

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

AN APPRAISAL OF LEGAL REPRESENTATION IN KENYAN JUVENILE JUSTICE  
SYSTEM

BY

MICHIEKA ELVIS

SUPERVISOR: DR. JUSTICE NANCY BARAZA

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS OF  
THE UNIVERSITY OF NAIROBI

2017

---

University of NAIROBI Library



0432303 6

**DECLARATION AND APPROVAL**

I hereby declare that this research project is my original work and has not been presented for the award of a degree at any other University. I also certify that it is entirely my own work and has not been taken from the work of others save to the extent that such work has been cited and acknowledged within the context of my work.

Signature: ..... *M Elvis* ..... Date: ..... *13/12/2017* .....

NAME: MICHIEKA ELVIS

REG. NO: G62/67492/2013

The research project has been submitted for examination with my approval as the candidate's University Supervisor.

Signed: ..... *Nancy Baraza* ..... Date: ..... *19/12/2017* .....

DR. JUSTICE NANCY BARAZA

SUPERVISOR



## DEDICATION

Dedicated to my family

## ACKNOWLEDGEMENT

The completion of this study would not have been possible without the support from various people. I extend my gratitude to them.

First, I would like to thank the almighty God for giving me the breath of life, strength and resilience throughout the entire course.

I wish to also thank my supervisor Dr Justice Nancy Baraza for her effective patience and dedicated guidance.

My appreciation finally goes to my classmates, with whom we weathered many storms, giving each other positive criticism and sharing of ideas.

God bless you all.

## TABLE OF CONTENTS

DECLARATION AND APPROVAL.....	i
DEDICATION .....	ii
ACKNOWLEDGEMENT.....	iii
LIST OF STATUTES.....	vi
LIST OF CONSTITUTIONS.....	vii
LIST OF INTERNATIONAL INSTRUMENTS .....	viii
LIST OF CASES .....	ix
LIST OF ABBREVIATIONS AND ACRONYMS.....	xi
CHAPTER ONE: GENERAL INTRODUCTION.....	1
1.1Background of Study .....	1
1.2Statement of the Problem.....	4
1.3Hypothesis .....	5
1.4Research Objectives .....	5
1.5Research Questions.....	6
1.6Theoretical Framework .....	6
1.6.1Sociological Jurisprudence .....	6
1.7Conceptual Framework.....	13
1.7.3.The ‘Substantial Injustice’ Test.....	18
1.8Literature Review.....	19
1.8.2.Challenges to Provision of State-funded Legal Representation.....	25
1.9Justification of the Study.....	26
1.10Research Methodology.....	27
1.11Research Design .....	27
1.12Data Analysis.....	27
1.13Limitations of the Study.....	28
1.14Chapter Breakdown.....	28
CHAPTER TWO: INTERNATIONAL LEGAL FRAMEWORK FOR STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS.....	30
2.1.Introduction .....	30
2.2.The Best Interests of the Child .....	33
2.3.Right to Legal Representation in International Law.....	34

2.4.Conclusion .....	37
CHAPTER THREE: NATIONAL LEGAL FRAMEWORK FOR STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS.....	38
3.1.Introduction .....	38
3.2.Historical Development of the Right to Legal Representation in Kenya.....	38
3.3.Rationale for the Right to Legal Representation of Child Offenders .....	42
3.4.The Constitution of Kenya.....	43
3.5.Statutory Framework for Legal Representation of Child Offenders.....	44
3.5.1.The Children Act.....	44
3.5.2.The Legal Aid Act.....	45
CHAPTER FOUR: COMPARATIVE ANALYSIS OF STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS .....	49
4.1.Right to Legal Representation for Children: Case Study of South Africa .....	49
4.2.Case Study: Australia .....	57
4.3.Conclusion .....	60
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS .....	61
5.1Conclusion .....	61
5.2Recommendations.....	62
BIBLIOGRAPHY .....	64

## LIST OF STATUTES

- Child Justice Act 2008 (South Africa)
- Children's Act 2005 (South Africa)
- Children Act No. 8 of 2001
- Legal Aid Act 1969 (South Africa)
- Penal Code Cap 63 of the Laws of Kenya.

## LIST OF CONSTITUTIONS

- Constitution of Kenya
- Constitution of the Republic of South Africa No. 108 of 1996.
- Constitution of the Republic of Uganda, 1995.

## LIST OF INTERNATIONAL INSTRUMENTS

- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child
- Convention on the Rights of the Child
- International Convention on Civil and Political Rights
- Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action.
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001.
- Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the Dakar Declaration and Recommendations).
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules).
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990.
- UNESCO Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)

## LIST OF CASES

- Artico v Italy A 37 (1980) 3 EHRR 1, ECtHR
- Bernard Kimathi v Republic (Cr MiscAppl No. 40 of 2013) [2013] eKLR
- Brossy v Brossy (602/11) [2012] ZASCA 151 (28 September 2012).
- Damian Belfonte v The Attorney General of Trinidad and Tobago CvA. No. 84 of 2004
- David NjorogeMacharia v Republic [2011] eKLR
- Delphis Bank Ltd v Chatte& 6 others [2005] 1 KLR 766
- E G M v Republic [2017] eKLR
- Ex Parte Van Niekerk, [2005] JOL 14218 (T).
- Gideon v. Wainwright 372 U.S. 335 (1963)
- Granger v United Kingdom A 174 (1990)
- In Re: Gault 387 U.S. 1 (1967).
- J. Campbell v Jamaica Communication 307 of 1988.
- John Swaka v The DPP & 2 others Constitutional Petition (2011)eKLR.
- K M M v Republic [2015] eKLR
- Legal Aid Board in re Four Children (512/10) [2011] ZASCA 39 (29 March 2011)
- Legal Aid Board v Republic & Another, 2009 (2) SA 262 (D).
- Mkunzo & Another v Republic (Crim Appeal No. 239 of 2004) (2008) 1 KLR G & F 649
- Nanga v Republic [2006] 2 KLR 269
- R v H and Another, 2005 (6) SA 535 (C) 539.



- Republic v S.A.O (a minor) [2004] eKLR
- Republic v S.T. (a child) (Criminal Appeal No. 144 of 2003) (2008) 1 KLR (G & F).
- Rosen v Habenga, 2006 (4) SA 1999 (C).
- S O M v Republic [2017] eKLR
- Soller NO v G and Another, 2003 (5) SA 430 (W)
- v Republic (Criminal Appeal No. 200 of 2006) (2008) 1 KLR (G & F) 659
- Yusufu Gitta v R [1959] EA.

## LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child (adopted 1 July 1990)
CLAN	Children's Legal Action Network
CRADLE	Child Rights Advisory, Documentation and Legal Centre
CRC	Convention on the Rights of the Child (adopted 20 November 1989)
ECERC	European Convention on the Exercise of Children's Rights
ECHR	European Court of Human Rights
FIDA	Federation of Women Lawyers
ICCPR	International Convention on Civil and Political Rights (adopted 16 December 1966)
LAB	Legal Aid Board
MACR	Minimum Age of Criminal Responsibility
UK	United Kingdom
USA	United States of America
UNSMRAJJ	United Nations Standard Minimum Rules for the Administration of Juvenile Justice (adopted 29 November 1985)

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background of Study

Access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice.<sup>1</sup> The statement above simply implies that access to justice depends on the enforcement of rights to due process, to a fair hearing and to legal representation. The justice system is a paramount pillar in the foundation of the rule of law as it enables citizens to resolve their disputes in an organized and structured mechanism that allows for objective adjudication.<sup>2</sup> It has been observed that having access to the justice system is not the same as having access to justice.<sup>3</sup> The people who get access to the justice system need to understand how the system works so that they can take part in it.<sup>4</sup>

Legal representation of accused persons has been widely recognized as a means of enhancing access to justice.<sup>5</sup> The criminal justice system in many jurisdictions is adversarial in nature and is applied in all criminal proceedings including proceedings against child offenders. Normally in a democratic society, the State hires prosecutors who are skilled in the law to protect the public interest.<sup>6</sup> These prosecutors go up against

---

<sup>1</sup> See Weilenmann M, 'Legal Pluralism: A New Challenge for Development Agencies', in *Access to Justice and Beyond: Making the Rule of Law a Reality* 87 (2007).

<sup>2</sup> Lugulu H.J.A, 'Equal Access to Justice: The Case for Legal Aid in Kenya' (2008) 2 *Moi University Law Journal* 1.

<sup>3</sup> See: submission to the Alberta Summit on Justice: *Legal Aid Society of Alberta* at <<http://www.albertajustice.org>> at 8 December 2009.

<sup>4</sup> Ibid.

<sup>5</sup> See Constitution of Kenya, art 50(2)(h): The proviso to qualify for State-funded legal representation requires that substantial injustice would otherwise result; we can glean that legal representation can remedy possible injustice on accused persons.

<sup>6</sup> *Gideon v. Wainwright* (1963) 372 U.S. 335 (as per Hugo J).

defence counsel in ideal situations. However, the situation on the ground is far from ideal as most child offenders are unrepresented. Even the intelligent and educated layman cannot muster enough legal knowledge to enable him to put up a good defence let alone be vigilant of procedural technicalities in the trial process.<sup>7</sup> The case is not any better for children who are less capable and more vulnerable than adults. They lack both the skill and knowledge to prepare their defence adequately even when they may have a good defence. These children risk being found culpable of offences they did not commit due to their apparent disadvantage.

Globally, there are a number of key instruments, relating to juvenile offenders, entrenching the right to legal representation at state expenses. Universal Declaration of Human Rights (UDHR);<sup>8</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>9</sup> Convention on the Elimination of All Forms of Violence Against Women (CEDAW); International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>10</sup> the African Charter on Human and People's Rights (ACHPR); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo

---

<sup>7</sup> *ibid.*

<sup>8</sup> Although there is no explicit right to be represented contained in the UDHR, equal access to legal representation is fundamental to the enforcement of fundamental freedoms to equality before the law, effective remedies for human rights violations and fair trials in the determination of rights.

<sup>9</sup> The ICCPR stresses States' obligation to ensure that effective remedies are provided when rights are violated, in particular, through 'competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.' Article 14(3)(d) of the ICCPR affirms the right of individuals facing criminal charges to have legal assistance assigned to them and, 'where the interests of justice so require,' that such assistance be provided 'without payment by him (or her) ... if he (or she) does not have sufficient means to pay for it.' The ICCPR additionally, under Article 26 emphasizes that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.' While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.

<sup>10</sup> While not expressly addressing the right to legal assistance, the ICESCR asserts State parties' obligation to uphold rights without discrimination, and to ensure the equal rights of men and women to the protections arising from the Convention.



Protocol);<sup>11</sup> the Convention on the Rights of the Child (CRC);<sup>12</sup> Convention on the Rights of Persons with Disability;<sup>13</sup> among other UN and AU Declarations and Statements of Principles.<sup>14</sup> The Constitution of Kenya makes it clear that not only do general rules of international law form part of the law of Kenya, but so does any treaty or convention ratified by Kenya.<sup>15</sup> This means that discussions on legal aid are informed by both domestic considerations as well as international human rights law.

State-funded legal representation for juveniles also finds its way in various resolutions adopted by the General Assembly of the United Nations.<sup>16</sup> The wording in these resolutions of the UN General Assembly, however, does not make it compulsory for member states of the United Nations to establish mechanisms for provision of state-funded legal representation. The resolutions only obligate the State parties to do so 'where there is provision for such aid in the country'<sup>17</sup> or 'where such aid is available'.<sup>18</sup>

Specifically, the Constitution of Kenya obligates the State to provide legal counsel to accused persons where substantial injustice would otherwise result.<sup>19</sup> The Constitution entrenches that any accused person has a right to a fair trial which includes the right to

---

<sup>11</sup> The protocol mandates State Parties to ensure access to justice and equality before the law (Article 8).

<sup>12</sup> States parties to the CRC undertake to treat accused children 'in a manner consistent with the promotion of the child's sense of dignity and worth,' including access to 'legal or other appropriate assistance' to enable the child to prepare his or her defence.

<sup>13</sup> Specifically, the Convention stipulates in Article 13 that the States parties 'shall ensure effective access to justice for persons with disabilities on an equal basis with others... in all legal proceedings, including at investigative and other preliminary stages.'

<sup>14</sup> While these are not binding on United Nations or African Union member States, Kenya being a member to both, they provide important sources for interpreting and understanding States' international and regional legal obligations as well as important normative guidance for States in developing domestic public policy that complies with generally accepted international human rights standards and principles.

<sup>15</sup> See Articles 2(5) and (6) of the Constitution.

<sup>16</sup> For instance, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (adopted: 29<sup>th</sup> November 1985); Convention on the Rights of the Child (adopted: 20<sup>th</sup> November 1989); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (adopted: 14<sup>th</sup> December 1990).

<sup>17</sup> UNSMRAJJ, rule 15.1.

<sup>18</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, art. 18(a).

<sup>19</sup> Constitution of Kenya, art 50(2)(h).

legal representation.<sup>20</sup> This right extends to children in conflict with the law. The Children's Act of 2001 which was enacted to implement Kenya's obligations under the CRC provides for state funded legal assistance for child offenders under section 186.

In light of these provisions in both domestic laws and international instruments, there is no doubt that Kenya has an obligation in respect to provision of legal assistance to child offenders. Despite these very deliberate efforts, majority of child offenders carry on with their cases without legal representation.<sup>21</sup> Studies indicate that in Kenya access to legal representation by children varies from place to place.<sup>22</sup> Lack of legal representation often results in negative verdicts against children with undesirable consequences not in the interest of the child.

## 1.2 Statement of the Problem

Even though the Kenyan legal framework creates an obligation to have regard to the child's best interests, there are still inadequate measures put in place to guarantee the realization of the right to legal representation to juvenile offenders. The question therefore which is at the core of this research is: what is the extent of protection guaranteed to juvenile offenders within the existing legal aid framework in Kenya? Legal representation for children in conflict with the law continues to be tied to the 'best interest of the child' standard.<sup>23</sup> The practice however has always been to conceive the best interest principle from the adult's perspective. The upshot is that best interests of a child are centred on adults, usually their parents. Legal representation of child offenders

---

<sup>20</sup> *ibid.*

<sup>21</sup> See generally Madalyn Wasilczuk, 'Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense' (2012) 45 *New York University Journal of International Law & Politics* 291; The researcher also observed this trend during tenure as a Magistrate at the Tononoka Children's Court.

<sup>22</sup> See National Council on Administration of Justice, "Criminal Justice System in Kenya; An Audit" (2016), pp 254, 256.

