

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**“ACCESS TO CRIMINAL JUSTICE IN KENYA:” AN ASSESSMENT OF
LEGAL, POLICY AND INSTITUTIONAL FRAMEWORKS**

BY

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DECLARATION

I, ROSELYNE MAKOKHA ABURILI, do hereby declare that this research project is my original work and that, to my knowledge, it has not been submitted to any institution for degree purposes.

In witness whereof I have signed this Declaration on this 10th day of November, 2017

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This research project is submitted for examination with my approval as University of Nairobi supervisor

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ABSTRACT

The Constitution of Kenya, 2010 guarantees all persons equal protection of the law. It also demands that “justice must be done to all irrespective of status” and that all state organs must ensure access to justice for all persons and “where any fee is required, it must be reasonable and not impede access to justice.” In addition, the Constitution guarantees fair trial for all persons charged with criminal offences. These constitutional dictates oblige efficient delivery of “substantive justice without undue regard to procedural technicalities.” The courts and other state institutions in the criminal justice system, especially the police, prosecution, witness protection and correctional services have the primary responsibility to deliver this justice to the citizenry without discrimination. It is however acknowledged that the criminal justice system like all other formal justice systems is a complex network. It comprises autonomous but interdependent state agencies involving the police, prosecutors, courts, correctional services and non-state actors among others. This study examined the concept of access to criminal justice as an integral feature in the realization of the “rule of law” and equality of all persons before the law, as embodied not only in international and regional human rights instruments, but also in the Kenya Constitution, 2010. The research proposition is that, a country whose legal framework does not afford its citizens equal access to the criminal justice as measured by its Constitution and international and regional human rights instruments ratified by that country, in effect, occasions them an injustice. The need for an efficient and effective criminal justice system for the citizens and especially the poor, vulnerable and the marginalized is therefore evident in the discussion. The paper scans through the Kenyan Constitutional, legal, policy and institutional frameworks on access to criminal justice by identifying its inadequacies, challenges and prospects in securing access to criminal justice for the citizens. The study acknowledges wide-ranging legislation and on-going institutional reforms in the judiciary, the police, prisons, prosecution, witness protection and non-state actors responsible for the delivery of criminal justice. The contribution of the organized legal profession is also acknowledged and discussed. The objectives of the study were: to identify the factors inhibiting access to criminal justice and to propose ways of addressing these challenges. The study also sought to identify the successes within the system and to highlight the efforts made and being made in addressing the challenges identified. Finally, the results of the study were intended to inspire policy formulation, dialogue and public awareness of the significance of having an effective and efficient criminal justice system in the country.

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DEDICATION

I dedicate this project paper to my Mother Albina Juma Mamai Ekirapa whose love and passion for education steered me this far, and to my three children: Xarilah Muindi, Ivanah-Rita Leona and Havilah Kelsen Aburili.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
ACECA	Anti-Corruption and Economic Crimes Act
AU	African Union
AUC	African Union Commission
CAJ	Commission on Administrative Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLAN	Children Legal Aid Network
CLEAR	Christian Lawyers Education and Research
CIPEV	Commission of Inquiry on the Post-Election Violence
COVAW	Coalition on Violence against Women
CREAW	Centre for Rights Education and Awareness
CRC	Convention on the Rights of the Child
CRPWD	Convention on the Rights of Persons with Disabilities
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
FGM	Female Genital Mutilation
FIDA-K	Federation of Women Lawyers, Kenya
GBV	Gender-Based Violence
HIV	Human Immuno-deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IMF	International Monetary Fund

KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
MDGs	Millennium Development Goals
NALEAP	National Legal Aid (and Awareness) Programme
NLAS	National Legal Aid Service
NCGD	National Commission on Gender and Development
NGO	Non-Governmental Organization
NPSC	National Police Service Commission
OAG&DOJ	Office of the Attorney General and Department of Justice
ODPP	Office of Director of Public Prosecutions
PACHPR	Protocol to the African Charter on Human and Peoples
Rights	
PCSC	Public Complaints Standing Committee
POA	Police Oversight Authority
POCAMLA	Proceeds of Crime and Money Laundering Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Fund
UNHCR	United Nations High Commissioner for Refugees
WB	World Bank

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The Advocates Act (Chapter 16, Laws of Kenya)

The Ethics and Anti-corruption Commission Act (Chapter 65A Laws of Kenya)

The Children's Act, 2001 (No. 8 of 2001)

The Commission on Administrative Justice Act, 2011 (No. 23 of 2011)

The Cooperative Societies Act (No. 12 of 1997, as amended in 2004)

The Counter-Trafficking in Persons Act, 2010 (No. 8 of 2010)

The Criminal Procedure Code (Chapter 75, Laws of Kenya)

The Employment and Labour Relations Act, 2011

The Environmental Management and Coordination Act, 1999 (No. 8 of 1999)

The Environment and Land Court Act, 2011 (No. 19 of 2011)

The Industrial Court Act, 2011 (No. 20 of 2011)

The Judicature Act (Chapter 8, Laws of Kenya)

The Legal Aid Act, 2016 (No. 36 of 2016)

The Law Society of Kenya Act (Chapter 18, Laws of Kenya)

The Penal Code, Chapter 63 Laws of Kenya

The Persons with Disabilities Act, 2007 (No. 14 of 2003)

The National Crime Research Centre Act NO. 4 of 1997 (Chapter 62 Laws of Kenya)

The Proceeds of Crime and Money Laundering Act (Chapter 59B, Laws of Kenya)

The Public Procurement and Disposal Act, 2015

The Refugees Act, 2006 (No. 13 of 2006)

The Sexual Offences Act, 2006 (No. 3 of 2006)

The Small Claims Act, 2016 (No. 2 of 2016)

The Supreme Court Act, 2011 (No. 7 of 2011)

The Victim Protection Act, (No. 24 of 2014)

The Witness Protection Act, 2006 (Chapter 79, Laws of Kenya)

CHAPTER ONE

1.0 INTRODUCTION

1.1 BACKGROUND TO THE PROBLEM

This is an introductory chapter. It gives the historical background to the problem under investigation and the perspective to the criminal justice system in Kenya, the purpose, aims and values of a criminal justice system. Kenya's legal system can be traced from the "common law" in the United Kingdom. Originally, the English judges applied norms and rules peculiar to each community whenever they settled disputes. Such rules eventually became "common law" or "judge-made law." This is derived from the fact that the rules were determined by judges and not by any legislative body. This "common law" had two main divisions, criminal and civil.¹

Characteristically, criminal law is comprised of a body of rules listing the various criminal offences, identifying the ingredients thereof and specifying the potential penal consequences for transgressing the norm.² A major goal of criminal law is the prevention and control of crime which is considered a public wrong prescribed by statute, to which punishment is provided in the event of violation. Criminal law is therefore concerned with public wrongs, or wrongs against society generally, or matters which society deems serious that in the event of defiance, it is the society which must punish the offender.³

Conventionally, the state initiates criminal charges on behalf of a wronged individual or complainant through investigations, arrest, prosecution, detention, trial and imprisonment or rehabilitation of the offender. In some incidents, a private person may seek leave of court to prosecute a suspect where it is clear that the state agency responsible for prosecuting an alleged offender has failed to act in

¹ Harvey, William Burnett (1975). "Introduction to the Legal System in East Africa. East African Literature Bureau. Nairobi."

² Clarkson, C.M (1987) Understanding Criminal Law. London, Fontana.

³ Denham, P (1983) A Modern Introduction to law. London: Edward Arnold.

accordance with their constitutional and statutory mandates.⁴ An important element of criminal justice is the presumption of innocence for an accused person until found culpable beyond reasonable doubt.⁵

The criminal justice system in Kenya comprises several interdependent sub-systems namely the police service, the judiciary, the prosecution, witness protection and the correctional or prisons services responsible for enforcement or restoration of convicted offenders. It is a legal process involving the arrest, investigations, prosecution to the final determination of the case and implementation of the resultant order.

The “criminal justice system” principally aims at ensuring “effective and efficient delivery of justice” to both accused persons and victims of crime.⁶ The police, prosecution, the courts, witness protection agency and the prisons are essential players in this “criminal justice system.” However, these agencies must be guided by the fundamental truism that “justice must not only be done but must be seen to be done.” The challenge is that, this principle is frequently said than tangible in a particular case.⁷

An apparently fair result in a criminal trial could be viewed with scepticism or open disagreement by a variety of people. For example, in Kenya, where the criminal justice system is predicated on the principles, values, practices and norms patterned to the former colonial masters, our policies and laws governing our criminal justice system remain complex for the “common” persons.⁸ These peoples’ perceptions of justice vary significantly from the official position of what criminal justice is all about.

⁴ Section 88(1) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

⁵ Art. 50 (1) of the Constitution of Kenya, 2010 echoing Art 11(1) of the Universal Declaration of Human Rights.

⁶ Daly, Kathleen (2011) *Crime and Justice: A guide to Criminology* (3rd Edition).

⁷ Wellford, Charles (1997): *Goals of Criminal Justice*. University of Maryland, Vol. 13 Issue 11.

⁸ YP Ghai and JPWB “McAuslan (1970) *Public Law and Political Change in Kenya: A study of the Legal Framework of Government from colonial times to the present* (Oxford University Press Nairobi,” Kenya p.3).

In some jurisdictions like the United Kingdom, the investigative process is solely in the hands of the police majorly because they receive and register crime reports⁹ In addition to investigations, police department is responsible for prosecution of suspects,¹⁰ which raises criticism on the efficiency of the dual role played by the police in investigations and prosecution.¹¹ This was the state of affairs in Kenya prior to the 2010 Constitution which now establishes the “Office of the Director of Public Prosecutions”¹² separate from the “Offices of the Attorney General”¹³ and the National Police Service.¹⁴

In Kenya, the Police are vested with investigative powers¹⁵ while the Director of Public Prosecutions is responsible for prosecution¹⁶ whereas the Attorney General remains the “Principal legal advisor” to the National Government.¹⁷ Before the 2010 Constitution, prosecution was a constitutional mandate of the Attorney General and the police investigators had delegated powers to prosecute all offences except murder and treason.

The objectives of the criminal justice system are to guarantee only lawful convictions and that there is accuracy in the identification of those persons who are tried and convicted of the crime by adduction of evidence which is proven beyond reasonable doubt. Further, the system must guarantee suspects and victims access speedy justice through a “fair, just and impartial process.”

The system further aims at ensuring equal treatment before the law; and that, convicts are treated with dignity for self-development, “to gain and sustain the trust

⁹ It should be noted that in Kenya, many other agencies apart from the National Police Service and the National Intelligence Service are granted investigative functions and powers under the Constitution for example, the Independent Commissions and Offices under Chapter Fifteen of The Constitution, as well as the Office of the Director of Public Prosecutions.

¹⁰ “Hetherington, T. (1989) Prosecution and the Public Interest. Waterloo Publishers. London. In England and Wales,” since the emergence of statutory police forces in 1829, the police handle both the investigation and prosecution of suspects.

¹¹ Ibid.

¹² Article 157 of the Constitution.

¹³ Ibid Article 156.

¹⁴ Part 4 Articles 243-247 of the Constitution.

¹⁵ Section 24 of the National Police Service Act No. 11A of 2011 (Revised Edition, 2016).

¹⁶ Article 157 of the Constitution.

¹⁷ Article 156 of the Constitution.

and confidence of the community, and engage the community as active and effective partners in solving crime, to “facilitate the provision of remedies particularly through restorative justice” and to “develop capacity of communities to demand accessible, speedy, impartial and quality justice.”¹⁸

Accountability for the criminal justice system in Kenya lies with the national government while the county governments perform supportive roles.¹⁹

The Penal Code²⁰ is the primary source of about 20 types of offenses in Kenya. There are other written laws, based on the classification of cases by the respective statute. These include crimes against national security and international crimes; crimes against- public order, public morals and chastity; the narcotics and psychotropic substances offences; crimes committed by state officers and other public servants in the larger public service; crimes against personal liberty and security; crimes against personal possessions; crimes violations of intellectual property rights; damage to forests and Wildlife; and violation of environmental laws among others.²¹

International and regional human rights instruments contain provisions that guarantee access to criminal justice. For example, the “Universal Declaration of Human Rights (UDHR),”²² the “International Covenant on Civil and Political Rights (ICCPR),”²³ the “Convention on the Rights of the Child (CRC),”²⁴ and the

¹⁸ Wasilczuk k. Madalyn, (2013) “Substantial Injustice: Why Kenyan Children are entitled to Counsel at State Expense New York University School of Law.”

¹⁹ Fourth Schedule Part I sections 7 and 8 of the Constitution on the “distribution of functions between the National and County Governments.”

²⁰ Penal Code, Chapter 63 of Laws of Kenya.

²¹ These laws include the International Crimes Act, the Ethics and Anti Corruption Act, The Forests Act, The Wildlife Act, Anti Money Laundering Act among others.

²² Ibid Art 8.

²³ Article 14 (1) of the ICCPR provides that “all persons shall be equal before courts and tribunals. In the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The media and the public may be excluded from all or part of a trial. The exclusion could be due to reasons of morals, public order or national security. It could also be due to the interest of the private lives in the trial or where publicity would prejudice the interests of justice. Such exclusion however, must be justifiable in a democratic society. Nevertheless, all criminal trials must be conducted in public. Any judgment rendered in a criminal case or in a suit shall be made public. However, proceedings can be heard in camera to protect the interests of children.”

²⁴ Arts, 39 and 40.

“African Charter on Human and Peoples’ Rights” (ACHPR)²⁵ all guarantee “access to criminal justice.” These instruments establish standards by which States Parties should ensure compliance.

Kenya has ratified most of these international instruments and incorporated the principles espoused therein in our expansive Bill of Rights under Chapter Four of the Constitution.²⁶ For example, the Constitution recognises the right of an individual to “access justice” without any impediment.²⁷ In addition, an accused person is entitled to “fair trial” which includes legal representation by an advocate of one’s own choice²⁸

Despite all these guarantees, ‘access to criminal justice’ in Kenya is a rare commodity to many people due to numerous constraints or impediments. The retired Chief Justice Willy Mutunga admitted this fact and hinted that Kenya’s criminal justice system was itself 'criminal' and so the need to push on with the judicial transformation process, arguing that “justice delayed is justice denied.”²⁹

The former Chief Justice and President of the Supreme Court Dr. Willy Mutunga exposed that there were 6,701 pending criminal cases across the country, which could take up to 8 years to determine, but owing to the commitment on the part of Judges, the judiciary had started registering tremendous progress towards reducing the backlog.³⁰

Dr Mutunga disclosed that criminal appeal cases still remained the highest with several suspects in this category being held for unnecessarily long periods in the cells as the cases dragged on. He revealed that 22 Court of Appeal Judges had so

²⁵ Art 7.

²⁶ Chapter Four of the Constitution of Kenya, 2010.

²⁷ Art 48 of the Constitution.

²⁸ Ibid Arts. 49-51.

²⁹ Opening remarks by Dr Willy Mutunga, the immediate former Chief Justice and President of the Supreme Court of Kenya. Accessed at www.judiciary.go.ke May, 18, 2017.

³⁰ Speech by the Hon Chief Justice Dr. Willy Mutunga speaking on March 6, 2013 when he officially launched the Court of Appeal in Kisumu. (Accessed at www.judiciary.go.ke).

far been appointed in the last 2 years, adding that each County would have its own High Court in line with the new devolved system of governance.³¹

The police, prosecution, prisons and courts are considered to be that place of refuge for the vulnerable and the marginalized in the advancement and fortification of rights, and the guardians against human rights violations. It is therefore expected that these institutions must be accessible to the citizens when necessary and access not just in the legal and hypothetical sense, but also in the results that flow from the decisions they make that give it meaning. These institutions must also create an enabling environment for citizens to have faith in the criminal justice system.

Courts are expected to be gatekeepers for the promotion and protection of all people in contact or in conflict with the law to ensure equality before the law and guard against arbitrariness and abuse of power, irrespective of one's social or political status;³² when the right to counsel is ensured in cases where one's liberty is threatened;³³ or when disputes or trials are heard by an unprejudiced court or tribunal and concluded without unreasonable delay as enshrined in the Constitution.³⁴

The concern for this paper was to seek to analyse the existing legal, policy and institutional frameworks for accessing criminal justice in Kenya and identify the barriers thereof and whether these frameworks are effective and efficient in service delivery. The paper was also concerned with the response by the state and non-state actors and the government's roles in the enforcement of fundamental human rights; and to propose how to overcome the identified impediments to "guarantee access to criminal justice for all"

³¹ Ibid.

³² *High Court at Nairobi in Petition No. 208 & 207 of 2012 (consolidated) Centre for Rights Education and Awareness & 8 others v Attorney General and Minister for Internal Security [2012] eKLR.*

³³ Art 50(2)(h) of the Constitution.

³⁴ Ibid. Art 50(1) & (2) (e) and Art 159(2)(b).

The study explored these issues by examining in general terms the “concept of access to justice” and its derivative, “access to criminal justice” and its practical implications for the “poor, vulnerable and marginalized” groups. The study evaluated the roles and capabilities of the court system, the police, prosecutions, witness protection agency, prisons and non-state actors in the context of criminal justice and identifying the major obstacles for the justice seeker whether in conflict or in contact with the law.

1.2 STATEMENT OF THE PROBLEM

Among Kenya’s colonial past was the retention of the English legal and judicial systems on the attainment of independence. The 1963 Lancaster House Constitution also known as the Independence Constitution, legitimized the institutions of justice, the laws, practices and procedures which are still retained by the present legal system.³⁵ Due to this colonial importation, Kenya’s legal system is considered alien and viewed as entrenching economic inequality and exploitation of the disadvantaged and illiterate majority by a privileged few.

The experiences of women, the poor and girls in particular, in accessing criminal justice have been traumatic due to high levels of illiteracy, patriarchy and systematic discrimination in their engagement with traditional dispute resolution mechanisms, unjust legal architecture on matters of succession and family disputes, and the far distances they have to traverse the justice points like the police stations or courts to lodge their complaints or testify against suspects.³⁶

Government statistics with a bearing on access to criminal justice estimates that Kenya’s population is forty million.³⁷ Of these, approximately 75 per cent live in the rural areas while the remaining 25 per cent constitute the urban dwellers. Life expectancy is 46.4 years. Unemployment is very high; pushing majority youths into the urban centres to seek for jobs. Their expectations for better pay are never met.

³⁵ This is by dint of section 3(2) of the Judicature Act, Chapter 8 Laws of Kenya.

³⁶ Wasilczuk K. Madalyn (2013). Substantial injustice: why Kenyan children are entitled to counsel at state expense. International Law and Politics Vol. 45.

³⁷ Official records from the Kenya National Bureau of Statistics, 2009.

Hence, some of them engage in crime for survival. It is estimated that more than 49% of the total population in Kenya is living under \$1.25 a day. Most of them reside in the poverty stricken urban informal settlements.³⁸

Women stand disadvantaged in their access to productive resources and labour markets and disempowerment at the household, community and national levels, where only but a few are involved in the process of making decisions. They face obstacles in business, have fewer skills, and due to traditional restrictions, tend to be found more in the homes while their activities, mostly domestic and household based like cooking, fetching water, washing clothes and utensils and tilling the gardens are less remunerative than those jobs done by majority of the men.³⁹

Children, on the other hand, have been affected by modernity which has had the effect of limiting the traditional collective responsibility over their wellbeing. Harmful cultural practices like forced marriages and female genital mutilation for girls as young as seven years violate their recognised rights and hamper their proper all-round development.⁴⁰ All these factors affect the capability of these groups to positively engage with the criminal justice when their rights are violated.

On the legal front, there are about 12000⁴¹ advocates admitted to the Roll of Advocates since independence, out of which 6000 are engaged in private practice,⁴² mostly in the urban centres while only about 680 are magistrates and judges.⁴³ The citizen-advocate ratio in the country is 1: 7000 while the judiciary serves the ratio of 1: 73000.⁴⁴

With the on-going implementation of the judiciary transformation framework aimed at reforming the institution that had been written off for more than four

³⁸ World Development Report, 2010.

³⁹ The Truth, Justice and Reconciliation Commission Report, 2013 Vol.IIC p.40.

⁴⁰ Seventh periodic report of States parties: Kenya CEDAW/C/KEN/7 (2010) p. 14.

⁴¹ The Law Society of Kenya. Accessed at www.lsk.or.ke

⁴² Ibid.

⁴³ Kenya Judiciary website www.judiciary.go.ke.

⁴⁴ Ibid.

decades, there are about 113 subordinate court stations staffed with 436 magistrates, 130 High Court judges majority of whom work in Nairobi, Six Court of Appeal stations stationed in Nairobi, Kisumu, Nakuru, Nyeri, and Malindi and a Supreme Court stationed in Nairobi.⁴⁵ Even with the constitutional requirement for devolution of services throughout the country,⁴⁶ the people of Kenya are still in short supply of these services. As the demand for them rises,⁴⁷ the legislature insists on reducing the budget for the judiciary, money intended for the employment of more judicial officers and construction of more courts in the counties.⁴⁸

The country also lacks a legal aid scheme. The six pilot projects operationalized by the former “Ministry of Justice, National Cohesion and Constitutional Affairs” in 2008 (now “Office of Attorney General and Department of Justice”) through the “National Legal Aid (And Awareness) Programme” (NALEAP) deliver “legal aid, education and awareness” to the public in only six regions, which is just a drop in the ocean.⁴⁹

The main challenge facing the pilot projects is lack of an operational policy and legislative framework. The three year pilot period ended in 2011 and has been running on an extension in the transitional period as the Legal Aid Service contemplated in section 5 of the Legal Aid Act enacted in 2016 has not been established.⁵⁰ Out of the six pilot projects, only one, located in Mombasa, serves to promote access to criminal justice for offenders facing robbery with violence.

⁴⁵ State of the Judiciary Report, 2015-2016.

⁴⁶ *Supra*, note 13 Art 6(3).

⁴⁷ Although the recent amendments to the Act increased the number of High Court Judges to 150, Judges of Appeal to 30 and Environment and the specialized courts to have 30 judges each, these positions are yet to be filled. Interviews for 40 High Court and specialized courts Judges were conducted in June-July, 2013 but to date, no communication has been availed on whether there has been any selection for appointments by the President.

⁴⁸ “Judicial Service Commission” Statement issued by the Chief Justice Dr. Willy Mutunga on the Independence of the Judiciary, in response to the reduction of funding to the Judiciary by the National Assembly, March 2, 2014.

⁴⁹ The pilot projects are situate in Nairobi for family and children, Nakuru for children, Eldoret for Moi University Law Clinic specializing in Alternative Dispute Resolution (ADR), Mombasa for capital offenders and Kisumu for paralegals.

⁵⁰ Act No.6 of 2016

It is acknowledged that access to criminal justice is as critical as access to civil justice. Both are basic and fundamental rights espoused in the Constitution that guarantee against discrimination⁵¹ on any basis of class, sex, gender, marital status, poverty or deprivation,⁵² and echoed in international and regional instruments ratified by Kenya.⁵³

However, this right to accessing criminal justice is largely constrained by, among others, poor police investigation of complaints, poor detection and prosecution of crime, the high poverty levels; high cost of legal services; inadequate sensitization on legal rights, police viciousness and the shoot to kill syndrome, poor prison conditions including overcrowding; considerable delays of court proceedings largely due to limited number of poorly equipped and staffed courts; long distances from the courts and police stations; exorbitant bail and bond terms; endemic corruption in the courts, police and other security agencies; formalities in the courts due to alien, incomprehensible and complex procedures; and the persistent use of English language that is seldom understood by majority of criminal justice seekers, among others.⁵⁴

These challenges are further compounded by disrespect for the law in Kenya generally speaking,⁵⁵ even among the law enforcers as well as the legislators and the executive arm of Government.⁵⁶

On the law enforcement front, the current citizen-police ratio is 1: 400⁵⁷ compared to the United Nations requirements of 1: 450 which means that the law enforcement

⁵¹ Art.27 of the Constitution.

⁵² Arts 48-51 of the Constitution.

⁵³These include the “Universal Declaration of Human Rights,” (1948), “International Covenant on Civil and Political Rights,” the “UN Convention on Persons with Disabilities,” the “UN Convention on the Rights of the Child” and the “African Charter on Human and Peoples’ Rights”.

⁵⁴ Supra, note 30.

⁵⁵“Commission on the Implementation of the Constitution” statement on “threats to the rule of law” by various institutions accessed at <http://www.cickenya.org/index.php/newsroom/press-releases/item/383> Monday February, 2014.

⁵⁶ In recent times, there have been supremacy wars among the three arms of Government in Kenya, with each arm declining to honour directives of the other in the name of sovereignty or independence. This has greatly affected service delivery.

⁵⁷ Report by Kenya National Bureau of Statistics, Kenya Facts and Figures, 2016.

and protection of rights of citizens is now enhanced. However, the police are ill equipped to handle crime as evidenced by the high crime rates including terrorist attacks in some areas where the police stations are just 30 metres away, indicative of inefficient crime detection.⁵⁸

It is however not clear what the Crime Research Centre has been up to for the last 5 years. In addition, all pointers are that the National Intelligence Service has failed to provide information that would necessitate early crime detection and prevention.⁵⁹ This situation is aggravated by the massive economic, political and social disparities among the people.

Other specific barriers impeding access to criminal justice include inefficient and ineffective investigations and prosecution especially for serious crimes; high cost of legal fees; exorbitant bond and bail terms; technicalities of court procedures; unfamiliarity with court language; geographical barriers where courts and police stations are located far from the people; unfriendly or hostile court and police environment; congestion in prisons; corruption and ineptitude among the police, prosecutors, court staff and other service providers, case backlogs; besides absence of an efficient alternative dispute resolution mechanism for criminal cases.

1.3 OBJECTIVES OF THE STUDY

The main objective of this study was to assess the policy, legal and institutional frameworks on access to criminal justice in Kenya. Specifically, the study intended to identify inherent organizational constraints and other flaws in the criminal justice system and to propose ways of addressing these challenges. The study also sought to identify the successes within the system and to highlight the efforts made and being made in addressing the challenges identified. Finally, the study intended to use the results on the status of criminal justice in Kenya to encourage policy discourse.

⁵⁸ Kisavi Dominic, the State of Security in Kenya, 2012.

⁵⁹ Report of the International Center for Policy and Conflict, 2016.

