples Rights is a regional treaty that specifically obligates every party nation to grasp every measure necessary, legislative and or otherwise, to provide validity and meaning to the rights it promises. These include the rights of an accused person to have a just court trial and legal representation of their own choice. Though the Banjul Charter borrows heavily from the Universal Declaration on Human Rights (UDHR) of 1948, in as far as the rights of the accused person to having a just trial

¹⁷ Ibid.

¹⁸ The African Charter on Human and People's Rights (Hereinafter referred to as Banjul Charter) was adopted on 27 June 1981 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), and entered into force 21 October 1986.

and legal representations are concerned, it doesn't specifically offer for free legal representation.¹⁹ It's notable however that this Charter is complementary to the UDHR and it is arguable that whereas it does not expressly and explicitly offers for free legal-aid to a person accused of an offence and who can't come up with the money for legal representation, it is customary for states to provide such facilities where the alternatives are clearly lacking to ensure safeguarding of the accused rights and without which assumptions the provisions of article 7 (1) (c) would be rendered moot.²⁰

Moreover, the Banjul Charter explicitly safeguards the right to life and human dignity.²¹ It provides that humanbeings are inviolable and no individual should be robbed of their right to life. It follows that capital offences such as murder, treason and robbery with violence that carry death as the only available penalty should be conducted in the most careful of ways to avoid violation of this provision. It is arguable that death sentence to an accused person without legal representation throughout the entire trial process amounts to arbitrary denial of life. It should be understood therefore that the member states are strictly under duty to provide free legal representation as of right in the circumstances that the accused cannot afford to pay on their own. The CoK borrows heavily from the provisions of the Banjul Charter. Articles 48 and 50 on access to justice and fair hearing respectively both mirror article 7 (1) (c) of the Banjul Convention. Further, articles 26 and 28 on right to life and human dignity respectively are clearly reflections of article 4 of the Charter. It is notable however, that like many other human rights conventions and treaties, the Banjul Charter doesn't deal with legal aid and access to justice in civil cases. That notwithstanding, the judiciary still performs a fundamental part in the realization of these rights. Though its legal aid and facilitation of access to justice is limited to promptly and directly informing the accused persons of their right to legal representation and ordering such representation from the state where the accused cannot arrange for one, it is doubtlessly fundamental.

¹⁹ Article 7 (1) (c) of the Banjul Charter Provides that the Accused has the right to fair trial and legal representation of choice. In strict interpretation of this provision one can comfortably state that free legal aid is not explicitly provided.

²⁰ Though the Banjul Charter does not explicitly say that defence counsel must be provided free of charge when the accused cannot afford to pay, a duty of the government to provide for such would seem to be present if no other legal aid schemes are available to ensure the defendant's rights, as the right in art. 7 (1) (c) would otherwise only be theoretical.

²¹ Article 4 of Banjul Charter states thus, "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

2.2.2 THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

Commonly known as the Maputo Declaration, The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa²² is another regional arrangement whose fundamental objective is to encourage local, national, regional and international projects directed at offering women easy admittance to law based amenities and in particular, legal-aid and awareness.²³ It essentially necessitates nations to set in position legal and institutional procedures which are aimed at giving women, as the most vulnerable members of the community, effective and unlimited access to judicial and legal services. The Kenyan judiciary as the custodian of the fundamental human rights and freedoms of the people, especially the vulnerable, is keen on protecting women from rights infringement through effective and elaborate legal schemes. Through the Kenya Women Judges and Magistrates Association, judicial officers provide legal empowerment to women in matters succession, marriage, divorce and property.

This Protocol is cognizant of the fact that African women have for a very long time been victims of discrimination and injustice, both economically and socially. Most are so much economically disadvantaged to have adequate access to the mainstream judicial bodies to acclaim their rights without support.

2.3 OTHER LEGAL INSTRUMENTS AND DECLARATIONS

It is noteworthy that there are several legal instruments and Declarations that underpin most of the conventions and charters discussed here before. Though these instruments and declarations aren't legally compulsory in a precise sense, they have worth for comprehending the range of a nations mandates under treaty law as well as laying down conditions that are significant for evaluation of the running of states and other such available legal-aid contributors. They also provide a platform for unbiased valuation of the responsibility of courts and judicial bodies in enforcement of these basic rights and freedoms within the lenses of local legal frameworks on legal-aid and awareness and access to justice. These declarations include the following;

²² Nanjala, C. (2013). Determinants of effective legal Aid service delivery in Kenya. *International Journal of Social Sciences and Entrepreneurship*, 1 (5), 271-288.

²³ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, art. 8(b).

2.3.1 THE RIGHT TO A FAIR TRIAL AND LEGAL AID IN AFRICA; THE DAKAR DECLARATION.

The Dakar Declaration was made in 1999 and accentuates the significance of access to justice as a paramount element of the right to just trial and positions the principal responsibility for guaranteeing legal-aid and awareness in crime related matters on the state. The Declaration acknowledges the fact that fair and effective trial cannot be realized in circumstances where the costs of legal representation and court processes are prohibitively high and points to this the rationale for state involvement in facilitation of legal representation for the poor and vulnerable and especially in criminal cases where sanctions are involved. Since the Declaration makes reference not just for “accused persons”, but as well as to “aggrieved persons”, it must undoubtedly be comprehended as demanding an obligation of the nation to provide legal-aid and awareness amenities to other deserving people outside the criminal law realm.²⁴

Further, the Declaration recommends and advocates member state’s urgent examination of ways through which quality and effective legal aid and assistance can be spread to all indigent accused people through an effective, elaborate and sufficiently funded public defender and legal aid schemes. It as well advises effective collaboration among governments, Bar Associations and Non-Governmental Organizations to facilitate innovative legal assistance programs comprising the permitting of paralegals to offer legal assistants to poor suspects at the stages before trial commences as well as pro-bono representation to the accused in crime related matters.²⁵ The same clearly articulated the necessity for state parties to encourage the contribution of the judiciary in delivering legal aid. It is this recommendation among other local legal instruments that informed integration of legal aid and legal awareness programs into the Kenya Judiciary Transformation Framework. Under the framework, judicial officers are guided to take measures proactive to ensure the accused and indigent accused and litigants who appear before them are adequately informed of all their fundamental liberties regarding the trial procedure, process and the expected outcomes. Further, the courts are expected to open its process to the public to boost familiarity and to demystify the legal requirements. The move by the Chief Justice to encourage

²⁴ Danish Institute for Human Rights, ‘Access to Justice and Legal Aid in East Africa; A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors,’ December 2011

²⁵ The Dakar Declaration is available in full length at <http://www.penalreform.org/files/man-2006-indexlegal-aid-v2-en_0.pdf> accessed 28 July 2015.

relaxed atmosphere and attire in the judiciary is considerably one such measure aimed at opening the judiciary and the judicial process to the general public.

2.3.2 PRINCIPLES AND GUIDELINES ON THE RIGHTS TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA

The Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa were adopted by the African Commission on Human and People's Rights in 2001 in harmony with the Dakar Declaration and member nations advised to incorporate the principles in their local legal instruments. The principles advocate for effective collaboration among the respective members state governments, lawyers associations, non-governmental organizations as well as the judiciary in facilitating legal representation and awareness among indigent litigants not only in criminal cases but also in civil matters in which the interest of justice necessitate it. One of the Principles provide thus:

“The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it”

It is notable that the principle does not just advocate for legal representation in criminal cases but also civil cases. In principle, it highlights two key aspects that need to be considered whilst deciding whether the underlying interest of justice requires without charge legal-aid especially in crime related matters. These include: the seriousness of the crime and harshness of the impending verdict. The principles stipulate “the interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence and amnesty or pardon”.

2.3.3 THE LILONGWE DECLARATION

Founded on a seminar organized by the Penal Reform International in the year 2004 November, the Lilongwe Declaration was implemented by the African Commission on Human and People's Rights. The Declaration recognizes that a huge number of persons touched by criminal justice system among member states are predominantly poor and lack resources necessary to properly defend themselves or acclaim their rights in a court of competent jurisdiction. It notes that it is

every government's primary responsibility to support and advance the fundamental human rights and liberties including through delivery of and access to legal aid to the indigent accused persons.