<sup>23</sup> *African Charter on the Rights and Welfare of the Child* adopted 01 July 1990, CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999) art 4(2): Connotes that it is in the best interests of a child to have his or her views heard through an impartial representative.

presents an avenue for them to have the benefit of participation as their adult counterparts.

As already stated, despite having deliberate provisions in our laws that recognise the vulnerability and special needs of children, child offenders in Kenya have largely been left to their own means. Although the law has made provisions for state funded representation for indigent persons which include children, this is hardly implemented. Children in conflict with the law continue to appear in court unrepresented which situation is a grave miscarriage of justice.

### **1.3 Hypothesis**

This study is premised on the following hypotheses:

- i) Child offenders have a constitutional right to legal representation at state expense.
- ii) Most child offenders go to trial without legal representation.

### **1.4 Research Objectives**

The main objective of this study is to strengthen the right to legal representation of child offenders at State expense. In order to realise this aim, the research is based on the following specific objectives:

1. To document the importance of legal representation generally and for child offenders in particular.
2. To outline the right to State-funded legal representation for child offenders in Kenya.
3. To assess the state of juvenile justice system in Kenya.
4. To document best practices of legal representation of child offenders at State expense in other jurisdictions such as Australia and South Africa.



5. To suggest recommendations on how to strengthen State-funded legal representation for child offenders in Kenya.

## **1.5 Research Questions**

The study seeks to answer the following research questions:

1. Why is legal representation important for offenders and particularly child offenders?
2. What is the current policy on state funded legal representation for child offenders in Kenya?
3. What is the state of the juvenile justice system in Kenya?
4. Are there best practices in respect to State-funded legal representation for child offenders that Kenya can adopt?
5. How can State-funded legal representation for child offenders in Kenya be strengthened?

## **1.6 Theoretical Framework**

This study is based on the sociological school of jurisprudence, the natural law and the legal positivism.

### **1.6.1 Sociological Jurisprudence**

This school of thought may share similar approaches as other schools of thought but it is distinguished from other schools of thought by its methodology. It relies on the findings of social sciences such as sociology and other disciplines including political and economic studies to help explain the nature of law.<sup>24</sup> Proponents of this school disagree with proponents of the natural law school in that they don't ascribe to the notion that there are

---

<sup>24</sup> Michael R. Hill, 'Roscoe Pound's Sociological Library: The Foundations of American Sociological Jurisprudence' (1989). Sociology Department, Faculty Publications. 452.



certain principles which are absolute and therefore form the basis of all law. Early proponents of the sociological school include David Hume<sup>25</sup> and Montesquieu.<sup>26</sup> The scholar most associated with this school of thought is the American Dean Roscoe Pound.<sup>27</sup> Pound sought to encourage a more unified approach which focused on how law can develop society via a strict analysis and interpretation of legal texts.<sup>28</sup> He believed in human experience being the basis for law and therefore law is tailored to meet the dynamic needs of society. His main contribution lies in his argument on “legal interests” and “jural postulates.” He posits that there are three categories of legal interests namely individual, public and social interests.<sup>29</sup>

The aim of sociological jurisprudence in his opinion is to balance out these interests and it is the core concepts of jural postulates that then seek to explain the process of balancing and comparing these interests.<sup>30</sup> Jural postulates are guidelines by which interests may be evaluated while resolving conflicts between these interests.<sup>31</sup> It is this process of balancing and evaluating interests that he referred to as ‘social engineering.’ He emphasized however, that jural postulates are static and will change according to the social evolution stages in any particular society.<sup>32</sup> In his works, he identified a major shortcoming relating to the ‘activation of law’ in society. According to him, legal principles mostly rely on state agencies such as courts, the legislature and others for activation. As such, they may only be activated when complaints are brought forward by individual citizens. As a result, those who lack the resources to do so are disadvantaged and may not access their rights under the law. He propounds that law must then provide incentives to ensure that it is not only invoked but that indigent citizens can access justice.

---

<sup>25</sup> David Hume Treatise on Human Nature (1740)

<sup>26</sup> L’Esprit des Lois (The spirit of laws) 1948

<sup>27</sup> James A. Gardner, ‘The Sociological Jurisprudence of Roscoe Pound’ (1961) (Part I), 7 Vill. L. Rev. 1.

<sup>28</sup> R Pound 1921 *The Spirit of the Common Law*, Boston: Beacon Press p. h212

<sup>29</sup> R Pound 1943 *A survey of Social interests* 57 Harvard Law Review, 99 p.1-2

<sup>30</sup> Joseph Clarence Verhelle, ‘Roscoe Pound and His Theory of Social Interests’ (1958). Master's Theses. Paper 1717

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

It is his opinion that legal aid schemes are an example in which the law can be invoked and justice afforded by all.<sup>33</sup> Through social engineering, the law should be used to achieve positive objectives of social and economic policy.<sup>34</sup> It calls for the intervention of the government in the interest of the community as a whole.

Children have an important place in the society and when they come into conflict with the law, they should be afforded the right to legal representation at state expense. This study therefore calls on the intervention of the government to act in the interest of child offenders by making it a mandatory requirement for such children to have legal assistance during trial. The process of adopting a model that would be responsive to the right to legal representation largely involves the law.

#### 1.6.2. Natural Law Theory

The naturalists hold that there is a certain order in nature from which humans can derive standards of human conduct through reasoning.<sup>35</sup> Within natural law, humans have equal and unalienable rights which accrue to them by virtue of being human.<sup>36</sup> Proponents of this school of thought, like Aquinas and John Locke, posit that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.<sup>37</sup> Both men place God as the supreme judge when determining laws. Aquinas preaches that all law bases itself on divine reason. The highest law is eternal law. Other laws follow eternal law. The government has limits to which they can go. They have to follow human nature and God's laws. Positive laws have to be consistent with man's nature. If a law goes

---

<sup>33</sup> Roscoe Pound, 'The Limits of Effective Legal Action Roscoe Pound' (1917) *International Journal of Ethics* Vol. 27, No. 2 150.

<sup>34</sup> *Ibid*, 852.

<sup>35</sup> Hadley Arkes, 'Natural Law', (1992) *Constitution* 4(1) 13.

<sup>36</sup> *Ibid*.

<sup>37</sup> Jack Donnelly 'Natural Law and Right in Aquinas' Political Thought.' (1980) *The Western Political Quarterly* 33 (December) 520; See also Patrick Riley, 'Locke on Voluntary Agreement' (1976) *The Western Political Quarterly* 29 (March): 136. Alex E. Wallin, 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods', (2012) 35(1) *Campbell Law Review* 12.

against divine law, it must be broken. Locke's theory is similar to Aquinas's that before positive laws are God's laws.<sup>38</sup> They exist whether the State exists or not. Natural law creates moral obligations that are valid whether held by the government or not.

The theory identifies with and provides security for human freedom and equality, from which other human rights flow. It also provides security and support for a human rights system, both domestically and internationally.<sup>39</sup> Natural law proponents believe justice is fairness and this principle transcends natural justice and social justice.<sup>40</sup> The rules of natural justice form the underlying principles in adjudication of dispute. For example, the right to be heard, right to legal representation and justice should not only be done but should be seen to be done.<sup>41</sup>

The theory is founded on the naturalist belief that justice is a universal and absolute concept and exists independently from human interventions.<sup>42</sup> From this universal and absolute justice, persons, societies and institutions derive laws, principles, codes, conventions, charters and religious creeds.<sup>43</sup> However, the human stipulations of justice sometimes and often fail to codify the absolute justice. Natural law theorists argue that every person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.<sup>44</sup> Justice anchors and safeguards rights of a person and the same are not politically or socially granted.<sup>45</sup> Therefore, there is no political or

---

<sup>38</sup> Ibid.

<sup>39</sup> Ibid

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Reflected in the Preamble to the UDHR of 1948 which stipulates inter alia "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...." The discussion on international human rights law and access to justice is presented comprehensively in the succeeding chapters.

<sup>43</sup> See generally, The International Forum for Social Development, 'Social Justice in an Open World: The Role of the United Nations' ST/ESA/305, United Nations, New York, 2006.

<sup>44</sup> John Rawls, *A Theory of Justice* (Revised Edn, Oxford: Oxford University Press, 1999).

<sup>45</sup> Preamble to the UDHR of 1948.



social justification for the perpetration of injustice on a person.<sup>46</sup> Rawls goes further to compare a legal system that does not recognize basic principles such as justice to be no different from the Nazi law.<sup>47</sup>

In this regard, for a society to effectively safeguard the rights of its people, then the channels of seeking justice should be readily accessible. This means the courts should not make the courts and other justice institutions bureaucratic and expensive. The legal framework should also envisage provisions to facilitate access to justice.<sup>48</sup> Courts should be given discretion to ensure justice is served. Where courts are faced with complex cases,<sup>49</sup> the judges should look beyond the law on the fundamental principle given the facts.<sup>50</sup> In effect, where there is a gap in the law, it is not the end to justice; the courts should resort to underlying principles of justice.<sup>51</sup>

Enforcement of rights is fundamental to their protection. Natural law theorists argue that for justice to be served there should be institutions entrusted with the mandate of ensuring that basic rights of citizens are protected.<sup>52</sup> The overall objective of protection of basic rights of the people is the fundamental consideration and that in light of the conception of justice as fairness; the various institutions that a society creates at the constitutional level are selected in the spirit of perfect rather than procedural justice. The legal framework of a country should promote both substantive and procedural justice.

---

<sup>46</sup> Rawls bases his argument on social contract theory where a society is made up of individuals who have come together and agreed on minimum rules and standards to regulate their relations. In such a setting there is a collective ultimate goal greatest advantage to all and it is possible to see injustice being perpetrated on a few for the good of the greatest number.

<sup>47</sup> Ibid (n. 44).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

<sup>51</sup> See the US cases, *Henningsen vs. Bloomfield* {(1960)32 NJ 358.} and *Riggs vs. Plamer* {115 NY 506, 22 NE (1889)} as examples of complex cases. Defined in Ronald M. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) as cases in which there is no pre-existing rule that governs the situation on which a judge is called upon to adjudicate or where a pre-existing rule would produce a result that seems manifestly.

<sup>52</sup> Ibid note 16.

From the foregoing, it is apparent that naturalists advocate for a just world where everyone is treated equally and they have equal protection by the law. Any law put in place should be for the promotion of the interests of all. If the existing legal framework does not achieve this, then it ought to be replaced or the better option adopted. The Constitution of Kenya adopts a naturalists' approach by guaranteeing the rights of all members of society including the right of access to justice by various groups such as children in conflict with the law, amongst others.

### 1.6.3. Legal Positivism

Legal positivism is the proposition that the existence and content of law depends on social facts and not on its merits.<sup>53</sup> The English jurist John Austin formulated it thus:

"The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."<sup>54</sup>

In this regard positivists contend that law is man-made and reject the notion of natural law.<sup>55</sup> Utilitarians such as John Stuart Mills and Jeremy Bentham have argued that justice has been overrated and that it is not as basic and important as thought to be.<sup>56</sup> Justice is a derivative of other more basic notions such as rightness and consequentialism.<sup>57</sup> Utilitarians hold that there is a nexus between justice and the greatest welfare principle such that what is just is that which produces the greatest happiness or welfare for the largest group which can best be achieved through legislature.<sup>58</sup>

---

<sup>53</sup> Jules Coleman, 'Negative and Positive Positivism,' (1982) 11 J. Legal Stud. 139.

<sup>54</sup> Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press 1975); David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991)

<sup>55</sup> Andrei Marmor, 'Legal Positivism: Still Descriptive And Morally Neutral' (2006) Oxf J Leg Stud 26(4) 683.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ronald Dworkin, *Justice in Robes*, criticizing the utilitarian concept of justice by Jeremy Bentham. The same belief was held by another utilitarian scholar Oliver Wendell Holmes.

The social contract theorists argue for social justice and hold that there is a social dimension in defining justice.<sup>59</sup> They maintain that justice is one of terms or rules of the social contract agreed upon through legislative enactments, judicial decisions or social customs.<sup>60</sup> As such, justice is derived from everyone concerned or from what they would agree to under hypothetical situation. Principles of justice are found by moral reasoning and actual justice cannot be achieved except within a sovereign state.<sup>61</sup> Under social contract theory, justice is highly weighed on a fairness scale. Thus, justice is fairness to everyone.<sup>62</sup> Modern analytical positivists advance the social contract approach to justice and argue that law and justice is a creation of man through consensus.

In his work 'theory of sources', Hart's argument is that there are no legal principles of law beyond the 'sources'.<sup>63</sup> The 'sources' means materials or documents which serve as sources of law. He does not recognize an inherent sense of law. The 'sources' inform the legal framework and without an effective and working legal framework, access to justice remains a mirage and subsequently, there is no legal protection of human rights. Article 48 of the Constitution of Kenya places an obligation on the State to ensure access to justice by all persons. They have a positive duty to facilitate this and one can indeed compel them to do so.<sup>64</sup>

A report on the English civil justice system highlighted a number of principles which the justice system should meet in order to ensure access to justice and these are: be just in the result it delivers; fair treatment of litigants; appropriate procedures at a reasonable cost; deal with cases with reasonable speed; understandable to those who use it; be responsive

---

<sup>59</sup> These include *inter alia* John Locke, Immanuel Kant and Rousseau.

<sup>60</sup> Leslie Green, "Legal Positivism" in the Stanford Encyclopedia of Jurisprudence.

<sup>61</sup> *Ibid.*

<sup>62</sup> However, there is a division with some saying that justice is created by all humans whereas others say it's is a command of a dominant class. Closely tied to this theory is the belief that justice varies from one culture to another. Thus, just like culture is dynamic so is the concept of justice.

<sup>63</sup> H.L.A Hart, 'The Concept of the Law' (New York: Oxford University Press 2 edn, 1994)

<sup>64</sup> Under Article 22, Constitution of Kenya, one can institute legal proceedings in Court to compel the State ensure enforcement and protection of rights



to the needs of those who use it; provide as much certainty as the nature of the particular case allows; and be effective, adequately resourced and organized.<sup>65</sup> Those principles of access to justice are believed to be of general application to all systems of justice, civil and criminal.<sup>66</sup> It has been rightly postulated that rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including inter alia the right to equal treatment and the absence of discrimination and the right to the due process of the law.<sup>67</sup>

It is important to underscore that natural law and positive law are complementary when it comes to the field of human rights. This is because while the fundamental rights and freedoms are neither obtained, nor granted by any man-made law (positive law),<sup>68</sup> they need a system or institutions charged with enforcing them. These rights derive from inherent dignity of human beings and are also inalienable. The fundamental human rights and freedoms are not therefore related to the duly adopted legal norms, but adoption of the appropriate norms is postulated to protect human rights and to determine the ways of their realization. Legal norms (human rights law) do not establish fundamental rights and freedoms but only guarantee them.<sup>69</sup> Whether the two classes of theorists agree with each other or not is not of much importance to this discourse; it matters that the two inform the Constitution of Kenya and especially the Bill of Rights.

