

Access to Justice and Legal Aid: A Human Rights Approach

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Executive Summary

This thesis proposes a human rights approach to access to justice and consequently a human right to legal care. The reason for this is that the legal aid system as it is presently constituted does not meet the needs of persons who wish to make use of the system to make rights effective. The rhetoric surrounding the need for legal aid has changed considerably over the years but the underlying principles have not. A right to legal aid only exists for criminal matters (not in every jurisdiction) and a limited right exists for civil matters. By considering access to justice in its broad sense, beyond legal representation and access to justice institutions, it is discovered that a right to legal aid does not exist.

This thesis concludes that the role of legal aid in development, especially in the wake of the global need to eradicate poverty, has reached a stage that it should be considered as a human right to legal care. Human rights provide a legitimate claim on the government to provide the institutions and services necessary to make rights meaningful and effective.

INTRODUCTION

There is growing interest in human development circles on the relatedness of poverty and human rights.¹ The United Nations Development Programme (UNDP) identifies poverty as one of the main limits to enjoying rights.² What this means in essence is that poverty may not always entail a denial of rights but may also refer to the absence of power to enforce rights. Powerlessness is seen as the lack of capabilities or effective participation in government to ensure that policies are not unjust and that the government is accountable for unenforcement of rights.³ It was Foucault who was quoted as saying 'It's the characteristic of our Western Societies that the language of power is law, not magic, religion or anything else.'⁴ Foucault's statement is not restricted to only Western Societies but it represents what is obtainable in every society all over the world. Without power there are no effective rights and no real obligations.⁵ This forms the basis for this thesis; if the law is power, then utilization of the law and knowledge of the law empowers, and so the means through which access to the law is made possible ought to be protected.

¹ See Gobind Nankani, John Page, Lindsay Judge eds., *Human Rights and Poverty Reduction Strategies: In Human Rights and Development*, Philip Alston and Mary Robinson Eds., Oxford University Press (2005) at 478. Since the Millenium Declaration, there has been steady and growing momentum for the eradication of poverty all accross the World. States are being asked to show initiatives they are developing to reduce poverty. An example is the Poverty Reuction Strategy Papers States are obliged to develop before borrowing money from the International Monetary Fund and the World Bank. As a result of this rising necessity, research into this area has shown that poverty reduction promotes objectives which are similar to those of human rights.

² United Nations Development Practice Note on Access to Justice (2004) at page 3.

³ Rosalind Eyben, *Linking Power and Poverty Reduction in Power, rights and poverty: concepts and connections*, edited by Ruth Aslop, Published by the World Bank (2005) at page 17.

⁴ Alastair Hudson, *Towards a Just Society: Law, Labour and Legal Aid, Citizenship and the Law Series* (1999) at page 93.

⁵ Alastair Hudson, *Towards a Just Society: Law, Labour and Legal Aid* , Ibid at page 3.

Statistics reveal that about 440 million persons the world over live below the poverty line.⁶ If it is accepted that poverty serves as a bar to enforcement or enjoyment of rights, then the number of persons referred to here do not only reveal the number of people that live on an average of less than \$2 a day,⁷ but also refers to the percentage of persons who also suffer from legal exclusion. The report of the Legal Commission for the Poor finds that about 4 billion people live outside the Rule of Law.⁸ Reforms to eradicate poverty have in the past recognized the law as a vital instrument to combat social exclusion⁹.

Even though poverty is usually associated with low income, it has also been referred to as the lack of 'intangible assets and social goods,'¹⁰ such as legal identity, good health, physical integrity, freedom from fear and violence, organizational capacity, the ability to exert political influence, and the ability to claim rights and live in respect and dignity.

The Law has been identified as key to empowering people to mobilize to place demands on the government, and to challenge oppressive government policies. But of what use are rights contained in the law to persons who by reason of poverty or exclusion do not know of the existence of such rights or the obligation that the government owes them? Legal aid is referred to as the modern answer to the ancient problem of providing justice for the poor.¹¹ However, an emphasis on legal aid through the instrumentality of litigation as a means of

⁶ Thomas Pogge, Poverty and Human Rights, at page 1.

http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf

⁷ Thomas Pogge, Ibid at page 1. This is the World Bank's poverty line.

⁸ Report of the Commission on Legal Empowerment for the Poor, Making the Law Work for Everyone, Volume 1, 2008 at page 15. The report says that most poor people do not live under the shelter of the law but far from the law's protection. It is important to note that 4 billion also represents the number of persons who live under the poverty line. See Thomas Pogge, Human Rights and Poverty, Ibid at page 1.

⁹ Byrnt Garth, Neighbourhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession. Sijthoff and Noordhoff International Publishers, 1980 at page 17.

¹⁰ Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary General to the Sixty-Fourth Session of the United Nations General Assembly, July 1999 at page 4.

¹¹ Don Fleming, Legal Aid and Human Rights, Paper Presented to the International Legal Aid Group Conference, Antwerp, 6th-8th June, 2007 at page 15.

reforming substantial rules to enable reforms has failed to deliver expected results.¹² The underlying assumption of placing an emphasis on the litigious side of the law lies in the fact that ‘social justice is available through procedural justice.’¹³

From the highly developed and sophisticated legal aid system in the United Kingdom to the developing and not so advanced system in Nigeria the issues largely remain the same. How can the legal aid system be poised to deliver effective access to justice and delivery of services required to meet the needs of all persons, and especially disadvantaged and marginalized groups?

Amidst the search for greater efficiency and wider coverage to those who need legal assistance, the latter part of the 20th century witnessed a general decline in public funding for legal aid schemes.¹⁴ For example, England and Wales adopted policies to reduce state funding for legal aid and as a consequence the eligibility criteria for those who may require aid was tightened, and the percentage of persons who could ordinarily access legal aid significantly cut down¹⁵. The reason for this and its practical impact has certain dimensions worth considering especially from a human rights perspective. Breger argues that the eligibility criteria for legal aid raise issues of ‘choices between ethical and social principles.’¹⁶ This begs the question, should the justification for efficiency in the administration of the justice system translate to narrowing the category of persons and cases that merit Legal aid? Or should certain other considerations like the apparent lack of

¹² Legal Aid and World Poverty: A Survey of Asia, Africa, and Latin America by Committee on Legal Services to the Poor In the Developing Countries, *Modern Law Review*, Volume 38, No. 6 at page 718-720.

¹³ Deborah L. Rhode, *Access to Justice*, Oxford University Press, 2004 at page 5.

¹⁴ Decline in Legal aid Eligibility in England and Wales began in the 1980s. Legal aid initially covered 80% of the population but by the 1980s it dropped to 40%. See Ole Hansen, *A future for Legal Aid?* *Journal of Law and Society*, Volume 19, No. 1 (Spring 1992) at pages 85-100.

¹⁵ See report of the Access to Justice Alliance which alleges that the Access to Justice Act in England and Wales has led to the number of acts of assistance cases in Civil Legal Aid to go down by 42% in 4 years.

<http://www.justice.org.uk/ourwork/legalsystem/index.html>

¹⁶ Berger Marshall, *Legal Aid for the Poor: A Conceptual Analysis*, *N.C.L Review* (1982) at page 282.

resources, in developing Countries for example, provide a good ground to foreclose an entitlement to legal assistance?

Moorehead and Pleasance state that efficiency is often a euphemism for cost containment¹⁷ by the government. In their view this is based on the fact that policy makers have been unable to articulate a persuasive case for the value of the law, unlike other issues such as health or education. Fleming agreed with this view expressed by Moorhead and Pleasance, when he stated that research has shown a general disparity on the ideology of legal aid. The conclusion he drew was that legal aid lacked a coherent ideology ‘at various times and in different environments legal aid has been justified as advancing values that are not only divergent but often fundamentally inconsistent.’¹⁸

This thesis proposes a human rights approach to the understanding of access to justice and legal aid. It explores the limitation in the principle of access to justice as the basis for legal aid provision when the focus is on legal justice. This thesis further explores the possibility of understanding the value of legal aid by focusing on the role of legal aid in the protection of ‘personhood’ and the larger role it has in society in mitigating the causes of poverty and social exclusion. It explores legal aid within its social engineering framework as a means of achieving substantive equality and social reform. This thesis argues that the role of legal aid in development has reached a stage that legal aid should be considered as a human right to legal care. The reason for this being that human rights provide a legitimate claim on the government to provide the institutions and services necessary to make rights meaningful. As Cappelletti and Garth have noted, other social rights become illusory without a right of access to justice¹⁹.

¹⁷ Richard Moorhead and Pascoe Pleasance, *After Universalism: Re-Engineering Access to Justice*: Journal of Law and Society, Vol. 30, No. 1, (Mar., 2003), at page 3.

¹⁸ Don Fleming, *Ibid* at page 15.

¹⁹ Mauro Cappelletti and Bryant Garth, *Access to Justice and the Welfare State: An Introduction*, at page 1.

Chapter 1 will review early conceptions of legal aid. The aim of this review will be to show that the conception of legal aid and the value of legal aid has always been affected by the societal values and the assessment of what the legal need is. This chapter will consider the relationship between; Legal aid and Charity, Legal aid and Access to Justice, Legal aid/Access to justice and the Welfare State. It will show how legal aid came to be associated with access to justice, in terms of procedural justice, or access to the Courts and the limitations of this conception.

Chapter two will explore how the concepts discussed in Chapter one, especially the classical conception of access to justice, affected the institutions established to deliver legal aid in the three jurisdictions under review. This chapter will also consider the limitations that were encountered in legal aid service delivery as a result of several factors. Such as restrictions that were placed on legal aid service provision because of its administration at the direction of the law society in England and Wales, the lack of a comprehensive government policy and racial citizenship legislations in South Africa, and lack of ‘a well thought through’ legal aid law plus excessive government interference in the functioning of the institution in Nigeria.

Chapter Three will consider classical values fundamental to Access to Justice in the understanding of Legal Aid. These values have been used as the normative basis for the provision of legal aid. This chapter will analyze the limitations inherent in those concepts to achieving social justice. This chapter will discuss the human rights approach as the ‘modern’ way of rethinking Access to Justice and Legal Aid by briefly considering the trend in international discourse, and by considering the role of legal aid in combating poverty and reducing social exclusion. This chapter will propose the concept of Legal empowerment of

the poor as the key to re-distribution of legal services in a manner which ensures that the delivery of free legal aid is achieved in an efficient way and effective way.

Finally, Chapter four states that the human rights approach to Access to Justice and Legal Aid can be translated to effective access to justice for the poor and it also guarantees that governmental role and responsibility is also secured.

CHAPTER 1-EARLY CONCEPTIONS IN THE DEVELOPMENT OF LEGAL AID

1.1 Introduction

In order to understand the role of legal aid in society, it is necessary to have a historical overview of the general development of legal aid. It is relevant to evaluate the type of obligation a particular conception of legal aid placed on the government. The premise of this thesis is that one of the major problems with assessing the relevance of legal aid is the failure to put value to legal aid.

The development of legal aid within the period under review will also reveal that the institutional arrangements put in place to assure legal aid service delivery is affected by the assessment of what the legal needs of persons are at a particular time. This background will help in understanding the choices of different Governments on the steps taken to provide legal assistance for the poor.

1.2 Legal Aid as Charity

Earlier conception of legal aid perceived it as a charity.²⁰ This early understanding left to the churches and other private institutions the responsibility for providing legal assistance to the poor when it did not relate to judicial proceedings.²¹ Lawyers who offered their services to poor persons did this solely on a charitable basis. This has been referred to as the history of the beginning of 'organized charity'.²² This development led to what was to be known as 'the

²⁰ Mauro Cappelletti and James Gordley, Legal Aid Modern Themes and Variations Part One: The Emergence of a Modern Theme, Stanford Law Review, Vol. 24. No. 2 (January 1972) at page 351. Legal Aid was seen as a form of assistance, *charitas*, to the *miserabiles personae* of the Christian Community, which was given by the Church and Christian men as a form of piety.

²¹ Mauro Cappelletti and James Gordley, Ibid, at page 351. Under the English System this was regarded as proceedings *in forma pauperis* which was criticized as existing only on paper, and also the office *Avvocatura dei Poveri* known as the public attorney for the poor in Italy.

²² Richard I. Morgan, The Introduction of Civil Legal Aid in England and Wales, 1914-1949. Twentieth Century British History, Vol. 5, No. 1, 1994 at page 38.

Poor Mans Lawyer',²³ in England and Wales, so called because Common law at that time belonged to the freedman.²⁴

The situation was described by Leat²⁵ thus;

'The cause of poverty was seen to lie not primarily in the social structure or political sphere but rather in the individual. The individual, according to this theory, had been corrupted by indiscriminate almsgiving which was in turn partly a result of the geographical and thus social separation of rich and poor. Charity divorced from knowledge and the control which personal gift giving brings was indiscriminate charity and thus necessarily harmful: "By passing through official hands the gift loses the redeeming influence of personal kindness and the recipient regards it not as charity but as a largesse to which he has a right...access to the law were (sic) for the most part irrelevant. Indeed legislation was seen by many as serving to exacerbate the problem by increasing reliance upon the State and weakening self-reliance. Similarly, access to the law was regarded as irrelevant, if not harmful, in that it implied that the problems of the poor lay somewhere other than in the individual',²⁶

This excerpt explains the belief that was prevalent at that time, which attached the state of being poor to the individual himself and not the State or any other factor beyond the control of the individual. Silver states in her article on Social Exclusion and Social Solidarity that it was for this reason the French rejected the British concept of poverty because they (the French) recognized that it was an issue of collective responsibility for

²³ Diana Leat, The Rise and Role of the Poor Mans Lawyer, British Journal of Law and Society, Vol. 2, No. 2 (Winter 1975) .

²⁴ Ibid, at page 166.

²⁵ Diana Leat, The Rise and Role of the Poor Mans Lawyer, *ibid* at page 168-169.

