ACCESS TO JUSTICE FOR PERSONS LIVING IN POVERTY

THE LEGAL AND INSTITUTIONAL FRAMEWORK IN KENYA

By

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DECLARATION

I **Pauline Mudeshi Muhanda** the undersigned hereby declare that this is my original work and that it has not been presented in any other university.

Pauline Mudeshi Muhanda

Signature…… **Dated…….**

SUPERVISOR

This project paper has been submitted for examination with my approval as university Supervisor

Mr. Jackson Bett

Signature…… **Date……..**

DEDICATION

This thesis is dedicated to my parents, who are not only my best friends but also the greatest gift God ever gave me.

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ABBREVIATIONS AND ACRONYMS

LASC	**Legal steering Committee**
DFID	**Department of international development**
AGO	**Attorney General's Office**
LEAPP	**Legal Education and Aid Pilot Programme**
MOJCA	**Ministry of Justice and Constitution Affair**
NALEP	**National Legal aid and awareness programme**
LSK	**Law society of Kenya**
ACHPR	**African Charter on Human and people Rights**
ACRWC	**African charter on the right and welfare of the child**
ICCPR	**International Convention on Civil and Political Right**
ECFRF	**European Charter of Fundamental Right and freedom**
ADR	**Alternative Dispute Resolution**

CHAPTER 1

1.0 INTRODUCTION

Access to justice to all citizens can only be possible by giving legal advice and legal assistance to all people who cannot afford the services of a lawyer[1]. It is therefore the duty of the state to ensure that all its citizens enjoy their right to justice which includes provision of legal aid services to those who cannot afford a lawyer to represent them due to their financial status.[2] Most Litigants in African countries are unable to access legal services due to non-provision of legal aid services from their home states and have thus been forced to approach the courts of justice without proper legal representation as most countries do not provide for mandatory legal representation for poor litigants.[3] It has been urged that access to justice entails the provision of dispute resolution mechanism which are affordable, proximate, ensure speedy justice and whose process and procedure are understood by users.[4] However in a broader context access to justice includes issues to do with accessibility to court, language in court proceedings, court fees, public participation in administration of justice, backlog of cases that delay justice, use of legalese, understaffing, lack of effective remedies and awareness of Alternative Dispute Resolution (ADR) and traditional dispute resolution mechanism.[5]

In Kenya until the passing of the Constitution in 2010 which recognized access to justice as a fundamental human right, no law existed that guaranteed poor Kenyans a right to access justice and thus most poor people ended up suffering due to the inability to access justice. Whereas the

[1] Nathalie Chappe et al(2012) Access to Justice and Legal Aid (University of Franche-Conte)
[2] Hague Convention of 15th November 1965 on the service abroad of judicial and Extrajudicial Documents in Civil or Commercial matters.
[3] Martin Schonteich (2012) the Powerful tool of Justice, College of Criminal Justice, (City University of New York)
[4] Kariuki Muigua PHD, "Improving access to justice; Legislative and administrative Reforms under the Constitution"
[5] *Supra 2*

Constitution of Kenya 1969 guaranteed right to fair hearing,[6] not every Kenyan could afford legal representation and thus most convictions were due to lack of proper legal representation. The Constitution has now made it mandatory under article 48 that the state should ensure access to justice for all persons and where a fee is required; the same should be reasonable and should not impede access to justice.[7]Kenya is also a signatory of international treaties which have now been recognized as part of the law under article 2 of the Constitution as such, most of these international treaties and conventions make it mandatory for all citizens of member states to access justice whenever the need arises. The African Charter on Human and People rights 1981 does not directly address the issue of access to justice but acknowledges the issue of costs by stating that all accused persons be granted a right to defence including the right to be defended by counsel of their choice.[8] The African Charter on the right and welfare of the child 1990 acknowledges the need for access to justice and states and puts the duty on state parties to ensure every child is afforded legal and other appropriate assistance in preparation and presentation of his Defence.[9]The UN International Convention on Civil and Political Rights (ICCPR) which out rightly appreciates the provision of legal assistance provides for legal assistance to be assigned in any case where the interest of justice require and without payment where an individual does not have sufficient funds.[10] The European Union strongly advocates for the right to legal aid more than any human right document under article 47 of the European Charter of Fundamental Rights and Freedom as it provides that Legal Aid should be available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[11]

The Lilongwe Declaration highlights the importance of providing legal aid at all stages of the criminal justice process by stating that suspects, accused persons, and detainees should have

[6]Constitution of Kenya (1969) Section 77(1)
[7] Constitution of Kenya 2010, Article 48
[8]African Charter on Human and People Rights (1981) Article 1,
[9] The African Charter on the Right and Welfare of the Child Article 2(ii)
[10]ICCPR Article 14
[11]The European charter of fundamental rights and freedom Article 47

access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. [12]

Despite the provisions of the Constitution and other international treaties, access to Justice is still hampered to many poor Kenyans in both the legal and institutional framework. Hence in areas like Northern Kenya, litigants have been subjected to cover large Kilometers so as to access courts and as if that is not enough, the presiding judges and magistrates are overwhelmed by the number of cases that they have to handle within a specific time.[13] The issue of the complicity of the procedures in court has also hampered access to justice as the procedures especially in civil procedure where the procedures are so many before one is compensated or gets justice.

Whereas this research appreciates the existence of the provision on access to justice under article 48 of the Constitution, it questions its effectiveness to those living in poverty and who desperately need to access justice and further questions whether proper legal and institutional frame work have been put forth to enable access to justice in Kenya. In 2008, the National Legal Aid and awareness programme (NALEP) was formed, its main mandate being the provision of affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya at state expense.[14] To date, the same is still pending as a bill of parliament, despite the Constitution recognition of the fact that access to justice is a fundamental legal right.

1.2 STATEMENT PROBLEM

The Rule of law is a fundamental principle in a free and democratic society which requires that all citizens are given equal protection of the law and its processes[15]. Through the provisions of Article 48 of the constitution, the state has now been given the obligation to ensure justice for all

[12]Lilongwe Declarartion Article 1
[13] The Danish institute for Human Right (2011) "Access to justice and Legal Aid in East Africa" p.29
[14] Legal Notice Number 220 of 2002
[15] Legal services society "making justicework; Improving access and outcome for British Colombia" Report to the minister of justice and Attorney General the Honourable Shirley Bond on 1st July, 2012.

unlike in the previous constitution where access to justice was a privilege to many.[16] Whereas this research appreciates the intension behind the provisions of article 48, it is of the view that there are many challenges that the poor in Kenya face when it comes to accessing justice and thus analyses whether the provisions of Article 48 of the Constitution can resolve these challenges.

Secondly, despite there being legal and institutional frameworks that have been put in force, the challenges facing the poor in accessing justice have not been fully done away with and thus the research analyses this legal and institutional frameworks so as to understand their effectiveness on access to justice.

1.3 JUSTIFICATION OF STUDY

a) This paper extends the frontier of knowledge in the field of access to Justice by analyzing the provisions of Article 48 of the Constitution and its effect to persons living in poverty and questions whether the article is intended for the benefit of everybody including the poor or whether a lot has to be done to ensure that the poor benefit from this right.

b) The research further analyses the Kenyan Legal and institutional framework in Kenya and further makes a comparison on the issue of access to justice with other jurisdictions with a view of proposing improvement on the said legal and institutional frameworks in place so as to realize access to justice and also influencing policy making on the issue of access to justice.

1.4 HYPOTHESIS

This study is based on the following hypothesis;

a. The mere inclusion of access to justice as a fundamental right in the Kenyan Constitution is not a guarantee its accomplishment.

[16] Article 48 of the Constitution of Kenya

b. The poor in Kenya cannot benefit from the provisions of Article 48 of the Constitution of Kenya when accessing justice as long as the right legal and institutional frameworks have not been put in place.

1.5 RESEARCH QUESTIONS

The research questions raised in the research were;

a. What are the fundamental challenges facing the poor in Kenya when accessing justice and thus preventing them from realizing the provisions of article 48 of the Constitution of Kenya.

b. What are the lessons that Kenya can learn from the practices of progressive jurisdictions when it comes to the issue of access to justice.

c. What legal and institutional frameworks need to be considered so as to ensure access to justice for persons living in poverty?

1.6 RESEARCH OBJECTIVE

a) To analyze obstacles facing persons living in poverty and the effect of article 48 of the Constitution of Kenya 2010.
b) To analyze institutional and legal framework that have been placed to promote access to justice and propose any improvement that needs to be done.

1.7 CONCEPTUAL FRAME WORK

This section puts into context the study's understanding of accessibility and justice.

1.7.1 THE NOTION OF ACCESIBILITY;

The idea of accessibility is broad and goes beyond physical accessibility of the Legal institutions to include affordability, culture appropriateness such as language, social acceptability and

relevance of applicable norms and processes, simplicity, convenience and friendless of the processes and agents of the law; fairness of treatment throughout the process and of outcomes; and timeliness and efficiency of delivery among others.[17] It therefore includes law enforcement agents such as the police, administration agents in charge of order and security such as the provincial administration, Criminal Investigation and Intelligence agents, lawyers, judicial officers, and prison agencies. It is relevant to matters of language, dress, procedure, cost, physical accessibility, legal representation, sentencing, judicial legal development, impartiality, independence of judicial officers and general efficiency of the entire system.[18]

1.7.2 CONCEPT OF ACCESS TO JUSTICE

Access to justice was first defined in 1978 to encompass, first, a system that is equally accessible to all, and leads to results that are individually and socially just.[19]The however study shall operate with a definition of justice to mean and to involve, Legal awareness on the part of the provider and user, the availability of legal services needed to link needs, to enforceable remedies, including legal aid and counsel, adjudication of disputes that is fair and effective and enforcement of remedies.[20] In the case of *Dry Associates Limited v Capital Markets Authority & Anor,* the court was of the view that, access to justice includes the enrichment of rights in the law; awareness of and understanding of the law, access to information, equality in the protection of right; access to justice systems particularly the formal adjudicatory processes; availability of physical legal structure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.[21] The right to have access to justice is now a basic and inviolable right guaranteed

[17] *Ibid* , p 6
[18] Connie Ngondi-Houghton "Access to Justice and the Rule of Law in Kenya" A paper Developed for the commission for the empowerment of the poor, 2006 page 8.
[19] Cappelleti & Grath (1978), p.6
[20] A Report by the Danish Institute for Human Rights based on a cooperation with the East Africa Law Society," Access to Justice and Legal Aid in East Africa"(2011)
[21]*Dry Association Limited v Capital Markets Authority & Anor Nairobi Petition No. 358 of 2011, (ureported)*

in international human rights instruments and national Constitution.[22] As a basic right, access to justice requires us to look beyond the dry letter of the law. It thus acts as reaction to and a protection against legal formalism and dogmatism.[23] As a consequence, access to justice seems to have two dimensions; procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's right).[24] Access to justice would require equality in accessing legal services by all persons regardless of means, and access to effective dispute resolution mechanisms necessary to protect their rights and interests. It also requires national equity in that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy. In addition, it requires equality before the law, by ensuring that all persons, regardless of race, ethnic origin, gender and disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[25] Arguably, therefore, in the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable.[26]

1.7.2.1 Relevance of Access to Justice[27]

Maintenance of the rule of law is fundamental to a country's economy and prosperity. It enables people to plan and live their life as they choose and underpins social and economic development. The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms. [28]Access to justice is an essential element of the rule of

[22] Article 48 of the Constitution of Kenya 2010, guaranteed theright of access to justice for all, see Article 159(2)
[23] *Kenya Bus services Limited and Nor v Minister of transport & 2 Others*
[24] *Ibid*
[25] See L. Schetzer *et al*., "Access to justice& Legal Needs; a project to identify Legal Needs, Pathways and barriers for advantaged People in NSW," Available at; http://www.lawfoundation.net.au/ljf/site/articleids/6ffeb98d3c8d21f1ca25707e0024d3eb/$file/older_law_report.pdf (accessed on 5/05/2015)
[26] *Ibid*
[27] Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009
[28]*Ibid*

law and therefore of democracy. Justice institutions enable people to protect their rights against infringement by other people or bodies in society, and allow parties to bring actions against government to limit executive power and ensure government is accountable. If people are unable to access these institutions to protect their rights, respect for the rule of law is diminished.[29]

Barriers to justice also reinforce poverty and exclusion.[30] Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind. Improving access to justice is therefore a key means of promoting social inclusion. Many of the issues commonly faced by people, such as family breakdown, credit and housing issues, discrimination, and exclusion from services, have a legal dimension that if not resolved can contribute to social exclusion.

