

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**THE ROLE OF LEGAL AID IN THE REALIZATION OF THE RIGHTS OF
INDIGENOUS PEOPLES IN KENYA**

**BY:
OWUOTH DESMOND TUTU**

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SUPERVISOR: DR DUNCAN OJWANG

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DECLARATION

The work contained in this thesis is my original work and has not been previously been presented for an award of a degree in this university or any other institution of higher learning. The thesis contains no material previously published except where cited.

Signature: _____ Date: _____

OWUOTH DESMOND TUTU

G62/75790/2015

Supervisor:

This thesis has been duly submitted with my approval as the University of Nairobi supervisor.

Dr Duncan Ojwang',

University of Nairobi,

Signature: _____ Date: _____

DEDICATION

ACKNOWLEDGMENT

TABLE OF CONTENTS

DECLARATION.....	i
DEDICATION.....	ii
ACKNOWLEDGMENT	iii
ABBREVIATIONS AND ACRONYMS.....	vi
ABSTRACT.....	vii
CHAPTER ONE: GENERAL INTRODUCTION	1
1.1 Background	1
1.1.1 Indigenous communities	2
1.1.2 Indigenous People of Africa	3
1.1.3 Land Factor	3
1.2 Problem Statement	4
1.3 Research Objectives	4
1.3.1 Overall Objective.....	4
1.3.2 Specific Objectives	4
1.4 Research Questions	5
1.5 Hypothesis	5
1.6 Justification	5
1.7 Theoretical Framework	7
1.8 Chapter Breakdown.....	10
CHAPTER TWO: ACCESS TO JUSTICE FOR THE INDIGENOUS COMMUNITY IN KENYA: A LITERATURE REVIEW	12
2.1 Introduction	12
2.2 The General Exclusion of Indigenous Peoples	13
2.3 Access to Justice Paradox	16
2.4 The Endorois Community	26
2.4.1 Territorial Occupation Existence and Recognition	27
2.4.2 Religious and cultural practices.....	28
2.4.3 Political Challenges	29
2.4.4 Legal Challenges	31
2.5 Conclusion.....	34

CHAPTER THREE: AN ASSESMENT OF THE RIGHT TO LEGAL AID FOR INDIGENOUS PEOPLES: DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAWS AND COMMENTS	36
3.1 Introduction	36
3.2 Domestic Laws and Policies.	36
3.3 International Instruments.....	39
3.3.1 United Nations Basic Principles for Lawyers.....	39
3.3.3 Other International Instruments	40
3.4 Regional Instruments.....	44
3.5 Conclusion.....	46
CHAPTER FOUR: COMPARATIVE STUDY OF KENYA’S LEGAL AID FRAMEWORK WITH SOUTH AFRICAN AND AUSTRALIAN LEGAL SYSTEMS	47
4.1 Introduction	47
4.2 Protection of Indigenous Communities in South Africa	48
4.2.1 Legal Recognition of Indigenous Peoples’ Rights in South Africa.....	48
4.2.2 Legal Aid and Access to Justice	52
4.3 Legal Aid for Aboriginal Peoples in Australia.....	56
4.4 Best Practices for Reform of the Kenyan Legal Aid Programmes	61
4.5 Conclusion.....	64
SUMMARY OF THE FINDINGS, RECOMMENDATIONS AND CONCLUSIONS...	65
5.1 Introduction	65
5.2 Summary Findings	65
5.3 Recommendations	68
5.3.1 Recommendations to the Parliament	68
5.3.2 Recommendations to the Executive	68
5.4 Conclusion.....	70
BIBLIOGRAPHY	72

ABBREVIATIONS AND ACRONYMS

AU	African Union
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LASA	Legal Aid South Africa
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
NALEAP	National Legal Aid and Awareness Programme
NGOs	Non-Governmental Organisations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

ABSTRACT

For decades, indigenous peoples in Kenya and the world at large have been discriminated, oppressed and disposed of their lands and related resources. This challenge is premised on poor governance, corruption, impunity, violent conflict and poverty. The dominant conundrum facing indigenous peoples is land dispossession, often inscribed under what is normally known as historical injustices in Kenya. This situation undermines indigenous peoples' livelihoods, leading to severe impoverishment. It fundamentally threatens the continued existence of indigenous peoples. The Constitution of Kenya provides for the recognition of historically marginalised groups, including indigenous peoples. However, the realisation of their constitutional rights has been a mirage. The reality is that these groups are often poorly represented in decision-making bodies, both locally and at the national level. Their participation in national development issues is also impeded by discrimination on grounds of social origin and descent. The lack of legal aid makes it difficult for the indigenous peoples to access meaningful justice. This study appraises the legal and policy landscape in relation to legal aid of indigenous peoples in Kenya and especially the role of advocates in the said regard.

Key words: Indigenous peoples, legal representation, legal aid, access to justice, social exclusion, non-discrimination.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

Historical account supports the viewpoint that legal aid has played a pivotal role in guaranteeing social, economic and even cultural rights in various societal contexts.¹ Notably, a number of delivery models for legal aid have emerged; including duty lawyers, community legal clinics and the payment of lawyers to deal with cases for individuals or communities who are entitled to legal aid.² In offering legal aid, the approach by advocates or lawyers in addressing specific interests of indigenous communities is dissimilar.³ Such inconsistencies arise from the fact that such cases⁴ raise various unique and complex issues to be resolved. This is as a result of multiple external and internal factors.⁵ For instance, other than territorial differences, broad principles of law and their intersection with traditional custom is to be grappled with.⁶ In many cases they conflict with each other. Even though it is impossible to rule out points of convergence, such cases are exceptional. This will be observed in various jurisprudence in Kenya and also, by analysing best practice approaches from jurisdictions specifically South Africa and Australia.

¹Regan, Francis (1999). The Transformation of Legal Aid: Comparative and Historical Studies. Oxford University Press. pp. 89–90. ISBN 978-0-19-826589-4.

²Ibid 90.

³Richard B. Lillich, Hurst Hannun & Dinah L. Shelton, *International Human Rights: Problems of Law, Policy, and Practice* (4th ed. 2006)

⁴<https://www.culturalsurvival.org/publications/voices/australia/recognizing-indigenous-peoples-human-rights> last accessed on 22 May 2016.

⁵“Protecting the rights of the indigenous peoples”<http://www.un.org/en/development/desa/news/social/protecting-rights-of-indigenous-peoples.html> accessed on 22 May 2016.

⁶“Rights of indigenous people” 12 Feb 2014 <<http://www.globalissues.org/article/693/rights-of-indigenous-people>>

1.1.1 Indigenous communities

Understanding concepts related to indigenous communities can be problematic and a times controversial.⁷ Universally⁸, there is no up to standard definition of the concept of 'indigenous peoples'.⁹ The closest attempts made adopts an approach that; there exists a number of criteria¹⁰ by which indigenous peoples can be identified and from which, each group can be characterized to fit a working definition.¹¹ Martín Cobo's Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986)¹², describes them as peoples and nations that exhibit a historical continuity with pre-colonial societies that developed on their territories. Further, that this group of persons consider themselves distinct from other sectors of the societies but form at present non-dominant sectors of the present society.¹³ To this end they are determined to preserve, develop and transmit to future generations their ancestral territories and ethnic identity.¹⁴ The aforementioned when accomplished, justifies their continued existence as indigenous people, in accordance with their own cultural patterns, social institutions and legal systems¹⁵ Erica-Irene Daes'

⁷Forest Peoples Programme & Bank Information Centre 2000. Report on a Workshop on Indigenous Peoples, Forests and the World Bank: Policies and Practice, Washington D.C., 9-10 May 2000.

⁸ The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions

⁹http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf last accessed 10th March 2016

¹⁰ Peters-Little, Frances, Ann Curthoys, and John Docker, eds.. "Table of Contents". Passionate Histories: Myth, Memory and Indigenous Australia. Ed. Frances Peters-Little, Ann Curthoys, and John Docker. Vol. 21. ANU Press, 2010. v-vi. Web

¹¹<https://www.culturalsurvival.org/who-are-indigenous-peoples> last accessed 10th March 2016

¹²<http://www.firstpeoples.org/> last accessed 10th March 2016

¹³Barume, Albert Kwokwo. Heading Towards Extinction? Indigenous Rights in Africa: The case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo, The Forest Peoples Programme and IWGIA 2000.

¹⁴Pityana, Barney. "The African Commission on Human and Peoples' Rights and the Issue of Indigenous Peoples", Indigenous Affairs, April May June 1999 © 1999 IWGIA, 49.

identification methodology is related to Cobo's proposal yet materially different. Her view and criterion identifies and designates certain peoples as indigenous thus excluding others who do not fit or meet the set out qualification.

1.1.2 Indigenous People of Africa

The narrative of indigenous peoples in Africa is exceptionally unique especially with relation to land which they consider vital¹⁶ Cross-cutting is that, Indigenous peoples are primarily discriminated against by mainstream populations and looked down upon as backward.¹⁷ Such stereotype only sanctions further discrimination and marginalization of indigenous peoples by institutions of governance and dominant groups.¹⁸ Accelerating this is lack of education¹⁹, poor governance, corruption, conflicts and most importantly poverty.²⁰

1.1.3 Land Factor

As earlier mentioned, the predominant challenge facing indigenous peoples in Kenya and Africa in general is land dispossession.²¹ Such incidences undermine livelihood systems of indigenous peoples and leads to severe impoverishment. As a consequence, fundamentally threatened is the continued existence of indigenous peoples. To be noted are numerous gaps in the legal frameworks that promote and seek to protect indigenous peoples' lands. A number of policies are also biased towards such communities and tend to undermine rather

¹⁷ Quoted in IWGIA, *Indigenous World 1999-2000*, 373 and IPACC, *Annual Review November 1998 – October 1999*, 2. Article 27 of the Draft Declaration on Indigenous People provides for the right of indigenous peoples to the restitution of the land that they traditionally occupied.

¹⁸ Madsen, Andrew. *The Hadzabe of Tanzania. Land and Human Rights for a Hunter-Gatherer Community*, IWGIA 2000.

¹⁹ *ibid.*

²⁰ Hitchcock at 8 and Suzman. *An Introduction to the Regional Assessment of the Status of the San in Southern Africa*, © 2001 LAC at 3 and 34

²¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.refworld.org/docid/4b8275a12.html> [accessed 10 October 2016]

than support their livelihoods.²² This predicament persists since the strategies employed to address this gap completely disregards indigenous communities plight and concerns.²³

1.2 Problem Statement

The case in Kenya reveals that the legal regime is not well placed to guarantee the full realisation of recognition, protection and appropriate enforcement mechanism to avert the proximate injustices that face indigenous communities.²⁴ The African Commission of Human and Peoples Rights has made particular observation especially with regard to Kenya.²⁵ The trend, demonstrates systematic acts and omissions involving harassment and arbitrary forced evictions of these indigenous communities from their ancestral homes. This raises serious question on the efficacy of the legislative framework and legal principles that protect these communities.

1.3 Research Objectives

The overall and specific objectives of this study are as follows:

1.3.1 Overall Objective

The overall objective of this study is to examine the role of legal aid in the realisation of the rights of indigenous communities in Kenya.

1.3.2 Specific Objectives

1. To assess the role of legal aid in realisation of the rights of indigenous communities in Kenya

²² Ibid page 1-2

²³ Ibid page 1-2

²⁴ African Commission of Human and Peoples' Rights v Kenya (the 'Ogiek case')

²⁵ See both Centre for Minority Rights Development, Minority Rights Group International and Endorois Welfare Council (On Behalf Of the Endorois Community) v Kenya (the 'Endorois' case) and African Commission of Human and Peoples' Rights v Kenya (the 'Ogiek case')

2. To assess the reforms towards legal aid as a key component in guaranteeing access to justice as mentioned in objective (1) above.

1.4 Research Questions

Q1 Is Legal Aid essential in realisation of the rights of indigenous communities in Kenya?

Q2 What are the reform initiatives to ensure access to legal aid with regard to the indigenous communities in Kenya?

1.5 Hypothesis

Legal aid is essential in realisation of rights indigenous communities in Kenya. However, there is inadequate law and mechanisms in Kenya to guarantee recognition, protection and enforcement of rights of indigenous communities in Kenya. In this regard, advocates play vital role in the realisation of rights of indigenous communities.

1.6 Justification

The legal aid mechanism and framework in Kenya is not quite developed and thus inadequately addresses the plight of indigenous communities. Further, lack of meaningful representation and participation makes it very difficult for indigenous peoples to advocate their cause and determine their own future. Ordinarily, where a party is unrepresented in adjudication, approximate injustice is likely to be manifested in the place of justice.²⁶In addressing the nexus on legal issues around indigenous communities and the question of their access to justice, one might only be focused on the existing legal frameworks and established institutions to facilitate the realization of the envisaged rights and overlook the integral need of legal aid especially legal representation of such groups. This is because of the assumption that indigenous communities solve their disputes in their traditional setup consistent with

²⁶ See Bear, Leroy Little. "Introduction". *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*. Ed. Menno Boldt and J. Anthony Long. University of Toronto Press, 1985. 3–14.

their norms.²⁷ This systematic discrimination is often qualified on irrepressible social stratification.²⁸ One of the salient features of adversarial justice system is premised on the theory that the advocate in representing clients utilises all the available legal tools in favour of the client.²⁹ The adversary's advocate will also apply all his legal tools to the advantage of that party, so that in the resulting equilibrium, approximate justice is achieved.³⁰ Thus, where indigenous people are unrepresented in court or in instances that would require the services of an advocate, the basic principles upon which the theory is based are negated. The net effect is that approximate injustice is manifested in the place of justice as reiterated by Lord Justice Denning, in *Pett v Greyhound Racing Association*, he says;

‘It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?’³¹

In addition, when an indigenous community decides to engage an advocate to conduct or help them conduct their affairs on their behalf in any matter, this introduces a paradigm shift from the ordinary representation by elders or elected members of the community fundamentally. In this regard, the responses to the concerns raised require an in depth examination of the nature of relationship of an advocate representing any indigenous community in Kenya. The findings herein are expected to assist in the development of a legal framework on how to handle cases involving infringements of the rights of indigenous peoples. Further it is hoped that the findings generated in this study will contribute additional knowledge for academic and research institutions working on the right to legal representation of the indigenous communities in Kenya. It may also provide useful information to policy makers who are keen on enhancing access to justice through legal representation of

²⁷ Dowie, Mark. 2006. “Conservation Refugees”, in *Paradigm Wars: Indigenous Peoples’ Resistance to Globalization*, ed. Jerry Mander and Victoria Tauli-Corpuz. A special Report of the International Forum on Globalization Committee on Indigenous Peoples. San Francisco, CA.: Sierra Club Book.

²⁸ *Ibid* 6.