²⁶ Diana Leat, *Ibid* at page 169.

any citizen suffering from the failure of the State and not an issue that was to be left to Christian charity.²⁷

1.3 Legal Aid and Access to Justice in the Welfare State

The period around 1945 when the Legal Aid Institution was to be formally set up in England and Wales was the post world war period. There were so many factors that influenced the type of legal aid scheme that was set up. Goriely wrote that one of such factors was the post war mood at the time, which was one of hope and social solidarity.²⁸ Goriely stated that the benefits of the welfare state were not to be minimum benefits for the few but equal benefits for all.²⁹

The access to justice movement became important with the rise of the welfare state and its proclamation of new rights especially for disadvantaged persons.³⁰ It was therefore necessary to find the responsibility of the Government in facilitating the protection of rights within the welfare state priority.³¹ The guarantee of the right to counsel for persons who could not afford one, became important, and this was viewed as part of the states responsibility in providing such other welfare benefits as health, education and housing even though it was not universally available as these other benefits.³² Further, justice institutions are said to be state creations, and since the rights of persons are also proclaimed by the state, it is therefore the

²⁷ Hilary Silver, Social Exclusion and Social Solidarity, Three Paradigms, International Labour Review, Volume 133, 1994 at page 537.

²⁸ Tamara Goriely, Rushcliffe Fifty Years on: The changing Role Civil Legal Aid Within the Welfare State, Journal of Law and Society, Volume 21, No.4 (December 1994) at page 546.

²⁹ Tamara Goriely, Rushcliffe Fifty Years on, Ibid at page 546.

³⁰ Mauro Cappelletti and Bryant Garth, Access to Justice as a Focus of Research, 1 Windsor Yearbook of Access to Justice (1981) at page x.

³¹ Mauro Cappelletti, Access to Justice and the Welfare State, Florence, Italy, European University Institute (1981) at page 20.

³² Alastair Hudson, Regeneration, Legal Aid and the Welfare State, at page 1
<http://www.alastairhudson.com/legalsystem/legalaid&welfarestate.pdf> Last Accessed 20th of November 2010.

responsibility of the state to remove barriers that could prevent the effective actualization of these rights.³³

Another argument that made access to justice important at this time was that, access to justice was seen as the means through which welfare was to be distributed in the way the parliament intended it.³⁴ Goriely cites Cappelletti and Garth as stating that social or welfare rights at that time required individual legal enforcement and individual legal enforcement required people to have access to justice.³⁵ Goriely did not agree with this argument, because in her opinion, individual legal enforcement was just one method of enforcing social rights. The different methods of enforcing social rights had a huge impact in determining what legal aid was expected to do.³⁶

As it was with the traditional framing of what legal needs are, many countries recognized the obligation of the state to provide access to justice within a very limited framework. Access to Justice meant access to courts. Access to courts meant access to civil (to a limited degree) and criminal proceedings, based mainly on 'equality of arms' principles.³⁷ This as stated earlier, has been criticized as being completely insufficient.³⁸

³³ Mauro Cappelletti, *Access to Justice and the Welfare State*, Ibid at page 20.

³⁴ Tamara Goriely, *Making the Welfare State Work: Changing Conceptions of Legal Remedies Within the British Welfare State*, in *The Transformation of Legal Aid: Changing Conceptions of Legal Remedies Within the British Welfare State*, Francis Regan ed., at page 89.

³⁵ Tamara Goriely, *Making the Welfare State Work*, Ibid at page 90.

³⁶ Tamara Goriely, Ibid at page 90.

³⁷ Hilary Sommerlad, *Some Reflections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid*, Ibid, page 350.

³⁸ Cappelletti and Garth also agree that this earlier understanding of access to justice and procedural concern of access was too restrictive. They therefore stated in the 'third wave' of access reform that the focus was more on substantive focus on rights. See Mauro Cappelletti and Bryant Garth, *Florence Access to Justice Project Series, Volume 1 and 2* (1978)

1.3 Legal Aid as an Imperative to Access to Justice

1.3.1 Introduction of the Concept of Access to Justice

Over the course of time legal aid came to be understood in the light of requirement of access to justice and more particularly justice for the poor³⁹. The development of the concept of Legal aid and the rising need for aid, also led the International Community and Regional organizations to recognize the requirement for access to justice and equality before the law as important concepts for a democratic society and also as important components for the Rule of Law.⁴⁰

The discussion following will focus more on the relationship that exists between access to justice and legal aid, with a focus on how the understanding of legal aid as an access to justice concern substantially changed the way in which legal aid services were delivered and the manner in which the role of lawyers was re-conceived. The problem with limiting legal aid to particular conception of access to justice has been aptly captured by Alderson Smith reviewing Mr Herbert Smiths report on ‘Justice and the Poor’⁴¹

He has, however, a tendency to dwell with too great insistence on the litigious side of the question, often, apparently, forgetting that it is only a minority who ever have cause to bring the adjudication or enforcement of their rights before a court of law, whereas, at some period of their lives, many have to seek advice either as to the definition of their rights, or by way of arbitration quite apart from that form of arbitration exercised by the Courts. It is in this latter form that it is

³⁹ Steve Hynes and Jon Robins, *The Justice Gap Whatever happened to Legal Aid?* Legal Action Group (March 2009) at page 70

⁴⁰ Eileen Skinnider, *The Responsibility of States to provide Legal Aid*, <http://www.icclr.law.ubc.ca/publications/reports/beijing.pdf>. See also Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later* in Francis Regan et al, *The Transformation of Legal Aid: Comparative and Historical Studies* (1999). Earl Johnson argues that equal access to justice to all citizens was not the primary impulse for transformation in the American Legal Aid History but that Government funding for civil legal services was built on the hope that the law could be used to change the lives of poor people.

⁴¹ H.M Alderson Smith, *Justice and the Poor*, *Journal of Comparative Legislation and International Law*, Third Series, Volume 2, No. 3 (1920) at page 298.

desirable that the lawyer should be made more available to the poor man, and it is in this same way that the systems adopted by the State fail to satisfy the want.

1.3.2 Traditional Conception of Access to Justice

Traditionally access to justice has been referred to in terms of procedural availability of lawyers to the poor.⁴² Access to justice initiatives sought to bridge the gap between the rights of persons formally proclaimed in the law and rights effectively guaranteed.⁴³ Cappelletti and Garth stated that early reformers within the access to justice movement defined the problem at that time in terms of a relatively traditional view of the law and the legal system where ‘unenforced rights represent unmet legal needs’ which could be met if lawyers were made more accessible.⁴⁴ This reform was a means of ‘correcting a procedural flaw’ or what they referred to as ‘imbalance of advocacy’ to meet the legal needs of the poor⁴⁵. Access to justice therefore took the form of institutional arrangements to ensure that people who did not have the resources or capacity to enforce their rights had access to the justice system⁴⁶. The assumption lay in the fact that lawyers could be instrumental in combating social exclusion.

It is however obvious, judging from the volume of research in this area,⁴⁷ that legal aid has not sufficiently or effectively responded to the problems associated with access to justice. For one, the actual needs to which legal aid can respond to have been said to be limited since ‘inequalities are economic, social and political.’⁴⁸ Whilst Legal Aid in concerns in Countries

⁴² Mauro Cappelletti, James Gorderly and Earl Johnson Jr., *Toward Equal Access to Justice: A Comparative Study of Legal Aid in Modern Societies*.

⁴³ Mauro Cappelletti and Bryant Garth, *Access to Justice and the Welfare State: An Introduction*, in *Access to Justice and the Welfare State*, Mauro Cappelletti, ed. (1981, Italy) page

⁴⁴ Mauro Cappelletti and Bryant Garth, *Access to Justice as a Focus of Research*, (1981) 1 Windsor Yearbook of Access to Justice, at page xi.

⁴⁵ Mauro Cappelletti and Bryan Garth, *Access to Justice as a Focus of Research*, Ibid at page xii.

⁴⁶ Albert Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, Research Report, Research and Statistics Department of Justice Canada. http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_5/rr03_5.pdf Last Accessed on 20th October 2010.

⁴⁷ The Florence Access to Justice Project is one of such researches that were undertaken to better understand the concept of Access to Justice from different fields of study.

⁴⁸ Richard Morehood and Pascoe Pleasance eds., *After Universalism Re-engineering Access to Justice*, “Access to Justice After Universalism”, *Journal of Law and Society*, Volume 30, Number 1, (March 2003), page 1

such as Nigeria is focused on issues that have to do with civil and political rights and protection of fundamental rights and freedoms.⁴⁹

Furthermore, the justice that was envisioned by this movement has failed to be substantially realized.⁵⁰ Morehood and Pleasance cite Goriely and Patterson in saying that ‘there are also questions over the utility of rights of access to justice, centered on the ability of lawyers and legal processes to deliver substantial benefits to the poor.’⁵¹ Sommerlad claims that the autonomy of the law itself impedes direct engagement with the causes of social exclusion.⁵²

Research in this area is reflected by Cappelletti’s summation⁵³ that the assessment of access to justice may be done by considering the question of “access” where the focus usually is to reduce barriers that prevent disputants to lawyers, courts and court like machinery or on the other hand, one might choose to look at the issue from the point of view of the “justice” which results from improved access. What this translates to in essence, in his view, is that the consideration may stop at the vindication of rights through accessibility to the legal institution or one may choose to look further to the beneficial changes in the lives of persons for whom these rights were created.⁵⁴

Proceeding from the first premise, most research has focused on the relationship between the ‘legal need’ of the poor which is usually interpreted as lack of access to lawyers and the result of the access which is vindication of rights by guaranteeing representation in court

⁴⁹ Fundamental rights and freedoms are contained in Chapter 4 of the Nigeria 1999 Consitution. They refer to the right to life, liberty, fairhearing, freedom of expression, freedom of thought etc. Lega Aid is available as of right for persons accused of committing criminal offences where the right to life or liberty is at stake.

⁵⁰ Hilary Sommerlad, Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid, *Journal of Law and Society*, Volume 31, Number 3 (September 2004) page 347.

⁵¹ Richard Morehood and Pascoe Pleasance eds., *After Universalism Re-engineering Access to Justice*, Ibid, page 1.

⁵² Hilary Sommerland, Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid, Ibid, page 348.

⁵³ Mauro Cappelletti and Bryant Garth, *Access to Justice as a Focus of Research*, Ibid, page xiv.

⁵⁴ Ibid.

regardless of what the outcome of the case may be.⁵⁵ Focus on the justice concern may usually draw the conclusion that procedural access to justice is suitable to meet only certain needs of the poor. If the wider spectrum of purposes is not met, then a recommendation to look to such other alternatives that may be more suited is ultimately drawn.⁵⁶ The problem is therefore identified as the problem of the formal justice institution itself. For example, Gargarella writing about the access to justice problems in Latin American Countries concludes that ‘I believe that the system of “formal” justice does not need to be “complemented” by a new one, it needs rather to be replaced gradually by a different one’.⁵⁷

Can the issue of legal aid within the access to justice discussion, be more properly assessed by looking at “access” and “justice” not as two separate concerns, but by an understanding that the type of justice essential when discussing disadvantaged and excluded persons may be determinative of what kind of access the state is duty bound to provide? This thesis explores for example, the fact that legal empowerment programmes through the legal aid institution have the capacity to produce results that are more favorable to indigent persons. This is more so when the focus of the system is not on what lawyers can do but rather on what the people need in terms of services that can be delivered whether from lawyers or non-lawyers.

1.4 From Charity, to Benefit, to Procedural Right

This chapter has revealed that legal aid has been a dynamic concept which has changed considerably over the course of time. The understanding of poverty and the conception of the role of the state affected what value was placed on legal aid. With the introduction of the fundamental principle of access to justice the importance of legal aid was recognized as being more than just charity or benefit to being a procedural right to access to justice institutions.

⁵⁵ See for example, Earl Johnson, Jr. Elizabeth Schwartz, Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants. Part One: The Legal Arguments (1978) 11 Loyola of Los Angeles Law Review. 249

⁵⁶ Roberto Gargarella, “Too Far removed from the People” Access to Justice for the Poor: The Case of Latin America, http://fly.undp.org/oslocentre/PAR_Bergen_2002/latin-america.pdf

⁵⁷ Ibid, page 15.

The emphasis on access to justice as a procedural right was shown to be a misconception of what the unmet legal need is. Defining the unmet legal need in a narrow and procedural manner narrowed the concept of legal aid to lawyers and courts. But is a conceptualization of access to justice really important? The next chapter seeks to show how the understanding of access to justice was institutionalized in the form of legal aid institutions that served a very narrow class of persons. We will also see how this understanding of legal aid and its role in the State affected the responsibility of States for legal aid and the harm this coursed to access to justice for vulnerable persons through the failure of government to ensure an effective access to justice system which protected the rights of persons.

CHAPTER 2-EVALUATION OF THE DEVELOPMENT OF STATE FUNDED LEGAL AID SCHEMES

2.0 Introduction

This chapter explores the development of legal aid in the three jurisdictions under review with a view to showing how the early concepts analyzed in Chapter one were incorporated in the establishment and development of the understanding of legal aid in these jurisdictions. It is necessary to give a historical account of the emergence of publicly funded legal aid schemes because publicly funded legal services in different countries are affected by local culture and history.⁵⁸ It is also considered here that, the different blends of values expressed in a society's legal aid services are not accidents but reflect deliberate choices made by Government in the development of the society.⁵⁹ This indicates that the type of legal aid service delivery in a particular state is unique (or ought to be unique) in accordance to the social context. It also suggests therefore, that a one-size fits all approach to implementing legal aid is not possible. This however, does not exclude the possibility of learning from the strengths or weaknesses found through a study of legal aid institutions from different jurisdictions.