1.7.2.2 The Access to Justice Principles[31]

1.7.2.2.1 Accessibility

Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.[32]

1.7.2.2.2 Appropriateness

The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level. Legal issues may be symptomatic of broader non-

[29] *Ibid*
[30] United Nations Development Programme's Commission on Legal Empowerment of the Poor, 'Making the law work for everyone' (2008) 1, 33.
[31] Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009

[32] *Ibid*

legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.[33]

1.7.2.2.3 Equity

The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.[34]

1.7.2.2.4 Efficiency

The justice system should deliver fair outcomes in the most efficient way possible. Greatest efficiency can often be achieved without resort to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating. The costs of formal dispute resolution and legal assistance mechanisms – to the government and to the user – should be proportionate to the issues in dispute.

1.7.2.2.5 Effectiveness

The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes and maintaining and supporting the rule of law.

[33] *Ibid*
[34] *Ibid*

1.7.2.3 Outcome of Access to Justice[35]

For a justice system based upon the principle of Access to Justice to be said to be successful, the same must be able to promotes access to appropriate mechanisms for the early resolution of problems and disputes, establishes a triage function, enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system, provides capacity for resources to be best directed to reflect where and how people access the justice system, promotes social inclusion by targeting the resolution and identification of broader issues which may be the cause of specific legal problems, promotes fair outcomes, empowers individuals to resolve disputes between themselves when appropriate, without recourse to the institutions of the justice system, allocates resources more efficiently, including through ongoing evaluation, and enables every individual to have improved access to effective resolution opportunities, irrespective of how they make contact with the system.[36]

Access to justice is a basic human right conferred by the common law and exists unless it is taken away under any valid exercise of statutory or Constitutional power by the legislature[37]. For this reason, justice denies that the loss of freedom is made right by a greater good by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.[38]

1.8 THEORETICAL FRAMEWORK

This research will be based on Nozick's entitlement theory and Rawl's Theory of Justice. The main aim of the two theories is to define justice in the society. The theoretical foundations of this

[35] Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009
[36] *Ibid*
[37] Prof. Dr. Ranbir Sign, Access to Justice and Legal Services with Special reference to specific Justice needs of the under privileged people.
[38] John Rawls(1971) A theory of Justice

research are based on social welfare being that everyone has a right to access justice. Whereas Nozick urges a controversial aspect of justice calling for respecting people's rights, Mills urges the provision of justice from Moral perspective while Rawl's arguments are based on fairness.

1.8.1 Nozick's entitlement theory

Nozick urges about respecting people's natural rights, their rights to own property and their rights to self-ownership.[39] He states that people should have the freedom to decide what they want to do as each individual has his own autonomy.[40]Nozick describes people to be ends in themselves and should not be used in ways they do not agree even if it would lead to their own good. From Nozick's perspective, justice means allowing people to self-ownership and not interfering with this right even if the same is for their own good. This theory of entitlement therefore assists the research in defining justice as a way of removing oppression from the society and letting people have the free will of making their own decision and being protected by the law while doing so. Nozick therefore defines justice as freedom which should not be restricted in spite of one's social standing but should be available to everybody.

1.8.2 John Rawls and Social Contract Theory

Rawls when asked why a theory of justice is needed, he would probably respond; because publicly agreed terms of social cooperation are both necessary and possible.[41]For Rawls, justice is the structural rules of society, within which people who have different sets of values in life can coexist, cooperate and to some extent compete.[42] Rawls describes his Theory of justice called "Justice as fairness". He agrees with Nozick that justice is quite separate from morality and he

[39] Robert Nozick (1974) Anarchy, State and Utopia, Basic books publishers,Ch,7
[40] *Supra 21*
[41] John Rawls,"ATheory of Justice" Harvard University Press, Cambridge, Mass.,1971(For detailed discussions of Rawls's work, see e.g Norman Daniel ed., "Reading Rawls; Critical Studies of A Theory of Justice", Basic Book s, New York, 1990, Robert Paul Wolff," Understanding Rawls; A reconstruction and critique of A Theory of Justice(Princeton University Press, Princeton, 1977)")
[42]Brian Bix,"Jurisprudence Theory and Context"2009, Sweet and Maxwell, p 109

too rejects Utilitarian form of justice. He first suggests a new way to learn about principles of justice –the original position[43]. In the Original position, he asks us to imagine a group of people will get to decide the principles of justice yet they do not know who they are (What he calls a veil of ignorance), they are self-centered and they know everything science can offer he argues in a veil of ignorance they would be as biased towards their profession, race, gender, age or social status because they would not know which category they belong to.[44] As far as self-interest is concerned, Rawls argues that they will want principles of justice that will "fairy distribute" certain good that everyone will value which he calls "Primary social good".[45]He argues that the people in the original position will discuss which principles of justice are best before voting and the best principle worth having will reach a "reflective equilibrium" the most intuitive principle will be favored and incompatible less intuitive principle of justice in particular will reach reflective equilibrium;[46]

a) Each person, poor or rich, is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

b) Social and economic inequalities are to satisfy two conditions; first , they are to be attached to positions and offices opened to all under condition of fair equality of opportunity; and second, they are to be the greatest expected benefit of the least advantage member of society.

Rawls says that the first principle has priority over the second, for societies that have attained a moderate level of influence. The liberties Rawls envisions in his mind are negative rights, like freedom of thought. The distribution of social good can include education, food, and housing

[43] *Ibid* 23 p. 103-105
[44]*Ibid* p 104-105
[45] *Ibid* p 105
[46] *Ibid*

which could be considered to be positive rights.[47]Rawls argues that social and economic inequalities must benefit the worst off group what is known as the "different principle" which seems to imply that total communism is automatically just for such a system has no economic or social inequalities because its only inequalities that require a rationale. Capitalism will only be justified if it benefits the least advantaged group like the poor and orphans. The assumption is that inequality can allow hard work to be rewarded to the point that people decide to be more productive and share their wealth with the poor. People won't be allowed to be wealthier unless the wealth is shared with the poor.[48]

Injustice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual hysterical state of affair, much less as a primitive condition of culture.[49] It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice where no one knows his fortune his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the likes.[50]This principle of justice are chosen behind the veil of ignorance and thus ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.[51] Since all are similarly situated and no one is able to design principles to favor his particular condition, the principle of justice are the result of a fair agreement or bargain.[52]

Rawls arguments are of the view that everybody should have equal rights to the most extensive system of equal basic liberties, thus when it comes to the issue of access to justice, no one should

[47] *Ibid*
[4848] Nigel Simmonds, "Central Issues in Jurisprudence" 2008, Sweet and Mawell
[49] *Ibid*
[50] *Supra* 13
[51] *Ibid*
[52] *Ibid*

be discriminated regardless of their financial standing in the society and thus it is the duty of the state to ensure that everyone has a right to access justice when needed.

Rawls's principle on the veil of ignorance ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance of the contingency of social circumstances; this supports the research in looking at people living in poverty as being entitled to the benefits of article 48 of the Constitution at all costs. The two theories support the research to the extent that once the provision to the right of access was recognized in the Constitution, the state has the obligation to ensure that each and every individual benefits from the provision and none is disadvantaged for whatever reason.

1.9 LITRATURE REVIEW

The subject of Access to justice has been popular among published theories and Jurists[53], but few have scrutinized the available methods that have been set for the main purpose of ensuring that justice reaches those who really need it.

Magdalena Sepuiveda[54] looks at the issue of access to justice from a human right perspective and declares that it is crucial for the realization and enjoyment of many civil, cultural, economic, political and social right as well as tackling impunity. She states that the human right approach to access to justice seeks to develop people's capacity to demand accountability and the state's obligation to provide effective remedy in a holistic manner. This include strengthening of the judicial system, promoting capacity building and empowerment at the judicial and community level, and by tackling underlying structural and social obstacles,, such as stigma, lack of access to education and social exclusion. She states that under the human rights framework, states have

[53] *Supra* 14
[54]Magdalena Sepuiveda "Access to justice for persons living in poverty; a human rights approach" 2008, Elements for dicussion

the obligation to ensure *de jure* and *de facto* access to justice for all without discrimination of by constructing a legal and institutional framework that does not discriminate against individuals or groups that facilitate access to independent and effective judicial and adjudicatory mechanism for all, ensures a fair outcome for those seeking redress, ensure effective enforcement and compliance with judicial ruling or adjudicatory decisions.

The author however fails to recognize that these steps alone will not be sufficient as there is need to take into account existing asymmetries of power and aims to change such power structures by empowering those who are more vulnerable and disadvantaged. Thus reforms must prioritize the needs of all, who must be considered evenly.

Michael R. Anderson[55]examines some of the principle factors that deny poor people access to justice and suggests a number of legal reforms strategies. Although, the legal system is composed of numerous institutions, the paper in particular focuses on the judiciary which is one of the principle institutions through which ordinary people can assert legal control over political and administrative action and over the behavior of those with greater power in the market and in the community.[56]The process of ensuring political accountability can be seen to involve at least two components.[57] The first answerability, which is the requirement placed upon public officials to make information available about their activities and to give wild reasons for their actions. The second component of accountability is enforcement which is the ability to impose sanctions on political leaders and other public officials who have acted illegally or otherwise violated their public duties. Enforcement also requires the ability to give an authoritative pronouncement on which actions are legal and which actions are illegal. In theory, the judiciary is suited to exercise accountability functions. The idea that the judiciary should act as a check upon exercise of

[55] Michael R. Anderson "Access to justice and legal process; making legal institutions responsive to poor people in LDCs" 2003, Institute of development studies.
[56] Sherwood et al"Judicial systems and economic performance" 1994,Oxford University Press.
[57] Ghai, Y.P et al "The political Economy of Law"1987, Oxford University press

legislative power is a fundamental component of the doctrine of separation of power.[58] The power of the judge to exercise control over other branches of government varies from country to country but most powers are either the judicial review of legislation or the judicial review of administrative action. He views the judiciary as a supplier of a set of goods and services, the services being dispute resolution and the provision of authoritative interpretation of the law, while the goods provided by the judges include reasoned opinion, orders, injunctions and all types of other remedies. But judges alone cannot supply this goods and services unless there are customers , that is litigants expressing a demand for them and thus he states that the character of justice depends on civil society demands as well us supply of judicial supply of justice services. It follows then that the supply of legal services by both lawyers and judges tend to reflect the preferences and needs of their most common users mainly propertied or salaried class. As long as the pattern is sustained, there will be very little pressure generated from users to reform the law or reshape legal procedures in a way that will benefit the poor.