The Declaration also encourages member states to implement measures and assign subsidy enough to guarantee an applicable and translucent way of providing legal-aid to the deprived and susceptible, particularly women and children, thus encouraging them to access justice.²⁶ It recognizes the inherent fact that there isn't a consistent method of satisfying every nation's obligation and accountability to deliver legal-aid and awareness. It acknowledges that each state has unique competences and needs when deliberation is offered to which type of legal-aid structures to exercise. In delivering its mandate to deliver impartial access to justice for deprived people and susceptible persons, there is a number of package delivery choices which could be taken into consideration. These can comprise state sponsored public defender offices, Judi care programmes, justice centres, law clinics as well as collaborations with civil society and faith-based organisations. The Declaration also recognizes the limited capabilities of the formal legal systems encourages states to promote alternative dispute resolution mechanisms (ADR's) including mediation; reconciliation, conciliation, arbitration, negotiation and use of traditional dispute resolution mechanisms. Article 159 (3) of the Constitution of Kenya borrows heavily from the declaration.²⁷ It validates and accentuates the role of the judiciary in advancing cheaper and people friendly alternative forms of dispute resolution as a fundamental judiciary operational principle.

2.3.4 KYIV DECLARATION

The Kyiv Declaration on The Right to Legal Aid was implemented in 2007 vide a conference graced by several players and stakeholders in the justice sector including but not limited to government officials, legal aid practitioners, lawyers, human rights activists and national,

²⁶ The Lilongwe Declaration of 2004, <http://www.achpr.org/english/resolutions/resolution105_en.htm. The declaration in full length is available at http://www.penalreform.org/files/man-2006-index-legal-aid-v2-en_0.pdf. Accessed 28 July 2015.

²⁷ Article 159 (3) of the CoK provides that in execution of their judicial function, the courts and tribunals shall be guided by principles, among others, that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted except where limited by the law especially in circumstances where the same is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is in conflict with any written law.

regional and international organizations.²⁸ Much like the Dakar and Lilongwe Declarations before it, the Kyiv Declaration takes close cognizance of the fact that individuals most affected by criminal cases are mostly the poor and the vulnerable whose involvement in crimes are driven by circumstances of extreme deficiencies and lack. It affirms that individual governments are duty bound to facilitate effective realization of access to justice via legal-aid and awareness and especially legal representation to the indigent. The Declaration stipulates that the legal profession and the judiciary both have a duty for guaranteeing that the deprived and vulnerable gain right to use to legal-aid structures: It provides thus:

“Support for and involvement in the provision of legal aid should be recognized as an important duty of the legal profession which should, through the organized bar and law schools, provide moral, ethical, professional and logistical support to those providing legal aid, especially through pro bono legal aid services. Governments should promote an enabling environment for private practitioners to provide pro bono services and ensure competitive rates of remuneration”.

It is notable that the discussed regional and international legal instruments, arrangements and declarations support and strongly advocate judiciary-backed legal aid. They all recognize the central role the courts and the judicial process play in incremental realization of access to justice via legal aid as a fundamental freedom and basic human right.

2.4 LOCAL LEGAL FRAMEWORK ON LEGAL AID

As discussed before, several local legal and institutional frameworks provide for judiciary-backed legal aid. These include the Constitution which specifically outlines promotion of ADR by the courts as judiciary’s guiding fundamental operational principle in a bid to promote wide access to justice in a cheaper and more expedient fashion; the Children’s Act of 2001 which advocates for legal representation to Children accused of criminal offences; the Industrial Court Act which empowers the courts to refer parties to arbitration and negotiation or any other appropriate form of alternative dispute resolution.

One common factor with the local legislations is they heavily mirror progressive international legal instruments. Kenya prides itself with pieces of legislation that address go beyond the popular advocacy for legal aid in criminal matters to include civil cases. This is especially due to

²⁸ The Kyiv Declaration of 2007, <http://dihr.org/legalaid/index.php?option=com_content&task=view&id=36&Itemid=1> accessed 28 May 2015

the country's widely-acclaimed progressive and pro-human rights and liberties Constitution. Article 2(5) and (6) of the Constitution allow for automated appliance of international law that Kenya has consented. It then ensues that every implement connected to matters of access to justice that Kenya has sanctioned is made part of the Kenyan legal structure and can be used to standardize legal-aid and awareness provision services.

2.4.1 THE CONSTITUTION OF KENYA (CoK)

At face value, CoK tends to focus more on access to justice with respect to criminal matters. It is instructive to note however, that Article 48 mandates the nation to guarantee access to justice for every person irrespective of whether their case is civil or criminal. It bestows that the nation will guarantee access to justice for every person and, if any charges are needed, it will be realistic and won't hinder access to justice. Practically nevertheless, criminal matters are still accorded more consideration due to two reasons: the seriousness of a crime compared to civil matters and the severity of penal sanctions in respect of criminal charges. Of notable balance however, is the fact that Article 48 of the CoK has generated a space of prospect for legal-aid in civil related matters that had very restricted freedom in civil practice with difficult and compound processes which ultimately developed to be a hurdle to the poor and vulnerable people.

Articles 59 and 50 further provide for the rights of a person who has been accused of an offence and their right to just hearing respectively. Of specific significance to legal aid is the right of an accused person to be represented by a lawyer allocated to them by the state at the cost of the state if considerable injustice is expected to happen as well as the duty of the court to promptly, and in the language the accused understands, inform him or her of this right.

Before the birth of the Constitution 2010, legal aid was encapsulated in various provisions scattered across statutes. Though these provisions are still intact in these statutes the CoK served to give them meaning and validation. Under the Civil Procedure Act²⁹ for instance, there is a margin for free legal aid amenities underneath the placard of pauper suits. This Act describes a pauper as a person who doesn't have adequate ways to allow him or her to shell out the charge recommended by law for the commencement of a court case.³⁰ Its detail rests on the point that a person should be subjected to severe analyses by the court in an attempt to demonstrate that they

²⁹ Chapter 21 of The Laws of Kenya

³⁰ The Civil Procedure Act, The Civil Procedure Rules, Order 33.

are actually paupers hence be permitted to chase justice. Although court charges are relinquished a person will be expected to repay it if and when the reparation resulting from the case is enough to furnish for the legal charges occurred.

As indicated before, Article 159 (3) of the CoK lists promotion of ADR as one of the guiding principles to the courts and the judiciary in their diligent exercise of the judicial function. This provision thus validates the involvement of courts and indeed judicial officers in advancement of accessing justice more so in particular, legal-aid and awareness be a fundamental human right and freedom.

2.4.2 THE CHILDREN’S ACT (No. 8 of 2001)

Section 77 of the Children’s Act explicitly stipulates court-backed legal aid to children. It obligates the courts to effectively command for legal exemplification of a minor produced in front of a court of law under any trials where such minor is not characterized and imposes duty on parliament to undertake all measures necessary to defray expenses incidental to such representations.³¹ The Act mandates the state to offer effective legal-aid to any minor in convergence with the laws of the state in the unfortunate circumstances that he or she is unable to obtain one.³²

The provisions of this Act clearly outline the fundamental role the courts play in effectively addressing the need for legal aid and support to children, the most innocent and vulnerable members of the society.

2.4.3 THE LAW SOCIETY OF KENYA ACT (CHAPTER 18 OF THE LAWS OF KENYA)

The Law Society of Kenya Act (Cap 18 Laws of Kenya) is another local legal instrument that forms the framework of legal aid in Kenya. An elucidation of Section 4(e) of the Act deduces that the association is underneath an onus to give advice to the community on topics incidental and auxiliary to the law. This section effectively arrogates the society members a duty to seize cases pro bono on behest of the community as implied to be one of the principal objects of the

³¹ The Children’s Act, No. 8 of 2001, s77 (1) and (2).

³² *ibid*, s186 (b).

law society of Kenya. Practice shows however that this provision is more elective than it is objective. As indicated before, the society is however working with several institutions and especially the judiciary to give effect and meaning to this provision as well as its founding purpose of delivering free legal services to the indigent and vulnerable persons.

2.4.4 THE LEGAL AID ACT No. 6 of 2016

The Legal Aid Act 2016 came into effect on 10th May 2016 it gives effect to Articles 48, Article 50 (2) (g) of the Constitution, inaugurates the National Legal Aid Service, create condition for legal-aid as well as afford for the subsidy of legal-aid as well as associated matters from the government. The Act establishes a legal and utilitarian structure to enable: delivery of inexpensive, available, maintainable, trustworthy and answerable legal-aid amenities to poor people in Kenya at the nations expenditure in conformance with the Constitution of Kenya 2010 and to ease accessing justice by offering a legal-aid system to help poor people in accessing legal-aid, encouraging enhanced legal aid and awareness, sustaining communal legal services via elevation of subsidy justice advisory centers, legal-education and legal-research and encouraging alternative disagreement determination devices that boost access to justice and are very much in conformance with the Kenyan Constitution 2010.