1.4 RESEARCH QUESTIONS

The study sought to find answers to both theoretical as well as practical questions on access to criminal justice namely:-

- (a) What is the significance of criminal justice in the administration of justice generally?
- (b) What are the legal, policy and institutional frameworks for accessing criminal justice in Kenya? How effective are these frameworks?
- (c) What are the obstacles if any, to accessing criminal justice in Kenya?
- (d) What efforts have been made or are being made in reforming the existing policy, institutional and legal frameworks and in providing solutions to the problems of accessing criminal justice? Are the efforts sufficient?
- (e) What are the proposals for future reform?

1.5 JUSTIFICATION OF THE STUDY

Society relies on the criminal justice system to keep it safe and maintain order. An efficient and effective criminal justice system must meet the fundamental goals of criminal laws namely- separation of the guilty from the innocent; incapacitate strictly dangerous individuals; and promote deterrence and retribution for those who violate the law. Criminal law and the criminal justice system are also expected to be fair and even-handed and to rehabilitate criminal offenders. It is further expected that the criminal justice system will assist offenders who have completed their sentences to re-enter the community as productive citizens to avoid commission of crimes in the future.

The study was therefore necessary to bring out awareness that access to criminal justice is an indispensable human right with constitutional guarantees, under which all persons in conflict or contact with the law are entitled. The study was significant in identifying various inherent endemic problems bedevilling the Kenyan criminal justice system including the inadequacy of our legal, policy and institutional frameworks, which impede the full enjoyment of this right to access criminal justice. It was therefore necessary to analyse the situation to identify the specific

impediments and suggest appropriate measures designed to bridge the gap between people's expectations and the actual results.

In addition, although much has been written in the area of "access to justice" previous studies focus mainly on "access to justice" generally and access to civil justice. This is because, understandably, the remedies in the civil justice system appear tangible in the form of monetary awards, injunctions and restitution, among other remedies, unlike in criminal law. The masterpiece thesis by Dr. Laibuta Imaana gives an account of the "concept of access to civil justice in Kenya, policy, institutional and legal frameworks" and their attendant inadequacies.⁶⁰

In this study, enormous literature was reviewed which revealed little appraisal of the concept of access to criminal justice and therefore the need to fill that gap by assessing the concept of access to criminal justice in Kenya, while examining the existing policy, legal and institutional frameworks.

1.6 CONCEPTUAL FRAMEWORK

This section explores the meanings assigned to the concept of "justice," "access to justice" and its derivative, "access to criminal justice" in the context of fair trial.

1.6.1 THE "CONCEPT OF JUSTICE"

The term "Justice" is too broad to give it an easy definition. It is however conceded that the court system plays a vital role as a "significant door for people's guarantee to accessing justice."⁶¹ "Justice" has been defined as "the exercise of authority in the maintenance of a right"⁶² and the "judgment of persons or causes by judicial process."⁶³ Mc Quire, S.C *et al* defines "Justice" as "a vindication of state-

⁶⁰ Imaana Laibuta, (2012) Access to civil Justice in Kenya, an appraisal of the legal, policy frameworks. (Unpublished PhD Thesis, University of Nairobi).

⁶¹ "Robert J. Grey Jr. Access to the Courts: Equal Justice for All" p 6.

⁶² The Oxford Reference Dictionary, 1989, p. 448.

⁶³ The Macquarie Dictionary, 1981, p. 961.

determined legal rights through an adjudicative institution that administers and enforces those legal rights.”⁶⁴

In all these definitions which are not exhaustive, the opportunity for judicial determination of a claim is an integral element of “justice.”⁶⁵ In this context, justice is considered the extent to which citizens are enabled to use courts for dispute resolution. However, these definitions make justice to be an end in itself. This study considers “access to justice” not only as an end, but also as a means to an end. The paper therefore adopted a broader definition of “justice” to include the ability of the institutions like the police, courts, prosecution, witness protection and prison or aftercare services to deliver services to an accused or victim of crime.

1.5.4 “Access to justice”

The expression “Access to Justice” has various connotations. Broadly speaking, “access to Justice” refers to the “provision of access to state-sponsored services such as health, welfare, education and legal services, particularly for the poor.” Here, “Access to Justice” is implicit in ensuring “collective justice,” in according every person fair opportunities in all sectors of the society.

The law performs different functions in different contexts including serving as an object of preserving order and delivering justice. The efficacy of the law is a function of multiple factors such as knowledge of the law, capacity to seek legal redress, availability of a forum to adjudicate disputes in the implementation and interpretation of the law and the access to such fora by aggrieved persons.⁶⁶

The lack of knowledge of the law by the citizenry, as well as lack of independent and impartial justice, law and order institutions which include the judiciary, the police, prosecution and witness protection undermines access to justice, and

⁶⁴ Mc Quire, S.C., and Mac Donald, R.A., *Small Courts Can't*, 1997, *Osgood Hall Law Journal*, Vol. 34 No. 3, page 510.

⁶⁵ *Ibid* p. 510.

⁶⁶ Dr. Patricia Kameri-Mbote, “Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,” IELRC Working Paper, 2005-1(www.ielrc.org).

especially criminal justice. Accessibility to justice therefore includes “ensuring availability and affordability of remedies, legal aid, legal education and representation, and legal counselling, affordable fees, as well as absence of procedural barriers.”⁶⁷

Among the essential elements which facilitate access to justice are citizen’s legal literacy; protection and easy affirmation of rights through law and dispute resolution processes; existence of fair laws in content and outcome; accessibility of laws to citizens in terms of language and form; accessibility to alternative dispute resolution mechanisms; and cheap, simple, affordable and understandable legal procedures.⁶⁸

Access to justice, whether civil or criminal is an essential component of any modern democracy committed to the promotion and protection of the rule of law. Under the watch of an independent judiciary and other state and non-state human rights institutions, access to justice accelerates the protection of fundamental freedoms and human rights; fair trial for the accused persons; “the ability of individuals to assert or defend their rights in relation to public authorities and those who may be economically more powerful and transparent, a safe and fair means of avoiding or resolving disputes.” Globally, access to justice has been regarded as both an independent human right as well as a crucial means of enforcing other substantive rights in a democratic society.⁶⁹

Kenya has a progressive modern Constitution guaranteeing an impressive set of rights for the individual.⁷⁰ However, in the absence of a genuine means of enforcing those rights, substantive guarantees can far too easily become merely a set of empty undertakings. In other words, in the absence of accessible justice, the enjoyment and realization of any other right is mirage.

⁶⁷ Ibid, note 64.

⁶⁸ Okech Owiti, “*Access to Justice and Small Claims Courts*, Paper Presented at a Workshop organized by the Legal Resources Foundation in February, 2004.”

⁶⁹ UNDP, Access to Justice Note, 2006.

⁷⁰ Chapter Four of the Constitution dedicates 39 Articles to fundamental rights and freedoms of persons.

As a fundamental right and part of the rule of law, the right demands that all state organs and other justice sector institutions should be open to all persons whose rights have been violated, or who are in search of a form of justice. The right entails the ability of an aggrieved subject to access services without any hindrances. The right is also inseparably interlinked with the availability of meaningful and reasonable remedy and equal treatment.⁷¹

1.5.7 Fair trial

A fair trial is a process of protecting persons against injustice. In the criminal justice system, fair trial involves separating the guilty from the innocent. Fair trial is also a fundamental right⁷² without which the rule of law and public confidence in the administration of justice would be eroded.

The “right to a fair trial” is the foundation of a just society. Fair trial is a fundamental constitutional human right, universally acknowledged and recognized. It aims at protecting persons from illegal and indiscriminate limitation of their basic human rights and freedoms, the most common being the right to life and personal liberty. “Fair trial” is found in Article 14 of the “International Covenant on Civil and Political Rights (ICPPR),”⁷³ and stipulates that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁷⁴ Accordingly, the “right to fair trial” is the door to accessing criminal justice. It is also the ultimate aim of criminal justice. It follows that this right cannot escape any study that attempts to assess the concept of access to criminal justice.

1.6.2 THEORETICAL FRAMEWORK

Legal philosophers contemplate four categories of “criminal justice” namely: “remedial” or “corrective justice,” “procedural justice,” “distributive justice” and

⁷¹ Article 159 (2) (d) of the Constitution.

⁷² Article 50(1).

⁷³ “International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), December 16, 1996, entered into force march 23, 1976.”

⁷⁴ Supra note 64.

“retributive or punitive justice.”⁷⁵ Criminal law is classified as a “retributive justice,” which model of justice considers “proportional punishment” to be a “morally acceptable response to crime.” “Retributive justice” is known by the caption “*lex talionis*” or retaliatory approach to crime (“an eye for an eye” or “tit for tat” and or “a hand for a hand”), which can be traced to the sacred book of Exodus.⁷⁶ The proponent of this theory is none other than Emmanuel Kant⁷⁷ However; this is not to say that criminal law is a mere punitive undertaking, as more emphasis is put on deterrence and rehabilitation.⁷⁸

Criminal law theorists have attempted to explain why individuals are at risk of criminal wrongdoing. The theoretic methods discussed in this section attempt to explain the relationship between the risk factors and criminal behaviour. There is, however, no consensus on the merit of those notions and it is therefore possible that the underlying mechanisms proposed significantly vary for different individuals.

It is however worth noting that most crime prevention programmes are mostly implicitly based on one or more of the theoretical understandings of crime. It therefore follows that when focusing on concrete responses, there is need to understand the various theoretical accounts of crime and the insights these clarifications provide.

This study was guided by the sociological and neo-Marxists perspectives, driven by the principles of equity, non-discrimination and equality towards a better society. These theorists propose that for the poor, marginalized and vulnerable people or groups of people to access justice, the social orientation of society must be changed to remove inequality and discrimination which increases the poverty gap between

⁷⁵ “Richard A. Posner, the Problems of Jurisprudence. p. 313-352”.

⁷⁶ Exodus 21:23–27.

⁷⁷ “H.L.A. Hart, Liberty and Morality (1963).”

⁷⁸ “Kant, Immanuel. (Original 1785.) Groundwork of the Metaphysics of Morals. Grundlegung zur Metaphysik der Sitten. (In German)” Grundlegung zur Metaphysik der Sitten. (In German).

the rich and the poor, and which compels the poor to want to partake of the share from the rich.⁷⁹

Sociological theory looks at crime as a societal phenomenon, and underscores the cultural and social origins of criminal behaviour. For example, it is theorized that people's social conditions have an effect on their propensity to be involved in crime. Such factors include inequalities in social life, the peer influence, breakdown of the social fabric in communities, inability to "succeed" and the role of criminal subcultures, including a cluster of criminals.⁸⁰ This explains why in Kenya, there are many organized criminal gangs among peers like the *mungiki*, *sungusungu*, *Mombasa Republican Council*, *Chinkororo*, *Musumbiji*, *Baghdad Boys* among others, comprising mostly the youths.⁸¹ These sociological theories have however been criticized for their inability to adduce strong evidence for their hypothesis.

1.7 LITERATURE REVIEW

The literature reviewed illustrate that there are inherent global issues attendant to people's access to justice and in particular, access to criminal justice which issues urgently need to be addressed. In Kenya, it is hoped that the findings of this study will contribute to this debate and highlight the way in which our legal system is failing those in most need of assistance and protection. Currently, as the available research works illustrate, most disadvantaged people face additional hurdles in accessing legal help. For the poor, vulnerable and marginalized individuals and groups, these obstacles can be grave.

It is acknowledged that access to both civil and criminal justice is an indispensable right for victims of all human rights abuses.⁸² Previous studies show that the concept of access to criminal justice contains two inseparable elements. These are "access" and the concept of "justice" itself. In the international law and practice,

⁷⁹ Austin Sarat, "Review: Access to Justice by Mauro Cappelletti; Bryant Garth; John Weisner; Klaus-Friedrich Koch," 94 (8) *Harvard Law Review* 1911, 1981, p 1911.

⁸⁰ Clifford R. Shaw and Henry McKay (1942).

⁸¹ Human Rights Watch, (2013).

⁸² Surya Deva, (2016) at the 5th Session of the Intergovernmental Working Group in Geneva on business and Human Rights.

access to justice must be fair, effective and prompt.⁸³ Access to justice covers substantive and procedural justice. In other words, a person's right of access to justice includes accessibility to all available judicial, administrative or other mechanisms under the existing domestic and international law.⁸⁴

The right to a fair trial including access to the law enforcement mechanisms and the courts for fair and impartial judicial proceedings is the cornerstone of the right to access to criminal justice. Under the ICCPR states must take practical steps to ensure that access to criminal justice is efficacious and this involves provision of legal counsel as well as diplomatic and consular assistance to victims seeking justice for violations.⁸⁵ To ensure effective access to criminal justice, these international instruments oblige states to measures to ensure access to justice for all without discrimination.

In its full sense, access involves absence of any hindrance whether it is in the form of; access to legal information; transparency of the judicial system; physical access to courts and police assistance, legal assistance for those who cannot understand and afford legal processes; expeditious determination of cases; and, finally, timely and effective enforcement of the orders issued by the courts.⁸⁶ This, however, does not mean that all complaints must be resolved within the formal legal institutions. People have resolved their disputes, depending on the nature, through informal or alternative dispute resolution mechanisms.⁸⁷

The Kenya Poverty Reduction Strategy Paper (PRSP) of 2001-2004 noted that “communities and the poor lacked access to socially responsive and affordable legal and judicial services as critical issues that needed to be addressed by the Government in the fight against poverty and crime.” This is so because the poor

⁸³ See “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A.”

⁸⁴ Arts 5 and 6 of the International Covenant on Civil and Political Rights.

⁸⁵ Ibid.

⁸⁶ Art 8 of the Universal Declaration of Human Rights.

⁸⁷ Such as the Gacaca system in Rwanda.

suffer most from effects of weak, unaccountable and insensitive legal and judicial systems.⁸⁸

A study conducted by the Kenya Magistrates and Judges Association found that integrity concerns amounted to less than 10% of the concerns of the citizenry on the delivery of justice. The most common concern was with backlogs and the inability of the courts to administer justice without undue delay.⁸⁹ The study also showed that the delays were caused not only by the judiciary but also by other court users in the entire justice system such as the police, prosecutors, advocates and prisons. Following wide consultations, the Association developed three transparent and accountability mechanisms: Court User's Committees, Citizen's Dialogue Cards and Peer Review Mechanisms.⁹⁰

Status Reports as at 2011 indicated that more than 86% of the court stations had established the Court Users Committees of which 75% were active.⁹¹ The main challenge facing the Court User's Committees was reported to be that most stakeholders expected the magistrates to lead the process and call for meetings. Owing to their busy schedules in court, most of the Court Users Committees hardly met and therefore, not operational.⁹² This necessitates a new innovative approach to addressing the backlog of all types of cases problem in the Kenyan judiciary.

The Judiciary Transformation Framework identifies access to justice as a key deliverable in the total change envisaged. Among the Key Result Areas, the judiciary intends to improve the speed and affordability of accessing justice; ensure courts are reasonably closer to where people live; improve physical accessibility of court buildings, being mindful of people with disabilities; having courts that are friendly; simplifying court procedures and documents; raising public awareness of

⁸⁸ The Kenya Poverty Reduction Strategy Paper, 2001-2004.

⁸⁹ ICJ Kenya, Promoting and Protecting Human Rights, Democracy and the Rule of Law. Judiciary Perception Survey, 2012.

⁹⁰ Court User's Committees were established in most court stations in the country beginning in 2007.

⁹¹ The Judiciary Transformation Framework, 2012.

⁹² Ibid, the Framework identifies the use of information technology as the most ideal mechanism of dealing with the problem. However, with advocates and other stakeholders contributing to the problem, much more needs to be done.

the court processes; and promoting and enforcing other ways of resolving disputes and not just by going to court.⁹³ Clearly, this Key Result Area recognizes the problems bedeviling the judiciary in the administration of justice, but deliberately avoids including the anti-corruption agenda, and how such transformation would enhance access to criminal justice in particular.

In a survey carried out on the 'State of Public Service and Access to Justice in Kenya,'⁹⁴ access to justice was assessed in view of the people's use of the judicial system. The study revealed that slightly over one fifth, (23%) of the respondents reported that a household member had lodged a complaint ending up in court in the three years preceding the survey. Half of those who lodged complaints in Lang'ata were (57%); Embakasi (53.5%) and Bungoma (50%) were asked for a bribe or some form of gift.

The report mentions a whole range of officials seeking for bribes including paralegals, magistrates, lawyers, prosecutors and the police. In addition, the study revealed that people still viewed the judicial system as expensive and did not trust it since the laws were applied unfavorably to the poor. However, it was notable that in Kisumu (37.4%), Siaya (22.7%) and Murang'a (18 %) of the respondents distinguished that the judiciary was acting more independently (without interference of the Government) than before, which is a positive pointer to public perception about the judicial reforms underway.⁹⁵

The study further recognizes that greater access to justice could institutionalize the human rights principles of accountability and the rule of law. Interventions under it would lead to the ability of poor and marginalized people to claim rights through the formal as well as the informal justice institutions. This would fortify the

⁹³ Supra, note 32.

⁹⁴ A report on the State of Public Service and Access to Justice in Kenya commissioned by INFONET in partnership with the United Nations Millennium Campaign (UNMC) and the African Institute for Health and Development (AIHD) 2012.

⁹⁵ Ibid, p.36.

achievement of the Millennium Development Goals targets in such areas as education, health care and water services.⁹⁶

An end-term National Legal Aid (And Awareness) Programme Evaluation Report made in 2013 identified poverty as the greatest impediment to accessing justice in Kenya. The report clearly indicates that Kenyans are in dire need of legal representation especially in criminal cases.⁹⁷ The report highlights the beehive of activities in the six pilot projects, which demonstrates that Kenyans have legal problems to which self-representation and mediation are not sufficient solutions. Case studies reviewed revealed how breakdown in mediation within the communities escalated minor disagreements to the criminal courts.

Beneficiaries interviewed during the NALEAP evaluation process noted that even with self-representation, the complicated language of the law and limited language literacy left them confused about the precise nature of proceedings in Court especially during cross-examination by prosecutors who are largely advocates. Although the report notes that stakeholders from the Judiciary applauded self-representation, they were quick to qualify that in civil and criminal cases, the outcome of self-representation was in favour of the adverse party who was represented by an advocate due to limited education and the vast experience of the advocates and prosecution counsels.⁹⁸

The 2013 announcement by the judiciary to deploy ninety judges countrywide to hear and determine pending criminal appeals was commendable. The challenge lies in the assumption that only those charged with criminal cases demand expeditious justice, leaving out civil matters which, in essence, and quite often than not, failure to resolve in sufficient time contributes to commission of offences.⁹⁹

⁹⁶ Ibid.

⁹⁷ NALEAP Evaluation Report, 2013.

⁹⁸ Ibid, p.6.

⁹⁹ The programme launched on 18th October, 2013 by the Chief Justice Dr. Willy Mutunga and dubbed: "Judicial Service Week: Criminal Appeals" targets 1500 convicted criminal appeals and review the eligibility of 3500 prisoners for Community Service Orders.

The initiative that involved all judges of the High Court, Employment and Labour Relations Court and the Environment and Land Court at all the 20 High Court stations in the country led to a delay of other court cases, including murder trials and civil claims, estimated to be 802,570 as at 19/10/ 2012.¹⁰⁰

The vision for the Draft National Legal Aid (And Awareness) Policy is "access to justice for all." Its overall goal is to enhance the facilitation of access to justice through a national sustainable and quality legal aid and awareness framework in line with the Constitution, regional and international human rights standards. The draft policy acknowledges that there is no escaping the fact that Kenyans have real legal representation needs, and that, an efficient, accessible, timely, affordable legal and judicial system inspires in the citizens a culture of abiding by the rule of law and human rights protection, which are cornerstones to social, political and economic development.

The draft policy further appreciates that "access to justice is critical in alleviating poverty as it creates an enabling environment for investment and development" as envisaged by the first Medium Term Plan under the Kenya Vision 2030 which is "to promote and sustain fair, affordable and equitable access to justice."¹⁰¹

The Kenya Vision 2030 political pillar envisions "adherence to the rule of law applicable to a modern, market-based economy in a human rights-respecting state." The overall goal for the year 2012 was "to enact and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable and equitable access to justice."¹⁰²

¹⁰⁰ "State of the Judiciary and Administration of Justice Report, 2011 to 2012" p.18. (the current status of some of those cases handled during the service week is that the decisions have since been overturned by the Supreme Court on account that the court was improperly constituted bearing in minds that the benches hearing criminal appeals in robbery with violence cases comprised a blend of the Environment and Land Court Judges and High Court Judges. (See the case of *Republic vs. Karissa Chengo [2017] eKLR*.)

¹⁰¹ Draft National Legal Aid (And Awareness) Policy, 2013 awaits approved by Cabinet and culminated in the Legal Aid Act, 2016.

¹⁰² The Kenya Vision 2030 Blue Print.

Specific strategies outlined would involve: “aligning the national policy and legal framework with the needs of a market-based economy, human rights and gender equity commitments; increasing service availability and access (or reducing barriers) to justice; streamlining the functional organization (including professionalization) of legal and judicial institutions to enhance inter-agency cooperation; and inculcating a culture of compliance with laws and decent human behaviour.”¹⁰³

Regrettably, the available legal or institutional framework for accessing criminal justice is the same, over a period of time as the much anticipated national legal aid scheme is yet to be rolled out nationally to serve the needs of all Kenyans especially those who are vulnerable.

1.8 HYPOTHESES/ASSUMPTIONS

Based on the research questions and objectives of the study, the paper used directional hypothesis to explain and predict the direction and existence of specific relationships. The predicted relationships would be either positive or negative. This was guided by the fact that directional hypothesis is more specific than the non-directional hypothesis, as it has the cause-and-effect prediction. Specifically, the study intended to test the hypotheses that:

- (a) Access to criminal justice is significant in the administration of justice. Nevertheless, the Kenyan criminal justice system generally cannot guarantee the poor, vulnerable and marginalized groups access to justice due to substantive and procedural barriers; and
- (b) The Kenyan criminal justice system plays a pivotal role in the administration of justice, and in ensuring access to justice for the poor, vulnerable and marginalized groups. However, there are a variety of challenges, which relate to both the justice system itself and the users’ social conditions bedevilling access to criminal justice.
- (c) The various existing policies, laws and institutional frameworks are inadequate in ensuring access to criminal justice for all.

¹⁰³ Ibid, p.160.

1.9 RESEARCH METHODOLOGY

The research adapted both the qualitative and quantitative research approaches. The study adopted a review of literature on the subject of access to criminal justice and limited data collection techniques was used. Desktop study extensively reviewed primary and secondary sources of major academic research and publications for other evaluations of this subject in the field of disadvantaged people's access to criminal justice in many jurisdictions. In addition, some interviews through written questionnaires were used to elicit answers from those participants who were engaged in the criminal justice system.

The inputs of key respondents were central across all the themes with face-to-face interviews conducted in selected institutions using appropriate semi-structured questionnaires for data collection from the targeted population represented by both public and private sector institutions which included the judiciary, public prosecutions, the police service, prisons service, private legal practitioners and civil society organizations. Purposive sampling of representatives from these institutions picked out ten participants.

Other primary data was sourced from key international, regional and municipal legal and policy instruments and case summaries. International and regional instruments included the African Charter on Human and Peoples Rights, the African Charter on the Rights and welfare of the Child, the Convention on the Elimination of All forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights.

At the municipal level, the Constitution of Kenya, 2010, was extensively reviewed, together with various pieces of legislation. Historical documents and reports of committees and commissions of inquiry appointed over the years to review the different aspects of the justice, law and order sector in Kenya were also reviewed.

These included the reports of the Committee on the Reform and Administration of the Judiciary 1998 (the ‘Kwach Committee’) and the Integrity and Anti-Corruption Committee of the Judiciary, 2003 (the “Ringera Committee”).

Other sources of data included the reports on the National Police Service and prisons service and the prosecutions policy. Documentation at the World Bank Kenya Country Office on judicial reforms, reports of the Federation of Women Lawyers (FIDA) Kenya, International Commission of Jurists (Kenya Chapter), the judiciary and the former Ministry of Justice, National Cohesion and Constitutional Affairs. The data collected from the key informants was collated and analysed and the research findings compiled. However, this does not mean that the findings are wholly representative and can be generalized when evaluating the policy, legal and institutional frameworks on accessing criminal justice system in Kenya. The key findings and recommendations are summarized in Chapter four of this paper.

1.10 OVERVIEW OF THE CHAPTERS OF THE STUDY

The paper has five chapters apart from this introduction, which provides a general overview of the problem being investigated, while reviewing the available literature on the subject. It is in this chapter that the theoretical framework, conceptual framework and methodology employed in the research are elucidated.

Chapter Two deliberates on the concept of justice, access to justice and focusses on the significance of access to criminal justice in the administration of justice in Kenya. The chapter also identifies the theories that were adopted in the study. The chapter further identifies the shortfalls in the legislative and regulatory frameworks

Chapter Three critically examines the legal, policy, and institutional frameworks on access to criminal justice in Kenya, identifying the inadequacies and successes.

Chapter Four presents an assessment of the state of access to criminal justice in Kenya, while exploring the hindrances to accessing criminal justice.

The study concludes with Chapter Five by restating the importance of access to criminal justice in the administration of justice, focusing on how the legal system can be made more receptive to the hopes of Kenyans. This chapter also summarizes the findings of the limited field study and makes some recommendations for future reform. Notwithstanding the concrete reform efforts thus far in the criminal justice system, specific recommendations are made for further research in enhancing access to criminal justice.

The next chapter which is chapter two introduces the concept and significance of access to criminal justice in the administration of justice. It debuts with a discussion of the contemporary meaning and rationale of access to criminal justice in its various components and goals. The object of the chapter is therefore to lay an introductory and a conceptual framework for the entire study. In particular, it explains the meaning of the concept of access to criminal justice in Kenya, and clarifies why access to criminal justice is important.