The poor rarely appear in court except as defendants in criminal prosecutions. This is not surprising if the judicial function is conceived of as a supplier of services in a market driven by demand. The poor possess a limited capacity to express effective demand for any goods or services, and there is no reason why justice should be any different.

Prof.(Dr.) Ranbir Singh in his article "Access to justice and Legal Aid services within special reference to specific Justice needs for the underprivileged people "[59] intensively looks at the challenges that face access to justice for the under privileged in India upon recognizing it as a fundamental human right that the state must guarantee to all. In particular, he looks at non availability of provision of Legal Aid and proposes that the Judiciary has more roles to play in

[58] An intellectual and political theory of the separation of power doctrine is provided by Vile (1998), while evidence of its global dissemination may be found in Beer(1992)

[59] Prof.(Dr) Ranbir Singh "Access to Justice and Legal Aid Services with special refrence to specific Justice needs of the needs of the underprivileged people"

ensuring access to justice upon the enactment of the legal Service Authority Act. He however fails to recognize that the state has a bigger role to play in ensuring enforceability of the Act and that the issue of enforceability cannot fully be left to the judiciary.

In analyzing different aspects of Access to justice the article **"*Access to justice and Legal Aid in East Africa*"** [60]is of the view that legal aid schemes are not sufficiently available to the population thus making certain areas of the law neglected and even those mechanisms that have been put in place the same do not offer quality services. He further states that majority of the population do not have knowledge of how they should approach and utilize it thus presenting a problem to access to justice. He however fails to propose exact methodologies that can be adopted to ensure that the larger population is aware of the availability of legal aid or how to ensure that each can access justice.

Hannie Van As in his article "Legal aid in South Africa; Making Justice Reality"[61] in advising on how legal aid should be offered urges there are two fundamental approaches in doing so, according to the first approach, it is the duty of the Legal profession to provide professional services for free of charge to those who cannot afford to pay for them, he proposes that lawyers should willingly carry cases for the needy in exchange for the monopoly on the provision of professional legal services they were granted by the state. He is of the opinion that in so doing, the profession gets market privileges in return for regulating their member's ethics and competence. The second approach that he offers is that lawyers should carry only part of the burden and that the bulk of the load must be shouldered by the state which can be done by the state providing legal services through salaried persons which he refers to us public defer system. He fails however to acknowledge that the state has a bigger role to play in ensuring that legal aid is available to the people than any other organizations.

[60] The Denish Institute for Human Rights, "Access to justice and legal aid in East Africa" A report by the Danish Institute for Human Rights based in a cooperation with the East African Law Society.
[61] Hannie Van As 2005 "Legal Aid in Africa; Making Justice Reality" School of Oriental African Studies

Orison S. Marden in his article "Help must come from the Judiciary"[62] is of the view that the judiciary has a bigger role to play in ensuring that everyone has representation when appearing in court. His proposal is founded on the concept that our judges know the real need better than anyone else and have every right to call upon the bar and the community to supply the machinery they need in order to ensure equal justice under law in their court.

He states that the presiding judge should dramatize the lot of the Defendant as opposed to the resources of the government persecutor. He should picture the community's disgrace that comes from conviction of the innocent; and the Constitutional and practical necessity of expert assistance of counsel in any case, whether the Defendant is guilty or not.

The author however fails to consider the bulk of work that judges face daily in their court room to the extent that they may not be in a position to monitor extra supervisory work and he further fails to acknowledge that the state has a duty to play in the employment of more judges so as to give them an opportunity to participate in ensuring access to justice through legal aid. Legal aid needs constant monitoring and as such judges may not be in a position to be the best placed to facilitate it.

Kariuki Muigua and Kariuki Francis in their article, "ADR, Access to Justice and Development in Kenya" [63] are concerned with enhancing procedural and substantive justice through ADR, and how enhanced access to justice can contribute to development by creating more avenues for ventilating disputes. They are of the view that despite the centrality of justice in national development, there still exist diverse impediment to justice particularly among the poor, *to wit,* weak economic position; high court charges; poor infrastructure/capacity of state's legal system;

[62] Orison S. Marden in "Help must come from the Judiciary' Center for applied studies
[63] Kariuki Muigua and Kariuki Francis in their article, "ADR, Access to Justice and Development in Kenya" 2014, Artcle presented at the Strathmore Annual Law Conference.

marginalization of minority group; gender; and language barrier.[64] These impediments prevent people from realizing their full potential in society. They propose that in order to enhance access to justice there is need for research that will illuminate the complex relations between formal disputes resolution forum and informal forums such as Alternative Dispute Resolution (ADR) and Traditional dispute resolution mechanism (TDRM). In making the proposal, they associate litigation with a number of challenges that hamper access to justice including though not limited to; high cost, delays, geographical location, complexity of rules and procedure and the use of legalese.[65] They are of the view that if the right of every person to access to justice is to be realized, then these handles must be addressed. They propose that ADR which is not affected by these challenges is the best solution. ADR techniques such as negotiation, conciliation, and mediation increase accessibility of justice since they are flexible, informal, cost effective, expeditious, efficient, foster parties' relations and produce win-win outcome.

The authors however have failed to realize that ADR is expensive and may not be affordable to the poor who will still be disadvantaged when accessing justice. Further, whereas ADR may be effective between disputes of poor people amongst themselves, they will be greatly disadvantaged when they face the rich and salaried individual; these categories of people are in a position to afford more experienced ADR representatives who the poor may not be able to match up.

[64] Democracy Promotion and conflict Resolution; The Role of access to justice, Working paper, Democratic progress Instituted 2012

[65]ICJ, "Strengthening Judicial Reform in Kenya; Public perceptions and proposals on the Judiciary in the new Constitution." *Op, cit;* D. Reiling, L. Hammergren & A.Di Giovanni, justice sector assesmens; A handbook , (2007) world bank

1.10 RESEARCH METHODOLOGY

The study shall adopt qualitative methods of getting information. This method seeks to describe and analyses the culture and behavior of humans and their groups from the point of view of those being studied.[66]

Further, a comparative analysis shall be used and the information acquired thereafter analyzed and interpreted for the recommendation and conclusion of the research.

1.10.1 Site and population of the Study

The location of the study will be Kenya, while the targeted population in the study is the poor Kenyan populaces who have made an attempt to seek justice through the justice system.

1.10.2 Research instruments

The Research shall be undertaken through the use of Secondary means these include library books, internet materials, treaties and conventions, and judicial decisions. The use of secondary source is justified by the limited time that the research is to be completed and the availability of numerous research materials on the issue of access to justice.

Further the study shall use a comparative approach by comparing south Africa and England as developed jurisdictions in the area of access to justice for purposes of making recommendations.

1.11 LIMITATION OF THE STUDY

This study is concerned with the problems that persons living in poverty in Kenya encounter while seeking justice, it analyses the effect of Article 48 of the Constitution and the Kenyan Legal framework to find out whether merely making access to justice a right under the Constitution is sufficient to guarantee persons living in poverty the right to access justice.

[66] Donald Kisuli Kombo et al "Proposal and thesis writing, an introduction" Paulines Publications Africa, p.9

1.12 CHAPTER BREAKDOWN

1.12.1 Chapter One; Introduction

This chapter being the introduction lays out the study and the reasons why it is important to have the issue discussed by providing the statement problem, Research Objectives, research question. Hypothesis, literature review and Chapter break down.

1.12.2 Chapter Two; Kenya's legal frame work on Access to Justice

This chapter looks at Kenya's legal framework in relation to access to justice with the aim of getting solutions for the poor and analyzing the possible problems that the poor would face when trying to access justice under the legal frame work.

1.12.3 Chapter Three; Legal, institutional and structural challenges

The chapter intensively looks at the challenges facing the poor in Kenyans in accessing justice by dividing the challenges into different categories and intensively analyzing the same for purposes of understanding why the poor in our society are greatly aggrieved when it comes to accessing justice. The chapter also gives possible solutions with the aim of showing that access to justice is possible to all categories of person including the poor.

1.12.4 Chapter Four; Conclusion

This Chapter will contain the findings emerging from the execution of the research methodology outlined above. The finding will further inform the recommendations that the research will be making with respect to the research topic.

CHAPTER 2

KENYA'S LEGAL FRAME WORK ON ACCESS TO JUSTICE

2.1 INTRODUCTION

This Chapter takes the breakdown of application of the legal framework at International and domestic level as it concerns access to justice for persons living in poverty. The chapter acknowledges that the establishment and development of formal legal procedures and institutional justice systems does not necessarily lead to real and substantive equal access in itself.[67] When aiming at promoting equal access to justice the starting point is typically the negative approach identifying process and factors hampering equal access to justice or excluding certain segments of the population from the basic right to equal access.[68]

The normative framework for access to justice is found in international instruments, setting principles and minimum rules for the administration of justice. They comprise the Universal Declaration of Human Rights, the international human rights law and specific conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations.[69]

In Kenya, the enactment of the new constitution 2010 has brought hope on the issue of access to justice being that the same is now a fundamental right guaranteed therein. Article 48 of the constitution obligates the state to ensure access to justice for all persons. The said article is geared towards enhancing access to justice for all persons in Kenya especially the poor.

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[67] Democracy, justice and peace programme Uganda, Access to justice component
[68] *Ibid*
[69] M. Anderson, "Access to justice and Justice and legal process; Making Legal Institution Responsive to the poor" (2003) LCD WORKING PAPER 178

2.2 ACCESS TO JUSTICE UNDER DOMESTIC LAWS

2.2.1 Constitutional provisions on Access to Justice

Whereas article 48 of the constitution of Kenya 2010 has made access to justice a fundamental right, there are other provisions that are geared toward enhancing equal access to judicial and other administrative institutions and mechanism in the same constitution.

Under Article 22 of the Constitution, the Chief Justice is required to make rules to provide for the right of every person to access courts and seek the enforcement of rights and fundamental freedom in the Bill of Rights that has been denied, violated, infringed or threatened.[70] Article 22 (3) is intended to ensure that no impediment whatsoever shall stand on the way to access to justice by ensuring that no fees are charged for commencing proceedings, removing the strict legal provisions of *locus standi*, minimizing procedural formalities, entertaining the commencement of proceedings on the basis of informal documents and allowing experts to appear as friends of the court.

The right of access to information held by the state and information held by another person and required for the exercise or protection of any right and fundamental freedom has now been acknowledged under the Constitution.[71] This is therefore important as all information required by anybody to institute a suit that is in the possession of any person including the state shall be easily available.

Article 47 provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It further calls for written reason where a Right or a fundamental freedom of a person has been or is likely to be adversely affected by an administrative action. This can be said to be preventing the issue of unfair and un-procedural arrest of persons by the police.

[70] See Article 22 of the Constitution of Kenya 2010
[71] Article 35 *supra 24*

Article 49 provides for the right of an accused person to be allowed to communicate with an advocate or other persons whose assistance is necessary while article 51(7) allows an intermediary to assist a complainant or an accused person to communicate with the court. This thus removes the phobia and confusion that many accused people face while accessing criminal courts hence making the said courts easily accessible to all.

Article 50 further provides for the right of every person to have an advocate assigned by the state and at the state expenses, if substantial justice would otherwise result and to be informed of this right promptly. This article thus provides for easy access to justice for capital offenders to be represented especially in circumstances where they are not able to afford an advocate.

Article 159 recognizes judicial authority to be derived from the people and exercised by courts and tribunals established by or under the constitution. In exercising this authority the courts are called upon to be guided by the fact that justice shall be done to all irrespective of status, justice shall not be delayed, alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promote, judicial justice be administered without undue regard to procedural technicalities and the purpose of the constitution be promote/d and protected.