Consequently, this chapter also explores how several influences such as the law Society in England and Wales, the political situation in South Africa and the role of the Government in Nigeria have affected the development of legal aid and how this has impacted on access to justice. This chapter concludes that legal aid is such a serious matter that cannot be left to a single authority to decide or to be in effective control over. Legal aid should be beyond the

⁵⁸ Roger Smith, Legal Aid Models of Organisation, Paper Written for a Conference of the European Forum on Access to Justice, Held in Budapest, 5th-7th December, 2002 at page 3. Available at <http://www.justice.org.uk/images/pdfs/legalaid.pdf>

⁵⁹ Francis Reagan, Why do Legal Aid Services Vary Between Societies? Re-examining the Impact of Welfare States and Legal Families in Francis Reagan, Alan Paterson, Tamara Goriely, Don Fleming eds., The Transformation of Legal Studies: Comparative and Historical Studies, Oxford University Press, 2002 at page 179.

reach of political maneuver, and should be given its proper place as a basic human right which requires protection even from the State itself.

2.1 Development of Legal Aid in England and Wales

2.1.1 Introduction

The Modern Development of Legal aid in England and Wales is divided into 3 distinct phases. The first phase is said to be the Establishment of the Legal Aid Service following the recommendation of Lord Rushcliffe in 1949. The second phase is said to be the Reform of Legal aid in 1989 and finally the establishment of the Legal Aid Board in 1999. However, the evaluation of the development of Legal aid in England and Wales will be traced back a bit to the period earlier to 1949 to better understand some of the fundamental principles and values regarding legal aid before its more modern conception. Morgan is of the view that it is difficult to understand the form of legal aid scheme adopted in 1949 without a close examination of the pressures operating on the various parties.⁶⁰

2.1.2 Historical Perspective- Legal Aid in England and Wales prior to 1949

The earliest form of legal aid service delivery in England and Wales was the so called *in forma pauperis* procedure. This procedure was enacted by statute in 1495.⁶¹ Under this procedure the attorney was not paid by the government, but it has been referred to as some form of ‘mandatory’ pro bono work.⁶² It allowed indigent persons to sue without liability for costs; it also allowed counsel to represent the indigent free of charge. The 1495 statute was repealed in 1883 by the Rules of Court. This provided that legal aid be administered by the

⁶⁰ Richard Morgan, The Introduction of Civil Legal Aid in England and Wales, 1914-1949, Twentieth Century British History, Volume 5, No. 1 (Oxford University Press, 1994) at page 39. The ‘parties’ he mentions are, the State, the legal profession and the pressure groups who were interested in seeing the development of an insitutionalized legal aid scheme.

⁶¹ The Act was called ‘An Act to Admit such persons as are poor to sue in form pauperis’ Pollack, Legal Aid, The First 25 years (London, Oyez Press, 1982) at page .

⁶² Mahoney Joan, Green Forms and Legal Aid Offices: A History of Publicly Funded legal Aid Services in Britain and the United States, Saint Louis University Public Law Review, Volume 17 No 2,1998 at page 226.

rules of court.⁶³ (It was however held to have been quite similar to the 1495 statute, with an exemption from the payment of court fees and an exemption from payment of attorney fees for a person who proved his indigence).

In 1903 the Poor Persons Defense Act was passed into law. This Act is said to be the codification of the concept of government providing legal aid to the indigent.⁶⁴ This act authorized judges to appoint compensated counsel where the gravity of the offence required such an appointment and if it was in the interest of justice. Assistance for defendants at trials was still an issue because courts were reluctant to exercise the authority given to them under the Act.⁶⁵ There was also a condition which stipulated that the defendant should be able to show that he had a case to bring within the Rules before free legal aid was granted.⁶⁶ The 1914 Rules⁶⁷ was more progressive because administering the Poor Persons Procedure was placed in the department of the High Court. The Rules provided for the appointment of 'Prescribed Officers' who administered the Poor Persons Procedure.⁶⁸ The Prescribed Officers who were also known as reporters determined which cases were deserving of legal assistance and distributed them to a rota of volunteer barristers and solicitors.⁶⁹

The provision of legal aid under this procedure remained charity.⁷⁰ The Prescribed Officers did not have any authority to assign cases, so the procedure was based on the altruism of the legal profession.⁷¹ Crisis arose after the World War 1 because of the high increase in demand

⁶³ It was however held to be quite similar to the 1495 Statute with an exemption from payment of Court fees and exemption of payment of attorney fess for a person who could prove his indigence. See Mahoney Joan, Green Forms and Legal Aid Offices, Ibid at page 226.

⁶⁴ Duncan S. Kemp, Criminal Defense for the Poor: An Evolution in Progress, 31 Southern University Law Review, 2004 at page 219.

⁶⁵ Deborah L. Rhode, Access to Justice, Oxford University Press, 2004 at page 50.

⁶⁶ Poor Prisoners, Legal Aid for Defence, New Regulations, Evening Post, Issue 93, 20 April 1934, page 8. <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=EP19340420.2.71>

⁶⁷ Rules of the Supreme Court (Poor Persons) 1914.

⁶⁸ Richard Morgan, The Introduction of Civil Legal Aid in England and Wales, Ibid at page 43.

⁶⁹ Richard Morgan, Ibid at page 44.

⁷⁰ Ibid at page 44.

⁷¹ Ibid at page 44.

for solicitors to handle divorce cases. The Poor Persons Procedure was severely strained, and lawyers were not willing to volunteer to undertake Poor Persons cases. The Law Society was said to have been forced to issue a circular to its members saying ‘It is evident that is solicitors do not offer to undertake cases voluntarily some other method will have to be found.’⁷² The Lawrence Committee set up to consider this situation came up with a recommendation, in which it agreed with the law society that, the main weakness of the Poor Persons Procedure was that ‘its organization and administration are in official hands and not in the hands of the profession responsible for its administration.’⁷³

2.1.3 The Legal Aid Act of 1949

The establishment of an institutionalized system of legal aid service provision in England and Wales is traced back to 1949, with effect from October 2nd 1950 when the Legal Aid and Advice Act came into force.⁷⁴ Legal aid service was delivered through public funding of private lawyers. The scheme has been referred to as ‘government subsidized legal aid’.⁷⁵

The background to the passage of the 1949 Act was that in 1944 the Rushcliffe Commission was set up to examine the existing system of giving advice to indigent persons and ways in which that system may be improved.⁷⁶ The memoranda submitted by the Law Society noted that the system for providing legal aid was ‘patchy had become totally inadequate and this would become worse’.⁷⁷ The development was said to be inspired by the rise in social consciousness which demanded that fair play demanded more equality in legal matters.⁷⁸ Indeed the mood described in England and Wales at that time was said to be that of social

⁷² Richard Morgan, *Ibid* at page 47.

⁷³ Richard Morgan, *Ibid* at page 47.

⁷⁴ Tamara Goriely, Rushcliffe 50 years later The Changing Role of Civil Legal Aid within the Welfare State, *Journal of Law and Society*, Vol. 21, No. 4 (December 1994) at page 547.

⁷⁵ Sydnor Thompson, Developments in the British Legal Aid Experiment, 53 *Columbia Law Review* 789, at page 1.

⁷⁶ Tamara Goriely, *Ibid* at page 546.

⁷⁷ Seton Pollock, *Legal Aid, The First 25 Years*, Oyez Publishers, London (1975).

⁷⁸ The welfare State was said to have come with a proclamation of rights. These rights needed mechanisms for enforcement in order for them to become effective.

solidarity and there was the desire to have equality in everything even if it was equality of misery.⁷⁹ Goriely believes that it was this desire for equality that led the Rushcliffe Committee to recommend that legal aid must extend beyond those normally classed as poor.⁸⁰ That was why at the inception of the legal aid scheme, legal aid covered about 80% of the population.⁸¹

What has been important for the operation of the Legal Aid Scheme in England and Wales is who controls the operation of the scheme. It was suggested at the inception of the program under the 1949 Act that the management of the program be under the State or a local authority. This proposition was rejected and the recommendation of the Law Society, which suggested that legal aid be managed by the Law Society under the supervision of the Lord Chancellor, was accepted.

The Rushcliffe Commission report was implemented by the Legal Aid and Advice Act 1949. Funding for Legal Aid was provided for by the Government while administration was left in the control of the Law Society. Legal Aid was available in High Courts only.⁸² By the 1960's and the early 1970s concerns arose because of 'the arbitrary, non- accountable exercise of power, discretion, and moral judgments by the bureaucrat of the public welfare system.'⁸³ Goriely stated that welfare providers were condemned by critics for being out of touch with clients and putting their own interests first.⁸⁴

In 1976, the Royal Commission on Legal Services was created. Its terms of reference was to 'inquire into law and practice relating to the provision of legal services in England, Wales and Northern Ireland and to consider whether any, and if so what changes are desirable in the

⁷⁹ Tamara Goriely, *Rushcliffe Fifty Years Later*, Ibid at page 546.

⁸⁰ Ibid, at page 547.

⁸¹ Ibid at page 547.

⁸² Ibid at page 551.

⁸³ Ibid at page 553.

⁸⁴ Ibid at page 553.

public interest.’⁸⁵ Evidence submitted to the Royal Commission suggested that it was necessary to set up a Legal Services Commission.

2.1.3 Establishment of the Legal Aid Board

One of the problems with Legal Aid service delivery before 1986, was that refusal to grant legal aid even for persons who qualified, was at the discretion of the courts. They were under no obligation to give reasons for refusing to grant legal aid, only a total statistics of refusals was kept by the Home Office.⁸⁶

The Legal Aid Act 1988 sought to resolve the irregularity present in the position of the Law Society being both the paymaster and the representative of the profession receiving funds.⁸⁷ The Legal Aid Act therefore created the Legal Aid Board (the Board) which took over the administration of the legal aid scheme from the Law Society, to do away with the anomaly of solicitors being responsible for their own payment.⁸⁸ The Board inherited the administrative role of the Law Society and codified the relationship between it and the Lord Chancellor, and his Department.⁸⁹ The major challenge the Board faced was that under the statutory framework, the Board was compelled to fund *any*⁹⁰ firm to undertake criminal defense work.⁹¹ The lifespan of the Board was short lived because of its inefficiency and lack of quality control in service delivery.⁹²

A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession.
Sijthoff and Noordhoff International Publishers, (1980)

⁸⁵ Bryant G Garth, *Neighbourhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Profession*. Sijthoff and Noordhoff International Publishers (1980).

⁸⁶ M. Harry Lease Jr., *Legal Aid in England and Wales*, 71 *Judiacture* (1987-1988) at page 347.

⁸⁷ Alisdair Gillespie, *The English Legal System*, Oxford University Press (2007) at page 263.

⁸⁸ Alisdair Gillespie, *The English Legal System*, *Ibid* at page 263.

⁸⁹ *A Fairer Deal for Legal Aid*, By Great Britain Department for Constitutional Affairs, at page 7.

⁹⁰ The word is highlighted for reason of emphasis. The Board did not have a discretion as to whether to fund a particular firm or not.

⁹¹ Roger Smith, *Legal Aid in England and Wales: Current Issues and Lessons in Making Legal Aid a Reality*, published by Public Interest Law Institute, 2009, at page 36.

⁹² *A fairer deal for Legal Aid*, *Ibid*. It was reported that legal aid was too heavily biased towards expensive, court based solutions rather than helping to tackle peoples problems before they reached the courts.

2.1.4 Reform of Legal Aid Services under the Access to Justice Act

The Access to Justice Act was passed in 1999, with the purpose of governing all aspects of the legal aid program in England and Wales.⁹³ One of the major changes brought about by this Act was the transfer of the direct administration of the legal aid program to the Legal Services Commission.⁹⁴ Under the Act the Commission is in charge of making decisions on individual cases as to who should receive legal aid, shielding the decision process from direct government involvement.⁹⁵ The Commission is also responsible for ‘development of management expertise’ and ensures this process is different from the political process of policy making by the Government.⁹⁶

The Legal Services Commission is an Independent body whose members are appointed by the Minister of Justice.⁹⁷ Even though the Minister remains responsible for overall policy of the program, the commission is responsible for the payment of participating practitioners and more importantly, it is responsible for monitoring the quality of service provided by them.⁹⁸ The Commission even though funded by Government is operationally independent. It has the powers to decide what areas of legal aid to fund.⁹⁹ The Legal Aid program is now divided into the Community Legal Service (CLS), which governs civil matters, and the Criminal Defense Service (CDS) which governs criminal matters. Legal aid is provided through the use of private contractors.¹⁰⁰

⁹³ Roger Smith, *Ibid* at page 36.

⁹⁴ Roger Smith, *Ibid* at page 36.

⁹⁵ This is an important point as will be seen later in this chapter how the legal aid scheme was misused in South Africa for very political reasons.

⁹⁶ Roger Smith, *Ibid* at page 44.

⁹⁷ Roger Smith, *Ibid* at page 44.

⁹⁸ *Ibid*.

⁹⁹ Alisdair Gillespie, *The English Legal System*, *Ibid* at page 264.

¹⁰⁰ Alisdair Gillespie, *Ibid* at page 264.

Even though the reform measures of the Government to ensure that there is a quality mark for providers, that there is greater efficiency and accountability in the system, this has come at a very high cost to the legal aid scheme.¹⁰¹ A parliamentary committee recently reported on the civil legal aid scheme thus:

Too much has been squeezed out of the CLS budget...Civil legal aid has become the Cinderella of the Government's services to address social exclusion and poverty. The highly desirable extension of provision and services has only been made possible at the expense of cutting back on eligibility, scope and remuneration. The process has gone too far.¹⁰²

2.1.5 Legal aid and the Welfare State in England and Wales

As early as 1908 an article was published in the British Medical Journal titled 'Legal Aid for the Poor',¹⁰³ the author wrote that the Central Legal Aid society had made a decision to give free legal aid to the poor who could not afford it.¹⁰⁴ An interesting question was put forward in the article, which went like this, 'Why is it that the lawyer gives none of his time or experience to the poor, while to minister to the wants of the sick and needy is part of the life work of every medical man?'¹⁰⁵ It is interesting that as early as 1908 a line of comparison existed between the importance of the law and free legal aid service to those who needed it, as health and delivery of free medical service to the sick. However, the importance of the law

¹⁰¹ House of Commons Constitutional Affairs Committee, Civil Legal Aid: Adequacy of Provision, paragraph 1348

¹⁰² House of Commons Constitutional Affairs Committee, Ibid.