²⁹ Henry JA Lugulu, ‘The Role of Legal Ethics in Achieving a Just Society’ in Luis G. Franceschif & Andrew M Ritho (eds.), *Legal Ethics & Jurisprudence in Nation Building* (2005) 55-87, 65.

³⁰ *Ibid*.

³¹ *Pett v Greyhound Racing Association* (1968) 2 All E.R 545, at 549.

indigenous peoples in Kenya, particularly those tasked with setting the legislative agenda for the implementation of the Constitution on matters related to access to justice. Moreover, by assessing the nature of relationship between an advocate and indigenous communities, the findings of this research may enable indigenous communities to know the duties and obligations arising from that relationship. Thus, by assessing the role of an advocate in the realisation of the rights of indigenous peoples, the study will have the effect of enhancing access to procedural and substantive justice by indigenous communities, shielding them from the legal technicalities that inform Kenya's adversarial system of justice.

1.7 Theoretical Framework

The plight of the indigenous peoples already mentioned raises a number of legal questions worth investigating. As a consequence, much scholarly enquiry which, in turn, has stimulated policy development as well as public discourse has progressively emerged. Within this literature, the work of political theorists and philosophers stands out. Many, if not most, see that the enquiry into the legal and political status of Indigenous peoples opens up fundamental questions about the very nature of the democratic states and represents a challenge to the philosophical premises that gave rise to modern versions of concepts such as democracy and sovereignty. The theoretical framework herein analyses both the procedural and substantial legal tenets of access to justice.

The study applies Rawls' theory of procedural justice. The theory is relevant to this study as it discusses the concepts of fairness, equal opportunities and liberties. Procedural technicalities are amongst several factors that hinder access to justice in formal courts. According to Rawls, justice is the first value of social institutions, as truth is of systems of thought.³² An injustice is tolerable only when it is necessary to avoid an even greater

³² John Rawls, *A Theory of Justice* Revised ed. (Harvard University Press 1971) 3.

injustice.³³ This may, for example, occur when an advocate exploits the poor status of indigenous peoples or other minority groups to enrich his or her selfish interests. According to Omondi, the concept of fairness refers loosely to fairness, equity and satisfaction by parties to a dispute.³⁴ Hollander and Tyler perceive procedural justice as the fairness of a process by which a decision is reached.³⁵ Procedural justice theory, therefore, explains procedural fairness in dispute resolution, which ensures that the outcome is acceptable to both parties in a dispute. Thus, even when people lose, they feel better about that loss when they experience fairness.³⁶ Conversely, when they win, they do not feel as good about that outcome in the absence of procedural fairness.³⁷

While explaining Aristotle's concept of retributive justice,³⁸ Rawls perceives justice as fairness premised on equal opportunities and liberties.³⁹ In a just society, the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.⁴⁰ Rawls thus introduces two principles of distributive justice namely the difference principle and the equal liberty principle.⁴¹ The equal liberty principle implies that the society is fair and just when everyone has equal opportunities as rights and liberties.⁴² In other words, justice is fairness resulting from equal distribution of rights and liberties to benefit everyone. Rawls illustrates the concept of justice as fairness by using a pie. He suggests the use of a procedure in which the allocator divides

³³Ibid 4.

³⁴Scholastica Omondi, 'Procedural Justice and Child Sexual Abuse Trial in Kenya' (2014) 2 (5) *Journal of Research in Humanities and Social Science (Quest Journals)* 30-56: 30, available at <<http://www.questjournals.org>> accessed on 04 November 2015.

³⁵Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 2011(1) *Journal of Dispute Resolution* 2, 3.

³⁶Ibid 10.

³⁷Ibid.

³⁸Aristotle, *The Nicomachean Ethics*, translated by J A Thomson, London: Penguin Books Ltd 1976, 741.

³⁹Rawls (n 26) 52.

⁴⁰Ibid.

⁴¹Ibid.

⁴²Ibid.

the pie and the other party makes a choice of the piece he or she wants.⁴³ In this process, the allocator is likely to divide the pie as equal as possible, since unequal division will motivate the choosing party to select the biggest piece.⁴⁴ In contrast, the difference principle is a strongly egalitarian conception in the sense that, unless there is a distribution that makes both parties better off, an equal distribution is to be preferred.⁴⁵

The question of procedural fairness is a natural justice precept that is integral in the administration of justice. It therefore includes, *inter alia*, the right to legal representation, absence of procedural technicalities, due process, impartiality in decision-making, the right of being heard, and giving reasons for a decision. Court procedures are often complex to understand for some indigenous peoples. Yet, they are expected to participate in the proceedings. This leads to unfair decisions as the procedure fail to address the concerns of indigenous participants in the dispute resolution process. Based on procedural justice theory, this study argues, procedural fairness can only be ensured if the indigenous communities are represented by an advocate who is able to understand the language of the law, court proceedings, and presentation of law and fact in order to effectively articulate their issues.

Procedural justice theory promotes legitimacy by giving individuals a neutral and trustworthy decision-maker, allowing them a voice, and treating them with respect.⁴⁶ This demonstrates respect for individual rights and instils confidence and trust. The parties are therefore able to own and accept the procedures. According to Galligan, fair procedures made known to and accepted by parties, lead to fair and acceptable results even if the result is not in favour of one of the parties.⁴⁷ Galligan's argument is relevant to this study since the court procedures in

⁴³ Riel Vermunt and Kjell Y Tornblom, "Distributive and Procedural Justice" 5, retrieved from <www.goverpublishing.com/pdf> accessed on 04 December 2015.

⁴⁴ Ibid.

⁴⁵ Ibid 65, 66.

⁴⁶ Ibid.

⁴⁷ Omondi Scholastica Awino Ollando, 'Implications of the Adversarial Legal Systems' Procedures to the Special Needs of Child Victims of Sexual Abuse: Balancing the Rights of Accused Persons and Child Victims of Sexual

cases involving the rights of indigenous communities are complex and the indigenous peoples are unable to understand or follow them.

In sum, procedural justice theory provides a standard of examining the rationale for legal aid and in the same strand extending the right to legal representation to indigenous communities in Kenya. To be seen is guidance for adjudication processes that ensure that the parties to a dispute are treated equally; that their interests are aired in court by a qualified legal representative; that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences; and that a decision reached is devoid of procedural technicalities as provided for in Article 159(1) of the Constitution of Kenya. This especially in cases when the person or group of person to be represented is indigent or less privileged than the ordinary citizen. Lastly, pivotal to legitimise the implementation is the social contract theory by Thomas Hobbes of what is the legitimate expectation of a Sovereign in upholding the rule of law especially when the subjects, in this case the indigenous community, have by consent or operation of law delegated their representation on legal matters to an individual.

1.8 Chapter Breakdown

Study is divided into five chapters. Chapter one of has provided an overview of the study, which include the background, problem statement, objectives of the study, theoretical framework and justification.

Chapter two shall provide an in-depth review of literature, identifying the gaps that will be bridged by this study. This also includes the history and challenges facing the Indigenous Communities.

Abuse in Kenya' (PhD Thesis, University of Nairobi 2013) 19 (citing J D Galligan, *Due Process and Fair Procedures* (Oxford University Press 1996) 12).

Chapter three shall discuss the legal framework on legal aid, especially under Kenyan law and practice.

Chapter four shall present an analysis of best practices from South Africa and Australia, which are Commonwealth countries like Kenya. These countries have a long history on discrimination of indigenous peoples, and have since their independence strived to develop sound laws to protect indigenous rights. The purpose of this chapter shall be to provide practical examples of why legal representation is important in the protection of the rights of indigenous communities.

Chapter five shall provide the summary of the study, study findings, conclusion and recommendations.

CHAPTER TWO

ACCESS TO JUSTICE FOR THE INDIGENOUS COMMUNITY IN KENYA: A LITERATURE REVIEW

2.1 Introduction

Chapter one reveals that the status of indigenous peoples raises both legal questions and political concerns. On a case by case study, this chapter proffers an analysis of the indigenous community in Kenya while pointing out to various theories that anchor fundamentally on their recognition and particularly enforcement of their rights. Further it rationalizes the relevance and importance of legal aid and the role of advocate's role in the said context. The chapter also provides a topical review of literature to capture various scholarly thoughts on the access to justice and the general exclusion of indigenous peoples. The indigenous peoples narrative as will be established, exemplifies a myriad of issues that affect indigenous people in Kenya necessitating legal redress. Despite the celebrated rulings of various cases, to note is that enforcement has demonstrated real and apparent challenges which will be canvassed. The cases involving communities such as the *Endorois, Ogiek and Chamuk* , have traversed geographical, national and international legal jurisdictions. To find is that, a number of advocates, legal experts and practitioners found themselves delving into the conventional practice and scrutiny of applicable laws and facts in this ordinary yet unfamiliar territory of advocacy. A synopsis of the *Endorois* case reveals that the Endorois community were, against their will, removed by the government of Kenya from their ancestral territory around Lake Bogoria devoid of any legal procedure. Ordinarily under the law, they were to be consulted adequately and compensated appropriately for any of the action to be deemed justifiable.⁴⁸ Accordingly, they sought legal redress in the Kenyan courts to no avail even after appealing the decision of high court in the appellate courts. This led to the renowned

⁴⁸https://www.hrw.org/sites/.../2010_africa_commission_ruling_0.pdf accessed on 31September 2016-10-31

international appeal to the African Commission on Human and Peoples Rights (ACHPR).⁴⁹ The Commission's ruling was fundamentally different from the Kenyan position and favourable for that matter. It emphasized that the action by the government of Kenya was a violation of the African Charter on Human and Peoples' Rights. Its recommendation was that the ancestral land rights of the Endorois be recognized and restituted. Additionally, the Endorois community should have unrestricted access to Lake Bogoria.⁵⁰ Ancillary to the same was that compensation was to be paid to the community for all the loss suffered and that they receive royalties from existing economic activities.⁵¹ This within the legal purview, relating to recognition and protection of land rights of indigenous communities was viewed as a big win.

2.2 The General Exclusion of Indigenous Peoples

Globally, there are no scholars who out rightly disputes the question of access to justice in the case of indigenous communities. Louis Schetzeret *al* in their work *Access to Justice & Legal Needs* 'A project to identify legal needs, pathways and barriers for disadvantaged people in NSW' argue that globally, the objects of the law and justice foundation are to contribute to the development of a fair and equitable justice system which addresses the legal needs of the community, and to improve access to justice by the community (in particular, by economically and socially disadvantaged people). To them, Legal aid as a facet of access to justice operates principally thorough a credible process, to develop a statement of the needs of such groups of persons to inform decisions of government, non-government and community agencies when engaging with them.⁵²

⁴⁹ Ibid page 1-2

⁵⁰ Ibid page 1-2

⁵¹ Ibid page 2

⁵² Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994.

According to Patricia Kameri-Mbote *et al*, the right to culture under Article 27 of (ICCPR)⁵³ includes such traditional or indigenous activities as fishing or hunting and the right to live in reserves protected by law.⁵⁴ The authors argue that enjoyment of those rights require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. State Parties are therefore enjoined to respect, protect and take all appropriate legislative, administrative, budgetary, judicial and any other measures for the full realisation of the right to culture as espoused under Article 27.⁵⁵ While the authors base their arguments on community land rights, this study widens the scope to include culture, intellectual property, religion, and natural resources. The study argues that the positive measures pointed out by Mbote *et al* include measures to ensure that indigenous communities are able to access legal representation in matters that affect their rights.

In a report examining the extent to which indigenous peoples participate in external decision-making, Riedl argues that parliamentary representation of indigenous peoples can help ensure their rights are protected, and their unique interests are heard and translated into relevant policies.⁵⁶ The report presents indigenous communities as traditionally unrepresented and historically marginalised groups.⁵⁷ While the report's focus is on parliamentary representation, this study is centred on legal representation of indigenous communities in Kenya. The study however explains the question of legal representation in the context of participation of indigenous people, which is the cornerstone of Riedl's report.

⁵³ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

⁵⁴ Patricia Kameri-Mbote, Collins Odote, Celestine Musembi, and Wilson Murigi Kamande, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Nairobi: Strathmore University Press, 2013) 107.

⁵⁵ *Ibid.*

⁵⁶ Karin Riedl, "Beyond numbers: the participation of indigenous peoples in parliament" (2014) *Survey Report, Inter-Parliamentary Union* 4, available at <<http://www.ipu.org/pdf/publications/indigenous-sur-en.pdf>> accessed on 21 December 2015.

⁵⁷ *Ibid.* page 1-5

As noted by Sing’Oei, the Constitution of Kenya 2010 is a progressive document that aims at addressing the failed legal and moral systems developed by earlier regimes.⁵⁸ In his view, Kenya’s previous Constitution estranged most citizens from the state, but indigenous peoples and minority groups bear the burden of exclusion.⁵⁹ Instead of building a pluralistic society based on diversity and equality before the law, the previous constitutional order caused conflicting forces of regression between Kenya’s diverse groups.⁶⁰ This is the setting that animates the present state of minority groups in Kenya. The author argues that, although the new Constitution introduces important opportunities for minorities and indigenous peoples, the prevailing experience illuminates increased vulnerability.⁶¹ Constitutional and policy recognition of these groups remains a paper issue which has not yielded positive developments in reality.

Song’Oei spells out the challenges facing indigenous and minority groups, such as lack of political participation, discrimination and weak protection of their right to socioeconomic development under Article 43 of the Constitution.⁶² The author argues that traditional governance structures have been subjugated over years, leaving indigenous peoples and minorities to contend with dominant formal decision-making institutions where they have limited or no representation.⁶³ In particular, minority groups have no voice in the formulation and implementation of public policy, and are not represented by people belonging to the same social, economic and cultural class as themselves.⁶⁴ Lack of participation translates into increased sense of exclusion and vulnerability within the state.⁶⁵ For example, members from

⁵⁸Sing’Oei Abraham Korir, *Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples* (London: Minority Rights Group International 2012) 1-32 at 3, available at <<http://responsibilitytoprotect.org/Kenya%20report%20Jan12%202011.pdf>> accessed on 21 December 2015.

⁵⁹ Ibid. page1-5

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid 12.

⁶⁴ Ibid 13.

⁶⁵ Ibid.

the Sangwer community associate their 2009 evictions from Kabolet forest with lack political participation, arguing that they have no representative in the present Parliament.⁶⁶

Often the Government has adopted policies with little success in implementation. This is the main challenge that has bedevilled the realisation of the rights enshrined in the Constitution. Song'Oei argues that developments following the promulgation of the 2010 Constitution point to partial change in manner in which the Kenyan state and non-state actors respond to the question of minorities.⁶⁷ Many minority groups still bear the brunt of evictions in absolute disregard of the Constitution. Although the Government has pursued justifiable resettlement programs for internally displaced persons (IDPs), some minority groups, such as the Maasai, Ogiek and Samburu, have been blatantly excluded and rendered landless by state-induced processes.⁶⁸ In addition, courts continue to prescribe contradictory determinations on matters affecting minorities, while the State has failed to meet its international obligations as provided for in Articles 2(6) and 21(4) of the Constitution, 2010. The media also focuses on gender concerns, failing to stress on the need to ensure minority participation in Government affairs. Sing'Oei's work presents important arguments for this study, particularly on the question of participation. This study however emphasises on legal representation as one of the main obstacles against access to justice by indigenous communities. The study underscores the distinction of minority groups and indigenous peoples.