2.2.2 County Government Act

The County government Act number 17 of 2012 is part of a number of laws that will not only implement and actualize the constitutional provision on devolution but also promote access to justice. County assemblies can now through the Act make any laws necessary or incidental to the effective performance of the function of a county government.[72] The Act benefits from the openness and participatory provision of the Constitution. The enactment of new laws will ensure

[72] Section 99 of the County Government Act, 2012

there is no vacuum due to the absence of by-laws. The laws enacted by the county government will reflect the wishes of the county residents.

2.2.3 Civil Procedure Act

The Civil procedure Act, Cap 21, Laws of Kenya has numerous provisions that facilitate access to justice. In July 2009, Parliament passed a draft of proposals for amendments to the Civil Procedure Act to introduce ADR. There were proposed amendments in section 1 to 81 of the civil procedure Act which have so far been enacted into law.[73]

Section 1 A (1) of the Civil Procedure Act provides that the overriding object of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the Civil Procedure to give effect to the overriding object.[74] In effect it implies that the courts in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustices or delay the proceedings and basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the end of the overriding objective. The Civil procedure rules provide for a suite by paupers- persons unable to pay legal fees to be heard before the civil court.[75] This provision is mainly to ensure that the less fortunate in the society are able to access court despite their financial standing.

2.2.4 Marriage Act

Parties to a marriage under the marriage Act, may seek the services of a reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was

[73] Section 1A and Section 81(2) of the Civil procedure Act
[74] Section 1A of the Civil Procedure Act
[75] Civil procedure act, Order 33

celebrated.[76] Further parties to a marriage celebrated under customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.[77]

2.2.5 Labour Laws

Section 47 (2) of the employment act[78] provides for complaints of summary dismissal or unfair termination which invokes the spirit of conciliation by providing that a labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best mean of settling the dispute.

Section 12(9) of the Labour institution Act[79] provides that the industrial court may refuse to determine any dispute before it, other than an appeal or review, if the industrial court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

Section 58 of the Labour Relations Act[80] provides that an employer, group of employers or employees' organization and a trade union may conclude a collective agreement providing for the conciliation of any category of trade dispute identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties and the arbitration of any category of trade dispute identified in the collective agreement by an independent and impartial arbitration appointed by the agreement between the parties

2.4.6 The Proposed legal Aid Bill, 2013

The Bill whose main purpose is to ensure access to justice through legal Aid to all Kenyans establishes a service known as the National Legal Aid Service a body corporate with perpetual

[76] Section 64 of the marriage Act
[77] *Supra* 68
[78] Act number 11 of 2007
[79] Act No. 14 of 2007
[80] Act No. 14 of 2007

succession[81] whose function are to establish a National Legal aid Scheme that is affordable, accessible, sustainable and accountable.

Further it is to take appropriate measures for promoting legal literacy and legal awareness among the public and in particular educate vulnerable sections of the society about their rights and duties under the constitution.[82]

The Bill further establishes a fund to be known as the Legal Aid Fund which consists of money allocated by parliament, gifts, donations and loans for the purpose of the service which includes payment of pro bono lawyers.[83]

2.3 Access to Justice under International Law

In addition to the direct constitutional guarantee of access to justice, Kenya has incorporated the access to justice requirements of various international instruments into its domestic law through Article 2(5) and (6) which recognize international law as part of Kenya's law.[84]

2.3.1 African Charter on Human and People's Right[85]

The charter makes a provision requiring every individual to have a right to be heard which includes the right to an appeal to competent national organs against acts of violating his fundaments rights as recognized and guaranteed by conventions, laws, regulations and customs in force.[86] Kenya's ratification of the African Charter gives the government positive obligations not only to recognize the right to access to courts, but also to undertake to adopt legislative or

[81] Section 5 of the Proposed Legal Aid Bill, 2013
[82] *Ibid* Section 6(1)h of
[83] *Ibid* Section 25
[84] Article 2 (5)and (6) of the Constitution of Kenya 2010
[85] Ratified on 23rdJanuary, 1992
[86] Article 7 (1) of the African Charter on Human and Political Rights

other measures to give effect to this right.[87] Article 7 (1) must be read together with article 3 of the African Charter, which provides that every individual shall be entitled to equal protection of the law. As in the case of equality before the law under the Kenyan Constitution, a legal system which fails to provide meaningful access to justice to everyone in society regardless of their financial position denies equal protection of the law to some.[88]

In 2001, the African Commission on Human and people's Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa. The Principles and Guidelines expressly recognized the necessity of access to the courts to redress human rights violations by stating that States must ensure, through adoption of national legislation that in regard to human right violation, which are matters of public concern, any individual, group of individual non-governmental organization is entitled to bring an issue before judicial bodies for determination.[89]

2.3.2 Hague Convention on International Access to Justice[90]

The Access to justice Convention is intended to facilitate, for any nationals of a State Party to the Convention or persons habitually resident in a State Party, access to justice in all the state parties to the Convention.[91] The convention's purpose is not to harmonize domestic laws, but rather to ensure that the mere status as an alien or the absence of residence or domicile in a state are not grounds for discrimination with regards to access to justice in that state.

[87] African Charter on Human and Peoples' rights, Article 1; " The member states of the organization of African Unity parties to the present charter, shall recognize the right, duties, and freedom enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them"
[88] Supra 71
[89] In 2001, the African Commission on Human and people's Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa
[90] Ratified in 1997
[91] A comprehensive and updated list of Contracting States to the Convention is available on the Hague Conference 's website at www.hcch.net, under "welcome"

The Access to justice Convention, seen as a supplement to the "service"[92] and "Evidence"[93] Convention, provide in relation between state parties for non –discrimination with respect to legal aid including the provision of legal advice, security for costs, copies of entries and decisions, and physical detention and safe conduct. It is to be noted that the Access to justice Convention allows State Parties to reserve the right to exclude the application of certain provisions of the Convention, subject to conditions.[94]

2.3.3 International Convention on Civil and Political Rights[95]

The International Convention on Civil and Political Rights (ICCPR) guarantees the right of access to the courts by stating that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[96] The substantive right is similar to that in Article 50(1) of the Kenyan Constitution.[97] Additionally Article 14 of the ICCPR expressly guarantees that all persons shall be equal before the courts and tribunal. The provision may have been intended only to secure equal treatment when a person appears before a court. However the treatment can hardly be considered equal if an entire segment of the citizenry is effectively denied access to the means to secure and protect their rights.

2.3.4 Universal declaration On Human Rights (UDH)[98]

Like the African Charter and The ICCPR, the Universal Declaration of Human Rights recognizes access to justice and access to the courts as a human right themselves. It provides that each

[92] Hague Convention of 15th November 1965 on the service abroad of judicial and Extrajudicial Documents in Civil or Commercial matters.
[93] Hague Convention of 18March 1970 on the Taking of Evidence abroad in Civil or Commercial Matters
[94] Article 28 of the Access to Justice Convention
[95] Signed by Kenya on 1st May, 1972
[96] Article 14 of the International Convention on Civil and Political Rights
[97] Article 50(1) provides that; "Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."
[98] Ratified on the 31st July, 1990

individual has the right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations.[99] Further it states that individuals have the right to an effective remedy as determined by the courts for violation of the fundamental rights granted by him by the Constitution or by the Law.[100]

2.3.5 Convention on the Elimination of All forms of Discrimination against Women

The main principle of this convention is to eliminate or prohibit all forms of discrimination against women.[101] In that regard the States have the obligation to ensure equality between men and women both theoretically and practically, through law or other material means.[102] In the course of a trial women must be represented in the same way as men, mainly meaning that the arguments presented by both men and women shall receive the same weight.[103] The provision embodied in the CEDAW provide a right to access to justice but further measures must be taken by the state to ensure that these rights exist not only in theory but also effectively in practice. CEDAW acknowledges that one of the main barriers to access to justice is the poor knowledge of the law, especially among rural women. The state has an obligation to widely diffuse the law, for example through periodic awareness-raising campaign, in the language of the state concerned.[104]

2.3.6 Convention on the Elimination of All forms of Discrimination[105]

The Convention states that parties shall ensure everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violates his human rights and fundamental

[99] Article 10 of the Universal declaration on Human Rights
[100] *Ibid* article 8
[101] Article 1 of the Convention on the elimination of all forms of discrimination against women (CEDAW)
[102] Ibid Article 2
[103] *Ibid* Article 15(2)
[104] See general Recommendation of the committee on the elimination of discrimination against women no. 6
[105] Ratifies on the 9th of March, 1984

freedom as well as the right to seek from such tribunal just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.[106]In other words, state parties have the obligation to protect its citizens' right against racial discrimination which includes an obligation to provide individuals with a mean of seeking redress in a national court or tribunal for a violation of that right.

[106] Article 6 the Convention on the elimination of all forms of discrimination

CHAPTER 3

LEGAL, INSTITUTIONAL AND STRUCTURAL CHALLENGES

3.1 INTRODUCTION

This chapter explores obstacles to achieving access to justice across jurisdictions and practices that have sought to overcome these barriers. Access to justice is fundamental to establishing and maintaining the rule of law. It enables people to have their voices heard and to exercise their legal rights, whether those rights derive from the Constitution, Statute, the common law or international instruments.[107] Access to justice is an indispensable factor in promoting empowerment, in securing access to equal human dignity and in social and economic development.[108] This chapter while acknowledging the fundamental importance of lawyers and courts in ensuring access to justice, it adopts a broader approach when thinking about barriers and solutions. Barriers originate from within and from outside formal justice institutions.[109] The chapter divides the barriers of access to justice to include societal and cultural barriers, institutional barriers and intersectional barriers.

The Judiciary in its transformation framework 2010 intended to promote access and expeditious delivery of justice to all.[110] Pillar number one was based on Article 159 of the Constitution which acknowledges that while judicial authority is derived from the people of Kenya, it vests in the judiciary.[111] It follows therefore that this delegated authority should be exercised for the benefit of the People of Kenya. The strategy under this pillar is to ensure access to delivery of justice.

[107] Julinda Berqirqj "International access to justice barriers and solutions" (2014) Bingham Center for the Rule of Law Report.
[108] *Supra* 100
[109] Kariuki Muingua, " Improving Access to Justice; Legislative and administrative Reforms under the Constitution"
[110] Judiciary transformation framework, 2010
[111] Article 159, Constitution of Kenya 2010

The Constitution having guaranteed equal protection of the law for everyone[112] it therefore demands that justice must be done to all irrespective of status. It also requires that justice be delivered expeditiously and without undue regard to technicalities.[113] Most importantly, the judiciary as the custodian of justice in Kenya is to make effective steps to reduce the obstacles that hinder public access to information, ensure proximity and physical access to courts, and simplify court procedures so that all litigants can understand and effectively participate in court proceedings.[114] In guaranteeing equal protection of the law, the Constitution demands that the judiciary must not only remove barriers of access to justice, it also obligates it to take effective steps to ensure that the judiciary is open and available to all who seek its assistance.[115] Further the judiciary is to put in place strategies aimed at ensuring awareness and understanding of the law and procedures by litigants, simplification of court documents, easy availability of information and easy accessibility of courts within reasonable distance of where people live, affordability of the adjudication system, cultural appropriateness of court procedures and processes, promotion and enforcement of dispute resolution systems which are in line with the Constitution, friendly and none intimidating courts, and timelines in the processing of claim and enforcement of judicial system.[116]

The framework therefore proposed that some of the things that were to be implemented included building more courts to reduce the distance of court, increasing the number of mobile courts and developing a strategy to ensure that they work, establishing an effective system including a litigant's charter to provide information on court's jurisdiction, fee, and calendar, reducing the costs of accessing judicial services, promoting and facilitating ADR, establishing an office of court counsel in each court to assist litigants who are representing themselves to understand court

[112] *Ibid* Article 48
[113] Article 159 of the Constitution of Kenya
[114] *Supra* 4
[115] *Ibid*
[116] *Ibid*

procedures, simplifying court procedures and making the courts none intimidating including establishment of a customer care desk at every court station.[117] The successful implementation of the framework will depend on the strength, resolve and commitment of the political leadership of the judiciary, the extent of internal ownership of this process and commitment of the staff and the extent of support from the public and other governmental agencies.

