

**ACCESS TO JUSTICE AND THE RIGHT TO
LEGAL AID: A COMPARATIVE ANALYSIS
OF KENYA AND THE UNITED KINGDOM
(ENGLAND AND WALES)**

BY

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DATE.....

DECLARATION

I declare to the best of my knowledge and information that this thesis or any part thereof has not been submitted in any other University for the fulfillment of any degree.

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Supervisor

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ABSTRACT

Kenya is a country currently undergoing a transition socially, economically and politically. In an effort to achieve the United Nations millennium development goals, and further implement international instruments prescribing good governance based on the rule of law and respect for human rights, access to justice by its citizens remains one of the biggest challenges.

This thesis therefore discusses the notion and significance of access to justice, *vis-a-vis*, the right to legal aid in Kenya, and a comparison is made to that of the English legal aid system, described as one of the best in the world. The reform of Kenya's National Legal Aid (and Awareness) Programme, a pilot project, is still in its initial phase. If a comparison is made to the English legal aid system, much is still desired.

Therefore, this thesis is intended to make a comparison in the legal aid systems of both jurisdictions, but will heavily borrow ideas from England and Wales to be suggested, and recommended for initiating further reforms in the Kenyan legal aid Programme.

INTRODUCTION

In a society governed by the rule of law, the notion of access to justice is one of the fundamental tenets of constitutionalism and democracy. However, the provision of equal access to the benefits and protection of the law remains the most consistently elusive challenges to democratic systems around the globe¹ Kofi Annan, the former Secretary General of the United Nations states that:

The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means. And we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers as well as many issues beyond the criminal justice system. Local actors must be involved from the start. The aim must be to leave behind strong local institutions when we depart.²

Most liberal states governed by the rule of law, and those which respect human rights principles, do recognize the need for having proper institutions of state that guarantee effective administration, and delivery of justice for its citizens.

Access to justice is a broad concept that has received international recognition as laid out in some international instruments. For example, the United Nations Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) provide for the right to legal representation as a minimum core right under the due process of law. The concept has further been propounded by various local and international human rights organizations such as the Kenya National Commission on

¹ Source Book *Access to Justice In Central and Eastern Europe* (Public Interest Law Initiative, Interrights, Bulgarian Helsinki Committee and Polish Helsinki Foundation For Human Rights 2003) p. 4

² http://www.undp.org/governance/docs/Justice_PN_English.pdf p. 2

Human Rights (KNCHR), the Open Society Justice Initiative (OSJI), the United Nations Development Programme (UNDP) and the Commission on Legal Empowerment of the Poor among others. It is a right that guarantees equal access to justice and fair trials to citizens in any given democratic society.

There is also a lot of emerging literature in this area. The Source Book on Access to Justice discusses at length the notion of access to justice in light of legal aid. It states that the right to legal assistance free of charge is one of the fundamental guarantees associated with the right to a fair trial embodied in international human rights treaties.³ It is firmly protected under the above mentioned international instruments. Cappelletti *et al* also discusses at length the issues revolving around access to justice in relation to free legal aid. He explains that the term ‘justice’ may mean different things.⁴ He is of the view that is hard to draw the line between failure of justice in the procedural sense and failure of justice in the substantive sense.⁵ The two aspects usually supplement each other. Substantive law and procedural law make legislation “easier both in rule and in process.”⁶

Further, Uzelac *et al*⁷ and Rhode⁸ discuss in depth on issues revolving around access to justice and legal aid. They are of the opinion that it is important to have state institutions which provide free legal aid services if justice and equality are to be realized in democratic governments. For example, Rhode explains that in America, it is not only the poor who are priced out of the legal system.⁹ “Millions of Americans, including those

³ Source Book, *Supra* note 1, at 10

⁴ M. Cappelletti et al *Access to Justice: Promising Institutions* (Dott. A. Giuffre 1978) p. 6

⁵ *Ibid* p. 6

⁶ *Ibid* p. 6

⁷ A. Uzelac et al *Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia 2009)

⁸ D. Rhode *Access to Justice* (Oxford University Press 2004) p. 4

⁹ *Ibid* p. 4

of moderate income, suffer untold misery because legal protections that are available in principle are inaccessible in practice.”¹⁰

More or less like the Americans, a majority of Kenyans, due to many reasons such as social, economic, legal and political factors, are unable to access justice. From exorbitant legal fees, to the exclusion of the poor from mainstream political processes undermines their ability to compete effectively in an adversarial civil and criminal justice system. It is mainly the rich who are capable of accessing justice by employing legal services, in a further complex judicial and formal legal system. “Many poorer individuals remain unaware of their rights, lack knowledge of the court system, or experience frustrations in accessing it.”¹¹ This is thus a pitfall to the commitment of equal justice, a central legitimacy of democratic processes.¹² It is therefore imperative that there is a need to develop an institution, or proper mechanisms that will secure accessibility of justice for Kenyans, and ease the burden of providing free legal aid currently being shouldered by non-governmental organizations.

In the nature of adversarial criminal justice system, an example of which can be found in Kenya, where the state has all the legal resources at its disposal, a defendant stands a high risk of being stripped of some, if not all, of his human rights if not adequately represented by a legal practitioner. In light of this, the state ought to provide all the necessary legal assistance for a defendant, enough to make him achieve a fair legal outcome of his/her trial.

¹⁰ Rhode, *supra* note 8, at 4-5

¹¹ <http://www.trust.org/trustlaw/country-profiles/pro-bono.dot?id=12600e6d-9822-41c2-bff1-579481b9108a>

¹² Rhode, *supra* note 8, at 3

Kenya is an upcoming, and a shining example of a state ruled by the principles of constitutionalism and the rule of law in the Eastern region of sub-Saharan Africa, and it is determined to achieve the United Nations millennium development goals by the year 2030, which besides pushing for economic growth and development based on sustainability, also advocates for governance based on the rule of law, equality and respect for human rights.