¹⁰³ Legal Aid for the Poor, The British Medical Journal, Vol 2 No. 2481 (July 1908) at page 1.

¹⁰⁴ Legal Aid for the Poor, Ibid.

¹⁰⁵ Legal Aid for the Poor, Ibid at page 172

and legal aid in the welfare State did not develop on the same priority level as National Health Service and free medical care.¹⁰⁶

Ed Cape notes that even though access to justice and legal aid formed an important part of the welfare state programmes it did not ‘exactly’¹⁰⁷ fall within one of the four pillars of the welfare state.¹⁰⁸ The effect of this was that the development of legal aid was stalled.¹⁰⁹ One of the reasons that has been put forward to explain the slow paced development of the legal aid scheme was that unlike the National Health which was a national legal service, the control of the legal aid scheme was handed down to the law society.¹¹⁰ Pleasence stated that the problem with access to justice revolves around the issue of value. He explained this as a failure to understand and articulate a persuasive case for the value of law, legality and access to justice when health and education dominate public interest and public spending.¹¹¹

2.2 Legal Aid in South Africa

2.2.1 Historical Perspective-The Apartheid Period

The Institution of Legal Aid in South Africa was established in 1937 with the setting up of the legal aid bureau in Johannesburg.¹¹² The bureau was later to be registered as a welfare

¹⁰⁶ Alastair Hudson, *Regeneration, Legal Aid and the Welfare State*, at page 1.

<http://www.alastairhudson.com/legalsystem/legalaid&welfarestate.pdf> Accessed on 11th November 2010 at 6:08 pm.

¹⁰⁷ Ed Cape, *Legal Aid and Essential Part of the Welfare State*, at page 1.

<http://welfarestate2008.newport.ac.uk/pdf/Legal%20Aid%20An%20essential%20part%20of%20the%20welfare%20state.pdf> Last Accessed 10th November, 2010. Even though legal aid was not part of the Four pillars of the welfare State, when legal aid was introduced in 1949, it was presented as part of the package of welfare state institutions created in 1945. According to Tamara Goriely, Legal Aid is seen as part of the welfare State to the extent that it plays a part in enforcing welfare provision and social rights. See Tamara Goriely, *Making the Welfare State Work: Changing Conceptions of Legal Remedies Within the British Welfare State* in Francis Reagan, Alan Paterson, Tamara Goriely, Don Fleming eds., *The Transformation of Legal Studies: Comparative and Historical Studies*, Oxford University Press, 2002.

¹⁰⁸ Ed Cape, *Legal Aid an Essential part of the welfare State*, *Ibid* at page 1. The four pillars of the welfare state were; the National Health Service, Universal Housing, State Security (benefits), Universal Education.

¹⁰⁹ Ed Cape, *Ibid* at page 1.

¹¹⁰ Alastair Hudson, *Regeneration, Legal Aid and the Welfare State*, *Ibid*.

¹¹¹ Richard Moorhead and Pascoe Pleasence, *Access to Justice After Universalism: Introduction*, *Journal of Law and Society*, Vol 30, No. 1, (March 2003) at page 3.

¹¹² Hennie Van As, *Legal Aid in South Africa: Making Justice a Reality*, *Journal of African Law*, 49, 1 (2005) at page 55.

organization.¹¹³ Before this time, much like England and Wales, free legal service was offered to the poor through counsel *pro deo*. This procedure was where members of the bar provided pro bono services to the poor in criminal matters.¹¹⁴ Civil legal aid was available to only litigants at the Supreme Court who satisfied a stringent means test and who established reasonable prospects of success. The means test was said to have differed according to whether the applicant was European, a coloured or an African.¹¹⁵ State-funded legal services were therefore divided along racial lines.¹¹⁶

One of the key issues considered in establishing the legal aid scheme in South Africa at the time was the fact that legal aid was going to help poor migrant laborers adjust to urban conditions and therefore go a long way 'towards the improvement of relations between races'.¹¹⁷ It is little wonder then that it was efforts of the South African Institute of Race Relations in consultation with the Justice department and the Incorporated Law Society of the Transval that led to the convening of the legal aid conference of 1935.¹¹⁸

The political situation in South Africa at the time the legal aid was developed was recounted by J. D Hayman¹¹⁹ thus:

The total population of the Union-10,521,700 is comprised of 7,250,000 Africans; 2,188,200 Europeans; and 1,082,800 Cape Coloured and Asiatics. Racial discrimination, which takes its most vicious form where the African is concerned,

¹¹³ Hennie Van As, *Ibid*. The establishment of the Legal aid bureau was tied with the Institute of Race Relations. It was a conference convened by the Institute in 1935 that led to the establishment of the bureau.

¹¹⁴ *Ibid*.

¹¹⁵ See J.D Hayman, *Legal Aid for the Poor in South Africa*, *Journal of Comparative Legislation and International Law*, Third Series, Vol. 26, No. 3/4 (1944) Cambridge University Press on Behalf of the British Institute of International and Comparative Law, at page 13. Most of the persons requiring legal aid at that time were non-Europeans.

¹¹⁶ Shadrack B. O Gutto, *Equality and Non-discrimination in South Africa: The Political economy of Law and Law Making*, New Africa Books (Pty) Ltd, 2001, at page 267.

¹¹⁷ *Ibid*, at page 353

¹¹⁸ *Ibid* at page 353.

¹¹⁹ *Ibid*, at page 15.

is directed against all Non-Europeans, and therefore 80 per cent of the total population is affected by it in some way or other. Thus we find (a) that the Non-European is subject to many legal and political disabilities; (b) that he suffers from severe educational handicaps; (c) that little or no provision is made for him in the various social welfare measures; and (d) that as a result of the above and many other factors he is confined to unskilled and semi-skilled work and in consequence is the lowest wage-earner by far in the country.

J. D Hayman concluded that for the sake of the future of the legal aid movement it was imperative that the role of the Government in the movement should be as minimal as possible. He proposed that Government involvement should be limited to only the issue of finance, as long as racial discrimination forms part of official policy.¹²⁰ It was obvious Hayman from the trend of legislations that had been passed that the administration of legal aid will be treated with the same segregationist position. The Government was later to introduce more oppressive legislations.¹²¹

It is not surprising therefore that few years after J. D Haymans article, the legal aid suffered a serious upset. The Annual Report for the Secretary of Justice in 1958 stated that legal aid in criminal offences not carrying the death sentence was redundant since the whole judicial system was designed to prevent the conviction of an innocent man '*whether defended or not*' moreover, it was the duty of judicial officers and prosecutors to ensure that there is no miscarriage of justice.¹²² The report for 1965 suggested that legal aid was positively harmful

¹²⁰ The Asiatic Registration Act of 1906 required all Indians to register and carry passes. South Africa Act of 1910 gave Whites political control over all other races and removed the rights of blacks to sit in parliament. The Urban Areas Act of 1923 introduced residential segregation. The Colour Bar Act of 1926 prevented black people from practising skilled trades.

¹²¹ See for example the Population Registration Act of 1950 which required every person to have a racial category. See also the Group Areas Act of 1950 which determined the area one lived according to race. The Reservation of Separate Amenities Act of 1953 stated that municipal grounds could be reserved for a particular race. The 1953 Bantu Education Act segregated education and made separate schools for Africans.

¹²² Albie Sachs, Justice in South Africa, University of California Press, 1973 at page 236

since it was going to ‘undermine’ the administration of justice and was going to be completely inconsistent with the general judicial and social pattern in the country.¹²³ This was a clear denial of the rights of accused persons. It also amounted to a restriction of the role of lawyers in the administration of justice.

Subsequently, subsidies to voluntary legal aid bureau ceased.¹²⁴ Subsidies for voluntary legal aid was so little that it was commented thus, ‘during 1958, the State paid 5, 304 pounds in subsidizing legal aid in South Africa, just over one hundredth of what has recently been set aside for research in the wine industry’.¹²⁵ In 1966, the South African Defense and Aid Fund¹²⁶ was declared an unlawful organization. There was thereafter no legal aid for criminal defendants.¹²⁷ It wasn’t until 1969, after extensive discussion between the leadership of the legal profession and the government, that statutory authority was given for the establishment of the Legal Aid Board.

2.2.1 Establishment of the Legal Aid Board

The Legal Aid Board was established by the Legal Aid Act of 1969 (as amended).¹²⁸ The objective of the board is ‘to render or make available legal representation at state expense where substantial injustice would otherwise result, as contemplated in the Constitution of the Republic of South Africa.’¹²⁹ The powers of the Legal Aid Board (LAB) as provided for by the Legal Aid Act include the authority to;

- (a) Obtain the services of legal practitioners and to pay them,¹³⁰
- (b) Fix conditions for giving legal aid, including conditions on:¹³¹

¹²³ Albie Sachs, Ibid at page 236.

¹²⁴ Albie Sachs, Ibid.

¹²⁵ Albie Sachs, Ibid.

¹²⁶ This was the organisation which had raised funds for the defence of persons charged with political offences.

¹²⁷ Albie Sachs, Ibid.

¹²⁸ Legal Aid (Amendment Act) 1996.

¹²⁹ Republic of South Africa Act 108 of 1996.

¹³⁰ Section 3 paragraph (a) Legal Aid (Amendment Act) 1996.

- The recovery of costs *ceded* to the LAB.
- People receiving legal aid paying contributions to costs.
- The payment of a proportion of amounts recovered by successful *litigants*.

(c) Set out benefits to the LAB arising from legal actions.¹³²

(d) Create new procedures for giving legal aid, including making *Co-operation Agreements* with other bodies.¹³³

(e) Do all things and perform all functions that are necessary to allow the LAB to achieve its aims.¹³⁴

At the time of the establishment of the LAB in 1969, the influence of the Government was still obvious in the service delivery of the Board. David McQuoid-Mason wrote that during the early years of the LAB under the apartheid period the LAB spent most of its very limited budget on civil matters involving mainly the minority white sector of the population.¹³⁵ It has been said that despite the apartheid and Governments hostility towards legal aid, the LAB was established so as to stop non-governmental organizations from providing aid.¹³⁶ In this way, the Government was the main provider of Legal Aid and this enabled it regulate cases for which legal aid could be provided and the persons who were to be entitled to legal aid.

After the introduction of the new South African Constitution, the Board became responsible for providing legal aid in criminal cases where accused persons could not afford lawyers and ‘a substantive injustice would otherwise result’ if they were not represented.¹³⁷

¹³¹ Section 3 paragraph (b) Ibid.

¹³² Section 3 paragraph (c) Ibid.

¹³³ Section 3 paragraph (d) Ibid.

¹³⁴ Section 3 paragraph (e) Ibid.

¹³⁵ David McQuoid Mason, *The Supply Side: The Role of Lawyers in the Provision of Legal Aid-Some Lessons from South Africa*, in *Access to Justice in Africa and Beyond*, 2007 at page 96.

¹³⁶ Hennie Van As, Ibid at page 56.

¹³⁷ Section 1, Legal Aid Amendment Act of 1996.

The Legal Aid Act was administered through the Legal Aid Guide.¹³⁸ The Guide specifies policies and procedures for providing and administering legal aid. The LAB had initially adopted the judicare model a system where cases were assigned to private practitioners.¹³⁹ With the coming of a democratic government the judicare system had to be replaced with the justice centre model because the LAB was no longer able to meet the increasing demand for legal aid.¹⁴⁰ The Justice Centers employ salaried legal practitioners to provide service to the poor. The justice centers now apply an integrated approach towards the provision of legal care to the needy, which is reflected by the composition of the Centers.¹⁴¹

2.2.2 Recent Developments in Legal Aid Service Delivery

The Legal Aid Board has been able to combine several methods of service delivery to effectively meet the needs of persons requiring legal aid. For example in non-criminal cases the methods of service delivery which have been notable include; Justice Centers, Impact Litigation, Independent University Law Clinics and Paralegal Advice Offices. The Justice Centers¹⁴² offer services in rural areas. The structure of the justice center is determined by the demands of the local legal environment.¹⁴³ Another service delivery method worth mentioning here is the Impact Litigation. Mason recounts incidences of the impact litigation being used to protect the rights of persons.¹⁴⁴ He stated that the Board set up a special impact litigation fund designed to uphold the rights entrenched in the Constitution of South Africa. The board dealt with cases involving deaths resulting from the collapse of a soccer stadium, the alleged poisoning of underground water, which affected the health and livelihood of neighboring communities, as well as the poisoning of residents by smoke originating in a fire

¹³⁸ S. 3A of the Legal Aid Act, 1996.

¹³⁹ Hennie Van As, *Ibid* at page 58.

¹⁴⁰ Hennie Van As, *Ibid* at page 58.

¹⁴¹ The Centres are made up of representatives from private practice, the Judiciary, law clinics, the national paralegal Association, the SA Council of Churches and other experts.

¹⁴² Legal Aid Guide, Chapter 1, Paragraph 1.

¹⁴³ Legal Aid Board (1999).

¹⁴⁴ David McQuoid-Mason, *South African Legal Aid in Non-Criminal Cases, Making Legal Aid a Reality*, Public Interest Law Institute, 2009, at page 23.

that emitted very high levels of sulfur dioxide.¹⁴⁵ The Board has been very creative in its delivery of legal aid services.