3.2 Challenges in Accessing Justice

The reasons why people living in poverty incur challenges when accessing justice vary from one community to another and context to the other, but many typically relate to under development of the legal framework and discriminatory norms, poor legal awareness, insufficient legal services, problems relating to legal capacity and corruption within existing justice sectors or generally inability of the justice system to reach beyond the interest sphere of the more affluent and influential members of the society.[118]

3.2.1 Social and Cultural Barriers

Access to justice is affected by the social and characteristics of jurisdiction, including economic factors. Characteristics may include average income, inequality gaps, economic structure, urbanization, religion and level of literacy and education. [119]Some of the ways in which social barriers can be a hindrance to access to justice include;

3.2.1.1 Stigma

Due to deeply entrenched discriminatory stereotype that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest and undeserving,[120] the society including criminal police officers, court staff and other justice sectional personnel, reflect a discriminatory attitude of the wider society, often show discrimination or bias against

[117] *Ibid*
[118] Sida, "A guide to equal access to justice programmes " (2010)
[119] Julida, "International access to justice; Barriers and solutions" (2014) International bar association
[120] *Ibid*

persons living on poverty in their decision or behavior.[121] As a consequence, persons living in poverty are not treated fairly, efficiently and efficiently through the justice chain or informal adjudication mechanism.[122]Stigmatization and prejudicial attitude generate a sense of shame[123] and discouraging to persons living in poverty from approaching public officials and seeking the support that they need, not wishing to expose themselves to even greater social discrimination or abuse by the authorities, they may refrain from claiming entitlements or challenging abuses.[124]

3.2.1.2 Illiteracy

Literacy and education empower individuals, increasing their capacity to understand and insist on the enforcement of their right. Low level of literacy and education reduce access to economic resources and the capacity to understand and enforce rights, resulting to low level s of access to justice.[125] For one to comprehend the existence of rights and the ways in which such rights can be invoked and enforced by judicial and adjudicatory mechanisms, is fundamental to the appreciation of the phenomenon of access to justice.

Persons living in poverty are mostly illiterate and thus have very little or no understanding of the law and its applicability in their circumstances. They are unaware of the existence of their legal rights and the entitlement of the state's obligation and duty towards them and how to secure the assistance they need. In most circumstances they have no idea where the laws can be found and even where the laws are availed to them, they can hardly read nor comprehend its content.[126]

The research suggest that some of the ways that could contribute in addressing social barriers include advocacy for changing legislations, Awareness arising of legal rights and judicial

[121] Magdalena Carmona Magdalena Carmona *et al* "Access to justice for persons living in poverty, a human right appraoch"
[122] *Ibid*
[123] Office of the High Commissioner for Human Right in Nepal,(2011) P.63
[124] *Ibid*
[125] M Anderson,"Access to justice and legal process; Making Legal institutions Responsive to poor people in LCD'S WORKING PAPER" (2003)Page 178
[126] *Ibid*

information through campaigns and programs, employing digital technology to disseminate general information and to provide informal legal education.

3.2.2 Geographical barriers

While excessive police deployment is problematic in some communities living in poverty, the absence of police and other institutions necessary for the administration of justice in rural, poor and marginalized areas is a common problem.[127] Courts, especially appeal courts are often located only in the Capital cities while police officer and lawyers are also concentrated in urban areas along with registries for lands, birth, death and marriages. In the circumstance, persons living in poverty often have to travel long distances at great costs to engage with the justice system, exposing them to unfamiliar environment and unsafe conditions.[128] Such factors often act as a persuasive deterrent against seeking redress from judicial and adjudicatory mechanisms, or may indeed represent an insurmountable obstacle for the poorest and most marginalized.[129] Those who experience limited mobility such as older persons or persons with disabilities are affected. For the poor people, the need to travel long distance to reach police stations, court houses or public registries often implies that they are in practice unable to seek redress or protection from violence, abuse and exploitation, and have greater difficulty in accessing documents such as birth certificates and title deed that are essential as evidence of their rights when they are contested, in land or inheritance[130] proceedings. Such distance may also affect the efficacy of the justice system and imply delays and needless lengthy detention periods. The poor are also disproportionately impacted when courts and police stations are not designed to ensure

[127] *Ibid*
[128] A Report by the Danish Institute for Human Rights based on a cooperation with the East Africa Law Society," Access to Justice and Legal Aid in East Africa"(2011)
[129] Ibid
[130] *Ibid*

accessibility for those with physical impediments, and when court processes are not adaptable to the needs of persons with disabilities.[131]

3.2.2 Financial Barriers

Persons living in poverty face daunting financial hurdles to engage with the justice system on a fair and equal basis, not only the costs of legal assistance but also the direct and indirect costs.

3.2.3.1 Lack of Quality legal Assistance

Legal aid is particularly important for persons living in poverty who are accused or victims of crime, as they face a rage of obstacles such as negotiating for bail procedures, pre-trial detention, trial and sentencing and appeals.[132] In civil matters when a person does not have sufficient resources to pay for legal assistance she is prevented from asserting her rights.[133] Lack of legal aid for Civil matters can seriously prejudice the rights and interests of persons living in poverty as they are unable to contest tenancy disputes, eviction decisions, immigration or asylum decisions and many more.[134] The legal process which relate to such civil matters are often extremely complex and there requirement onerous making it impossible for poor persons to represent themselves.[135]

3.2.3.2 Fees and Costs

In addition to legal fees, there are other numerous costs associated with accessing the justice system, which constitute a major barrier for those who simply cannot afford them. Costs are encountered at every stage of the legal process, alongside several direct costs, such as obtaining a legal document, commissioning of documents, photo copy and phone calls whose cumulative impact is a crucial factor in preventing the poor from accessing and benefiting from the justice

[131] *Ibid*
[132] Asian Center for Human Rights, (2012) p.2
[133] Centre for poverty solutions,"making law work for everyone-volume 1"(2008) Ney York
[134] *Ibid*
[135] *Ibid*

system.[136]In criminal matters, costs are particularly burdensome where large sums of money is needed to pay bail or risk long periods of pre-trial detention. In addition to formal administrative fee, persons living in poverty encounter other collateral costs in accessing justice. The costs are severe for those living in the rural areas and who may have to travel days to access the justice system.[137] Persons who are employed in the informal sector may not be able to get permission from work thus they risk losing their work. Care givers, the majority being women may not be able to leave home to submit a claim or attend court hearings.[138]

3.2.3 Institutional Barriers

Several systematic problems in the operation of the justice system impact harshly on people living in poverty thus obstructing them at every stage of the justice chain.

3.2.3.1 Inadequate capacity and resources

Shortfalls in financial and human resource allocations to courts, police and prosecution corps, and insufficient training and capacity building for judicial and law enforcement officers, translate into failure in the judicial system that infringe upon access to justice.[139] Such failures including delays, flawed into insufficient evidence gathering, lack of enforcement, and abuse, undermine the effective functioning of judicial and adjudicatory mechanisms and undermine human rights. Poor functioning of the justice system particularly affect the poor, because perusing justice requires a much greater effort and investment in terms of money and time for them, while their chances of a just and favorable outcome are worse.[140] When judicial systems receive inadequate financial and human resource allocation from state budget, police stations, prosecutors and courts are understaffed and poorly equipped, and benches are deprived of adequate number of judges.

[136] *Supra* 22
[137] *Supra* 22
[138] International commission of Jurist, 2012 p.67
[139] Open Society Foundation "Open Society Justice Initiative, The Socio-Economic Impact of pre-trial detention," (2011)
[140] *Ibid*

The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the most disadvantaged, whose cases are usually under prioritized. None registration of complaints by the police is a practice common in overburdened and under resourced criminal systems.[141] In such cases, it is usually the complains of persons living in poverty that go unregistered due to bias, discrimination, and their disempowerment and lack of knowledge and information about their rights.[142] Rights and interest of women are thus especially compromised by badly resourced and trained judicial systems, police officers, state organs that traditionally reflect and prioritize the interest of men and are dominated by men.[143] Not only do women living in poverty come up against stark power imbalances, discriminatory cultural norms and other social structures when instituting legal proceedings, they are also disadvantaged by the lack of training afforded to officials on the application of the laws related to gender based violence and the improper treatment of victims and handling of complains.[144]

3.2.3.2 Excessive delay

Due to lack of adequate resources and qualified staff, limited budget and inadequate infrastructure, there are unnecessary delays in adjudication of cases and enforcement of judgments.[145] While these problems affect all persons seeking justice through the formal justice system, they have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation. Often their cases are under prioritized due to biased preferential treatment to the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimant. Those with power and resources are not only able to assume the costs of the long waiting period, but also have access to informal ways to speed up a process.

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[141] Supra 100
[142] *Ibid*
[143] *Ibid*
[144] *Ibid*
[145] United Nations office on drugs and crime, 2011 p.23

3.2.3.3 Corruption

In Kenya partly due to overstretched and unfunded judicial system, corruption is epidemic within the police force, prosecution lawyers, and among judicial officials. Illicit payments and favors enable those with financial and social capital to access the justice system with greater efficiency and effectiveness, and even to secure a certain outcome. When people living in poverty cannot afford to pay requested bribes for services that should be free, their claims and cases are delayed, denied or discontinued.[146] Moreover, bribes represent a greater burden for persons living in poverty, often meaning that they have to sell or sacrifice their health or education costs to meet such demands.[147]

Persons living in poverty are not only denied access to justice when they are unable to meet the costs of bribe or engage in other corrupt activities, but they are also deterred from accessing the justice system when they perceive the system to be corrupt. Such perception can have the seriously detrimental consequence of deterring people living in poverty from even attempting to access the justice system to have their rights enforced and to claim remedies from violations.

3.2.4 Procedural Barriers

High cost, complexities, excessive documentation requirements, geographically distinct offices and time consuming processes of registration are great disincentives to accessing access to justice for the poor and the most marginalized.[148]

[146] People living in poverty are more likely than other individuals to be confronted with requests for bribes, and to resort to paying bribes. In Burundi, a "certificate d'indigence' is to ensure that people living in poverty benefit from free legal advice and legal fee waivers" Transparency international, 2007,p.13

[147]Evidence show that women are more likely to be affected by demands for bribes and in many cases they are always subjected to harassment or abuse by law enforcement officers themselves., UN Women, 2011 p. 54

[148]Sen, A. " Poor, Relatively Speaking," Oxford Economic Paper, PP35, Oxford University press

3.2.4.1 Formalism

Without the resources to retain private legal assistance, and with restricted access to legal aid, persons living in poverty are often forced to navigate the judicial system alone.[149] In doing so, they encounter a complex labyrinth of laws, traditions and interaction with copious paperwork, the use of legal jargon, mainstream languages and restrictive time limits, all of which can deter the poor from seeking justice under formal system and impede fair outcomes.[150] These barriers are particularly damaging in areas of the law that frequent impact upon the most marginalized. Person living in poverty may be unfamiliar with, and often intimidated by, regulations regarding dress codes, the hierarchy of the court system, confrontational design of court rooms, and traditions about when to sit, stand and address the judge.[151] As a result they are in an unequal and disadvantaged position before they even walk into the courtroom. Requirements of high evidentiary proof before civil claims can be instituted can have a disproportionate impact on the poor who are hampered by their lack of financial resources, time, and understanding of the law and the legal process.[152] Collecting evidence, obtaining expert opinion and preparing forms in the correct language can be an impossible without the assistance of a competent legal representative. Persons living in poverty are even further disadvantaged when they are conducting proceedings or making claim against corporate entities. This is particularly evident in criminal cases, where the state controls the collation and production of evidence.[153] The process of collecting exculpatory evidence or obtaining expert testimony may prove prohibitively costly for the poor thus giving them very little hope at the trial.