However, in order for the country to achieve these goals, it has to overcome many challenges hindering access to justice. There can be no real progress in a country if the social, economic and political aspects, which are very crucial for the development of its society, are hampered by lack of, or denial of justice. Even with the current minimal reforms, a majority of the citizens cannot access justice due to the expensive nature of legal services. Therefore, if equality and progress need be achieved in the Kenyan society, a leaf ought to be borrowed from the English legal aid system.

Chapter one of the discourse examines the concept of the term ‘access to justice’ in relation to the right to legal aid, and further analyses the justification for legal aid. Chapter two examines the different models of legal aid employed by various countries around the world. It tries to point out the shortcomings of each model, while chapter three analyses the legal aid systems in both jurisdictions, and looks at how they operate. Chapter four makes a comparison of the legal aid systems in both jurisdictions, and borrows many ideas that can be used to initiate further reforms, or revamp the Kenya National Legal Aid Programme. Finally, the research concludes by reiterating importance of access to justice *vis a vis* the right to legal aid.

CHAPTER ONE

ACCESS TO JUSTICE

1.1 The Concept of Access to Justice

This chapter analyses at length the concept of the term ‘access to justice’. It is a term that is rarely used in “the language of most international human rights instruments.”¹³ However, it is foolish to deny that citizens under the developing international customary law are conferred upon certain basic rights that can enable them invoke international or treaty law against a state.¹⁴ It is therefore worth noting that human rights does play a vital role in furthering the concept of access to justice within the domestic jurisdictions of many states.

The concept of access to justice is too broad a term to narrow down to a specific meaning. There have been many attempts by different authors to come up with a classic definition of this term, however this discourse limits its discussion on the various interpretations, and focuses on the notion of access to justice *vis a vis* the right to legal aid as a necessary principle of equal justice under the rule of law.

As mentioned above, international law seems to be shaping and furthering the concept of access to justice in many states today. Some of the following international instruments such as: the United Nations Universal Declaration of Human Rights 1948 in Article 8, the European Convention on Human Rights in Article 7, the American Convention in Article 25, the African Charter of Human and People’s Rights in Article 7.1, and the Charter of Rights of the European Union, emphasize the paramount need of access to justice as a fundamental human rights principle.

¹³ F. Francioni *Access to Justice as a Human Right* (Oxford University Press 2007) p. 24

¹⁴ *Ibid* p. 6

However, Francioni is of the view that “despite treaty and state practice supporting the individual right to access to justice, a number of questions and obstacles remain with respect to its effective implementation.”¹⁵ He argues that it is not enough to proclaim such a right formally if its actual enjoyment is not guaranteed by a system of fair and impartial administration of justice, something that is problematic in many countries.¹⁶

An impartial and independent judiciary plays a vital role in furthering the commitment of justice and equality under the law. There can be no effective justice if courts act as “toadies of the state.”¹⁷ Accessing courts must be a constitutional right of which the poor and underprivileged in society, and not only the rich and privileged, can approach to seek for effective remedies. Further, uneven accessibility of legal institutions in most societies impedes equal justice.¹⁸ “This is problematic because legal solutions have direct social and economic consequences.”¹⁹

Any group of persons can be denied access to justice.²⁰ They may include the poor, the lower-class or some other disadvantaged part of the population, such as people of ethnic racial minority, foreigners or simply the ordinary man or woman of the working class on the streets.²¹ Cappelletti states that:

In dictatorships or terror states, ordinary people do not have the right to speak out and claim justice against those in power, not without running terrible risks. In some countries, almost nobody has full access to what at least the liberal states would define as justice; even the courts can be toadies of the state.²²

¹⁵ Francioni, *supra* note 13, at 2

¹⁶ *Ibid*, at 2

¹⁷ Cappelletti et al *supra* note 4, at 6

¹⁸ I. Pushkarova *Access to Justice: Legal Aid Systems* in A. Uzelac et al *Access to Justice and the judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Metro 2009) p.45

¹⁹ *Ibid*, at 45

²⁰ Cappelletti et al *supra* note 4, at 6

²¹ *Ibid*, at 5

²² *Ibid*, at 6

Also, every discussion usually assumes a goal called ‘justice’ and assumes further that some group or type of person living in a society finds the door to justice closed, or at least too stiff to move on its hinges.²³ “In theory, ‘equal justice under law’ is difficult to oppose. In practice, however, it begins to unravel at key points, beginning with what we mean by ‘justice’.”²⁴

Access to justice is an expensive affair, and if it “were cheap enough, the poor or disadvantaged could open the doors of justice by themselves.”²⁵ However, “effective access to justice is not just a luxury of economically advanced societies – everyone, everywhere should enjoy the equal protection of the law if justice should be served at all”²⁶, which in this context, is a commitment to equal access to justice, a central legitimacy of democratic processes.²⁷

Access to justice as a necessary element for the rule of law²⁸ usually employs procedural safeguards to counter a state’s coercive legal apparatus. It provides for mechanisms such as the due process of the law, of which among other procedural safeguards such as presumption of innocence, a lawyer’s service plays an important role in ensuring a fair outcome of a trial, and few would contest this idea.²⁹

Anyone accessing justice has a right to an effective judicial remedy before an independent court of law.³⁰ And this right is in tandem with the right to free legal aid as

²³ Cappelletti et al *supra* note 4, at 5

²⁴ Rhode, *supra* note 8, at 5

²⁵ Cappelletti et al *supra* note 4, at 6

²⁶ Lord Lester of Herne Hill QC, INTERIGHTS President’s speech, in *Access to Justice*, Interights Bulletin, Volume 10, No.2, 1996, p. 53.