2.2.3 Conclusion

Based on South Africa's tainted past, it is evident that the legal aid is influenced by the social, political philosophy of the time.¹⁴⁶ The successes of legal aid service delivery now, also show how the social and political context is able to improve the provision of legal aid and enhance the protection of human rights. And like the conclusion drawn from the history and development of legal aid in England and Wales, legal aid is too important an issue to be considered as a mere luxury or government policy.

2.3 Development of Legal Aid in Nigeria

2.3.1 Historical Perspective-Nigerias Colonial History

Nigeria was a formerly a British Colony which gained its independence on the 1st of October 1960. The link between Nigeria and the English Legal System was therefore established during this colonial era.¹⁴⁷

The establishment of legal aid in Nigeria was driven by private lawyers who saw the need to mitigate the harshness of the formal justice structure on poor persons who could not afford a lawyer. The 'dock brief' and *informa pauperis* proceedings which were the form of legal assistance in practice before that time was largely insufficient.¹⁴⁸ The efforts of these private

¹⁴⁵ Davis McQuoid Mason, Ibid.

¹⁴⁶ Mauro Cappelletti and James Gordley, Legal Aid: Modern Themes and Variations, 24 Stanford Law Review (1972) at page 347.

¹⁴⁷ The Sources of Nigerian Law are; Nigerian Legislation, English Law which consists of- recieved English Law; the common law, the doctrines of Equity and statutes of general application in force in England on January 1, 1900. See Akintunde Olusegun Obilade, Nigerian Legal System, Sweet and Maxwell, London (1979) at page 55.

¹⁴⁸ The dock brief in practice at that time was a process where legal assistance was given to

practitioners led to the establishment of the Legal Aid Association to provide legal aid to indigent Nigerians based on charity.¹⁴⁹

The development of legal aid in Nigeria came at a time when the propriety of developing countries delivering state funded legal aid service was in question.¹⁵⁰ One of the major issues with the legal system in Nigeria is the plurality of its legal system. The ‘formal system’¹⁵¹ functions alongside the ‘informal system’.¹⁵² The formal system consists of courts of record, otherwise known as the superior courts.¹⁵³ Whilst the informal system is made up of courts other than court of records, also called inferior courts.¹⁵⁴ Collet mentioned that there seemed to be a fundamental incompatibility between the way of life of a majority of Nigerians and the superordinate western legal system.¹⁵⁵

One of the key reasons for the establishment of the legal aid scheme was the inability of accused persons to understand the language of the court, which was in English, while proceedings conducted in Area and Customary Courts were usually done in the Language of the Accused.¹⁵⁶ Even though on the one hand, the proceedings in the lower courts are usually informal, considering that these courts are presided over by non-lawyers, and so cases are dispensed with a lot faster due to the absence of formalities. On the other hand, the customary court judges do not receive training in adjudication or protection of fundamental human

¹⁴⁹ Chimezie Ikeazor, *Legal Aid for the Poor in Nigeria*, (Minaj Printers Limited 2003) at page At the Inauguration of the Legal Aid Association on the 6th of February 1974 the lawyers who constituted the organisation informed the Honourable Attorney General and Commissioner for Justice at that time that a charitable body known as the Nigerian Legal Aid Association had been founded.

¹⁵⁰ Jill Cottrell, *The New Nigerian Legal Aid Decree*, *Journal of African Law*, Vol. 22, No. 1 (Spring 1978) at page 78. Cortell reasoned that focus may have been placed instead on issues such as health, education, or improvement of agriculture rather than on ‘the provision of lawyers’.

¹⁵¹ The Nigerian Constitution in Section 275-283 provides for 3 Court Systems. The Federal Courts, which include; the Supreme Court and the Court of Appeal, The state Courts, and the Local Courts which include the Area Courts, Customary Courts and the Sharia Courts.

¹⁵² Akintunde Olusegun Obilade, *Nigerian Legal System*, Sweet and Maxwell, London (1979) at page 169.

¹⁵³ Akintunde Olusegun Obilade, *Ibid* at page 169. See also See Section 275-283 of the Nigerian Constitution 1999.

¹⁵⁴ Akintunde Olusegun Obilade, *Ibid* at page 169.

¹⁵⁵ Adrian Collet, *Legal Care in Nigeria: Early Beginings*, *Journal of African Law*, Vol. 24, No. 2 (Autumn 1980) at page 222.

¹⁵⁶ Adrian Collet, *Ibid* at page 221.

rights, consequently, the absence of effective mechanisms to protect the right of accused persons.¹⁵⁷ Collet wrote that because of the complexity in the Higher Courts, if an accused person was given the choice, it was safer to go with the local courts where the procedure was informal, and since such courts were located within the local community.¹⁵⁸

The first Legal Aid Bill was introduced in 1966 by the then Attorney General, but the Civil war suspended normal governmental functioning and so the bill was never considered. The present Legal Aid scheme in Nigeria began as an initiative of private members of the bar and was later to be established as institutionalized scheme through their personal efforts.¹⁵⁹ It is noteworthy that the Legal Aid Council was established during a period when the protection of human rights was not a priority.¹⁶⁰ The Military regime promulgated the legal aid decree with a very narrow mandate.¹⁶¹

2.3.2 Promulgation of the Legal Aid Decree

The Legal Aid Council was established by the Promulgation Decree No. 56 of 1976.¹⁶² The scope of legal aid in Nigeria was initially to cover criminal cases only.¹⁶³ It is important to note that, at the time the Legal Aid Decree was promulgated, a large percentage of criminal cases were presided over by Area Courts even though the Decree specifically excluded Area Courts, Customary Courts and Magistrate Courts with lay benches.¹⁶⁴ No clear reason could be given for limiting representation in Courts to certain criminal cases only, or the fact that

¹⁵⁷ Jadesola Akande, *The Legal Order and the Administration of Federal and State Courts*, in *Federalism in Nigeria: Toward Federal Democracy*, (Fall 1999) Oxford University Press at page 61-73.

¹⁵⁸ Adrian Collet, *Ibid* at page 222.

¹⁵⁹ Office of the Director Planning, Research and Statistics, *An Overview of the State of the Legal Aid Scheme in Nigeria Pre-1999*, at page 1.

¹⁶⁰ The Legal Aid Council was established during the Millitary Era. This era was characterized by disregard of the rule of law, abuse of human rights and fundamental freedoms.

¹⁶¹ Jill Cotrell, *Ibid* at page 80.

¹⁶² *An Overview of the Legal Aid Scheme in Nigeria*, *Ibid* at page 1.

¹⁶³ Jill Cotrell, *Ibid* at page 80.

¹⁶⁴ Part II, Section 6, of the Legal Aid Decree.

armed robbery cases were not included in the scope of legal aid and advice.¹⁶⁵ Cotrell notes that some of the offences that were excluded from the list of cases, for which legal aid was available, carried penalties higher than those for which legal aid was available.¹⁶⁶ Cotrell also noted the poor drafting of the legal aid decree at the ambiguities that it created.¹⁶⁷

One of the major issues with the legal aid scheme presently is the lack of independence of the legal aid council, reflected in the level of governmental control in the management of the Council. This control is evident from the inception of the Scheme under the legal aid decree. Under the legal aid decree, the Chairman of the Legal Aid Council was to be appointed by the Federal Executive Council; the Legal Aid Council was to have only two representatives of the Bar Association who were to be selected by the Federal Executive Council and not by the Bar Association itself.¹⁶⁸ Apart from the monopoly that the Government had over the council through appointments, the Government also had the power to direct certain of the councils' activities.¹⁶⁹

2.3.3 The New Legal Aid Bill

The Legal Aid (Repeal and Re-enactment) Bill 2008, seeks to make some innovative changes within the legal aid system. The most significant of which is the expansion of the scope of the council to include civil matters.¹⁷⁰ The pragmatism of this is however in question. One of the major problems the legal aid council is facing is that of inadequate funding.¹⁷¹ Increasing the

¹⁶⁵ Adrain Collet, *Ibid* at page 224-226.

¹⁶⁶ Jill Cotrell, *Ibid* at page 80.

¹⁶⁷ Certain offences that were contained in the Decree were not offences known under Nigerian Law! Cotrell stated that Schedule 2 (which contained the offences covered by legal aid) was of little use to the public because it was too technically drafted and it was useless to lawyers because it was too imprecise. Jill Cotrell, *Ibid* at page 82.

¹⁶⁸ Part I, Section 2 (e), *ibid*.

¹⁶⁹ Section 2 (5) *ibid*.

¹⁷⁰ For now, the Legal Aid Council can only take on civil matters relating to accident cases and damages for breach of fundamental human rights.

¹⁷¹ An Overview of the Legal Aid Council Scheme in Nigeria, *Ibid*.

scope of cases which it can handle without a corresponding increase in its funding base will be fatal to the functioning of the Council.¹⁷²

Another problem with access to legal service in Nigeria is, apart from the high costs of litigation which in comparison to England and Wales is not so high, one of the significant hindrances to access to justice is, accessibility of the institutions of justice to people at the community level. The Courts are located in Central areas of the State, the Legal aid institution, since it was created to respond to the complexity of the court system and to ensure the representation of accused persons in courts, is also centrally located. This situation therefore reproduces the system of inaccessibility present within the justice system itself.

The new legal bill proposes the establishment of a community legal service unit¹⁷³ which is to:

d) promote improvement in the quality of services provided for the benefit of those who need them

(e) ensure that the services provided in relation to any matter are appropriate having regard to its nature circumstances and importance and

(f) achieve a swift and fair resolution of disputes in order to avoid the necessity of a protracted court proceedings.¹⁷⁴

It is hoped that from this section, when the Bill comes into law, a clear implementation plan will be put in place to ensure that disadvantaged persons at the community level are able to

¹⁷² It should be noted however that the Legal Aid Bill proposes an Access to Justice Fund, which is to be different from the General funds of the Council. This fund it is proposed will be deducted from the Revenue created from the Oil industry (1% of the total Revenue). This proposal has been referred to as 'politically suicidal' considering that resource sharing is one of the most politically volatile areas in Nigeria at present. See Lagi Odinakaonye, Human Rights and Poverty Reduction: Exploring the Relevance of legal Empowerment of the Poor in Poverty Reduction in Nigeria, (2009) at page 41.

¹⁷³ Legal Aid (Repeal and Enactment) Bill 2008, Part II, Section 5.

¹⁷⁴ Legal Aid (Repeal and Enactment Bill) Ibid.

access legal aid services. To make certain that they do not suffer ‘legal discrimination’¹⁷⁵ as a result of poverty or geographical location.

Some of the issues that the new Legal Aid Bill has not addressed however include; how to secure independence in the appointment and tenure of the Director General of the Legal Aid Council with minimum executive control.¹⁷⁶ It has not put in place a quality control system. It mentions what will be accessed before a private legal practitioner or a law firm can be qualified to provide legal aid either for free or for a fee as; the payment of annual subscription/practicing fee, conduct when acting or selected to act for persons receiving legal aid or professional conduct.¹⁷⁷ It does not mention the professional performance of firms.¹⁷⁸

2.3.4 Conclusion

Legal Aid Delivery in Nigeria has not recorded very tremendous success but it has been a useful institution to meet certain needs of indigent persons. It must be recognized however, that the Legal Aid Institution in Nigeria has a very daunting task. Based on the poverty level in Nigeria, Legal Aid is available to cover over 70% percent of the population. The Government of Nigeria has not taken legal aid in Nigeria very seriously. The Legal Aid Bill has not been given very serious consideration and the independence of the Council has still not been guaranteed. There is a serious need to re-think the role of Legal Aid in Nigeria, and tailor it to meet the needs of indigent persons in Nigeria who live in the rural areas and are excluded from the reach of the justice system.

¹⁷⁵ Hennie Van As, Ibid at page 60.

¹⁷⁶ The Legal Aid (Repeal and Enactment) Bill, Part I, Section 4 provides for the appointment of the Director General of the Council. This appointment is to be made by the President on the recommendation of the Attorney General. Section 3 provides that the amount to be paid as salary and allowances to the Director General is by the governing board of the Legal Aid Council with the approval of the President!

¹⁷⁷ Legal Aid (Repeal and Enactment Bill), Part IV, Section 4.

¹⁷⁸ In England and Wales the Community Legal Services Quality Mark is a system where the Community Legal Service prior to granting a contract for criminal legal aid confirms compliance with an already set ‘Quality Mark’ standard. Things that are evaluated include; the overall quality of the firm, its operation and management, financial stability, client satisfaction and a lot of other issues.

2.4 Conclusion- A Need to Rethink Access to Justice?

This chapter examined the legal aid system in 3 jurisdictions under review to show how several influences have affected legal aid service delivery and how this in turn has a far reaching impact on access to justice for disadvantaged persons in the society.

This chapter has also considered that initiatives that grant access only to formal justice institutions or access to lawyers are able to meet the needs of a limited number of persons. This situation is compounded in certain of the countries, by the formal justice structure which, in spite of legal aid initiatives, still remains inaccessible by the people who require assistance. It has also shown that legal aid structures established to aid the indigent have employed rationing in distributing services and have therefore reproduced the system of inaccessibility reflected in the justice system itself. Targeting and rationing in the delivery of legal aid have been referred to as a return to the period where legal aid was a matter of charity given for the very poor.

The question to ask is has present global concern on the need to eradicate poverty which is one of the major hindrances to access to justice changed the role of legal aid? Has this called for a re-conceptualization of the concept of access to justice and invariably the status of legal aid? These are the questions that will be answered in the next chapter.

CHAPTER THREE-RE-THINKING ACCESS TO JUSTICE: LEGAL JUSTICE, SOCIAL JUSTICE

3.1 Classical Values Fundamental to Access to Justice in Legal Aid Delivery

In chapter one an assessment was made of early concepts underlying the provision of legal aid to the poor. The limitations that existed in this early understanding of the responsibility of the State for Legal aid service provision were revealed. These limitations became even more apparent in chapter two, when an evaluation of the establishment of institutionalized legal aid schemes in the three jurisdictions under review was carried out.