It is notable that the drafting of the Legal Aid Act and the growth of the National Legal Aid Policy were spearheaded by the National Legal Aid and Awareness Programme established funded by the government of Kenya ostensibly to identify ways through which the government can realize its universal and fundamental duty of facilitating non-discriminatory but effective access to justice all as a fundamental human right. The Act brings under one canopy all legal aid service providers and lays out the standard for legal aid service delivery to be implemented within the country. It ensures excellence of amenities by putting criteria alongside which legal service workers intend to provide their amenities.

2.4.5 NATIONAL ACTION PLAN LEGAL AID 2017

The launch of the National Action Plan on Legal Aid is a great breakthrough in the journey towards generating an empowering environment for legal aid in Kenya. The National Action Plan lays out key proposals which speak to legal-aid worries across the nation. An example of the extreme challenges that the judicial division has met in the earlier times which has been impairment to the distribution of satisfactory reserves, is the absence of gratitude of the

connection between legal-aid and awareness and improvement. The proposal exhibits a robust dedication by state in guaranteeing that the rights enshrined in the Bill of Rights of the Kenyan constitution 2010 mostly on accessing justice, aren't just protected but also are realized in a methodical way. It as well fosters transparency and accountability in the indulgence of Governments mandates and commitment under national, regional and international legal framework on access to justice.³³

2.5 CONCLUSION

From the foregoing, it is clear that the nature of legal aid and awareness in Kenya has improved slightly over the years but still has a long way to go. It is on this basis of this gap that this study makes a case for Kenya to develop an effective scheme for the advancement of legal aid programs. The ensuing chapter three offers a complexity of the analysis of the Kenyan Legal structure to establish whether it adequately provides legal aid programs.

³³ Githu Muigai, National Action Plan Legal Aid 2017-2022 Kenya

CHAPTER 3

THE GLOBAL LEGAL AID PRACTICE; LESSONS FOR KENYA

3.0 INTRODUCTION

This Chapter critically interrogates legal aid practice in several jurisdictions in Asia, Europe and North America with the view to narrowing down on the lessons Kenya can draw in as far as realization of effective involvement of the judiciary in the process concerned. It is analytical and looks into several aspects of legal aid in the identified jurisdictions including the existing legal aid models; types; accessibility and quality

3.1 INTERNATIONAL LEGAL AID MODELS

3.1.1 INTRODUCTION

It is noteworthy that there exist several legal aid models globally. Despite a full and comprehensive comparative evaluation and review of many variant approaches being past the scope of this thesis, this Chapter will outline the systems in place in several jurisdictions including United States, Singapore and Netherlands. Although the types and sources of legal aid vary widely across the three jurisdictions, they all give some level of civil and criminal legal assistance to their respective citizenries as a matter of right.¹ Of great importance is the Netherlands case study which interrogates the recent ameliorations to their civil legal aid model that effectively overhauled and reconditioned the cut-up between government-sanctioned and privately provided legal aid. Similarly, the United States (US) study centers on the contentious public and private division, taking in hand both the government's tactic to legal assistance generally and the leading role of the courts, the civil society as well as the academia facilitating access to justice. Case study on Singapore on the other hand provides an alternative third example to private and public sectors division of legal services.

Interestingly, like Kenya, public legal aid services in the U.S, Netherlands and Singapore are all faced by staffing, quality and funding challenges albeit in inequivalent proportions. These

¹ See BBC News, *Country Profile: The Netherlands*, available at: http://news.bbc.co.uk/2/hi/europe/country_profiles/1043423.stm; U.S. Dept. of State, *Background Note: The Netherlands*, available at: <http://www.state.gov/r/pa/ei/bgn/3204.htm>. Excepts where noted, this case study is derived from: Peter van den Biggelaar, *The Future of Legal Aid in the Netherlands*, available at: http://www.pili.org/en/component/option,com_bookmarks/Itemid,83/task,view/id,18/

countries however showcase better, better advanced, valuable and pragmatic slants to these challenges. With Netherlands the case is doubtlessly the most instructive and progressive. The country has in place a successful government-driven approach to reforms. The United States on the other hand typifies a vibrant private sector creativity in addressing legal demands while Singapore practice bespeaks a robust and fast evolving approach to the trials faced by a dynamic society.

This Chapter will carefully analyze the roles of the courts in facilitating legal assistance either directly or indirectly by acting as the bridge between government-sanctioned and private-backed legal aid programs. It will deliberate community intercession, a substitute disagreement determination “ADR” instrument which has been exploited effectively to provide legal-aid and awareness in several areas and nations.

3.1.2 THE NETHERLANDS

Like most of its European counterparts, the Netherlands traditionally provides considerably significant legal aid and awareness services to its citizens both in civil and in criminal matters.² The Dutch Constitution accords all its locals the right of accessing justice and legal representation as a matter of principle.³ Effectively, Dutch criminal defendants are assured legal representation if faced with the likelihood of incarceration, deportation and solitary confinement.⁴ The country’s civil legal assistance on the other hand provides guidance and advice on issues ranging from family and succession to employment and labour relations, tax, housing as well as consumer rights. The process is however not open to everyone. Qualification is primarily pegged upon an individual’s financial status.⁵

This case analysis emphases on the 2004 modification of the Dutch civil legal-aid organization, in which the Dutch government streamlined the delivery of civil legal support to poor

² Ibid, n71

³ Dutch Constitution, Art. 17: “No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law;” Art. 18: “(1) Everyone may be legally represented in legal and administrative proceedings. (2) Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament.” Available at: http://www.servat.unibe.ch/law/icl/nl00000_.html

⁴ Erhard Blankenburg, *Legal Aid in the Netherlands: With some comparisons to the German Legal Aid System*, at 4. Available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalaidNetherlands.pdf>.

⁵ Sylvie Bacquet and Lisa Webley, *A Review of How Other Countries Provide Information and Advice to the Vulnerable on Consumer and Social Issues*, May 2006, at 43. Available at: <http://www.dti.gov.uk/files/file33786.pdf>

consumers, in search of a more transparent and efficient delivery of services. The system offers a beneficial case study of successful government-sanctioned reform efforts.

a) The Dutch Civil legal Aid System

i) Government Approach to Civil Legal Assistance

Before the establishment and operationalization of the popular Dutch legal-aid organization reform in 2004, the Dutch legal assistance programme comprised five regional Legal Aid Boards fully sponsored by a mishmash of state contributions and pro rata client donations and functioning underneath the aegis of the Ministry of Justice.⁶ Impressively, an approximate of 45% of the Dutch citizenry was eligible for subsidized assistance.⁷ The system encompassed two basic forms of legal aid: preliminary free-of-charge discussions with a legal specialist and prolonged support, hypothetically comprising the whole determination of a consumer's difficulty.

One fundamental trademark of the Dutch legal-aid structure is its ability to reduce the cost of legal disputes. This it has achieved by performing on the notion that legal difficulties ought to be collared at an initial phase, an approach that has been hailed as effectively preventive. The initial free consultation with a legal professional play a serious function in the procedure. It effectively provides the legal aid lawyer with an opportunity to assess whether the consumer offered legal snags subsiding inside the legislative gauges for suitability for legal aid and which facility suppliers would best be capable of solving their customer's hurdles. The platform as well provided persons seeking legal aid with an opportunity to obtain information critical to their case including the costs involved as well as critical insights to their cases including their chances of success. These services were offered by the Legal Aid and Advice Centers ("LAAC") funded by the government.⁸

⁶ Ohm, *Reforming Primary Legal Aid in the Netherlands*, at 1.