²⁷ Rhode, *supra* note 8, at 3

²⁸ U. Emelonye *Access to Justice: A Comparative Study of Legal Aid Schemes in Nigeria, South Africa and England* (Central European University 2004) p. 7

²⁹ Source Book, *supra* note 1, at 4

³⁰ Francioni, *supra* note 13, at 4

recognized under international instruments. The Source Book on Access to Justice in Central and Eastern Europe points out that:

The right to legal assistance free of charge for indigent criminal defendants is one of the fundamental guarantees associated with the right to a fair trial embodied in international human rights treaties. The right to free legal assistance is explicitly protected by Article 14.3 (d) of the International Covenant on Civil and Political Rights and by Article 6.3 (c) of the European Convention on Human Rights³¹

Article 14.3(d) of the International Covenant on Civil and Political Rights is also an important provision in Human Rights that safeguards against arbitrary and unfair trials. It provides that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled...to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.³²

Further, on a regional level the right to free legal aid has been emphasised by the European Court of Human Rights. Although there is no explicit requirement for the provision of free legal aid in civil cases under the ECHR³³, the European Court of Human Rights nevertheless in *Airey v. Ireland*³⁴, emphasized the need for legal aid for indigent litigants in civil disputes.³⁵

In Kenya, the 1963 Constitution in Section 77 (2) (d) also provides for the right to legal representation, though as previously discussed, and an issue which will further be discussed in detail in chapter three, the law and practice in Kenya, only grants legal

³¹ Source Book, *supra* note 1, at 10

³² International Covenant on Civil and Political Rights

³³ European Convention on Human Rights

³⁴ 32 Eur Ct HR Ser A (1979)

³⁵ Source Book, *supra* note 1, at 11

representation to suspects charged of committing capital crimes. Any other criminal offence does not oblige the state to provide a suspect with a lawyer. Thus, a lot is still desired in ensuring equal access to justice through the provision of free legal aid in Kenya. The following discussion analyses the rationale for legal aid.

1.2 What is the Rationale for Legal Aid?

As discussed above, international and several regional instruments prescribe free legal assistance as a matter of right. But we may ask ourselves: why the need for legal aid? “Should government support go to only the officially poor or to those who cannot realistically afford lawyers?”³⁶ Further, we may also wish to know the circumstances that can allow individuals to get full-blown representation by attorneys, as opposed to other less expensive forms of assistance.³⁷

The reason for this clearly lies on the notion of equality under the law, which as stated previously, is a commitment to equal justice, a core legitimacy of democratic processes³⁸, and modern jurisprudence.³⁹ “The social value of this commitment seems to be grounded by the implication that equality in procedural opportunities leads to equality of social opportunities.”⁴⁰ “Equality of justice should not rely on the ability to pay”⁴¹, especially when a defendant is facing the state which has “marshaled its legal resources to accuse him of a crime.”⁴² “True equality in legal assistance would presumably require not only massive public expenditures, but also the restriction of private expenditures.”⁴³

³⁶Rhode, *supra* note 8, at 6

³⁷*Ibid.*, at 6

³⁸*Ibid.*, at 6

³⁹Pushkarova, *supra* note 18, at 45

⁴⁰Rhode, *supra* note 8, at 45

⁴¹*Ibid.*, at 6

⁴²Source Book, *supra* note 1, at 4

⁴³Rhode, *supra* note 8, at 6

Many legal systems around the world are characterized by complexities of procedures, which makes it a hard task for anybody accessing justice in courts. From expensive defense legal fees, coercive legal apparatus of the prosecution, and technicalities of court procedures, many an accused person would rather wish for a quick end to their trials, regardless of the consequences of their outcome. Uzelac *et al* reiterates this in the following excerpt by stating that:

The poor experience conflict when encountering the legal system, and do not recognise it as cooperative. They are reluctant to access the law for many reasons apart from the traditional social stigmatization which comes from any involvement with the judiciary. Being frequently or permanently exposed to illegality as both perpetrators and victims, they naturally do not voluntarily seek official contact with legal institutions. Because of their low education they also cannot comprehend legal language. This experience grounds deep mistrust in the law and an unwillingness or even fear to approach its institutions.⁴⁴

It follows then that if society has to assist the poor access justice and further advance the policy of equality under the law, then a system of legal aid needs be put in place.⁴⁵ Some developed and developing countries recognize the right to free legal aid for indigents as a matter of constitutional right.⁴⁶ The rationale behind this has clearly been articulated by Rhode below who avers that:

The rationale for subsidized representation seems particularly strong...where fundamental interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced. Under such circumstances, opportunities for legal assistance are crucial to the legitimacy of the justice system.⁴⁷

Rhode is further of the view that:

For many individuals, legal aid is equally critical in legislative and administrative contexts...not only does access to legal services help prevent erroneous decisions, it

⁴⁴Pushkarova, *supra* note 18, at 45-46

⁴⁵Emelonye, *supra* note 28, at 14

⁴⁶Source Book, *supra* note 1, at 16

⁴⁷Rhode, *supra* note 8, at 9

also affirms a respect for human dignity and procedural fairness that are core democratic ideals.⁴⁸

In many developing countries such as Kenya where death penalty is punishment for committing capital offences, the provision of free legal aid makes a lot of difference in situations where suspects have been charged of committing the said crimes, and cannot properly defend themselves due to the complexities involved in legal and judicial processes. Therefore, the need for free legal aid cannot be overemphasized.

⁴⁸ Rhode, *supra* note 8, at 9

CHAPTER TWO

THE MODELS OF LEGAL AID

This chapter explores the various methods of legal aid currently being employed in many countries today. It marks out the positive and negative side of each, which is important if states wish to adopt a cost effective model that will be best suited for the legal needs of their citizens.

Many “countries have adopted different models”⁴⁹ of providing “legal aid service mechanisms for criminal and civil matters”⁵⁰, but no such system is ideal.⁵¹ “As with Tolstoy’s unhappy families, each of these systems breeds unhappiness in its own way.”⁵² “Each country’s experience, however, can help inform the decisions of those seeking to reform legal aid.”⁵³ There exist three main types of legal aid model systems which are cost effective, and can be put into practice. These include “the *Ex officio* assigned counsel, the contracting and the public defender systems”⁵⁴ which will be discussed below.