CHAPTER TWO

2.0 THE CONCEPT OF “ACCESS TO CRIMINAL JUSTICE” AND ITS SIGNIFICANCE IN THE ADMINISTRATION OF JUSTICE

2.1 INTRODUCTION

In order to understand access to criminal justice in Kenya, one must first understand the concept of justice. John Rawls' seminal work on “Justice” from a Western perspective theorises¹⁰⁴ a vision of the world where “actors – behind a ‘veil of ignorance’ rendering all parties equal – determined the principles of the institutions governing their social relations.”¹⁰⁵ Rawls' “institution-focused theory of justice” led to two fundamental principles. The first principle being that “each person has the right to the same liberties as those received by others.” Second, if there are to be social and economic inequalities, they must be attached to offices predicated on fair and equal hiring and must be advantageous to the worse off.”¹⁰⁶

Sen Amartya in *The Idea of Justice*, presents a substitute version of justice by, essentially, placing considering to how an effective pursuit of justice might happen. Sen's focus is not on “institutions” but rather on the “behaviour of people in societies.” He underlines the significance of the relative approach, rather than focusing on a utopic goal, such as the overall “perfectly just institution.” Sen proposes likening diverse communities facing analogous challenges and understanding the mechanisms that provide them with outcomes that are more just.¹⁰⁷ This approach moves the focus away from Rawls' “institutions” and is concerned with an individual or communities' “actual realizations and accomplishments.” The relative approach also recognizes that “different reasonable principles of justice” exist and is thus a more flexible construct when trying to understand justice as perceived by a different culture or community.”¹⁰⁸

¹⁰⁴ John Rawls (1999). *A theory of Justice*, Revised edition. Harvard University Press.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Amartya Sen, “the Idea of Justice” (Cambridge, Mass.: Belknap Press of Harvard University Press (2009).

¹⁰⁸ Steven Poole, “The idea of justice” by Amartya Sen”, *The Guardian* (7 November 2009) online: Guardian Unlimited

<<http://www.guardian.co.uk/books/2009/nov/07/amartya-sen-justice-book-review>>.

Sen further underscores the idea of open neutrality. In his view, his concept of open impartiality allows “different types of unprejudiced and unbiased perspectives to be brought into consideration, and encourages us to benefit from the insights that come from differently situated impartial spectafactors.”¹⁰⁹ In his view, “in scrutinizing these insights together, there may well be some common understanding that emerges forcefully, but there is no need to presume that all the differences arising from distinct perspectives can be settled similarly.”¹¹⁰

Sen’s idea of justice welcomes a multitude of views on what can be considered more or less just and emphasizes the process of reasoning. The latter, he says, can be “concerned with the right way of viewing and treating other people, other cultures, and other claims and with examining different grounds for respect and tolerance. We can also reason about our own mistakes and try to learn not to repeat them.”¹¹¹

Rawl’s principles, however, do not encourage an understanding of why institutions are prone to corruption. In addition, whereas these doctrines offer a tangible end goal, it is not necessarily achievable within the limited resources as civil society organizations, for example, rely on donor funding in the attempt to provide accessible justice to the poor and vulnerable groups. It can therefore be argued that Sen’s assessment of the idea of justice serves as a commencement point, for understanding justice and for mounting a “more just society” where order is maintained and personal freedoms are upheld.

The *Source Book on Access to Justice in Central and Eastern Europe*¹¹² discusses the concept of access to criminal justice in the context of legal aid and postulates that the right to free legal assistance is one of the fundamental guarantees linked to

¹⁰⁹ Supra, note 115.

¹¹⁰ Ibid, p. 52.

¹¹¹ Ibid, p. 7.

¹¹² Public Interest Law Initiative, Interrights, Bulgarian Helsinki Committee and Polish Helsinki Foundation For Human Rights (2003) p. 4.

the right to a fair trial, which is a basic human right embodied in international human rights treaties.¹¹³

Leo Milonas¹¹⁴ illustrates that many nations of the world today face the unique challenge of providing meaningful access to criminal justice to all its citizens. In an analysis of legal aid in South Africa, Van Hennie A.S.¹¹⁵ stresses that “equal access to the courts and to legal representation are the main components of access to justice.” He argues that “the onus is on states to make sure that their legal frameworks embody such key values to serve their citizenry.”¹¹⁶

Mauro Cappelletti and Bryant¹¹⁷ deliberate on issues revolving around access to justice. They explain in their writing that that the term ‘*justice*’ may mean different things. Further, that it is not easy to distinguish between “failure of “ the procedural sense and “failure of justice” in the substantive sense because the two aspects usually complement each other, with both substantive law and procedural law making legislation easier both in rule and in process.

A. Uzelac¹¹⁸ and D. Rhode¹¹⁹ discuss the in-depth issues revolving around access to justice. They opine that it is essential for state institutions to offer legal services to be accessible to the people, for justice and equality to be realized in democratic governments. Rhode expounds that it is not only the poor who are priced out of the legal system, but millions, including those of moderate income who also suffer misery because legal protections that are available in principle are inaccessible in practice.¹²⁰

¹¹³ Ibid, p.10.

¹¹⁴ Milonas, L “Ethics, Access to justice and pro bono work” The United States legal profession <http://www.abcnv.org/VanceCenter/PDF/probono/pdf> (accessed 19 November 2012).

¹¹⁵ Van, Hennie AS “Legal aid in South Africa’ Making justice reality” (2005) 49 *Journal of African Law* 54.

¹¹⁶ Ibid.

¹¹⁷ Cappelletti, Mauro (1979) 2 p.6 “*Access to justice Promising institutions*”: Sijthoff and Noordhoff.

¹¹⁸ Uzelac, A & CH van Rhee (eds.) “*Access to Justice and the Judiciary Towards New European standards of Affordability, quality and efficiency of Civil Adjudication*” (2009): Oxford University Press.

¹¹⁹ Supra, note 27.

¹²⁰ Ibid pp. 4-5.

The European Commission for the Efficiency of Justice¹²¹ emphasizes that “Access to justice should enable society to deliver a maximum number of decisions at reasonable cost to the taxpayer, with quality being a prime requirement.”

Van Vollenhoven Institute for Law, Governance and Development¹²² uses a broad definition of access to justice, taking the perspective of a justice-seeker as its point of departure and looks at the process that this justice-seeker has to go through to achieve appropriate redress. The various elements in the definition leave room to see access to justice as a process and not merely as a situation or goal. In their conceptual paper on “access to justice”, they argue that access to justice exists if:

“People, notably poor and vulnerable, suffering from injustices, have the ability to make their grievances be listened to and to obtain proper treatment of their grievances by State or non-state institutions leading to redress of those injustices on the basis of rules or principles of State law, religious law or customary law in accordance with the rule of law.”

Francioni on the other hand holds the view that “despite treaty and state practice supporting the individual right to access to justice, a number of questions and obstacles remain with respect to the effective implementation.”¹²³ He argues that “it is not enough to proclaim such a right formally if its actual enjoyment is not guaranteed by a system of fair and impartial administration of justice, something that is problematic in many countries.”¹²⁴

According to Cappelletti, in almost every discussion, people usually pursue a goal called “justice” and they assume that some group or type of person living in a society finds the door to justice closed or at least too stiff to move on its hinges.¹²⁵ He states that while in theory it is difficult to oppose equal justice under the law, in

¹²¹ Report of the Evaluation of European judicial systems (2008).

http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp (accessed 10 December 2012).

¹²² <http://law.leiden.edu/organization/metajuridical/vvi/research/access-to-justice-tu> (accessed 19 November 2012).

¹²³ Francioni, Francesco (2007) p 24: “*Access to Justice as a human right*.” Oxford University Press.

¹²⁴ Ibid.

¹²⁵ Supra, note 124.

practice, however, obstacles begin to unravel the moment we begin to question what we mean by “justice.”¹²⁶

Similarly, formal legal assistance programmes are only part of a complex system. In other words, to improve the quality of dispute resolution, justice must be maintained in individuals’ daily activities, and dispute resolution mechanisms situated within a community’s socio-economic context. Reforms should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or afford.

In the context of this study, access is conceived to include aspects of contact, entry and use of the criminal legal system. In a strict legal sense, the concept of justice is derived from law itself, as one of its attributes of being just. Justice in that sense refers to standards of rights set or defined by substantive and procedural law and enforced by specific institutions in the justice delivery system, with the state bearing the primary responsibility for the protection of those rights.

Access to justice, therefore, relates to whether or not individuals, groups and communities realize their rights from the enforcement of substantive laws using procedural rules, as well as the quality of justice availed by the justice delivery system. The study discusses access to justice generally at three main levels: access in financial terms, or how affordable legal services are to the users; access in technical terms, or how comfortable the users are with the procedural requirements which also relates to the treatment of users by the lawyers and language, and physical access, or how close the users are to the institutions that dispense justice.

No doubt, there is a significant relationship between the three aspects of access. How far or close the law enforcement institutions are from the user become irrelevant if it is too costly for them to utilize it. On the other hand, affordable legal services that are too far from the user constitute a constraint to accessing the

¹²⁶ Ibid.

services. Furthermore, if the process of accessing justice through the law enforcement institutions is too complex for the user, it will diminish the initiative of prospective users regardless of how affordable and physically accessible they are.

No right is as fundamental as the capability to access the legal system. Under common law, a right requires a capability of securing a remedy. In our view, that remedy must necessarily be found in a justice system. Thus, rights cannot exist and have meaning if the system cannot be accessed, and if it fails to provide a fair and just hearing, and result. The courts are that place where the State and individuals enforce rights. It is where rights and freedoms are protected against arbitrary interference, while ensuring that no one unlawfully interferes with the rights and freedoms of others. Implicit in this responsibility is the duty of the courts to ensure equality of access for all persons, regardless of their standing in society.

An impartial, accessible and independent judiciary plays a vital role in furthering the commitment of justice and equality under the law. Consequently, there can be no effective criminal justice if the courts act as puppets of the executive machinery. In addition, accessing the courts and other bodies with the power to adjudicate disputes must be a constitutional right, which the poor and underprivileged in society, and not just the rich and privileged, can enjoy. Further, uneven accessibility of legal institutions, for whatever reasons, impedes equal justice. This is so because legal solutions have direct social, political and economic consequences.¹²⁷

It is the duty of every judge, police officer, public prosecutor and lawyer to play a role in the promotion and protection of the rule of law without fear or favour. It is on this basis that access to justice, and therefore access to criminal justice should not only be a preserve of the rich in society, but available for all. Sometimes this notion is qualified by the exorbitant fees demanded by the advocates, corruption

¹²⁷ Pushkarova, I. (2009) "Access to Justice. Legal Aid System" p.45.

and ineptitude in the courts and among the police investigators as well as public prosecutors and other procedural and geographical hardships, making it impossible for the common citizen to access the criminal justice system.

In a democratic society where the governed relinquish a portion of their autonomy, the legal system is the guardian against abuses by those in positions of power.¹²⁸ Citizens agree to limitations on their freedom in exchange for peaceful coexistence. They expect that when conflicts between citizens or between the citizens and the state arise, there is a place that is independent from undue influence, that is trustworthy, accessible and that has authority over all the parties to resolve disputes peacefully.

The courts are that place of refuge. Civil rights and liberties are protected and advanced when citizens have access to and confidence in the criminal justice system. In other words, a stable social, political, and economic environment is created when a state is able to provide and protect its citizens from predation. If citizens lack confidence in the criminal justice services provided by the state, they will take matters into their own hands.¹²⁹ In turn, a state loses its legitimacy when it becomes incapable of monopolizing the use of force and providing security for its citizens against private violence.

Courts must be available and capable of resolving disputes between and among individuals and between citizens and the state, and the enforcement of decisions to all citizens, regardless of their class, identity, or geographical location. The existence of a properly functioning justice system increases citizens' confidence and their willingness to bring disputes to court and respect the decisions thereof. Strong rule of law principles and availability of judicial services facilitate proper solutions to civil and criminal disputes and guarantee that decisions are enforced.

¹²⁸ Art 2 of the Constitution.

¹²⁹ It is widely believed that lack of confidence in the justice system in Kenya is what caused the 2007/2008 post-election violence to erupt. Gallup, Lacking Faith in Judiciary, Kenyans Lean toward The Hague, 8.5.2009. Available online at: <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>. (Accessed on 17/10/2013).

According to Gangl, three factors affect the assessment of the legitimacy of a judicial decision. First, individuals must believe that the decision-making process considers their views. Second, decision-making should be neutral and all opinions must be granted equal consideration without favouritism. Finally, citizens must trust the judicial system and its representatives.¹³⁰

Parties' satisfaction with the procedural justice (i.e., their views of the neutrality of the process and their access to representation), affects their perception of legitimacy over and above their preferred outcome. Thus, citizens' favourable perception of the fairness of the process increases the likelihood that they will report satisfaction with the process of decision-making and the decision itself. They are more likely to accept outcomes when the process is perceived favourably.¹³¹ Implicitly, individuals accept that in an adversarial situation, sometimes one wins and sometimes one loses. However, such acceptance is only possible when everyone has a fair hearing in the decision-making process.

2.2 THE CONCEPT OF "ACCESS TO JUSTICE"

An efficient and fair system for providing justice holds individuals, including state officials, responsible for their actions. It also sets norms of behaviour for other citizens. To appreciate the significance of access to criminal justice in the context of Kenya, we must first and foremost understand the whole concept of "justice" and "access to justice." "Access to justice" is a broad concept that has no easy and concise definition.

The term "access to justice" has been used in different ways in different contexts. Traditionally, the term refers to opening up the formal systems and structures of the

¹³⁰ Amy Gangl, (2003). "Procedural Justice Theory and Evaluations of the Law-making Process," *Political Behavior*, p. 121.

¹³¹ *Ibid*, p.127.

law to disadvantaged groups in society.¹³² This includes removing legal and financial barriers, as well as social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹³³

Access to justice is also differently defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.¹³⁴ There can be no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. It legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.¹³⁵

Access to justice comprises procedural access (involving fair and expeditious trial or hearing before a court of law or tribunal) and substantive justice (which involves a fair, expedient and just remedy for violation of rights). Access to justice also refers to the courts and to administrative procedures.

Often, courts inaccessibility sometimes results in vigilantism and violence.¹³⁶ In essence, a court will normally determine who is right and who is wrong according to the law, although it may not always provide a meaningful remedy to the party found to be right. For this reason, mere access to an independent, impartial, and incorruptible system of courts does not always result in substantive justice. Resources are often required to vindicate claims of right, while lack of it can be the greatest impediment to accessing the judicial system, especially in countries where there is no state-funded legal scheme like Kenya.

Access to justice is concerned with effective use of the judicial and quasi-judicial institutions and processes in pursuit of rights. It has traditionally been seen in the context of judicial access answering the question whether one is able to access the

¹³² A definition by the United States Institute of Peace. <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice>. (Accessed on 17/10/2013).

¹³³ http://www.gaatw.org/atj/index.php?option=com_content&view=article&id=105&Itemid=116. accessed 17/10/2013

¹³⁴ UNDP, (2004) "Access to Justice."

¹³⁵ UNDP, (2006) "Access to Justice."

¹³⁶ Supra, note 81 pp. 6-7.

judiciary to vindicate their rights when they are violated. Access to justice answers the fundamental questions including: are the judicial structures available? What about the cost, is it affordable? What are bureaucratic formalities that could hinder quick access to justice?

Access to justice is therefore more than improving an individual's access to courts or guaranteeing legal representation. Other questions that need to be addressed in the context of the concept of access to justice are with regard to the operations of the institutions charged with dispensing justice, and whether they are easily accessible in terms of the number of users; the exemptions accorded to the poor in terms of court filing fees; the existence of legal aid and *probono* programmes; how expeditious justice is dispensed; the application of principles of natural justice; and the effective enforcement of remedies.

2.3 WHAT IS CRIMINAL JUSTICE AND WHY IS ACCESS TO CRIMINAL JUSTICE IMPORTANT

Criminal justice, according to the Oxford Dictionaries, is “a system of law enforcement which is directly involved in the arrest, prosecution, defence, sentencing, and punishment or rehabilitation of those who are alleged or convicted of criminal offenses.”¹³⁷ Criminal justice is thus “the application of laws regarding criminal behaviour.” Players in the criminal justice include the police, prosecution, witness protection agencies, suspects, complainants, lawyers, judicial officers, civil society organizations and activists, prisons service, probation and aftercare services. Justice in a criminal sense has many aspects including the fair trial accorded to the accused persons, as well as the punishment or rehabilitation of victims of crime.

Access to justice is considered to be “an essential element of democratic governance and development and a normative prescription for democratic governance and the rule of law. As such, its means, requirements and ends are all consensually agreed upon to be located beyond the exclusive confines of the

¹³⁷ Oxford Dictionary, Oxford University Press.

judicial system.”¹³⁸ Access to justice revolves around the just and equitable resolution of disputes and grievances.

Strong linkages exist between poverty and access to justice since being poor, marginalized and vulnerable, transforms into being dispossessed of an opportunity to access basic resources and a say in decision-making. Inaccessible justice further limits not only a facilitative business environment, but also the effectiveness of poverty reduction and democratic governance efforts as it limits accountability, transparency and participation.

Access to justice is a basic human right entrenched in most constitutions and reflected in various covenants already ratified. However, many people in this region of the world and especially in Kenya are denied this fundamental right because of the following: The high cost of legal services; corruption and ineptitude of judicial officers and staff; lack of public awareness of their legal rights; massive delays of court proceedings largely due to a limited number of courts; poorly equipped and staffed courts; long distances from the court; fear of the formal courts and justice system due to alien, incomprehensible and complex procedures and the use of a language they do not understand.

Some international instruments like the Universal Declaration of Human Rights (UDHR),¹³⁹ the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁰ and the African Charter on Human and People’s Rights (ACHPR),¹⁴¹ lay emphasis on the significance of the principle of access to justice. They consider access to justice a fundamental and independent human right.

The former Secretary General of the United Nations who had this to say highlighted the importance of access to justice:

“The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process

¹³⁸ Rajesh Choudree (2003). UNDP Governance centre, Oslo, Access to Justice Adviser), “Poverty and Access to Justice: An Overview, “cited in a survey of private legal practitioners to monitor access to justice by the disadvantaged in the Philippines, p.9.

¹³⁹ Art 8.

¹⁴⁰ Art 14.3(d).

¹⁴¹ Art 7.1.

when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means. In addition, we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to justice and the rule of law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers as well as many issues beyond the criminal justice system. Local actors must be involved from the start. The aim must be to leave behind strong local institutions when we depart.”¹⁴²

Effective access to criminal justice is a necessary condition for the establishment of the rule of law, which is important in according communities opportunities. In the absence of the rule of law, there can be no accountability for government actions and abuses of fundamental rights of its citizens. Accessibility to criminal justice “employs procedural protections to counter a state’s coercive legal apparatus.” Access to criminal justice offers mechanisms such as due process. Barriers to criminal justice underpin poverty and exclusion.¹⁴³ Access to criminal justice promotes social and economic inclusion.

Further, inaccessible criminal justice underwrites unchecked abuse of political power and violence meted by the security agencies on the poor and vulnerable groups. Other impacts include the fact that the poor may pay high premiums for public goods and basic services, use scarce resources to act as self-protection.

In its various reports, the United Nations Development Programme (UNDP) has consistently emphasized, “access to justice is a fundamental human right, as well as a key means to defend other rights.”¹⁴⁴ In addition, inaccessibility to justice is said to define poverty, and is an obstacle to poverty eradication.¹⁴⁵

¹⁴² UNDP (2004) ‘Access to Justice Practice Note’ p.4.

¹⁴³ UNDP (2008) Commission on Legal Empowerment of the Poor, “Making the law work for everyone”) 1, 33.

¹⁴⁴ UNDP (2005) Programming for Justice P.3 “Access to justice for all’ A Practitioners Guide to a Human Rights-Based Approach to Access to Justice.”

¹⁴⁵ Penal Reform International (2000) “Access to Justice in Sub-Saharan Africa’ the role of traditional and informal justice systems” 22 London <http://www.peacebuildinginitiative.org> (accessed 10 December 2012).

UNDP considers an effective justice sector to be a condition precedent for economic growth. It is for this reason that majority of the UNDP programmes focus on enhancing the capacities of the judiciary to deal with civil and commercial matters, as a way of averting and overcoming human poverty, by strengthening the vulnerable people's choices to pursue and obtain effective remedies for their grievances. It follows, therefore, that accessing justice plays a role in achieving the security of the people.¹⁴⁶

In the 1970s, an Italian jurist, Mauro Cappelletti, conducted a research on "*access to justice in modern societies*," In emphasizing the importance of access to justice, Mauro Cappelletti stated:

"The right of effective 'access to justice' has emerged with the new social rights. Indeed, it is of paramount importance ... Effective access to justice can be seen as the most basic requirement, the most basic human right, of a system which purports to guarantee legal rights."

In other words, access to justice could be said to be the hallmark of any enlightened society, guaranteeing people's rights.

Our history demonstrates that without justice, there can be no peace, unity and liberty.¹⁴⁷ This is evident in the words of our national anthem, "Justice be our shield and defender" comes before "May we dwell in unity, peace and liberty." situation undermines the rule of law that is premised on the principle that all individuals stand equally before the law.

Access to justice is critical in matters of environment¹⁴⁸ environmental justice such as the one propounded by the late Professor Wangari Maathai to protect the environment from destruction is achieved through judicial review of decisions made by public officials to defy the laws that promote and protect the environment from utter destruction. Without this knowledge, capacity and accessibility to

¹⁴⁶ Supra, note 93 p.4.

¹⁴⁷ UNDP Final Report Kenya (2007) <http://www.undp.org/legalempowerment> (accessed 19 November 2012).

¹⁴⁸ Sadeleer, Nicolas et al "Access to Justice in Environmental Matters and the Role of N-GOs: Empirical Findings and Legal Appraisal" (2005): Europa Law publishing http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf (accessed 19 November 2012).

enforce environmental justice, people suffer from the effects of pollution, environmental degradation and other hazards.¹⁴⁹ Only the courts or tribunals can ensure through pronouncements, that the state and other persons respect this right to a clean and healthy environment.

Access to justice can be considered a handmaiden of true peace. As stated by the UNDP report,¹⁵⁰

“Access to justice is an integral element of any peace-building and long-term development process after conflict. Concepts of redress and justice are central to peace, trust and confidence-building.”

Koffi Annan, the past United Nations Secretary-General in the report titled “*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*” emphasised this point of justice and peace being intertwined when he stated:¹⁵¹

"Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."

In other words, if people feel that their justice requirements are satisfactorily taken care of, through a variety of fair and expeditious mechanisms, they are most likely to have faith and confidence in the mechanisms put in place to address the post-conflict situations.

Access to criminal justice comes in to control abuse of power and the protection of human rights abuses. These groups face social, economic and cultural exclusion, and to them, the elimination of all barriers as they seek remedies is the solution to

¹⁴⁹ Art 47 of the Constitution guarantees the right to “a clean and healthy environment.” Under Article 22, enforcement of this right is free of charge.

¹⁵⁰ Ibid p.180.

¹⁵¹ UN Doc.S/2004/616 (August 23, 2004) para 2 <http://www.un.org/en/ruleoflaw> (accessed 19 November 2012).

those historical injustices. Highlighting this fact, the Kenya Poverty Reduction Strategy Paper (2003/2004)¹⁵² provides that:

"...the application of these principles to reduce human deprivation, promote human rights and achieve sustainable growth requires close, determined and sustained political commitment"

In the absence of justice, people's voices cannot be heard¹⁵³ According to the World Development Report, 1997, "access to criminal justice provides essential preconditions for economic growth, ensuring life and personal security and reducing political risks to investors. It also cuts down on transaction costs and fosters the development of markets in land and capital. Markets cannot exist without effective property rights,¹⁵⁴ and effective property rights depend upon three conditions namely, protection from theft, violence and other acts of predation, protection from arbitrary government action and a reasonably fair and predictable judiciary capable of enforcing those rights."¹⁵⁵

2.4 CONCLUSION

In conclusion, access to justice is inherently linked to the promotion and protection of human rights. It contributes to sustainable peace, rule of law and reduction of poverty. It contributes to development, and if people can access justice institutions, they are better placed to enjoy and have their legal, political, social and economic rights recognized, protected and enforced. On the other hand, when people's right to accessing justice is obstructed, they are exposed to socio economic vulnerability, legal uncertainty and political discrimination. In its report, the World Bank states:

...“legal institutions including courts play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practices. Justice Systems can provide a vehicle to mediate conflict, resolve disputes, and sustain social order.”¹⁵⁶

¹⁵² Chapter Four of the Kenya Strategy Paper on Governance (2003/2004).

¹⁵³ UNDP Democratic Governance publication (2009). Access to Justice and the Rule of Law.

¹⁵⁴ World Development Report (1997) p. 99.

¹⁵⁵ Ibid. The report states that the state's role in the institutional environment underlying the economy, that is, its ability to enforce a rule of law to underpin transactions, is vital to making government contribute more effectively to development. It argues against reducing government to a minimalist state, explaining that development requires an effective state that plays a facilitator role in encouraging and complementing the activities of private businesses and individuals.

¹⁵⁶ World Development Report on Equity and Development, (2006).

With respect to Courts and the procedures thereof, for example, expeditious implementation and enforcement of contracts contributes to accessible credit with ease thereby creating more job opportunities for the youth which translates into economic progress, and therefore, poverty reduction and reduced delinquency.

The next chapter discusses the policy, legal and institutional frameworks for access to criminal justice in Kenya.

CHAPTER THREE

3.0 POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS FOR ACCESS TO CRIMINAL JUSTICE IN KENYA

3.1 INTRODUCTION

Criminal justice does not exist in a vacuum it is regulated by constitutional, policy, legal and institutional frameworks. On the legal front we have several Acts of Parliament which include the Criminal Procedure Code, the Penal Code, the Prisons Act, the Children's Act, the Witness Protection Act, the Anti-Corruption and Economic Crimes Act, the Sexual Offences Act, the National Police Service Act, the Borstal Institutions Act and the Victims Protection Act, among others.

Similarly there are several policies and guidelines both at the national and international level that promote access to criminal justice in Kenya. These include the sentencing policy, the prosecution policy, the sexual Offences policy, the bail and policy among others. Beyond the legal and policy frameworks, we have the institutional and constitutional frameworks, with the latter being the foundation for the rest of the frameworks within which the criminal justice system operates.

The significance of access to criminal justice in Kenya is demonstrated by its recognition of the international instruments guiding the criminal justice reform. These include the "United Nations Code of Conduct of Law Enforcement Officials,"¹⁵⁷ "Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary,"¹⁵⁸ The "United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),"¹⁵⁹ "Procedures For the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners,"¹⁶⁰ "UN Standard Minimum Rules for Non-Custodial Measures(the Tokyo Rules),"¹⁶¹ the "Declaration of Basic Principles of Justice for

¹⁵⁷ General Assembly Resolution No. 34/169, annex.