2.3 Access to Justice Paradox

According to Muigua and Kariuki, the term "justice" can be viewed as distributive justice or economic justice, which is concerned with fairness in sharing; procedural justice, which involves the principle of fairness in sense of fair play; restorative justice (corrective justice)

⁶⁶Ibid 23.

⁶⁷ Ibid.

⁶⁸ Ibid.

or retributive justice.⁶⁹ Justice is thus a broad concept. The concept of access to justice is not easy to construe. It may refer to a situation where people in need of help find effective solutions available from justice systems which are cost-effective, accessible, and which will dispense justice fairly, expeditiously, and without discrimination, fear or favour.⁷⁰ It could also refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.⁷¹ It may also mean judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue.⁷² In addition, it refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge, of legal rights and intimidation by the law and legal institutions.⁷³ In *Dry Associates Limited v Capital Markets Authority & another*, the court's view was that access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems such as formal or informal; affordability of legal services; expeditious disposal of cases; and enforcement of judicial decisions without delay.⁷⁴

Access to justice is two-pronged. It involves procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for violation of one's rights).⁷⁵ In terms of Article 27 of the Constitution of Kenya 2010, access to justice requires equality before the law, by ensuring that all persons, regardless of race, ethnic origins or gender, are entitled to equal opportunities in all fields, use of community facilities and access

⁶⁹ Francis Kariuki and Kariuki Muigua, , "Alternative Dispute Resolution, Access to Justice and Development" (2015) 1(1) *Strathmore Law Journal* 1-21, 6.

⁷⁰ Francis Kariuki, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR" (2014) 2(1) *Alternative Dispute Resolution Journal* 210.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Global Alliance against Traffic in Women (GAATW), available at <<http://www.gaawt.org/atj/>> accessed on 27 October 2015.

⁷⁴ *Dry Associates Limited v Capital Markets Authority & another* Nairobi Petition No 358 of 2011 (Unreported).

⁷⁵ *Kenya Bus Service Ltd & another v Minister of Transport & 2 others* [2012]eKLR.

to services. Thus, without justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.⁷⁶

According to Young and Sing'Oei, effective access to justice for indigenous peoples has several pillars that should operate holistically to enable the vulnerable protect their rights.⁷⁷ These pillars include the constitution and other laws, customary justice systems, formal justice mechanisms, administrative mechanisms, legal aid policy, and rights-based education and awareness.⁷⁸ The authors argue that access to justice is based on the interaction between these pillars and with collective rights, such as the right to land natural resources; the right to recognition; the right to development; the right to participation; the right to non-discrimination and substantive equality; and the right to be free from violence.⁷⁹

In addition, Young and Sing'Oei add that, although indigenous peoples are recognised under the domestic legal system, access to justice remains elusive.⁸⁰ Customs have been a conduit for access to justice in Kenya, but these systems have been subjugated by the colonial-oriented repugnancy clause.⁸¹ This has further suppressed community elders traditionally representing the indigenous peoples. Addressing their concerns and claims has therefore been ineffective with the State being reluctant to integrate customary systems into national systems.⁸²

According to the authors, indigenous peoples in Africa have frequently resorted to courts, but, despite courts affirming their petitions, many States have blatantly refused to enforce the

⁷⁶Muigua and Kariuki (n 99) 8.

⁷⁷ Laura A Young and KorirSing'Oei, "Access To Justice for Indigenous Peoples in Africa" 89-112 at 94, available at

https://academiccommons.columbia.edu/download/fedora_content/download/ac:184798/CONTENT/Chapter_6_Young_Sing_Oei.pdf accessed on 22 December 2015.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid 112.

⁸¹ Ibid.

⁸² Ibid.

decisions.⁸³ This has also been the trend with decisions pronounced by regional human rights institutions, including the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.⁸⁴ A notable example is the *Endorois* case, which demonstrates Kenya's failure to recognise and implement judicial decisions on indigenous rights despite the continuous advocacy from the indigenous peoples and their allies. Young and Sing'Oei note that, with their inefficiency and corruption, African courts have become the theatre of dramatising the predicaments of indigenous peoples.⁸⁵ The authors provide important insights into the present study preferably on the failures of the government of Kenya, the question of access to justice and the constitutional recognition of the rights of indigenous peoples. However, the focus of this study is on the legal representation of indigenous peoples and their relationship with an advocate.

In their paper, Sarah and Spencer argue that law and legal processes in Australia portray very complex and confusing codes for indigenous peoples to navigate in the absence of solicitors and barristers.⁸⁶ In most cases, indigenous peoples have to contend with a system of foreign and complex rules, procedures and forms that they have not experienced before.⁸⁷ Lack of knowledge on the legal services available exacerbates this complexity as a significant number of people are unaware of the means and methods available to get sufficient legal representation.⁸⁸ With the modern and historical inequalities, disadvantaged peoples are often limited in their ability to participate effectively in the legal system, obtain legal assistance and engage effectively in legal reform processes.⁸⁹ According to the authors, the resources

⁸³Ibid 99.

⁸⁴Ibid 103.

⁸⁵Ibid 99.

⁸⁶Iuliano Sarah, and Caitlin Spencer, "Inquiry into Access to Legal Assistance Services: 'Indigenous Access to Legal Assistance'" Submission 22. Hunter Community Legal Centre, 26 April 2015. 1-14 at 7, available at <<http://www.aph.gov.au/DocumentStore.ashx?id=4a93542e-2a9b-4721-bfc2-921cbc337f6e&subId=350755>> accessed 19 December 2015.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹Ibid 8.

currently provided to legal service providers that would assist indigenous peoples in Australia are inadequate and uncertain.⁹⁰ It therefore becomes difficult to meet the high demand on the legal assistance sector.⁹¹ This negatively hinders indigenous peoples' access to justice. While Sarah and Spencer provide impetus into this study, their paper is based on the Australian context. Noteworthy, unlike in Kenya, Australia has proactive legal assistance actors for the indigent, albeit faced with a number of challenges.

According to Gargarella, the inability of the disadvantaged to access justice in courts is premised on a number of conundrums.⁹² These include, *inter alia*: lack of information, which the author terms as “legal poverty”; excessive legal formalism; corruption; inordinate delays; and geographical distance.⁹³ The author argues that the general problem of legal poverty comprises many subsidiary challenges, such as lack of basic knowledge on what rights one is constitutionally entitled to; not knowing what to do in order to vindicate their rights; and the inability to understand the legal language and procedures.⁹⁴

Concerning economic challenges, Gargarella argues that the disadvantaged are more likely to be unable to initiate a legal process, let alone carrying it through. The high court fees and the costs of hiring a good lawyer are a heavy burden for them. It is important to note that the absence of a good lawyer drastically reduces the chances of succeeding in a case. Thus, according to Gargarella, lack of free legal services for the poor and the indigenous peoples, in particular, is a teething barrier to access to justice.⁹⁵ In addition, the author asserts that, within the formalistic and bureaucratic subtleties in the adversarial system, an advocate is likely to

⁹⁰Ibid 11.

⁹¹Ibid 11.

⁹²Roberto Gargarella, “Too Far Removed from the People” Access to Justice for the Poor: The Case of Latin America’ 1, available at <http://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_society/pdf_violence_rights/gargarella_removed_from_people.pdf> accessed on 20 December 2015.

⁹³ Ibid.

⁹⁴Ibid 3.

⁹⁵Ibid [emphasis on indigenous peoples added].

perform better if he knows how to exploit the prevailing legal complexities to his or her advantage.⁹⁶ These complexities transform justice into something exclusive, reinforcing existing inequalities to the detriment of the disadvantaged.⁹⁷ According to Gargarella, these challenges represent significant obstacles for the disadvantaged and greatly obstruct their access to justice.⁹⁸

One of the arguments dominating Gargarella's paper is that the judiciary is far removed from the underprivileged. In his view, most of the aforementioned difficulties exude from the very laws that apply to the poor through the judiciary.⁹⁹ Some court decisions may be against the poor not out of the judge's personal prejudice, but because the laws applied are inherently skewed against the poor. Accordingly, judicial reform to provide the underprivileged with better legal representation and impartial judges could still not be a panacea to access to justice.¹⁰⁰ As Garro explains, reforms may not shape the rules of law or increase the poor's legal bargaining power.¹⁰¹ Much broader institutional reforms are required to enhance the poor's access to justice.¹⁰² Gargarella's work is very useful to this study on the barriers to access to justice. However, while the author focuses generally on the indigent, this study is limited to indigenous peoples and how lack of free legal representation is a barrier to their access to justice.

Mukundi discusses access to justice for indigenous communities in the South African context.¹⁰³ He argues that efficient and accessible courts and quasi-judicial forums are

⁹⁶Ibid 4.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹Ibid 9.

¹⁰⁰ Ibid.

¹⁰¹ Alejandro Miguel Garro, 'Access to Justice for the Poor in Latin America' in Mendez Juan E, O'Donnell Guillermo, and Pinheiro Sergio Paulo (eds), *The (Un) Rule of Law and the Underprivileged in Latin America* (Indiana, University of Notre Dame Press 1999) 286-7 (cited in Gargarella, *supra* note 9).

¹⁰² Ibid.

¹⁰³ G Wachira Mukundi, *South Africa: Constitutional, legislative and administrative provisions concerning indigenous peoples* (Geneva: ILO 2009) 29, available at

important to guarantee access to justice to all, including indigenous peoples.¹⁰⁴ Mukundi refers to the case of *Bernstein v Bester*¹⁰⁵ in which the Constitutional Court of South Africa observed that the state has a duty to establish independent tribunals for the resolution of civil disputes and the prosecution of accused persons. Mukundi further notes that courts have a role to play in protecting the rights of minorities and the marginalised.¹⁰⁶ Courts have the capacity to provide a judicial forum in which the marginalised can be heard and seek redress in circumstances where the political process could not have successively mobilised to assist them.¹⁰⁷

In addition, according to Mukundi, judicial processes are technical, expensive and take considerable time for matters to be determined. Given that most indigenous peoples, due to their historical and continued marginalisation are indigent, there is need for more courts to espouse their rights.¹⁰⁸ He welcomes the fact that Courts in South Africa recognise the need for legal aid in civil and criminal matters. The right to legal aid is envisaged for poor people in civil matters under section of the South African Legal Aid Act (1999),¹⁰⁹ and the rules promulgated under the Magistrates Courts Act¹¹⁰ and the Supreme Court Act.¹¹¹ Except for article 50 of the Constitution of Kenya 2010 on criminal proceedings there are no specific constitutional duties imposed upon the state to provide the services of an advocate to litigants in civil matters. Mukundi's work provides an important best practice for this study. However, by using a case study of the Endorois community, this study provides a more practical rationale for the need to provide legal representation for indigenous communities. The study

<http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf> accessed on 04 December 2015.

¹⁰⁴ Ibid.

¹⁰⁵ *Bernstein v Bester* 1996 2 SA 751 (CC) para 51.

¹⁰⁶ Mukundi, *Op. cit.*

¹⁰⁷ Ibid 30.

¹⁰⁸ Ibid 30.

¹⁰⁹ Legal Aid Act 22 of 1969 sec 3.

¹¹⁰ Act 32 of 1944, r 53.

¹¹¹ Act 59 of 1959, uniform Rules 40.

further underscores the nature of the relationship between an advocate and the indigenous peoples, including the rights and duties arising from such a relationship.

Toovey examines the limitations and drawbacks in relation to cases involving indigenous people and title.¹¹² According to Toovey, indigenous communities have been struggling for their freedom since colonial regimes first tried to assert sovereignty over indigenous territories.¹¹³ Although such struggle has ebbed, it has remained a struggle nevertheless.¹¹⁴ Many indigenous peoples have taken their struggle into courts based on the belief that justice will be done.¹¹⁵ However, the justice indigenous seek is simply unavailable. Moreover, even when indigenous peoples have achieved a “win” in the courts, that win can be reworked and interpreted to the advantage of the coloniser, or the government in the Kenyan context.¹¹⁶ Thus, the courts favour the interpretation that legitimises and perpetuates colonialism. According to Toovey, changing goalposts is the scheme of the Government and the Judiciary to maintain free access to indigenous resources.¹¹⁷ Although Toovey’s work is based in Canada, it provides an insight on the need to ensure access to justice through legal representation. This study argues that, despite the skewed nature of certain court decisions as explained by Toovey, the law still remains a viable option with which to pursue claims to rights. However, substantial or procedural justice can be effectively ensured when the right to legal representation of indigenous peoples is made a reality.

According to the Australian-based Human Rights Law Resource Centre (HRLRC), human rights centre on fair treatment of all people and enable all people to lead lives of dignity and

¹¹²Karilyn Toovey, ‘Decolonizing or Recolonizing: Indigenous Peoples and the Law in Canada’ (Master of Arts Thesis, University of Lethbridge 2000) 2.

¹¹³Ibid 3.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶Ibid 5.

¹¹⁷ Ibid.

value.¹¹⁸ The concept of trial or just decisions is an important tenet of effective access to justice. It comprises standards against which a hearing is to be assessed in terms of fairness.¹¹⁹ As HRLRC notes, these standards include, *inter alia*: equal access to, and equality before, the courts; right to legal advice and representation; litigation costs; right to procedural fairness; expeditious hearing; positive duties to self-represented litigants; access to a competent, impartial and independent court or tribunal; and, where necessary, the right to have free assistance of an interpreter.¹²⁰ In the author's view, Article 14 of the International Covenant on Civil and Political Rights (ICCPR)¹²¹ imply that all persons are entitled to the right of equal access to justice systems without discrimination.¹²² This denotes equality before courts, which requires that the justice system is designed in a way that ensures inclusiveness in the court processes.

Further, according to HRLRC, the government's efforts to fund legal aid is obvious and real, but what is real and substantial is the cost of the delay and inefficiency which stem from the absence of legal representation.¹²³ An essential prerequisite to a fair legal system is the ability to access legal assistance for the purpose of obtaining a fair trial.¹²⁴ The authors argue that accessibility of the law depends on the awareness of legal rights and the availability of

¹¹⁸Human Rights Law Resource Centre, "The Right to a Fair Hearing and Access to Justice: Australia's Obligations" (2009) *Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice*. Human Rights Law Resource Centre Ltd, 6 March 2009, 8, available at <<http://www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf>> accessed on 19 December 2015.