⁷ Peter van den Biggelaar, *Legal Aid in the Netherlands* (PowerPoint presentation). Available at: <http://www.pili.org/en/dmdocuments/Sarajevo-structuur.ppt>

⁸ Peter van den Biggelaar, *The Value-Added of a Good Gateway to the Legal Aid System*, at 1. Available at http://www1.worldbank.org/publicsector/legal/gateway_SA.doc

ii) The Dutch Government and Private Sector approach to legal aid in civil matters;

The prevailing practice preceding the 2004 reforms to the Dutch legal aid system required referral of persons for extended consultation at a minimal fee if their legal problem couldn't be determined by the preliminary consultation. Individuals were however allowed to freely request further consultation if the time allocation at the second consultation was not sufficient to effectively resolve their issue. As a standard practice, the applicants were required to make full disclosure of their financial situation before a legal aid practitioner who would complete a standard form explaining the legal problem. This information together with any other ancillary to it was then sent to the legal aid boards that carefully looked into the cases to establish whether the applicant is qualified as per the set criteria. If satisfied, the board will then conduct extensive due diligence on the competencies of the legal professional keen on offering the aid to establish their probity in as far as the aid in question is concerned. It will then effect the reduced payment to jumpstart the process. Surprisingly majority of the legal assistance were and are still offered by professionals in private practice unlike it is in Kenya

b) The Dutch Legal Aid Reforms of 2004

i) The Civil Legal Aid System's Shortcomings

A critical and extensive needs-assessment study was conducted by the Dutch Legal Aid Boards to determine the country's legal assistance needs. The study keenly evaluated the legal services' demand and supply dynamics discovered lack of awareness as the major threat to access to legal aid and awareness. Over fifty percent of the Netherlands citizenry suitable for the legal assistance program remained acutely oblivious of its very existence. The study also found out that the existing legal aid centres paid more attention to extended legal-aid and awareness amenities at the expense of the initial consultation yet the initial stage was widely deemed the trademark of the country's legal aid system. This effectively meant the legal aid centers were serving mostly paying individuals contrary to the existing legal framework.⁹ Due to their competitively lower overheads, the legal aid centres in the process undercut more experienced and qualified legal professionals. The assessment also discovered the initial consultations offered a rather fertile playing field

⁹ The Netherlands Legal Aid Act.

for the legal aid centers who exploited the opportunity to tap off remarkable cases to themselves. As a consequence of the mentioned shortcomings, the Dutch Legal Aid Boards discovered that the legal-aid and awareness structure stood in want for reforms to entrench greater transparency and accountability.

The Dutch Legal Aid Boards' study did not stop at identification of problems and shortcomings of the legal aid system it as well recommended several deep-seated reform-propositions for the legal aid system. These included introduction of demand driven influence of the legal aid system; introduction of Legal Service Counters (LSC) to entrench and foster accountability and transparency and introduction of greater quality control measures. For the purposes of this comparative assessment, this research looked into these recommendations. This is ostensibly due to the fact that they contributed significantly to the overhaul to the Dutch Legal Aid System.

ii) Introduction of Quality-Control Measures

Following the Legal Aid Boards' study, several quality control measures have been taken both at the public and private level to bolster the caliber of the Dutch legal aid. In 2002 for instance, the Dutch Government through the State Secretary for Justice concluded an agreement with the Legal Aid Boards and the local Dutch Bar for payment of merit allowances for proven service quality.¹⁰ This then introduced a thorough quality audit. Legal practitioners and Law Offices that permit the audit are accorded the privilege to bear a special quality trademark. It is noteworthy that only few law firms in Netherlands have so far been accorded this prestigious acknowledgement. Most of the recipients of the quality hallmark have been individual audited-lawyers.

iii) Introduction of Legal Service Counters

An impartial committee to weigh the benefits and shortcomings of the establishment of the Legal Service Counters (LSCs) was established by the Dutch State Secretary for Justice immediately following the 2000 Legal Aid Boards' study. This committee conducted an extensive examination of the prevailing legal aid structures and concluded the advantages of the LSCs far outweighed any conceivable disadvantages. The committee also endorsed the two-tier approach to consultation by the LSCs with the first

¹⁰ The Dutch State Secretary for Education recently permitted seven colleges of higher education to provide courses in law. Graduates of these courses (paralegals) could, for example, staff LSCs, preparing legal files and addressing less complex claims.

stage being a brief initial consultation and the second being a more intense and in-depth counseling conducted by the referenced private attorneys.

In a bid to curtail the unnecessary cutthroat antagonism between the private or public legal-aid service suppliers, the committee recommended the LSCs be particularly in the public domain with the protracted legal assistance conducted exclusively by the competent private sector. The committee also recommended a raise of the existing consultation fee ostensibly to discourage frolicsome and baseless aid bids. It further proposed the government's participation in the procedure by guaranteeing that through extensive training and support, quality qualified legal staff can be made available. The propositions by the committee were formally adopted and implemented in 2004 without any alterations whatsoever.

It is noteworthy that the first ever Legal Service Counter was commissioned in 2004 following Parliamentary approval for replacement of the then existing Legal Advice and Assistance Centres (LAACs) with LSCs. Within the first year of operation, the LSC managed to serve wean impressive over 300,000 Norwegian citizens.¹¹ The transition from LAACs to LSCs was not only organized but also systematic. The Ministry of Justice gave the employees of LAACs options to either transform their LAACs to private firms or go work for the new LSCs.

iv) Demand-driven approach to legal aid.

The Dutch government's initial plan as per the recommendations of the committee was to allows the LSCs to offer legal aid vouchers with which the citizens with legal questions to effectively utilize as imbursement with private legal practitioners of their desire. This proposition was nevertheless found unfeasible and has since not been implemented. It has however resulted in the LSCs being faced by insurmountable legal aid requests which they deal with by referring most cases to audited private legal aid lawyers.

c) Challenges to the Dutch Legal Aid System

It is notable that despite the several progressive changes made to the Dutch Legal aid systems thanks to the 2004 reforms, a couple of problems and challenges still linger prominently.

¹¹ Frans Ohm, *Reforming Primary Legal Aid in the Netherlands* (Feb. 2005), at 1. Available at: http://www.justiceinitiative.org/db/resource2?res_id=102839

Studies and surveys of the Dutch legal aid process reveal that slightly under 40 percent of clients referred for private legal consultation by the LSCs choose not to consult further due to financial limitations. This elevated section of people that have decided to discontinue looking for a resolve to their rights may imply that most would be sneaking through the flaws of the novel legal-aid scheme.

The extended consultation service that was an essential portion of the pre-reformed Dutch legal scheme was effectively substituted by an equivalent consultation with a private lawyer upon referral by the LSCs.¹² Although this change phenomenally improved access to quality legal aid for the Dutch citizenry, it also featured an unexpected difficulty. The Dutch were expected to pay for the extended services. This essentially obliged them to critically assess their positions in light of probable expenses. Worries have also been expressed concerning the worth of the recruitment of the new LSCs, as they depend on and extra profoundly on the amenities of paralegals. Nevertheless, there is no purpose to presume that attorneys or legally skilled staff won't be capable of providing the LSCs with superiority recruitment, particularly since in extent legal representation isn't part of the mandate of the LSCs.¹³

Another challenge that faces successful implementation of the Dutch Legal Aid reforms of 2004 is the country's expanding Muslim community.¹⁴ Netherlands' legal aid treatment of mediation and divorce vary greatly from the traditional Islamic approach to the subject. The country's legal aid system deliver less of a mediation dedicated slant to these matters than may be presumed or wanted by those of Arab foundation, and consider divorce as more of an entity, instead of a communal, apprehension.¹⁵

¹² Van den Biggelaar, *The Value-Added of a Good Gateway to the Legal Aid System*, at 3.

¹³ Ohm (n81) at 3.

¹⁴ Statistics Netherlands Web Magazine, *More than 850 thousand Muslims in the Netherlands*, October 25, 2007. Available at: <http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2007/2007-2278-wm.htm>

¹⁵ See Marijke ter Voert and Susanne Peters, *Justiciable Problems and Disputing Behavior of Ethnic Groups in the Netherlands*, presented at the Legal Services Research Centre Conference ("Transforming Lives: The Impact of Legal Services and Legal Aid") in Belfast, Ireland (Apr. 2006), at 15.

Finally, transparency of the private legal firms' audits as well as public awareness of the obtainability of legal aid still remains a big challenge to the Dutch government.¹⁶ Quality and quantity concerns are also still rife considering some of the above discussed challenges.

It is noteworthy that the Dutch government has taken access to justice and more so legal aid a national concern unlike in Kenya. It constantly seeks ways to not only improve access but also quality and reliability. In contrast, the Dutch judiciary has taken a backstage approach to legal aid as the efforts by the executive are doubtlessly fruitful with over 70 percent of Dutch citizens being legible to access legal aid.