¹⁵⁸ ECOSOC Resolution 1989/60, annex.

¹⁵⁹ Assembly Resolution 40/33, annex.

¹⁶⁰ Council Resolution 1984/47, annex.

¹⁶¹ Assembly Resolution 45/110, annex.

victims of crime and abuse of Power”¹⁶² and the “Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime among other instruments.”¹⁶³

Kenya is a signatory to most regional and international human rights instruments that guarantee access to criminal justice. The nexus between international and national law instruments is categorized from monist or dualist viewpoints. This characterization, however, remains highly contested, depending on individual states’ domestic constitutions.

Since the effective date of the 2010 Constitution, there have been discourses on whether Kenya, which has been a *dejure* and *defacto* dualist state is now a monist state, with the inclusion of Articles 2(5)(6). Under this Article, “international law, once ratified, forms part of the law of Kenya under the Constitution.” In addition, “the general rules of international law form part of the law of Kenya.” There are arguments that these provisions signify “the scientific revolution and overthrow of the dualist paradigm, and establishes the monist paradigm as the new problem-solving one in the treaty practices of Kenya.”¹⁶⁴

In their persuasion, the espousal “of monist treaty practice will create separation of powers and improve the implementation of international law in Kenya.”¹⁶⁵ In this approach, the writers content that “the role of each of the three organs of state will become even better defined because whereas the executive will negotiate treaties; Parliament will debate about them, and make voting decisions about whether they should be ratified or not.”¹⁶⁶

¹⁶² Council Resolution 1989/57.

¹⁶³ “Council Resolution 2005/20, annex.”

¹⁶⁴ Mwangi Makumi, (2011).”From Dualism to Monism: The Structure of Revolution in Kenya’s Constitutional Treaty Practice.” *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1,* 144.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Such argument appears to change the previous position espoused in the case of *Okunda vs. Republic*,¹⁶⁷ where the question of the supremacy of East African Community law over Kenyan law was in issue. The East African Court of Appeal held that international law is only binding municipally upon domestication through statutory enactments. Some scholars on the other hand argue that international instruments, though ratified, and customary international law must be transposed into national law through legislation or executive order before they become part of the municipal legal system.¹⁶⁸ They argue that monism challenges the traditional understanding of sovereignty and that Kenya could not have intended such a drastic change.¹⁶⁹

Furthermore, Article 21(4) of the Constitution obliges the State “to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.” This is fortified by Article 94(5) of the Constitution, which enacts that “no person or body other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation.”

The impression created by these provisions, coupled with the procedure provided for enacting legislation under part 4 reveals that all laws enacted by Parliament must be originated by way of bills. Parliament does not merely adopt treaties as part of the laws of the land. Neither does it debate them as laws for purpose of adopting them. It only debates treaties for purposes of ratification by the executive.¹⁷⁰ One can therefore safely argue that the international instruments, even after ratification, must be domesticated or transposed into the municipal laws before they have the force of law¹⁷¹ this is notwithstanding the recent purposively interpretation by some Kenyan judges of Article 2(5) and (6) to mean that upon

¹⁶⁷ *Okunda vs. Republic* [1970] EA 453.

¹⁶⁸ Wambua Paul Musili, (2012) *Aborted Monism; An analysis of treaty Practice under the new constitution*.

¹⁶⁹ *Ibid.*

¹⁷⁰ See section 8 and 9 of the “Treaty Making and Ratification Act No. 45 of 2012.”

¹⁷¹ *Supra*, note 109.

ratification, international instruments apply to Kenya automatically without the need for domestication.¹⁷²

The above discussions notwithstanding, Kenya has ratified and domesticated several regional and international human rights instruments that promote access to criminal justice. These instruments include the “United Nations (UN) Charter,” “the International Covenant on Civil and Political Rights (ICCPR)”¹⁷³ and the “African Charter on Human and Peoples’ Rights (ACHPR).”¹⁷⁴ Many of the guarantees found in these instruments are replicated in the “Principles and Guidelines on the Right to a “Fair Trial” and Legal Assistance in Africa.”¹⁷⁵ Within the Commonwealth, “the 1998 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence” and “the 2003 Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government” are also binding on Kenya.

Other international and regional instruments guaranteeing access to criminal justice are the “Universal Declaration of Human Rights,” “the United Nations Convention on the Elimination of all Forms of Discrimination against Women,” “the United Nations Convention on the Rights of the Child,” “the Convention on the Rights of Persons with Disabilities” and “the International Convention on the Elimination of all forms of Racial Discrimination (ICERD).”

The other instruments are the “Bangalore Principles on Judicial Conduct” as adopted in 2001 by a world Chief Justices gathering in Bangalore. These Principles set out “standards for the ethical conduct of judges,” emphasising the independence and accountability of the judiciary, thereby playing a critical role in enhancing access to justice for all.¹⁷⁶

¹⁷² *Re the Matter of Zipporah Wambui Mathara [2010] eKLR.*

¹⁷³ “Date of accession 01 May 1972.”

¹⁷⁴ “Date of accession 23 January 1992.”

¹⁷⁵ “Adopted by the African Commission on Human and Peoples’ Rights in 2003.”

¹⁷⁶ These standards together with further details are contained in International Commission of Jurists guide on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.

Regionally, Kenya has also endorsed “the African Charter on the Rights and Welfare of the Child (ACRWC),” “the 1951 UN Convention relating to the Status of Refugees,” “the 1967 Protocol Relating to the Status of Refugees,” and “the Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa.” All these instruments have a bearing on access to criminal justice in various forms.

The above instruments once ratified, where ratification is necessary, and or domesticated, “form part of the law of Kenya, under the Constitution.” The relevant applicable principles or rules are then reflected in the policies and legislation, which subsequently establish institutions to implement the principles or rules of international law, with the intention of guaranteeing the “promotion and protection of human rights particularly relating to access to criminal justice.”

3.2 POLICY FRAMEWORK

On the policy front, the Kenya Vision 2030 aims at “adherence to the rule of law applicable to a modern, market-based economy in a human rights-respecting state.” The 2012 intermediate objective of the Vision is “to enact and implement the policy, legal and institutional framework vital for promoting and sustaining fair, affordable and equitable access to justice.”

Among other strategies, the country is determined to achieve this objective through “the alignment of the national policy and legal framework with the needs of a market-based economy, national human rights and gender equity commitments, increasing service availability and access to justice and streamlining the functional capacity of the legal and judicial institutions to enhance inter-agency cooperation.”¹⁷⁷

The policy also aims at reviewing legislation that is clearly not conducive to a good business environment in Kenya, and “instilling a culture of compliance with laws

¹⁷⁷ The Kenya Vision 2030.

and decent human behaviour.”¹⁷⁸ This is intended to “promote the rule of law and enhance access to justice for all.”¹⁷⁹ Based on this vision, there have been efforts to develop policies that guarantee human rights and access to criminal justice in Kenya.

Among the efforts, is the development of the Medium Term Plan of 2008-2012, which was the first phase implementation plan for the Kenya Vision 2030, which notes implementation of several projects that would serve to “improve access to justice” These are related to flagship projects dealing with general improved conditions of reform in the justice sector and address the impact “of the post-election violence of 2007.”

Among the strategies were to establish “the truth, Justice and Reconciliation Commission to deal with transitional justice issues and the post-election legal counselling.”¹⁸⁰ The Post- Election Legal Counselling project was most directly related to the “provision of legal aid in Kenya” and noted that “the National Legal Aid (and Awareness)” Program’s (NALEAP) objectives would be enhanced to include post-election legal counselling and would consequently be fast tracked within the six pilot locations.

The Vision also incorporates the legal counselling component directed at those citizens who were affected and traumatized by the 2007-2008 violent events this component was to be prioritized at the pilot locations.¹⁸¹ Annual progress reports of the Medium Term Plan noted the achievements of NALEAP and acknowledged the same as having made strides towards greater “access to justice through provision of legal advice to citizens in need,” training on alternative dispute resolution mechanisms and training on paralegal work, among other key activities.¹⁸²

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, p.132.

¹⁸⁰ The TJRC (Commission) was established in 2009 and wound up in 2013.

¹⁸¹ See “Kenya National Dialogue and Reconciliation Process” and the implementation process facilitated by the defunct “Ministry of Justice, National Cohesion and Constitutional Affairs.”

¹⁸² 2008-2012 Medium Term Plan Annual Progress Report, January 2013.

Other national policies include the Policy on Human Rights, Policy on Internally Displaced Persons, Prosecutions Policy, the Draft Policy on Legal Aid and Awareness and the sexual offences policy among others. These policies, apart from the policy on Legal Aid and Awareness, have been adopted by the Cabinet and are being implemented awaiting legislative support. Some of these policies are briefly examined here below.

3.2.1 THE PROSECUTIONS POLICY

The exercise of prosecutorial power must be seen in the context of national development. Efficient, effective and fair prosecutions is an essential component of administration of criminal justice. Successful prosecutions are a foundation of a safe and secure environment in which people can contribute to national development goals. This is so because prosecution has far-reaching implications on the right to liberty, reputation, property and other interests of those directly or indirectly affected by crime. It therefore calls for extreme caution in the exercise of prosecution power.¹⁸³

The Office of Director of Public Prosecutions developed a Prosecutions Policy through public participation. The Policy provides guidelines to prosecutors in deciding whether to prosecute and in the selection of charges to prefer. The policy also explains the prosecutor's role as an officer of the court thereby empowering the public to demand fair, efficient and effective public prosecution services taking into account the public interest, as espoused in the Constitution.¹⁸⁴

3.2.2 THE BAIL AND BOND POLICY

In March, 2015, the immediate former Chief Justice and President of the Supreme Court of Kenya Dr. Willy Mutunga launched the Bail and Bond Policy, observing that the country had 53,789 inmates and 20544 people remanded in custody, well above the capacity of the prison amenities." The policy is intended "to eliminate the contradictions in issuing bond and bail to suspects of crime in the country." It was noted that previously,

¹⁸³ Former Attorney General Amos Wako in his foreword to the National prosecution Policy, 2007

¹⁸⁴ Article 157.

the courts were not consistent in granting bail or bond, which resulted in grievances of excessive and unreasonable bond and bail terms beyond the reach of many.¹⁸⁵

3.2.3. THE SENTENCING POLICY

Sentencing is one of the most important aspects of criminal justice. It comes at the tail end of a successful prosecution of an offender. On 28 January 2016, the retired Chief Justice Dr. Willy Mutunga officially launched the Taskforce Report on Sentencing chaired by Honorable Justice Mboghli Msagha of the High Court. The detailed and comprehensive policy guidelines reflect the judiciary's commitment to its transformation path in line with its constitutional mandate to deliver efficient and expeditious justice for all persons irrespective of their status.¹⁸⁶ The policy guidelines also provide coherent sentencing structures based on the principles of fairness, justice, proportionality and commitment to public safety. The policy guidelines are expected to curb arbitrariness in sentencing of convicts and enhance public confidence in the criminal justice system.¹⁸⁷

3.3 CONSTITUTIONAL AND LEGAL FRAMEWORKS

The legitimate framework on access to criminal justice in Kenya comprises the Constitution, legislative enactments and the rules and regulations made thereunder; judicial pronouncements and codes of conduct, and customary practices that govern the society. We examine some of these below.

3.3.1 THE CONSTITUTION OF KENYA, 2010¹⁸⁸

The Constitution of Kenya recognizes “access to justice as a fundamental human right.”¹⁸⁹ The Constitution is the supreme law of the land, it “binds all persons and state organs at all levels of government.”¹⁹⁰ “Any other law, policy or decision that is at variance with the Constitution becomes void to the extent of that inconsistency.”¹⁹¹ Chapter Four contains an elaborate Bill of Rights, and access to justice is one such guarantee. The state is obliged to “ensure access to justice for all

¹⁸⁵ The policy is in line with Article 49 of the Constitution on the right to bail by all accused persons.

¹⁸⁶ Article 159 of the Constitution.

¹⁸⁷ The Judiciary. Sentencing Policy Guidelines, (2016).

¹⁸⁸ Promulgated on 27 August 2010.

¹⁸⁹ Article 48.

¹⁹⁰ Ibid Art 2(1).

¹⁹¹ Ibid. Art 2(4).

persons and if a fee is required, it shall be reasonable, and it shall not impede access to justice.”¹⁹²

Other relevant constitutional provisions on access to criminal justice are as stipulated in Article 47 on the right to “fair administrative action,”¹⁹³ Article 50(1) on fair hearing; Article 50(2) on “fair trial,” including the “right to have adequate time and facilities to prepare for defence, to choose, and be represented by, an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

The “right to a fair hearing,” which includes the right of an accused person “to have an advocate if it is in the interest of justice,” means that an accused person may, in the discretion of the court “receive a court-appointed advocate” if the court considers it necessary for example, where the sentence to be imposed in the event of a conviction is likely to be death or life imprisonment. Suspects who are unable to mount their own defences owing to a disability are expected to be assigned an advocate at the state expense. Free legal representation could also be availed to the accused person “where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence.”

However, seven years into the implementation of the Constitution, these rights are yet to be actualized. Many people accused of committing serious crimes are still representing themselves. The courts have not helped either, as they only apply the pauper brief system, which the judiciary facilitates for indigent murder suspects.

Under the Constitution, “Substantial injustice” is not clear. However, regional and international instruments which include conventions and declarations ratified by Kenya offer help to the courts in the interpretation.¹⁹⁴ In this regard, the

¹⁹²Art 48.

¹⁹³Fair Administrative Action Act No. 4 of 2016).

¹⁹⁴ Because they form part of the law of Kenya as stipulated in Article 2 (5) and (6) of the Constitution.

“International Covenant on Civil and Political Rights” as well as the “Commentaries by the Human Rights Committee” and “Communications by the African Union Commission” provide useful interpretation in those instances where legal aid is mandatory. Under these instruments, the test for substantial injustice is when the sentence would be very stiff such as life or other long sentence, not in a matter where a fine would be meted out and where the accused is an indigent person.¹⁹⁵

The Constitution also provides for implementation of the fundamental rights and freedoms under Chapter Five.¹⁹⁶ and “any person can bring an action on his or her own behalf, or on behalf of another person, as a member of, or in the interest of, a group, or, in the public interest.” There is also the guarantee for “administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” Furthermore, no filing fees is chargeable where the person seeks to enforce rights and fundamental freedoms, thereby promoting the enforcement of fundamental rights and freedoms.¹⁹⁷

Children can only be incarcerated as a last option.¹⁹⁸ The Constitution further guarantees rights of Persons with disabilities who are entitled to access all places, public transport and information.¹⁹⁹ Braille and Kenya Sign Language are specifically mentioned.²⁰⁰ This ensures that special needs including easy access to the courts and translation or interpretation of court proceedings is undertaken for them.

To insulate these rights from derogation by the state, the Constitution provides that none of these rights, including the right to access justice in its various forms, “shall be limited in any way, except by law.” Further, “any provision in legislation limiting a right or fundamental freedom must specifically express the intention to,

¹⁹⁵ Article 49 obliges the police to “bring suspects before a court not later than twenty-four hours” upon arrest.

¹⁹⁶ ¹⁹⁶ Articles 21, 22& 23 of the Constitution.

¹⁹⁷ Ibid, Article 22(3) (c).

¹⁹⁸ Ibid Art 53.

¹⁹⁹ Ibid, Art 54.

²⁰⁰ Ibid, Art 7.

and the nature and extent of the limitation, and must be clear and specific about the right or freedom to be limited.” “In no case can any law limit a right or fundamental freedom so far as to derogate from its core or essential content.”²⁰¹

The Constitution also sets the basis upon, and parameters within, which the conduct of every institution and person is determined. A sound and effective justice system will ensure rule of law and good governance. For good governance to prevail, credible policy and legal environment is therefore essential.

On the procedural aspect of criminal prosecution, Article 50(1) stipulates that “if a person is charged with a criminal offence, the case shall be afforded a fair and public hearing within a reasonable time, by an independent and impartial court or tribunal established by law.” The presumption of innocence and the use of intermediaries by complainants to communicate with the court are also guaranteed.

On the enforcement of these fundamental rights, the High Court is vested with jurisdiction to redress any contravention under the Bill of Rights.²⁰² A person aggrieved by the determination of the subordinate, other Superior Courts and the High Court may appeal not only to the Court of Appeal as of right, but also to the Supreme Court.²⁰³

The Constitution provides a right of access to legal representation in criminal cases²⁰⁴ and the right to bail pending trial.²⁰⁵ It can be argued that this guarantee is not adequate “to ensure access to justice for all” as the only provision regarding access to justice in civil cases is fair administrative action.²⁰⁶

²⁰¹ Ibid, Art 24.

²⁰² Ibid, Art 51(2) as read with Article 23.

²⁰³ Sec 3 of the Supreme Court Act No. 7 of 2011 provides that one of the objects of the Supreme Court is to improve access to Justice.

²⁰⁴ Ibid, Arts 47-51.

²⁰⁵ Ibid, Art 49.

²⁰⁶ Ibid, Art 47.

The Constitution further mandates the courts, in the exercise of judicial power, to apply certain principles that improve accessing justice. These include “expeditious disposal of cases,” “administration of justice without undue regard to procedural technicalities” that normally accompany litigation²⁰⁷ and “the promotion of alternative and traditional dispute resolution mechanisms,” unless “they contravene the Bill of Rights,” the Constitution or “are repugnant to justice and morality.”²⁰⁸

These Constitutional provisions have already impacted on NGOs that engage in “public interest litigation” in that the NGOs are now redirecting their attention from what previously used to be “general public interest litigation” to “Constitutional and Human Rights Litigation.” The Judiciary on its part has set up separate High Court divisions and units especially in Nairobi to deal with constitutional Petitions, judicial review of administrative actions, criminal matters as well as the anti-corruption and economic crimes matters.

On the part of the legal practitioners, it is expected that many of the larger commercial law firms will have to mount special Constitutional Litigation units in order to prepare themselves for the new practice under the Constitution. The government is also collaborating with local and international partners in the training of the police and other players on the implications of the new bill of rights.²⁰⁹

To insulate these guaranteed rights and fundamental freedoms from derogation by the state, the Constitution provides that these rights may not be limited except by legislation specifying the right or freedom to be limited, the intention of the limitation, and the nature and extent of the limitation.²¹⁰

²⁰⁷ Ibid, Art 159(2) outlines principles by which the courts, in the exercise of judicial authority, shall be guided.

²⁰⁸ Ibid, Art 159(3).

²⁰⁹ This is conducted through the Kenya National Integrated Civic Education (KNICE) Programme.

²¹⁰ Articles 24 &25 of the Constitution.

3.4 LEGISLATIVE FRAMEWORK

Parliament has enacted several pieces of legislation which focus on improving access to criminal justice. For example, the Children's Act²¹¹ mandates provision of legal aid and legal representation for children in conflict and contact with the law, and protects children from harmful practices by, for example, criminalizing genital mutilation and forced marriages, which may be culturally acceptable in some communities.

The Children's Act further establishes special magistrates' courts with jurisdiction to hear and determine cases where children are the subjects. These courts are presided over by specially trained magistrates who are also child-friendly.²¹² Most of the proceedings involving children are held in camera, although the press may be allowed to cover the subject matter for purposes of informing the public of the dangers the children are exposed to in the society, and in order for the caregivers to take protective measures against potential predators. Child offenders may not be held in the same detention facility with adult offenders.

The Children's Act further limits the period within which a child should be tried, which is not more than six months in capital offences, and a maximum of three months in all other cases. The implementation of the Children's Act has seen an improved access to justice for children. Many civil society organizations like the CRADLE and CLAN are committed to ensuring children access justice through these courts by not only representing them, but also building the capacity of their guardians and holding sensitization programmes on the rights of the child. These organizations have also recruited *probono* advocates to represent the children free of charge in exchange for awards, recognitions and minimal honoraria per concluded case.

The Sexual Offences Act improves access to justice for victims of injustice by sex predators. The requirement for corroboration of the victim's evidence with the

²¹¹ Cap 586 Laws of Kenya.

²¹² Ibid, Part VI secs 73-76.

medical evidence as being sufficient proof, sentence prescribed under the Act for the convicted offenders is a maximum of life imprisonment and hearing of the cases in camera have, in a way, ensured that victims are protected from the public eye and enabled to testify without fear. However, it cannot be said that this has effectively deterred sex offenders as reports indicate that sexual offences are increasing day by day.²¹³

The Persons with Disabilities Act makes provision for legal aid to persons with disabilities, besides waiving taxes on some essential services and goods imported for their exclusive use. The Persons with Disabilities (Legal Aid) Regulations, 2009, provide that persons with a disability are entitled to legal aid in matters affecting the violation of their rights. A nominee of the NCPWD is a representative to the Legal Aid Service Board.

The regulations made under the Act provide that the persons living with disabilities should lodge an application for legal aid with the Council. This requirement for involvement of the National Council for Persons with Disabilities regrettably discourages many people from seeking legal aid, as the process is long and tedious. Further, the NCPWD is not represented in all parts of the country and therefore most of the affected persons do not benefit from the service. Partly, because they have no information on the services and partly because they are not financially able to reach the urban centres.

The “Commission on Administrative Justice Act, 2011,” (CAJ) establishes the “Commission on Administrative Justice,” thus providing an avenue for redress of complaints on maladministration and delayed administrative action by public servants, among other remedies.²¹⁴ This provides an avenue for those affected to

²¹³Statistics from the Kenyan police show that the annual total rose by 33 per cent – more than 1,000 cases – from 2007 to 2011. Other statistics indicate that “three out of ten women suffer some gender-based violence.” In the 2010 study led by the United Nations Children’s Fund (UNICEF), 32 per cent women between the age of 18 and 24 who were surveyed said they had suffered sexual violence before they turned 18. http://www.standardmedia.co.ke/?articleID=2000085284&story_title=policestatistics-shows-crime-level-down-by-10-per-cent-between-january-and-may&pageNo=3 (accessed 17/10/2013).

²¹⁴Implements Article 59 of the Constitution.

get legal advice, whether on delayed or delayed justice on the appropriate action to take to access justice, whether civil or criminal.

The Criminal Procedure Code²¹⁵ accords free legal representation to persons who are charged with murder only. The challenge here is that the judiciary appoints legal counsels practicing within the jurisdiction of the court for the accused and one may not have a choice for a particular lawyer. Further, the judiciary does not pay the court appointed advocates up front. As a result, most advocates are not keen on taking up pauper briefs and even where they do, their commitment is not guaranteed.

Other legislation with provisions on free legal representation includes the Counter-Trafficking in Persons Act, which exempts the victims from prosecution and guarantees them access to free legal services.²¹⁶ Under this legislation, trafficked persons are considered vulnerable and victims who are entitled to legal aid and representation.

The Contempt of Court Act²¹⁷ was enacted in 2016 and came into force on the 13th day of January, 2017 espouses the respect for court processes. Any person who disobeys a court order or contemptuously obstructs the course of justice would be punished in accordance with the Act. This Act promotes the respect for the rule of law although the punishment for breach is too lenient.

The Witness Protection Act²¹⁸ creates the Witness Protection Agency responsible for protection of complainants or witnesses in serious crimes such as corruption and economic crime, international crimes and crimes against humanity. This guarantees justice for the victims and witnesses who would be afraid of testifying against the accused persons for fear of reprisals.

²¹⁵ Cap 75 Laws of Kenya.

²¹⁶ Counter-Trafficking in Persons Act, No.8 of 2010.

²¹⁷ Act No. 46 of 2016.

²¹⁸ Act Chapter 79 of Laws of Kenya.

However, the uncovering of information concerning some witnesses of the International Criminal Court trying Kenya's President, his Deputy and a radio journalist on social media platforms generated concerns on the risks associated with exposing confidential information regarding the protection of witnesses via social broadcasts.

The Power of Mercy Act, (POMA)²¹⁹ is an important legislation in the promotion of access to criminal justice. The Act espouses that on petition of "any person," the president may exercise a power of mercy in accordance with the advice of the Advisory Committee... and may grant a free or conditional pardon to a person convicted of an offence.²²⁰ The Act establishes the Advisory Committee on the Power of Mercy (ACPOM) and the duration of the Power of Mercy among other provisions. However, victims of the crime have a right to express objections to the application of the power of mercy in favour of a convict.

The Legal Aid Act, 2016 formalizes the national consensus on the form and delivery of government legally aided services. The Act defines legal aid to suit the needs within the Kenyan context of advice for criminal, civil and constitutional matters, assistance with drafting of instruments, referrals to advocates as well as pupil advocates and/or student lawyer, and other actions that do not constitute legal representation. Provision of legal aid services also encompasses Alternative Dispute Resolution (ADR).²²¹

The Act establishes the mechanism for delivery of services through the National Legal Aid Service, charged with the overall responsibility and accountability for the establishment and operationalization of the Service, with a level of autonomy suitable for effectively transacting on actions that would ensure quality service delivery.

²¹⁹ Act No. 11 of 2011 enacted pursuant to Article 133 of the Constitution.

²²⁰ Section 19 of the Power of Mercy Act.

²²¹ As per Article 159 of the Constitution.

The Service which is yet to be operationalized is governed by a Board of Directors constituted by representative members of the Judiciary, LSK, Universities Law Clinics, two Civil Society Organizations, the National Treasury, the Principal Secretary in the Ministry responsible for matters related to legal aid, a delegate jointly nominated by the Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC), the Director of Public Prosecutions, Principal Secretary responsible for Interior and National Government, Nominee of the Council of Legal Education, National Council for Persons with Disabilities and the Commission on Administrative Justice (CAJ) and the Director in charge of the Service.²²²

The Act also establishes the Legal Aid Fund would rely on both public and private sources of funding. Along with definition of allowable services, the Act sets forth criteria for eligibility using personal qualifications, income threshold and chances of success. Eligible indigent persons include citizens, children, and refugees, victims of human trafficking, and internally displaced persons (IDPs) or stateless persons.

Matters of public interest are also criteria for eligibility. The proposed National Legal Aid service will maintain a database of approved legal service providers who will be able to offer legal aid to applicants. Eligible service providers will include accredited Advocates, pupil advocates, on-advocate lawyers, law teachers, law students as well as paralegal officers.