¹¹⁹Ibid 10-11.

¹²⁰Ibid 11.

¹²¹ International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966 GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, retrieved from <www.refworld.org/docid/3ae6b3aa0.html> on 21 December 2015. Article 14(1) of ICCPR reads in part: "All persons shall be equal before the courts and tribunals. 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."

¹²² HRLRC (n 118) 12.

¹²³ Ibid 14 (Citing Chief Justice Murray Gleeson's "State of the Judicature" speech delivered at the Australian Legal Convention, Canberra, on 10 October 1999).

¹²⁴ HRLRC (n 118) 14.

procedures to enforce such rights.¹²⁵ In the absence of legal assistance, meritorious claims or defences may not be pursued or successful. HRLRC notes that, although the jurisprudence regarding legal aid and representation stresses that the right to fair trial imposes no obligation on the state to provide legal assistance on civil matters, the state is required to make the judicial system available to everyone, which may itself include the provision of legal aid.¹²⁶ In fact, the convolution of civil cases may actually call for legal aid to ensure a fair hearing.

In its General Comment 32 on Article 14 of ICCPR,¹²⁷ the UN Human Rights Committee encouraged states to provide free legal aid to individuals who cannot afford it.¹²⁸ Similarly, in *P, C and S v United Kingdom*,¹²⁹ the European Court of Human Rights held that the failure to provide a person with an advocate was a violation because, in the circumstances, legal representation was deemed to be necessary. The Court observed that the absence of a lawyer prevented the applicant from articulating their case effectively due to the complexity, high emotional content and serious consequences of the proceedings.¹³⁰ Based on this jurisprudence, HRLRC posits that a person's access to justice should not be curtailed on grounds of inability to afford the cost of independent advice or legal representation.¹³¹ Any failure to provide legal aid to those who are otherwise unable to access an advocate is likely to engender inefficiencies and additional costs in the legal system.¹³² While the author's work is based in Australia, this study delves into the nexus between legal representation and indigenous communities in Kenya. .

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ United Nations Human Rights Committee, *General Comment No 32*, CCPR/C/GC/32, 23 August 2007 [cited in HRLRC, *supra* note at 14].

¹²⁸ HRLRC (n 118) 14.

¹²⁹ *P, C and S v The United Kingdom*, Application No 56547/00 [2002] ECHR 604 (16 July 2002).

¹³⁰ HRLRC (n 118) 14.

¹³¹ Ibid 16.

¹³² Ibid.

In its aboriginal strategy dubbed “Legal Aid Ontario,” Legal Aid Ontario (LAO) argues that, in order to actively promote access to justice, a legal plan was necessary to address the needs and concerns of the aboriginal peoples.¹³³ The plan would contain concrete initiatives and proposals for change and improvement that must be feasible and affordable.¹³⁴ According to LAO, the strategy would build on its efforts to ensure successful delivery of legal services for aboriginal peoples and broaden such successes across the board.¹³⁵ LAO recognised that the need to make information on legal aid services and issues more readily available and accessible is apparent.¹³⁶ The author raised awareness issues as the main challenges affecting access to justice by indigenous peoples. These include lack of knowledge on the plurality of laws in Canada, including aboriginal customary laws; lack of information on their constitutional rights, including international human rights; and the utility of historical injustice of legislative means to assimilate and regulate aboriginal people in Canada.¹³⁷ Accordingly, there was need to improve the aboriginal training, beyond awareness or cultural sensitivity training, to give them more comprehensive practical and historical perspective.¹³⁸ This would enable them seek legal aid whenever a matter of community or public interest arises.

2.4 The Endorois Community

As one of the minority groups in Kenya, the Endorois boast of a population of 60,000 people¹³⁹ who, for centuries, lived in the Lake Bogoria area.¹⁴⁰ Prior to the dispossession of

¹³³ Legal Aid Ontario, *The Development of Legal Aid Ontario’s Aboriginal Strategy* (Toronto: Legal Aid Ontario 2008) 2, available at <http://www.legalaid.on.ca/en/publications/downloads/0807-29_DiscussionPaper_public.pdf> accessed on 21 December 2015.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 14.

¹³⁸ Ibid 15.

¹³⁹ https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf, accessed on 31 October 2016.

¹⁴⁰ Ibid page 1

Endorois land, there was the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya.¹⁴¹

2.4.1 Territorial Occupation Existence and Recognition

Indigenous Peoples possess vast tracts of territories rich in natural resources and a wealth of intellectual assets and cultural property.¹⁴² Ironically, they are the most marginalized and disenfranchised people in the world, and this situation is getting worse.¹⁴³

Arising from stripped rights to self-governance and control over assets, globalization has accelerated the exploitation of Indigenous territories and resources to an extent that threatens their very existence.

Resources within indigenous peoples territories like waterways, hunting territory and farm land are collectively owned and cannot be bought or sold, and are cultivated for collective use rather than for individual gain. This guarantees that every member of the community will be provided for, in turn fostering in each individual a sense of responsibility for the whole community.¹⁴⁴

Established is that for centuries, the Endorois people practised a sustainable way of life. The Endorois people held their territory in high esteem, since tribal land, in addition to securing subsistence and livelihood, was seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life.¹⁴⁵ Land, they claim, belonged to the community and not the individual and is essential to the preservation and survival as a traditional people. Health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing

¹⁴¹ Ibid

¹⁴² www.refworld.org/docid/4b71215bc.html accessed on 31 October 2016.

¹⁴³ Ibid

¹⁴⁴ https://www.researchgate.net/publication/259413346_Centre_for_Minority_Rights_Development_Kenya_and_Minority_Rights_Group_International_on_Behalf_of_Endorois_Welfare_Council_v_Kenya_A_Landmark_Decision_from_the_African_Commission accessed on 31 October 2016

¹⁴⁵ Ibid

lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.¹⁴⁶

However things changed from 1978 when the Endorois were denied access to their land. Notwithstanding altercations with the other communities such as the Maasai over the Lake Bogoria region dating from about three hundred years back, over time the Endorois were accepted by these tribes as *bona fide* owners of this territory including the colonial regime.¹⁴⁷

The colonial and post colonial developments affirm that the Endorois people continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.¹⁴⁸ Upon independence in 1963, the British Crown's claim to Endorois land was passed on to the respective County Councils. Constitutionally under Section 115 of the 1963 Kenyan Constitution, the County Councils held this land in trust, on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it. Equally their customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya.¹⁴⁹

2.4.2 Religious and cultural practices

Studies show that the Indigenous way of life is based on a holistic worldview that sees everything as vitally connected.¹⁵⁰ The fundamental purpose of this way of life is to attain sustainability. Indigenous social, political and economic models are designed to keep families, communities, and natural environment in balance, not just for the present but for their future generations. To this end, the Indigenous practices have survived for thousands of years. Their traditions and beliefs are

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ www.achpr.org/communications/decision/276.03/ accessed 31 October 2016

deeply rooted in principles that guide our social and economic models.¹⁵¹ These models are not limited to Indigenous communities, but can be applied globally in order to preserve our natural environment while providing enough resources for all people to thrive. These principles are the foundation of all Indigenous practices, and it is because of them that their economies and societies are considered equitable, balanced, and sustainable.¹⁵²

Lake Bogoria as a territory was central to the Endorois religious and traditional practices. The community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are situated here.¹⁵³ As it were, these sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. It is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The Endorois belief is that the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake. Areas like the Monchongoi forest are considered the birthplaces of the Endorois and the settlement of the first Endorois community.¹⁵⁴

2.4.3 Political Challenges

In every society, there are aspects of organization premised on the value system of that society. There are several models in existence. Not all Indigenous communities adhere completely to these social and economic models, and outside interference has made their way of life increasingly difficult to maintain.¹⁵⁵ The Endorois community are poorly represented in decision-making bodies. Their participation in decision-making processes is equally limited. The lack of representation and participation makes it very difficult for them to advocate their cause. Adopted in Kenya was a western modernization and development strategies that completely disregarded the

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ www.achpr.org/communications/decision/276.03/ accessed on 31 October 2016

values of the Endorois and the important contributions of such communities to the national economies and their need for supportive policies.¹⁵⁶

An essential pillar of the Indigenous rights is the demand for the right to free prior and informed consent to any activities undertaken in their territories.¹⁵⁷ When Indigenous communities have the right to decide what happens on their land, they retain control of their assets.¹⁵⁸ This is the foundation upon which all of their current and future prosperity is based. Put differently, a way that empowers Indigenous Peoples without leaving the concept of consent vulnerable to manipulation. The primary goal of this principle is to create operational practice and models for both Indigenous people and other parties including the state so that the outcome is consistent and beneficial use that is mutual.

In Kenya, as other parts of the globe, a presumed status of the indigenous people is defined through an ethnocentric assessment based on a presumed "hierarchy" of peoples from less to more advanced. This presumptive status has shaped the process by which the state has imagined the legitimacy of its assertion of sovereignty in the face of pre-existing Indigenous societies.

In the Endorois case, the government of Kenya gazetted Endorois traditional land as a Game Reserve and denied them access to their territory.¹⁵⁹ This jeopardized the community's pastoral enterprise and put in danger its cultural integrity.

The state through the Kenyan Wildlife Service misrepresented that certain Endorois elders shortly after the creation of the Game Reserve that 400 Endorois families would be compensated with plots of "fertile land." The undertaking also specifically provided that the community would

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Ibid

¹⁵⁹ Ibid

receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by State.¹⁶⁰

Following meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide a mere 3,150 Kenya Shillings per family.¹⁶¹ Even so, none of these terms have been implemented. It emerged that Only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. This was understood to be a means of facilitating relocation rather than compensation for the Endorois' loss. The Endorois was left with no say in the management of their ancestral land. The Welfare Committee, which was to act as their representative body was denied registration.¹⁶² This diminished their right to fair and legitimate consultation.¹⁶³ As a result, their united struggle was sufficiently curtailed translating to illegitimate consultations taking place with the authorities. The only unfavourable option was to select particular individuals to lend their consent 'on behalf' of the community. They were not sure if such people aptly represented their interests

The efforts by the Endorois to reclaim their land and to safeguard their pastoralist way of life included petitioning to meet with their local Member of Parliament who at the time was now the President of Kenya.¹⁶⁴ Despite, the President's direction that the local authority respect the 1973 agreement on compensation nothing transpired even with reiteration by the President for the directive to be followed. It is this non-implementation of the directives the Presidents directive, that triggered legal action against Baringo and Koibatek County Councils.

2.4.4 Legal Challenges

In a number of jurisdictions, the unifying issue facing Indigenous Peoples everywhere is how to

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

protect their territories and stop the “asset stripping” that robs them of their livelihoods and the foundation of their cultures. Without land and control of their assets, Indigenous Peoples are destined to remain the world’s poorest communities with the worst health, highest mortality rate and shortest life span.¹⁶⁵ Through legal quests, public awareness campaigns, partnerships with governments, corporations and other organizations, Indigenous-led development efforts and a worldwide network of Indigenous advocates, Indigenous Peoples have made huge progress in securing our rights over the last 10 years. Nevertheless challenges exists. Some rights have been won, but these communities need access to the legal and political resources to exercise and defend those rights.¹⁶⁶ Many countries do not enforce their laws protecting Indigenous Peoples, or intentionally fail to provide easy access to the benefits of such laws. Exploitative governments and businesses still threaten Indigenous Peoples thus requiring multi-faceted approach to solutions and oppose these forces.¹⁶⁷

The Endorois for example had to raise money amongst them to retain an advocate as the legal fee was expensive and no advocate was interested to take their brief.¹⁶⁸ At the onset of the legal representation after getting the fee, challenges emerged that were of concern. Their advocate was arrested and accused of “belonging to an unlawful society”.¹⁶⁹ This was inclusive of threats to his life. The Endorois community were only able to articulate their grievances with the help of the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (CORE - which submitted an *amicus curiae* brief) on behalf of the Endorois community.¹⁷⁰ Specifically they reiterated displacement from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of

¹⁶⁵ www.achpr.org/files/sessions/46th/.../276.03/achpr46_276_03_eng.pdf accessed on 31 October 2016

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid

the right to practise their religion and culture.

Consequently, judgment was given on 19 April 2002 dismissing the application.¹⁷¹ It is a paradox that even though the High Court recognised that Lake Bogoria had been Trust Land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974 a course that did not benefit them.¹⁷² The court's conclusion was that the money given to the few families facilitating relocating them represented the fulfilment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land. The High Court's view was that it lacked jurisdiction to address the issue of a community's collective right to property.¹⁷³ It took away the locus standi of the endorois people referring to them as "individuals". To the court there was no proper identity of the people who were affected by the setting aside of the territory around Lake Bogoria.¹⁷⁴ The jurisprudence by the judge was that the high court did not believe Kenyan law included jurisdiction for any special protection to a people's land based on historical occupation and cultural rights. In the proceedings and evidenced adduced by the state disclosed that parts of the Endorois ancestral land had been demarcated and sold by the State¹⁷⁵ to third parties and not held in trust at all. This was without their knowledge or consent.

Concessions had been granted to private companies such as ruby mining as early as 2002.¹⁷⁶ As part of that private contract, a road was to be constructed to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use

¹⁷¹William YatichSitetalia, William ArapNgasia et al. v. Baringo Country Council, High Court Judgment of 19 April 2002, Civil Case No. 183 of 2000, p. 6.

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ <https://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/> accessed on 31 October 2016.

¹⁷⁶ Ibid

by their livestock.¹⁷⁷ Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present Communication.

Following the pressure by the commencement of the legal action, the state took some steps to mitigate the veracity of their actions by allowing the community members' access to the Lake and waiving charges for Game Reserve entrance fees subject to the Game Reserve authority's discretion. Upon appeal, the African Commission found that the government of Kenya was in violation of the African Charter. It subsequently recommended that the government among other obligations recognise rights of ownership and restitute Endorois ancestral land.¹⁷⁸ This was to include unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.¹⁷⁹ Additionally, the state was to ensure adequate compensation to the community for all the loss suffered and pay royalties to the from existing economic activities and ensure that they benefit from employment possibilities within the Reserve. Further, the community welfare committee was to be registered appropriately.¹⁸⁰ To ensure effective implementation, the Kenyan State was to engage in dialogue with the Community for the effective implementation of these recommendations and compile a report on the implementation of these recommendations within three months from the date of notification. To facilitate this, the African Commission availed its offices to assist both the parties in the implementation of these recommendations.