The *Ex officio* assigned counsel⁵⁵

The *ex officio* model is one of the earliest models designed to assign lawyers to represent legal aid clients in court. This model relies on random assignment of lawyers to cases as a method of fairness. However, it does not take into account the effect of assigning barely competent lawyers to legal aid clients. It is for this reason that various nations which have adopted this method of legal aid, have inevitably evolved and

⁴⁹ Source Book, *supra* note 1, at 19

⁵⁰ *Ibid*, at 19

⁵¹ *Ibid* at 18

⁵² Rhode, *supra* note 8, at 11

⁵³ Source Book, *supra* note 1, at 18

⁵⁴ *Ibid*, at 19-22

⁵⁵ *Ibid*, at 19

developed it to avoid this outcome, and therefore provide a more fair system of lawyer selection.

“Many countries have adopted more refined *ex officio* models, under which attorneys are assigned on a rotational basis in accordance with their experience, their expertise, and the complexity of the case.”⁵⁶

The justification of the *Ex Officio* Model in randomizing appointment of lawyers is the very crux of criticism against the efficiency of this model: “Critics of the *ex officio* model point to its lack of control over the qualifications of the appointed lawyers and the quality of services”.⁵⁷ Rhode elaborates that:

Under competitive bidding systems, lawyers offer to provide representation for all, or a specified percentage of a jurisdiction’s criminal cases, in exchange for a fixed price, irrespective of the number or complexity of matters involved. Such systems discourage effective assistance by selecting attorneys who are willing to accept a high volume of defendants at low cost. Annual caseloads can climb as high as 900 felony matters or several thousand misdemeanors. Rarely can these lawyers afford to do adequate investigation, file necessary motions, or take a matter to trial.⁵⁸

It is apparent that the shortcomings of the *ex officio* model run deeper than the selection process, but also relate to the result of client paperwork overload.

The Contracting system⁵⁹

The contracting system is one method of legal aid that has worked effectively in the United Kingdom, and serves as a method of assigning lawyers to legal aid cases but without running the risk of selecting barely competent lawyers. This model is focused around a contract that is entered into by a law firm and the Legal Services Commission.

⁵⁶Source Book, *supra* note 1, at 20

⁵⁷*Ibid*, at 20

⁵⁸Rhode, *supra* note 8, at 12

⁵⁹Source Book, *supra* note 1, at 21

This contract guarantees quality of service by way of fee and caseload analysis of the firm in question.

There are also various other factors considered in determining the quality of the firms performance as a whole. This ensures more control over the qualifications of lawyers appointed to legal aid cases. This is further enforced in the United Kingdom in the following way: “In England the contracts for legal representation of indigent people, negotiated between the Legal Services Commission (formerly the Legal Aid Board), and law firms, contain certain clauses for quality of services and mechanisms for supervision.”⁶⁰ Furthermore, “a law firm must have complied with the standards of the code of professional practice, fulfilling requirements of conduct, files and records maintenance, accountability, and the like.”⁶¹

Public Defender System⁶²

The Public Defender System, similarly with the Contracting System, aims to ensure legal aid clients are provided with the best possible service upon appointment of a lawyer. However, this system is based upon the employment of full-time lawyers working for a governmental agency where their sole commitments are to handle the caseloads of legal aid clients.

The method aims to reduce costs and regulate the caseload of each lawyer so as to avoid reducing the quality of the service provided. One inherent difficulty in doing so is that it may not be possible for all cases to be taken on by lawyers due to sheer numbers.

This method also assures quality in the following way: “Regardless of the organizational structure or oversight mechanism, ethical rules and the codes of ethics

⁶⁰ Source Book, *supra* note 1, at 21

⁶¹ *Ibid*, at 21

⁶² *Ibid*, at 22

applied to private attorneys usually are binding on the staff of public defender offices as well”.⁶³ This system is used around the world but can be difficult to minimize costs depending on the potential case load.

Although these methods try to maximize the benefit to the client, each one of them, and its various evolutions around the world bear many shortcomings as Rhode argues that:

Under all these systems, the vast majority of court-appointed counsel lack sufficient resources to hire the experts and investigators who are often essential to an effective defense. The same is true for defendants who retain their own counsel. Most of these individuals are just over the line of indigence and cannot afford substantial legal expenses, their lawyers typically charge a flat fee, payable in advance, which creates obvious disincentives to prepare thoroughly or proceed to trial.⁶⁴

She is further of the view that:

Many defense counsel also face nonfinancial pressures to curtail their representation. A quick plea spares lawyers the strain and potential humiliation of an unsuccessful trial. Such bargains also preserve good working relationships with judges and prosecutors, who confront their own, often overwhelming caseload demands....Judges coping with already unmanageable caseloads have been reluctant to appoint “obstructionist” lawyers who routinely raise technical defense or demand lengthy trials.⁶⁵

In light of this, it is clear that a greater obstacle lies in the way of providing best legal services to legal aid clients. To eliminate both hurdles would call for even greater reform, therefore putting pressure on available resources both financial and non-financial. Although many inadequacies can be found in the methods of legal aid, it is very important not to lose sight of the ultimate goal, which is to enable one’s case to be heard in the general interest of justice.

⁶³ Source Book, *supra* note 1, at 22

⁶⁴ Rhode, *supra* note 8, at 12

⁶⁵ *Ibid*, at 12

CHAPTER THREE

AN ANALYSIS OF LEGAL AID IN KENYA AND THE UNITED KINGDOM (ENGLAND AND WALES)

LEGAL AID IN KENYA

This chapter analyses the legal aid system in both jurisdictions with an aim of pointing out the loopholes in the Kenyan legal aid Programme in order to propose further suggestions for reforms.

The 1963 Constitution of the Republic of Kenya in section 77 (2) (d) provides that anybody charged with a criminal offence shall be permitted to defend himself in court in person, or by a legal representative of his or her own choice. Further, the Criminal Procedure Code in section 193 provides for the right of an accused to be defended. The laws imply an entitlement of accused persons to legal representation.