3.1.3 THE UNITED STATES OF AMERICA

The United States and the Dutch approach to legal aid differ considerably. While an interrogation of the Dutch approach reveals an ordered, top down reform effort focused on establishment of civil legal assistance, the U.S situation is more diverse. This comparative evaluation critically overviews the US criminal and civil legal-aid practice, emphasizing the diverse indigenous methodologies to legal aid by various institutions including the judiciary. It is noteworthy that the Dutch and the US approaches to legal aid differ in two fundamental ways. First, while the Dutch have a meticulously structured and distinct split between the delivery of legal-aid and awareness by both private and public resources, the US demonstrates a much more mixed or collaborative method. Secondly, civil and criminal legal aid is not always administered by the federal government in the US but rather provided by mixed sources. This approach embodies the strength of manufacturing an extensive assortment of advanced methods to legal-aid but not like in the Netherlands, there are scarce similar assurances of value all through the U.S. and numerous territories agonize with significant financial inadequacies.

a) Civil Legal Aid in the United States of America

i) Federal-government-provided Civil Legal Aid.

Like the Kenyan Constitution and unlike the Dutch Constitution, the United States Supreme law does not clearly establish the right to counsel in most civil cases.¹⁷ Quite a significant proportion of the total funding for civil legal-aid and awareness facilities in

¹⁶ Van den Biggelaar (n82), at 11.

¹⁷ Alan W. Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005*, July 2005, Center for Law and Social Policy, at 6. Available at: http://www.clasp.org/publications/us_overview_program_2005.pdf

the US come from the Legal Services Corporation (LSC) - a federally-funded institution. This funding however, represents only a fraction of the entire country's legal aid needs.¹⁸ Efforts of LSC are complimented by numerous government and privately backing foundations which effectively subsidize to legal-aid and awareness systems recommending legal amenities to poor Americans. An estimated 60% of American legal-aid attorneys function with LSC as the others offer aid via structures not supported by the LSC.¹⁹

Established in 1974, LSC is a statutory, confidential, non profit establishment fully-funded by the United States Congress.²⁰ The corporation devotes most of its resources in resolving housing disputes, domestic relations cases, healthcare and consumer affairs cases. Research establishes that most of the cases before LSC are addressed either through referrals or advice. In 2006 for instance, only 13 percent of the over one million cases brought before it were recommended for court action.²¹

ii) Local and private sector participation in the US civil legal aid

Control of legal aid services is another point of difference between the US and Netherlands legal aid practice. Whereas the Dutch legal aid-system is fully sponsored and controlled by the government, the US system is predominantly privately funded and controlled by private individuals most of whom include lawyers offering their services *pro bono* and whose opinions shape the key resolutions regarding who receives legal aid and over what circumstance.

Despite the American legal-aid providers being exposed to statutory limitations on the kinds of legal amenities their allowed to offer, also limitations on the beneficiaries of such legal facilities, they still have a lot leeway in as far as the steering of the entire legal

¹⁸ Carmen Solomon-Fears, CRS Report for Congress, *Legal Services Corporation: Background and Funding*, May 23, 2007, at 10. Available at: http://openocrs.cdt.org/rpts/RL34016_20070523.pdf

¹⁹ Legal Services Corporation ("LSC"), *Documenting the Justice Gap in America*, Sept. 2005, at 15. Available at: <http://www.lsc.gov/JusticeGap.pdf>

²⁰ Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005*, at 3, 6. The San Diego, California, based program, Affordable Housing Associates, is an example of a non-LSC funded legal aid program with a particular focus - housing. Their website is available at: <http://www.affordablehousingadvocates.org/advocacy.html>.

²¹ Solomon-Fears, *Legal Services Corporation: Background and Funding*, at 4. Aside from the 1,000,000 cases that LSC employees are directly involved in, LSC programs annually handle an additional 4,000,000 "matters" by providing information, distributing legal materials, making referrals and giving mediation assistance. Solomon-Fears, *Legal Services Corporation: Background and Funding*, at 5.

assistance process is related. The law places a cap on the financial abilities of those who qualify for the legal aid programme. Further, legal aid providers are strictly prohibited under laws from providing legal representation and assistance to undocumented persons.²² These include emigrants, prisoners and anyone else who is encountering housing difficulties that are stemming from them staying accused with a narcotic and drug-related offence.

Most of these funding restrictions in consequence prompted Non-Governmental Organizations (NGOs) in America to establish alternative legal aid programmes completely independent of the government control and funding with the primary objective of converging the unmet legal wants of the underprivileged population.²³ The NGOs are currently responsible for over 40 percent of the total annual US legal aid programmes and enjoy autonomy in as far the type of aid and the recipients are concerned.

iii) US Civil Legal Aid Challenges

Although the involvement of the NGOs in legal aid services effectively compliments LSCs efforts, their combined effort do not fully meet the demand for civil legal aid services. A 2005 survey into the legal aid system in US commissioned by the LSC revealed that well over half of the total legal aid requests were not fulfilled to scarcity of resources.²⁴ Further, and as reflected in Netherlands, persons who qualify for the legal assistance services were acutely unaware of their existence and thus did not make an effort to get in touch with the service providers.²⁵ Some of the low income residents with problems could not clearly define nor explain their problems. As a consequence, only a few of the recipients had their problems resolved by the providers satisfactorily.

Another challenge acutely facing LSC is recipient attorney ratio. Whereas the corporation's establishment goal was to reduce the attorney recipient ratio to one attorney for every 5,000 references, the current ratio stands at one for every 7000 low income

²² *ibid*, at 2 and 4.

²³ Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005*, at 22

²⁴ LSC, *Documenting the Justice Gap in America*, at 7.

²⁵ *Ibid*, at 9.

persons ostensibly due to poor funding.²⁶ Further, the funding to the LSC since its establishments has made very little to consider inflation and ever rising costs of services let alone increasing population and thus demand. Comparatively, the Corporation received more money in 1981 than it did in 2005. At the identical time, nevertheless, both private and state backing of LSC procedures has multiplied threefold, reimbursing for the lack of federal government funds.

b) Criminal Legal Aid In United States of America

i) Government involvement in Criminal Legal Aid

Like Articles 50 of the Constitution of Kenya 2010, the Sixth Amendment of the United States Constitution provides for the accused's right to legal counsel in cases where effective administration of justice would not otherwise be possible without effective representation. The right to effective legal aid in US was established and affirmed by the Supreme Court in a series of cases.²⁷ In *Gideon v. Wainwright*²⁸ for instance, the court established the right to counsel for persons charged with felonies in state courts. The 1967 decision of *In re Gault*²⁹ extended this right to juveniles. In 1972, *Argersinger v. Hamlin*³⁰ extended the right to counsel to all criminal prosecutions that carry a potential prison sentence. Thus, in the United States, all criminal defendants facing the threat of imprisonment, regardless of the period of time involved, are entitled to defense counsel. This right extends to multiple stages in criminal proceedings, including post-arrest debriefing, initial trials and plea bargaining discussions.³¹ Furthermore, the right to representation persists all along and after an appeal, throughout the sentencing procedures and in other cases even throughout the probation procedures.³² The right to representation can also spread to particular non criminal matters in which the accused

²⁶ Solomon-Fears (n91)

²⁷ As the U.S Supreme Court stated in 1970, “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Available at: <http://supreme.justia.com/us/397/759/case.html#T14>

²⁸ 372 U.S. 335 (1963). Available at: <http://supreme.justia.com/us/372/335/case.html>

²⁹ 387 U.S. 1 (1967). Available at: <http://supreme.justia.com/us/387/1/case.html>

³⁰ 407 U.S. 25, 37 (1972) (“... absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”). Available at: <http://supreme.justia.com/us/407/25/index.html>

³¹ National Legal Aid & Defender Association, *History of Right to Counsel*. Available at: http://www.nlada.org/About/About_HistoryDefender.

³² *ibid*

person is endangered with a shortfall of freedom, such as extradition procedures or psychological capability and obligation procedures.³³

ii) Local and private approaches to criminal legal aid in US.

In a fashion akin to the civil legal-aid, the delivery of criminal legal aid in the US is structured and organized on a local level; within the three thousand counties subsists a widespread diversity of programs specifically premeditated to offer communal defense facilities. The assistance process include: the public defender's office; court selected lawyers who are paid by the government to handle cases involving the indigent; contracted private firms and attorneys who handle cases at predetermined prices for set amounts of court matters; and lawyers hired by NGOs to offer public defense services.³⁴ It is noteworthy that most of the US governments meet their constitutional obligation to provide representation through a combination of these approaches funded by revenues generated by court fees as well as allocation from city, county and state governments.³⁵

iii) Contemporary Innovative approaches to criminal legal aid in US.