2.5 Conclusion

The facts of this analysis confirms that Indigenous communities in Kenya are not simply losing control of their assets. These assets are being stripped away from them due to exploitation. At the same time, they are systematically being denied access to the legal and political tools to secure

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Ibid

¹⁸⁰ Ibid

their rights. These are concerns of immense magnitude to these Indigenous Peoples which require at the least legal aid. Regardless of where they are located; they are vulnerable to eviction, violence, exclusion, discrimination and disenfranchisement. This leads to poverty, health issues, and the destruction of their cultures. Perhaps most detrimental is the widespread perception that they lack the capacity to take care of ourselves or to defend themselves for that matter. Despite having been prosperous for the vast majority of their history, it has not prevented the loss of that prosperity. This is signified as a result of being completely stripped of our resources and our rights by parties that are non-indigenous. The perception that Indigenous Peoples lack capacity not only leads to further marginalization, it prevents them from working effectively with non-Indigenous partners, and from acquiring the capital to create change for our communities. To embrace meaningful development and to integrate with the other societies, they need legal assistance in extensively than what is currently being provided.

Legal Aid will go a long way to mitigate these unjustified actions contrary to political good will. The rights that are being violated cannot be suspended to wait for a convenient time for negotiation. The case also corroborates the fact that there are communities in Kenya that fit the definition by the African Commission of Peoples and Human Rights on indigenous community such as the Endorois. .

CHAPTER THREE

AN ASSESSMENT OF THE RIGHT TO LEGAL AID FOR INDIGENOUS PEOPLES: DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAWS AND COMMENTS

3.1 Introduction

This chapter is devoted to examining the domestic and international legal underpinnings that directly or indirectly props up legal aid and its relevance to indigenous communities in Kenya. To be grappled with are fundamental provisions, highlighting Kenya's opportunities and challenges based on the existing and applicable law relevant to promoting legal aid for the indigenous communities. This is on the backdrop that, Article 27(4) of the Constitution of Kenya 2010 prohibits direct or indirect discrimination on any grounds including ethnic or social origin, belief, culture, language or race. The implication herein is that, the state has a constitutional responsibility to take legislative and other measures, including affirmative action programmes and policies to redress any disadvantages suffered by the indigenous communities.

3.2 Domestic Laws and Policies.

Indigent persons according to *Black's law dictionary* refer to persons who are needy and poor, or lack sufficient property to sustain them. As such, they are in need of assistance.¹⁸¹ Generally indigenous communities in Kenya are marginalised and poor thus fitting this classification of being indigent.¹⁸² By dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, Kenya has an obligation under various ratified international treaties to ensure that every person has access to justice and. It includes legal provision and mechanism that

¹⁸¹ Black's Law Dictionary (9th ed. 2009).

¹⁸² See Maurice Odhiambo Makoloo, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (Nairobi: Minority Rights Group International 2005) page 2.

prop up legal aid ideology.¹⁸³ This is especially with regard to services to indigent persons who are likely to suffer from substantial injustice if such services are not provided.¹⁸⁴ However, in a number of instances, this obligation has been regarded as costly especially when handling civil cases¹⁸⁵. Thus, it is not a surprise that even with the provisions of Article 22 only criminal matters are prioritised.¹⁸⁶ This is demonstrable under Article 49(1) (c) of the Constitution of Kenya 2010, where, an arrested person has the right to communicate with an advocate, and other persons whose assistance is necessary. Likewise, Article 50 (2) (h) provides an accused person with the right to be assigned an advocate by the state where there might be substantial injustice. Further, Article 50(7) provides for the court's responsibility to provide an interpreter to assist a complainant or an accused person to communicate with the court. This is essentially is guaranteeing legal aid, although in the context of criminal matters. In spite of this plausible development, legal aid when it comes to civil matters is aloof. Interestingly, Article 48 thereof requires the state to ensure access to justice for all persons and, if any fee is required, it should be reasonable and not an impediment to justice. This provision generally envisions the waiving of court fees to enable all persons to access justice, and provision of legal aid where necessary. It is not specific whether this should be strictly on criminal matters. Under the 5th Schedule of the Constitution, 2010, the government was required to enact legislation to give effect into Article 19, 48 and 50 respectively within 4 years from the effective date. Unfortunately, the Bill which was drafted for that purpose is still pending in Parliament even after the lapse of the four-year period. The Bill¹⁸⁷ establishes a legal and institutional framework for the delivery of legal aid and also proposes the

¹⁸³http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihl_study_final.pdf page 26-29 accessed on 8th November 2016.

¹⁸⁴ <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya.pdf> page 364-366 accessed on 9th November 2016.

¹⁸⁵¹⁸⁵ Ibid.

¹⁸⁶ Constitution of Kenya 2010, Article 50.

¹⁸⁷ Republic of Kenya, The Legal Aid Bill, 2015.

decentralisation of legal services to the counties and sub-counties in accordance with Article 6(3) of the Constitution on access to services.¹⁸⁸

However, it is worth noting that given the period that the Constitution of Kenya 2010 was promulgated, the government of Kenya is making steps, albeit sluggishly, to address the question of access to justice for all. Apart from the aspirations pegged on the enactment of the Legal Aid Bill 2015, it is however not clear if legal aid on civil matters will be adequately addressed. To observe is, the level of interaction between the Government, the legal profession, NGOs and paralegals in Kenya has remarkably improved. This is especially with the establishment of National Legal Aid and Awareness programme in 2008 to foster legal aid.¹⁸⁹ The legitimacy of this initiative has been strengthened with the promulgation of the Constitution of Kenya 2010 and the proposed Legal Aid Bill in the offing.¹⁹⁰ But, unless the state is committed to enforcement and puts in place an effective legal framework recognising the coverage of all cases, including human rights and civil cases, by legal aid programmes, the overall existing legal mechanisms that protect indigenous communities in Kenya remain inadequate compared to other countries where legal aid initiatives have already been established. As a consequence, indigenous communities, such as the Endorois, will continue living under various pressures of human rights violations unless adequate legal aid is afforded to them. Living under the pressure of human rights violation entails actions such as, forced eviction from their ancestral territories due to various conflict and inadequate compensation in instances where the state acquires their land through compulsory acquisition.

The justification for this relies on Article 27 of the Constitution of Kenya 2010 which provides that every person is equal before the law and has the right to equal protection of the

¹⁸⁸ Ibid

¹⁸⁹ http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihf_study_final.pdf page 26-29 accessed on 9th November 2016.

¹⁹⁰ Ibid.

law. This does not exclude indigenous community. Equality in this case includes full enjoyment of all rights and fundamental freedoms enshrined in the Constitution and international law without discrimination.¹⁹¹ Impliedly, systems ought to be in place to ensure that these rights are realised and not merely recognised.

Kenya still has no specific legal provisions on legal aid that is relevant to expressly protect the rights of indigenous communities other than the mere recognition of marginalised minority groups under the Constitution.¹⁹² As a result, indigenous peoples in Kenya suffered from serious historical injustices and human rights abuses necessitating the need for legal aid.¹⁹³ Without which, their vulnerability is a viable platform for the rich to oppress them and dispossess them of their property and violate their rights.¹⁹⁴ As earlier mentioned, while the Constitution expressly provides for legal aid in criminal cases¹⁹⁵, there is no similar provision of civil and human rights cases for communities abovementioned.

3.3 International Instruments

3.3.1 Basic Principles on the Role of Lawyers

Taking cognisance of the need to provide conditions under which justice can be achieved through legal aid, the UN has prepared a set of general principles to guide lawyers in the execution of their services.¹⁹⁶ States Parties are required to establish a framework reflecting on those principles. The Preamble to the Basic Principles provides for international

¹⁹¹ See Article 27(2) of the Constitution of Kenya, 2010.

¹⁹² See Article 260 of the Constitution of Kenya 2010

¹⁹³ Seth Muchuma Wekesa, 'County Government and Rights of Marginalised Ethnic Minorities in Kenya: Evaluating the Potential Benefits and Challenges of Devolution' (University of the Western Cape, South Africa 2012) page 10
<http://repository.up.ac.za/bitstream/handle/2263/37393/Wekesa_County_2012.pdf?sequence=1>
accessed on 8th November 2016.

¹⁹⁴ Ibid.

¹⁹⁵ See Article 50 of the Constitution of Kenya 2010

¹⁹⁶ Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27-Sept-7, 1990, 8, 11, U.N. Doc A/CONF.144/28/Rev.1 at 118 (1990)
<https://www.unodc.org/pdf/criminal_justice/UN_Basic_Principles_on_the_Role_of_Lawyers.pdf> accessed 16 November 2016.

cooperation in promoting and encouraging respect for and protection of human rights without regard to race, sex, language or religion.¹⁹⁷ It is further stated that protection of human rights and fundamental freedoms, be they economic, social, cultural, civil and political, can only be effective if all persons have effective access to legal services provided by an independent legal profession.¹⁹⁸

Under paragraph 2, governments are required to provide efficient procedures and responsive mechanisms for effective and equal access to advocates without distinction of any kind, for instance, based on race, economic or other status, political or other opinion, birth, and national or social origin. Sufficient funding and other resources should be provided to ensure adequate legal services for the indigent peoples.¹⁹⁹ Professional associations of lawyers, like the Law Society of Kenya, should cooperate in the provision of affordable legal services to indigenous peoples in Kenya. The associations should also cooperate with the government to promote legal education programmes, with special attention being given to indigenous communities.. This will not only enable them to access justice but also assert their rights from a point of information.

3.3.3 Other International Instruments

Adopted in 1948, the Universal Declaration of Human Rights (UDHR) is a constitutional foundation of international human rights. Despite its non-binding nature, the UDHR sets out a framework for economic, social, civil, cultural and political rights. Among the rights enshrined therein include the rights to own property, social security, labour and fair trial.²⁰⁰

Under Article 10 thereof, every person is entitled to full equality to a fair trial and public

¹⁹⁷ Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27-Sept-7, 1990, 8, 11, U.N. Doc A/CONF.144/28/Rev.1 at 118 (1990).

¹⁹⁸ See the Preamble to the UN Basic Principles on the Role of Lawyers, *ibid.*

¹⁹⁹ UN Basic Principles on the Role of Lawyers, *ibid.*, para 4.

²⁰⁰ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.A/RES/217(III), at 71 (Dec. 10, 1948) [hereinafter UDHR] Article 17, 22-23, 25.

hearing by an independent and impartial court or tribunal, in the determination of his rights and obligations and of any criminal charge against him. This right is reflected in Article 50(1) of the Constitution of Kenya, 2010.

Some of these rights are also replicated in the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁰¹ which provides for the right to adequate housing, social security and insurance, work and education.²⁰² The Committee on Economic, Social and Cultural Rights stated that states should provide legal aid to those facing forced evictions as provided for under the ICESCR.²⁰³ The Committee affirmed the fact that forced evictions are inimical to the provisions of the ICESCR. Forced evictions and house demolitions as punitive measures are also inconsistent with the norms of the ICESCR. Further, the State should provide legal remedies to forced evictees, and those whose properties are affected should be adequately compensated.

Kenya is a party to the International Convention on Civil and Political Rights (ICCPR),²⁰⁴ which envisages fair trial, non-discrimination and equality before the law as the basic strata of access to justice. In particular, under Article 14 (1) of the ICCPR, all persons are equal before the courts and tribunals. This proviso sets out a general guarantee regardless of the nature of proceedings before a tribunal or court.

Importantly, 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, every person is entitled to a fair and public hearing by an impartial,

²⁰¹International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁰² See Articles 6, 8, 9, 11 and 13 of the ICESCR.

²⁰³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, available at: <http://www.refworld.org/docid/47a70799d.html> [accessed 9 May 2016].

²⁰⁴ International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

competent and independent tribunal or court established by law.²⁰⁵ Although this provision is silent on legal representation in human rights cases, it is instructive to note that the right to fair trial may include the right to access an advocate of one's choice. Article 2(3) of the ICCPR enjoins states to ensure that any person whose rights have been violated accesses effective remedy before a competent judicial or administrative body, and competent authorities have an obligation to enforce the granted remedy. States are required to take all necessary action to comply with their obligations under the Covenant. The duty to take appropriate measures is unqualified and cannot be mitigated by economic, social or cultural factors.²⁰⁶

States Parties to the ICCPR are required to report to the Human Rights Committee, which has invariably urged states to provide the indigent with free legal aid in civil cases. In one of its Comments, the Committee stated that reservations can be accepted in relation to particular provisos of Article 14, but "a general reservation to the right to a fair trial" will be contrary to the spirit of the ICCPR.²⁰⁷ The Committee added that, while Article 14(3) (d) overtly addresses the provision of legal assistance in criminal cases, States are urged to extend free legal aid to other cases, especially for persons who cannot afford the requisite fees.²⁰⁸ In addition, the imposition of fees that will de facto restrain a person's access to justice may be in contravention of Article 14(1) of the ICCPR.²⁰⁹ Specifically, an award of costs without due regard to the implications or without providing legal aid may frustrate a person's pursuit for justice under the ICCPR. According to the Committee, equality includes provision of similar

²⁰⁵ See Article 14(1) of the ICCPR [emphasis added].

²⁰⁶ Zachary H. Zarnow, 'Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the United States is Doing Instead, and How Legal Empowerment Can Help' (2011) 20 (1) *Journal of Gender, Social Policy & the Law* 297.

²⁰⁷ UNHRC, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, *op. cit.* para. 9.

²⁰⁸ *Ibid*, para. 10.

²⁰⁹ *Ibid*, para. 11.

procedural rights to all parties, unless reasonable distinctions are invoked based on law, without actual disadvantage or other unfairness.²¹⁰

Under the UN International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), states are required ensure the dignity and equality of all peoples and must establish mechanisms prohibiting racial discrimination.²¹¹ The Preamble to the ICERD recognises the fact that all persons are equal before the law and should be accorded equal protection of the law against discrimination of any kind. Kenya is one of the states parties to ICERD, and should comply with the provisions of the Convention. The ICERD Committee emphasises the need for states to afford communities legal aid. This includes free access to interpreters who play a vital role in articulating their concerns hence enhancing their access to justice.²¹² The states are also urged to facilitate group claims; encourage NGOs to defend descent-based communities; organise training programmes for law enforcement and public officials with the aim of preventing injustices based on prejudice against indigenous peoples.²¹³ Governments are also urged to take appropriate measures to ensure constructive dialogue between the law enforcement agencies and the members of indigenous communities.²¹⁴ In Kenya, the latter provision can be instrumental in preventing various human rights abuses that indigenous communities are exposed to in various contexts.

Kenya has not ratified the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries,²¹⁵ but it is important to look at how it addresses the right to legal representation for indigenous peoples. Article 9(1) of the ILO Convention 169 requires states

²¹⁰ Ibid, para. 13.

²¹¹International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 UNTS 195 [ICERD].

²¹²UN Committee on the Elimination of Racial Discrimination, General Recommendation No 29: Discrimination Based on Descent, para. 5, UN Doc HRI/GEN/Rev 9 (Vol. II) (Jan. 11, 2002).

²¹³ Ibid.

²¹⁴Ibid, para 5(z).