[149] *Supra* 100
[150] *Ibid*
[151] *Supra* 121
[152] *Ibid*
[153] *Ibid*

3.2.4.2 Complexity of procedure

While many people find it difficult to understand legal or judicial terminology, the complexities increase in multilingual and multiethnic societies like Kenya where legal proceed are conducted in English making it difficult for the very poor who only speak their local dialect. Similarly, judicial systems like ours that are heavily reliant on paper forms and written submissions put illiterate persons in a disadvantaged position. While individuals facing a criminal charge have the right to a free interpreter under international human rights law[154] in practice this service is often limited, unavailable or reserved for those who speak foreign language, rather than a minority language or local dialect, and is rarely provided for in civil cases. Even when the predominant language is spoken, cultural differences can impede communication within the judicial system. In some cultural groups, different terminology maybe used for specific occasions or to speak to people in a different terminology may be described in different ways.[155] Furthermore inter cultural communication between indigenous people and the judicial officers can be impeded by difference in perception of politeness, cultural taboos which prevent the giving of certain evidence.[156]

3.2.5 Potential intervention to Access to Justice

In order to be able to identify the set of intervention that are most relevant to overcome access to justice, it is necessary to maintain a system wide perspective. Even though resource constraints may make it impossible to try addressing all relevant aspects of the justice system, individual reform initiatives should not be considered in isolation as improvement on one part of the justice system may be effectively undermined by existing weakness in other parts of the system.[157]

[154] See article 14.3(f) ICCPR
[155] *Supra* 126
[156] *Ibid*
[157] Sida "A guide to Equal Access to justice programmes" (2010)

In conducting a system wide analysis, the framework set out relate to normative protection, legal awareness, legal assistance, redress and conflict resolution, enforcement and oversight monitoring and to reform claim by rights holder.[158]

3.2.5.1 Normative Protection

Normative protection refers to the presence of a legal umbrella that defines rights and duties, reflecting customs and accepted social behaviors.[159] The quality of a court cannot be assured if the rights of the applicants are not assured. A set of rules and practices related to the right of a fair hearing have been developed, including; the right to a fair hearing, the right to a public hearing and pronouncement of judgment, presumption of innocent, the right to know the accusation, adequate time and facilities to prepare a defence, the right to legal assistance, the right to examine a witness, the right to an interpreter and the right to compensation for miscarriage of justice.[160]Gaps in existing legal frameworks are often filled by new laws that are heavily influenced by or copied from other countries.

Transplanted laws tend to work best when borrowed from a country with a similar political and legal culture and do not concern areas of law that are deeply hysterically religiously anchored, such as family law.[161] Public litigation can contribute to filling gaps in existing legal frameworks and be an effective way of strengthening legal protection for disadvantaged groups. Even when law suits have not succeeded in court, they have sometimes helped to bring public attention to the issue in question and contribute to shape public opinion in favor of reforms.[162] Ratification of international human rights treaties do not necessarily mean a readiness to amend relevant laws and ensure that rights are upheld, but it gives among other things civil society

[158] This framework builds on what is set out in UNDP's Equal Access to Justice Guidance Note, 2003
[159] For a more comprehensive description of different interventions, see Alffram, Henrik "Equal Access to justice; a mapping of experience", September 2010
[160] Magdalena Sepulveda *et al* "Access to justice for persons living in poverty; a human rights approach" (2008) Elements discussion
[161] Side "A guide to Equal Access to justice programmes" (2010)
[162] *Ibid*

actors a tool to use in their advocacy.[163] Domestication of treaties is equally important, so that they become applicable to the country's jurisdiction.[164]

3.2.5.2 Legal Awareness

People living in poverty and with no or little formal education are in most circumstances likely to have particularly low awareness of laws and rights, and as a result have the biggest problem in accessing the justice system. [165] Legal awareness can be enhanced through training initiatives, but also by making laws and regulations more accessible. Some of this initiatives include; Legal literacy programs implemented by the state, civil society organization or media which would be effective on increasing legal awareness, integrated approaches that pair legal literacy with mainstream development programs, writing laws in plain language thus making it more accessible and easy to understand and ensuring a participatory law making process which would provide for public hearing and allowing citizens and organizations to summit comments, would help to make laws more accessible and ensure that the needs of the people are reflected.[166]

3.2.5.3 Legal Assistance

As the legal systems are complicated to navigate, most people seeking to settle a dispute or obtain a right are in need of assistance from a person with legal training and knowledge.[167]Intervention focusing on strengthening legal assistance may be relevant in all contexts where lawyers and legal assistance providers are allowed to operate independently, or where such assistance is likely to help strengthening their independence.[168] Paralegal programs where non-lawyers assist people and communities who are poor and denied access to power with

[163] *Ibid*
[164] Unless the country abides by direct applicability of international agreements and treats signed and ratified.
[165] Supra 40
[166] *Ibid*
[167] *Ibid*
[168] Julinda Berqirqk, "International access to justice; Barriers and Solutions" Bingham Centre for the rule of Law Report.

their justice needs by providing legal advice and assisting in settling dispute through mediation and negotiation have always had significant impact. Legal aid non-governmental programs with a clear focus on protecting the right of women and men living in poverty have sometimes been effective providers of legal services to disadvantaged clients.[169] Law school clinics in which law students under supervision provide free legal services have occasionally contributed to improve access to justice, but their effect has been hampered by limited outreach.[170]

3.2.5.4 Redress and conflict resolution

Access to justice is often hindered by an absence of state and non-state institutions that register rights adjudicate disputes and ensure redress for grievances in a fair, predictable and effective manner.[171] As courts can be used to enhance oppression as well as to uphold freedoms, support to increase the capacity of the judiciary should be accompanied by genuine government commitment to reform and go hand in hand with interventions to ensure independence, transparency, accountability and adherence to fair trial standards. Research on local government corruption cases indicate that extensive public scrutiny of judicial procedures play a key role in ensuring that cases progress through the legal process.[172] Anticorruption programs and strengthening external monitoring mechanism such as non-governmental organizations, court watch programs are an example of ensuring improved accountability.[173] Formal and informal alternative dispute resolution mechanisms including small courts, networks of trained volunteer mediators and various other alternative dispute resolution mechanisms have produced low cost resolution of disputes in a manner that is satisfactory to the parties involved.[174] Whereas these have contributed to easing the burden on the formal legal system, they tend to work best when

[169] *Ibid*
[170] *Ibid*
[171] United Nations, "Access to justice" 2006
[172] Taufik Rinaldi, et al "Coombating cirruption in a decentralized Indonesia," (2007) World Bank.
[173] *Ibid*
[174] Supra 125

the economic stakes are not too high and the parties involved are fairly equally armed in terms of financial strength, connections and societal status.[175]

3.2.5.5 Enforcement

A major problem with many formal and informal justice systems is that the decisions handed down by courts and similar institutions are not enforced due to factors such as corruption, political interference, lack of resources and poor administration routines. Another problem is that the enforcement process is often accompanied by human right abuses.[176] The justice reform process too often fails to include police reform. However, the police play a fundamental role in ensuring access to justice, particularly since it is the point of 1st contact in the criminal justice system.[177] Interventions to improve the effectiveness of the police and other enforcement agencies should always be accompanied by efforts to ensure transparency, accountability and adherence to establishment of human norms. [178] Therefore efforts to strengthen the human rights and accountability perspective of policing need to be combined with initiatives to increase crime control capabilities. Community based policing programs striving to build positive relationships between the police and the communities, focusing on crime control and prevention, have contributed to increased public confidence in the force and thus reduced crime level.[179]

3.2.5.6 Oversight and monitoring bodies

Civil society and parliamentary oversight are necessary to strengthen overall accountability in the justice system.[180] Developing watchdogs and monitoring capacities in civil society and parliament not only benefit disadvantaged groups and citizens at large, it is also useful for justice

[175] *Ibid*
[176] *Ibid*
[177] Supra 139
[178] *Ibid*
[179] *Ibid*
[180] *Ibid*

institutions themselves.[181] Strategies may include creating civic oversight mechanism, supporting civil society in monitoring public appointment and law implementation, developing research capacity, enhancing skill for investigative journalism and human rights reporting, and involving civil society in the establishment of access to justice indicators and baselines.[182]

[181] *Ibid*
[182] *Ibid*

CHAPTER 4

COMPARATIVE ANALYSIS

4.1 Case Study South Africa and England

Unlike Kenya, South Africa and England have a well-structured and established system that ensures that the arms of justice are reachable to everybody, including those who cannot afford the services of a lawyer. The new South African constitution attempts to provide access to justice by establishing a court System which is staffed by persons who reflect the race and gender composition of the country[183]and who are not, as in the past, drawn from one group only. Further, the country's court system has ensured that all persons feel comfortable and at ease when seeking justice through the court system by establishing different courts that can accommodate all calibers of cases that the society faces. In 1969 it enacted the legal aid act that introduced the national legal aid scheme headed by the Legal Aid Board an independent legal aid body which today render and make available legal aid services to indigent persons. The South African Legal aid scheme has employed over 1,048 qualified lawyers and 615 candidate attorneys[184] who provide state funded legal aid to its needy citizens. To further enhance access to justice in South Africa, the country in 1996 formed a law commission that investigated less expensive and more expeditious modes of enhancing access to justice through alternative dispute Resolution (ADR). In its proposal, the commission was of the view that the involvement of the community in dispute resolution process would go a big step from decongesting the courts. It is through this proposal that traditional and community courts were established.

England on the other hand has enacted an Access to Justice Act of 1999 that has ensured access to justice is accessible to all persons; the English have further decongested their courts by

[183] David McQuoid-Manson "Access to Justice in South Africa" Unibersity of Windsor, Windsor Year book of access to justice (1999).
[184] *Supra* 44

establishing a well-functioning arbitration and mediation facilities including passing laws that are actively in operation for purposes of enhancing ADR. Another mechanism that England has employed is the monitoring of case flow from the filing stage to disposition for purposes of avoiding backlog in courts and maintaining a pending case inventory that is manageable in terms of workloads of judges and court staff members. This chapter appreciates the steps taken by the two countries in promoting access to justice and compares the same to that of Kenya for purposes of proposing, improving and ensuring that proper reforms are made in ensuring the provisions of article 48 of the constitution are achievable.

4.2 Access to Justice in South Africa

South African just like Kenya has recognized the importance of access to justice in its constitution and has made all possible ways to ensure that its citizens are not limited in whatever way when it comes to the issue of access to justice. In South Africa, access to justice is not only a value and a theme that binds the judiciary, but binds all branches of state, state organs, and juristic persons such as universities and individuals[185]. None state institutions and individuals are bound by the country's constitution to the extent that they are bound by the bill of rights to promote access to justice. Unlike other countries, It has seen a protracted struggle against colonialism and apartheid which persisted for more than 300 years. During this period, the country was characterized by racial discrimination, deep inequality, poverty and strife which were rooted in and enforced through the laws and policies of the colonialists.[186] The fruits of colonialism and apartheid were the denial of justice, which was only accommodated by the privileged, the powerful and rich to the detriment of the poor, the marginalized and the weak.