The State of Indiana in the US is doubtlessly one of the best examples of the most successful criminal legal aid programs. This is ostensibly due to the several steps taken by the resident state government to guarantee the indigent defense meet exceptionally high standards while maintaining some local autonomy. The government has devised an innovative scheme where an established state commission reimburses the local county administrations for 40 percent of their legal-aid expenditures in non-capital sentence criminal cases provided the local counties comply with the state-wide quality standards and develop a comprehensive plan to provide indigent defense services.³⁶

Faced with challenges of funding, quality control and exceptionally huge demand, many states in the US are actively devising ways to meet their constitutional legal aid obligations. The State of Rhodes Island for instance has a prominent state-wide practice

³³ *ibid*

³⁴ ABA Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, A Report on the ABA's Hearings on the Right to Counsel in Criminal Proceedings, December 2004, at 2. Available at: <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/fullreport.pdf>

³⁵ *ibid*

³⁶ Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *Law and Contemporary Problems* 1 (Winter 1995), 31-49, at 39. More information on the Indiana Public Defender Commission is available at: <http://www.in.gov/judiciary/pdc/about.html>

where legal services are combined with social services, allowing the public defenders to effectively to collaborate with social workers to develop assessments and alternatives to incarceration for defendants.³⁷ In Washington on the other hand, a local NGO known as TeamChild works to train attorneys, judges, public defenders among other professionals involved in the justice system to identify issues underlying behaviour and to increase consciousness of the success of community-based services to meet these needs.³⁸

This comparative study found that several significant obstacles still face the US criminal legal aid system. Despite being extremely poor and marginalised, most of the criminal defendants who stand to benefit more from the legal aid schemes tend to evoke very little emotional sympathy thanks to their criminal accusations. Still however, several legal aid reforms continue to emerge from the US. In contrast with Netherlands, most of the impetus to support and grow legal aid both in US and Kenya emerge from the private sector as opposed to public sector through NGOs, bar associations. The State of Georgia for instance, is a perfect example of successful overhaul and reform of the criminal legal aid system. The state has created a state-level oversight committee to enact and enforce state-wide standards effectively replacing separate local systems of criminal legal aid.

It is noteworthy that while the existing US system of criminal legal assistance certainly gives rise to concerns of oversight, it like its Dutch and Kenya counterpart suffer from lack of resource. Several US states and counties have however devised innovative methods of effectively dealing with this perpetual drawback. The State of Texas for instance began contribution of funds to indigent defense. New York on the other hand increased compensation for private lawyers involved in criminal legal aid programmes.

c) Challenges facing the US Criminal Legal Aid Services.

As discussed before, one major shortcoming of the US criminal legal aid practice lies in its non-uniform and varied approaches. This effectively makes oversight and quality-control a daunting and an expensive endeavour.³⁹ Even though the US LSC plays a significant part in

³⁷ Cait Clarke and James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, the Justice Systems and Communities They Serve*, 17 St. Thomas Law Review 781, 794 (Spring 2005). Available at: http://www.ewashtenaw.org/government/departments/public_defender/symposiumdoc1

³⁸ TeamChild website, available at: <http://www.teamchild.org/overview.html>

³⁹ *Improving Criminal Justice Systems through Expanded Strategies and Innovative Collaborations* (Executive Summary), Report of the 1999 National Symposium on Indigent Defense, February 25-26, 1999, published March

regulation of legal-aid and awareness programs in civil matters, there is no statutory body established to oversee criminal legal aid services. This has led to a self-regulated operating environment where private players including NGOs, private law firms, private attorneys and state governments creating general criteria for the implementation of the public defenders. The American Bar Association however, crystallized an operational guideline in 2002 ostensibly to arrest the chaos that marred criminal legal aid systems. The guidelines outlined the operating principles as follows:

- i) There ought to be equivalence between the prosecution and defence in means and handling by the legal system.
- ii) The choice and financing of public defenders be autonomous from political and judicial administration.
- iii) Defense lawyer's execution should be evaluated according to established standards, and defense counsel should be mandated to be given continuous education.⁴⁰
- iv) Defense lawyer should be skilled and must be supplied with adequate time and restricted access to the accused person to inaugurate a defense. Lawyer's amount of work must allow thorough attentiveness to every given matter and lawyer should be allowed to uninterruptedly speak for the accused person through the length of the court trial.

Whereas the United States and Netherlands Legal Aid systems function properly and serve a larger percentage of the wider population, they are faced with similar challenges including lack of adequate funds, difficulty in quality-control and assurance, lack of general public awareness, imbalance of resources between the prosecution and the indigent defense, and unwillingness of established legal professionals to participate in the exercise unless made mandatory. One major difference between the Kenyan approach to Legal-aid and the Netherlands and also the US legal aid is the respective government's commitment to enforcement of the right of the citizens to legal representation. In Netherlands for instance, the government is assertive and progressively makes effort to guarantee access to justice for all persons. Studies indicate that thanks to the

2000, reprinted in *Indigent Defense*, October/November 2000, Vol. 4, No. 2. Available at: http://www.nlada.org/Defender/Defender_IndigentDef/NLADA/Defender/Defender_IndigentDef/Publications/Indigent_Defense/OctNovArticle4. The full report is available at: <http://www.sado.org/publicdefense/icjs.pdf>

⁴⁰ ABA Standing Committee on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System*, February 2002. Available at: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>

2004 Legal Aid Services Reforms, well over 60% of the country's citizens qualify for legal aid with hundreds of thousands of cases being handled annually by the local LSCs.

The major triumph of the Kenyan legal aid practice over Netherlands and the US is the active participation of the courts in the process. Whereas in the Netherlands and the United States the process is left to the government and private practitioners, the Kenyan judiciary has over the years taken a proactive approach towards promoting nationwide access to justice. Through several initiatives including the judiciary walks, judiciary open-weeks and judiciary participation in expos and exhibitions, the local judiciary has managed to reach out to millions of Kenyans country-wide. This has effectively translated into more Kenyans having direct access to the courts and thus justice. Further, live coverage of cases of national importance has also contributed to wider familiarity with the court process. The judiciary periodicals, journals and magazines currently published on a weekly, monthly and bi-monthly basis respectively have also helped many Kenyans appreciate the law, the cases before the courts and the supervening circumstances.

3.1.4 SINGAPORE

With a populace of about 5 million people, Singapore is among the smallest yet the wealthiest nation in Southern Asia and Muslim population comprises nearly 15 percent of the country's total population.⁴¹ Like Kenya, Singapore differs considerably with the Netherlands and the United States of America. Firstly, the country, like Kenya, attained its independence in the 1960s (1965 to be precise) and its legal and political systems, in many respects, are distinctly reflective of the English Common law practice and tradition having been a British colony for over a century.⁴² The country has also incorporated some Islamic laws into its legal system.⁴³ Like Kenya, the Singaporean Islamic laws only affect Muslims and are limited to matters of family, divorce, marriage and succession. One similarity Singapore shares with Kenya, The Netherlands

⁴¹Singapore Economic Development Board website, available at: http://www.sedb.com/edb/sg/en_uk/index/why_singapore/singapore_facts_.html; Singapore 2000 Census, Table 15, available at: <http://www.singstat.gov.sg/pubn/popn/c2000adr/t15-18.pdf>

⁴²Siva Murugaiyan and Parveen Kaur Nagpal, *Introduction to Singapore Law & Legal System*, at 2-4. Available at: http://www.sma.org.sg/whatsnew/ethics/Y1_S2_siva_article.doc

⁴³Murugaiyan and Nagpal, *Introduction to Singapore Law & Legal System*, at 2, 4. For additional information about the role of Sharia in the Singapore legal system, see Emory University School of Law, *Islamic Family Law Legal Profiles, Singapore*. Available at: <http://www.law.emory.edu/ifl/legal/singapore.htm>

and the United States is its robust hybrid legal aid services system that feature publicly and privately funded assistance with the only variations being the degree of participation of either.