The Act is also progressive in its use of approved and accredited legal service providers, which include, among others, paralegals, student lawyers, and interns from university law clinics. Overall, the Act does represent a harmonized effort to ensure access to justice whether in civil or criminal matters for majority of Kenyans who are poor.

²²² Section 9 of the Legal Aid Act.

3.5 JUDICIAL PRONOUNCEMENTS

The Kenyan Judiciary has made significant pronouncements on the need for access to criminal justice. Some of the landmark decisions on access to criminal justice are summarized below.

In “*Re the Matter of Zipporah Wambui Mathara*,”²²³ the High Court stated that by dint of Article 2(6) of the Constitution, “international treaties and conventions ratified by Kenya, including the International Covenant on Civil and Political Rights (ICCPR) were part of the Kenyan law.”²²⁴ In *David Njoroge Macharia vs. Republic*,²²⁵ the Court of Appeal held that “in addition to circumstances where ‘substantial injustice’ would otherwise result, persons accused of capital offences and facing death sentence have the right to legal representation at the expense of the state.” The Court further held that “all capital convicts from the effective date of the Constitution, who had no legal counsel at the trial would as a matter of right be re-tried with the same offences.” It is hoped that the legal and policy implications of the above judgment will find favour for implementation with the enactment of the national legal aid scheme once the programme is rolled out countrywide.

In *Godfrey Ngotho Mutiso vs. Republic*,²²⁶ where the appellant challenged the imposition of a death sentence, the Court stated that:

“We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code, which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the

²²³ [2010] eKLR.

²²⁴ Ibid.

²²⁵ [2011] eKLR.

²²⁶ Court of Appeal at Nairobi Criminal Appeal No. 17 of 2008.

crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.²²⁷

Nonetheless, the above judgment does not outlaw the death penalty. It only gives room for courts to exercise discretion and pass any other sentence other than death sentence. More recently, Justice John Mativo of the Constitutional and Human Rights Division of the High Court at Nairobi held that persons under the age of eighteen years could not be subjected to death penalty hence they could not be held at the President's pleasure.²²⁸ This judgment enhances access to criminal justice for children.

3.6 INSTITUTIONAL FRAMEWORK

3.6.1 INTRODUCTION

The demand for criminal justice is initiated when people take their grievances to the police, a lawyer, and a court of law, tribunal, an independent government agency or a Non-Governmental Organization (NGO) for legal advice, representation or redress. Like most services, the increased assertion for “access to justice” can be attributed partly to the accessibility of institutions, free legal representation as well as the purchasing power of the parties. It is also deeply influenced by levels of trust in the institutions that are charged with the delivery of justice, their geographical locations, and language and opportunity costs, among others.

Kenya has a concentration of state and non-state institutions playing a critical part in the promotion of “access to criminal justice.” The roles played by some of the key institutions are discussed below. The institutions are classified into public or state institutions and non-governmental or civil society organizations.

²²⁷ Ibid.

²²⁸ High Court Constitutional *Petition No. 570 of 2015. A.O.O. & 6 others v Attorney General [2017] eKLR. Delivered on 12 May 2017.*

3.6.2 THE COURTS AND QUASI-JUDICIAL INSTITUTIONS

Courts and quasi-judicial bodies or authorities promote access to justice. They are responsible for interpreting the Constitution, all public policies and legislation, they are mandated to enforce constitutional rights, judicial review of administrative actions, and enforcement of civil claims, conduct of criminal trials and hearing of appeals, among others. In the exercise of judicial authority, the courts are expected to adhere to the principles enshrined in the Constitution.²²⁹

The Constitution establishes the Judiciary and the legal system²³⁰ and all courts and quasi-judicial authorities fall under the Judiciary. The Constitution further guarantees the independence of the judiciary thereby insulating it from executive or legislative manipulation. Unlike in the past when the judiciary relied on parliamentary appropriations, the Constitution creates the Judiciary Fund to be administered by the Chief Registrar of the Judiciary who is also the accounting officer. This Fund draws directly from the Consolidated Fund. All judicial officers are now state officers, enjoying security of tenure.²³¹

The Constitution also establishes a hierarchy of courts consisting of the Supreme Court,²³² the Court of Appeal,²³³ the High Court,²³⁴ two specialized courts with the same status as the High Court²³⁵ and subordinate courts and tribunals.²³⁶ The High Court has inherent original and appellate jurisdiction to hear and determine all cases of a civil and criminal nature, other than those relating to land, environment, and employment and labour relations.²³⁷

²²⁹ Art 159(2) of the Constitution.

²³⁰ Ibid Part Ten.

²³¹ Ibid. Art 160.

²³² Established under Article 163 (1) of the Constitution.

²³³ Established under Article 164(1) of the Constitution.

²³⁴ Established under Article 165(1) of the Constitution.

²³⁵ Article 162 (2) of the Constitution establishes the Environment and Land Court and the Employment and Labour Relations Court.

²³⁶ Ibid, Article 169.

²³⁷ Ibid. Art 165(5) (b).

The High Court also exercises jurisdiction on claims of violation of fundamental rights and freedoms.²³⁸ Further, it is vested with jurisdiction to determine whether provisions of the Constitution have been violated. Any complaint concerning a threat or violation of rights under the criminal process would be considered by the High Court and Subordinate Court as a violation of rights.²³⁹

Article 165(6) and (7) clothes the High Court with “supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.”²⁴⁰ All other courts including the subordinate courts and Kadhis courts and tribunal are expected to apply the principles in Article 159, which include fairness, expeditious disposal of cases, disregard for procedural technicalities and natural justice.

The Constitution also recognizes a quasi-judicial system comprising tribunals and administrative bodies established by respective legislation, to deal with specialized claims depending on their complexity or urgency involved.

Tribunals are cheaper and operate with less procedural technicalities albeit they must adhere to the Constitutional guarantees on the right to a fair hearing and comply with the rules of natural justice. These bodies include the Cooperatives Tribunal,²⁴¹ the Rent Restriction Tribunal,²⁴² the Business Premises Rent Tribunal,²⁴³ the National Environment Tribunal²⁴⁴ and the Public Procurement and Asset Disposal Review Board.²⁴⁵ However, criminal cases are not within the purview of tribunals or quasi-judicial or administrative bodies or authorities.

²³⁸ Ibid Art 165(3) (b).

²³⁹ Ibid. see also Article 23(2) of the Constitution with regard to the jurisdiction of subordinate courts in the enforcement of fundamental human rights and freedoms.

²⁴⁰ Ibid. Art 165(6).

²⁴¹ Cooperative Societies Act (No. 12 of 1997) as amended in 2004.

²⁴² Rent Restriction Act (Cap 296 Laws of Kenya).

²⁴³ The Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (Cap 301 Laws of Kenya).

²⁴⁴ Environmental Management and Coordination Act (No. 8 of 2000).

²⁴⁵ Public Procurement and Disposal Act No. 3 of 2005 and Rules, 2006. The latter became operational in 2007 and was repealed in 2015 with the enactment of a new Act in 2015.

3.6.3 THE NATIONAL POLICE SERVICE

The Constitution in Article 243 establishes the National Police Service. The Service is operationalized by the National Police Service Act.²⁴⁶ The Service is responsible for maintenance of law and order. It receives reports on violations of law, investigates, arrests and presents suspected criminals before the courts for trial. The Inspector General of Police heads the Service, assisted by two Deputies, one responsible for Administration Police and the other for the regular Police. Article 246 establishes the National Police Service Commission whose mandate includes recruitment, appointment, promotion, transfer and discipline of police officers and is also one of the Independent Commissions established under Chapter fifteen of the Constitution.

3.6.4 THE DIRECTORATE OF PUBLIC PROSECUTIONS

Article 157 of the Constitution establishes the Office of Director of Public Prosecutions (ODPP) under the leadership of the Director of Public Prosecutions responsible for prosecution of all criminal cases in the country. The DPP is vested with powers to “direct the Inspector General of Police to carry out investigations into a criminal complaint.” Other functions of the Office are espoused in the Office of the Director of Public Prosecutions Act,²⁴⁷ implementing Article 157 of the Constitution, the Criminal Procedure Code and other pieces of legislation dealing with criminal cases.

3.6.5 WITNESS PROTECTION AGENCY

The efficacious trial of suspected criminals heavily depends on safeguarding dependable evidence from reliable and truthful witnesses. It follows that if witnesses are compromised or threatened or intimidated it is impossible to get any suspect convicted for a crime committed. Therefore, witness protection becomes an important aspect of criminal justice. The Witness Protection Act²⁴⁸ establishes the Witness Protection Agency under a Director.²⁴⁹

²⁴⁶ Act No.11Aof 2011.

²⁴⁷ ²⁴⁷ Act No. 2 of 2013.

²⁴⁸ Chapter 79 of Laws of Kenya

The Agency takes responsibility for the protection of witnesses in criminal cases, determines the criteria for placement of a witness in the Programme, determines the type of protection and advises the government on measures and strategies for witness protection among other functions. The Agency also provides protection, where necessary, to members of the family of the protected witness. This involves relocating them into safe houses in the country or outside the country to ensure they are safe. There are challenges in implementing the witness protection Programme including inadequate funding and witnesses leaving the Programme before the cases are determined.

3.6.6 NATIONAL CRIME RESEARCH CENTRE

The National Crime Research Centre (NCRC) is established under the National Crime Research Act.²⁵⁰ The Centre is a state corporation in the State Law Office. The Centre is responsible for conducting research “into the causes of crime, its prevention and to communicate its findings and recommendations to the agencies of Government concerned with the administration of criminal justice” with a view to assisting them in their policy formulation and planning.

3.6.7 PRISONS, AFTERCARE AND BORSTAL INSTITUTIONS

Prisons, Probation and Aftercare Service is a Government Department under the National Government housed in the State Department of Interior. The Department forms part of the Criminal Justice System in Kenya and is responsible for advising courts and corrective institutions for on issues relating to bail, sentencing and pre-release decision making. It is also responsible for supervision, rehabilitation and reintegration of offenders serving custodial and non-custodial sentences in the community.

3.6.8 CHILDRENS DEPARTMENT

For children’s rights to be more than a promise there must be a way for those rights to be enforced. The Children’s Department is established in the Department of Interior in the Ministry of Interior and Coordination of National Government,

²⁵⁰ No. 4 of 1997, Chapter 62 of the Laws of Kenya.

headed by a Director of Children's Services. Childrens Officers or protection officers are employed by the government in the department to provide psychosocial support to children who are in conflict with or in contact with the law. The Officers ensure that children are treated in accordance with the law; they are not abused, subjected to child Labour and ensure that those who neglect or abuse children are dealt with in accordance with the law.

3.6.9 NATIONAL LEGAL AID (AND AWARENESS) PROGRAMME

The National Legal Aid (and Awareness) Programme (NALEAP)²⁵¹ is a pilot programme which was established to generally improve access to justice for the poor, marginalized and vulnerable. Working in conjunction with various institutions and individual lawyers, the programme launched six (6) pilot projects around the country, dealing with legal advice and representation, and counselling, and mainly serving the marginalized, children, poor and vulnerable (indigent) clients. The programme also promotes alternative dispute resolution mechanisms and has trained a pool of advocates, paralegals, magistrates, chiefs and community leaders, children's officers, police officers and probation officers to undertake mediation and conciliation. The pilot projects are premised on the realization that legal aid, representation and awareness are critical components of access to justice.

With respect to legal aid and representation, the Programme works by identifying deserving cases, where clients have legitimate cases but cannot afford legal fees, and refers these cases to the *pro bono* advocates trained by, or associated with, the Programme. The Programme undertakes training for the associated lawyers in order to enhance their capacity to offer legal aid and representation or undertake various forms of mediation or arbitration as appropriate, to the clients.

The Programme is the predecessor to the Legal Aid Service established under the Legal Aid Act, 2016 and continues to serve the public in the transitional period into the new outfit. The challenges facing the programme include increased demand for

²⁵¹ Established in 2007 by the Ministry of Justice, National Cohesion and Constitutional Affairs vide Gazette Notice No. 11598 of 30 November 2007.

legal services, limited capacity among Pilot Project facilitators and underfunding, among others.

3.6.10 UNIVERSITY LAW FACULTIES

Besides teaching the subject of access to justice, public interest and human rights, the University law faculties regularly conduct legal aid clinics at various locations in the country. Law students play a role in the promotion of “access to justice” by getting involved in “legal aid,” advisory and awareness as well as “public interest” programmes in the spirit of social responsibility to prepare them for *pro bono* legal services later in their careers.

Where need is identified, advisory programmes for law students providing free legal advice and drafting of legal documents and pleadings for the indigent as well as building their capacity for *pro se* representation are offered.

3.6.11 THE “LAW SOCIETY OF KENYA”

The Law Society Act²⁵² establishes the Law Society of Kenya which is the principal Bar Association in Kenya. The Bar Association is mandated to promote the rule of law, regulating the practice of law, advising and disciplining its members, advising the government and the public in matters relating to administration of justice.

The Bar Association, like the university law faculties, Federation of Kenya Women Lawyers and other stakeholders, work through collaboration and comprise the steering committee for the National Legal Aid (and Awareness) Programme. Through its access to justice committee, the Law Society of Kenya works with other local and regional agencies and organizations in strengthening access to justice, especially for the poor.²⁵³

It conducts annual legal aid clinic open days in collaboration with the judiciary and other civil society organizations. It also undertakes public interest litigation and

²⁵² Cap 18 Laws of Kenya.

²⁵³ “Strengthening Access to Justice in Eastern Africa Program” (2011) 3 http://www.cba.org/sajea/en/pdf/2011-05_newsletter.pdf (accessed 10 December 2012).

legal representation to the indigent. It also has a disciplinary committee that investigates and addresses complaints by individuals against advocates and may recommend action against errant advocates.

3.6.12 NON-GOVERNMENTAL/CIVIL SOCIETY ORGANIZATIONS AND THE MEDIA

Besides the public/state and or statutory institutions involved in the promotion of access to justice, there are many non-governmental or civil society organizations in Kenya that have for a while devoted their efforts to the advancement and protection of the rights of the poor and vulnerable groups. Most civil society organizations are specialized in areas of family and children protection, women's rights, domestic violence, employment issues, land rights and governance.

These civil society organizations develop and implement programmes for provision of legal aid, legal advice, psycho-social counselling and legal representation to the indigent in both civil and criminal cases. These programmes are implemented through linkages comprising *probono* advocates, law interns and paralegals spread throughout the country. They also run legal awareness programmes in thematic areas in conjunction with members of the Bar and government Departments and encourage the respect for the rule of law in the promotion of good governance.

These organizations include the Independent Medico-Legal Unit (IMLU), Muslims for Human Rights (MUHURI), the Kenya Human Rights Commission (KHRC), the Child Rights Advisory, Documentation and Legal Centre CRADLE, Christian Legal Action Network (CLAN), the Coalition of Violence against Women Victims (COVAW), Legal Resources Foundation (LRF), Christian Lawyers Education, Awareness and Research (CLEAR), the International Commission of Jurists (ICJ-Kenya Chapter) and the Federation of Women Lawyers (Kenya Chapter).

These organizations also place emphasis on documenting, monitoring and exposing contraventions of civil and political rights by state and non-state machinery. Some organizations also develop capacities on human rights observance involving

medical practitioners, advocates and media practitioners. They also develop capacities of the legislature and the judiciary through training on human rights legislation. They also take up public interest litigation.

FIDA (Kenya), the Federation of Kenya Women Lawyers, for example, is involved in the promotion of access to justice for indigent women whose rights have been violated for example, through domestic violence. The organization develops programmes which engage with the formal justice system of taking up and filing court cases and watching briefs for needy women who are violated. They also train women on *pro se* representations.

The Coalition of Violence against Women Victims of violence offers women victims of crime psycho social counselling and legal advisory and representation services. They also train community-based social support groups to assist the victims of violence. These organizations also promote the use of alternative dispute resolution mechanisms like mediation, negotiation and conciliation among its clientele.

Other organizations like *Kituo Cha Sheria*, Legal Resources Foundation and Christian Lawyers Education, Awareness and Research (CLEAR), promote access to justice through *pro bono* representation and legal aid, creation of awareness, human rights education and research and policy advocacy. They are involved in the training of paralegals who in turn sensitize communities on the basic legal issues and procedures. This is done through local advocates specializing in the practice of criminal justice, especially capital offences, public and family law, land and labour laws, among others, to ensure that the indigent, are aware of their legal rights.

The Child Rights Advisory, Documentation and Legal Centre (CRADLE) and Children's Legal Action Network (CLAN) have also been instrumental in the promotion and protection of children subjects before the law. They develop programmes for the provision of legal aid, representation and psycho-social support

to indigent children, both in contact and conflict with the law. They have participated in child-related law reform initiatives and promotion of community awareness and training of magistrates, advocates, and public officials on child rights. The ICJ-Kenya is a global human Rights watchdog organization dedicated to the promotion and protection of human Rights.

3.6.13 CONCLUSION

This chapter has examined the concept of access to criminal justice and the policy, legal and institutional arrangements for access to criminal justice in Kenya, elucidating the roles played by both state and non-state agencies in the promotion of access to criminal justice. The chapter further analysed some of the local judicial pronouncements that improve access to criminal justice. It is recognised that much has been, and is being done by various legal service providers to improve access to criminal justice for disadvantaged people.

Despite the commitment to enhance “access to criminal justice” efforts by the non-state actors in the distribution of the most needed legal aid services, the services are not yet fully distributed throughout the country. It is therefore necessary to single out in the next chapter, specific hindrances to accessing criminal justice in Kenya, and for this reason, the discourse in the next chapter is on the state of access to criminal justice in Kenya and barriers to accessing criminal justice.

CHAPTER FOUR

4.0 CHALLENGES TO ACCESSING CRIMINAL JUSTICE IN KENYA

4.1 INTRODUCTION

The previous chapter focused on the key policy, legal, and institutional frameworks on accessing criminal justice in Kenya. This chapter identifies fundamental obstacles to accessing the “criminal justice” and the response by the justice system as a whole to those obstacles.

In Kenya, the main attention on the criminal justice front has been directed towards issues of build-up of cases commonly known as case backlogs in the courts, congestion in prison facilities which never expand despite the growing population of inmates,²⁵⁴ the discourse on the constitutionality or morality of capital punishment,²⁵⁵ and abuse of human rights by the police.²⁵⁶

Access to criminal justice is often diminished due to various procedural, substantive and historical barriers. The barriers include inefficient and ineffective institutions, economic costs, language barriers, poor investigations and prosecution, inadequate legal aid counsel for the vulnerable and marginalized individuals and groups, institutionalized judicial delay, corruption, weak witness protection measures, intricate judicial procedures, hostile court environment and the adversarial process, exorbitant bail and bail terms for the poor and children, socio-cultural biases and geographical barriers.²⁵⁷ This study, however, does not address all barriers. The main challenges are discussed below.

²⁵⁴ United Nations “Special Report on Kenyan Prisons by Standing Committee on Human Rights” (2002, 2003 and 2004). See also Jasper Edward Nyaura and Margaret Njeri Ngugi (2014). A critical overview of the Kenyan Prisons system: Understanding the challenges of correctional practice. *International Journal of Innovation and Scientific Research*. Vol. 12 No. 1 Nov 2014 pp6-12.

²⁵⁵ “Kenya National Commission on Human Rights” (2010). “The abolition of death penalty in Kenya” accessed at www.knchr.org. See also Penal Research International,(2011) accessed at www.penalreform.org.

²⁵⁶ Death Penalty Project www.deathpenaltyproject.org.

²⁵⁷ Commission for the Legal Empowerment of the Poor, (2006). Summary Report of the Kenya National Consultation).

4.2 BARRIERS TO ACCESSING CRIMINAL JUSTICE

There are a myriad challenges to accessing criminal justice in Kenya. Some of these challenges identified are discussed below.

4.2.1 MISTRUST FOR THE JUDICIARY

It is an undisputed fact that a decade ago in 20017, Kenya was in a political turmoil following disputed presidential elections after the main opposition party refused to challenge the election of Mwai Kibaki as president, in court. What followed was an attempt to establish a local legal mechanism for prosecution of the post-election violence suspects, which attempt flopped on indictments that the locally established judicial institutions could not be trusted to deliver criminal justice to all those affected.

The cost of this mistrust of the judicial system was paid with loss of lives, property and disgrace to the nation of Kenya as the President and his Deputy, among other senior government officials and a local vernacular radio scribe were dragged to the Netherlands Hague-based International Criminal Court to face charges of human rights violations and crimes against humanity among others. The Head of State, his Deputy and a radio journalist Mr Joshua Arap Sang went through a harrowing trial and exited the Hague after the withdrawal of the charges against them for either non-availability of witnesses to testify and prove the charges against the three Kenyans, after some witnesses either died, withdrew from testifying, disappeared, were interfered with or retracted their statements that they had earlier recorded with investigators and Office of the Prosecutor.

As a consequence, the victims of the atrocious crimes were left crying for justice and to date, there is no indication that perpetrators of the politically motivated violence will ever be brought to book. Over time, there was an attempt to reform the judiciary and its systems with some success as was witnessed by the successive presidential election disputes which were resolved by the Supreme Court in 2013 and 2017 August 8th general elections.

In 2003, the Ringera purge saw 82 senior magistrates and 23 judges retire yet the public mistrust of the judiciary still persisted. Before then, it is believed that there was no political will to reform the judiciary which was controlled by the executive. In fact, the judiciary was considered to be a department in the then office of the Attorney General, devoid of any independence contemplated in the old constitutional order only on paper. The immediate former Chief Justice, in an address to the nation on his 120th day in office had this to say about the institution that he had been bequeathed by the new Constitution:

“We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralized. Accountability mechanisms were weak and reporting requirements absent. When we put people on a pedestal it is based on negative power and authority. That is the old order.”²⁵⁸

No doubt, the above words clearly and succinctly capture the impediments to the delivery of criminal justice, and therefore the need for the transformation of the Judiciary to overthrow the Old Order and usher in the New Order fuelled by genuine and deep public demands and expectations.

Even after the promulgation of the new Constitution, the functioning of the criminal justice system in Kenya is generally perceived to be poor, the reason why many people avoid using it.²⁵⁹ There is general aloofness in the judiciary due to poor service delivery leading to delays and poorly written judgments that people cannot relate with.²⁶⁰

²⁵⁸ Dr. Willy Mutunga, (2011) Speech on the Progress Report (120) Days. Accessed at www.judiciary.go.ke.

²⁵⁹ “Hansen, Thomas Obel ‘Constitutional Reform, Transition and Preventing Violence, ‘an assessment of Kenya’s new constitution in light of the need for political and peaceful transformation’” (September 2011) <http://papers.ssrn.com/sol3/papers> (accessed 19 November 2012).

²⁶⁰ The “Danish Institute for Human Rights” (2011) “Access to Justice and Legal Aid in East Africa” “a comparison of the legal aid schemes used in the region” p.28.

However, this mistrust cannot be compared to the situation before 2010 where, for example, in 1998, the Kwach “Committee on the Administration of Justice” observed that Kenyan courts were generally inefficient. Fundamental recommendations were made but it took too long to be implemented them since cases of delay are still reported to be rampant where people are held in remand for longer periods than the sentence they were likely to serve if convicted.²⁶¹ Civil cases, particularly in the rural areas took as long as 10-20 years to be determined. In general, accessing justice in Kenya was a pipe dream. With the demand for justice overtaking the number of judicial officers being recruited, and with crime becoming even more complicated with each passing day, the improvement is still insignificant.

An “Advisory Panel of Eminent Commonwealth Judicial Experts” appointed by the defunct Constitution of Kenya Review Commission in its report released in 2002 painted the state of the judiciary in Kenya to be appalling.²⁶² The Advisory Panel drew general conclusions through its Consultative Programme and concluded that as then constituted, “the Kenyan judicial system suffered from a serious lack of public confidence and was generally perceived as being in need of fundamental structural reform.”²⁶³

The panel opined that serious measures were inevitable for the country to have “an independent and accountable Judiciary, capable of serving the needs of the people of Kenya by securing equal justice and the maintenance of the rule of law under a new constitutional order.” During the consultations, the report says that “some members of the Judiciary too admitted that there was need for change.”²⁶⁴ The panel in its statement regretted stated:

²⁶¹ Report of the “Committee on the Administration of Justice in Kenya (1998)”

²⁶² “Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Kenya” Chaired by the Hon. Justice Dr. George W. Kanyehamba Judge of the Supreme Court of Uganda” p.29.

²⁶³ Ibid.

²⁶⁴ Ibid.

“We are disappointed to report that the Kenya Judiciary has failed to come to grips with the crisis confronting it. We regret to report that the group of judges delegated by the Chief Justice to meet with us did not come prepared to discuss the issues identified in our Terms of Reference.”²⁶⁵

The two inquiries unearthed several weaknesses in the judiciary, that hamper access to justice among them case backlog and poor case management, unethical conduct by judicial officers, complex rules and procedures, manual recording of proceedings and lack of financial independence. However, there are some recent positive developments in the criminal legal and justice system. For example, the strengthened position of the judiciary through financial independence, transparent appointments and vetting of all serving judicial officers flowing from the new Constitution, are likely to address some of the impediments identified as being responsible for inaccessible criminal justice.

In addition, the judiciary most recently employed strategies through the justice at last initiative such as the expeditious disposal of criminal appeals, service weeks and the adoption of performance management as a tools in service delivery, which it is hoped, will no doubt provide justice for some criminal offenders and victims of crime whose cases have been pending for a long time.

The succeeding section is an assessment of the inability of many Kenyans to access criminal justice from the courts, taking into account the on-going reform initiatives by the judiciary as an institution and the Government in general through the National Council on Administration of Justice, which is a multi-stakeholder agency comprising the Judiciary, Police, civil society and other state and non-state actors engaged in the administration of justice.

4.2.2 HOSTILE GATEKEEPERS

Unreceptive access points into the criminal justice system impede accessing the criminal justice system. The abrasiveness of the Kenya police, despite reforms in

²⁶⁵ Ibid. p.7.

the sector and their general perceived incompetence in handling complaints, coupled with their being indifferent to those who approach them to report crimes is appalling. It is reported that some children and women complainants and even suspects have been raped or defiled in police stations. The police take too long to go to the scenes of crime and in some cases they ask for fuel or transport to proceed to investigate complaints. Some of the police officers humiliate women who go to report rape cases or cases involving domestic violence.²⁶⁶ They also delay to distress calls made via phone calls. This attitude by the police results in fear by the victims of crime.