The Constitution has in all ways attempted to prevent the historical injustices faced by its people through enshrining the issue of access to justice its constitution. Section 34 of the South African

[185] Speech by Jeff Radebe at the University of Cape Town, on challenges facing access to justice (2012)
[186] *Ibid*

Constitution states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[187] Further Section 34(2) of the same constitution provides that everyone who is detained, including every sentenced prisoner, has the right to choose and consult with a legal practitioner, to be informed of his rights promptly and to have a legal practitioner assigned to the detained person by the state and at the state expense, if substantial justice would otherwise result to be informed of their rights promptly.[188] Although the provision of access to justice in the South African Constitution is more like that of the Kenya constitution, the said provision in South Africa has been put to test and succeeded especially due to the fact that the country has an access to justice act unlike that of Kenya which is still being implemented through progressive realization and has a pending Legal Aid Bill that is yet to be passed for purposes monitoring the issue of access to justice. Some of the transformations made in South Africa include making judicial services accessible to the poor, the uneducated and the vulnerable. The country has established a judicial presence in rural and township areas, offering low legal fees and providing speedy and empathetic services.

South African's Constitution just like that of Kenya [189] has acknowledged the importance of categorizing different cases to be handled by different courts mainly according to similarity and their weight. Both countries have established constitutional courts that handle constitutional matters, Labour /industrial courts to handle labour related matters, Environmental /land courts to hand matters relating to ownership of land and children courts at magistrate level to handle child related matters.

Unlike Kenya, South Africa has further established specific courts at the magistrate court level to handle cases depending on the caliber of people involved this further including forming special

[187] Section 34 of the Constitution of South Africa
[188] *Ibid*
[189] Article 162 of the Constitution

rules to apply in those courts. This scenario is completely different from that of Kenya where save for the anticorruption and the children's court, all cases at the magistrate level are only differentiated on the basis of the nature of crime in case of criminal cases and the money involved in the case of civil cases and in all these, the same rules of law apply respectively.

One of such special courts at the magistrate level formed in South Africa is the Equity Courts[190], whose function is promotion of Equality and prevention of unfair Discrimination.[191] The design of the equity courts identified several major barriers to litigation that would be addressed through an alternative court system. These barriers included costs, informational deficits related to navigation of the legal system, the intimidating nature of the courts, and the long time needed for litigation.

Equality courts unlike ordinary courts are meant to be very inexpensive for litigants to use which scenario is a complete contrary to the Kenyan situation where unless one is filing his case under pauper brief, no special charges have been provided for those who may have minimum income or are illiterate.[192] Easy accessibility to Equity courts has been enhanced by the fact that advice needed by litigants is provided by court clerks whose job responsibility include guiding of complainants through the process of filing a complaint.[193] Both the presiding officer and the Equity clerk provide guidance on how to develop the case and on the type of evidence to be produced. Presiding officer also question witnesses when necessary and have the authority to call for more witnesses.[194] This is however very different from the Kenyan circumstance where only non-government organizations have been established to offer free legal advice which organizations are only available in urban areas thus cannot be easily accessible by those in rural areas. Lastly Kenyan courts unlike the Equity courts adhere to the strict rule of the common law

[190] The promotion of Equity and prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)
[191] Article 9(4) of the Constitution of South Africa
[192] *Supra* 49 Article 2
[193] *Supra* 49 section 17
[194] *Supra* 4 9 section 16

case procedure like rules of evidence and civil procedure which are followed despite the different calibers of people who may be seeking justice from the court.

Other such courts established in South Africa are the Small claim courts which adjudicate over small civil claim[195] and were strictly created to eliminate the time consuming and adversary procedure before and during the trial of small claims. Matters within small claims courts are presided over by commissioners who are usually practicing advocates or attorneys, a legal academic or other competent person. These services are voluntary as commissioners are not paid any fee.[196]Neither the Plaintiff nor the Defendant may be represented or assisted by counsel at the hearing. The commissioner's decision is final and there is no plea to a higher court, only a review process is allowed.

In Kenya whereas the magistrate's act[197] and the civil procedure rules[198] have attempted to make classification distinguishing the handling of cases by different ranks of magistrates, litigants with small claims still stand at a disadvantage as they have to follow all laid down procedures for presenting cases in court and must wait an equal period of time for the determination of their cases just like multi-track cases. South Africa has further established Traditional Courts and Community Courts which are courts in traditional community areas in rural villages that deal with disputes within the villages. They are easily accessible and the presiding elders relate to the issues of the complainant hence can easily understand the genesis of their disputes.[199] Such courts are not recognized in Kenya however most communities in Kenya have recognized Alternative Dispute Resolution (ADR) like negotiation, arbitration and mediation in dealing with disputes within the community notwithstanding that the decisions made from such forums may

[195] http;//www.gov.za/aboutgovt/justice/courts.htm, last visited 18th August, 2014
[196] *Supra 54*
[197] Cap 10 of the Laws of Kenya
[198] Cap 21 of the Laws of Kenya
[199] *Supra 54*

not be binding however, the same have proved to be more efficient and fulfilling unlike the formal courts.

From the foregoing, if the poor in Kenya are to benefit from the judicial system in view of article 48 of the constitution, then just like South Africa, all calibers of people must be considered while establishing different courts to deal with different nature of cases.

4.2.1 Legal Aid in South Africa

The main vehicle for the delivery of access to justice for the poor in South Africa is the Legal Aid Board, which operates under the Legal aid act[200] and has been contracted by the state to deliver legal aid services as required by the constitution in criminal cases. However as in the case of Kenya's Order 33 of the civil procedure rules that relates to pauper briefs, in South Africa some limited state assistance is provided in civil cases under the *in forma pauperis* procedures in the rules of the Supreme Court[201]whereby the Registrar of the High Court refer poor people[202] to legal practitioners for help. This is however quite different from the provision of Order 33 where the discretion is placed upon the court to make a determination whether an individual can be treated as a pauper or not upon such person making the application to be treated as such[203]. In so making the said determination, the court may lock out people who are in actual need of legal aid as no precise format has been set for making such a determination.

4.2.1.1 The legal Aid Board

A national legal aid scheme was first introduced in South Africa in 1969 by the Legal Aid Act[204] which then established the Legal aid board to render or make available legal aid services to

[200] Act 22 of 1969
[201] Rule 44 of the Uniform Rules of Court
[202] People with assets of less than R10,000
[203]Order 33(2) of the Civil Procedure Rules
[204] *Supra 59*

indigent people[205]. The composition of the Board has representatives from the Bench, the bar, the attorney profession, government departments and independent experts on legal aid. The board has offices in the main cities and relies on assistance from designated legal aid officers employed by the Department of Justice in the magistrate's courts in towns where the Board has no offices. This is a completely different from the National legal aid Programme (NALEP) which Kenya currently relies on for the provision of legal aid as the same only has pilot offices spread out in few cities in the country and has no structured way of providing legal aid to the people in those cities or to the adjacent cities.

The Legal Aid Board upon formation established a set of working rules which are incorporated in the *Legal aid guide*[206]which provide the board's resolutions to be carried out under the supervision of the director of Legal aid who is also an officer in the board. The guide recognizes that legal practitioners should be remunerated for their work, and a tariff of fees has been introduced for both attorney and advocates.

In general, the Guide provides that legal aid should be rendered in all cases where the assistance of a legal practitioner is normally required. The guide however excludes the assistance for legal aid in certain categories of criminal[207] and civil cases[208]even though a person has satisfied the

[205] *Supra59 sec. 3*
[206] Legal Aid Board, Legal Aid Guide (1996)
[207] Thus in criminal cases, no legal aid is rendered where; (1) *pro deo* Defence is available, unless the service of an attorney cannot be dispensed with; (ii) an admission of guilt has been determined or can be compounded; (iii) the commission of the offence is admitted and the offense and the accused person's defence or excuse is so simple that it can be advanced by the accused without assistance; (iv) a traffic offence, or any other offence involving the use of a car, (other than culpable homicide), is committed; (v) the applicant wishes to institute a private prosecution; (vi) in cases where the director is not satisfied that a criminal appeal has a reasonable prospect of success; (vii) in certain matters excluded from the board from time to time (at present, white collar crime, commercial fraud, dealing with drugs or habit producing substance); (viii) where a person is charge for the 3rd or subsequent time on the same or similar charge; and (ix)save with the consent of the Director, where the person is charged for failing to pay maintenance under the maintenance act of 1963.
[208] In civil matters, legal aid will not be rendered; (1) in debtor court proceedings; (ii) for the administration of estate or the voluntary surrender of an estate; (iii) in an action for damage on the ground of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery and inducing someone to dessert or stay away from another's spouse, (iv) in a claim for maintenance and which can be determined by the maintenance court without the assistance of a legal practitioner; (v) in undeserving divorce matter; (vi) for an action which may be institute in the small claim court or where the amount of claim does not exceed the jurisdiction of the small claim court by more than 25%; (vii) in arbitration, conciliation or any other form of alternative dispute resolution: (ix) in Civil appeal

mean test. Unlike the English system where Legal aid applicants may make application for limited advice and assistance directly to the solicitor who participate in the legal aid scheme, In South Africa the applicant must approach the legal aid officer directly. The officer then screens the applicant to see if they qualify for legal aid before referring them to a legal attorney or the public defender's office[209].

4.2.1.2 Method of Legal Representation

There are three main methods of delivering legal aid services used by the Legal Aid board in South Africa; (i) referral to private practitioners; (ii) Public defender; and (ii) Law Clinic.

4.2.1.3 Referral to Private Practitioners (Funded judicare)

Referrals to private lawyers probably provide the most common form of legal aid in African Countries. In this method, the state pays private lawyers for their service at fixed tariffs. In Kenya, the state provides such services by inviting lawyers to provide such services at a fee that is paid to the lawyers upon completion of the case.

In South Africa, the introduction of the new constitution[210] had a devastating effect on the ability of the board to continue using this method. The huge number of criminal attorneys required meant that the board had to revise its strategies concerning the delivery of Legal aid Services and eventually this method was abandoned. Today, private lawyers for legal aid in South Africa are only contracted if the salaried Legal Aid Board public defender cannot take up the case, there is a

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unless the director is satisfied that there is a reasonable prospect of the appeal succeeding; (x) in matters where there is no substantial and identifiable benefit to the client; (xi) in matters excluded by the board from time to time; (xi) matter where enforcement of an order for a client will yield little benefits and (xii) in enquires in the Children's Court without the prior approval of the Director.

[209] *Supra 65*

[210] South Africa's Constitution 1996, Article 35

conflict of interest regarding the legal aid lawyer, or there is no other legal aid service in the area[211]

The South African, the judicare system only worked when the numbers of cases were comprehensively few and the Legal Aid Board had the resources to handle them administratively. However, there must be adequate staffing and administrative structure to support the system, proper accounting systems to deal with claim for fees and disbursements expeditiously, and budget constraints that keep pace with the demand. Once a centralized staffing establishment can no longer keep the pace with the demands of practitioners for payment within a reasonable period of time, the referral system breaks down[212].

Whereas the Kenyan system still uses the referral system, the South African experience shows that in order to retain the judicare approach as part of the Legal aid system, it is best to use a fixed contract approach. This has been done with the South Africa's Legal Aid board which has entered into such agreement with Public Interest law firms and University clinics.