## 1.7 Conceptual Framework

The prime obligation of the State is to ensure that all persons, including the poor, indigent and marginalized have access to justice. The Constitution of Kenya guarantees this right

---

<sup>65</sup> *Access To Justice Final Report*, By The Right Honourable the Lord Woolf, Master of the Rolls, July 1996; Final Report to the Lord Chancellor on the civil justice system in England and Wales, Available online at <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec3a.htm#c9> accessed on 2 May 2017.

<sup>66</sup> Ibid.

<sup>67</sup> 'Fundamental Rights' The Just World Project, Available online at <http://worldjusticeproject.org/factors/fundamentalrights> accessed on 5 May 2017.

<sup>68</sup> Universal Declaration of Human Rights, 1948.

<sup>69</sup> MT Ladan, 'Access To Justice As A Human Right Under the ECOWA Community Law' at pp 6.

which should be availed upon demand. The philosophy of access and representation as an inalienable element of fairness is evident from this phrase:

*"Nothing rankles more in the human heart more than a brooding sense of injustice. Illness we can put up with. But injustice makes us pull things down. When only the rich can enjoy the law, as a doubtful luxury and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued democracy is not imaginary, but very real because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."<sup>70</sup>*

### 1.7.1. Understanding the Concept of Access to Justice

Access to justice is a fundamental right in any society; a justice system fails if it does not provide justice for the vulnerable and poor in society, especially children. The right of access to justice is one of the internationally acclaimed human rights which is considered to be basic and inviolable. As already highlighted in the previous Chapter, it is guaranteed under various human rights instruments. Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. Access to justice can only be as effective as the available mechanisms to facilitate the same. A right is not just the ability to do something but a guarantee or empowerment to actually do it.<sup>71</sup>

Access to justice relates to the ease of entry to a legal institution as also to the nature of the de jure fact that carries its promise. The concept of access to justice has undergone an important transformation. Earlier a right of access to judicial protection meant essentially the aggrieved individuals formal right to merely litigate or defend a claim. The reason behind this was that access to justice was a natural right and natural rights did not require affirmative state action. However, with the emergence of the concept of welfare State the right of access to justice has gained special attention and it has become right of effective

---

<sup>70</sup> 7 Jeremy Gans et al, Criminal Process and Human Rights (Federation Press, 2011) 494.

<sup>71</sup> The Hendrick Hudson Lincoln-Douglas Philosophical Handbook, Version 4.0 (including a few Frenchmen) 4.



access to justice. In the modern, egalitarian legal system the effective access to justice is regarded as the most basic human right which not only proclaims but guarantees the legal rights of all.<sup>72</sup>

In today's global context, 'access to justice' means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum.<sup>73</sup> The words serve to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. Thus, it requires that the system, firstly, must be equally accessible to all, and second, it must lead to results that are individually and socially just.

Justice has been conceptualized as existing in at least four forms namely: procedural justice which involves the principle of fairness in the idea of fair play; distributive justice (economic justice), which is focused on fairness in sharing; restorative justice (corrective justice); and retributive justice.<sup>74</sup> This emanates from the belief that justice does not apply in a blanket form and what is considered as justice to one person may be different from another. The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are affordable, accessible, comprehensible to ordinary people, and which dispense justice speedily, fairly, and without discrimination.<sup>75</sup> It refers to administrative, judicial remedies and procedures available to a person (juristic or natural) aggrieved or likely to be aggrieved by an issue. It further refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.<sup>76</sup>

---

<sup>72</sup> M Cappilietti and Garth, Bryant, *Access to Justice*, Vol I, The Florence Access to Justice Project, Sijthoff and Noordoff, Milan, 1978, p. 9.

<sup>73</sup> P P Rao, 'Access to Justice and delay in disposal of cases' (2003) *Indian Bar Review* 30, p.208.

<sup>74</sup> 'Four Types of Justice' available online at

[http://changingminds.org/explanations/trust/four\\_justice.htm](http://changingminds.org/explanations/trust/four_justice.htm) accessed 1 May, 2017.

<sup>75</sup> MT Ladan, 'Access To Justice As A Human Right Under the ECOWAS Community Law' A Paper Presented at The Commonwealth Regional Conference on the Theme: - The 21st Century Lawyer: Present Challenges And Future Skills, Abuja, Nigeria, 8 - 11 April, 2010.

<sup>76</sup> *Ibid.*

Absence of access to justice generally means that people are unable to challenge discrimination, have their voice heard, exercise their rights, or hold decision-makers accountable.<sup>77</sup> Access to justice is an essential element of the rule of law and therefore of democracy. According to the United Nations Secretary-General, 'the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability.'<sup>78</sup> Maintaining a strong rule of law therefore is a precondition to protecting people who are disadvantaged in the society and helping them empower themselves. Improving access to justice consequently becomes a key means of promoting social inclusion.<sup>79</sup> It is important to note that maintenance of the rule of law is fundamental to Kenya's socio-cultural, economic and political prosperity since the rule of law frames the relationship between State and society, founded upon an accepted set of socio-political and economic norms.

A comprehensive rule of law is said to be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against international law in terms of standards of judicial protection.<sup>80</sup> Further, rule of law is said to encompass inter alia: a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment

---

<sup>77</sup> United Nations Development Programme (UNDP), 'Access to Justice and Rule of Law' Available online at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) accessed on 1 May, 2017.

<sup>78</sup> Report of the Secretary-General (A/59/2005).

<sup>79</sup> Australian Government (Attorney General's Department), 'A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action' (September 2009) Access to Justice Taskforce Attorney-General's Department.

<sup>80</sup> Dag Hammarskjöld Foundation, 'Rule of Law and Equal Access to Justice', (2013) Discussion Paper, 1 January 2013.

and administration.<sup>81</sup> Therefore, without the rule of law, access to justice becomes a mirage. If the rule of law fails to promote the foregoing elements, then access to justice as a right cannot be realised.

To ease the understanding of this right of access to justice and how it relates to provision of legal aid to children in conflict with the law, the research explores the philosophical underpinnings as put forward by some of the most prominent theorists on justice and access to justice. This chapter further evaluates legal strategies and their effectiveness in actualizing the constitutionally guaranteed right of every person to access justice, as conceived in this discourse.

### 1.7.2. Contextualizing the Right to Legal Representation

The right to legal representation is a constituent of the right to fair hearing.<sup>82</sup> It ensures that accused persons have access to the services of a qualified legal practitioner to represent them during judicial and other legal proceedings. It is noteworthy that legal representation in some countries is funded by the State although there are strict qualification criteria for persons to have the benefit of State-funded legal representation.<sup>83</sup> Kuria argues that the right to legal representation stems from the equality principle which holds that every person has a right to equal protection by the law.<sup>84</sup> Kuria further posits that democracy and protection of fundamental rights of an individual, which include the

---

<sup>81</sup> Ibid.

<sup>82</sup> See Markus Schmidt, 'International Human Rights Norms: Application of the International Covenant on Civil and Political Rights by the Human Rights Committee' (Developing Human Rights Jurisprudence, Fourth Judicial Colloquium on the Domestic Application of Human Rights Norms, Abuja, 9-11 December 1991) 92 <[http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/developing-human-rights-jurisprudence\\_9781848594968-en#page3](http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/developing-human-rights-jurisprudence_9781848594968-en#page3)> accessed 20 August 2015. The Human Rights Committee of the United Nations Organisation has held that the right to a fair trial includes the right to legal representation; See also Constitution of Kenya, Art. 50(2)h.

<sup>83</sup> The basis for such legal assistance is pegged on justice and fair trial of the accused person.

<sup>84</sup> Gibson Kamau Kuria, 'The Right to Legal Aid in Kenya' in Smokin Wanjala (ed), *Law and Access to Justice in East Africa* (Kituo Cha Sheria 2004) 46.



right to the protection of the law and the rule of law, form the basis of the right to legal representation.<sup>85</sup>

Kuria conceptualises a three-pronged approach to the rule of law. They include:<sup>86</sup> first, the government must abide by the law; secondly, the State must provide a system which affords protection of the rights of individual when contravened by either the government or a private individual; and thirdly, the State must provide to the indigent adequate resources to enable him to enjoy the protection of the law. The third approach herein demonstrates the onerous obligation that the State should carry out to give effect to the right to legal representation especially regarding indigent persons who are unable to afford the legal costs involved in judicial proceedings.

### 1.7.3. The 'Substantial Injustice' Test

A common rationale posited for legal representation is 'where substantial injustice would otherwise occur'<sup>87</sup> or in 'the interests of justice'.<sup>88</sup> A number of legal provisions on the foregoing argument are illustrative: Article 6(3) (c) of the European Convention on Human Rights provides the minimum right to every accused person 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Interests of justice should be examined by reference to the facts of the case in entirety including the facts that may materialise after the competent authority such as a court or tribunal has taken its decision.<sup>89</sup> In *Granger v United Kingdom*<sup>90</sup> the court enumerated some of the factors to take into account 'in the interests of justice'. They include complexity of the case and the accused's ability to contribute to their defence.

---

<sup>85</sup> Ibid, p.49.

<sup>86</sup> Ibid, p.50.

<sup>87</sup> Constitution of Kenya, art. 50(2)(h).

<sup>88</sup> ICCPR, art. 14(3)(d).

<sup>89</sup> Halsbury's Laws of England, (n. 153) at p.156.

<sup>90</sup> A 174 (1990).

The 'interests of justice' test is not based on the requirement of whether in the absence of legal representation there has been actual prejudice to the presentation of the accused's defence. The test applied is whether 'it appears plausible in the particular circumstances' that a lawyer would be of assistance.<sup>91</sup>

#### 1.7.4. Conclusion

It is not enough that the right of access to justice is guaranteed both under the international and national frameworks on human rights. Making the enjoyment of these rights a reality requires the efforts of all concerned stakeholders, in reforming the existing frameworks as well as taking up new measures to facilitate the same. The ability to access justice is of critical importance for the enjoyment of all other human rights. However, for the State to conceptualize a working legal framework within which these rights can be fully enjoyed, the philosophical understanding is the best place to start. This was the focus of this Chapter. It established a theoretical foundation for the nature of the concept of access to justice through a philosophical analysis.

### 1.8 Literature Review

#### 1.8.1. Legal Representation

Legal representation is arguably one of the key aspects of the right to fair trial.<sup>92</sup> It is noteworthy that some commentators strongly argue that legal representation is an indispensable component of the right to access to justice. Vicki Schmolka notes in 'The Right to Publicly-Funded Legal Representation in Canada: Making the Case'<sup>93</sup> that in the

---

<sup>91</sup> *Artico v Italy* A 37 (1980) 3 EHRR 1, ECtHR, para 35.

<sup>92</sup> See marginal notes to Articles 50, 6 and 35(3)(f) and (g) of the Constitution of Kenya, the European Convention on Human Rights and the Constitution of South Africa respectively which indicate that the right to fair trial includes the right to legal representation be it at the expense of the accused person or at the expense of the State. The marginal note to Article 28 of the Constitution of Uganda reads, 'right to fair hearing' and the article entails the provision on the right to legal representation.

<sup>93</sup> Vicki Schmolka, 'The Right to Publicly-Funded Legal Representation in Canada: Making the Case' (February 2002) Canadian Bar Association <[http://www.cba.org/cba/pdf/2002-02-15\\_case.pdf](http://www.cba.org/cba/pdf/2002-02-15_case.pdf)> accessed 16 January 2014.

absence of state-funded legal representation a good part of the population cannot take advantage of the protections and guarantees offered by a country's legal system and are therefore denied access to justice. Gabriela Knaul, the United Nations Special Rapporteur on the Independence of Judges and Lawyers also remarks that state-funded legal representation is an essential component of a fair and efficient justice system.<sup>94</sup>

Legal representation is entrenched as a right in a number of international instruments which oblige member states to formulate national laws that define the criteria for provision of legal representation. Be that as it may, many countries have failed to give full effect to the obligations to provide state-funded legal representation. Some scholars observe that the right to state-funded legal representation does not exist in practice.<sup>95</sup> The national policies and legal interventions are expected to spell out the criteria for determining the eligibility of persons to state-funded legal representation. In South Africa a 'means test' has been established to determine the eligibility for state-funded legal representation.<sup>96</sup> However, some of these criteria are said to highly restrict access to legal representation because many people do not meet the requirement of the tests set by the law.<sup>97</sup>

It has been suggested that state-funded legal representation should be mandatory to all accused persons. Bowry notes in his opinion piece 'Mandatory Legal Representation a Necessity'<sup>98</sup> that if the Constitution of Kenya is strictly to be applied each accused must be provided a lawyer. Odunga voiced the good news regarding provision of free legal

---

<sup>94</sup> 'Legal Aid, A Right in Itself' OHCHR

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E>> accessed 16 January 2014.

<sup>95</sup> See Jeremy Sarkin, 'The Constitutional Court's Decision on Legal Representation' (1996) 12 South African Journal on Human Rights 55, 56.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Pravin Bowry, 'Mandatory Legal Representation a Necessity' *Standard Newspaper* (Nairobi, 08 May 2013).



representation which is expected to be given full effect with the Legal Aid Act<sup>99</sup> now in place.<sup>100</sup> Moreover, the Act is expected to pave way for free legal services to the poor.<sup>101</sup>

Many jurisdictions provide the basis for provision of state-funded legal representation to be in the circumstances where 'substantial injustice would otherwise occur'.<sup>102</sup> Scholars, however, contend that this criteria is limited in scope and highly dependent upon a vague, predictive ground.<sup>103</sup> It is also argued that the boundaries of the 'substantial injustice' test may be difficult to delineate in practice.<sup>104</sup>

Some scholars argue that children have a right to legal representation in all cases in which they are directly involved.<sup>105</sup> According to Sloth-Nielsen,<sup>106</sup> a child is specifically entitled to legal assistance as soon as the child is deprived of liberty. This mirrors the provision of article 37(d) of the United Nations Convention on the Rights of the Child which provides that every child deprived of liberty has the right to 'prompt access to legal and other appropriate assistance.' Sloth-Nielsen further notes that child's the right to legal assistance upon deprivation of liberty is also entrenched in article 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child (ACRWC). Article 17(2)(c)(iii) tasks State Parties to the ACRWC to ensure that every child accused of infringing the penal law is afforded legal and other appropriate assistance in the preparation and presentation of their defence.