4.2.3 THE UNAVAILABILITY OF COMPLAINANTS

Criminal inquiry and prosecution primarily depend on material provided to the investigator by a complainant as a victim of the crime or by independent witnesses. There is, however, a challenge where complainants do not report the.²⁶⁷ The lethargy of the complainant or informant to avail themselves and to record their statements with the police to enable investigations to be undertaken has even received judicial notice on a number of occasions.²⁶⁸ The Court in its judgment in the above case noted that: “It is common knowledge that witnesses often refrain from coming forward in case they might get into some sort of trouble.”

The ordinary Kenyan citizen fear and treat the police with suspicion and this attitude can be traced to the colonial days when the police were used as instruments of oppression²⁶⁹ against the” native population using strong-arm tactics.”²⁷⁰

Sometimes the victims and witnesses fear reprisals from the offenders and in some cases, traditional dispute resolution mechanisms are employed by some communities to compensate the victims. In some instances, however, an offence

²⁶⁶ Human Rights Watch Report (2017). “Sexual Violence in Kenya.”

²⁶⁷ *Juma and others v Attorney-General (2003) AHRLR 179 (KeHC 2003)*.

²⁶⁸ Ibid.

²⁶⁹ Anderson, D. (2005). “Histories of the Hanged:” Britain’s dirty waters in Kenya and the End of the Empire.” London: Weidenfeld & Nicolson.

²⁷⁰ Vasha Ghanda (2016) the effects of MauMau Rebellion and Colonization of Kenya on its Political Economy.

under the law is not a crime to the community and an example is cattle rustling and Genital Mutilation of females.²⁷¹ In other cases, it was reported that the police demanded money for them to investigate the crime.²⁷²

Children fear reporting crimes committed against them upon being warned that they will be killed if they divulge information. Most child offenders and victims of crimes live either in the streets or in informal settlements in urban areas. Regrettably, law enforcement officers who police the streets and carry out arrests of street children demonstrate brutal attitudes towards these children and abuse and exploit the children with impunity.

In the Human Rights Watch Report, children reported that they are often harassed and beaten by police, and were forced to part with money in order to avoid arrest. Street girls reported being sexually propositioned by police and City County security night guards in order to avoid arrest or to be released from custody, including being raped, with no one to come to their aid to get justice.²⁷³

4.2.4 INADEQUATE FUNDING FOR INVESTIGATIONS

The axis of the “criminal justice system” is crime exposure and inquiry, which serves as the pivot of every criminal case. Criminal investigation involves the inquiry into criminal claims and the gathering of evidence to establish whether the complaint is genuine and actionable. As was articulated by Justice Kalgo of the Supreme Court of Nigeria, on the relationship between criminal investigations and criminal justice:

“[t]here is no doubt that in all criminal allegations, investigations play an important part and it will make or mar subsequent criminal proceedings.”²⁷⁴

²⁷¹ Momany Bwonong’a, (1994). Procedures in Criminal Law in Kenya.

²⁷² See the decision in High Court at Meru *Petition No.8 of 2012. C.K. “(Child) through the Ripples International as her guardian and next friend)” v Inspector General of Police & others [2013] eKLR.*

²⁷³ Human Rights Watch Report, 2015.

²⁷⁴ “African Journal of Criminology and Justice Studies”: AJCJS, Vol.5, #s1 &2 79 “Effective Investigations, A Pivot to Efficient Criminal Justice Administration: “Challenges in Nigeria by Oluwafemi Alexander Ladapo).

It follows that shoddy investigations would cause an offender go scot free. However, it is not a cheap affair to investigate and detect crime. Resources both human and financial as well as equipment are required. In Kenya, most crimes reported require visiting of the *locus in quo* (scene of crime). In many instances, the complainant is asked to provide transportation or to fuel a police car. If the crime involves a murder, the deceased's family is required to meet costs of an autopsy.

Upon completion of investigations, the deceased person's family are asked to fund certain aspects of investigations such as buying paper for statement-writing before the investigations file can be submitted to the prosecution for perusal and directions. It is clear from the foregoing that criminal investigations are not adequately funded in Kenya. This inadequacy in funding contributes to unreachable criminal justice in Kenya.²⁷⁵

4.2.5 CORRUPTION

Corruption pervades the Kenyan Police Service in Kenya, according to the Transparency International Report, 2013. The report claims that the police lead in corruption and that Kenyans are adapted to seeing the police officers "collect "toll" at roadblocks and traffic checkpoints mounted across the country."²⁷⁶ This overt corruption affects the quality of investigations into criminal activities.²⁷⁷ The famous police reform initiative by the National Police Service Commission of vetting and fishing out corrupt officers has not deterred the offending officers.²⁷⁸

4.2.6 POVERTY

In Kenya there is a wide gap between the rich and poor. The necessity of a lawyer is predicated on the complex procedures, formalities as well as the antagonistic

²⁷⁵ Kenya Human Rights Report (2015) by the US Department of State.

²⁷⁶ Mwangi Muraguri, Standard Reporter, 27th May, 2016. "Four top traffic cops accused of extorting junior police officers."

²⁷⁷ In his recent address to the media the Chairman Mr Johnstone Kavuludi revealed that most police officers use their juniors to extract bribes from citizens which monies are remitted via Mpesa. Many police officers have been relieved of their duties through vetting because they could not account for their wealth acquisition.

²⁷⁸ Ibid.

atmosphere in the courts. However, lawyers charge exorbitant legal fees for a simple criminal charge and contend that “more people are resolving disputes in the courts, and cases are increasingly complex, so they charge more fees for their time and expertise, dictated by the prevailing market trends.”²⁷⁹

Nearly all lawyers will demand that prospective clients deposit an initial fee of not less than ten thousand Kenya shillings before they can commit themselves to represent the clients. Put in perspective, this is higher than what majority of Kenyans earn in a month.²⁸⁰

The Advocates Remuneration Order provides for the minimum fees a lawyer should charge, but not the maximum. Undercutting is a crime and one could even be struck off the Roll of Advocates if found liable.²⁸¹ Therefore, people living on less than two dollars a day would not afford legal advice and representation in criminal cases.²⁸² This high cost of legal services disadvantages the poor and vulnerable in society.²⁸³

The high cost of legal services also deter persons from seeking the assistance of lawyers.²⁸⁴ Similarly, some lawyers have been reluctant to provide legal assistance where it is unlikely that they would be remunerated for their services and efforts.²⁸⁵

The notion of “business element” that has been given much preference by most advocates has thus been a great hindrance to access to criminal justice by the citizenry, especially where most advocates avoid taking up *pro bono* cases because they are in businesses which are not, by their nature, philanthropic. As a result, millions of Kenyans who are poor, including those of moderate incomes, “suffer

²⁷⁹ Maina, Cyrus *Kenyan Lawyer* Maina, Cyrus is a commercial, property and corporate lawyer practicing in a leading commercial law firm in Nairobi, Kenya <http://kenyanlawyer.blogspot.com> (accessed 10 December 2012).

²⁸⁰ Kamau Gatherer, (Sunday, March 8 2015 Daily Nation). Lawyers are becoming unaffordable for majority of Kenyans.

²⁸¹ Sec 36 of the Advocates Act (Cap 16 Laws of Kenya).

²⁸² Transparency International Case Study: Kenya, (October 2004).

²⁸³ Federation of Women Lawyers (FIDA) Kenya on 3 November, 2008 “Statement to the International Women’s Human Rights Clinic based on a joint report submitted by the (FIDA (K), to the UN Human Rights Committee.

²⁸⁴ Statement by an inmate at Nakuru GK Prisons on 29/10/2013 on the researcher’s visit to conduct training for inmates.

²⁸⁵ Hashimoto, O Masumi “The quest for justice and the lawyer’s dilemma” Time for a paradigm shift <http://www.strathmore.edu/pdf/ethics/hashimoto.pdf> (accessed 19 November, 2012).

untold misery because legal protections that are available in principle are inaccessible in practice.”²⁸⁶ The other aspect of the “business element” is the fact that the cost of litigation is too high even for the advocates who may be willing to handle pro bono work. This impedes equal access to justice by all.

In conclusion, this part of the paper discusses the challenges of accessing criminal justice in relation to investigations, prosecutions and the efficiency of the courts in Kenya. Our conclusion is that the challenges require a collaborative approach by the police, prosecution and the courts and other key players in the entire criminal justice system such as the advocates and paralegals to address.

When “lawyer-less litigants” swamp the courts, their ignorance of court processes add to the expense, confusion, delay and the congestions witnessed in Kenyan prisons. This is not to mention the “life-changing impact it could have for an inexperienced litigant who might end up with a criminal record or lose custody of their children or be rendered landless, simply because they lack the experience and understanding to properly present their case.”²⁸⁷

These observations are without prejudice to the many civil society and paralegal organizations like the Federation of Kenya Women Lawyers, *Kituo Cha Sheria*, Legal Resources Foundation, CLEAR, among others, which train people to represent themselves. This practice was adopted by NALEAP with the financial support from the European Union Bridging Divides through Governance programme.²⁸⁸

Very few Kenyan judges, magistrates or advocates have experience in the use of “alternative dispute resolution mechanisms” in resolving criminal disputes, which

²⁸⁶ Rhode, L Deborah ‘Access to Justice: Oxford University Press (2004) p.4.

²⁸⁷ D.M.Maingi, (2013). Regional Commander, Nakuru GK Prisons on a visit by the NALEAP training on self-representation in criminal and civil procedure team.

²⁸⁸ A training on self-representation in criminal and civil procedure was undertaken by NALEAP in the six pilot areas.

could be cheaper and faster.²⁸⁹ In practice, alternative dispute resolution mechanisms also work best to ensure that relationships are not destroyed.

Most legal aid schemes offered by civil society organizations rely on charitable benevolence.²⁹⁰ This means that when the donors are unavailable, the legal aid schemes will cease to operate. While this has been the case, it should be the responsibility of the government to guarantee “equality before the law” as espoused in the Constitution and international human rights law.²⁹¹

Besides the costs associated with filing and execution of cases, paying for legal representation and transport costs which would enable a litigant successfully access the justice system, there are also ‘potential costs’ of what happens when one loses a case and has to pay the successful party for malicious prosecution in civil proceedings.²⁹² Such difficulties affect all people. However, it is worse for the poor. The statement by one English judge Justice Sir James Mathew Darling (1830-1908)²⁹³ lends credence to this when he stated:

‘In England, justice is open to all and like the doors of the Ritz Hotel; the courts are open to the rich and the poor alike. If you can afford, get in there. If you can’t keep off from there.’

The meaning, of course, is clear; you can access the law courts as easily as you can afford to. The converse is sad, but true. These factors represent serious barriers for the poor in accessing justice.²⁹⁴

²⁸⁹ Final Report of the Taskforce on Judicial Reforms (2010) pp.54-55.

²⁹⁰ FIDA Kenya’s Statement to the CEDAW Committee on the 5 & 6 Country Report by Kenya during the 39 CEDAW Session 23 August 2007.

²⁹¹The Ministry of Justice, National Cohesion and Constitutional Affairs established the multistakeholder National Legal Aid (and Awareness) Programme (NALEAP) in 2008 as a pilot project in an attempt to address access to justice issues.

²⁹² Sec 27 of the Civil Procedure Act (Cap 21 Laws of Kenya) provides that a successful party is entitled to an order for costs payable by the unsuccessful party. Those who are unable to pay the costs are subjected to the execution process which includes committal to civil jail.

²⁹³ Justice Sir James Mathew Darling (1830-1908) England. Quoted in “*Legal Aid for the 21st Century trends in the developed economies*” by Prof Allan, Paterson. http://www.lasc.hk/ppt/Prof_Paterson_ILAG.pdf (accessed 19 November 2012).

²⁹⁴ Ngondi-Houghton, (2006) “Access to justice and the rule of law in Kenya.” A paper developed for the empowerment of “the poor.”

4.2.7 INEXPERIENCED PROSECUTORS AND INADEQUATE TRAINING FOR POLICE INVESTIGATORS

Criminal investigations require experience. However, most investigators were found to be junior police officers sent out in the field by their bosses who sit in offices thereby compromising the quality of investigations and results of the cases taken to court for prosecution. Most of these police officers have only attended the Kiganjo Police Training College for six months which training is basically concerned with physical drills. Those who major in investigations are taken to the CID Training School but are not exposed to serious training on unravelling serious crimes like disappearance of persons and frauds.²⁹⁵

The prosecutors too do not undergo any specialized prosecution training. Most prosecutors are fresh graduates from laws School with no skills which compromise the quality of prosecutions and success rate of trials.

Sometimes this lack of capacity to investigate the crimes drives the police to coerce suspects to give confessions.²⁹⁶ These statements never stand the test of times during the trial and “trial within trial procedure is then conducted leading to delay of the criminal justice process, especially where there is an interlocutory appeal .”²⁹⁷ In our limited field research, we interviewed five prosecution counsels in the office of Director of Public Prosecutions, Nairobi.

4.2.8 MISSING CASE FILES

In many instances, case files containing investigation reports and witness statements and exhibits go missing from the police stations because the investigating officers always return with the original investigations files to the criminal investigations department and only leave duplicate files with the director of Public Prosecutions. This affects the progress and eventual outcome of criminal cases.

²⁹⁵ This study randomly sampled 10 investigation files compiled by the National Police Service and submitted to the Director of Public Prosecutions from January 2013 and December 2013, in the Nairobi office for perusal and directions. Out of the 10 files sampled, 7 were investigated by police officers at the rank of Constables answerable to the Inspector of Police.

²⁹⁶ *Patrick Mwangi Weru v Republic [2013] eKLR.*

²⁹⁷ Section 25 of the Criminal Procedure Code.

4.2.9 INADEQUATE FORENSIC SPECIALISTS AND RESEARCH LABORATORIES

Forensic science is indispensable in criminal investigations. In Kenya, forensic investigations are not yet fully embraced and the country has no forensic science laboratory. According to Rachael Brown, the equipment reportedly “acquired for a police crime laboratory by the Government turned out to be a hoax and scandalous infamous Anglo-leasing saga.”²⁹⁸ this inadequacy hampers investigations into complex homicides.

4.2.10 LANGUAGE BARRIERS

Language barriers contribute to inaccessible criminal justice whether in civil or criminal law practice. Our statutes are based on the English legal system and procedures, hence the justice system in Kenya is dominated by excessive use of legal language that is full of complex terminology, a blend of Latin and archaic English, thereby challenging both the educated and uneducated lot. Lord Wolf²⁹⁹ described the English as “behaving like extra-terrestrials, with their courtrooms, wigs and esoteric language” in the following terms: “it is true that the English enjoy surrounding the law with considerable pomp, ceremony and costume drama.”³⁰⁰

Court proceedings take place in English, despite the changes in the Constitution incorporating Kiswahili as a national and official language respectively, which language is not understood by all people, most of whom appear pro se, and are illiterate. The taking of proceedings in the English language makes it mandatory for court interpreter to be present yet these interpreters also face the challenge of understanding and interpreting technical legal jargon.³⁰¹

The published laws are only available in one language, English. This limits people’s access to the written law yet the same law espouses that “ignorance of the

²⁹⁸ Rachel Brown, (2009). “Financial Transparency Coalition, Kenya’s Anglo-Leasing Scandal: doing our part to fry the Fish.”

²⁹⁹ “Lord Woolf,” “Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, London.” Vol. I http://books.google.co.ke/books/about/Access_to_Justice (accessed 19 November 2012).

³⁰⁰ Ibid. P.96.

³⁰¹ Art 7 of the Constitution makes Kiswahili both a national and official language.

law is no defence.” Lingual and sign interpreters are not available in court most of the time, to assist suspects, complainants, litigants and witnesses needing the services, although this is a mandatory constitutional requirement especially for accused persons. These language barriers reinforce existing inequities, making it necessary for some desperate people to engage in some cases, unqualified persons to act for them in criminal proceedings.

4.2.11 INADEQUATE LEGAL AID AND LEGAL COUNSEL FOR THE VULNERABLE AND MARGINALIZED GROUPS

This study established that there is inadequate legal aid and legal representation among the persons accused of crimes which limitation has serious implications on people’s access to criminal justice.

Kenya has no clearly defined or codified legal aid, awareness and representation policy or legislation and therefore, no legal aid scheme.³⁰² Consequently, for many would-be justice seekers, the initial hurdle on the way to court is finding appropriate legal advice.

At the Nakuru GK Prisons out of a population of about 2000 inmates waiting for trial, over 75 per cent are not represented by advocates. Some of the inmates are facing serious charges that include robbery with violence, sexual assaults and poaching, among others. They complained of poverty and lack of funds to hire advocates to represent them. As a result, they claimed that magistrates and judges in the courts favour hearing cases, which are represented by advocates, while “parking” the unrepresented suspects.³⁰³ This research found over 30 convicted inmates serving between life and death sentences. They had lodged appeals, which had been dismissed and were now hoping they could be saved by the power of mercy law.

³⁰² Report of the United Nations Committee Against Torture, (CAT), 42 Session (May 2009) p.42.

³⁰³ Statement by an inmate at the Nakuru GK Prisons during a training on self representation in criminal cases on 28/10/2013.

According to Capeheart, “without legal representation, already disadvantaged people are further disempowered when confronted with complex legal issues and proceedings. They risk an inequitable decision, particularly where the matter involves a socio-economic power imbalance (for example, a dispute between a property owner and a tenant). Where the other side has legal representation, the quest for justice is often being fought on one side with a “hired gun” and on the other with an “unarmed party.” Equality of arms between those parties in judicial proceedings is often disproportional.”³⁰⁴

Advocates play an important role in promoting “access to criminal justice.” Their legal advice and representation enable individuals to meet their legal obligations. They facilitate not only business but also personal relationships, as it is through the provision of legal services that citizens are able to understand the law, their rights and legal obligations. Absence of advocates who volunteer to provide legal services would therefore lead many suspected criminals to wait for trial for longer period, crowding prisons, especially those charged with murder and robbery with violence, as most of them are granted bond and bail terms that are unaffordable.³⁰⁵

As part of the sector wide reforms to ensure justice for all, the Government established the Legal Sector Reform Coordination Committee to coordinate the review process. This culminated in the formulation of a National Legal Aid (and Awareness) Programme, (NALEAP) through a widely consultative process. However, NALEAP is challenged by lack of a policy and legislative framework spelling out how *pro bono* work can effectively be undertaken, and on what terms, by volunteer advocates. Inadequate infrastructure and funding from the government is another key setback. Apparently lacking is the comprehensive plan that facilitates the coordination of efforts, avoiding overlaps.

³⁰⁴ Capeheart, Lorreta & Milovanovic, Dragan (2007) “Social justice theories, issues and movements.”

³⁰⁵ A survey at the Nakuru GK Prisons revealed that there are over 2000 remandees while only 300 are convicted offenders.

The services provided do not have a general approach but a specific one to protect only certain rights. The programme currently provides legal aid and advisory services to children, men and women in family protection and succession matters, and legal representation for robbery with violence suspects.³⁰⁶ Other challenges facing NALEAP include the fact that it is particularly difficult to identify willing advocates to participate in the *pro bono* scheme, using their time and resources to represent clients, especially against the background of “tokens” provided by the state and non-state actors engaged in voluntary legal services provision.

Most of the cases requiring *pro bono* intervention, particularly those involving female clients, are the most difficult and sensitive to handle, since they relate to issues of domestic and gender based violence. This is in terms of the greater “burden of proof” placed on the victim and the emotional aspect of the violation. Being financially disempowered, these clients can barely afford legal representation, let alone psychiatric attention. The *pro bono* advocate normally turns into the psychiatrist-cum-counsellor, which further strains the lawyer emotionally. This factor is a disincentive to most lawyers.³⁰⁷

There are also some limitations on the legal services offered by the non-governmental organizations due to the limited number of advocates and paralegals that these organizations can afford to hire. This renders them inaccessible to most poor, vulnerable and marginalized groups who are more concentrated in the rural areas and informal settlements, and who cannot afford transport costs to the urban areas.³⁰⁸ There are also no standardised methods of collaboration among the various legal service providers in the civil society arena.

Another concern is that legal aid is concentrated around litigation because there are costs payable to the winning advocates. As a result, other modes of dispute resolution suffer. While litigation is the most effective system as far as enforcement

³⁰⁶ NALEAP Progress Report released by the National Steering Committee Secretariat (November 2011).

³⁰⁷ Statement by Florah Bidali, NALEAP Regional Coordinator, Nakuru during the training for inmates at the Nakuru G.K Prisons on self-representation in criminal procedure. 28/11/2013.

³⁰⁸ Final “Report of the Task Force on Judicial Reforms (2010)” pp.85-88.

is concerned due to its binding nature, it is costly to majority of Kenyans. Even in public interest litigation, there is reluctance to access the courts due to the heavy penalties in the form of costs that the courts award against unsuccessful litigants.³⁰⁹

4.2.12 JUDICIAL DELAY

The expeditious resolution of disputes is a requirement for efficient delivery of justice to the people. This is because “justice delayed is justice denied.”³¹⁰ However, inordinate delays in the dispensation of justice continues to dog the judiciary. These inordinate delays are some of the reasons why people are reluctant to exhaust legal mechanisms for resolving their disputes which then culminates into the employment of extra judicial means of resorting to vigilantism and mob injustice.³¹¹

According to the statistics of the Judiciary, in 2012, the High Court cleared 3,944 pending criminal appeals, leaving 10,289, a figure that includes 3,325 new appeals filed during the year. Out of this number, 3,008 prisoners had been waiting for hearing of their appeals for over five years. Most of the appellants are held in prisons throughout the country, with the bulk being in Kamiti, Shimo la Tewa, King’ong’o, Naivasha and Kodiaga prisons.³¹²

The expeditious disposal of cases is required in order to avoid the injustice currently being witnessed where either many die or convicts serve sentences before the hearing of their cases or appeals.³¹³ A survey seeking public perceptions of the Judiciary commissioned in 2012 found a slow justice system was the biggest worry among Kenyans. About half of the 1,222 respondents surveyed singled out delays and corruption as two of the biggest faults in the Judiciary. Sadly, there would be

³⁰⁹ Section 27 of the “Civil Procedure Act, (Cap 21 Laws of Kenya).”

³¹⁰ Art 159(2) (b) of the Constitution.

³¹¹ Mango Christine, (2011) “Policy direction and administration of the Judicial Service Commission.” A new dawn, a fresh paradigm, <http://www.kenyalaw.org> (accessed 17 September 2012).

³¹² State of the Judiciary Report, 2012/2013 accessed at www.judiciary.go.ke.

³¹³ Standard digital, Monday, October 14th 2013 “Slow justice system denies many Kenyans right to timely appeals.”

no recourse for them over the time spent in incarceration should their appeals ever be successful.³¹⁴

There are many reasons for delays in the dispensation of justice some of which are not necessarily caused by the judicial officers. For example, delays occasioned by the hearing and disposal of election petitions by the judicial officers as required by the Elections Act and as prioritized by the judiciary.³¹⁵

Inadequate staff, equipment such as computers, lesser number of judges in specific Divisions like the Constitutional and Human Rights and Judicial Review twin Division of the High Court in Nairobi which has only four judges handling an estimated forty cases per day, fewer magistrates compared to the workload often impose a serious limitation on the courts' ability to render quality and timely justice to the parties.

On other occasions, however, some judicial officers simply do not care about the urgent needs of claimants, or prefer to direct their attention to other cases, which may be more important in terms of prestige, power, or illegal benefits, especially commercial transaction cases. Some judges are reported to adjourn cases involving persons in custody in favour of an application for an injunction involving banks.³¹⁶ Whatever the reasons, court delays discourage people from seeking redress, thereby aggravating their situation.³¹⁷

Judicial delay is sometimes used as a resource by suspects and advocates in the realm of commercial, land and rent control litigation to script a successful outcome to a dispute that holds high stakes. Frequent and unnecessary adjournments sought and obtained by advocates on behalf of their clients in criminal cases undermine the rights of the victims of crime and erodes public confidence in the delivery of justice. Unprepared, incompetent, late-coming and absentee advocates seeking

³¹⁴ A study commissioned by ICJ-Kenya Chapter, conducted by Infotrak Harris in September, 2012. Accessed 11/11/2013 <http://www.judiciary.go.ke/portal/infotrak-harris-opinion-poll-september-2012.html>.

³¹⁵ Timelines stipulated under the Elections Act.

³¹⁶ Report of the ICJ (2004) "High-Level Fact-finding Mission to Kenya."

³¹⁷ "Kenya Human Rights Commission (2011)" "Justice Delayed" "A Status Report on Historical Injustices in Kenya."

repeated adjournment of cases also deny parties speedy justice.³¹⁸ As was stated by Robert J. Grey Jr.³¹⁹

‘If the Judiciary is the guardian of the rights of the people, the organized bar and its lawyers are the foot soldiers. The legal professional and the private bar bear a large share of the burden....’

The recent report on the state of the judiciary 2011/2012 is reminiscent of the situation in 2008.³²⁰ The average period for concluding a case in Kenya has been found to be 4-5 years.³²¹ These delays are aggravated by other factors including, lack of case tracking systems, outmoded equipment and poor management of case statistics in the judiciary. Inadequate training for judges, magistrates, advocates and paralegal staff on efficient case management too, contributes to the malaise.

Some advocates and suspects are known to manipulate the courts to ensure their clients’ cases are given priority with regard to hearing dates. This practice upsets the court diary.

Some judges and advocates are reportedly engaged in other businesses outside the judicial and legal services, paying little attention to the court diaries. Other reasons for delays and backlog include laxity of court officials due to inadequate supervision³²² and recording of proceedings in long hand and ignoring geographical jurisdiction in filing of charges.³²³

There is no doubt that delay in justice is not only a challenge but poses a serious threat to the criminal justice system in Kenya. Although delay is a universal phenomenon, in Kenya, the situation is alarming, chronic and proverbial. An example of unusual delays is manifested by the fact that, according to a rough figure, more than two-thirds of the jail inmates comprise of under-trial prisoners.³²⁴

³¹⁸ Mr. D.M.Maingi, Regional Prisons Commander, Nakuru on 28/10/2013.

³¹⁹ “Robert, J Grey” Jr. “Access to the courts & equal justice for all” Issues of Democracy” (2004) *e-Journal United States of America*.