²¹⁵ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No.169), June 7, 1989, 28 I.L.M. 1382 [Vol. V [hereinafter ILO Convention No 169].

to recognise indigenous peoples' customary methods relating to offences committed by their members. Courts or authorities dealing with their cases should give due regard to their customs in relation to penal matters, and other methods of punishment should be preferred other than imprisonment.²¹⁶ Courts or authorities should also consider their economic, social and cultural characteristics when imposing penalties.²¹⁷ These provisions generally imply special treatment of indigenous peoples in the sentencing process. Importantly, Article 12 of the Convention provides for the safeguard of the peoples against abuse of rights. Appropriate mechanisms should be provided for them to take legal action, either individually or through their representatives, to protect their rights.²¹⁸

3.4 Regional Instruments

Kenya borrows a lot from other jurisdictions in terms of legal reform. In this regard, consideration of a few legal provisions or practices on legal representation or aid may be vital in this study. Article 6 of the European Convention on Human Rights²¹⁹ is *pari materia* to Article 50(2) of the Kenyan Constitution on fair trial in criminal cases. However, in the case of *Airey v Ireland*,²²⁰ the European Court of Human Rights interpreted the right to fair trial in Article 6 to mean that indigent communities or peoples should have effective access to tribunals or courts. This can be done, for instance, by providing an advocate or simplifying court procedures so that the indigent person does not have to look for an advocate for the trial to be regarded as fair. This decision affirms the responsibility of states to provide legal aid to indigent peoples as a means of ensuring effective access to justice. Further, in the case of

²¹⁶Article 9(2) of the ILO Convention No 169.

²¹⁷Article 10(1) of the ILO Convention No 169.

²¹⁸Article 12 of the ILO Convention No 169.

²¹⁹Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, 213 UNTS 222, entered into force 3 September 1993, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols 1, 4, 6, 7, 12 and 13 [hereinafter "European Convention"], available at <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 07 January 2016.

²²⁰*Airey v. Ireland* 32 European Court of Human Rights (ser. A) at 21 (1979).

Steel v United Kingdom,²²¹ the European Court of Human Rights held that legal and factual complexities in a case may necessitate the provision of legal aid, particularly where an indigent layperson may be unfairly disadvantaged without an advocate or with complicated or inaccessible procedures.

In Africa, Article 10(2) of the Protocol to the African Charter on Human and Peoples' Rights, 1998 provides that "free legal representation may be provided where the interests of justice so require."²²² While this provision applies to the African Court on Human and Peoples' Rights, the thesis behind its inclusion in the Protocol was to assist those individuals who cannot access a legal representative of their choice, for instance because of financial problems. As a Party to the Protocol, Kenya has some lessons to learn from the manner in which the African Court operates with regards to free legal representation.

Providing free legal aid to indigent people is an important aspect of equal access to justice as envisioned in the AU Charter, which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.²²³ The African Charter on Human and Peoples' Rights provides that every person is equal before the law and is entitled to equal protection of the law.²²⁴ Equality in this case counters any discriminatory acts, either from the Government or the lawyers, against indigenous communities.

²²¹*Steel v United Kingdom* 41 ECHR 22, 59-72 (2005).

²²² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004, AU Doc, art. 10(2), available at <www.au.int/en/treaties/status> accessed on 19 December 2015 (hereinafter referred to as "the 1998 Protocol").

²²³ See the Preamble to the African Charter on Human and Peoples' Rights, adopted 1 June 1981, entered into force 24 January 1986, AU Doc., available at <www.au.int/en/treaties/status> accessed on 19 December 2015 (hereinafter the Banjul Charter).

²²⁴The Banjul Charter, Article 3.

3.5 Conclusion

From the foregoing discussion, it can be argued that Kenya has not adopted any special institutional and effective legislative mechanisms to protect the rights of indigenous communities other than the recognition of their culture, customs and their minority status under the Constitution. This explains why the implementation of the African Commission's opinion in the Endorois case and the decision in the Ogiek has had challenges. The Constitution clearly provides for the provision of legal aid in criminal cases, omitting human rights cases which deserve special measures as invariably emphasised by the Human Rights Committee. The Constitution envisions the enactment of a legal framework to give effect to Article 50(2) (h), but the Government has been reluctant in complying with the same within the four-year timeline set out under the 5th Schedule.

CHAPTER FOUR

COMPARATIVE STUDY OF KENYA'S LEGAL AID FRAMEWORK WITH SOUTH AFRICAN AND AUSTRALIAN LEGAL SYSTEMS

4.1 Introduction

As previously mentioned in chapter one, the social, political and economic are contexts of indigenous communities are complex and vary from jurisdiction to jurisdiction. What becomes relatively applicable are the legal and institutional mechanisms employed to address legal aid. Important to note is that Kenya is a commonwealth state, with a plural legal system that is premised on the English legal system. As indicated in chapter three, it is party to a number of international laws that apply directly in the national context by virtue of Article 2(5) and (6) of the Constitution. Additionally, the rights enshrined in the Bill of Rights are a summary of a number of international human rights instruments, such as the International Convention on Civil and Political Rights (ICCPR),²²⁵ the Universal Declaration of Human Rights (UDHR),²²⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²²⁷ One of the common features of these treaties is the provision for equality before the law and equal protection of the law. While the Constitution of Kenya generally

²²⁵International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

²²⁶Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.A/RES/217(III), at 71 (Dec. 10, 1948) [hereinafter UDHR] Article 17, 22-23, 25.

²²⁷International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

recognises the rights of indigenous communities,²²⁸ the existing legal framework when it comes to legal aid is ineffective and inadequate when compared with South Africa and Australia. This chapter discusses the legal aid framework for indigenous peoples in the two jurisdictions in order to provide best practices for improvement of Kenya's legal aid system.

4.2 Protection of Indigenous Communities in South Africa

4.2.1 Legal Recognition of Indigenous Peoples' Rights in South Africa

Since South Africa became a democratic state in 1994, the vulnerability of indigenous communities, such as the San and Khoekhoe, has been recognised, with the government maintaining a close developmental nexus with those communities.²²⁹ The country also nominated a representative of all indigenous communities to participate in the UN Permanent Forum on Indigenous Affairs. South Africa also participates in the activities of the UN Working Group on Indigenous Affairs.²³⁰

Under sections 30 and 31 of the 1996 South African Constitution, cultural, religious and linguistic communities have the right, with other members of that community, to enjoy their culture, religion and language, and form linguistic, cultural and religious associations.²³¹ These provisions generally recognise the basic rights of indigenous peoples and other minority groups in South Africa. They envision the establishment of a framework under which indigenous communities may enjoy their rights without discrimination. They also provide a viable platform upon which the peoples may find recourse within the formal justice

²²⁸Constitution of Kenya 2010, Articles 56 and 260.

²²⁹ G Wachira Mukundi, *South Africa: Constitutional, legislative and administrative provisions concerning indigenous peoples* (Geneva: International Labour Office 2009) 22.

²³⁰ *ibid.*

²³¹Constitution of the Republic of South Africa 1996, sections 30, 31.

systems. The South African state, therefore, has an obligation to ensure the protection and development of minority practices and cultures, particularly where they are threatened.²³²

In 2002, South Africa established the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to promote and protect the rights of indigenous peoples.²³³ This Commission was established in line with section 181(1) of the 1996 Constitution, which provides for state institutions supporting democracy. The Commission, like other state institutions, is required to be independent and subject only to the Constitution and the law.²³⁴ It must be impartial and exercise its powers without fear, favour or prejudice. Section 5(1) (b) of the Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities Act, 2002, requires the Commission to conduct programmes to promote respect for and protection of the cultural;, linguistic and religious rights of indigenous peoples.

Concerning access to justice, the Commission is required to monitor, investigate and research any issue concerning the rights of indigenous peoples.²³⁵ The Commission also has the mandate to facilitate the resolution of disputes between and within indigenous communities, or between any such communities and state organs; assist in the development of strategies that will facilitate the active participation of the peoples in nation building; bring any matter to the attention of the appropriate state authority or organ, making recommendations on how such matters should be dealt with; and establish and maintain databases of linguistic, cultural and religious community organisations, institutions and experts.²³⁶ This Commission has since its establishment ensured that indigenous peoples' rights are recognised in law and

²³² *ibid* 24.

²³³ Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities Act, No 19 of 2002, section 2; Constitution of the Republic of South Africa 1996 section 181(1) (c).

²³⁴ *ibid*, section 3(a),

²³⁵ *Ibid*, section 5(1) (e).

²³⁶ *Ibid*, section 5(1) and (2).

measures are put in place to protect their rights.²³⁷ In 2003, the Commission facilitated a mediation process between the Khoe and San peoples who were historically divided.²³⁸ The process was positive as it ended with a healing and cleansing ceremony.²³⁹

Before the enactment of the 1996 Constitution, indigenous communities in South Africa were highly discriminated because of their strong attachment to culture and customs.²⁴⁰ Given South Africa's history of racial discrimination, it was anticipated that the 1996 Constitution could provide an important avenue towards the realisation of the rights of indigenous peoples and other oppressed groups. Indeed, section 1 of the Constitution recognises human dignity, equality before the law and the right to equal protection and benefit of the law, non-racialism and non-sexism, and the advancement of human rights and freedoms as the values upon which South Africa is founded as a sovereign.²⁴¹

Under section 9 of the Constitution, discrimination on grounds of ethnic or social origin and culture is prohibited. The provision echoes the rights to equality and equal protection of the law enshrined in section 1. South African Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act in 2000 to give effect non-discrimination provisions under section 9 of the Constitution.

Like the Kenyan Constitution, the South African Constitution requires the state to establish affirmative action programmes in order to address past inequalities.²⁴² Section 235 of the Constitution recognises the right to self-determination, stating that this right does not preclude any community sharing a common cultural and language heritage within a territorial

²³⁷Priscilla Felicity de Wet, 'Make our Children Proud of the heritage: A case study of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in SA with specific reference to the emerging Khoe and San Indigenous Peoples in the Republic of South Africa' (Master Thesis, University of Tromsø2006) 28.

²³⁸ibid 49.

²³⁹ ibid.

²⁴⁰ ibid 17.

²⁴¹ Constitution of the Republic of South Africa 1996, section 1.

²⁴²Constitution of the Republic of South Africa 1996, section 9(2); Constitution of Kenya 2010, Article 27(6).

entity in South Africa. Further, traditional governance structures and institutions are recognised under the Constitution and other legislations as a way of promoting self-determination and access to justice at the local level. Section 211(1) of the South African Constitution explicitly recognises the institution of traditional leadership and customary law. In addition, section 211 (3) of the South African Constitution requires courts to apply customary law when the law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Section 212 provides for the role of traditional leaders and urges the enactment of legislation to provide for guidelines for this institution.

In 2003, the South African Parliament passed the Traditional Leadership and Governance Act, section 2 of which recognises traditional communities that are subject to a system of traditional leadership and observe a system of customary law.²⁴³ The Act aligns traditional leadership institutions and governance structures with the Constitution. Section 22 establishes the Commission on Traditional Leadership Disputes and Claims to investigate and make recommendations on all traditional leadership claims and disputes. Within this framework, indigenous communities in South Africa have been able to seek recognition of their traditional leadership and institutions. This is done through gazettelement by the Premier of the province after consultation with the provincial house of traditional leaders and the concerned community.²⁴⁴ The community's practices, customs and traditions should be in accordance with the principles of the Bill of Rights under the Constitution, such as non-discrimination and equality. After recognition, a traditional council is created to deal with the affairs of the community.²⁴⁵

The government of South Africa has been making all possible means to ensure the recognition of traditional leadership structures. However, some indigenous communities

²⁴³ Traditional Leadership and Governance Framework Act No 41 of 2003.

²⁴⁴ *ibid*, section 2(2) (a).

²⁴⁵ *ibid*, section 3(1)

claim the existing law does not adequately support their recognition. For instance, in 2008, the National Khoi-San Council, established in 1999, argued that Chapter 12 of the Constitution which provides for the recognition of traditional leadership, and the Traditional Leadership and Governance Framework Act, do not provide any basis for the recognition of the Khoi-San leadership. The Council, therefore, sought the amendment of the Traditional Leadership and Governance Framework Act or, in the alternative, the enactment of a specific law that recognises the Khoi-San communities.²⁴⁶

In its efforts to respond to the Council's requests, the Government of South Africa commenced negotiations under the auspices of the Department of Provincial and Local Government regarding the full recognition of indigenous peoples. The Council was also funded by the Government to review the Government's Status Quo Report on the role of traditional leaders and provide recommendations on various issues affecting indigenous peoples.²⁴⁷ Although this process has not been effective, it provides a forum through which indigenous communities can engage Government directly. This is distinct from Kenya, where indigenous communities can only air their views through civil society organisations, which are voluntary in nature. In other words, there is no specific state-funded institution that deals exclusively with indigenous community issues in Kenya.

4.2.2 Legal Aid and Access to Justice

With regard to access to justice, section 34 of the Constitution of South Africa clearly guarantees every person, including indigenous peoples, equal protection of the law and the right to have a fair hearing before an independent and impartial court, tribunal or forum.²⁴⁸

This provision is *parimateria* to Article 50(1) of the Constitution of Kenya, 2010.

²⁴⁶ Mukundi, (n 229) 27.

²⁴⁷ *ibid* 28

²⁴⁸ See section 34 of the Constitution of the Republic of South Africa, 1996, [emphasis mine].

It has been invariably stated by the Constitutional Court of South Africa that courts have a role to play, in accordance with the Bill of Rights under the Constitution, in protecting indigenous communities and other indigent groups.²⁴⁹ Courts also recognise the importance of legal aid in both civil and criminal cases. Under section 35(2) of the South African Constitution, every detainee and sentenced prisoners have the right to consult with an advocate and to be informed of this right promptly. It is instructive to note that there is no express constitutional provision concerning legal representation in civil matters, but section 34 of the Constitution envisions that. In terms of the Constitutional Court's decision in *Bernstein v Bester*,²⁵⁰ section 34 includes the right to legal representation if required to ensure effective participation as well as equality of arms. Thus, it is constitutionally imperative to provide legal aid in civil matters where substantial injustice may arise.

Unlike Kenya, South Africa has a comprehensive legislation and guide on legal aid. The 1969 Legal Aid Act²⁵¹ was repealed in 2014 by section 25 of the Legal Aid South Africa Act, 2014 (LASA Act)²⁵² to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available.²⁵³ Section 3 of the repealed Act envisaged the provision of legal aid services to indigent people, including indigenous communities, in civil matters. This was also replicated under the rules made under the Magistrates Courts Act²⁵⁴ and the Supreme Court Act.²⁵⁵ It is, however, important to note that the state has no constitutional obligation to provide legal aid in civil matters.

²⁴⁹ See *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC).

²⁵⁰ *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2.

²⁵¹ Legal Aid Act No 22 of 1969.