---

<sup>99</sup> No. 6 of 2016.

<sup>100</sup> Dennis Odunga, 'Kenya Set for Free Legal Services' *Daily Nation* (Nairobi, 20 January 2014).

<sup>101</sup> *ibid.*

<sup>102</sup> Marvin Krohn & Jodi Lane (eds), 'The Handbook of Juvenile Delinquency and Juvenile Justice', p.70.

<sup>103</sup> Noel Zaal and Ann Skelton 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts' (1998) 14 *South African Journal of Human Rights* 539, 541.

<sup>104</sup> *ibid.*

<sup>105</sup> Martin Guggenheim 'The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children' (1984) 59 *New York University Law Review* 76.

<sup>106</sup> Julia Sloth-Nielsen, 'Realising Children's Rights to Legal Representation and to Be Heard In Judicial Proceedings: An Update' (2008) 24 *South African Journal on Human Rights* 495.

Various approaches are adopted in legal representation of child offenders. According to Monahan<sup>107</sup> these approaches are 'direct' representation and 'best interests' representation. Sometimes a hybrid of both approaches is employed. Under direct representation the lawyer acts upon the instructions of the relevant child or young person. Under the 'best interests' representation, the lawyer does not act upon instructions of the relevant child but instead acts separately upon his or her assessment of the child's best interests or receives instructions from a responsible adult accepted by a court and who is generally a parent or guardian of the relevant child.<sup>108</sup> While voicing the various models of legal representation of children, Marvin Ventrell describes the direct representation approach as an approach which allows the lawyer to be directed by the child client and does not prohibit the lawyer from acting in his or her capacity as counselor for the client.<sup>109</sup>

Issues, however, arise concerning who should direct the lawyer in legal representation of children in delinquency proceedings.<sup>110</sup> While discussing the 'best interests' approach Geoff Monahan notes that the lawyer should be guided by what he perceives to be in the child's best interests, rather than by the child's explicit instructions.<sup>111</sup> However,

---

<sup>107</sup> Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8 Queensland University of Technology Law & Justice Journal 392.

<sup>108</sup> See Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC), 'Seen and Heard: Priority for Children in the Legal Process' (1997) Report No 84, cap 13 (Legal Representation and the Litigation Status of Children)

<<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>> accessed 20 January 2014.

<sup>109</sup> Marvin Ventrell 'Legal Representation of Children in Dependency Court: Towards a Better Mode - The ABA (NACC) Revised) Standards of Practice' in National Association of Counsel for Children (ed), *NACC Children's Law Manual Series* (NACC 1999) 172.

<sup>110</sup> Guggenheim M 'The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children' (1984) 59 New York University Law Review, pp.82-93.

<sup>111</sup> This is termed as the 'direct' representation approach. See Guggenheim (ibid) p.88. There are, however, practical difficulties experienced in adopting this approach. For instance it was observed by the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC) in the report that many lawyers have difficulties accepting instructions from a child client. See ALRC and HREOC (n 41) 13.5.



Goldstein, Freud and Solnit in *Before the Best Interests of the Child*, argue that the lawyer should be guided neither by his own opinion of the child's best interests nor by the child's instructions, but rather by the wishes of the parents.<sup>112</sup> Although these authors settle for the control of legal representation by parents, they seem to have disregarded the circumstances such as where the parents or even guardians of the child in question cannot be reached. Such is the experience for instance where the child in question is a street child whose parents are hardly involved in their lives.

As has been pointed out, various jurisdictions base the provision of State-funded legal representation on circumstances where 'substantial injustice would otherwise occur'. In relation to children it is argued that substantial injustice would occur if a child is prosecuted with a possible outcome being a criminal record.<sup>113</sup> It is also suggested that substantial injustice would arise where a child may be liable to be deprived of his or her liberty by placement in any of the institutions linked to the juvenile justice system.<sup>114</sup>

In some jurisdictions, the respective bar associations have established clearly defined principles outlining how representation of children should be conducted by the lawyers. For instance, the Law Society of New South Wales crafted the *Representation Principles for Children's Lawyers*.<sup>115</sup> The Representation Principles in New South Wales for instance give directions on how lawyers should proceed in circumstances where the lawyer is a direct

---

<sup>112</sup> Joseph Goldstein, Anna Freud and Albert Solnit, *Before the Best Interests of the Child* (Macmillan 1979). These authors contend that the right to legal representation is not a personal right belonging to the child, but is a collective right of the family, designed to prevent juvenile justice from taking over parental functions (129).

<sup>113</sup> Ann Skelton 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice' (1996) *Acta Juridica* 180, 190.

<sup>114</sup> Sloth-Nielsen, (n 108) 498.

<sup>115</sup> The Law Society of New South Wales, 'Representation Principles for Children's Lawyers' (3<sup>rd</sup> edn, 2014) < <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026517.pdf>> accessed 05 January 2016.

representative of the child<sup>116</sup> and where the lawyer is a best interest representative of the child.<sup>117</sup>

Although the provision of legal representation to children has been widely supported, criticisms against it exist. Guggenheim notes that the appointment of a lawyer to provide legal representation creates difficulties especially when the child is too young to direct the lawyer.<sup>118</sup> He typifies that legal representation of young children introduces a critical element of arbitrariness into the legal system.<sup>119</sup> In the same vein, Guggenheim asserts that legal representation of young children undermines legitimate parental interests in privacy and autonomous decision-making.<sup>120</sup> He therefore recommends that legal representation of children is only appropriate in limited number of situations.

State-funded legal representation has been entrenched as a right in a number of international conventions. These international instruments grant leeway to the respective countries to develop their own national laws that guide the provision of state-funded legal representation. Kenya is party to the CRC, ICCPR, and ACRWC among other conventions hence the country has obligations to provide legal representation in the circumstances described by the conventions. These obligations have hardly been met and Krissie Hayes and Ken Nyaundi decry Kenya's constant violation of her international obligations imposed by international human rights standards and laws as well as her obligations under domestic legislations.<sup>121</sup> Bowry observes that legal aid is a necessity

---

<sup>116</sup> Under Principle A1, the child is the client whenever the lawyer acts as the direct representative. The lawyer must therefore act upon the instructions of the child, regardless of who has appointed him or who would be paying the legal fees.

<sup>117</sup> Under Principle A2, the lawyer as a 'best interests' representative acts as an officer assisting the court by representing the best interests of the child. However, the child must still be given the opportunity to express his/her views and have those views taken into account.

<sup>118</sup> Guggenheim M (n.112), p.76.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

<sup>121</sup> Krissie Hayes and Ken Nyaundi, 'Legal Opinion Case 116' African Human Rights and Access to Justice Programme < [http://www.icj-kenya.org/dmdocuments/opinions/Legal\\_Opinion\\_Case116.pdf](http://www.icj-kenya.org/dmdocuments/opinions/Legal_Opinion_Case116.pdf)> accessed 20 December 2015.

because the very basis of human rights and dignity of a Kenyan depends upon getting sound and worthwhile legal aid at the right moment by law.<sup>122</sup>

The consequences of non-representation of children in the Kenyan judicial system were captured by Madlyn where she rightly pointed out that the Kenyan jurisdiction has failed to implement this constitutional right in matters involving children.<sup>123</sup> Kenya is a signatory to a number of international instruments which safeguard this right for children but still has not made these obligations a reality for her children. Even with the Legal Aid Act in place, structures to ensure representation of children in Kenya have not been put in place.

### 1.8.2. Challenges to Provision of State-funded Legal Representation

There are a number of cited challenges that are encountered in the provision of State-funded legal representation. Wasilczuk observes that in Kenya, the jurisprudence on who qualifies for state-funded legal representation is not settled.<sup>124</sup> The lack of effective legal, policy and institutional framework to give effect the right to State-funded legal representation remains a major setback. Bowry acknowledges that no mechanisms or law has been put in place in respect to legal aid in accordance with the constitution.<sup>125</sup>

Financial constraints also impair the provision of State-funded legal representation.<sup>126</sup> Bowry however suggests a scheme that can be devised to address the challenge.<sup>127</sup> This scheme should be established by the Law Society of Kenya which will require advocates, ranging from the newly admitted to those with vast experience in the profession to

---

<sup>122</sup> Bowry (n 100).

<sup>123</sup> Madalyn Wasilczuk, 'Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense' (2012) 45 *New York University Journal of International Law & Politics* 291, 295.

<sup>124</sup> *ibid*

<sup>125</sup> Bowry (n 100).

<sup>126</sup> *ibid*.

<sup>127</sup> *ibid*.



commit to take up a determined minimum number of criminal and civil matters in a year on pro bono or on subsidized basis.<sup>128</sup>

The shortage of human resources who qualify to provide legal representation is also a great challenge in many jurisdictions. Similarly, the large number of offenders in need of legal representation cannot be served by the few qualified personnel. This compromises the quality of legal representation. Ventrell underscores that the quality of legal representation has been essential to obtaining good outcomes for children.<sup>129</sup>

Even with the enactment of the Legal Aid Act, the National Legal Aid Board has not come up with specific guidelines for implementation and a specific strategic plan to roll out legal aid as envisioned in the Act. This implementation has been marred with issues of funding as State funded legal representation relies heavily on government funding. The government and stakeholders have to look at allocation of funding to the National Legal Aid Service as well as other sources of funding otherwise the initiative will backfire as argued by Kelvin Njuguna.<sup>130</sup>

## 1.9 Justification of the Study

This study is a valid input in the ongoing efforts to fulfil the constitutional right to legal representation especially to child offenders. It is instrumental in informing the policy-making and the enactment of subsidiary legislation focusing on state-funded legal representation. The Legal Aid Act has been enacted by the Parliament. The findings of this study will provide a blue print for an action plan and stronger policy for use by the legal aid stakeholders in ensuring access to justice by the impecunious and disadvantaged in society with a special focus on children. It will also contribute valuable literature in this area for scholars interested in this area which has long been left undeveloped.

---

<sup>128</sup> *ibid.*

<sup>129</sup> Ventrell (n 111) 169.

<sup>130</sup> Njuguna Kelvin, 'Legal Aid in Kenya' Nairobi Law Monthly (Nairobi, September 2016)



## 1.10 Research Methodology

It is the right of every individual to have access to his/her right to justice and the establishment of a legal aid system is one of the ways in which this is done. There are approaches as regards the manner of provision of legal aid. The first is that it is the duty of the legal profession to provide professional legal services to the impecunious for free. One school of thought in support of this opinion would then be that in offering free legal aid, the lawyers would retain the monotony in provision of professional legal services they were granted by the State.<sup>131</sup> The second approach is that lawyers should carry only part of the burden and that most of the responsibility should lie with the State.<sup>132</sup> The research conducted comparative analysis of legal representation for child offenders in Australia and South Africa. The countries have been sampled randomly although this takes into account countries with more developed legal systems.

## 1.11 Research Design

This research used qualitative case study design.<sup>133</sup> Books, journal articles, administrative regulations, policy documents, statutes, treaties, the Constitution, court decisions and reports on the subject were obtained from the libraries, resource centres and the internet and were instrumental in informing the conclusions of this study.

## 1.12 Data Analysis

The nature of the data collected is qualitative. It was analysed qualitatively using content analysis technique. The researcher finds content analysis technique suitable because it

---

<sup>131</sup>Moorhead R, Patterson A, and Sherr A, 'Contesting professionalism: legal aid and non-lawyers in England and Wales', (2003)37 *Law and Society Review* 765.

<sup>132</sup> *Ibid.*

<sup>133</sup> The choice of this research design is based on the advantage it has concerning use of multiple sources of data which also enhances data credibility. See Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (2<sup>nd</sup> edn, Newbury Park 1990).

can be used to analyze written, audio or video data from experiments, observations, surveys or secondary data studies.<sup>134</sup>

### **1.13 Limitations of the Study**

There is inadequate literature on the subject especially in the Kenyan context and may therefore not give the accurate national picture of the practice of legal representation of child offenders. Most of the literature in Kenya regurgitates the right to legal representation for children as enunciated in legislation and the Constitution with no writings on implementation of the same to ensure access to justice by children.

### **1.14 Chapter Breakdown**

Chapter One is the introductory chapter. The researcher presents information on the background to the study, statement of the problem, the research objectives, research questions, research methodology, and justifications for the study, limitations of the study and literature review. This Chapter also conceptualizes the concept of access to justice as well as the philosophical underpinnings on justice. The concept of access to justice in relation and its relationship with access to justice is also explored. Finally, the Chapter introduces the concept of legal representation and its philosophical underpinning.

Chapter Two examines the international framework for State-funded legal representation of child offenders. This includes international instruments on this right and obligations arising from various aspects of these provisions.

Chapter Three specifically explores the national legal framework for State-funded legal representation of child offenders in Kenya. It gives a historical background and discusses the status of the legal framework for State-funded legal representation.

---

<sup>134</sup> Donald Cooper, and Pamela Schindles, *Business Research Methods* (8<sup>th</sup> edn, McGraw-Hill 2005).

Chapter Four takes a comparative analysis of the right to State-funded legal representation in the Republic of South Africa and Australia with a view to drawing best practices that can be implemented in Kenya and the procedures for implementation.

Chapter Five covers recommendations on how the right to state funded legal representation can be maximized. The recommendations are drawn from the findings of the study as well as the practice in other model jurisdictions.

## CHAPTER TWO

### INTERNATIONAL LEGAL FRAMEWORK FOR STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS

#### 2.1. Introduction

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations guidelines on the juvenile justice are the main instruments that have provisions that deal with child justice. These guidelines are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),<sup>135</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules)<sup>136</sup> and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).<sup>137</sup> These United Nations guidelines on the juvenile justice all constitute a comprehensive framework for the treatment of children who come into conflict with the law. The UN Economic and Social Council in its Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) called for prioritisation of establishing appropriate agencies and

---

<sup>135</sup> Adopted by the General Assembly in its resolution 40/33 on the 29th of November 1985. The Beijing Rules provide a framework within which a national juvenile justice system should operate. They set standards for a fair and humane response to juveniles who find themselves in conflict with the law from the time they are arrested, throughout the ensuing processes of investigation, prosecution, adjudication and disposition, non-institutional treatment, institutional treatment and aftercare.