4.2.2.4 State Funded Public Defenders

Public defenders are full-time salaried lawyers by the Legal Aid Board and on its condition of service, thus are not employed by the Public Service Commission hence they are not public servants. They consist of Legal interns in the district courts and qualified lawyers in the regional and High Court, and are attached to the justice centers throughout the country.

[211] David McQuid-Mason "The supply side; The role of lawyers in the provision of Legal Aid- Some lessons from South Africa" University of KwaZulu Natal, Durban, South Africa(2006).
[212] *Supra in "*The delivery of Civil Legal Aid Service in South Africa*"* 24 FORDHAM INT'L (2000)

Public defenders deal primarily with criminal cases where an accused person has a constitutional right to legal representation in trial and appeals[213] The fact that Public defenders are employed by the Legal Aid Board, an independent statutory body with its own board of independent, non – executive members, assures the independence of Public Defenders. However, Public Defenders remain members of their bar council or law society. The Public Defender models are considerably cheaper than the judicare system[214]. Kenya which relies almost exclusively on the judicature model despite the fact that it is limited by budget constraints should seriously consider introducing partial public defender scheme in areas where the court process has substantial numbers of criminal cases. A full –fledged network of public offices is likely to be too expensive for small jurisdictions like Kenya but the South African's experience has shown that justice centers that combine public defenders with intern public defenders for a modest *per capita* expenditure on Legal aid by the state.

4.2.2.5 University and Law School Legal Aid Clinics

Like state funded law clinics, university aided clinics supply free legal advice to indigent persons, but they are independently funded and staffed by law students under the supervision to qualified legal practitioners. Most law clinics either require law students to work in a university law clinics or assign the student to an outside partnership organization where they can provide legal services under supervision[215] Almost all universities in South Africa operates campus law clinics independent of state-funded law clinics[216] and employ directors who are practicing advocates who may seek accreditation from the local law society, and, if granted, candidate attorney may be employed and trained at these institution with a view of admission.

[213] Section 34 of the South African Constitution
[214] It has been suggested that this is not the case in the United Kingdom and Canada
[215] David McQuid-Mason "The organization, administration and funding of legal clinics in South Africa" 1 NULSR P.189, 193 (1986)
[216] David McQuid-Mason "The Role of Legal Clinics in Assisting victims of crime, in Victimization" Nature and Trends. P. 59"(1992)

The funding of law clinics tend to be uncertain, as such clinics generally rely on donor funding.

4.2 Access to Justice in England

Access to justice in England is regulated by the Access to justice Act of 1999[217] which establishes a legal service commission that oversees the right to justice through legal assistance.The commission is futher empowered under section 3 to enter into contrcts, take loans, invest money, promote or assist in the promotion of publicity relating to this function, and to advise the lord of chancellor on matters concerning the function of the commission.

The commission as set in England has promoted legal aid in the country and a great distinguishment can be made from access to justice in England and Kenya. In Kenya, whereas an accused person can represent himself[218] upon entering a plea of guilty or not guity, his admission are recorded and conviction issued on his plea of guilty or not guilty not withstanding the fact that he may not be in a position to comprehend the complixities involved in legal matters. In England, the scene is diffrent as the Access to Justice Act 1999 confers a right to persons seeking free legal aid to approach the legal service commission and through its criminal defence service where a proffessional lawyer is allocate to him to represent him instead of self representation. In this system, legal representation for all sorts of offences committed is therefore an entitlement, and not just a luxury of the few, a lesson that ought to be learnt by Kenyan's legal and policy makers. In Kenya, unlike in England an order by the court to demand the Attorney General to grant free legal representation, usually commences after a person has been arrested, interrogated, charged and spend nights in the police cells which actions before the commencement of trial without the presence of a lawyer can clearly jeopardize the chance of affair hearing. In England, from the point of arrest, interrogation and trial a suspect if he chooses can be represented by a lawyer provided by the legal service commission.

[217] http;//www.legislation.gov.uk/ukpga/1999/22/content
[218] Section 207 of the Criminal procedure code

In England, the Legal Service Commission is a quasi-independent national government organisation[219]that makes its own decision free from government interfearence. In Kenya whereas the proposed Legal Aid bill establishes the National Legal Aid service Board[220] as an independent boady[221]the same has no effect untill the bill is passed into law. The existing National Legal Aid programme is a government organization that does not have independence in its decision making and cannot therefore gurantee justice to the person being represented. In Kenya therefore there is no clear cut line in the Kenya Legal system as both counsel representing the accused and the prosecution that wish to put the accused behind bars, come from the same state institution. It is therefore imparative that Kenya do ensure that cousels representing an accused person should be provided by an quasi-independent body having the free hand to direct its own affair. Before the enactment of the Access to Justice Act in 1999, legal aid in England was administered by the Law society and the solicitors' proffessional association who would then be paid by the state and thus it was viewed not to be independent in its functioning thus was rejected for not being able to gurantee justice to the vulnerable. In England, criminal defence is usually conducted by qualified and well paid solicitors[222]employed by the state through the legal service commission or private solicitors employed by the commission and thus promoting efficiency, quality of legal services and administration of justice. In Kenya, courts usually request private lawyers to do *pro bono* services or as stated the government is ordered to provide free legal representation despite the fact that majority of the lawyers do not like taking these cases for obvious reasons.

The legal proffession anywhere in the world is not a charitable event, in the course of helping courts arrive at fair decisions, lawyers usually expected a good sum of renumeration from their client and for job well done, due to this, in Kenya most of the *pro bono* cases forwarded to

[219] Section 3 of the Access to Justice Act 1999
[220] Section 5 of the Legal Aid Bill
[221] Section 6 of the Legal Aid Bill
[222] Section 18 of the Access to Justice Act, 1999

lawyers are forwarded to fresh law graduates who may have no experience at all or in the matter at hand. On the other hand, state lawyers may also not do a great job of defending the best interest of their clients reason being that they are not well paid compared to their counter part in private practice or in the non-governmental organisations, which fact makes most state lawyers loose morale in persuing justice from their client and this is further compounded by volumes of work they have to do with little pay. Further in Kenya the practice of the High Court requesting lawyers to represent suspects at times result to poor work as most lawyers know which case is best suited to them and giving an advocate a criminal case when he specializes in civil cases may not be in the best intreset of the victim. In England Public Defence Service lawyers are specialized lawyers who solely dedicate their time to criminal mattersand under go countinuous training and thus have aquired the expartise need to produce good result. In Kenyan, most of the money given to the National legal Aid programme is never acounted for due to factors like corruption which then play a big role in destroying the dreams of many Kenyans on having the realization of a legal aid scheme that can gurantee equl and effective justice for all, whereas a large sum of money allocated to the Legal Aid scheme of England is accounted for.

CHAPTER 5

CONCLUSION

5.1 INTRODUCTION

The recognition of access to justice as a fundamental right means that the human and financial resource employed in reforming such a system would be immense, and the government would clearly feel the strain. However, as previously discussed, access to justice is a core principle of law in a democratic society. For a country to achieve progress socially, economically and politically, then equal access to justice must play a vital role.

As pronounced in the Constitution and many of the discussed domestic laws, there are no legitimate reasons why the Kenyan government should be selective while granting legal aid to persons who require the same. There are further no reasons why proper legal and institutional frame work should not be put in place to realize access to justice for all those who require it. The Government must in realizing the provisions of article 48 ensure that all necessary efforts have been put in place including the passing of the legal aid bill which has remained ignored in parliament yet it is desperately need for purposes legitimizing access to justice as a human right. If some or all the mechanisms employed in the English and South African legal system can be borrowed into the Kenyan access to justice programmes, then the dream of an equal society will be realized, and justice shall be guaranteed to all.

This research upon evaluating the issues facing the poor in access to justice, the legal and institutional frameworks in place and making a comparison of the same with other advanced jurisdiction gives the following recommendations as ways of improving access to justice for the poor.

5.2 Recommendations;

5.2.1 Use of Alternative Dispute Resolution as a form of Access to Justice

The status of ADR has been elevated in the new constitution, if the state is to put forth proper and structured modes of promoting ADR within Kenya, then notion of court dependency shall be drastically reduced among the high end cases and the very small cases that merely need a third party to arbitrate on the same. ADR are as a mode of settling dispute shall do away with the procedural aspects that the courts have upheld and may also defeat the issue of accessing physical structures so as to arbitrate on a case.

5.1.2 Establishment of Small Claim Courts

The versed majority of the poor in rural areas mostly rely on the chiefs and village elders to resolve their disputes where indigenous law and custom is applied and no legal representation is required. However, as much as these "courts" bring justice to the people, their decisions have no legal backing and can be disregarded or easily rendered ineffective. Like South Africa, Kenya must accept that not all disputes need to be settled in the formal courts that follow the strict provisions of the law and which are presided by judicial officers with legal backgrounds. An acknowledgement must be made that certain small disputes, like petty theft, trace pass of animals and matrimonial related disputes within a community can best be settled by elected village elders who only need basic training in dispute resolution and who are in a better position to understand the nature and cause of such disputes thus being in a position to easily settle them. By introducing small courts, the formal and scarcely located courts will be decongested of minor cases that can be handled and resolved at village. Such courts will not only be easily accessible by any person within a community in terms of distance but due to the petty nature of disputes, the charges payable if any would be minimal and unlike formal courts that have insisted in using the English language and confusing evidence production and civil procedures this court will

bring a sense of "being at home" to litigants due to the fact that such procedures if any will be applicable to the lowest point of one's understanding.

5.2.3 Language and Presentation of Law

Most of the courts today use English as the formal language of communication in court and at times getting translators has proven to be difficult, for the less uneducated persons who do not understand the language. It is important that the courts for purposes of avoiding intimidation to certain litigants do adopt a language that can easily be understood by the victims where such a victim is self-represented or is against an advocate. Further the laws that we have today have all been written in the English Language and no translation has been offered for the uneducated persons who not only cannot understand the language but can also not read it. It is paramount that for an effective realization of article 48 of the constitution, all laws must be translated to the different dialects recognized in Kenya.

5.2.4 Case flow Management System

Most cases filed in court take up to more than one year before they are heard and determined at which time, the victim has either lost hope in the judicial system or has given up on any form of justice that may be available to him. Case flow management is the coordination of court processes and resources so that the court cases progress in a timely fashion from filing to disposition[223]. The best case flow management practice includes setting the cases disposition time standards, early court intervention and continuous court control of case progress, use of differentiated case management establishing meaningful pretrial events are schedule, maximizing dispositions before setting specific trial dates, monitoring case load information and effective post-disposition. Case backlog has remained a big problem in our courts today and it is very common to find some judicial officers are over whelmed with cases while others at the same

[223] htt;/supremecourt.gov.pk/ijc/article/20/1.pdf Last visited 4th October, 2014

station spend most of the time sitting around with no work to do mainly due to the fact that cases having been divided according to their nature are allocated to a certain judicial officer who despite heavy work load cannot get assistance from his colleague, as he is in a different division but in the same station. For access to justice to be achievable, there must be proper case management from the point of filing and dispositions thus making it easy to track cases that have been pending for a longer time and giving them priorities to newer cases.

5.2.5 Enactment of a Legal Aid Act

Article 48 cannot be said to be operational when the state does not have a structured way in which legal aid reaches the people. Legal aid must be recognized by the state as a fundamental form of access to justice and the same can only be said to have been recognized if an act regulating it is enacted. The enactment of such an act will further ensure that legal aid is spread evenly around the country and that it reaches those who desperately need it.

Whereas this chapter is not exhaustive on the modes of promoting the issue of access to justice for the poor, the modes proposed herein only show that indeed it is possible to fight the impediments of access to justice.

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