³²⁰ State of the Judiciary, (2011/2012).

³²¹ Final Task Force Report on Judicial Reform, (2010).

³²² Ibid.

³²³ Ibid.

³²⁴ A visit to the Nakuru GK. Prison in November revealed that there are over 2000 suspects awaiting trial in the prison, as opposed to only 200 convicts serving various sentences.

Such a phenomenon erodes the trust of the people and their confidence in the administration of justice.

4.2.13 PERCEIVED CORRUPTION IN THE JUDICIARY

There is overwhelming perception that the judiciary as a whole is corrupt, in a big and small way. Earlier inquiries revealed rampant corrupt practices in the institution.³²⁵ Although it has slightly improved its standing since 2002,³²⁶ the judiciary is largely believed to be corrupt.³²⁷

Beginning with the “Report of the Committee on the Administration of Justice” chaired by the then Appellate Judge Richard Kwach, the judiciary has since 1998 consistently established that perceptions of corruption within the judiciary were validated by practice at all levels, from the judges of the highest court to the lowest paralegal.³²⁸ In a follow up report of “the Integrity and Anti-corruption Committee of the Judiciary” established to verify judicial corruption and headed by High Court Judge Aaron Ringera, a partial purge on judicial officers and paralegals was recommended and implemented in 2003.³²⁹

The Report³³⁰ documents that both minor and substantial corruption was practiced in the judiciary, thereby compromising the integrity of the institution as a whole. Today, there is no evidence to show that this evil has been eradicated, notwithstanding the purge through vetting and disciplinary action by the Judicial Service Commission.

4.2.14 INTRICATE JUDICIAL PROCEDURES

The judicial system requires that to access its services and get certain remedies from the courts and tribunals, certain procedural formalities must be adhered to. These procedures have existed since the beginning on assumption that all parties will be represented by legal counsel. However, many people cannot afford legal

³²⁵ Transparency International, Kenya, Indexes 2001, 2002, 2003, and 2004.

³²⁶ Transparency International, Kenya, Index 2004.

³²⁷ The 2013 Transparency International survey report revealed that the judiciary in Kenya ranked number 3 in corruption.

³²⁸ “Report of the Committee on the Administration of Justice, Republic of Kenya”, (1998).

³²⁹ “Report of the Integrity and Anti-Corruption Committee of the Judiciary (2003).”

³³⁰ Ibid.

representation and so they appear *pro se*. lack of legal representation presents a hindrance to understanding of their cases and diminishes the ability of the courts reaching a fair determination. On the other hand, the Advocates Act³³¹ prohibits the unauthorized practice of law, save as an intermediary who may not possess legal knowledge.

The uncertainty about what is the unauthorized practice of law also limits the amount of information available to self-represented persons. Sometimes the justice seeker obtains information from the court staff that have no legal training and because of concerns about violating the Advocates Act.

4.2.15 HOSTILE JUDICIAL OFFICERS AND STAFF AND THE ADVERSARIAL PROCESS

Some judicial officers often appear very harsh to the justice seekers, which intimidates accused and even witnesses.³³² The mode of dress by the learned friends and judges of the High Court in criminal trials especially murder trials where red gowns are worn and the wigs and gowns is still foreign to the ordinary Kenyan and intimidating to the justice seeker.³³³ The conduct of proceedings has not been simplified and the general demeanour of some court officers is rigid towards, suspects, witnesses and complainants. This frightens the seekers of justice, who may never return to court, thereby compromising the outcomes of criminal trials.³³⁴

4.2.16 EXORBITANT BAIL AND BOND TERMS FOR THE POOR AND VULNERABLE

The 2010 Constitution makes bail a right of accused persons.³³⁵ However, this right is not absolute as bail prescriptions by the courts, besides not being standardized, are often beyond affordability by the poor, children and women. For example, prior to the effective date of the new Constitution, the Court of Appeal held declared that

³³¹ Chapter 16 of Laws of Kenya.

³³² National Assembly Official Hansard Report (01 March 2012) p.4.

³³³ The new Chief Justice and his deputy were sworn in at State House, on June 20, 2011 without wigs and gowns, Daily Nation, 'CJ vows to fight graft in the Judiciary' *Daily Nation* 20 June 2011 p.1 <http://www.nation.co.ke/News/CJ-vows-to-fight-graft-in-the-Judiciary-/-/1056/1185562/-/12dif3oz/-/index.html> (accessed 5 December 2012).

³³⁴ Ojienda, O Tom "The Legal profession in 2015' Rethinking the challenges, opportunities and threats." (2005): *The Law Society of Kenya Journal* Vol. I No.2 p.20.

³³⁵ Arts 9 & 49 of the Constitution.

the provision in the Children's Act on bail for children indicted of a capital offence is unconstitutional and that therefore, such children could not be granted bail pending trial.³³⁶ No doubt, such an interpretation of the law hinders access to criminal justice for the vulnerable children.

4.2.17 SOCIO-CULTURAL BIASES

In some communities, often, women, children and persons living with disabilities are looked down upon and therefore some judicial officers reflect such biases in decisions, thereby becoming an anathema to access to justice.³³⁷ Socio-cultural biases are also mirrored in customary justice systems, where the prospects of accessing justice is challenged by discrimination on the basis of sex, age and social status for instance, women are not permitted to preside over or even attend the *Maslaha* courts in the North Eastern part of Kenya, and even where they are the victims of rape or where their children are defiled, only men make decisions that bind them.

4.2.18 GEOGRAPHICAL BARRIERS

One other real barrier to accessing criminal justice for most Kenyans is the inadequate physical access to courts. This is despite the fact that the Constitution makes provision for unimpeded access to the courts as a basic right. The courts are located mainly in urban areas owing to lack of funding to construct courts near the people in compliance with Article 6(3) of the Constitution. For some people, the nearest court could be in excess of 70 kilometres away.

In certain instances, persons may have to walk long distances to the nearest these far-flung courts are also poorly resourced and poorly managed and offer a limited range of services. The road networks are also appalling. Most judicial staff decline to be deployed to serve in the rural areas. The effect of such distances is worsened

³³⁶ “*Kazungu Kasiwa Mkunzo & another v Republic (2006 eKLR.*” Judgment by Justices Omollo, Bosire & Githinji J.J.A.

³³⁷ Justice (Rtd) Richard Kuloba's judgment on the sharing of matrimonial property between spouses on dissolution of a marriage in the High Court at Nairobi in *Mbugua v Mbugua* [2000] LLR 1136 Gicheru JA the majority bench of the Appellate Court allowed the appeal on the basis of patent bias against women by the Honourable Judge , and ordered a retrial. Justice (Rtd) Richard Kuloba relied on the English Matrimonial Property Act of 1882.

by the fact that most rural areas do not have regular public transport. “Where public transport exists, it is expensive for most Kenyans.”³³⁸

The courts are also less geographically accessible. Some Counties are too expansive and not every County has a High Court or courts of equal status. However, with the establishment of the two courts of equal status with the High Court,³³⁹ this has eased some pressure on the High Court especially on determination of land matters. Geographical obstacles mean that travel costs are high and are paid continually.³⁴⁰

Many justice seekers arrive in courts late and find their cases determined in their absence, and in some instances, warrants of arrest issued against the suspects who are on bond or cases against litigants heard or determined *ex parte*.

Refugees and Asylum seekers are mainly settled in Daadab and Kakuma camps, located over 400 miles away of Nairobi Capital City and from other administrative centres. As a result, they are physically removed from accessing courts of their choice and other justice institutions.

The Kenya government place reserved the “United Nations Convention Relating to the Status of Refugees, 1951” on “its right to designate the place or places of residence of the refugees and to limit to the refugees’ movement on account of threat to national security and public order.” No adequate criminal justice institutions are in those far removed places which affect the rights of refugees to access justice.³⁴¹ It is for this reason that the Government drafted a bill for enactment to allow the refugees access agricultural farm services which bill is nonetheless still pending before the President for assent.

³³⁸ Supra, note 115 p.15.

³³⁹ Art 162(2)(a) and (b).

³⁴⁰ Art 6(3) of the Constitution provides that state organs shall ensure that their services are reasonably accessible throughout the Republic, “having regard to the nature of the service.”

³⁴¹ Refugee camps are located in Kakuma, IFO and Daadab in the Northern and North Eastern parts of Kenya respectively where there are very few courts and judicial officers.

4.2.19 CONCLUSION

This chapter was to identify the key barriers in accessing the criminal justice system and how the system is dealing with those barriers. The chapter also identified areas that the government and non-state actors will consider examining in the future. In conclusion, although the promotion of “access to criminal enhances the “rule of law” this “access” remains a pipedream, especially to the majority poor and marginalized population.³⁴²

Ineffective investigations and prosecutions, long distances to court houses, inaccessible or unfriendly physical environments, delays in the determining of cases, backlog, technical legal processes and out-dated language used in an adversarial justice system further complicates access to justice. In addition, the architecture of the court system is to serve mostly individuals who have legal knowledge and representation by advocates.

In an ideal situation, every justice seeker should benefit from services of an advocate during their case whether or not they can afford the services. However, a majority of individuals cannot afford an advocate for their trial or even as complainants. The Constitution gives accused persons a choice to be represented by an advocate of their own choice but it does not guarantee that legal representation. As a result, those unacquainted with the “rules of the game” are using a system designed for use by advocates. It is therefore vital that potential solutions are recognized to tackle the identified hindrances of accessing justice.

The identified barriers for accessing justice call for reforms to eliminate unequal access in order to ensure effective protection of the right, particularly as between the rich and the poor. These proposals are not exhaustive. It is therefore hoped that this discussion will generate more interest in this are to ensure quality access to criminal justice.

³⁴² “National Development Plan” (2002-2008) “Effective management for sustainable economic growth and poverty reduction by the Government of Kenya.” According to this report, well over 56% of Kenyan population is living below the poverty line of USD 1.25 per day.

Above all, it is important to reflect on the risks and opportunities of the poorest and least protected members of the society to defend their rights. The next chapter therefore summarizes the key findings in this study, and makes recommendations for tackling the identified barriers of accessing criminal justice in Kenya.

CHAPTER FIVE

RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 FINDINGS AND CONCLUSIONS

In this paper, we have argued that people's inability to access criminal justice through the courts or obtain an effective remedy for their grievances for various reasons gives rise to constitutional problems that transcend the rights and interests of not only individuals but also the society as a whole. "Without equal access to the law, the system not only robs the poor of their only protection, but it places it in the hands of their oppressors the most powerful and ruthless weapon ever created."³⁴³ "Access to criminal justice" is therefore essential in the promotion and protection of the "rule of law" and an essential element in the enjoyment of fundamental human rights and freedoms. It, promotes security, peace and harmony in society as a whole.

Alexander Hamilton, one of America's first constitutional lawyers, in one of his memorable quotes stated, "the first duty of society is justice."³⁴⁴ Nonetheless, access to justice remains a challenge in many countries all over the world, including Kenya.

This study examined the "concept of access to criminal justice" and its significance in the administration of justice in Kenya. The findings demonstrate that "access to justice" is a critical instrument for promoting and protecting fundamental human rights and freedoms, and ensuring the rule of law. It is an essential element of democracy. It is not just "physical access" but the outcomes of court that give meaning to that "access."

The study has established that access to justice encompasses policy and normative legal safeguards, strong institutions, legal awareness, legal aid, representation and advice, effective enforcement of the law and oversight by independent offices. To

³⁴³ Reginald Heber Smith (1919), *Justice and the Poor*.

³⁴⁴ Alexander Hamilton, Federalist Paper No. 78. *the Federalist Papers*, Terence Ball ed. (United Kingdom: Cambridge University Press 2003).

achieve the highest level of protection, international, regional as well as municipal frameworks play complementary facilitative roles. Critically, is the adherence to international norms in the protection of peoples' rights? The international and regional instruments and institutions impose human rights obligations on the state parties to domesticate and implement the provisions.³⁴⁵ These normative strategies are foundational in making conclusions on access to justice and practices put in place, as well as offering a platform for recommending further action. The international standards held to promote and protect people's rights from being violated by the state or persons in society, and encourage parties to seek redress against the government to ensure that the government is answerable to its citizens.

The Universal Declaration of Human Rights (UDHR), for example, declares that all persons accused of committing a crime should be guaranteed adequate facilities to mount their defence. The ICCPR on its part is a legally binding treaty which mandates that an accused person should be accorded "adequate time and facilities to enable them prepare their defence, including the right to be represented by counsel of their choice. "The African Charter on Human and Peoples Rights" replicates the above instruments while calling upon states parties to fully domesticate into their Constitutions the espoused principles. Kenya has already incorporated these provisions in the 2010 Constitution.³⁴⁶

People's fundamental rights can only be protected and enforced when individuals have access to judicial institutions to resolve disputes and in an efficient and effective manner. Barriers to criminal justice underpin poverty and marginalization.³⁴⁷ Upholding a robust rule of law is a prerequisite in the protection of the underprivileged groups. Access to criminal justice, therefore, is vital to the promotion of "social inclusion."

³⁴⁵ Article 21(4) of the Constitution of Kenya obliges "the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms." Under Art "21(1), every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

³⁴⁶ Ibid, Arts 49, 50 & 51.

³⁴⁷ UNDP "Commission on Legal Empowerment of the Poor," "Making the law work for everyone" (2008) pp.1& 33.

Hindrances to accessing justice are numerous. The study has considered some of those barriers that relate to accessing the judicial system such as high cost of litigation, language barriers, undue delay in the administration of justice, reliance on technical rules and the inherent adversarial system, inadequate provision of legal aid and representation by counsel, hostile court environment, corruption, socio-cultural biases and geographical barriers. These barriers confirm the suggestion that many people are unable to enforce their rights because the criminal justice delivery systems are not facilitative of those rights. This is why we have so much of street injustice. On the other hand, the informal justice systems are not fully developed and legislated hence not effectively operational to deliver criminal justice to the people.

The study has demonstrated that access to justice is crucial to the broad notions of a just, social, economic and political system and concluded that inadequate access to criminal justice undercuts public confidence in state institutions. This aggravates discernments of, impunity, injustice and exclusion by the economically and socially disadvantaged persons in the society, which also undermines the rule of law. This necessitates that regardless of means, all Kenyans should have access to legal and judicial institutions and services.

5.2 RECOMMENDATIONS

This study has underscored the working of the criminal justice system in Kenya and numerous of challenges. Suggestions are therefore made in order to enhance the activities related to each phase of the criminal process. The suggestions related to challenges to criminal investigations are stipulated in the sections below.

5.2.1 STRENGTHEN THE WITNESS PROTECTION PROGRAMME AND IMPLEMENT THE VICTIMS PROTECTION ACT

No criminal case can succeed without witnesses or complainant recording statements and appearing in court. On this aspect, the state should therefore develop the confidence levels that its citizens have in the police service.

Witness protection programme needs to be fully developed and the public educated on how the programme works. Complainants in serious cases need to be counsel before being placed in the programme to avoid leakage of their whereabouts which will risk their lives and that of their friends and relatives. There is also need to operationalize the Victims Protection Act especially on the aspect of compensation for victims of crime, where necessary. This will encourage complainants and witnesses to step forward and give evidence in criminal trials.

5.2.2 ADEQUATE FUNDING FOR THE POLICE SERVICE

Albeit the government has over the last two years increased the number of police officers to citizen ratio, it must also increase funding to the Police. The police should be adequately equipped and logistical support provided for their operations. It is also important to encourage other players who enjoy this public good to also raise funds to help facilitate policing activities. State and non-state actors should be stimulated to support the police service to build their capacity in investigations, community policing and crime watch.

5.2.3 ADEQUATELY TRAIN INVESTIGATORS AND PROSECUTORS

There is need to overhaul the training modules and methodologies for the Kenya Police service in order to integrate new approaches and expertise of police discipline in criminal investigation and crime detection. Recruitment into the national police service should be pegged on objectivity criteria and the recruits to undergo not only physical training by way of drills but also psychological, mental analytical skills training.

Refresher courses should be compulsory for all not a select few and it should not be for those who have disciplinary cases. This will help officers updated on modern policing methods. Training both regionally and internationally will help build linkages for purposes of collaborative internal and external investigations especially in cross border crime detection and prevention as well as mutual legal assistance for prosecution purposes.

5.2.4 ENHANCE THE SECURITY AND SAFETY OF INVESTIGATIONS FILES

To effectually confront the issues relating to missing case file spectacles, it is suggested that police files control policy be formulated to spell out how an investigations case file is initiated upon a complaint being raised. A strong file movement register should be created and officers held to account for any loss of files in their custody. Archives for duplicate files should be created to ensure that there is always one extra file kept in the archives should the moving files disappear.

This process should be replicated in court where case files disappear at will. Before court proceedings are digitalized, court proceedings should at the end of each day be photocopied and archived in an extra file to be kept by the Deputy Registrar.

5.2.5 TRAIN MORE FORENSIC EXPERTS AND ESTABLISH FORENSIC LABORATORIES

In Kenya, there are virtually no forensic experts and a forensic laboratory. There is therefore need to train forensic experts and establish a national forensic science research institute for training of such scientists to help unravel sophisticated crime.

5.2.6 ON BARRIERS ASSOCIATED WITH CORRUPTION

On the barriers associated with corruption, while it is hoped that the vetting of judges and magistrates might bring real change in the judiciary,³⁴⁸ transformation can only become a reality if the practicing lawyers will also change their way of doing business. As seen in the preceding chapter, in most instances, lawyers, too participate in the denial of justice through corruption and ineptitude. The Bar Association should therefore, through training or disciplinary sanctions, cultivate the genuine altruistic spirit of lawyers, and resurrect their role as watchdog, to create an enabling environment for access to justice for all to thrive.

Judicial Service Commission should also implement an anti-corruption agenda, and send clear signals to individuals and other institutions that corruption shall not be tolerated. This can be done through awareness-creation and sensitization

³⁴⁸ This is a requirement under sec 23 of the Sixth Schedule to the Constitution as operationalized by the Judges and Magistrates Vetting Board Act No. 2 of 2011. Already, the Board has vetted Court of Appeal Judges and found four of them unsuitable to serve, although they have contested the decision and their petition is pending determination by the High Court.

programmes to members of the public, and naming and shaming corrupt judicial officers, besides reporting them to the anti-graft agencies.

Information gathered on corrupt officers could form a basis for their eventual removal from office as stipulated in the Leadership and Integrity Chapter of the Constitution.³⁴⁹ This move will secure integrity of the entire judicial system, as corruption has been identified as the most corrosive barrier to accessing justice. Taking a solid against this vice called corruption within the criminal justice system is not an option.

Reforms must be geared towards securing judicial independence. In the context of access to justice for all, an independent, efficient judicial system. In this regard, the target should be to sever the judiciary from executive control and afford it reasonable autonomy. Although the Constitution guarantees the independence, especially in financial matters by creating a Judiciary Fund, the challenge remains where Parliament must scrutinize the budget for the judiciary, and where court decisions affecting people's rights are not respected by the executive and the legislature.

Reforms are also needed in the process of appointment and training of every judicial officer. The aim here is to attract and recruit qualified and competent personnel to undertake the responsibility of administration of justice.³⁵⁰ An independent Judicial Service Commission should select, vet and nominate potential appointees, without the executive or politicians influencing the process.

Although the new Constitution attempts to provide the criteria for appointment and removal of judges, a criteria for recruitment of all judicial officers as developed in the Judicial Service Act, should be adhered to strictly, to ensure standardization in the recruitment process. The Kenya Anti-Corruption Commission, the National

³⁴⁹ Chapter Six of the Constitution.

³⁵⁰ Lawyer Kenya (2009). "The Judiciary: "Taking Judicial Reforms Seriously" Vol 1 Issue No. 1.

Security Intelligence Service, the Advocates Complaints Commission, the Law Society of Kenya and the Judicial Service Commission should gather sufficient information on the prospective appointees to ensure that they are persons beyond reproach, before they are vetted.

Where court divisions are created, such as commercial, civil, constitutional, family, criminal, children, anti-corruption among others, the Chief Justice should ensure that those with the commitment and competence in the matters for which the divisions were created sit in the divisions, and attendant training accorded to them to increase their efficiency in the delivery of criminal justice.

5.2.7 ON LEGAL TECHNICALITIES AND FORMALITIES

To make the courts more accessible, certain formalities must be shed off. To achieve this, we must develop simplified legal forms and procedures, encourage alternative dispute and conflict resolution mechanisms, conduct citizen sensitization programmes, waive court fees, operationalize the Small Claims Court to help expeditiously resolve some disputes which give rise to criminal cases

Judicial officers should be sensitized on their reactions in court and to create a court environment that is sensitive to the users. Their manner of dress and that of the advocates appearing before them should not be intimidating to members of the public. They should also adopt the use of simple language that is comprehensible, to guard against the trauma experienced by parties or witnesses whenever the latter are shouted down.

5.2.8 ENSURE AFFORDABLE BOND AND BAIL TERMS FOR SUSPECTS

Bail prescriptions should be standardized and made affordable through legislation and courts should, as a matter of right, grant bail to children subjects and persons abled differently brought to unless to do so would endanger the lives of the, child, person with a disability or others.

5.2.9 USE OF COMMUNICATION AND TECHNOLOGY

There should be improved communication with the public through more judicial open days to demystify the judiciary, and improved interactions between the

judiciary and the private sector stakeholders, including the media, civil society and academia, who all play specific but interrelated roles in the criminal justice transformation process.

The judiciary should also develop strong relationships with other stakeholders in the criminal justice sector by strengthening bar-bench committees and Court Users Committees.

Kenya could borrow from the Philippine judiciary which launched a “Jail Decongestion Project” in selected cities in Metro Manila.³⁵¹ The “Jail Decongestion Project” with a view at facilitating the release of overstaying prisoners by providing adequate legal assistance to them. While strictly speaking, the jails are outside the jurisdiction of the courts, the Manila Judiciary pursues the project in collaboration with other players.³⁵²

Automation of all court proceedings will increase efficiency and transparency in the judiciary. The public should have greater access to the judiciary just as they have legislative information, through live webcasts of court oral arguments with links to all the cases filed in each argued case. Ethiopia³⁵³ and Singapore have succeeded on this and we can borrow a leaf from them.

In Singapore,³⁵⁴ for example, the judiciary uses electronic data inter-change, “workflow and imaging technologies.” This is a system where advocates present their cases and documents, serve their opponents and obtain abstracts of documents from the court files electronically right from the comfort of their offices. This system saves the courts of time and storage. Retrieval is nearly instantaneous.” In Kenya, trials at the Mombasa and Milimani Commercial Division High Court to

³⁵¹ Panaligan, G Rey “Mobile courts: Justice to go” (2009) <http://www.mb.com.ph/node/320399/mobileco> (accessed 19 November 2012).

³⁵² Philippines Supreme Court Public Information Office Annual Report (2008). http://sc.judiciary.gov.ph/pio/annualreports/SC_Annual_08.pdf (accessed 10 December 2012).

³⁵³ Article on Ethiopia ‘Equipping the Judicial System to serve’ A project of International Development Association <http://web.worldbank.org/WEBSITE/EXTERNAL/EXTABOUTUS/IDA> (accessed 19 November 2012).

³⁵⁴ Iqbal, Javed ‘The role of the judiciary as a catalyst of change’ <http://www.supremecourt.gov.pk/ijc/Articles/9/1.pdf> (accessed 19 November 2012).

automate proceedings on a pilot basis have been undertaken. However, the programme is yet to be rolled out in other courts and the rest of the country.

5.2.10 JUSTICE ON THE WHEELS

To guarantee that criminal justice meets the needs of the people it is created for, the courts and tribunals must be more accessible to the people. These institutions should be decentralized to make them more accessible to the citizens who spend time and money travelling long distances in search of justice. Therefore, the judiciary must ensure that the services that it offers are accessible to all parts of the country.³⁵⁵

To achieve this, we could have “justice on the wheels” where mobile courts are established to reach distant areas where there are no courts to enhance access to justice for majority of Kenyans. This method of bringing justice closer to the people has worked well in the Philippines.³⁵⁶ On the other hand, the existing court infrastructure and facilities must be improved.³⁵⁷ The physical access that identifies the range of disability-related internal as well as external access requirements, including communication and assistive devices for persons with diverse disabilities should be provided. Appropriate designs and signage across the entire justice system must be developed.

In areas where lawyers are limited, the state and civil society should provide structures for training of paralegals to undertake the awareness-creation and play advisory, mediation or conciliatory roles. A policy on legal aid and awareness recognizing the role of paralegals should be fast tracked. This will help where

³⁵⁵ Article 6 of the Constitution.

³⁵⁶ Azcuna, Adolfo S “The Justice on the Wheels in Philippines.” 28-30 November 2005 [http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_PhilippinesAzcuna\).pdf](http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_PhilippinesAzcuna).pdf) (accessed 5 July 2012) The Justice on Wheels is an access to justice programme which was commenced in 2004 by the Philippines Supreme Court following the example of the Guatemalan Mobile Court System. “Justice on the Wheels” “brings justice “closer to the poor by providing on-the-spot fast and free dispute resolution services – adjudication, mediation and conciliation.

lawyers concentrate on legal representation in court. Small Claims Courts should be fully operationalized and located at the lowest administrative units.³⁵⁸

5.2.11 IMPLEMENT THE RIGHT TO LEGAL AID AND LEGAL REPRESENTATION

Government has an obligation to promote and protect basic human rights of their citizens. As part of this duty, the government should allocate sufficient funds to the legal aid service to ensure an effective and transparent delivery of legal aid and representation to the needy people. Towards that end, the National Legal Aid Service must be fully operationalized. The government should also develop programs incorporating legal education and assistance at all stages of the criminal process from investigations, trial, appeal stage hearings, trials, appeals, and other proceeding to ensure the protection of human rights.

5.2.12 STAKEHOLDER SENSITIZATION

The police, prisons, advocates, prosecution and judicial officers should be sensitized on human rights protection and to ensure provision of legal assistance for all suspects appearing before them.

5.2.13 GUARANTEE REPARATION FOR OF HUMAN RIGHTS VIOLATIONS

It is not an option for the state to protect its citizens and promote their fundamental rights and freedoms. However, this can only be guaranteed if government officials take responsibility for their actions. Human rights abuses through torture and directives to shoot to kill by those in power must stop. In addition, there should be a Reparations Programme for persons whose human rights are violated and such persons should be enabled to access legal aid and representation free of charge or at the expense of the government. In this instance, the TJRC Report which was submitted to the President and the National Assembly way back in 2013 should be debated and recommendations on reparations and other alternative means of dispute resolution that the report recommends be implemented.