However, this right, as is also portrayed through court practice, is only limited to persons who have committed capital offences.⁶⁶ “As a result, individuals accused of non-capital crimes or who want to bring a civil claim must represent themselves, hire a lawyer or hope to receive the help of a local non-governmental organization (NGO).”⁶⁷

However, the efforts of non-governmental organizations have been strangled by lack of sufficient funds. “To help alleviate this resource concern, the Open Society Initiative for East Africa recently donated more than 70 million Kenya shillings (approximately \$1 million) to provide legal aid to HIV patients.”⁶⁸ Besides human rights non-governmental organizations, other groups and organizations such as “local law

⁶⁶ <http://www.trust.org/trustlaw/country-profiles/pro-bono.dot?id=12600e6d-9822-41c2-bff1-579481b9108a>

⁶⁷ *ibid*

⁶⁸ *ibid*

school clinics, also provide an avenue to help provide legal aid to those who need it.”⁶⁹

Kenyan final year university law students, with the permission of the Attorney General can plead cases in courts for indigents.⁷⁰

Despite the concerted efforts by the non-governmental and human rights organizations to meet the legal needs of many people, majority of Kenyans live in a society that denies them equal access to justice. Kristin Kalla *et al* elaborates that:

The great majority of Kenyans do not have access to legal services in the formal justice system. Clement Ochola, an official with the Kenya’s Ministry of Justice, estimated that Kenya had fewer than 5,000 lawyers, most of whom charge for their services. There is no national free legal aid program in Kenya, and there are few organizations established as legal aid clinics through which people can obtain free or low-cost legal services.⁷¹

As a government that prides itself as one of the emerging countries in post-colonial Africa which is governed by the rule of law, and which also respects the tenets of constitutionalism, democracy and human rights, it clearly falls short of these expectations.⁷² Through its reluctance to operate a government funded national legal aid system, it has failed to provide an environment where the poor can access justice on an equal footing with the rich. The ineffective state-funded legal aid programme is only available to suspects charged of committing capital offences⁷³, leaving out others also being tried for other minor offences.

However, the government is now taking these concerns seriously. Through the 2003 reforms in “the Governance, Justice, Law and Order Sectors (GJLOS)”⁷⁴, it is

⁶⁹ <http://www.trust.org/trustlaw/country-profiles/pro-bono.dot?id=12600e6d-9822-41c2-bff1-579481b9108a>

⁷⁰ *ibid*

⁷¹ K. Kalla et al *Ensuring Justice for Vulnerable Communities In Kenya-A Review of HIV and AIDS-related Legal Services* (Open Society Initiative for East Africa 2007) p. 24

⁷² <http://www.hrw.org/africa/kenya>

⁷³ <http://www.kituochasheria.or.ke/>

⁷⁴ <http://www.knchr.org/images/stories/nguzo-za-haki-issue8.pdf> p.17

initiating changes. It identifies the lack of access to socially responsive and affordable legal and judicial services as critical issues that need to be addressed in the fight against poverty.⁷⁵ The breakthrough appeared to have come in 2008. The Kenya National Commission on Human Rights states that:

The launch of the National legal Aid (and Awareness) Programme in September 2008 by the Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA) is a milestone in the development of legal reform in Kenya. This came about after a series of initiatives and efforts by government and stakeholders geared towards the creation of a legal aid scheme that would ensure the poor and vulnerable in Kenya enjoy the protection of the law.⁷⁶

The Commission further points out that the main “objective of the Programme is to increase access to justice in Kenya especially for the poor, marginalized and vulnerable groups through the provision of legal advice and representation, creation of legal awareness and paralegal support and training.”⁷⁷

It affirms that the government has an obligation, and thus a strong commitment to improve the lives of Kenyans by improving access to justice for all, which can only be achieved through the effective implementation of the National Legal Aid Programme.⁷⁸ The Programme is a pilot project which will be implemented in phases in a three year period⁷⁹. “The thematic areas to be covered by the pilot project are; children’s justice, family law, defence of capital offenders, paralegal training and support and ADR.”⁸⁰

Pilot projects are important because many of them “have proved successful in initiating legal reforms because they allow communities to experience the benefits of new institutions at an earlier stage than they would otherwise, providing the opportunity for

⁷⁵ <http://www.knchr.org/images/stories/nguzo-za-haki-issue8.pdf> p.17

⁷⁶ *ibid* p. 17

⁷⁷ *Ibid* p. 18

⁷⁸ *Ibid* p. 18

⁷⁹ *Ibid* p. 18

⁸⁰ *Ibid* p. 18

proponents to mobilize public and political support.⁸¹ Further, they “may serve as ‘legislative laboratories’ for exploring the possible disadvantages of a particular programme and thereby minimizing the potential negative effects.”⁸²

LEGAL AID IN ENGLAND AND WALES

Legal aid in England and Wales is regulated by the Access to Justice Act 1999.⁸³ It establishes a Legal Services Commission which shall have functions relating to Community Legal and Criminal Defence Service. Further to this, the Commission is empowered by the statute in section 3 to enter into any contracts, make grants, make loans, invest money, promote or assist in the promotion of publicity relating to its functions, and to advise the Lord Chancellor on matters concerning the functions of the Commission.

Before the enactment of the Access to Justice Act 1999, legal aid in England and Wales “was administered by the Law Society, the Solicitors’ professional association. Assistance was provided by a solicitor chosen by the client. The solicitor would be paid by the state.”⁸⁴ However, the system had its own shortcomings. “It did not particularly focus on the quality of legal services.”⁸⁵ A major transformation though came in 1988 through the enactment of the Legal Aid Act 1988⁸⁶ as Uzelac *et al* explains:

A major change was introduced when its administration was transferred by the Legal Aid Act 1988 from the Law Society to a Legal Aid Board established as a ‘quasi-independent national government organisation’ (*quango*). The Board was statutorily responsible for managing the legal aid budget, decision-making in individual cases, and implementing policy, but was otherwise independent of the government, save that Ministers appointed its members and it had to report on its spending.⁸⁷

⁸¹Source Book, *supra* note 1, at 36-37

⁸²Source Book, *supra* note 1, at 37

⁸³<http://www.legislation.gov.uk/ukpga/1999/22/contents>

⁸⁴Pushkarova, *supra* note 7, at 46

⁸⁵*Ibid*, at 46

⁸⁶<http://www.legislation.gov.uk/ukpga/1988/34/contents>

⁸⁷Pushkarova, *supra* note 7, at 46

From the 1980s to the 1990s, “the Board developed the idea of ‘preferred suppliers’. This involved identifying a group of practitioners who could satisfy the criteria of competence and reliability, and it would then encourage and assist them by contracting partnerships under preferential terms in return for maintaining quality standards.”⁸⁸ In other words, this is what is referred to as ‘franchising’.