<sup>136</sup> The guidelines were adopted and proclaimed in its resolution 45/112 on the 14th of December 1990. The JDLs stipulate the standards applicable to juveniles deprived of their liberty in all forms and emphasize that deprivation of liberty must be a means of last resort, for the shortest possible period of time and limited to exceptional cases. These rules outline specific circumstances under which children can be deprived of liberty. They are essentially intended to counteract the detrimental effects of deprivation of liberty by ensuring the protection of the rights of child offender and their welfare while in custody

<sup>137</sup> The guidelines were adopted and proclaimed in its resolution 45/112 on the 14th of December 1990. The Riyadh Guidelines offer a comprehensive and proactive approach to prevention of delinquency and the social reintegration of children at risk of being abandoned, neglected and abused. They are aimed at minimizing the circumstances and conditions, which drive children to crime or expose them to victimization and entrapment in irregular situations. They indicate situations which would need official intervention and encourage an environment conducive to healthy development, integration and adjustment.



programmes for provision of legal and other assistance for children.<sup>138</sup> The Guidelines emphasise that the right of every child to have access to legal assistance should be safeguarded from the onset when the child is detained.<sup>139</sup> Their main limitation is that they are mere recommendations and are non-binding.<sup>140</sup>

Kenya is a signatory to both the CRC and the ACRWC. Kenya has domesticated and implemented these international instruments domestically through the Children's Act, 2001. The constitution provides that the general rules international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution. The CRC and the ACRWC established the overarching legal framework to consider how member states are giving effect to the rights of children at the domestic level.

Both the CRC and the ACRWC are premised on a set of four principles which guide consideration of all issues relating to the rights of the child, including the administration

---

<sup>138</sup> UNESCO *Guidelines for Action on Children in the Criminal Justice System* (21 July 1997) para 16.

<sup>139</sup> *ibid.*

<sup>140</sup> AD Viccica 'The promotion and protection of children's rights through the development and recognition of an international notion of child justice and its child centred perspective in the United Nations' (1989) 68 *Nordic Journal of International Law* 68 at 81.

of child justice. These are the best interests of the child,<sup>141</sup> non-discrimination,<sup>142</sup> the right to life, survival and development,<sup>143</sup> and the right to be heard.<sup>144</sup>

The CRC and the ACRWC in Articles 37 and 40 and 17 respectively set out the requirements of a child rights-oriented juvenile justice system. These requirements

---

<sup>141</sup> Article 3 of the CRC; article 4 (1) of the ACRWC and CRC General Comment No 5: General Measures for the Implementation of the Convention on the rights of the Child, CRC/GC/2003/5 (2003). The best interest of the child is an interpretative principle that guides the application of the other three principles. According to the CRC Committee on the Rights of the Child, its application requires systematic consideration of how children's rights and interests are or will be affected by decisions and actions concerning the child, undertaken by public or private welfare institutions including judicial and administrative decisions as well as policy formulation<sup>74</sup>. In all actions and decisions, affecting the child, the best interests of the child must be the subject of active consideration and it must be shown that children's interests have been explored and taken into account as a primary consideration.

<sup>142</sup> Article 2 of the CRC; Article 3 of the ACRWC. The principle of non-discrimination prohibits discrimination on the basis of gender, ethnic or social origin, race, disability or any other status, and calls for the equal treatment of children. It underpins approaches to all other rights enshrined in the Convention including the rights of children who come into conflict with the law. By this principle, state parties are obliged to take all the necessary steps to ensure that all children in conflict with the law are treated equally by establishing rules, regulations or protocols, which enhance the equal treatment of child offenders and provide redress, remedies and compensation. See also CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 paragraph 6.

<sup>143</sup> Article 6 of the CRC; article 5 of the ACRWC. By conferring the right to life survival and development upon all children, both treaties place an obligation upon state parties to recognise every child's inherent right to life and to ensure, to the maximum extent possible, the survival and development of the child. States parties are expected to interpret development in its broadest sense as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development, to achieve optimal development of all children. see also CRC General Comment No 10 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 paragraph 12.

<sup>144</sup> Article 12 of the CRC makes provision of the child's right 'to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law...' The ACRWC has a similar provision in article 4(1). Child participation highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights and applies equally to all measures adopted by states to implement the CRC. The principles impress upon governments to open their decision-making processes to children and to ensure respect for their views in matters that affect them. Within the child justice context, the right must be fully respected and implemented through every stage of the process, by giving children the right to participate either directly or through competent legal representation. The child's participation must be genuine and not a mere formality. The older and mature the child is, the more weight should be given to his or her views<sup>77</sup>. According to the CRC, a child is every human being below the age of 18 years unless under the national law of a country, majority is attained earlier. Under the ACRWC article 1 a child is an every human being below the age of 18 years, with no room for flexibility.

include the establishment of separate laws, institutions and procedures applicable to children accused of committing crimes; the setting of a minimum age of criminal capacity; the principle of detention as a last resort and for the shortest period of time; the desirability of diversion; procedural guarantees in a juvenile justice framework and the limitation of certain sentences and need for alternative dispositions at the sentencing stage.

## 2.2. The Best Interests of the Child

One of the key principles for handling child-related matters is that best interests of the child must be taken into account.<sup>145</sup> International legal instruments relating to children also emphasise on giving primacy to a child's best interests in all matters pertaining to them. Article 3(1) of the CRC requires that the best interests of the child must be given primary consideration in all matters pertaining to children. It is noteworthy that this obligation applies to both public and private entities. According to Todres the use of the term 'primary consideration' in the CRC does not make it the overriding principle in all matters and decisions concerning children.<sup>146</sup> It is merely a measure for procedural fairness. Article 4 of the ACRWC mirrors the need to give primary consideration of a child's best interests.

In the ACRWC, the 'best interests' standard has been tied to child participation in matters affecting them. Article 4 of the ACRWC requires that views of a child must be heard, be it directly or through a representative, in all judicial or administrative proceedings affecting the child.<sup>147</sup> It follows that the views of children in conflict with the law should be heard and the court handling their matters should take into account such views when determining the matters.

---

<sup>145</sup>Supra note 49.

<sup>146</sup> Jonathan Todres, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1998) 30 Columbia Human Rights Law Review 159, 161.

<sup>147</sup> This applies to children who are capable of communicating their views. The relevant authorities are enjoined to take into account views of such children.



Hamilton argues that it is in the best interests of a child offender to be granted access to legal assistance when being questioned as a suspect as well as during trial.<sup>148</sup>

The CRC Committee has expressed its opinion on the juvenile justice system in General Comment No. 10 (Children's Rights in Juvenile Justice)<sup>149</sup>. The Committee explains that protection of the best interests of the child connotes that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. In General Comment 10 the CRC Committee sets out a number of justifications for upholding the 'best interests' principle. According to the CRC Committee children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. The CRC Committee opines that these and other differences form the backdrop for a separate juvenile justice system and require a different treatment for children.

### 2.3. Right to Legal Representation in International Law

The right to legal representation entails a proviso that the accused person is entitled to a legal practitioner of his or her own choice. Halsbury's Laws of England however notes that an accused person's right to a lawyer of his own choice is not absolute.<sup>150</sup> This is because a lawyer may be excluded from acting for the accused person for a number of reasons such as failure to comply with professional ethics. There exists the general rule that an accused's choice of lawyer should be respected.<sup>151</sup> This however entails a number of restrictions such as the maximum number of lawyers permitted to represent the accused at any given time.

---

<sup>148</sup> Carolyn Hamilton 'Guidance for Legislative Reform on Juvenile Justice' (2011) UNICEF 45 <[http://www.unicef.org/policyanalysis/files/Juvenile\\_justice\\_16052011\\_final.pdf](http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf)> accessed 23 May 2014, p.45.

<sup>149</sup> Available at: <[http://www2.ohchr.org/english/bodies/crc/docs/GC10\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc)> accessed 29 May 2014.

<sup>150</sup> *Halsbury's Laws of England*, vol 8(2) (Butterworths 1996) 155.

<sup>151</sup> *ibid.*



Moreover, where legal representation is provided on legal aid, Halsbury's Laws of England notes that the accused person does not have the right to be involved in the appointment and functioning of the lawyer acting for him.<sup>152</sup>

Legal representation does not extinguish a person's right to participate in the proceedings. While canvassing a child's right to effective participation in legal proceedings facing him or her, the UN Committee on the Rights of the Child notes that in the interests of fair trial the child offender should be able to effectively participate in the proceedings.<sup>153</sup> The accused person needs to understand the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.<sup>154</sup> Regarding the trial of child offenders Article 14 of the Beijing Rules underscores that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely.

The ICCPR expressly enunciates the right to legal representation in procedural and substantive terms. The Convention provides:<sup>155</sup>

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal

---

<sup>152</sup> Halsbury's (n 153) 156.

<sup>153</sup> UN Committee on the Rights of the Child, 'General Comment No. 10 (Children's Rights in Juvenile Justice)' (2007) CRC/C/GC/10 <[http://www2.ohchr.org/english/bodies/crc/docs/GC10\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc)> accessed 29 May 2014.

<sup>154</sup> *ibid.*

<sup>155</sup> Article 14 (3)

proceedings, and establishing alternative sentences for “the best interests of the child” offenders.

#### **2.4. Conclusion**

The author having looked at the main international law instruments providing for the right to legal representation argues that the provisions of the Constitution and even the international instruments that drum support for legal representation are not couched in mandatory terms to allow accused persons to choose a legal counsel who would represent them even under a free legal aid programme. The author submits that legal representation at State expense should also afford accused persons the right to choose who to represent them.

AS much as States have recognized their legal obligations to protect and respect children’s rights through the ratifications of international human rights treaties, such as the CRC, ICCPR and UDHR the rights of children in criminal proceedings are not properly enforced in judicial systems.<sup>159</sup> Their rights have often been violated due to the limited legal protections offered in practice and implementation of the obligations in international law.

---

<sup>159</sup> Muy Seo Ngouv, *Challenges to the Implementation of the Right to Legal Representation for Children in Criminal Proceedings in Cambodia*, LLM thesis, Lund University 2016.

## CHAPTER THREE

### NATIONAL LEGAL FRAMEWORK FOR STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS

#### 3.1. Introduction

The juvenile justice system in Kenya reveals important aspects such as when a child becomes subject to the law. The term 'child' is defined and the law sets out when an individual is capable of committing a crime. Both the Constitution and the statutory regime in Kenya define the term child as a human being who has not attained the age of eighteen years.<sup>160</sup>

#### 3.2. Historical Development of the Right to Legal Representation in Kenya

The right to legal representation in Kenya has grown in leaps and bounds. This growth is however notable in the recognition of the right in the country's constitutional and statutory instruments. The challenge lies in the implementation of the right to legal representation. Here is a focus on the constitutional development and the statutory development of the right to legal representation in Kenya.

Chapter 2 of the 1963 Constitution (repealed) enumerates provisions on the protection of fundamental rights and freedom of the individual. Kenya was in the bad books of history within the international community for the violation of human rights between 1986 and 1992.<sup>161</sup> After Kenya was made a one-party State by the 1982 constitutional amendment, many people were detained without trial following the pressure for restoration of political pluralism. The detainees were considered a threat to the ruling party's (KANU) hold on power. An amendment to the Constitution was enacted in 1992 in an attempt to

---

<sup>160</sup> See Constitution of Kenya, art 260; *Children Act* 2001, s 2.

<sup>161</sup> Kuria, (n.84), p.46.



address Kenya's poor human rights record.<sup>162</sup> Under the 1969 Constitution, legal representation was not entrenched as a right. Instead there were provisions that only tasked Parliament with legislating on modalities for providing legal assistance for indigent persons to enable them secure the services of an advocate. This was introduced by an amendment to the Constitution by Act No. 6 of 1992. Section 84(5) of the Constitution provided as follows:

Parliament shall make provision-

- (i) for the rendering of financial assistance to any indigent citizen of Kenya where his right under this Chapter has been infringed or with a view to enabling him engage the services of an advocate to prosecute his claim; and
- (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

We can also deduce that section 84 only contemplated provision of legal representation at State expenses for persons whose rights under the Constitution had been breached. Notably, the Constitution only contemplated the provision of financial assistance to the person rather than appointing an advocate who would be assigned to the person and whose services would be paid for by the State.

The 1969 Constitution did not contemplate provision of financial assistance to accused persons to enable them engage advocates in their trial before the courts. The closest the Constitution got in so far as safeguarding legal representation is concerned is by stating that every person charged with criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice.<sup>163</sup> The

---

<sup>162</sup> *ibid.* Kuria opines that the amendment was based on the assumption of denial of access to the High Court due to poverty and the perceived courts' inability to properly construe the Constitution and specifically section 77(2)d for recognition and enforcement of the right to legal representation.

<sup>163</sup> Constitution of Kenya 1969, s 2(d).



Constitution took a hasty retreat from the provision of State funded legal representation for persons charged with criminal offences. It stated in unequivocal terms that 'nothing contained in subsection (2)d shall be construed as entitling a person to legal representation at public expense'. It follows that accused persons were left to meet expenses of their trial and even subsequent appeals before superior courts.

For a detained person, section 83(2)(d) acknowledged that they would be provided 'reasonable facilities to consult a legal representative of his own choice'. The legal representative is allowed to make representations to the tribunal appointed for the review of the case of the detained person. At the hearing of his case by the tribunal appointed for the review of the detained person's case, he was permitted to appear in person or by a legal representative of his own choice. It is noteworthy that the Constitution defined a legal representative as person entitled to practise as an advocate in Kenya.<sup>164</sup>

In 1994, a number of stakeholders such as Law Society of Kenya, the Kenya Human Rights Commission and the International Commission of Jurists (Kenya Chapter) developed and published a 'Model Constitution'. Section 25(4) of the Model Constitution entrenched thus, 'Every person shall have the right to be assisted by counsel provided by the State if the accused does not represent himself personally or engage his own counsel in those civil and criminal matters as shall be prescribed by the Parliament.' The Model Constitution did not specify the instances in which legal representation at State expenses would be provided. It only provided a basis for developing an Act of Parliament that would give effect to the right to legal representation.

The 2004 Bomas Draft of Constitution adequately entrenched the right to legal representation. Under Article 74(1)g every accused person is guaranteed the right to fair trial which includes the right 'to choose, and be represented by, an advocate and to be informed of this right promptly'. Moreover, Article 74(1)h establishes the right to 'to have an advocate assigned to the accused person by the State and at State expense, if

---

<sup>164</sup> *ibid* s 86(1).

substantial injustice would otherwise result, and to be informed of this right promptly'. The foregoing provisions of the Bomas Draft Constitution were subsequently mirrored in the 2005 Wako Draft Constitution under Article 73(1)g and (h) respectively. In the 2010 Draft Constitution which was successfully adopted through a referendum the right to legal representation both at State expense and at individual expense was also entrenched under Article 50(2)g and (h).