It is noteworthy that the Singaporean Judicial practice is generally fair and is adherent to strict general guidelines of international best practices and standards of due process including the right to a just trial and presupposition of once guiltlessness till proven guilty.⁴⁴ However, unlike the Netherlands and the US, the Singaporean Judiciary isn't totally free from political manipulation by other government divisions.⁴⁵

The legal aid practice in Singapore is relatively vibrant. Low-income persons faced with criminal sanctions or civil matters are almost always capable of relying on quality and reliable services of the Singaporean legal aid systems. Unlike the United States whose legal aid system offers more of government warranted criminal legal aid, the Singaporean government gives more emphasis to representation and aid in civil cases with the majority of criminal legal aid being provided by the private sector independent players. The countries Ministry of Law operates an institution referred to as the Legal Aid Bureau (LAB). This entity is fully state-funded and operates a nation-wide civil legal assistance.⁴⁶ Its efforts at legal aid are complemented by the local Law Society of Singapore that offers legal-aid to persons accused with criminal offences.⁴⁷

As in the United States and Kenya, the endowment of legal aid in Singapore is not the absolute purview of some few organizations. The Supreme Court for instance actively offers lawyers for persons accused in capital offences while supplementary programs funded by the Singaporean government offer legal knowledge and arbitration amenities through distinct government bodies.⁴⁸ Lastly, the nation has various supplementary without charge legal aid clinics, run by NGOs, that offers a variety of legal aid services.

It is noteworthy that of the countries discussed only in Kenya and Singapore do the Judiciary take an active role in provision of legal aid, assistance and general awareness. While the Singaporean Judiciary actively selects lawyers for the accused in criminal cases with capital sanctions, their Kenyan counterparts have partnered with several institutions to actively create

⁴⁴ U.S. Department of State, *Singapore: Country Report on Human Rights Practices - 2006*. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78790.htm>.

⁴⁵ *ibid*

⁴⁶ The Singapore Legal Aid Bureau, available at: <http://app.minlaw.gov.sg/lab/default.asp?r=2>

⁴⁷ *ibid*

⁴⁸ ACJLS Policy Dialogue Report I, at 4-5.

public awareness on the roles of the courts, the court process, the rights of citizenry of access to justice as well as the available alternative forms of dispute resolution. In a nutshell, there needs to be a synergistic approach to delivery of legal aid services. The efforts of the government to guarantee universal access to justice should be effectively and actively complimented by the courts and other private sector players.

3.2 CONCLUSION

In conclusion, the Netherlands, United States of America and Singapore have established and implemented effective legal aid mechanisms that recognize the rights of the people to adequate and effective legal aid programs. This chapter has explored possible criteria that may be used to effectively offer legal aid programs to the people of Kenya. Founded on the lessons learnt from the comparative analysis, and other findings in this chapter, the next chapter provides the overall findings of the study, the conclusion and recommendations.

CHAPTER 4

4.0 FINDINGS

Access to justice is a fundamental and basic human right notion of the rule of law. In the nonexistence of access to justice, people are inept to have their voices heard, use their fundamental liberties, challenge bias and other unfair practices or hold decision-makers accountable. Rebuttal of the right of accessing justice is therefore, a Rebuttal of a core and fundamental human right. It's the state's mandate and other such agencies which carry a constitutional obligation, to ensure that the right is not only recognized but also protected and supported. The existence of a civil legal aid scheme establishes that the State recognizes it has an important role to play

Similar to Netherlands, U.S.A and Singapore, the Kenyan Constitution 2010 advocates for the need of accessing justice as a basic human and fundamental right and has a positioned up legal framework that makes it possible to safeguard the interest of the rights of the citizen.

However, the limitations, shortfalls and delays in the current scheme, together with the absence of apt facilities for addressing client or community need display that only reluctant steps have been taken to ensure to everyone the right of equivalence in front of the law which is a right assured by Kenyan Constitution 2010 and International human rights laws. As noted in chapter one, this study aimed at:

1. Identifying and singling out the weaknesses of the existing laws and policies in ensuring, advancing and supporting judiciary-backed legal aid initiatives;
2. Carefully gauging and assessing the existing mechanisms of judiciary-supported legal aid programmes with the view to proposing clear and concise but practically realistic and less combative approach to ensuring the same is not only effective but also qualitative;
3. Keenly analyzing the measures, if any, that the judiciary has taken in an attempt to effectively meet and realize its constitutional obligations of ensuring ease of access to justice for all Kenyans;
4. Establishing whether there are mechanisms in place to effectively help the courts participate in legal awareness creation;

5. Determining how the existing Kenyan policy, legal, regulatory and established framework on judiciary-backed legal aid compares with the most progressive, future-looking legal and policy practices of developed jurisdictions, especially Singapore
6. Ascertaining what best practices the country could borrow from Britain in order to effectively promote involvement of the judiciary in legal aid and legal awareness creation;
7. Proposing measures that can be effectively adopted by the country's judiciary to facilitate promotion and provision of legal aid and legal awareness creation.

Whereas an all-inclusive assessment of the role of Kenyan judiciary in advancement of legal aid programs reveals encouraging cases of direct involvement, this study notes that such involvement, however noble, is more a matter of choice as opposed strict statutory requirement. It plays more of a facilitative role. As such, an assessment of effectiveness of judiciary in advancement of legal aid programs is admittedly incomplete if its supportive role is not accorded due consideration. This clarification is essential at this point considering the number of key players involved in promotion and protection of accessing justice as a unanimous legal entitlement and whose course is utterly frustrated and incomplete without a progressive and assertive judiciary.

Article 50 of the Constitution of Kenya 2010 stipulates that each accused person has a right to have a legal representative assigned to them by the State at its own expenditure. The primary obligation for guaranteeing legal-aid in criminal related matters thus vests with the state. This doesn't automatically mean that the state should assign and reimburse for lawyer on record, on the contrary infers that the state is accountable for guaranteeing, for instance via support to supplementary legal-aid and awareness facilitators, that legal-aid and awareness is essentially offered in specific severe criminal matters. As result from the deliberations below, all in all speaking, the government would seem not fully to fulfill this constitutional obligation, nor accord it the seriousness it deserves and neither has the judiciary demonstrated robust commitment to enforce this right as mandated by the supreme law.

As distinguished in Chapter two, there's a mandate conferring to the ICCPR and the Banjul Charter for the state to guarantee that poor people are offered with valuable legal representation at no cost in grave criminal matters. Going by treaty compulsions don't make it exactly clear what matters should prompt the said mandate except in cases that involve offences of a capital nature, several soft law instruments and international declarations seems to set standards that obligate legal representation to be offered and any compensation done by the state in cases that accused person can't pay for it in grave criminal cases (further than capital sentence matters). As the nation, short-lived schemes in Kenya are being carried out mostly merely in capital punishment offences, it is open to discussion whether this constrained range is adequate to meet with the state's responsibilities. The applicable restriction to capital penalty matters would in turn appear to hint at that no discrete valuation of the matter has taken place when choosing what people meet the requirements for the nation's aid. This creates a difficulty for acquiescence with the ICCPR as well as it flouts with criteria put in place in soft law mechanisms and international depositions. It is notable however, that the question of seriousness of an offence as to warrant government legal aid provision to the accused is decidedly one to be answered by the courts before which the case is tried. It necessarily follows therefore that effective application of these provisions (of the CoK and ICCPR) in advancement of the right for access to legal representation depends primarily on the proactiveness of the judiciary. Whereas several measures have been undertaken towards this endeavor as discussed earlier in this study, a lot more needs to be done.

International human rights instruments necessitate provision of competent legal counsel in criminal cases. Such counsel, the law anticipates, must not only prove effective but also demonstrate ability to deliver quality legal assistance. However, due to poor funding and lack of prioritization of the state brief system in the country, many victims end up with inexperienced legal counsels.

4.1 RECOMMENDATION

Based on the above findings, the study proposed the following recommendation

1. One indisputable remedy to these problems would be additional funding. Funding can be through the government, the other possible solution would be effective and standardized judicial intervention, involvement of the courts that is predicated or preconditioned on established standards for counsel services delivery in these cases. The courts, as the

custodians and defender of the fundamental right and freedoms, can put in place measures that would ensure the quality of legal representation in such cases is in any way no lesser than in conventional cases.