However, this system received sharp criticism from all quarters, especially in a publication released in 1994.⁸⁹ It “was based on one of the largest observational studies of practitioners ever conducted. Its findings were damning.”⁹⁰ The level of criminal quality was reported to be extremely low.⁹¹ Further, it was reported that legal assistance was mostly being provided by paralegals who were not lawyers, and who were merely responding to the evidence submitted by the prosecution instead of taking the initiative.⁹²

The “Law Society responded”⁹³ swiftly. Through a publication entitled ‘Active Defence’⁹⁴, it set out “guidelines and detailed best practices”⁹⁵ for solicitors on how to best conduct criminal cases. “The idea behind active defence is suggested by its title. The defence lawyers must take initiatives rather than always being responsive to the prosecution.”⁹⁶ At significant milestones in the case, they must analyse and take stock of the information obtained so far, secondly, consider the implication of this for the prosecution and defence cases, and thirdly, make decisions about the actions to be taken

⁸⁸ Pushkarova, *supra* note 7, at 46

⁸⁹ McConville J et al *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*. (Clarendon Press 1994)

⁹⁰ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 2

⁹¹ Pushkarova, *supra* note 7, at 46

⁹² *ibid* at 46

⁹³ *ibid* at 47

⁹⁴ R. Ede et al, Law Society

⁹⁵ Pushkarova, *supra* note 7, at 47

⁹⁶ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 3

in consequence, particularly defence investigation.⁹⁷

In order to improve the quality of legal services, the Legal Aid Board⁹⁸ decided to set up its own standards known as the Franchising Quality Assurance Specification (LAFQAS).⁹⁹ Roger Smith explains that:

The terms of the Specialist Quality Mark are based on standards devised by the Law Society at the urging of the Legal Services Commission. They represent a set of standards for the running of an efficient office. They require procedures not only to be in place but to be written down and demonstrably in place.¹⁰⁰

“Since then, only solicitors’ firms and non-profit advice agencies that have passed a quality audit and contracted with the Board have been entitled to receive state funding via the Board.”¹⁰¹ Though a number of solicitors have complained about the bureaucracy involved in this¹⁰², it has however helped improve the quality of provision of legal aid services in England and Wales.

Criminal Defence Service¹⁰³

The Access to Justice Act 1999 empowers the Legal Services Commission to “establish, maintain and develop a service called the Criminal Defence Service for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interest of justice require.”¹⁰⁴ Section 12 (2) of the Act defines and elaborates on what constitutes criminal proceedings. Unlike in Kenya, one of the most important things to note under the Act is that, any offence or order sanctioned by the criminal law of England and Wales

⁹⁷ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 3

⁹⁸ Currently known as the Legal Services Commission. See Access to Justice Act 1999

⁹⁹ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf>

¹⁰⁰ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 7

¹⁰¹ Pushkarova, *supra* note 7, at 47

¹⁰² <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 7

¹⁰³ Access to Justice Act 1999

¹⁰⁴ *Ibid* S. 12 (1)

shall be funded by the Commission in accordance with sections 13 to 15 of the statute.

Section 13 of the Act provides for advice and assistance. It provides that the Commission shall fund such advice and assistance it considers appropriate when individuals have been arrested and are being held in custody, or those individuals who are under investigations that may lead to criminal proceedings, or have been subject of criminal proceedings. And in the furtherance of this as provided in section 13(2), the Commission has the duty to facilitate the best legal services for a client. Section 15 of the Act is further in line with “the fundamental guarantees associated with the right to a fair trial embodied in international human rights treaties.”¹⁰⁵ It enables clients to choose lawyers to represent them at their best interests.

Section 18 of the Act¹⁰⁶ provides that the Lord Chancellor shall pay to the Commission such sums as are required to meet the costs of any advice, assistance and representation funded by the Commission as part of the Criminal Defence Service. However, to qualify for legal aid services as provided under the General Criminal Contract¹⁰⁷, one has to satisfy certain criteria. “An individual has to undergo a ‘means testing’ to show whether they can be eligible for funding. Means testing ensures that those who can afford to pay, do pay for legal representation.”¹⁰⁸ The Legal Services Commission expounds on who can qualify for legal aid funding. First, passported applicants will automatically pass the means testing. However, they still need to undergo a further Interest of Justice Test to qualify for legal aid.¹⁰⁹ “The initial means test assesses the applicant’s income and how this is spread between any partners and children. A full

¹⁰⁵ Source Book, *supra* note 1, at 10

¹⁰⁶ Access to Justice Act 1999

¹⁰⁷ [http://www.legalservices.gov.uk/docs/cds_main/GCC_\(Jan_08\)_25.09.07.pdf](http://www.legalservices.gov.uk/docs/cds_main/GCC_(Jan_08)_25.09.07.pdf)

¹⁰⁸ http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

¹⁰⁹ *Ibid*

means test is carried out if, through the initial means test, the applicant's adjusted income is calculated to be more than £12,475 and less than £22,325. It works out an applicant's disposable income after deducting tax, maintenance and other annual costs from the gross annual income. The complex means test is for those who have complex financial circumstances.”¹¹⁰ Finally, hardship reviews can be carried out if an applicant can show they are unable to fund their own representation.¹¹¹

The Legal Services Commission through the Criminal Defence Service (CDS) also provides Public Defender Services (PDS), which is the first salaried criminal provider in England and Wales.¹¹² Clients seeking legal aid have a choice of either choosing their own lawyers through the General Criminal Contract, or can have an option of going directly for lawyers employed by the Commission.