³⁵⁸ As at the time of submission of this project paper, the National Assembly had passed the Small Claims Court Act No. 2 of 2016. The Act came into force on 21 April 2016 but the Court is yet to be functional.

5.2.14 EMBRACE ALTERNATIVE INFORMAL CONFLICT AND DISPUTE RESOLUTION MECHANISMS

Our legal system is traditionally adversarial. The Constitution at Article 159 obliges the court in the exercise of judicial authority to encourage “the use of alternative dispute resolution mechanisms” and “traditional dispute resolution mechanisms,” which do not contravene human rights. These include mediation, conciliation and arbitration. Alternative dispute resolution mechanisms compared to the formal criminal processes potent peaceful resolution of disputes and reestablishes “social cohesion.”

These mechanisms latently reduce dependence on the police for law enforcement. They also reduce backlogs of cases in courts. The state should consider reestablishing and effectively supervising community service as an alternative to incarceration as a means of resolving conflict occasioned by crime. All stakeholders should therefore be encouraged to embrace such alternative measures and support such mechanisms while ensuring that they adhere to human rights principles. In this regard, sensitization seminars throughout the country are necessary.

5.2.15 DIVERSIFY AND EFFECTIVELY COORDINATE LEGAL AID DELIVERY SYSTEMS

There is need to diversify legal aid service delivery options to ensure reasonable “access to criminal justice.” These options include embracing the South African model of “government funded public defender offices,” “judicare programmes,” “justice centers,” “law clinics” and creating synergy and collaboration with the civil society and faith-based organizations. Legal Aid Fund should be operationalized and its sustainability guaranteed.

5.2.16 DIVERSIFICATION OF LEGAL AID SERVICE PROVIDERS

Out of a population of about 45 million Kenyans, there are now over 6000 active practicing advocates. For this reason, law students and paralegals as well as legal assistants who volunteer to provide legal advice should undergo training free of

charge at the Kenya School of law at the state expense to subsidize what advocates in private practice are offering.

5.2.17 OFFER LEGAL SERVICES TO THE INDIGENT

Legal representation and advice is costly. Advocates in private practice, if found to be undercutting or charging legal fees below that which the Advocates Remuneration Order stipulates, will be guilty of professional misconduct. However, since lawyers are “officers of the court,” they are obliged to ensure equitable access to justice. The Bar Association should therefore be encouraged to provide *probono* services as part of their corporate social responsibility to the Community.

5.2.18 GUARANTEE AND SUSTAIN LEGAL AID

In Kenya, Legal aid is mainly donor driven and therefore termination of the services occurs from time to time. There is therefore need to ensure that the legal aid service once rolled out will be sustainable. This calls for coordinated and collaborative efforts by the government and private sector service providers creating synergy to boost the statutory Legal Aid Fund established under the Legal Aid Act.

5.2.19 PROVIDE LEGAL LITERACY AND HUMAN RIGHTS EDUCATION

One of the major hindrances to accessing criminal justice in Kenya, as was identified in this study is ignorance of the law, and human rights. When people are ignorant of their rights as stipulated under the law, they cannot enforce those rights. As a result, others expose them to violations. As a way forward, it is recommended that the state should develop and roll out a curriculum for human rights education and legal literacy in schools right from the lowest levels to University and tertiary institutions. The curriculum should cover the needs of all categories of persons.

5.2.20 CONCLUSION

The identified obstacles to accessing criminal justice represent a problem for the equitable administration of justice. As indicated in this study, the existing interventions by governmental and non-governmental agencies to enhance access to justice are still negligible, compared to the gravity of the obstacles. We therefore

contemplate reforms that are being attempted in Kenya and elsewhere, hoping that they will impact on the equality of access to criminal justice. We however do not boast that these proposals are exhaustive enough. They may pose certain risks as well as opportunities that the actual process of judicial reform presents in almost all countries of the world in the quest to achieve improved “access to criminal justice.”

Achieving justice for all can only be meaningful if resolute efforts are made to address the challenges through enactment of legislation and policies that provide for waiver of court fees; legal aid, legal information, legal advice and representation; use of paralegals and law students; developing and adopting simplified legal forms and procedures; embracing modern information technology such as automating court proceedings and conducting proceedings via video conferencing; implementing an anti-corruption agenda; creating inter-sectorial linkages with other stakeholders in the justice system; recruitment and training of competent and committed personnel to administer criminal justice; establishing mobile and fast track courts, operationalizing the “Small Claims Courts countrywide; practical judicial reform; efficient case management and expeditious disposal of cases including pre-trial conferences for criminal cases, developing an efficient monitoring and evaluation mechanism to act as a check on the judicial performance, making use of innovative approaches to justice such as the *Gacaca* system in Rwanda; and promoting alternative dispute resolution mechanisms in minor offences.

Barriers associated with economic costs can be addressed in various ways. Poverty, the main root cause of people’s economic woes should be tackled to ensure access to resources by all is guaranteed. We propose the expeditious enactment and implementation of laws and policies that ensure effective and efficient management of public resources, and access to these resources by all.

Fast-tracking poverty eradication efforts will probably be the ultimate solution to access to justice. Where the citizens are economically empowered, legal

representation and access to justice situations identified in this study will improve. Poverty is linked to the exercise of judicial power. It censors people's capacities to access education and information on their rights.

Access to justice programmes should be incorporated into poverty alleviation programmes to strengthen their outcomes. Linking legal awareness programs, for example, to broader development programs, enables direct access to identifiable beneficiaries, such as women-headed households or internally displaced persons. In addition, it strengthens commitment for the awareness programs and sustainability. The judiciary could highlight these linkages and encourage the government and donor agencies developing poverty reduction programs to address "access to justice" issues.

Legal fees charged by courts should be kept affordable so that the poor can initiate their complaints in courts for example, to claim for damages arising from the criminal harm or injury occasioned to them by the convicts. This will complement waiver of court fees where an accused or victim litigant is unable to raise any part of it. Further, minor offences should be submitted to mediation before trial. Even in those cases where the matter is fixed for hearing, parties should be encouraged to seek alternative dispute resolution mechanisms, which are cheaper and faster such as deviation or where civil suits can be pursued as an alternative to criminal proceedings.

Legal practitioners in the private sector should also commit themselves to the fundamental principles enshrined in the "UN Basic Principles on the Role of Lawyers" which espouse that, "no one, especially the weak and vulnerable, should be unable to enforce or defend a right for want of resources necessary to obtain legal advice and representation." The Bar Association can do this by urging its members to de-commercialize the practice of law through legislative amendments to the Advocates Remuneration Order.

It is also necessary that advocates charge fair and affordable legal fees to less endowed clients. This in itself has nothing to do with undercutting when applied uniformly and universally. The Law Society of Kenya should study the phenomenon of undercutting and come up with regulatory initiatives, which would ensure every person appearing in court is represented by an advocate, irrespective of the level of affordability of the standard legal fees.

Laws and policies that ensure effective coordination and implementation of legal aid, education, awareness and representation should be enacted. The judiciary can also secure adequate budgetary allocation for pauper brief representations, and ensure that lawyers who take up pauper briefs are remunerated immediately the matter is concluded.

Other potential actions regarding challenges faced by unrepresented litigants include: developing brochures stipulate the dangers of prose representation; holding of “orientation” conferences or pre-trial conferences to court proceedings via video; developing and ensuring implementation of registry manuals for judicial staff and training of court staff and paralegals of advocates on what would constitute legal advice; creating legal information desks at all court stations and establish hotline number for legal awareness.

The legal profession is expected to provide accessible, quality, ethical, and cost-effective legal services to the citizens, and show the willingness and ability to answer the call to public service. Each of us as a citizen has the same responsibility as part of the stewardship of our citizenship. As was wisely stated by Thomas Paine, “those who expect to reap the blessings of freedom must, like men and women, undergo the fatigue of supporting it.”³⁵⁹

To tackle the language barriers, adoption of simple language during judicial proceedings will ensure that all parties before the court, as well as their witnesses

³⁵⁹ Paine, Thomas (1737-1809).
http://www.brainyquote.com/quotes/authors/t/thomas_pain (accessed 19 November 2012).

follow the proceedings, without necessarily relying on advocates. This will help achieve maximum participation of all those who engage the justice system.³⁶⁰

Where a witness is not competent in either Kiswahili or the English language, and chooses a preferred language, the court should provide an interpreter. Witnesses who need an interpreter may, however, find themselves disadvantaged in communicating their testimony and in responding to questions during cross-examination, as the interpretation may not be accurate. They may end up, especially where there is no representation, with self-incrimination compromising their defence.

We propose that Judges and Magistrates, particularly those serving in rural areas, be granted a greater autonomy as to procedure, for example, using the local language, to ensure that all participants in the legal process follow the proceedings. Courts should also ensure that trained lingual and sign interpreters are available to interpret proceedings to the parties in a language they understand most. Parties with small claims should be allowed to prepare their pleadings in Kiswahili. The ultimate answer, however, lies in the total overhaul of both the statutes and rules accompanying them on the language of the court.³⁶¹

Members of the legal profession should take a dynamic role in reforming the existing laws and procedures that inhibit “access to criminal justice” to create an enabling environment for “access to justice for all.” Law reform will improve the speed of dealing with cases by simplifying the procedures and language of the law for users; making responsive laws to the society; improving certainty and clarity of the law; and improving efficiency.

³⁶⁰ Under Art 7 of the Constitutional, both Kiswahili and English are recognized as official and national languages. It also obliges the promotion of indigenous languages.

³⁶¹ The “Civil Procedure Act (Cap 21 Laws of Kenya)” and the Judicature Act (Cap 9 Laws of Kenya) (Appellate Jurisdiction Rules) prescribe the language of the High Court and Court of Appeal to be English. A total overhaul of these statutes should be urgently considered to accord with Article 7 of the Constitution.

However, legal representation as a right must transcend criminal cases. As mentioned above, we believe one of the simplest ways that courts could address the problems of inaccessibility as identified is by recognizing that judges have a constitutionally entrenched power to appoint state-funded legal counsel when it is necessary for them to support one or more of the values underlying judicial independence. In effect, this appointment power would be a new rule or guarantee that would be added to the existing bundle of rules, powers and guarantees that presently constitute judicial independence in Kenya.

The proposed power to appoint legal representation based upon judicial independence would not be limited to proceedings involving the deprivation of life, liberty or security of the person. Nor would it require state action. Since judges must always be impartial and must strive to uphold the rule of law, there is no reason that an appointment power would be limited to certain kinds of legal disputes. The result, among other things, is that legal counsel could be appointed in a much broader set of cases than is currently the case.

This, of course, raises the question of when and how appointment power should be exercised. In our view, the decision to appoint counsel would be context-driven and would depend upon the nature of the dispute, its complexity and the capacity of the unrepresented persons or litigants to participate in the process. Judicial officers could appoint counsel on their own motion, or individual litigants could ask for counsel to be appointed. Having said this, we think the appointment power would be subject to important limitations.

First, it could only be exercised in support of the proper resolution of a legal dispute; second, its exercise would be predicated on legal counsel being necessary to support judges' ability to be impartial, manage the constitutional dispersal of powers, or uphold the rule of law. Third, the government would have an opportunity to justify why it should not pay for state-funded counsel and an opportunity to propose alternative measures short of the appointment of counsel. In

this way, the appointment power we proposing would be integrated into the judicial function and subject to a requirement of proportionality.

The state must be wary of the much litigation that is likely to emerge because of the enactment of the Constitution and fast track the enactment of the legal aid policy and legislation. These will provide for the establishment of the legal aid institution that will roll out the national legal aid scheme.³⁶²

Adequate legal aid provision to the poor, vulnerable and marginalized will ensure that all persons, irrespective of status, not only have their say in court, but are also informed of their rights. The Bar Association should, therefore, through training, inculcate a genuine altruistic spirit of lawyers to resurrect their role as watchdogs for the public interest. This will also create better conditions for the rule of law, an indispensable prerequisite for access to justice.

The practice, like in other jurisdictions,³⁶³ where senior students of law and young lawyers are permitted to represent parties in courts under close supervision of a senior lawyer should be introduced. What this means is that since these categories of lawyers have different priorities, they are in a better position to represent the poor, marginalized and vulnerable groups without demanding unreasonable payment in terms of legal fees. Most students and young lawyers will go to court to gain experience and network as there is improved “access to justice for all.”³⁶⁴

An analysis of the legal framework reveals certain gaps that the lawyers need to seal to guarantee improved “access to justice for all.” The solid preamble to our Constitution and its principles should guide in its interpretation. Lawyers, therefore, should be the first to engage in the national civic education and educate the public

³⁶² *David Njoroge Macharia v. Republic Nairobi HCCRA No. 71 of 2005 p.24.*

³⁶³ “United Nations Handbook on improving access to legal aid in Africa.” ”Criminal Justice Handbook Series” (2011) p.23 New York.

³⁶⁴ Thelle, Hatla & Dalton, Paul “A human right to legal aid’ Danish Institute for Human Rights.” Contributed by Bruno Kalemba “http://www.humanrights.dk/files/pdf/Publikationer/LEGAL_AID.pdf” (accessed 10 December 2012).

on the salient features of the new Constitution. This will be the starting point for citizens to know their fundamental rights and freedoms.

Lawyers must promote the interpretation of international norms that promote international human rights standards into domestic realm to give effect to judgments and rulings. Fast tracking the enactment of ratification of treaties legislation is necessary.³⁶⁵ There need for continuous reform of the judicial process to accord with the constitutional dictates to ensure human rights protection.

Under the Constitution, “judicial authority is derived from the people and vests in, and shall be exercised by courts, tribunals established by or under the Constitution.”³⁶⁶ The judiciary, being the last protector the of the fundamental human rights and freedoms of the citizens and as the custodian for the rule of law, should at all times send strong and clear signals to the executive and the legislature that the poor and vulnerable should not be denied legal protection of the law under their watch.

The judiciary can act as a catalyst for change, since app persons rely on it for protection. It should at all times ensure that its decisions are enforced by the executive organ, especially where citizens’ rights are involved.

The causes of delay, which include adjournments, prompted mainly by applications by either of the parties to disputes, inadequate number of trial magistrates or judges, frequent transfers of judicial officers and unavailability of witnesses, and laziness and judicial ineptitude of some judicial officers, result in backlogs. These barriers can be addressed by the judiciary through proper case management systems, enactment and enforcement of the judicial code of conduct which has, to

³⁶⁵ This will enable the courts apply international standards in the interpretation of laws as stipulated in Article 2(6) of the Constitution.

³⁶⁶ Supra, note 247 Art. 59.

date not been enacted, recruitment of more judges³⁶⁷ and magistrates and the effective implementation of the rules on expeditious disposal of cases.

Judges in criminal trials must go beyond silently listening to proceedings. Where there is complacency on the part of prosecutors or lawyers, the court should be firm and set strict timelines for them to complete trials through pre-trial conferences, the same way The Hague court controls proceedings before it.

A common strategy for reducing daily and costly cases before the court is to curtail the parties' freedom to engage in procedural manoeuvres by empowering the judges and magistrates to set firm deadlines to manage the litigation process. A file management system needs to be set up in order to monitor and track case files easily so that all pending cases are known before hand and disposed of more speedily.

More judges and magistrates should be recruited. It is important to mention, however, that increasing the number of judges and magistrates who may not be efficient will not lead to a reduction in the congestion rates.

The judiciary can also reduce court case rate through awareness creation of alternative dispute resolution mechanisms, coupled with the disaggregation of the nature and extent of court congestion in different courts and devising methods to curtail frivolous litigation.

In addition, there is need to create fast-track courts to assist subordinate courts to deal with backlogs. Fast-track courts should also be established in criminal trials, since community service orders are not effective enough. Fast-track courts are where petty offenders such as those accused of loitering, drunken and disorderly, preparation to commit felonies and other misdemeanours are offered the option of plea-bargaining with the prosecution for a lenient sentence.

³⁶⁷The Judicature Act (Chapter 9 of the Laws of Kenya) was amended in 2012 increasing the number of Judges for the Court of Appeal and in the High Court.

The community-based justice, like the *Njuri Ncheke* among the Meru community in Meru County, needs reconsideration. Conciliation courts needs contemplation. The way forward should be to ensure that the inadequacies of such systems are identified and addressed appropriately. This can be done through formal recognition of such systems and the provision of enforcement mechanisms to such traditional dispute resolution systems found at the local levels. In other words, the administration of justice should include traditional systems as part of the justice system.³⁶⁸

The National Legal Aid Service (NLAS) should seek review of the rules and procedures on court fees and formalities. The judiciary should also be receptive, to facilitate efficient delivery of justice for all, especially the indigents.

To prepare for emerging challenges, the continuing legal education for judicial officers and lawyers in private practice should be broadened to counter the changing profile and complexity of cases keeping abreast of developments in information technology.³⁶⁹

On challenges affecting female offenders in correctional facilities, timely delivery of justice is one of the key strategies for decongesting prisons. The courts should hasten the delivery of justice and use the alternative sentencing mechanism to resolve disputes other than custodial sentences especially in minor cases. The Community Service Orders, should be wholly executed to give petty convicts non-jail sentences.

³⁶⁸ Art. 59(2) (c) of the Constitution obliges courts to, among others, embrace or encourage the application of “traditional dispute resolution mechanisms.”

³⁶⁹ The piloting of tele-conferencing hearings in criminal cases has been carried out in Mombasa Law Courts and it is hoped that the process will be rolled out in the entire country. ‘Video conference brings virtual courts to Kenya’ *Daily Nation* Wed Oct 20 2010.

Female convicts serving long term sentences should be exposed to trainings which expose them to market oriented courses that guarantee them self-employment when they leave jail.

The Power of Mercy should be exercised to rid jails of persons serving long sentences where such persons have reformed and rehabilitation programmes set up for them by either the county or national government.

In conclusion, therefore, it is hoped that the recommendations contained in this study will assist the government to develop and strengthen the criminal justice through policy, legal and institutional reforms. We are not speaking about just some cosmetic reforms of the criminal justice system. It is about real reform of the state of access to criminal justice that focuses on the transformation of the basic calling to safeguard the rule of law. It is imperative, therefore, that underscoring these changes is the only way of guaranteeing “access to justice for all.”

These suggestions are only but a few and it is hoped that further research will be carried out to establish other more efficient and effective ways of resolving the challenges identified in the delivery of criminal justice in Kenya.

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APPENDIX I.: QUESTIONNAIRE

Roselyne Makokha

Aburili

P.O Box 30041-00100

NAIROBI

Telephone: +254 715580626

E-mail:

ekirapa.aburili@yahoo.com

Dear

**RE: RESEARCH QUESTIONNAIRE ON ACCESS TO CRIMINAL JUSTICE
IN KENYA: AN ASSESSMENT OF THE LEGAL, INSTITUTIONAL AND
POLICY FRAMEWORKS**

I, Roselyne Makokha Aburili, a Master of Laws Candidate at the University Of Nairobi School of Law, Iam undertaking a study on the accessibility of criminal justice in Kenya, focusing on the existing legal, institutional and policy frameworks in Kenya. The study was reviewed and approved by the School of Law Defence Panel on 2nd October, 2013.

This questionnaire is intended to gather information from the users of the criminal justice system in Kenya. It is also intended to establish the most common barriers of accessing criminal justice in Kenya. The information you provide shall be treated as confidential and shall be used for academic purposes only.

1. QUESTIONNAIRE PARTICIPANT INFORMATION

A. NAME.....(Optional)

B. SEX (tick as appropriate)

a. Male

b. Female

C. AGE (tick as appropriate)

a. 18-24yrs

b. 25-30yrs

- c. 31-36yrs
- d. 37-42yrs
- e. 43-48yrs
- f. 49-54yrs
- g. 55-60yrs
- h. 61-65yrs
- i. Over 65yrs

D. LEVEL OF EDUCATION(tick as appropriate)

- a) Graduate
- b) Postgraduate
- c) Masters
- d) PhD

E. OCCUPATION (Tick as appropriate)

- a) Judicial Officer
- b) Public prosecutor
- c) Practicing Advocate of the High Court
- d) Prisons Officer
- e) Children’s Officer/Probation Officer
- f) Police Officer/investigator

F. YEARS OF EXPERIENCE IN CRIMINAL JUSTICE

- a) 0-5 years
- b) 5-10 years
- c) 10 years and above

2. GENERAL UNDERSTANDING AND PERCEPTIONS OF ACCESS TO JUSTICE

- a) Please state briefly, your understanding of the concept of access to justice

.....
.....
.....

.....

b) In your view, is access to criminal justice important?

Provide reasons for your answer

.....

.....

3. STATUS OF THE LEGAL AND POLICY FRAMEWORK

a) Are you aware of any national policy on access to criminal justice in Kenya?

Tick one

[YES] [NO]

b) If yes, please state the policy as you understand it.

.....

.....

c) In your view, does the current legal framework guarantee equal access to criminal justice in Kenya?

[YES] [NO]

Please explain your answer.....

4. PERCEPTIONS ON INSTITUTIONAL FRAMEWORKS

a) In your experience, do the courts adequately monitor the progress of cases and take remedial measures?

.....

b) What are some of the reasons for the delays in the dispensation of criminal justice in our courts? (tick as appropriate)

- i. insufficient advocates
- ii. waste of time by unrepresented suspects

- iii. frequent adjournments
- iv. complex procedures
- v. commitment by court personnel
- vi. corruption
- vii. inadequate witness protection fear of reprisals

c) How would you rate the level of efficiency in the court that handled the case that you prosecuted? (tick one)

- i. High
- ii. Average
- iii. Low
- iv. Do not know

d) Did you experience any attempt to bribe you for the service that you were engaged in? (tick one)

- [Yes]
- [No]

e) If your answer in (i) above is Yes, how would you rate the level of corruption in the court named above?(tick one)

- i. Do not know
- ii. High
- iii. Average
- iv. Low
- v. Nil

f) State the various forms of corruption practised by officials involved in the criminal justice system that you have interacted with

.....

.....

.....

g) State how corruption affected the outcome of your case in your quest to achieve justice for the parties

.....

h) Are you aware of any reforms currently taking place in the criminal justice system in Kenya?[Yes]

[No]

i) If your answer in (m) above is Yes, please explain how the said reforms have improved service delivery

.....
.....

5. ACCESS TO CRIMINAL JUSTICE

(To be completed by either advocates, suspects or complainants)

a) Have you been party to criminal proceedings in a court of law?

[YES]

[NO]

If yes, please explain your answer

.....

b) What, in your view, is the pace of criminal proceedings (tick one)

i. [Fast]

ii. [satisfactory]

iii. [Slow]

iv. [Very slow]

c) In your experience, do the courts adequately monitor the progress of criminal cases and take remedial measures?

[YES]

[NO]

If yes, please explain.....

d) In your view are criminal cases disposed of timeously?

.....
e) How long did your case take to be determined by the court?

[Under 2 years]

[3-5 years]

[More than 5 years]

f) what are the main causes of delays in the determination of criminal cases?.....

.....
.....
.....

g) How affordable is it to defend a criminal case or how do you rate the cost of criminal legal representation?

[Very High]

[Reasonable]

[Generally affordable]

6. BARRIERS ON ACCESSING CRIMINAL JUSTICE

a) d)What do you consider to be the main factors that impeded full and equal access to criminal justice in Kenya?

Please list them.....

.....
.....
.....

b) What is your main source of information regarding courts in Kenya?(tick as appropriate)

[Television]

[Radio]

[Newspapers]

[Legal documents]

[Publications]

[Legal Fraternity]

[Government offices]

[Other]

c) How far is the nearest court from your place of abode?.....

d) Do you think there are enough courts in Kenya?.....

e) Do you think the Kenyan courts deliver equal justice to the rich and the poor people?.....
Give reasons for your answer.

f) Do you think there is sufficient legal protection for all citizens in Kenya?

.....
Please explain your answer.

g) Do you think the courts are the best place to resolve disputes?

.....
Please explain your answer.

h) In your view, has the conduct of proceedings before courts since the coming into force of the new constitution been different from before August 2010?

.....
i) Please explain your answer.

.....
j) Have you ever been intimidated by the court official? Please explain.

.....
k) Are the court fees reasonable or affordable? Please explain your answer.

.....
l) Please state whether the court procedural formalities are user friendly.

.....
If your answer is in the negative, explain the problem.
.....

m) What language was used in the proceedings in your case?.....

Were you comfortable with the use of language in the court?

If not, propose which other language(s) should be used
.....

j) In your experience, what do you consider to be the main reasons for not achieving fair trial in Kenya?

[Economic]

[Social]

[Political]

[Gender]

[Other]

Please explain your answer.....
.....

7. REFORMS

n) Propose ways in which access to criminal justice can be improved in Kenya
.....
.....
.....

Thank you for taking your precious time to complete the questionnaire.

APPENDIX II INFORMED CONSENT FROM THE RESPONDENTS

Name of Researcher

Name of University

Roselyne Makokha Aburili	University of Nairobi School of Law
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Title of Research Project:

ACCESS TO CRIMINAL JUSTICE IN KENYA: AN ASSESSMENT OF THE INSTITUTIONAL, POLICY AND LEGAL FRAMWEWORKS.

By filling out this questionnaire / answering the questions put to me:

1. I agree to participate in this research project.
2. I have read this consent form and the information it contains and had the opportunity to ask questions about them.
3. I agree to my responses being used for educational and research purposes only on condition that my privacy is respected and protected subject to the following: - (*tick as appropriate*)

	Yes	No
My name may be used in the published research		
My personal details (e.g. age, occupation, position) may be included in the published research		
My responses can only be used in a way that I cannot be personally identifiable		

4. I understand that I am under no obligation to take part in this research project.
5. I understand that I have the right to withdraw from this research project at any stage.
6. I understand that this research might be published in a research journal or book. In the case of dissertation research, the document will be available to readers in a university library in printed form, and possibly in electronic form as well.

Name of Participant:

Signature of Participant

:

Date

:

APPENDIX III: KEY INFORMANT INTERVIEW GUIDE

1. Do you think the existing policies, laws and institutions are adequate in dealing with criminal justice issues in Kenya?
2. What do you think is the highest greatest hindrance to accessing criminal justice in Kenya?
3. What are your suggestions on how to address those barriers in 1 above?