Whereas the right to legal representation is made available to every accused person, there are legal instruments that specifically guarantee the same to child offenders.<sup>165</sup> Much of the effort to provide free legal representation to child offenders in Kenya has emanated from non-governmental organisations<sup>166</sup> and individual advocates.<sup>167</sup> Mbote and Akech note that State funded legal representation is provided for persons charged with murder in the High Court and for child offenders having no other recourse to legal assistance.<sup>168</sup> In the case of *Bernard Kimathi v Republic*<sup>169</sup> the applicant had been charged for the offence of stealing by servant before a subordinate court. His application was on grounds that he was denied legal representation during the trial before the subordinate court. Lesiit J observed that the court has a duty to ascertain from its records before commencement of a hearing that an accused person is present and represented by counsel. In the same vein, it was held that the trial magistrate had failed in his duty for failing to note that the accused had counsels and that their counsels were absent. Moreover, the trial magistrate had also failed in his duty to inform the accused of their right of continued legal

---

<sup>165</sup> CRC, art 40(3).

<sup>166</sup> In Kenya those involved are child-focused NGOs such as CRADLE and CLAN.

<sup>167</sup> Lorraine Anyango, 'Model Juvenile Court for Town', *Daily Nation* (Nairobi Kenya, 4 April 2006) 17 quotes Justice Martha Koome then of Nakuru High Court as follows: 'The Law Society of Kenya is encouraging many advocates to take up children's cases, and we have also introduced a legal aid scheme in which we will be able to reimburse out of pocket expenses to advocates who take up children's cases as well as pay a small stipend for every case concluded.'

<sup>168</sup> Patricia Kameri-Mbote and Migai Akech, 'Kenya: Justice Sector and the Rule of Law' (OSIEA 2011) <<http://www.ielrc.org/content/a1104.pdf>> accessed 28 May 2014.

<sup>169</sup> (Cr MiscAppl No. 40 of 2013) [2013] eKLR.

representation. It is notable that magistrates and judges handling a case have a duty to inform the accused person(s) of their right to be represented by a legal counsel.

In the same vein, it was noted in the case of *Delphis Bank Ltd v Chatte & 6 others*<sup>170</sup> that the right to legal representation of one's choice may be curtailed. The Court further noted the accused person's right to legal counsel of their own choice may be weighed against the principle of confidentiality in advocate/ client fiduciary relationship or where the advocate may also be a witness. This is in tandem with the requirement of Rule 9 of Kenya's Advocates (Practice) Rules which provides as follows:

"No advocate may appear as such before any court or Tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."

### 3.3. Rationale for the Right to Legal Representation of Child Offenders

Hamilton argues that legal assistance to child offenders ensures independent scrutiny of the methods of interrogation of the child by either the police or prosecutors.<sup>171</sup> Moreover, she posits that legal assistance will ensure that the evidence obtained from the child is voluntary and not coerced. Legal representation also shields the child offender from inappropriate questions and treatment that is inappropriate to the child's age and maturity.<sup>172</sup> The CRC roots for diversion of the juvenile justice system from the formal justice system. Legal representation of the child offender allows the legal counsel to push for diversionary measures.<sup>173</sup>

---

<sup>170</sup> [2005] 1 KLR 766.

<sup>171</sup> Hamilton, (n. 172), p.47.

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*



The complicated nature of proceedings is also one of the rationales for legal representation. Children are unable to understand the nature of legal proceedings and this can be addressed by giving them access to legal representation. In connection to complexity of legal proceedings the European Court of Human Rights on one occasion held that a woman's right to fair hearing was contravened because she did not have the benefit of legal representation and that the court procedure was too complicated for a lay person. Ventrell describes the adversarial court process as being 'dependent on competing individual advocacy for information'.<sup>174</sup> He argues that the outcome of such processes may be undesirable for litigants without competent individual advocates.<sup>175</sup> Such is the case when child offenders go unrepresented in the trial process.

In the landmark case of *David Njoroge Macharia v Republic*<sup>176</sup> the Court of Appeal of Kenya emphasised the significant role played by counsel in the trial process. It was recognised that legal representation is necessary due to a counsel's knowledge of the applicable laws and rules of procedure in matters before the court. The court also acknowledged that the counsel's ability to relate applicable laws and rules of procedure to the facts as well as the ability to sieve relevant, admissible, and sometimes complex evidence from what is irrelevant and inadmissible makes it necessary for representation by counsel. In a nutshell, the position of the court illustrates the important place of the advocate in the trial process. The court has set out the complexities involved in judicial proceedings which require some level of expertise to navigate through successfully. The decision of the Court of Appeal in the instant case paints a scenario of the possible outcomes when an accused person is not afforded legal representation.

#### 3.4. The Constitution of Kenya

The Constitution of Kenya asserts at Article 27(1) that 'every person is equal before the law and has the right to equal protection and equal benefit of the law'. The Constitution

---

<sup>174</sup> Ventrell (n 111) 169.

<sup>175</sup> *ibid.*

<sup>176</sup> [2011] eKLR.



at Article 50(2)(g) also acknowledges the right of an accused person to 'choose and be represented by an advocate'.

It has been noted that legal representation is entailed under the right to fair trial. The Constitution of Kenya ensconces that the right to fair trial cannot be limited. It follows that under no circumstances should any of the constituent rights to fair trial be limited. Although legal representation has been acknowledged as a right under the umbrella of the right to fair trial, it remains an unfulfilled promise for many accused persons and of great concern are the child offenders who also go unrepresented. Regrettably there is no established jurisprudence in Kenya on the mandatory provision of legal representation especially to child offenders.

### **3.5. Statutory Framework for Legal Representation of Child Offenders**

#### **3.5.1. The Children Act**

Section 77 of the Children's Act mandates the Children's Courts to make an order for granting legal representation for child offenders who are unrepresented. In such circumstances the costs of legal representation offered to the child is borne by the State.

Section 186 of the Act enumerates the 'guarantees to a child accused of an offence'. Among them is the guarantee to be provided legal assistance by the Government in the preparation and presentation of his defence where the child is unable to obtain legal assistance.<sup>177</sup> We can glean two separate prongs to the guarantee in the foregoing provision. First, the child offender has the right to legal representation at his own expenses. Secondly, the child offender has the right to be afforded legal representation at the expense of the State where he is unable to obtain legal assistance.

Despite the clear legal provisions of the Children Act on requirements for legal representation of child offenders trial courts often proceed to hear and determine such

---

<sup>177</sup> *Children's Act* s 186(b).

cases against unrepresented child offenders. In the case of *E G M v Republic*<sup>178</sup> the High Court quashed the conviction of a child who had been charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. The trial court's conviction was quashed by the High Court on grounds *inter alia* that the appellant was not accorded legal representation as required under section 77(1) of the Children Act. In that case the court proceeded to hold that no explanation had been advanced as to why the appellant (a minor aged 13 years) had not been accorded legal representation. It held further that it, in light of article 50(2)(h) of the Constitution, it was necessary for the trial court to direct that the appellant be accorded legal representation at State expense if the appellant's parents/guardian were unable to do so.<sup>179</sup>

Similarly, in the case of *S O M v Republic*<sup>180</sup> the High Court quashed the trial court's conviction of a child offender on grounds *inter alia* that the child was not provided legal representation as required under section 77 and 186 of the Children Act. In that case the High Court held that the Appellant's rights under section 77 and 186 (b) of the Children's Act were violated since he was not provided legal representation.<sup>181</sup> The court noted that legal representation could have greatly helped the Appellant in the manner in which he responded to the charges laid against him.<sup>182</sup>

Furthermore, in the case of *K M M v Republic*<sup>183</sup> it was held that proceedings and convictions against unrepresented child offenders are illegal and defective.<sup>184</sup>

### 3.5.2. The Legal Aid Act

The Legal Aid Act No. 6 of 2016 came into effect on 10<sup>th</sup> May, 2016. Section 2 of the Act envisages the scope of legal aid to include legal representation. The Act establishes the

---

<sup>178</sup> [2017] eKLR.

<sup>179</sup> *Ibid*, p.4.

<sup>180</sup> [2017] eKLR

<sup>181</sup> *Ibid*, p.5.

<sup>182</sup> *Ibid*.

<sup>183</sup> [2015] eKLR.

<sup>184</sup> *Ibid*, pp. 4,5.

National Legal Aid Service under section 5 and clothes it with the capacities of a body corporate. The functions of the National Legal Aid Service include *inter alia* to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable as well as to develop and issue guidelines and standards for the establishment of legal aid schemes by Non-Governmental Agencies.<sup>185</sup> Management of the National Legal Aid Service vests in an independent Board, the National Legal Aid Service Board, established under section 9 of the Act. It is expected that the National Legal Aid Service will establish branches across the counties in Kenya to ensure reasonable access to its services.<sup>186</sup>

The Act recognises the pivotal role of legal aid providers. In that regard the Board of the National Legal Aid Service has been tasked with accrediting and entering into cooperation agreements with legal aid providers.<sup>187</sup>

The Act identifies children among the classes of persons who are eligible to receive legal aid services.<sup>188</sup>

Section 29(1) of the Act establishes the Legal Aid Fund which vests in and is managed by the National Legal Aid Service. Section 29(2) identifies the various sources of the Legal Aid Fund. The Fund is applied towards the following:

- (i) defraying the expenses incurred in the representation of persons granted legal aid in accordance with the Act
- (ii) payment of remuneration of legal aid providers for services provided in accordance with the Act;
- (iii) meeting the expenses incurred by legal aid providers in providing services under the Act; and

---

<sup>185</sup> Legal Aid Act, No. 6 of 2016, s.7.

<sup>186</sup> Ibid, s.6.

<sup>187</sup> Ibid, s. 10(e). See also Part VIII of the Act.

<sup>188</sup> Ibid, s.36(1)(b).



- (iv) meeting the expenses of the operations of the National Legal Aid Service as approved by the Board.<sup>189</sup>

It is noteworthy that implementation of the right to State-funded legal representation will largely depend on availability of financial resources.<sup>190</sup>

For children in lawful custody the officer-in-charge of a remand home for children is obligated to inform the child, in the language the child understands, that legal aid is available on admission to custody and whether the child desires to seek legal aid.<sup>191</sup> Every response to the question on whether a child desires legal aid must be recorded in a register to be maintained by the officer-in-charge.<sup>192</sup> The officer-in-charge must also ensure that every person seeking legal aid applies in the prescribed form; the officer must also notify the National Legal Aid Service within twenty four hours of making of an application for legal aid.<sup>193</sup> Notably, it is a criminal offence to obstruct a person held in lawful custody from applying for legal aid.<sup>194</sup>

Although the Legal Aid Act provides for prompt procedures for applying for legal aid and notification of such application upon the National Legal Aid Service an eligible applicant is still subjected to further scrutiny by the National Legal Aid Service particularly on the person's financial resources.<sup>195</sup> Section 36(4) of the Act also enumerates additional stringent qualifying criteria for applicants before being granted legal aid. The qualifying criteria include *inter alia* justifiability of costs of proceedings, availability of resources, appropriateness of offering the legal aid having regard to present and future demands, probability of success in the claim for which legal aid is sought, likelihood of loss of rights by person seeking legal aid, the nature, seriousness and importance of the proceedings. The upshot is that an eligible applicant is not

---

<sup>189</sup> Ibid, s.30.

<sup>190</sup> Ibid, s.36(4)(a) and (b).

<sup>191</sup> Ibid, s. 42(1)(a).

<sup>192</sup> Ibid, s. 42(1)(b).

<sup>193</sup> Ibid, s. 42(1)(c).

<sup>194</sup> Ibid, s. 42(2).

<sup>195</sup> Ibid, s. 36(3).

guaranteed access to legal aid due to the stringent qualification criteria under the Act. Moreover, it may take a long duration of time for applications for legal aid to be processed and granted due to the expected large number of applicants. These restrictive qualifying criteria may impede children's access to legal aid despite being eligible. Furthermore, the Act fails to clarify the level of autonomy of the Board of the National Legal Aid Service in relation to parents and guardians of children in conflict with the law.

The Act also defines the role of the court in enforcing the right to legal representation. For instance, under section 43(1) of the Act a court before which an unrepresented accused person appears is obligated to inform the accused of his right to legal representation; promptly inform the accused of the right to have an advocate assigned to him/her if substantial injustice is likely to occur;<sup>196</sup> and inform the National Legal Aid Service to provide legal aid to the accused. As regards proceedings involving children, the court is mandated to order the National Legal Aid Service to provide legal representation for the child where the child is unrepresented.<sup>197</sup>

The Legal Aid Act is not self-sufficient as it still envisages enactment of regulations for the "better carrying into effect the provisions of th[e] Act".<sup>198</sup> The regulations have not been enacted yet they are expected to define critical aspects of the Act *inter alia* the criteria for legal aid and the way applications for and grant of legal aid to a child are to be dealt with.<sup>199</sup>

---

<sup>196</sup> See section 43(1A). A court determines that substantial injustice is likely to occur by considering the severity of the charge and sentence, complexity of the case and the capacity of the accused to defend himself/herself.

<sup>197</sup> *Ibid*, s. 43(3).

<sup>198</sup> *Ibid*, s. 86(1).

<sup>199</sup> *Ibid*, s. 86(2).

## CHAPTER FOUR

### COMPARATIVE ANALYSIS OF STATE-FUNDED LEGAL REPRESENTATION OF CHILD OFFENDERS

#### 4.1. Right to Legal Representation for Children: Case Study of South Africa

The analysis of the justice system in the Republic of South Africa, particularly in relation to legal representation of minors, is informed by the fact that South Africa's legal system, much like Kenya's, is still developing. However, the juvenile system of South Africa has made advancements at a faster rate than Kenya and it would be appropriate for Kenya to take lessons from a jurisdiction with which it shares a lot in common but which has made wider strides than Kenya has.

Most countries that derive their legal system from the English model, such as South Africa, use the adversarial legal system, a model which relies on contest between parties to a case represented by legal practitioners arguing their parties' positions before an impartial party, that is, magistrate or judge. The adversarial system has for a long time been unfriendly to children. The formal nature of the proceedings in court is very intimidating and confusing to a child offender. This system thus silences children in court consequently denying them their fundamental right to be heard.<sup>200</sup> Due to the adversarial nature of the system, and the fact that the right of children to have their own separate representative is a fairly new concept in South African courts,<sup>201</sup> experience of representing children in civil matters in South Africa reveals that it is a field of legal practice characterised by challenges and dilemmas that professionals often do not anticipate.<sup>202</sup>

---

<sup>200</sup>Blessing Mushonwe 'Child Offenders have rights' [http://www.unicef.org/zimbabwe/media\\_16104.html](http://www.unicef.org/zimbabwe/media_16104.html) accessed 17 January 2016.