Besides guaranteeing that people charged and accused of criminal offences get free “legal advice and representation”¹¹³, the Criminal Defence Service (CDS) plays a very important role in the criminal justice system by helping “the police and courts operate fairly and efficiently.”¹¹⁴ This is very crucial if a verdict is to be arrived at fairly, and without compromise in a criminal adversarial system such as the one in England and Wales.

This chapter has enabled us to see how and why the English legal aid system is often referred to as the best in the world.¹¹⁵ With all the financial and legal resources at the Legal Services Commission's disposal, it is clear that access to justice in England and

¹¹⁰ http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

¹¹¹ *ibid*

¹¹² <http://www.legalservices.gov.uk/criminal/pds.asp>

¹¹³ <http://www.legalservices.gov.uk/criminal.asp>

¹¹⁴ *ibid*

¹¹⁵ Source Book, *supra* note 1, at 46

Wales guarantees equality of persons under the law.

The next chapter juxtaposes the legal aid system in both jurisdictions in order to see how best to revamp the Kenyan National Legal Aid Programme. Kenya's Legal Aid Programme is certainly not a match for the legal aid system in the United Kingdom (England and Wales). However, in the implementation of the recent legal aid pilot project, the country could borrow a leaf from the English system.

CHAPTER FOUR

COMPARISON OF THE PROVISION OF LEGAL AID IN KENYA AND THE UNITED KINGDOM (WALES AND ENGLAND), AND PROPOSALS AIMED AT IMPROVING THE LEGAL AID PROGRAMME IN KENYA

This chapter compares the system of legal aid in both jurisdictions, and proposes ideas for reforms that can be implemented in the Kenyan legal aid Programme, which is definitely not a match for the English legal aid system.

As previously discussed in this work, the right to legal representation for accused persons is an entitlement under the laws of Kenya. However, it is only under capital offences that the High Court usually can demand for legal representation for an accused, to be provided by the state. Also, it can request private lawyers to represent accused persons under a *pro bono* service. For other minor criminal offences, there is no absolute obligation on the state to provide free legal representation. However, prosecution risks losing the case if the court thinks that the outcome of the trial will be unfair due to lack of legal of legal representation for the accused.

Accused persons can defend themselves. However, they may not be in a position to comprehend the complexities involved in legal matters. Section 207 of the Kenya Criminal Procedure Code Act Cap 75 provides that an accused can represent himself in court. Upon entering a plea of guilty or not guilty, his admission shall be recorded, and a conviction based on the evidence adduced by the prosecution shall be pronounced, after all procedures outlined in the Code have been met by the court. Consequences here can be dire. Without legal representation, an accused may risk going to jail. If a lawyer is present, they can argue their case professionally on points of fact and law.

In England and Wales the scene is different. The Access to Justice Act 1999

confers a right to persons seeking free legal aid to approach the Legal Services Commission. Further, the Commission through the Criminal Defence Service provides professional lawyers for its clients under the Public Defender System. In this system, legal representation for all sorts of offences committed is therefore an entitlement, and not just a luxury of the few, a lesson that ought to be learnt by Kenya's legal and policy makers.

In Kenya, unlike in England and Wales, an order by the High Court to demand the Attorney General to grant free legal representation, or request a private Counsel to conduct *pro bono* services to defend suspects, usually commences after a person has been arrested, interrogated, charged and spent not more than forty-eight hours in the police cells, at times even more if the police claim that suspects have been involved in a crime of terrorism, and therefore wish to gather more evidence for prosecution before presenting them to court.

These actions, before the commencement of a trial without the presence of a lawyer, can clearly jeopardize the chance of a fair hearing on the accused. Without the presence of lawyer in the period of interrogations, a suspect can be forced to undergo torture, or other coercive methods of extracting evidence to extract confessions. Further, suspects may also not understand the gravity of their confessions if allowed to speak to the police without being cautioned. These actions are clearly against principles of fair trials as enshrined in international instruments, such as the United Nations Covenant on Civil and Political Rights under Article 14.

In England and Wales, from the point of arrest, interrogation and trial, a suspect if he chooses, can be represented by a state lawyer provided by the Legal Services

Commission. Public Defence lawyers are usually available twenty-four hours a day, seven days a week to give advice to people who have been arrested, and who are being held in police custody.¹¹⁶ Advice at the point of arrest, interrogation and trial is very important as distortion, or twisting of evidence in order to enhance the chances of winning a case, is a common phenomenon with prosecutions in most parts of the world.

In England and Wales, the Legal Services Commission just like its predecessor, the Legal Aid Board, is a “quasi-independent national government organisation”¹¹⁷, makes its own decisions free from government interference. This is important because political interferences can easily influence a State body at arriving in not so independent decisions, thus altering its image and performance. For example, political interference could easily influence the direction and position of a defence counsel handling a suspect’s file, especially in a highly charged political case. Though bound by the duty of confidentiality, and to serve clients best interests as provided under the lawyers’ professional and ethics code, a highly charged political case can easily change tide and turn against the client’s interests.

There is no clear cut line in the Kenya legal aid system as both counsel representing an accused, and the prosecution that wishes to put the accused behind bars, come from the same state institution. Files of suspects can easily be tampered with to suit government’s interests. For example, “the government may declare that certain evidence is protected by the State Security Secrets Law and local officials often classify certain documents to protect corrupt government officials.”¹¹⁸ It is therefore imperative, just like

¹¹⁶ <http://www.legalservices.gov.uk/criminal/pds.asp>

¹¹⁷ Source Book, *supra* note 1, at 46

¹¹⁸ <http://www.trust.org/trustlaw/country-profiles/pro-bono.dot?id=12600e6d-9822-41c2-bff1-579481b9108a>

in England and Wales, that lawyers representing accused persons should be provided by a quasi-independent body having the free hand to direct its own affairs. It is highly unlikely that there can be a separation of interests if both defence and prosecution counsel, receive instructions from the same office.