²⁵² See section 25 of the Legal Aid South Africa Act No 39 of 2014.

²⁵³ Preamble of the Legal Aid South Africa Act, 2014.

²⁵⁴ Act 32 of 1944, Rule 53.

²⁵⁵ Act 59 of 1959, Rule 40.

Section 2(1) of the LASA Act establishes the Legal Aid South Africa (LASA), which is a national public entity that renders or makes available legal aid and legal advice; and provides education and information concerning legal rights and obligations.²⁵⁶ Funded primarily by the national government, LASA is the only statutory body that provides legal aid services to the indigent and poor in South Africa in both civil and criminal matters.²⁵⁷ The LASA provides legal services, representation and advice by recruiting legal practitioners and candidate attorneys, and paralegals.²⁵⁸ It also procures the services of legal practitioners in private practice by entering into contract with them and other entities.²⁵⁹ LASA provides legal representation at state expense in accordance with the Constitution where substantial injustice is likely to render or make legal aid and advice available.²⁶⁰ It also conducts programmes to promote public awareness of constitutional and other legal rights and public understanding of its objects, role and activities.²⁶¹

Under section 5 of the LASA Act, LASA, its directors, employees and agents must be impartial and independent, acting in good faith and without fear, favour, bias or prejudice. The LASA is governed by a Board of Directors established under section 6 of the LASA Act, and which is accountable to the Minister of Justice and Constitutional Development, as well as to South African Parliament.

Section 23(1) requires the Minister to make, in consultation with the Board, regulations relating to, *inter alia*, the types of civil and criminal matters in respect of which LASA provides legal aid, does not provide legal aid, and provides limited legal aid and the circumstances under which it does so. Although LASA was initially established to deal criminal matters, it has recently expanded its scope to civil matters. Currently, every Justice

²⁵⁶ See section 3(1) of the Legal Aid South Africa Act, 2014.

²⁵⁷ Legal Aid South Africa, *Country Report* (Scotland: ILAG Conference, 2015) 2.

²⁵⁸ See section 3(1) of the Legal Aid South Africa Act, 2014.

²⁵⁹ See section 3 of the Legal Aid South Africa Act, 2014.

²⁶⁰ See section 3(f) of the Legal Aid South Africa Act, 2014.

²⁶¹ See section 3(g) of the Legal Aid South Africa Act, 2014.

Centre in the High Court has a civil section staffed by lawyers who have specialised in civil matters only.²⁶²

There exist community-based advice offices which provide advice to the communities in liaison with LASA. The community-based offices refer issues to appropriate institutions for resolution. The offices also refer clients with more complex issues to LASA for further assistance. The offices receive funding from international humanitarian donors, which is declining.²⁶³ Like Kenya, South Africa has non-governmental organisations having qualified lawyers who provide legal services to the indigent, particularly on human rights aspects. These include, among others, the Legal Resources Centre (LRC), Lawyers for Human Rights (LHR) and the Centre for Applied Legal Studies. Further, virtually all universities in South Africa have established legal aid clinics, which employ qualified advocates.²⁶⁴ Various professional governing institutions for advocates and attorneys have each made rules requiring their members to perform at least 24 hours pro bono services annually.²⁶⁵ Professionals employed by LASA are obliged to perform pro bono work.²⁶⁶

South Africa also has established Citizen Advice Desks, mainly to provide information or advice on the court system, administration of justice and fundamental rights and freedoms.²⁶⁷ This has the ultimate effect of expanding community participation in the administration of justice.²⁶⁸ There are also One Stop Centres, which offer services to victims of domestic violence and sexual offences.²⁶⁹

²⁶² Legal Aid South Africa, *Country Report*, *op. cit.* 13.

²⁶³ *ibid* 3.

²⁶⁴ *ibid* 4.

²⁶⁵ *ibid* 4.

²⁶⁶ *ibid* 4.

²⁶⁷ Mukundi, *South Africa: Constitutional, legislative and administrative provisions concerning indigenous peoples*, *op. cit.* 31.

²⁶⁸ *ibid* 31.

²⁶⁹ *ibid* 31.

It is worth noting that, although South Africa's legal aid framework does not expressly refer to indigenous peoples, it creates an important legal landscape upon which indigenous peoples can access justice. The creation of community-based advice offices brought justice closer to the people, including indigenous communities.²⁷⁰ Such offices work closely with LASA in referring disputes to the relevant dispute resolution institutions.

4.3 Legal Aid for Aboriginal Peoples in Australia

Both Kenya and Australia are Commonwealth states. The current legal system in Australia is a replica of the English legal system, which was introduced in the 1770s when the British set up a colony in Australia.²⁷¹ From 1855 to 1890, the British Parliament granted all the six Australian colonies a right to set up their own laws in line with their local contexts.²⁷² Thus, with this right, albeit limited, each colony was able to create its own legal system to meet its particular needs.

The promulgation of the Constitution in 1901 heralded the creation of an independent legal framework that forms part of today's legal system in Australia.²⁷³ The six independent colonies or states amalgamated to form a federation state, which then became the Commonwealth of Australia under the 1900 Commonwealth of Australia Constitution Act.²⁷⁴

Born from these developments was a two-tier structure of government manifest at the federal

²⁷⁰ Cases referred by community-based offices have not been documented, but this does not mean that those offices do not exist in South Africa. Community-based offices have been there in South Africa even before the enactment of the 2014 Legal Aid South Africa Act. These offices were under established by in partnership with the National Community-Based Paralegal Association. In 2007, the Association entered into an agreement with LASA to backup the community-based legal services. see David Holness, 'Coordinating Free Legal Services in Civil Matters for Improved Access to Justice for Indigent People in South Africa' (University of KwaZulu-Natal October 2014) 111; paragraph 24 of the National Human Rights Institution Report on the South African Government's combined Fourth to Eight Periodic Country Report under the International Convention on the Elimination of Racial Discrimination Submitted to the United Nations Committee on the Elimination of Racial Discrimination for consideration at the 90th session in August 2016.

²⁷¹ Robin Banks, 'The Australian Legal System' (2007) 60 *Hot Topics: Legal Issues in Plain Language* 1.

²⁷² *ibid* 1.

²⁷³ *ibid* 1.

²⁷⁴ Australian Constitution 1900, Preamble.

and state levels. Power in Australia is, therefore, divided between the states' governments and the federal government.²⁷⁵ This is similar to Kenya, except that the 47 county governments have no constitution of their own. Like Australia, they are accountable to the national government. All Australians are subject to laws of the particular states or territory and the federal state laws. Generally, it can be argued that the constitutional structure of the two states is somewhat similar.

Since colonialism, indigenous peoples in Australia have been oppressed and discriminated in terms of cultural disintegration, and appropriation of lands.²⁷⁶ In the independent Australia, indigenous peoples were denied constitutional recognition or protection at the federal level. A provision of the Commonwealth Constitution 1900 excluded them from national census.²⁷⁷ The existing laws then separated indigenous peoples into reserve locales, prohibited cultural practices and restrained their movement in the reserves.²⁷⁸ Per a referendum conducted in 1967, the Constitution was amended to remove discriminatory provisions. As a result, indigenous peoples were part of the national census, and the Australian Government had impetus to enact laws protecting indigenous peoples.²⁷⁹

In 1942, the Legal Services Bureau was established to develop a national legal aid system.²⁸⁰ This means that, unlike Kenya, Australia's legal aid framework for indigent peoples has been in existence for a long time. The Government of Australia established the

²⁷⁵ Australian Constitution 1900, Preamble.

²⁷⁶ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: The Situation of Indigenous Peoples in Australia* UN Distr. General A/HRC/15/4 March 2010, 7.

²⁷⁷ Australian Constitution 1900, section 127 [repealed].

²⁷⁸ See the Western Australia Aborigines Act 1905, Old-age Pensions Act 1908, and Aborigines Protection Act 1909 (NSW).

²⁷⁹ Law Council of Australia, 'Constitutional Recognition of Indigenous Australians' (2011) Discussion Paper 19 <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/ConstitutionalRecognitionofIndigenousAustralians.pdf>> accessed 15 November 2016.

²⁸⁰ Richard Coates, *The 20th Century - A Century of Change: A History of Legal Aid in Australia* (4th Annual Colloquium of the Judicial Conference of Australia) 7 <<http://jca.asn.au/wp-content/uploads/2013/11/CoatesPaper.pdf>> accessed 15 November 2016.

Legal Aid Office in 1973 to provide legal assistance to, among others, social security recipients, indigenous Australians, migrants, returned servicemen and women.²⁸¹ The Office also dealt with matters arising under the Federal or Commonwealth law, such as family law, social security, divorce, and tax.²⁸²

Even after the promulgation of the 2010 Constitution, Kenya has not enacted a legal aid legislation to give effect to Article 50(2) (h) of the Constitution and also provide for circumstances under which legal aid may be provided in civil matters.

There is also no law that recognises the threatened rights of indigenous peoples in Kenya other than the few Constitutional provisions on equality and non-discrimination. Australia enacted the Commonwealth Racial Discrimination Act in 1975 to prohibit discrimination on grounds of, *inter alia*, descent, race and national or ethnic. Section 117 of the Australian Constitution also provides that any subject resident in any state shall not be subjected to any disability or discrimination. Indigenous justice agreements entered into between states in Australia recognise indigenous capacity building, participation and self-determination as important values to attaining the objectives of those agreements.²⁸³

From 1976, land right laws were enacted, but they did not adequately recognise indigenous land rights. In the infamous case of *Mabo v Queensland*,²⁸⁴ the Australian High Court held that indigenous peoples' customary title to land could be recognised under common law. This decision marked the beginning of reform of Australian laws to protect indigenous land rights. In 1977, the Commonwealth Legal Aid Commission Act²⁸⁵ was enacted to facilitate

²⁸¹PwC, 'Legal Aid Funding Current Challenges and the Opportunities of Cooperative Federalism Final Report' (December 2009) 15.

²⁸² *ibid.*

²⁸³ Fional Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous Peoples' (2010) 32 *Sydney Law Review* 660.

²⁸⁴ *Mabo and Others v Queensland (No 2)* (1992) 175 CLR 1, [1992] HCA 23.

²⁸⁵ Commonwealth Legal Aid Commission Act, 1977, Republication No 30, Effective 10 December 2015 [hereinafter Legal Aid Act, 1977].

cooperation between the federal government and the state or territory governments in terms of legal aid services. Independent legal aid commissions were also established in each state or territory to cooperate with the federal commission established under the Act. The cooperative arrangements established between the federal and state or territory resulted to funding agreements between the two levels, which commenced in 1987.²⁸⁶ However, from 1997, the Australian Government has been funding legal aid services for federal law issues directly. The states or territories fund legal aid programmes under their own legislations.²⁸⁷ These arrangements were, arguably, aimed at reducing the financial burden on the part of the Federal or Commonwealth Government. There are also over 200 non-profit organisations in Australia providing legal aid services.²⁸⁸

The Legal Aid Act, 1977, was republished in 2015 after a series of amendments. Section 6 of the Act establishes the Legal Aid Commission (ACT) as a body corporate charged with the mandate of providing legal aid services. The Commission does this by arranging for the services of private legal practitioners to be made available at its expense or by making available the services of its officers. In other words, the Commission may procure the services of private practitioners in addition its legal officers.²⁸⁹

Under section 10(1) of the Legal Aid Act, 1977, the Commission has a duty to liaise with and make reciprocal arrangements with other legal aid commissions at state level, professional bodies represent private practitioners and other institutions interested in the provision of legal aid. The Commission must ensure that legal assistance is provided in the most effective, efficient and economical manner.²⁹⁰

²⁸⁶ Coates (n) 13.

²⁸⁷ *ibid.*

²⁸⁸ PwC (n 280) 16.

²⁸⁹ Legal Aid Act, 1977, section 6(2).

²⁹⁰ Legal Aid Act, 1977, section 10(1) (a).

Section 13 of the Legal Aid Act, 1977, deals with the professional conduct of the officers of the Commission. For instance, an officer of the Commission, acting as a solicitor exercising a right of audience before a court or tribunal, is required to observe the same rules and standards of professional conduct and ethics as those observed by a private legal practitioner.²⁹¹ The privileges that arise from the relationship of a client and solicitor acting in his or her professional capacity shall arise between a person who has applied for legal assistance, or to whom legal assistance is being provided, and a statutory officer of the Commission.²⁹²

Legal assistance under the Legal Aid Act is provided in three circumstances: where the person in need of legal assistance cannot afford an advocate (the means test); where the case is a type of case in which legal assistance may be granted (guidelines); and where it is reasonable in all circumstances to provide the assistance (the reasonableness test).²⁹³ Under the means test, the Commission assesses the applicant's income, the cost of living, assets and liabilities, and the cost of obtaining legal services from a private legal practitioner. Section 12 of the Act requires the Commission to make Legal Assistance Guidelines detailing the type of legal matters in which assistance may be provided. As regards the reasonableness test, the Commission must have regard to the benefit that may accrue to the person or the public or a section of the public, any disadvantage that may be suffered if the assistance sought is not granted, and whether the outcome of the case will be favourable to the person if assistance is granted.²⁹⁴ These tests do not apply to legal assistance consisting of legal advice, duty lawyer services or minor legal assistance.²⁹⁵

²⁹¹ Legal Aid Act, 1977, section 13(1)(a).

²⁹² Legal Aid Act, 1977, section 13(2).

²⁹³ Legal Aid Act, 1977, section 28.

²⁹⁴ See section 28(4) of the Legal Aid Act, 1977.

²⁹⁵ Legal Aid Act, 1977, section 28(2).

Besides, the Government of Australia recently endorsed the UNDRIP, with the Minister responsible for indigenous affairs pledging government support for the implementation of the Declaration. This support augments the federal government's commitment to protect indigenous peoples' human rights.

Despite the comprehensive legal aid framework, the Australian Chief Justice noted that the framework is complex for people to follow.²⁹⁶ Accordingly, the Council of Australian Government commenced major reforms in 2008 on the federal financial relations as well as legal aid in order to simplify the payments to the states and to rekindle the cooperation that existed before between states' legal aid systems and the federal legal aid system.²⁹⁷

4.4 Best Practices for Reform of the Kenyan Legal Aid Programmes

Kenya, Australia and South Africa are Commonwealth states, and their legal structures replicate the English legal system. However, South Africa and Australia have advanced in many aspects, including the recognition and protection of indigenous peoples. As minority groups whose rights have been historically threatened, states have an international obligation to establish mechanisms that protect and promote the indigenous peoples' rights. This is expressly provided for under the UNDRIP and ILO Convention No 169. Both Kenya and South Africa have not ratified the two instruments, but they are parties to other international treaties entrenching the right to equality and equal protection of the law. Such treaties include, *inter alia*, the ICCPR and UDHR. Kenya's failure to sign or ratify the two indigent-specific instruments indicates lack of interest in protecting indigenous peoples and addressing their historical setbacks.