2. The institution of autonomous organizations to manage state legal-aid and awareness amenities. As indicated before in this study, the notion of the impartiality of the legal profession (a pledge of the right to a fair trial) as well as the prerequisite to guarantee nondiscrimination and impartiality in apportioning legal-aid and awareness funding steers states to an “arm’s length” principle in the administration of state legal-aid therefore could be deemed to be a suitable procedure in this view. The establishment of the office of the ombudsman is therefore a step in the proper course. The partnership between the judiciary and the legal profession to further accessing justice through the *pro bono* program is indicative of the judiciary’s commitment towards advancement of legal aid initiatives. A well-structured and clearly defined approach is thus recommended to ensure the program endures leadership changes in both institutions otherwise the intervention would run the risk of being short-lived and elective.

4.2 CONCLUSION

In as much as the international legal instruments place the principal obligation for legal aid provision on government, they also accord due regard on the role of the legal profession towards this endeavor. As discussed before, the Law Society of Kenya is involved in legal aid. It is in appreciation of this noble act that the Judiciary, through the earlier discussed Transformation Framework sought a long term partnership with lawyers to promote access to legal aid. While the exercise has somewhat achieved positive results, the magnitude of its benefits cannot be described authoritatively as huge. This is ostensibly due to the fact that proper assessment of the actual choice of lawyers’ involvement in legal aid is quite difficult and in most cases individual lawyers are seemingly not adequately dedicated to guaranteeing that *pro bono* clients get value legal-aid and awareness. These issues seem to be brought about for not having an efficient structure for standardizing and increasing *pro bono* facilities, through legislation or internal guidelines of law societies or the legal aid partnership guidelines.

While international standards are effectively well-defined on the role of the state in legal-aid and awareness, the same is unassumingly quite on judiciary’s contribution. This is despite the

judiciary being the most interested party in such matters. Perhaps the assumption has been that the judiciary as the arbiter in most cases needs not to bear responsibility whose enforcement it would otherwise call to question. As demonstrated through the Judiciary Transformation Framework, the courts, as custodians of the people's fundamental liberties has a say in the fight for these rights and freedoms. It is thus not strange for the CoK in acknowledging the challenges the courts face in dispensation of justice, to recommend that the mainstream courts, identify, promote and further alternative dispute resolution mechanisms provided they are not averse to justice and morality. The backlog of cases in civil courts clearly demonstrates that whereas the judiciary has undertaken several measures discussed earlier to promote ADR, its intervention has indisputably been insufficient. Access to justice still remains a big challenge to effective administration of justice.

It is noteworthy that of the countries discussed in only in Kenya and Singapore does the Judiciary take an active role in provision of legal aid, assistance and general awareness. While the Singaporean Judiciary actively selects lawyers for the accused in criminal cases with capital sanctions, their Kenyan counterparts have partnered with several institutions to actively create public awareness on the roles of the courts, the court process, the rights of citizenry of access to justice as well as the available alternative forms of dispute resolution. In a nutshell, there needs to be a synergistic approach to delivery of legal-aid and awareness services. The efforts of the government to guarantee universal access to justice should be effectively and actively complimented by the courts and other private sector players. The challenge of incompetence of the state-provided legal counsel can be effectively mitigated by the direct involvement of the courts in appraisal of the appointed counsels. This would in turn safeguard the interests and rights of the accused in serious cases as espoused by international standards.

International criteria endorses the delivery of legal-aid and awareness by various bodies, including civil society organisations and paralegals. The capability of these actors to offer quality legal aid significantly dangles on the degree to which the state takes note of and supports them. The nonexistence of a comprehensive national legal-aid procedure in Kenya exemplifies a difficulty for taking note of and managing legal-aid work by these suppliers. Besides, there could be an issue on the side of the state to collaborate with these actors. Therefore it should be noted that in a few of the country has somewhat founded legal-aid schemes that draw on the know-how

of the legal profession as well as civil society organisations and paralegals. This study noted that this intervention is in itself not sufficient especially considering government facilitation is as seasonal as it is acutely sporadic. The collaboration of the judiciary with these institutions, especially through the earlier discussed judicial week is highly encouraged. The involvement of judicial officers and private actors in educating the public on the court process, their rights of access to justice and use of alternative dispute resolution mechanism is admittedly laudable. However, as discussed in Chapter 2, many such interventions need to be carried out extensively and intensively to achieve meaningful outcomes. The current approach is not effectively structured and its impact cannot be assessed definitively.

In recognition of the significance of proposals created by the judiciary in collaboration with the legal professions, comprising the creation of national legal aid or awareness days and Judiciary Open weeks, to increase knowledge in the general public involving the law and the legal process, both entities should further propagandize awareness among the public, mainly the poor people and the vulnerable people regarding the law and legal processes, for instance through:

- i) Conducting seminars and clinics in collaboration with civil society organizations in local communities;
- ii) Printing and distributing easy to read brochures and various written materials on essential attributes of law and legal process translated into local dialects;
- iii) Encouraging the carrying out of trainings regarding how to better improve legal awareness among the typical person;
- iv) Using media spots and especially local radio stations to explain court processes as well as newly adopted laws;

In recognition of the fundamental roles the legal vocation plays in the advancement of legal aid, the judiciary needs to partner with the law society in creating credible and lasting initiatives that would incentivize lawyers to actively participate in legal aid. These could include:

- i) Encouraging and facilitating the Law Society to put in place initiatives that guarantee that lawyers are promptly and competitively compensated for the legal-aid and

- awareness facilities given, for instance by depend on a clinical style whereby legal representatives are commissioned explicitly for the objective of providing legal-aid and awareness as is practiced in Britain;
- ii) Facilitation of full implementation relevant legislation concerning pro bono obligations and to recommend specifications of the in-house regulations of the law society for advocates to undertake pro bono jobs, comprising laying down necessities concerning the amount of working hours that should be committed to legal aid and awareness annually, identify which kind of ways of legal amenities must be totaled as legal-aid and take up excellence criteria regarding how specific advocates must treat pro-bono matters.
 - iii) Establishment of an advocate ranking and assessment scheme that specifically interrogates the standing of advocates before the judiciary based primarily on their participation in legal aid provision and pro bono services rendered to the vulnerable and unable.
 - iv) Encourage establishment of proposals, comprising effective supervising instruments and penalization systems and guidelines that don't include the ones that dont comply with the prerequisites from permitting their practicing certificate renewed, thus ensuring advocates accomplish their requirements to provide pro bono facilities as is the widespread practice in United States of America;
 - v) Encourage lawyers to establish law firms in countryside regions in which legal-aid and awareness can be offered, and example being through encouraging the law society to offer such specific advocates numerous types of advantages when launching offices within countryside areas and reducing filing charges of legal documents in courts by such law firms thereby encouraging the establishment of more law firms.

Recognizing that certain proposals launched by the judiciary in the country such as the judiciary open week, have created useful links amongst the judiciary, legal profession members and supplementary legal-aid suppliers, particularly civil society organizations and including paralegals, the judiciary is particularly implored to explore ways in which the level of cooperation among judicial staff, members of the legal field/profession and supplementary legal-

aid and awareness suppliers can be encouraged and fortified, including but not limited to the following:

- i) Putting in place procedures that can ensure that the knowhow and experience of affiliates of the bench and other judicial staff is joint with supplementary legal aid suppliers, comprising lawyers, officers of state-run legal-aid projects, civil association organizations and also paralegals.
- ii) Employing paralegals in the judiciary to educate the public on the court process and its role as well as help litigants without advocates prepare and file documents necessary for the advancement of their cases.
- iii) Bearing in mind whether a recommendation scheme could be established in collaboration with lawyers, NGOs, so that various indigent litigants without representation could be submitted to lawyers, NGOs and paralegals functioning in the turf of legal-aid and awareness;
- iv) Guaranteeing that legal-aid and awareness suppliers comprising lawyers, personnel of state run legal-aid systems, NGOs and paralegals if need be called to partake in education colloquiums conducted via the judiciary;
- v) Provision of support to proposals, for instance pilot legal-aid and awareness undertakings set in motion with another group of players striving at boosting legal-aid and collaboration amongst the numerous legal-aid and awareness suppliers.

The Judiciary in appreciation of its fundamental role as the custodial of justice needs to initiate measures that would encourage involvement of judicial officers in provision of legal aid to the general public. This can be through establishing an employee appraisal and promotion system that lays more emphasis to and grades participation in legal awareness during the scheduled events such as the judiciary open week, the judiciary could nurture a robust in-house legal aid culture and in the process make the process and the system as a whole welcoming to the ordinary citizen and less intimidating, in turn ensuring access to justice is promoted to the individual, more so the indolent and the vulnerable.

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