In England and Wales, criminal defence is usually conducted by qualified and well paid solicitors employed by the state through the Legal Services Commission, or private solicitors contracted by the same provider entrusted to provide quality legal services, in return for a handsome package. This promotes efficiency, quality of legal services and administration of justice. In Kenya, courts usually request private lawyers to do *pro bono* services, or as previously stated, orders the government to provide free legal representation for suspects charged of committing capital crimes. It has negative consequences. Save for the lawyers registered by the Law Society of Kenya to offer *pro bono* services, a majority of private lawyers normally do not like taking on these cases for obvious reasons.

The legal profession anywhere in the world is not a charitable event, and therefore in the course of helping courts arrive at fair decisions, lawyers usually expect a good sum of remuneration from their clients for the hard work, and a job well done. However in this case, most lawyers in Kenya will normally forward *pro bono* files to fresh law graduates interning, or those employed by their firms, to proceed with such matters. Fresh law graduates may be good at handling criminal matters. However, they lack the experience and expertise which senior lawyers have gained over a number of years, and which could be put into good use in criminal litigation.

On the other hand, state lawyers may also not do a good job of defending the best

interests of their clients. They are not as well paid compared to their counterparts in private practice who usually work for non-governmental organizations, such as the human rights organizations, and who usually earn twice as much as them. This fact makes most of state lawyers lose morale and vigor in pursuing a strong course of justice for their clients, and this is further compounded by the volume of work they have to do for little wages, which eventually dilutes their professionalism and kills the quality of their services. The Kenya government should take great consideration on this matter and contrast procedures from the English legal aid system.

In Kenya, the practice of the High Court requesting lawyers to represent suspects at times, results in poor work done. Most lawyers know which case is best suited for them. An Advocate specialized in civil matters taking on criminal matters may jeopardize a good case which could have gone in favor of an accused. However, this is not aimed at discrediting the credentials of any trained lawyer handling both civil and criminal matters accordingly. In England and Wales, Public Defence Service lawyers are specialist lawyers who solely dedicate their time to criminal matters, and through time, continuous training, and in and out of court experience, have acquired the expertise needed to produce good results in criminal litigations. Therefore, lawyers with experience in other fields may be at a disadvantage during litigation.

Despite lack of sufficient funds in facilitating an efficient National Legal Aid Programme, other factors as well such as corruption and lack of accountability, play a big role in stunting the dreams of many Kenyans: the realization of a legal aid scheme that can guarantee equal and effective justice for all. A large sum of monies allocated to the legal aid system of England and Wales is usually accounted for. The British government

reckons with the fact that equal access to justice is an important element for attaining equality, and also ensuring economic stability and prosperity. Thus, it “spends more per head of population than any other country on legal aid in criminal matters and, indeed, on civil matters as well.”¹¹⁹ It is therefore important that the Kenya government places greater emphasis in tackling corruption in order to ensure the survival of the new legal aid Programme, and to assure donors’ confidence that their money is being used effectively and efficiently.

Providing legal aid that is sufficient to cater for the need of every citizen in a country is a great challenge. Indeed, non-governmental organizations such as *Kituo Cha Sheria* (Centre for Legal Aid), deserve much credit for initiating, and developing legal aid projects in Kenya as early as 1970s. With proper management of internal and external funds, the Kenya government can easily sustain the new legal aid programme and ensure access to justice for all. By adopting some, if not all ideas from the English legal system, such as the criteria used to determine persons eligible for legal aid and establishments of law centres among other things, could ensure a sustainable legal aid scheme that guarantees many an access to justice through legal representation, and which would further save taxpayer’s money.

Much insight can be taken from the mechanisms employed in the English legal aid system. It is a unique system, has stood the test of sixty one years since its inception in the modern form, and continues to deliver quality services to the people of England and Wales. However, the most important lesson to be learnt is that, the creation of an independent body equivalent, and functioning in the capacity such as that of the Legal Services Commission of England and Wales, free from government, or political

¹¹⁹ <http://www.justice.org.uk/images/pdfs/legalaidqual.pdf> p. 1

interference and instructions, can best deliver legal aid services to the millions of Kenyans yearning for it.

CONCLUSION

Revamping the legal aid system is a costly affair. The human and financial resources employed in reforming such a system would be immense, and most governments would clearly feel the strain. However, as previously discussed in this discourse, equal access to justice is a core principle of law in democratic societies. For a country to achieve progress socially, economically and politically, then equal access to justice plays a vital role. “Access to justice is not only central to the exercise of constitutionally guaranteed rights, but also to the reduction of poverty.”¹²⁰

Access to justice through legal representation as has been previously discussed, is a fundamental right. Costs involved in legal aid reforms cannot outweigh the value of a person’s right to access justice, or be adequately defended by a lawyer when on trial. “Therefore, the question of financing legal aid system is not a question of charity but a matter of positive state obligation.”¹²¹ Through low cost and effective mechanisms of employing legal aid such as those ones discussed in chapter three, many people can be assured of accessing justice. Internal and external funds if utilized properly, again as previously discussed in chapter four, can make a whole lot of difference in ensuring sustainable funds are available before another financial year to cater for the legal aid needs of indigents.

The 1963 Constitution clearly stipulates that the right to legal representation is an entitlement. Therefore, there is no legitimate reason why the Kenyan government should be selective while granting legal aid to persons who have been accused of committing both capital or minor offences. If some, or all mechanisms employed in the English legal

¹²⁰ Pushkarova, *supra* note 7, at 45

¹²¹ Source Book, *supra* note 1, at 46

aid system can be implanted into the Kenyan legal aid Programme, then a dream of an equal society will be realized, and fair trials will be guaranteed in criminal matters. This work is not exhaustive, and therefore further research for enhancing the Kenyan Legal Aid Programme is encouraged.

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