²⁹⁶ PwC, 'Legal Aid Funding Current Challenges and the Opportunities of Cooperative Federalism Final Report,' *op. cit.* 17.

²⁹⁷ *ibid* 18.

Although Australia has not ratified the two instruments, it has a well developed and coordinated legal framework for the protection of indigent people. The Legal Aid Act, 1977, stated above is very germane and supports the provision of legal assistance to indigenous peoples. Importantly, the Legal Aid Act, 1977, provides for the professional ethics of officers employed by the Legal Aid Commission to provide legal services to the indigent. The standards of ethics are important in protecting indigent peoples from, for example, criminal actions of the officers. Australia has various institutions that deal exclusively with the issues affecting indigenous communities. For instance, at the State level, the New South Wales Local Court Aboriginal Client Service Specialist Program (ACSSP) has been very instrumental in assisting indigenous peoples to access court documents, and to understand the legal issues affecting them.²⁹⁸ They also inform indigenous clients about court orders in relation to their cases.²⁹⁹ Additionally, the Federal Government established the Aboriginal and Torres Strait Islander Legal Services (ATSILS) to address the legal challenges affecting indigenous peoples in Australia. This institution is funded by the Federal Government to extend their services to every region in Australia, particularly those inhabited by aboriginal peoples. Other indigenous-specific institutions that offer legal aid services in Australia include Community Legal Centres, and Family Violence Prevention and Legal Services (FVPLS).³⁰⁰ The latter receives funding from the Federal Government.³⁰¹

In contrast, Kenya has only recognised the rights of indigenous communities and other minority groups under article 260 of the Constitution of Kenya 2010, but there are no other mechanisms especially institutions to aid in implementing and fostering the abovementioned. This is despite the fact that indigenous peoples are among those groups that have suffered

²⁹⁸ Legal Aid NSW, 'Making our services work for Aboriginal people' (June 2006) 1 <http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/5844/Making-our-services-work-for-Aboriginal-people.pdf> accessed 17 November 2016.

²⁹⁹ *ibid.*

³⁰⁰ *ibid.*

³⁰¹ *ibid.*

from historical injustices.³⁰² Courts also seem to have rigid perceptions on the status of indigenous communities, and this constrains their access to justice.³⁰³ . In South Africa for example, there has been a series of legal reforms and institutional mechanisms particularly on indigenous peoples which enhance legal aid. The South African Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities was established in 2002 to promote and protect the rights of indigenous peoples. The Commission has been very instrumental in the reform process and other issues relating to the recognition of the rights of indigenous communities. For instance, the Commission is mandated to monitor, investigate and research any issue concerning the rights of indigenous peoples. Kenya lacks such a body. Such institutional mechanisms considerably strengthen enforcement initiatives and enhance legal aid platforms. Another important aspect in South Africa is the establishment of mobile courts in remote areas, particularly those inhabited by indigenous peoples (such as Northern Cape Town).³⁰⁴ These courts, however, operate on an *ad hoc* basis, and most indigenous communities have criticised the fact that they rarely rely on their version of customary law.³⁰⁵

Further, there exists the National Khoi-San Council, which was established in 1999 to advocate for the rights of the Khoi-San and other indigenous peoples. This Council has invariably been funded by the state to facilitate its activities. South Africa also repealed the 1969 Legal Aid Act in 2014, establishing the Legal Aid South Africa Act, to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in

³⁰² *Joseph Letuya and 21 others v the Minister for Environment and Natural Resources and Attorney General HCCA No. 228/2001- Nairobi; Kenya: Commission of Inquiry into the Post Election Violence (CIPEV) Final Report (Government of Kenya 2008) 219 <<http://www.africog.org/reports/Commissionsofinquiryreport.pdf>> accessed 16 November 2016.*

³⁰³ *G Wachira Mukundi, Kenya: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples (International Labour Office, Geneva: ILO, 2009) 29; Joseph Letuya and 21 others v the Minister for Environment and Natural Resources and Attorney General HCCA No. 228/2001- Nairobi.*

³⁰⁴ Mukundi (n 229) 31-32.

³⁰⁵ *ibid.*

the Constitution. While the Act deals with criminal matters, it provides for other options under which a person may be granted legal assistance in civil matters. The Minister is required to make regulations to that effect.

Kenya's legal aid framework on civil matters is inferred from different laws. Section 4 of the Law Society of Kenya Act,³⁰⁶ liberally construed, indicates that the Law Society has a duty to provide legal advice to the public and its members have the duty to provide pro bono services where necessary to ensure access to justice. However, this provision is rarely complied with. Order 33 of the Civil Procedure Rules, 2010, also provide for the provision of legal services to paupers. The establishment of NALEAP marked an important step towards the implementation of these provisions and the Constitution, but little has been done to enact the enabling law.

4.5 Conclusion

Kenya has a lot to do in order to ensure legal aid and access to justice for indigenous communities and other minority groups is effective. While South Africa and Australia have a long history of legal aid reform initiatives to guarantee access to justice for indigenous communities, Kenya enacted the Legal Aid Act 2016 recently and it may take time for it to have an impact in achieving access to justice. Australia has a number of specific programs and institutions that offer legal aid services to aboriginal people. These include, among others, ACSSP, ATSILS, **FVPLS**, and Community Legal Centres,

³⁰⁶ Cap 18 of the Laws of Kenya.

CHAPTER FIVE

SUMMARY OF THE FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter constitutes a summary of the study's findings, the recommendations and conclusion.

5.2 Summary Findings

From the analysis of Kenya's legal aid framework for indigenous peoples and access to justice, it was found that Kenya has not adopted any special mechanisms to protect the rights of indigenous communities other than the mere recognition of their culture, customs and their minority status under Article 56 of the Constitution. These indigenous communities also have no structural and institutional platform or organisation to assist them to realise access to justice as envisaged in the constitution. Unlike Australia and South Africa, Kenya has not enacted any law that exclusively protects the rights of indigenous peoples. As a party to a number of international and regional human rights instruments, Kenya has failed to enforce and safeguard the emotive nature of the rights of indigenous peoples. This is evident in the challenges that affect the Endorois community, Ill Chamus and the Ogiek communities, among others. For instance, despite the African Commission's opinion on with regards to the Endorois case, which was initially determined in Kenya, the Government of Kenya has been inordinately sluggish in implementing it. It may be argued that lack the reluctance of the Government in implementing the Commission's opinion is a clear evidence of the lack of an institution that specifically deals with indigenous peoples, and which can push the

government to implement the provisions on indigenous peoples. In addition, indigenous communities have been faced with a myriad of historical injustices in relation to their ancestral lands and related resources. However, the avenues available for them to access justice are ridden with limitations, such as procedural technicalities, high court fees, expensive legal fees demanded by advocates, and backlog of cases. Constitution of Kenya clearly provides for the provision of legal aid in criminal cases, omitting human rights cases which deserve special measures as invariably emphasised by the international Human Rights Committee. The Constitution envisions the enactment of a legal aid framework to give effect to Article 50(2) (h), but the Government has been reluctant in complying with the same within the four-year timeline set out under the 5th Schedule. The Legal Aid Act 2016 is a few months old and its implementation may take time. It is hoped that the new Chief Justice will facilitate expeditious implementation of this legislation to enhance access to justice. It is also hoped that the newly enacted Community Land Act 2016 will be implemented as fast as possible to address the historical injustices affecting indigenous communities and other communities in Kenya.

Further, although Articles 2(4), 11 and 159(2) of the Constitution recognise customary laws, culture, language and traditional dispute resolution approaches, the existence of the repugnance clause under section 3(2) of the Judicature Act and Article 159(3) of the Constitution subjugates these structures. Section 3(2) of the Judicature Act, for instance provides that courts shall apply customary law as a guide and not as an authoritative source of law. Similarly, Article 159(3) provides that traditional dispute resolution mechanisms should not be repugnant to justice and morality, or be applied in a manner that is repugnant to justice and morality. What is just or moral depends on the jury's discretion.

The study reveals that legal aid is very instrumental in indigenous peoples' access to justice. As various scholars indicate in chapter 2, indigenous groups are faced with several

conundrums, such as lack of political participation, discrimination and weak protection of their right to socioeconomic development under Article 43 of the Constitution of Kenya 2010. Their institutions have for decades been suppressed through the repugnancy test, leaving them to contend with dominant formal justice systems where they have limited or no representation. Indigenous communities, thus, continue to live under pressure of being evicted from their lands or being generally oppressed. In light of this, this study finds a reason as to why it is important to establish pragmatic mechanisms to protect the indigenous peoples' rights and enhance their access to justice.

These findings are in line with Rawls' procedural justice theory, which is premised on the concept of fairness, equal opportunities, and liberties. The Government's failure to provide a framework through which indigenous communities may access justice means that these communities may not articulate their issues successively in the formal justice system which is often characterised by procedural technicalities and partiality. Given the subordination of their traditional mechanisms, indigenous peoples are left with the option of contacting non-profit organisations. Whether their rights in the client-advocate relationship are abused by the NGOs is not an issue. The most important thing is to access legal service for them to vindicate their rights in courts. The Endorois case discussed in chapter two clearly indicates the legal battle that indigenous communities have to go through to protect their rights. Their incessant eviction by the government evidences that lack of equality and equal protection of the law envisaged in Article 27 of the Constitution. This is inimical to Rawls' concept of equal opportunities and liberties.

The findings are also consistent with the study's hypothesis that indigenous communities have been for a long time marginalised, oppressed and discriminated against. This explains why the Legal Aid Act 2016 will be very significant in promoting access to justice for

indigenous peoples. However, there is no indigenous-specific institution that can help them to mitigate discrimination like in South Africa and Australia.

5.3 Recommendations

In light of the foregoing findings, the study makes the following recommendations

5.3.1 Recommendations to the Parliament

First, the enactment of the Legal Aid Act 2016 is a positive step that will enhance access to justice for indigenous peoples. However, this is only in relation to the formal legal system. Some cases can still be resolved using community-based institutions to assist the courts in managing case backlog. It is, therefore, recommended that Parliament enacts legislation that recognises traditional leadership and governance structures, particularly on procedural aspects. This can be similar to the South African Traditional Leadership and Governance Act, which gives effect to the Constitutional protection and recognition of traditional institutions. There is no such law in Kenya and, since the Constitution retains the colonial repugnancy clause, the legislation should explicitly define what constitutes justice and morality under Article 159 of the Constitution. The enactment of this legislation is in line with Article 11 of the Constitution, although there is no proviso on legislation in that respect. Importantly, the legislation should provide for gender parity on the membership of traditional councils, protecting women from exploitation and discrimination. The legislation should also provide procedure on the selection of traditional leaders, including those who will represent the indigenous community in the National Council of Indigenous Communities proposed below.

5.3.2 Recommendations to the Executive

Firstly, due to the nature of the challenges that affect indigenous peoples in Kenya, the study recommends that the Government supports the establishment of an indigent-specific

institution, similar to the National Khoi-san Council of South Africa, to be known as the Kenyan National Council of Indigenous Communities. The institution should work with the Kenya National Commission on Human Rights, which has broad duties, and NALEAP. The establishment of this institution shall reduce the Human Rights Commission's workload, making it easy to carry out its mandates effectively. It is important to note that South African Council had the mandate to deal with reform programmes in liaison with the Government. The membership of NALEAP (or the National Legal Aid Service) should also have representatives from each indigenous community as the Government may prescribe.

Secondly, the Government should expedite the implementation of the African Commission's opinion in the Endorois case. This will clean Kenya's non-compliance image under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights, 1998, and the African Charter. Several scholars, such as Sing'Oei, have questioned the manner in which the Government has been implementing the Endorois case, with other issues of the Il Chamus and Ogiek still pending.

Thirdly, with regard to legal aid, the Government should provide enough funds for legal aid as this is a constitutionally protected aspect, particularly under Article 50(2) (h) of the Constitution. This will ensure that the activities of NALEAP or the National Legal Aid Service envisaged in the Legal Aid Act 2016 are discharged effectively to assist indigent peoples vindicate their rights. Similarly, the Government has an obligation, by virtue of Article 50(2) (h) to create legal awareness on how the indigent can benefit from this provision. This should extend to indigenous communities who are always discriminated because of their close attachment to tradition, culture and religion.

Fourthly, it is recommended that the Government ratifies the UNDRIP and ILO Convention No 169 to provide more legal machinery through which indigenous communities can be

protected and also defend their rights. The substance of the two instruments is discussed in chapter three of this study.

5.4 Conclusion

Kenya has seen progressive reforms in her legal system since independence. These reforms have had great effects on indigenous communities and resented opportunities that when appropriately explored could considerably diminish the human rights challenges that the indigenous peoples face. The promulgation of the 2010 Constitution opened the door for the recognition and protection of marginalised groups, including indigenous peoples. Kenya is a party to a number of international and regional human rights instruments, which articulate the rights to equality, inherent human dignity, equality before the law and equal protection of the law before an impartial tribunal or court and non-discrimination on diverse grounds, including race, social origin, and ethnicity. The UN adopted the UNDRIP, but Kenya has not signed or ratified it, despite having serious challenges affecting indigenous communities. The ILO Convention No 169 has also not been ratified by Kenya. This means that the two important instruments do not apply in Kenya. However, the other instruments that have been ratified or acceded to by Kenya apply domestically within Article 2(5) and 2(6) of the Constitution. Under Article 21(4), Kenya has an obligation to ensure that international human rights instruments to which it is a party are implemented. Thus, the provisions of the UDHR, ICCPR and pronouncements of human rights Committees on indigenous peoples are applicable in Kenya and should be implemented. It is unfortunate that, while the Constitution of Kenya recognises the rights of the marginalised, no effective legal mechanisms have been created to enforce their rights or protect them from oppression and discrimination. Compared with Australia and South Africa, Kenya lags behind in terms of laws and institutions on legal aid and assistance for the indigent, as well as the protection of customary laws and governance structures. The fact that these laws and structures are still subject to the

repugnancy clause under the Constitution means that indigenous peoples are left with the often complex formal justice systems. The South African Constitution does not contain any provision on the repugnance test; customary law is only subject to the Constitution. One challenge is that they cannot afford the legal fees charged by private practitioners and the high court fees. The lack of legal representation means that indigenous communities in Kenya have minimal chances of succeeding in the formal justice institutions in Kenya. In light of this, this study recommends, among others, that the government enacts a law which exclusively deals with the unique nature of life and rights of indigenous peoples and other marginalised groups in accordance with Article 56 of the Constitution; that the government enacts legislation that recognises indigenous customary laws and institutions, just like the South African Traditional Leadership and Governance Act; and community-based offices be established to link with the National Legal Aid Service in dispensing justice to the indigenous communities. This should apply to all communities.

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