Chapter three goes further to consider the role of legal aid in society through the universally recognised value underlying legal aid, which is, Access to Justice.¹⁷⁹ It explores the limitation of the meaning of justice when confined strictly to legal justice in defining the unmet legal need. An analysis is made here of the meaning of legal justice and social justice *vis-a-vis* the value of legal aid.¹⁸⁰ It considers that even though the outcome of legal justice through the creation of access to the formal justice system, may be *satisfactory*,¹⁸¹ in certain circumstances, it is also encumbered by serious limitations.¹⁸² These limitations become obvious when considering legal aid in its broad sense, as a means of combating poverty and social exclusion.

This Chapter therefore in the first instance, defines what the classical notion of justice is when considering a theory of access to justice and legal aid. It further explores the limits of

¹⁷⁹ Don Fleming, Legal Aid and Human Rights, Ibid at page 15.

¹⁸⁰ Legal Aid here is referred to in its broad sense beyond legal representation of clients in court to other functions such as providing public access to legal information, legal advice and education, in short, legal empowerment.

¹⁸¹ Satisfactory is highlighted here because what maybe satisfactory to the litigant may be dependent upon the justice sought for. If it is one of only process, legal representation, equality of arms, and a fair hearing resulting in a judgement that is against the litigant may seem to be satisfactory. It may be that what is most important is the outcome justice, in which case the process is still important but the outcome is what may used to assess if the justice is satisfactory or not. See Deborah Rhode, Access to Justice, Oxford University Press, 2004 at page 6. She wrote there that 'those who receive their day in Court do not always feel that justice has been done.'

¹⁸² Deborah Rhode, Ibid at page 5. She states the source of this problem lies in the fact that there is an underlying assumption that social justice is available through procedural justice.

certain concepts that have been articulated in the past to ensure the availability of legal aid to indigent persons. It explores two major concepts which have gained some level of notoriety; the notions of equality and citizenship. These two concepts have points at which they converge, such as when reference is made to equality as part of the fundamental basis of citizenship.¹⁸³ This chapter considers the relationship between legal aid and equality, and also the relationship between legal aid and citizenship. It assesses the viability of these concepts as the normative basis for the provision of legal aid by States.

The conclusion drawn is that if legal aid is to be meaningful in making rights effective and in being instrumental to combat poverty and social exclusion, the legal basis for the provision of legal aid by the State, must be the fact it is a right in and of itself and not analogous to, or derivative from other rights. The right to legal aid will be established from an evaluation of the changing understanding of the value of legal aid in international law, the role of legal in society and the right to legal aid generated from the notion of ‘personhood.’

A human rights approach to access to justice allows focusing attention not on the justice institutions alone but also on the needs of the justice seeker.¹⁸⁴

3.1.1 The Legal Justice Social Justice Dichotomy

Theories of justice are concerned with the question ‘what ought law to do for the men whose conduct it governs?’¹⁸⁵ This consideration leads yet to a further inquiry on what the proper place of the law is in society.¹⁸⁶ How these questions are answered ultimately affects the way in which access to justice and legal aid are viewed and valued.

¹⁸³ T. H Marshall, *Citizenship and Social Class* (Doubleday 1964). T. H Marshall regards citizenship to be about expanding the scope of equality through the development of civil, political and social rights.

¹⁸⁴ Ineke Van De Meene and Benjamin Van Rooij, *Access to Justice and Legal Empowerment, Making the Power Central in Legal Development Co-operation*, Leiden University Press, 2008 at page 6

¹⁸⁵ Julius Stone, *Human Law and Human Justice*, Stanford University Press 1965, at page 2

¹⁸⁶ Julius Stone, *Human Law and Human Justice*, *Ibid* at page 2.

In his much debated book, 'A theory of Justice',¹⁸⁷ John Rawls developed two principles of justice.¹⁸⁸ He states that social and economic inequalities are to be arranged so that;

- a) they are to be of the greatest benefit to the least-advantaged members of society (*the difference principle*)
- b) offices and positions must be open to everyone under conditions of *fair equality of opportunity*¹⁸⁹

The difference principle makes a case for distributive justice, a situation where inequalities can be just, to the extent that they are to the benefit of the least well off.¹⁹⁰ Rawls stated that the difference principle applies primarily to the basic structure of society through individuals whose expectations are to be estimated by an index of primary goods.¹⁹¹

The more progressive way to conceptualize a theory of access to justice is to focus on legal development that makes the needs of the poor and marginalized a priority issue.¹⁹² This breaks away from traditional legal development efforts which focus on promoting the rule of law through legal reform and institutional strengthening.¹⁹³ This traditional view to legal development had as its priority institutions while the latter focuses on 'the justice seeker'.¹⁹⁴

Legal Justice is said to be about conforming to the rules whatever they maybe, while social justice is the distributive quality of these rules.¹⁹⁵ Whilst formal justice says we should treat people according to their rights, it does not demand any requirements or conditions of the

¹⁸⁷ John Rawls, A Theory of Justice, Revised Edition, Harvard University press, 1999 at page 72.

¹⁸⁸ Ibid at page 53. The first principle is the principle of liberty where Rawls claims that 'each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.' The second is the difference principle.

¹⁸⁹ John Rawls, Ibid at page 54.

¹⁹⁰ John Rawls, Ibid at page 54.

¹⁹¹ Ibid at page 54.

¹⁹² Ineke Van De Meene and Benjamin Van Rooij, Ibid at page 6.

¹⁹³ Ineke Van De Meene and Benjamin Van Rooij, Ibid at page 6.

¹⁹⁴ Ibid at page 6.

¹⁹⁵ Wojciech Sadurski, Giving Desert its Due: Social Justice and Legal Theory, Published by D. Reidel Publishing Company Dordrecht, Holland, 1985 at page 14.

moral quality of those rights.¹⁹⁶ On the other hand, judgments about social justice have as their object the content of legal rules; they confirm that the rules distribute burdens and benefits justly among members of a community.¹⁹⁷ Man is born to deep inequalities, these inequalities affect mans initial life's chances and are said to be inevitable in the basic structure of any society. Therefore, the principle of social justice applies in the first instance to these inequalities.¹⁹⁸

A conception of Social Justice is to be regarded as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be assessed.¹⁹⁹ According to Miller 'Social justice refers to the principles, values and institutions that need to be in place to enable each person to get a fair share of the benefits, and carry a fair share of the responsibilities, of living together in a community'.²⁰⁰

An understanding of the notion of social justice is imperative to discussing the role of legal aid in relation to poverty and social exclusion.

3.1.2 The Concept of Social Exclusion

The word social exclusion is said to have developed in France when the word *lexs exclus* was used to refer to the poor.²⁰¹ Since its inception social exclusion has been used to refer to different classes/categories of people in society.²⁰² What was important to the concept of social exclusion in France, was that the theory of exclusion was anchored on the French

¹⁹⁶ Ibid at page 14.

¹⁹⁷ Ibid at page 14.

¹⁹⁸ John Rawls, A Theory of Justice, Ibid at page 7.

¹⁹⁹ Ibid at page 7.

²⁰⁰ Nick Pearce and Will Paxton, Social Justice: Building a Fairer Britain, 2005 at page ix.

²⁰¹ Hilary Silver, Social Excluion and Social Solidarity: Three Paradigms, International Labour Review, Volume 133 (1994) at page 532.

²⁰² Hilary Silver, Social Exclusion and Solidarity, Ibid at page 532. Silver writes that in 1974, it was used to refer to persons with mental and physical disability, the elderly, abused children single parents, etc, during the late 1970s it was used to refer to 'the ones that economic growth forgot',

belief in ‘solidarity’.²⁰³ It was this idea of solidarity that justified the establishment of social institutions to further social integration.²⁰⁴ The interpretation of social exclusion received a different interpretation in the Britain, where it had more of an individualistic connotation.²⁰⁵ Another important distinction is that exclusion was seen in the Britain as different from poverty. The French rejected the British idea of poverty because of its association with Christian charity.²⁰⁶ The British idea of poverty individualized the concept of poverty while the French preferred the idea of solidarity. This is said to have justified the establishment of public institutions to further National integration.²⁰⁷

Social exclusion has been defined as ‘the process through which individuals or groups are wholly or partially excluded from full participation in the society within which they live.’²⁰⁸ Social exclusion also serves as a framework for understanding deprivation, both in the multidimensionality of deprivation, and the processes and social relations that underlie it.²⁰⁹

Reducing social exclusion has been emphasized as one of the goals of legal aid provision.²¹⁰ The usefulness of emphasizing social exclusion in the discussions on legal aid is because of the descriptive nature of the term.²¹¹ It gives the opportunity to see people as social beings

²⁰³ The notion of solidarity was one of the fundamental basis of the French Revolution and still remains an important part of French culture.

²⁰⁴ Hilary Silver, *Social Exclusion and Solidarity* Ibid at page 537.

²⁰⁵ Arjan de Haan, *Social Exclusion: Towards an Holistic Understanding of Deprivation*, at page 3.

<http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/Documents/publications/sdd9socex.pdf>

²⁰⁶ Ibid at page 1.

²⁰⁷ Hilary Silver, *Social Exclusion and Solidarity*, Ibid at page 537.

²⁰⁸ European Foundation for the Improvement of Living and Working Conditions, 1995.

²⁰⁹ Arjan de Haan, Ibid at page 6. The multidimensionality of deprivation refers to the fact that people could be deprived of different things at the same time. Exclusion based on this understanding could refer to deprivation in the economic, social and/or political sphere.

²¹⁰ The United Kingdom Legal Services Commission website mentions the problems that cause social exclusion as one of the reasons why the Government provides funding for legal aid to help people.

²¹¹ Gerry Rodgers, Charles Gore, Jose B. Figueiredo, eds., *Social Exclusion: Rhetoric, Reality, Responses*, International Institute for Labour Studies, United Nations Development (1995) at page 6-7.

rather than as objects of utility.²¹² Social exclusion is important for this discussion because of its connection with social justice.

The next two sections of this thesis will be focused on considering the concepts of equality and citizenship as they relate to the value of legal aid and legal aid service provision. This will be with particular focus on the need to achieve social justice and social inclusion.

3.2 Access to Justice and Equality

When considering access to justice in terms of its relationship to equality, the question that immediately comes to mind is equality of what? (this relates to the material requirements and measure of equality), equality of whom? (how far is equality to extend).²¹³ It was Dworkin who was quoted as saying: 'Equality is a contested concept: Those who praise it or disparage it disagree about what they are praising or disparaging.'²¹⁴ Equality is neither being praised nor disparaged here, but it is evaluated to gain a better understanding to the question, 'how does the principle of equality translate to governmental responsibility to provide legal aid to an effective access to the justice system and not only justice institutions?'

The Universal Declaration on Human Rights states that 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'²¹⁵ This fundamental principle of equality is echoed in constitutional provisions.²¹⁶ The rights of equality before the law contained in constitutional

²¹² Gerry Rodgers, Charles Gore, Jose B. Figueiredo, Ibid at page 7.

²¹³ Deborah L Rhode, Access to Justice, Oxford University Press (2004) at page 4.

²¹⁴ Equality, Stanford Encyclopedia of Philosophy, (2007) <http://plato.stanford.edu/entries/equality/> Last Accessed on 19th November 2010 at 11:09 am.

²¹⁵ Article 7, Universal Declaration of Human Rights.

²¹⁶ See for example Chapter Two of the Nigerian Constitution and also, Chapter Two of the South African Constitution.

provisions are insufficient for two reasons. They fail to translate to a right of access to law²¹⁷ and they are also affected by the material conditions people find themselves which renders the right nugatory.

On the first point, the right of equality before the law which is translated to a right of access to law, limits this access when legal aid is limited. By first, specifying the types of cases for which people are eligible for legal aid, and secondly, by limiting the percentage of the population of persons who are eligible for legal aid through the means test. In England and Wales, the case which best illustrates this point is the McDonalds Libel Case. Klug et al wrote that this case became the longest libel trial in legal history, with over 100 hundred witnesses examined over a period of 200 days. McDonalds were advised and represented throughout by specialist solicitors and barristers, while the defendants, Helen Steele and David Morris with a disposable income of 1.57 pounds a week had to represent themselves because defamation cases are not part of legally aided cases.²¹⁸

In Nigeria, the mandate of the Legal Aid Council is even more limited than what is available in England and Wales.²¹⁹ More than half of the complaints turned down by the Legal Aid Council are not turned down because they fail to show to meet ‘an interest of justice’ standard, but because they are civil cases for which the Council does not have the mandate.²²⁰

The second point regarding the limits of the equality principle relates to the gap between what is contained in the constitution and the material conditions people actually live in. Jjuuko is of the view that while the constitution proclaims rights of either ‘everyone’ or

²¹⁷ Francesca Klug, Keir Starmer, Stuart Miller, *The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom*, Routledge 1996 at page 102.

²¹⁸ It should be noted that the European Court of Human Rights Found the United Kingdom in Violation of Article 6 (1) of the European Convention of Human Rights.

²¹⁹ Legal aid is available as of right in criminal cases. It is only available in civil cases for claims related to damages for accident cases and for damages for breach of fundamental human rights. See Schedule II of the Nigerian Legal Aid Act 2004.

²²⁰ Catherine Fwangchis Interview with the Director of International Operations Legal Aid Council of Nigeria, 23rd November 2010.