<sup>201</sup> Mariska Blom, 'A Child's Right to Legal Representation in Divorce Matters' (LL.M thesis, North-West University 2011) 1.

<sup>202</sup> 'Draft Guidelines for Legal Representatives of Children in Civil Matters' <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0a>



The obligations of a legal representative have not been expressly set forth in any of the statutes in Kenya. It is however worth noting that South Africa's Child Justice Act No. 75 of 2008 has entrenched a number of requirements that legal representatives of children must comply with. Under section 80 of the Child Justice Act the legal representative must: allow the child, as far as is reasonably possible, to give independent instructions concerning the case; explain the child's rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child; promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility; ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance; and uphold the highest standards of ethical behaviour and professional conduct.

Legal representation of child offenders is not limited to proceedings before the court. It is also guaranteed during preliminary inquiries.<sup>203</sup> In South Africa, unrepresented child offenders are shielded from taking pleas until they are granted reasonable opportunity to obtain a legal representative or a legal representative has been appointed.<sup>204</sup>

The quality of legal representation is also a concern in some jurisdictions. In South Africa's Child Justice Act a court can order remedial actions or sanctions if a legal representative contravenes his obligations set out under section 80(1) of the Act. The order by the court must be sent to the relevant law society; the relevant controlling body to which the representative, if an advocate, is a member; or the Legal Aid Board, if the representative was employed by the Board.

---

[http://www.probono.org.za/FManuals/One-Child/Guides/Guidelines-for-legal-representation-of-children-2015.docx&usg=AFQjCNHWR9HT2\\_rLY06Pb6UGGLT-0yAZNA&sig2=8zNIbi2rstgOdPDBNzlZ8w&bvm=bv.112766941,bs.2,d.bGQ](http://www.probono.org.za/FManuals/One-Child/Guides/Guidelines-for-legal-representation-of-children-2015.docx&usg=AFQjCNHWR9HT2_rLY06Pb6UGGLT-0yAZNA&sig2=8zNIbi2rstgOdPDBNzlZ8w&bvm=bv.112766941,bs.2,d.bGQ) accessed 21 January 2016.

<sup>203</sup> See *Child Justice Act* (South Africa) s 81.

<sup>204</sup> *ibid*, s 82(2).

#### 4.1.1. The Constitutional Underpinning

In South Africa every detainee or sentenced prisoner has the right to 'choose, and to consult with, a legal practitioner, and to be informed of this right promptly'.<sup>205</sup> The Republic of South Africa attempts a mix of the 'substantial injustice' and the 'best interest of the child' approach in assessing legal representation of child offenders at State-expense. Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996 provides that, 'Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.' Sub-section 2 emphasises that a child's best interests are of paramount importance in every matter concerning the child. From the foregoing, it would appear that the constitution leaves out those children in criminal proceedings. This apparent void has, however, been filled by the Legal Aid Act, 1969 which mandates the Legal Aid Board to render legal assistance to a minor at State expense.<sup>206</sup>

The expectation of the legal representative in section 28(1)(h) has been interpreted by the court in *Soller NO v G and Another*<sup>207</sup> as being the ability to take the side of the child and act as his or her agent or ambassador, and in *R v H and Another*<sup>208</sup> as ability to ensure that the child's best interests are safeguarded and that the child's views are articulated. Barrat summarises the skills and expertise of the legal representative as ability to-

Communicate effectively with a child, providing him/her with the information he/she needs to make an informed choice, and assisting him/her to reach a decision; understand and interpret what the child is saying, contextualising this within a knowledge both of child development and the child's social environment, including factors pertaining to the child's cultural and economic background; develop a relationship of trust with the child-

---

<sup>205</sup> Constitution of the Republic of South Africa 1996, art 35(2)(b).

<sup>206</sup> *Legal Aid Act* s 3.

<sup>207</sup> 2003 (5) SA 430 (W).

<sup>208</sup> 2005 (6) SA 535 (C) 539.

client, which may require time, skill and patience; and be able to liaise with other professionals involved with the child such as psychologists, social workers and teachers.<sup>209</sup>

In interpreting Section 28(1)(h), the courts have endeavoured to achieve both the substantial injustice test and the best interest of the child test as was evident in *Rosen v Habenga*<sup>210</sup> where the court held that the appointment of a separate legal representative would be in the best interest of the child since there was an apparent need to articulate the views of the minor in the proceedings in the interest of justice, and that separate legal representation might be in the best interest of the minor.

#### 4.1.2. Legislative Foundation

South Africa's Children's Act No. 38 of 2005 has laboured to give the scope of the 'best interests' standard. Section 7 of the Act is instructive. A number of factors are outlined for consideration in determining the application of the 'best interests' standard. Also instrumental in emphasising the State's obligation is Section 10 which provides that, 'Every Child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. Section 14 proceeds to confirm that, 'Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.' The Act affirms the role of the LAB by providing at section 55 that a children's court must refer a matter to the LAB where the court is of the opinion that it would be in the best interests of the child to have legal representation.

Most importantly, the Act acknowledges the fact that children are most affected in divorce matters. Section 29(6) broadens access to legal representation for children by

---

<sup>209</sup> Amanda Barratt, 'The Child's Right to Be Heard in Custody and Access Determinations' (2002) *Journal of Contemporary Roman-Dutch Law* 556, 57.

<sup>210</sup> 2006 (4) SA 1999 (C).



empowering the court to appoint a legal practitioner to represent the child in court during care, contact and guardianship proceedings and to order the parties or the state to pay the costs for such representation. This provision ensures that the interests of children in divorce proceedings are not only represented, but by a neutral legal professional who is not under the influence of the acrimonious parties. This right under Section 29(6) was first emphasised in *Ex Parte Van Niekerk*,<sup>211</sup> where the court recognised the children's rights to have separate legal representation and for the first-time children were joined as parties in the parents' case. This Act has been described as 'an extensive articulation of the ideal of the protection of children from all forms of neglect, abuse, maltreatment and degradation, as well as an elaborate blueprint for the revision of family relationship'<sup>212</sup> with its main focus being to give effect to the children's rights in relation to certain areas of family law, including care, protection from abuse and neglect, as well as to legal representation in all children court matters affecting the child.<sup>213</sup>

Specific to criminal proceedings is the Child Justice Act, 2008 which establishes a criminal justice system for children who are in conflict with the law and are accused of committing offences. It creates a unique and separate criminal justice system for children different from the pre-2010 era where children who committed crimes were dealt with under the Criminal procedure Act of 1977 which also deals with adults.<sup>214</sup> The Act creates a Child Justice Process which is followed when children between 10 - 18 years are suspected to have committed a crime.<sup>215</sup> Chapter 11 of the Act provides for legal representation for

---

<sup>211</sup> *Ex Parte van Niekerk and Another: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

<sup>212</sup> Julia Sloth-Nielsen, 'Trials and Tribulations, Trends and Triumphs: The State of the Nation's Child and Family Law and their Institutions for the Administration of Justice' in Julia Sloth-Nielsen and Zenobia Du Toit (eds), *Trials & Tribulations, Trends & Triumphs Developments in International, African and South African Child and Family Law* (Juta Cape Town 2008) 12.

<sup>213</sup> Lizette Berry, 'Protecting South Africa's Children: What Difference Will the New Children's Bill Make?' (2007 Continuing Medical Education : Your South Africa Journal of Continuing Professional Development : Community Paediatrics 168, 169.

<sup>214</sup> 'Child Justice' <<http://www.justice.gov.za/vg/childjustice.html#sthash.Yo2448dO.dpuf>> accessed 17 January 2016.

<sup>215</sup> *ibid.*

children in conflict with the law at any stage of proceeding at state expense. This right is jealously guarded even the child himself/herself and may not waive it.<sup>216</sup> Only in exceptional circumstances can the child waive this right, and even then, the state may appoint a legal representative to assist the child with technical expertise such as cross-examining witnesses, addressing the court on the merits of the case and ensuring procedural fairness.<sup>217</sup>

#### 4.1.3. International Obligations

In addition to the above municipal laws of the Republic of South Africa, international obligations under various instruments also bind South Africa in this regard. Article 12 of the Convention on the Rights of the Child espouses the general principle that children have a right to have their voices heard, with the assistance of effective legal counsel, in all judicial or administrative hearings affecting them. Article 37 of the convention provides for access to legal and other assistance, while Article 40 provides for the recognition of the rights of children alleged or who have committed offences, the child's right to due process of law, legal assistance in preparing and presenting their defence. The above principles are reinforced by Article 4(2) of the African Charter on the Rights and Welfare of the Child which provides that-

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Directly echoing the convention above is Article 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child which obligates State Parties to ensure that every child

---

<sup>216</sup> *Child Justice Act* s 83.

<sup>217</sup> Peter Kratcoski, *Juvenile Justice Administration* (CRC Press 2012) 395.

accused of infringing the penal law is afforded legal and other appropriate assistance in the preparation and presentation of his defence.

#### 4.1.4. Role of the Legal Aid Board in Legal Representation of Children

The Legal Aid Board (LAB) has become the main role-player in providing legal representation to children in South Africa, both in civil cases and criminal cases.<sup>218</sup> While this assistance is limited to where substantial injustice would otherwise occur, this Board enjoys immense autonomy when deciding what is best for the child *vis-a-vis* the wishes of the child. This was emphasised in *Legal Aid Board v Republic & Another*<sup>219</sup> where the court held that, 'Whilst in many circumstances it will be desirable for the LAB to consult with the child's guardian, or both the child's parents, before granting legal assistance I can find no provision of law that requires it to do so.' Considering that parental consent and court orders are sometimes major impediments to representation of minors, this autonomy enables the LAB to afford legal presentation to a minor without being unnecessarily weighed down by having to obtain parental consent and court orders provided the board's requirements of substantial injustice and best interests of the child have been met.

While the law does not elaborate on circumstances when 'substantial injustice' would be deemed to be likely to occur the LAB defines 'substantial injustice' as instances when a child's 'constitutional or personal rights are affected'.<sup>220</sup> Suffice to note that the near-supremacy of the LAB in legal representation of children is reinforced by the fact that the current position of the courts is to refer all cases dealing with children to the Legal Aid

---

<sup>218</sup> Sloth-Nielsen, (n.108), pp.495, 496.

<sup>219</sup> 2009 (2) SA 262 (D); See also *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011) and *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012).

<sup>220</sup> Legal Aid South Africa, *Legal Aid Guide 2014* (13<sup>th</sup> edn, Juta 2014) Para 4.18.1.



Board to decide whether it will be in their best interest to appoint a legal representative.<sup>221</sup> Specifically, the LAB uses the following criteria to determine substantial injustice:

- i) The seriousness of the issue for the child, for example, if the child's constitutional rights or personal rights are at risk.
- ii) The complexity of the relevant law and procedure.
- iii) The ability of the child to represent himself or herself effectively without a lawyer.
- iv) The financial situation of the child or the child's parents or guardians.
- v) The child's chances of success in the case.
- vi) Whether the child has a substantial disadvantage compared with the other party in the case.<sup>222</sup>

The LAB has created an innovative system for rendering legal aid. The LAB has Justice Centres run by professional attorneys and paralegals as well as university law clinics; each centre serves a number of court stations.<sup>223</sup> Located within justice centres are Children's Units through which the LAB rolls out services to children.<sup>224</sup> Through these units, the LAB is able to reach children not only in courts, but also by monitoring prison visits and conducting school and community outreach programmes.

An important observation that Kenya could perhaps take into account is the fact the Constitution of South Africa guarantees the right whether the child is a party to the proceedings or is otherwise directly involved.<sup>225</sup> This ensures that all children in

---

<sup>221</sup> Mariska Blom, 'A Child's Right to Legal Representation in Divorce Matters' (LL.M thesis, North-West University 2011) 24.

<sup>222</sup> Legal Aid South Africa, *Legal Aid Guide 2014* (13<sup>th</sup> edn, Juta 2014), p.65.

<sup>223</sup> Julia Sloth-Nielsen, 'Realising Children's Rights to Legal Representation and to Be Heard in Judicial Proceedings: An Update' (2008) 24 *South African Journal on Human Rights* 495, 510.

<sup>224</sup> *Ibid.*

<sup>225</sup> Constitution of the Republic of South Africa 1996, s 28(1)(h).

proceedings are clothed with this protection provided they are affected notwithstanding that they may not themselves be directly before the court.<sup>226</sup>

#### 4.2. Case Study: Australia

Australia has one of the best models in child representation in the world. It is a signatory to the Convention on the Rights of the Child and its Additional Protocols.<sup>227</sup> As much as it has not yet domesticated the Convention, its ratification has given rise to a legitimate expectation such that its provisions cannot be ignored by stakeholders or decision makers.<sup>228</sup> The High Court in Australia has held that where legislation permits discretion, that discretion should be exercised in conformity with Australia's international treaty obligations.<sup>229</sup> The government has maintained that the provisions of the Convention are fully implemented in the wide range of Federal, State and Territory laws, programs and policies affecting children.<sup>230</sup>

In light of international law now recognizing that children can and do have the capacity to participate in legal processes to enforce their rights,<sup>231</sup> the Australian government has in place the Australian Human Rights Commission. This Commission does not only provide public awareness on children's rights but is also tasked with key juvenile justice

---

<sup>226</sup> See Julia Sloth-Nielson and Benyam Mezmur, 'Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) *International Journal of Children's Rights* 1.

<sup>227</sup> G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49), at 167, U.N. Doc A/44/49 (1989). 28 Int'l Legal Materials 1456 (1989). Available from the United Nations Office of the High Commissioner for Human Rights website at: <http://www.ohchr.org/english/law/crc.htm> (last visited July 23, 2007).

<sup>228</sup> *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353, [1995] HCA 20, (1995) 69 ALJR 423, (1995) 183 CLR 273

<sup>229</sup> *ibid*

<sup>230</sup> Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996, 2-3.

<sup>231</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS art 12 (entered into force 2 September 1990) which states: '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law



issues with regard to the Convention on the Rights of the Child. These include best interest of the child, sentencing juvenile offenders and ensuring best practice principles on the diversion of juvenile offenders.<sup>232</sup>

Australian law is very clear on the role a child and his representative(s) play in criminal, civil and family law proceedings.<sup>233</sup> This ensures that the child is afforded the best legal representation in all matters. An independent children's lawyer (ICL) is appointed by the

---

<sup>232</sup> In their joint 1997 report, *Seen and Heard*, the Commission and the Australian Law Reform Commission recommended that national standards for juvenile justice should incorporate best practice guidelines for conferencing. Matters for consideration should include: the desirability of diversionary options being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer; the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence; the need to ensure that young people do not acquire a criminal record as a result of participating in conferencing; the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person; the child's access to legal advice prior to agreeing to participate in a conference; whether it is preferable for schemes to have Attorney-General's Dept *Australia's Report under the Convention on the Rights of the Child* Attorney-General's Dept Canberra 1996, 2-3.

*Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS art 12 (entered into force 2 September 1990) which states: '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

In their joint 1997 report, *Seen And Heard*, the Commission and the Australian Law Reform Commission recommended that national standards for juvenile justice should incorporate best practice guidelines for conferencing. Matters for consideration should include: the desirability of diversionary options being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer; the need to monitor penalties agreed to in conferences to ensure that a legislative basis so that the process is more accountable and less ad hoc and the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.

*Youth Justice Act 2005* (NT) ss 4(d), 62; *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a); *Juvenile Justice Act 1992* (Qld) s 79 (also see: sch 1 'Charter of Juvenile Justice Principles'); *Young Offenders Act 1993* (SA) s 30(2)(b); *Youth Justice Act 1997* (Tas) ss 4(d), 5(b), 29(a)(ii); *Children, Youth and Families Act 2005* (Vic) ss 10(2), 524, 525; *Young Offenders Act 1994* (WA) ss 6(c), 7(c), 44(2)(b). *The Children and Young People Act 1999* (ACT) ss 23 and 24 indicate that children can be represented on a best interests basis in this jurisdiction.

<sup>233</sup> *ibid*



Court, on the application of a child or by an organisation concerned with the welfare of children or any other person, to represent and promote the best interests of a child in the legal proceedings.<sup>234</sup> The main roles of an ICL include: arranging for necessary evidence, including expert evidence, to be obtained and put before the court; facilitating the participation of the child in the proceedings in a manner which reflects the age and maturity of the child and the nature of the case and acting as an honest broker between the child and the parents and facilitating settlement negotiations where appropriate. The appointment of an ICL is one means of giving effect to the United Nations Convention on the Rights of the Child.<sup>235</sup>

The New National Policy for Legal Aid in Australia promotes a completely new direction for the Commonwealth's role in the provision of legal aid. This came after assessment of two other previous policies and lessons learnt from them. The new policy aims to effect to the commitment that all citizens can be assured of protection under the law, of access to justice and the guarantee that legal rights, privileges and protections apply to all.

Law Societies such as the Law Society of South Wales have come up with comprehensive principles to guide practitioners in legal representation of children.<sup>236</sup> This guideline is compiled after consultations with various stakeholders such as Non-Governmental

---

<sup>234</sup> Section 68L of the *Family Law Act 1975*

<sup>235</sup> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Article 3.1)CRC

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." (Article 12.1)

"For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body consistent with the procedural rules of national law." (Article 12.2)

<sup>236</sup> The Law Society of New South Wales, 'Representation Principles for Children's Lawyers' (2014) 4th Edition

Organizations and Child Welfare Societies. In light of the above legislative, institutional and operational support, this jurisdiction offers the best model for legal representation of children.

### 4.3. Conclusion

The Children Act 2001 provides for the protection of children in conflict with the law within the criminal justice system. Its effectiveness, however, is hampered by the inadequate implementation of some of its provisions due to lack of procedural and institutional framework on which the effective operation of the Act depends. In order to ensure that children in conflict with the law access justice, it is essential to overhaul the national legal framework to bring it in line with international standards and also put into operation the recommendations as discussed in Chapter 5. This will also be in line with Kenya fulfilling her constitutional obligations as provided by Articles 2(6) and 21(4). South Africa and Australia, countries used in this chapter as case studies, have made great efforts in ensuring and guaranteeing the right to legal representation to children in conflict with the law. This is the direction which Kenya should take.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

The Constitution of Kenya is very clear on the right to access justice by all Kenyans. There is adequate legal backing for this from statutes and policy papers. There appears to be a strong commitment in ensuring access to justice and especially the right to legal representation for children. The Legal Aid Act has been tasked with the key role of ensuring that life is breathed into the provisions therein. As has been discussed above, the National Legal Aid Service Board is key to actualizing the right for the children of Kenya. The major challenge then becomes coming up with ways to actualize this right as has been provided for in law to ensure its full realization. The right of access to justice to be actualized, there has to be a framework based on certain principles.<sup>237</sup>

As pointed above legal and extra-legal measures are required to ensure compliance. These measures include three key areas namely legal and procedural reform, training and sensitization of professionals and the general public, budgeting for children's rights at the national and county government and reform within state institutions requiring innovation and dedication of different officials in the implementation process. These are discussed below as recommendations.

The UN Committee on Rights of the Child has emphasised in General Comment No. 10 that the quality of persons involved in the administration of juvenile justice is indispensable for a proper and effective implementation of the rights and guarantees of fair trial of child offenders.<sup>238</sup> Training would be necessary equip such persons with the requisite quality. Therefore, this thesis concurs with the UN Committee that police

---

<sup>237</sup>See Maiese, Michelle. "Principles of Justice and Fairness," *Beyond Intractability*, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003)

These principles include expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies.

<sup>238</sup> General Comment No. 10 (CRC/C/GC/10), para. 40.



officers, prosecutors, legal and other representatives of the child, magistrates, judges, probation officers, social workers and others in the juvenile justice system should be trained in a systematic and ongoing manner.

## 5.2 Recommendations

- a) Funding for this initiative is at the heart of its success. As such, the National Legal Aid Service Board must ensure that it secures multiple sources of funding to ensure that all the budget needs for provision of legal aid services are met.
- b) There is need to entrench restorative justice in the Children Act and put policies and incentives in place to encourage the use of restorative processes in court or within the community. This needs to also reflect in the legal aid policy in Kenya for child representation.
- c) There is also a need to provide information and training to all stakeholders in the sector. Advocates must be trained and sensitized as to their role in this initiative. The Law Society of Kenya's pro bono legal scheme must be expanded effectively to cover child litigants and accused persons.
- d) Organizations such as the Federation of Women Lawyers, Kenya and the Cradle Children's Foundation have attempted in the past to offer free legal aid to the indigent with a focus on children and women. The Legal Aid Act provides a framework for cooperation between the National Legal Aid Service and accredited legal aid providers for purposes of provision of legal aid services. The National Legal Aid Service should therefore establish the linkages through cooperation agreements with accredited legal aid providers to strengthen the State's capacity for provision of legal aid services.
- e) The role of university legal aid clinics and 'student lawyers' cannot be overlooked in actualizing the right to legal representation to children and juvenile offenders.

Kenya must look at law students as a valuable resource in addressing increasing legal needs in the country and especially those affecting children.

- f) The National Legal Aid Service Board must ensure that it has trained alternative dispute resolvers in its database. This will ensure legal representation of children in matters where alternative dispute resolution methods such as arbitration and mediation are used.
- g) The existing infrastructure in the form of the Department of Children Services should be utilised by the National Legal Aid Service as the Children Department is fully devolved to the court station level to ensure easy access to legal aid services for child offenders.
- h) Judges and magistrates should be vigilant in ensuring that child offenders appearing in their courts have access to legal representation at the time of plea-taking either from the *pro bono* schemes or other voluntary schemes before the service is fully rolled out.

## BIBLIOGRAPHY

### Books

Assiagio J and others, *Youth and Crime in Nairobi* (UN-HABITAT 2002).

Australian Government (Attorney General's Department), *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action* (September 2009) Access to Justice Taskforce Attorney-General's Department.

Cooper D, and Schindles P, *Business Research Methods* (8<sup>th</sup> edn, McGraw-Hill 2005).

Cover, Robert M., *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press 1975)

Dworkin, Ronald M., *Law's Empire* (Cambridge: Harvard University Press, 1986)

Dworkin, Ronald M., *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977)

Dyzenhaus, David, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991)

Freeman MDA, *Lloyd's Introduction to Jurisprudence* (8<sup>th</sup> edn, Dennis Lloyd ed, Sweet & Maxwell 2008).

Gans, Jeremy et al, *Criminal Process and Human Rights* (Federation Press, 2011) 494.

Goldstein J, Freud A and Solnit A, *Before the Best Interests of the Child* (Macmillan 1979).

*Halsbury's Laws of England*, vol 8(2) (Butterworths 1996).

Hart, H.L.A., 'The Concept of the Law' (New York: Oxford University Press 2 edn, 1994)

Kothari CR, *Research Methodology, Methods and Techniques* (2<sup>nd</sup> Revised edn, New Age International Publishers 2004).

Kratcoski P, *Juvenile Justice Administration* (CRC Press 2012).



Legal Aid South Africa, *Legal Aid Guide 2014* (13<sup>th</sup> edn, Juta 2014).

Myer JEB, *Child Protection in America: Past, Present, and Future* (Oxford University Press 2006).

Patton MQ, *Qualitative Evaluation and Research Methods* (2<sup>nd</sup> edn, Newbury Park 1990).

Rawls, John Rawls, *A Theory of Justice* (Revised Edn, Oxford: Oxford University Press, 1999).

The International Forum for Social Development, 'Social Justice in an Open World: The Role of the United Nations' ST/ESA/305, United Nations, New York, 2006.

#### **Book Chapters**

Kuria GK, 'The Right to Legal Aid in Kenya' in Wanjala S (ed), *Law and Access to Justice in East Africa* (Kituo Cha Sheria 2004).

Ventrell M, 'Legal Representation of Children in Dependency Court: Towards a Better Mode - The ABA (NACC) Revised) Standards of Practice' in National Association of Counsel for Children (ed), *NACC Children's Law Manual Series* (NACC 1999).

Sloth-Nielsen J, 'Trials and Tribulations, Trends and Triumphs: The State of the Nation's Child and Family Law and their Institutions for the Administration of Justice' in Sloth-Nielsen and Du Toit Z (eds), *Trials & Tribulations, Trends & Triumphs Developments in International, African and South African Child and Family Law* (Juta Cape Town 2008).

#### **Journal Articles**

Arkes, Hadley, 'Natural Law', (1992) *Constitution* 4(1) 13.

Barratt A, 'The Child's Right To Be Heard in Custody and Access Determinations' (2002) *Journal of Contemporary Roman-Dutch Law* 556.

Berry L, 'Protecting South Africa's Children: What Difference Will the New Children's Bill Make?' (2007) *Continuing Medical Education: Your South Africa Journal of Continuing Professional Development : Community Paediatrics* 168.

Coleman, Jules, 'Negative and Positive Positivism,' (1982) *11 J. Legal Stud.* 139.

Guggenheim M 'The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children' (1984) *59 New York University Law Review* 76.

Marmor, Andrei, 'Legal Positivism: Still Descriptive And Morally Neutral' (2006) *Oxf J Leg Stud* 26(4) 683.

Monahan G, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) *8 Queensland University of Technology Law & Justice Journal* 392.

Sarkin J, 'The Constitutional Court's Decision on Legal Representation' (1996) *12 South African Journal on Human Rights* 55.

Skelton A, 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice' (1996) *Acta Juridica* 180.

Sloth-Nielsen J, 'Realising Children's Rights to Legal Representation and to Be Heard In Judicial Proceedings: An Update' (2008) *24 South African Journal on Human Rights* 495.

Sloth-Nielson J and Mezmur B, 'Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) *International Journal of Children's Rights* 1.

Todres J, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1998) *30 Columbia Human Rights Law Review* 159.

Wallin, Alex E., 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods', (2012) *35(1) Campbell Law Review* 12.

Wasilczuk M, 'Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense' (2012) 45 *New York University Journal of International Law & Politics* 291.

Zaal N and Skelton A, 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts' (1998) 14 *South African Journal of Human Rights* 539.

### **Discussion Papers**

Ladan, MT 'Access To Justice As A Human Right Under the ECOWAS Community Law' A Paper Presented at The Commonwealth Regional Conference on the Theme: - The 21st Century Lawyer: Present Challenges And Future Skills, Abuja, Nigeria, 8 - 11 April, 2010.

Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', (2013) Discussion Paper, 1 January 2013.

### **Newspaper Articles**

Anyango L, 'Model Juvenile Court for Town', *Daily Nation* (Nairobi Kenya, 4 April 2006).

Bowry P, 'Mandatory Legal Representation a Necessity' *Standard Newspaper* (Nairobi, 08 May 2013).

Odunga D, 'Kenyans Set for Free Legal Services' *Daily Nation* (Nairobi, 20 January 2014).

### **Thesis**

Blom M, 'A Child's Right to Legal Representation in Divorce Matters' (LL.M thesis, North-West University 2011).

### **Electronic Sources**

'Child Justice'  
<<http://www.justice.gov.za/vg/childjustice.html#sthash.Yo2448dO.dpuf>> accessed 17 January 2016.



'Draft Guidelines for Legal Representatives of Children in Civil Matters'  
<[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjAt47Z\\_8fKAhUDwxQKHdLXCLMQFggsMAI&url=http%3A%2F%2Fwww.probono.org.za%2FManuals%2FOne-Child%2FGuides%2FGuidelines-for-legal-representation-of-children-2015.docx&usg=AFQjCNHWR9HT2\\_rLY06Pb6UGGLT-0yAZNA&sig2=8zNlbi2rstgOdPDBNzIZ8w&bvm=bv.112766941,bs.2,d.bGQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjAt47Z_8fKAhUDwxQKHdLXCLMQFggsMAI&url=http%3A%2F%2Fwww.probono.org.za%2FManuals%2FOne-Child%2FGuides%2FGuidelines-for-legal-representation-of-children-2015.docx&usg=AFQjCNHWR9HT2_rLY06Pb6UGGLT-0yAZNA&sig2=8zNlbi2rstgOdPDBNzIZ8w&bvm=bv.112766941,bs.2,d.bGQ)> accessed 21 January 2016.

'Four Types of Justice' available online at [http://changingminds.org/explanations/trust/four\\_justice.htm](http://changingminds.org/explanations/trust/four_justice.htm) accessed 1 May, 2017.

'Fundamental Rights' The Just World Project, Available online at <http://worldjusticeproject.org/factors/fundamentalrights> accessed on 5 May 2017.

'Legal Aid, A Right in Itself' OHCHR  
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E>> accessed 16 January 2014.

<[http://www2.ohchr.org/english/bodies/crc/docs/GC10\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc)> accessed 29 May 2014.

Amnesty International, 'Nigeria: Prisoners' Rights Systematically Flouted' (2008)  
<<https://www.amnesty.org/en/documents/afr44/001/2008/en/>> accessed 29 December 2015.