‘every citizen’, behind this formal equality, there is usually substantive inequality. Substantive inequality results from the differing social conditions and situations in which different people actually exist. This is especially the case where there are exploitative and oppressive relationships on which the constitutional order itself is built.²²¹ Legal aid is alleged to address this differing social condition or this state of exclusion, but cannot effectively do so, when it is structured in such a manner that only formal equality is what is largely achievable by its provision. This view is supported by the Marxist thesis of equality which states that, equality before the universally-applied law is no guarantee of equal access to social goods.²²²

Beyond equality before the law as contained in constitutional provisions, equality is also often referred to as an underlying principle for societies founded on the rule of law.²²³ Hudson discusses 3 concepts of equality which are; equality of opportunity, equality of access and equality of provision.²²⁴ She explained the aim of equality of opportunity as ‘equality of access to life chances’ which is different from equality in redistribution of social goods.²²⁵ Over the course of time, the concept of equality of opportunity has been elevated while the value of concrete interventions to support it has been eroded.²²⁶ The World Bank defines equality of opportunity as enabling individuals ‘to pursue a life of their choosing.’²²⁷

²²¹ Frederick W. Jjuuko, Law and Access to Justice, <http://www.kituoachakatiba.co.ug/LAW%20AND%20ACCESS%20TO%20JUSTICE.htm> Last Assessed on the 23rd of November 2010 at 12:56am.

²²² Alastair Hudson, Towards a Just Society, Labour, Law and Legal Aid (Citizenship and the Law Series 1999) at page 78

²²³ Alastair Hudson, Equality of Access to the Justice System, from Towards a Just Society, at page 2 <http://www.alastairhudson.com/wordsandconcepts/Equality.pdf>

²²⁴ Alastair Hudson, Towards a Just Society, Labour Law and Legal Aid, Ibid at pages 89-95.

²²⁵ Ibid at page 90.

²²⁶ Interventions to support equality in relation to legal aid service provision have gradually moved from universalism to targeting and rationing. See Richard Moorhead and Pascoe Pleasence, Access to Justice After Universalism: Introduction, Journal of Law and Society, Volume 30, No. 1, After Universalism, Re-engineering Access to Justice (March 2003) at page 3.

²²⁷ World Bank, 2006.

Amartya highlights the problem with this definition. Sen argues that what people choose or want is, itself, limited by their experience and the opportunities available to them.²²⁸

The conclusion that Hudson draws is that equality of opportunity does not necessarily translate to equality of outcome.²²⁹ It will even be difficult to discuss an equality of outcome for cases brought before the court, where the judge is expected to maintain the position of a neutral *arbiter*, and to reach an unfettered decision. According to Hudson, the preferred concept of equality which should be the fundamental principle in a discussion concerning the provision of justice is “equality of access”.²³⁰ Legal aid is the medium through which access to justice for all on an equal basis can be realized. But the problem as noted earlier is that legal aid is not universally available. Hudson inevitably concludes that ‘Legal aid operates as a mechanism for social justice for the worst off in society but as an engine of inequality at the same time.’²³¹

Formal equality prohibits the use of distinctions, or discrimination, in law and policy. Substantive equality considers laws and policies discriminatory if they have a disproportionate negative impact on any group of people.²³² It therefore stands to reason as Sadurski puts it that legal equality is not possible and cannot be properly maintained ‘since no law can do without any classifications and at the point where classification becomes discrimination depends upon substantive moral views which are irreducible to formal principles of equality’.²³³

²²⁸ Sen Amartya, Social Exclusion: Concept, Application and Scrutiny, Social Development Papers No. 1 (June 2010) http://www.adb.org/documents/books/social_exclusion.pdf at page 5. Last Accessed on the 23rd of November 2010 at 1:30am.

²²⁹ Sen Amartya, *Ibid* at page 5.

²³⁰ Alastair Hudson, Towards a Just Society: Law, Labour and Legal Aid, *Ibid* at page 92.

²³¹ Alastair Hudson, *Ibid* at page 93.

²³² Diane Elson, Gender, Equality and Economic Growth in the World Bank, 2006. <http://www.informaworld.com/smpp/section?content=a913238920&fulltext=713240928#references> Last Accessed on the 23rd of November 2010 at 1:40am.

²³³ Giving Desert its Due: Social Justice and Legal Theory, Wojciech Sadurski, Published by D. Reidel Publishing Company Dordrecht, Holland, 1985 at page 78.

This 'contradiction' in the notion of equality is why it has been said to be not only an impracticable, but an incoherent, ideal.²³⁴ The notion of equality can be held to make sense only when the respect is specified in which people are, or should be, equal; but then again however many the respects in which people are equal, there are others in which they are, and should be, different.²³⁵

Jjuuko notes therefore, that:

'in this regard the struggle for justice is not primarily a 'legal' battle; it is not an immediate struggle for mere reform of the law but the struggle to change the social and economic conditions that underpin the legal order. The latter is erected to preserve and allow the social order to reproduce itself over time; this fact has practical consequences in the determination of the nature of activities that activist civil organizations pursue in the quest for justice: their target must go beyond the law and law reform. They must also recognize the contexts and limits of law reform as such'.²³⁶

It is suggested that it will help if the idea of equality or inequality, are understood as issues of social justice, not as single principles, but as a complex group of principles forming the basic core of today's social equality.²³⁷ It is only when that is done that legal aid can properly be situated within an equality framework, but before then it is an insufficient concept to anchor the requirement for legal aid in a society of differing social conditions and needs.

²³⁴ Equality, Distributive Justice and Legitimacy, <http://users.ox.ac.uk/~jrlucas/ethecon/chap10.pdf> at page 16. Last Accessed on the 23rd of November 2010 at 1:46am.

²³⁵ Equality, Distributive Justictive Justice and Legitimacy, Ibid at page 163.

²³⁶ Frederick W. Jjuuko, Law and Access to Justice, Ibid at page 1.

²³⁷ Equality, Stanford Encyclopedia of Philosophy, Ibid.

3.3 Legal Aid and Citizenship

The relationship between legal aid and citizenship is said to be a discussion of the relationship between law and society.²³⁸ Citizenship has been referred to as the ‘membership of individuals in a nation-state with universalistic rights and obligations at a specified level of equality’.²³⁹

Marshall is cited with the development of the concept of 3 categories of citizenship which are traced over 3 centuries.²⁴⁰ The first category was “Civil Citizenship”—this involved the rights to speech, faith and property. These rights were said to have emerged in 18th Century England when capitalist political systems instituted the protection of property, equality before the law, and civil liberties.²⁴¹ The second category was “Political Citizenship” which involved the right to participate in the exercise of political power. Political Citizenship was developed in the 19th Century when the franchise was first granted to middle-class and later to working-class men.²⁴² The third category of citizenship, “Social Citizenship”, arose in the 20th century and includes a broad range of rights including the right to economic welfare and security, a right to share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society.²⁴³

The discourse on legal aid features in the third category of citizenship-social citizenship.²⁴⁴

The concept of social citizenship is said to legitimize the provision of welfare services, given on a universal basis, as a right of citizens to public goods, rather than the initial ‘poor law

²³⁸ Hilary Sommerlad, Ibid at pages 346-348

²³⁹ Pieter Beole van Hensbroek, The Concept of Citizenship in Political Theory-Reflections on Globalised Applications of the Idea, presentation for the conference: Citizenship in East Asia, (December 2007) at page 2. <http://www.rug.nl/cds/asiannetworks/paperboele.pdf> Last Assessed on 19th November 2010 at 3:00pm.

²⁴⁰ Kathleen Knight Abowitz and Jason Harnish, Contemporary Discourses on Citizenship, Review of Educational Research, Volume 76, No. 4 (Winter 2006) at page 653-654

<http://www.jstor.org/stable/pdfplus/4124417.pdf?acceptTC=true> Last Assessed on 19th November at 3:02pm.

²⁴¹ Kathleen Knight Abowitz and Jason Harnish, Ibid at page 653.

²⁴² Kathleen Knight Abowitz and Jason Harnish, Ibid at page 653.

²⁴³ Kathleen Knight Abowitz and Jason Harnish, Ibid at page 654.

²⁴⁴ Hilary Sommerlad, Ibid page 348. Sommerlad quotes Humphrey Marshall as saying that legal aid was the basis for other social rights.

approach' to welfare which was often associated with stigma, and tainted by official discretion.²⁴⁵ King and Waldron explain the reasoning of those who make an argument for the social right dimension to citizenship to be that:

...collective provision for welfare is associated now with an idea of social citizenship, and is taken to be comparable in status and importance to other aspects of citizenship such as the right to own property and the right to vote. Such a perception implies that if governments try to cut the welfare state, they will confront resistance based upon a belief that people have rights embedded in welfare services which no one ought to tamper with: such welfare 'rights' are integral to the contemporary sense of citizenship...'²⁴⁶

This argument therefore, creates a link between social citizenship and welfare. The argument makes the claim to welfare provision as flowing from the responsibility of government for social rights, and therefore a fulfillment of governments responsibility for the rights and obligations it owes its citizens.²⁴⁷

Sommerlad analyses the link between citizenship and access to justice by considering legal aid with its status as a social policy tool to combat social exclusion.²⁴⁸ This is especially when considering the definition of social exclusion as the inability of the poor to fully exercise their rights as citizens.²⁴⁹ In her view the establishment of legal aid in England and Wales was a defining moment because it was fundamental to the development of an inclusionary form of citizenship, by providing a basis for participation and making it possible

²⁴⁵ Desmond S King and Jeremy Waldron, *Citizenship, Social Citizenship and the Defence of Welfare Provision*, *British Journal of Political Science*, Volume 18, No. 4 (October 1988) at page 422.

²⁴⁶ Desmond S King and Jeremy Waldron, *Ibid* at page 417.

²⁴⁷ *Ibid* at page 418.

²⁴⁸ Hillary Sommerlad at page 348.

²⁴⁹ Arjan de Haan, *Social Exclusion, Enriching the Understanding of Deprivation*, <http://www.sussex.ac.uk/cspt/documents/issue2-2.pdf> at page 30. Last Assesed on the 23rd of November 2010 at 1:35am.

to have a political life open to legal challenge.²⁵⁰ She also embraced the view that the law is a potential tool for empowerment and therefore it is an important vehicle for democratizing citizenship.²⁵¹

Since access to justice is necessary for democratic participation of all citizens, re-enforced by the equality principle, it is the responsibility of the government to make participation possible by making access to justice a substantive right of access to both criminal and civil legal aid.²⁵² Legal aid was therefore considered as a vital part of social rights since it was what stood between such rights formally claimed and their vindication.²⁵³ It therefore follows that universal access to the law is essential for persons who are regarded as citizens to enable this participation.

3.3.1 Citizenship and Welfare Rights in England and Wales compared

In England and Wales at the time of establishing the legal aid institution, the link between legal aid and social rights is said to have been responsible for the recommendation made by the Rushcliffe report that legal aid was to extend beyond persons normally classed as poor, to other people of moderate means.²⁵⁴ However, the concern for how much was to be expended on legal aid, opposition of universal application of legal service provision by the law society,²⁵⁵ and failure of the government to see the importance of legal aid to social citizenship are referred to as reasons why the judicare model of legal aid was set up.²⁵⁶

²⁵⁰ Hillary Sommerlad, Some Relections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid Ibid at page 348.

²⁵¹ Ibid at page 350.

²⁵² Ibid at page 350-351.

²⁵³ Mauro Cappelletti states that the initial problem with the welfare state was the creation of new rights.

²⁵⁴ Hilary Sommerlad, I Some Relections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid bid at page 354. See Tamara Goriely, Rushcliffe Fifty years On, Fifty Years on: The Changing Role of Civil Legal Aid Within the Welfare State, Journal of law and Society, Volume 21, No. 4 (December 1994) at page 547.

²⁵⁵ Hillary Sommerlad, Some Relections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid Ibid at page 354.

²⁵⁶ Hillary Sommerlad, Ibid.

The manner in which legal aid was established in England and Wales, and the policy of the government concerning legal aid over the years resonates the question as to whether welfare benefits can actually be regarded as rights.²⁵⁷ Sommerlad drew the connection between citizenship, social rights and legal aid, and the provision of free legal aid service as part of the distribution of ‘welfare rights’. In her account, the decline in universal provision of legal aid, cost cuts and cut in eligibility is hinged on Governments misconception of social citizenship, by viewing legally aided litigants ‘as parasitic figures’ rather than as active citizens, blaming citizens for over consumption of litigation.²⁵⁸

The conclusion that can be drawn from this is that if citizenship places an obligation on the government to provide welfare rights for its citizens based on social citizenship, then it is either legal aid has not been fully comprehended as a welfare right, or it is simply considered a benefit and not a right.

Faulks criticizes Soysals proposition that human rights could be a viable means of conferring civil and social rights on non-citizens through her thesis on personhood rather than nationhood. His criticism is based on the fact that human rights ‘do not address the question of reciprocity of obligation’.²⁵⁹ This explanation seems to view human rights as conferring only rights without corresponding obligations. Human rights are about both rights and duties at the same time.²⁶⁰

²⁵⁷ Desmond S King and Jeremy Waldron, *Ibid* at page 434. They acknowledge however that some welfare benefits are distributed as a matter of right, such as, education and child benefits.

²⁵⁸ Hillary Sommerlad, *Ibid* at page 355-358. The state is seen as regulator in the market of goods and services. By providing certain legal services to the society, the state ensures that people who do not have the means of purchasing legal services do not suffer. However, certain reforms such as extending the provision of legal service provision from litigation to advice expands access to justice from the former

²⁵⁹ Keith Faulks, *Citizenship*, (Routledge 2000) at page 146.

²⁶⁰ Even though it is not practicable to say all human rights impose corresponding duties, but the African Charter is an example of such human rights documents that imposes duties and obligations on persons as part of their rights to be enjoyed in community with others.

Faulks himself agrees that citizenship is contingent because it is always reflecting the particular set of relationships and types of governance found within any given society.²⁶¹ A right to the source of holding government responsible for failure to provide access to justice institutions cannot be placed back in the hands of such government to deal with in accordance with their policy preferences.

3.3.2 Citizenship and Rights in South Africa Compared

In Africa, the citizenship contest makes it unsafe to base government responsibility for the provision of legal aid on the concept of social citizenship. It is reported that

‘Hundreds of Thousands of people living in Africa find themselves non-persons in the only states they have ever known. They cannot get their children registered at birth or entered in school or university; they cannot access state health services...Most of all they cannot vote, stand for office or work for state institutions.’²⁶²

This quote mirrors the state of affairs in many African Countries even at present.²⁶³ There has been development of terms such as ‘indigenes’ and ‘settlers’, which refers to people who are regarded not to be indigenous to the communities which they have lived all their lives. Such people are not seen as being entitled to citizenship rights. The example of South Africa, under the apartheid regime, discussed in chapter two, is instructive in showing how government policies on citizenship can limit the rights and entitlements of persons within a state. The apartheid government created different levels of citizenship segregating education, medical care, and other public services along racial lines.²⁶⁴ As a result of this distinction that existed

²⁶¹ Keith Faulks, Citizenship, Ibid at page 6.

²⁶² Bronwen Manby, Struggles for Citizenship in Africa, Published by Zed Books, (London) 2009 at page 1.

²⁶³ Ibid at page 1. This book illustrates, with examples from a large number of African Countries how the citizenship laws are used as political and economic tools to systematically exclude persons from effective participation in government and government institutions.

²⁶⁴ The Economic Legacy of Apartheid, The International Development Research Centre, http://www.idrc.ca/en/ev-91102-201-1-DO_TOPIC.html

between blacks, whites and colored's, state funded legal services, which included legal aid, was also provided along racial lines.²⁶⁵

3.3.3 Citizenship and Social Rights in Nigeria compared

Part II of Nigerias' Constitution provides for Social and Economic Rights.²⁶⁶ These rights include; equality of opportunities,²⁶⁷ equal pay for equal work,²⁶⁸ equality of educational opportunities,²⁶⁹ and eradication of illiteracy.²⁷⁰ However this Chapter is also titled 'Fundamental Objectives and Directive Principles of State Policy.'²⁷¹ What this has been interpreted to mean is that Social and Economic rights in Nigeria are non-justiciable.²⁷² Odinkalu has called this 'out-dated law.'²⁷³ Odinkalu cites one of the members of the Constitution Drafting Committee of 1979 as saying that Part II of the Constitution does 'not confer on any individual a corresponding entitlement to demand the amenities as a right and no machinery is provided by the Constitution for ensuring such compliance, the use of the courts for the purpose being explicitly excluded.'²⁷⁴

Part II of the constitution has made it impossible for the realization of social rights in Nigeria. It has also limited the creation of any institutions or the mandate of any institution to see that

²⁶⁵ Shadrack B. O Gutto, Equality and Non-discrimination in South Africa, Ibid at page 267.

²⁶⁶ Part II, Constitution of the Federal Republic Nigeria, 1999.

²⁶⁷ Section 17 (2) (a)

²⁶⁸ Section 17 (3)

²⁶⁹ Section 18 (1) – (3)

²⁷⁰ Section 18 (1) – (3)

²⁷¹ Part II, Constitution of the Federal Republic Nigeria, 1999.

²⁷² In Archbishop Anthony Olubunmi Okogie & 6 Others vs The Attorney-General of Lagos State (1981) Nigeria Constitutional Law Reports at page 337-339. The Supreme Court of Nigeria held that 'the Court has no jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy.' The Court concluded by saying that Chapter II of the Constitution is not enforceable.

²⁷³ Chidi Anslem Odinkalu, Do Our People Matter to Our Courts? Keynote paper on the 1st Annual Human Rights Conference of the Nigerian Bar Association, Abuja 6th-8th December 2009 at page 1. He also calls this inconsistent with the United Nations Resolution 48/134 of December 1993 which states that 'all human rights are equal, universal, indivisible, interrelated, interdependent and inalienable.'

²⁷⁴ Chidi Anslem Odinkalu, ibid at page 8.

these rights are given effect to. I agree with Odinaklu that these rights have been reduced to ‘deniable and expendable categories.’²⁷⁵

3.4 A Human Rights Account to Access to Justice –A Modern Concept

What benefit will be it to consider a human rights account to access to justice? As will be discussed below, human rights give us the opportunity to give a substantive account to access to justice as opposed to a procedural account.²⁷⁶ It further helps us to understand why the responsibility of government in ensuring access to justice is not only needful, but it is an imperative, if the legitimacy of democratic government is to be sustained.

3.5 A Human Rights Approach to Legal Aid²⁷⁷

Human rights have become increasingly important in development issues because of their role in either poverty reduction, when rights are exercised or aggravating poverty, when rights are violated.²⁷⁸ The human rights approach is esteemed for its combination of international, regional, and national frameworks and its capacity to address both individual and collective rights.²⁷⁹ Human rights also create a link between people's needs and the political processes and devices necessary to ensure that policies and resources are in place to meet those needs.²⁸⁰ Therefore, the human rights approach to access to justice is preferred because it is a substantive account which helps to explain what the role of legal aid is in society and the obligation that this places on the government.

²⁷⁵ Ibid at page 20.

²⁷⁶ A substantive account allows us to view human rights as used in society, in everyday life as opposed to a procedural account that focuses on justice institutions and systems.

²⁷⁷ This proposal is made with the full knowledge that Legal Aid is available in most Countries as a right in Criminal Cases. While in Civil cases it is available based on either a means test, or where the Justice of the case demands. This proposal focuses on the availability of legal aid on an expanded scale to civil cases and outside of ‘formal’ proceedings.

²⁷⁸ Thomas Pogge, Poverty and Human Rights, Ibid at page 1.

http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf Last accessed on the 23rd of November 2010 at 12:05pm

²⁷⁹ Government and Social Democratic Resource Center, Human Rights Legal Framework, <http://www.gsdrc.org/go/topic-guides/human-rights/human-rights-legal-framework> Last accessed on the 23rd of November 2010 at 12:20pm.

²⁸⁰ Clare Ferguson, Caroline Moser, and Andy Norton, 2007, Claiming Rights: Citizenship and the Politics of Assets Distribution in Reducing World Poverty, Brookings Institution USA (2007)

Fleming is of the view that a look at the relevance of legal aid and human rights shows that a right to legal aid has developed at the international level. It may be instructive to consider certain of these developments.²⁸¹

3.5.1 Right to Legal Aid in International Discourse

The Universal declaration of Human Rights did not particularly provide for legal assistance but provided for the guarantee of ‘equal protection before the law’²⁸². Most International instruments which entered into force therefore required states to make available legal representation for persons who could not afford it.²⁸³

The United Nations in 1968 adopted a General Resolution on Legal Aid. It recommended that member states should ‘guarantee the progressive development of comprehensive systems of legal aid’.²⁸⁴ The African Commission on Human and Peoples Right also recognizes legal aid as a right, even though as a right enforceable as part of the guarantees of fair trial rights²⁸⁵ but this has no doubt set a normative framework for most African Countries in ensuring basic minimum standards for the provision of legal aid. The European Convention provides for the right to a fair trial in both civil and criminal cases.²⁸⁶ The right to legal assistance is considered as part of the fair trial guarantee, since legal assistance may be crucial to the right of ‘access to the courts.’²⁸⁷ The meeting of the Committee of Ministers of the council of

²⁸¹ Don Fleming, *Ibid* at page 15.

²⁸² See, Article 7 of the Universal Declaration of Human Rights 1948.

²⁸³ See, Section 14 (3) (d) of the International Covenant on Civil and Political Rights places an obligation on States to provide state funded counsel to indigent persons. The Human Rights Committee of the ICCPR which is the treaty monitoring body has established jurisprudence on the scope and form of legal representation required under the Covenant. See also, Article 6 (3) (d) of the European Convention on Human Rights and Fundamental Freedoms also provides for the right to representation.

²⁸⁴ United Nations General Assembly Resolution, 2449, Adopted on the 19th of December 1968.

²⁸⁵ See African Commission Resolution on the Right of Recourse to and Fair Trial. See also Resolution on the Right to a Fair Trial and Legal Assistance in Africa 1999 and also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001.

²⁸⁶ Article 6, European Convention on Human Rights, 1950.

²⁸⁷ *Golder v. United Kingdom*, Series A, no. 18, 1975.

Europe in 1978 considered that the right of access to justice as the obligation of the international community as a whole.²⁸⁸

Francoini believes that access to justice as a human right has developed under Customary International Law.²⁸⁹ Francoini examines whether there is an obligation today under International Law for every State to guarantee individual access to justice as a human right, regardless of diversity of citizenship.²⁹⁰ He traced the development of the right of access to justice as a minimum standard in the treatment of aliens, to other areas of international law such as minority rights. He concludes by stating that access to justice has now become an essential component of every system of human rights protection, which must be safeguarded also in times of crisis and emergency.²⁹¹ The International trend gives some guidance and points to the development in recognition of the right to legal aid. Even though it has been recognized with limited scope, in relation to the right of access to justice, it is argued that the Millennium Declaration and the importance to eradicate poverty has broadened both the scope and importance to be placed on the value of legal aid.

3.5.2 The Millennium Development Goals and the Scope of Human Development

In 2008, 189 world leaders met and agreed to the millennium declaration, a new global commitment to reduce extreme poverty and achieve human development and human rights.²⁹² The millennium development goals (MDGs) are a set of eight quantifiable goals focused on human development.²⁹³ The first goal on the list of the MDGs is to 'Eradicate Poverty and Hunger.'²⁹⁴ It is proposed that the commitment that the 189 leaders of the world

²⁸⁸ Council of Europe Committee of Ministers Resolution 78 (8) On Legal Aid Advice, Adopted on the 2nd of March 1978.

²⁸⁹ Francesco Francoini, ed., *Access to Justice as a Human Right*, Oxford University Press, 2007 at page 54.

²⁹⁰ Francesco Francoini, at page 2.

²⁹¹ Francesco Francoini, at page 55.

²⁹² Human Rights and the Millenium Development Goals, Making the Link, at page 4.

<http://hurilink.org/Primer-HR-MDGs.pdf>

²⁹³ Human Rights and the Millenium Development Goals, Ibid at page 4.

²⁹⁴ United Nations Millenium Development Goals, <http://www.un.org/millenniumgoals/>

have made by adopting the MDGs, and their commitment to human rights as central to the achievement of these goals creates the opportunity to place legal care as central to ensuring that the capacity of people is developed through rights awareness, a more focused approach to legal service delivery, with emphasis on its role in combating social exclusion.

As noted earlier in the introduction to this thesis, there is a causal and sequential relationship between human rights and poverty.²⁹⁵ Poverty may lead to social exclusion when people are cut off from the labor market, they lose social contacts, they live in stigmatized neighborhoods and cannot be reached by welfare agencies.²⁹⁶ Poverty also results from disempowerment, exclusion and discrimination.²⁹⁷ Therefore the issue relating to persons who live in excluded communities and who live in poverty is that they do not have effective access to government institutions and services that protect and promote human rights.

It is evident then as mentioned above that a link exists not only between, power and poverty, but also rights and poverty.²⁹⁸ Power involves the capacity to have an effect, the ability of people to make choices about their lives.²⁹⁹ Poverty is an impediment to the exercise of a person's power and it is a limit to the enjoyment of rights.

Human rights change the way that the problem of human development is conceived and the process of tackling this problem.³⁰⁰ A human rights approach refocuses attention on duties and obligations. It assesses the relationship between the State and Individuals and the

²⁹⁵ Ruth Lister, *Poverty* (Polity Press 2004) at page 81.

²⁹⁶ *Ibid* at page 81.

²⁹⁷ Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary General to the United Nations General Assembly, July 2009 at page 3.

²⁹⁸ Ruth Alsop and Andrew Norton, *Power, Rights and Poverty Reduction in Power, Rights, Poverty: Concepts and Connections*, Ruth Alsop ed., The World Bank, 2005 at page

²⁹⁹ Rosalind Eyben, *Linking Power and Poverty Reduction*, *Ibid* at page 15.

³⁰⁰ Human Rights and the Millenium Development Goals, *Making the Link*, *ibid* at page 10.

corresponding entitlement of the individual.³⁰¹ Further to this, when considering development challenges, human rights help to ‘identify the groups of people whose rights or entitlements have been violated, neglected or ignored, and identify who has a responsibility to act.’³⁰² The human rights framework requires that there should be an understanding of ‘the reasons why certain groups and people are unable to enjoy their rights – such as discriminatory laws and social practices.’³⁰³

The human rights approach gives a holistic understanding to access to justice, legal aid and the changing role of legal aid in society.

It is no surprise then that empowerment is referred to as one of the key principles to sustainable development and poverty reduction.³⁰⁴ Empowerment has been defined as ‘increasing the capacity of individuals and groups to make choices and to transform these choices into desired actions and outcomes.’³⁰⁵ Legal Empowerment is identified as key to human rights approach to access to justice and a right to legal care because it focuses on building the capacities of persons to have a voice and to assert the enforcement and protection of their rights.³⁰⁶

³⁰¹ Human Rights and the Millenium Development Goals Ibid at page 10.

³⁰² Human Rights and the Millenium Development Goals Ibid at page 10.

³⁰³ Human Rights and the Millenium Development Goals bid at page 10.

³⁰⁴ Ibid. Other normative principles on the same level with empowerment are; Transparency and Participation. These principles help to ensure that institutions are responsible and accountable and that people are fully informed, influential and vested in the decision making processes that affect their lives.

³⁰⁵ Rosalind Eyben, Ibid at page 15.

³⁰⁶ Legal Empowerment of the Poor and Poverty Eradication, Ibid at page 5.

3.5.3 Legal Aid as protection of personhood

Griffin in his account of human rights stated that ‘human rights can be seen as protections of our human standing or personhood.’³⁰⁷ Our status as human beings centers on our being agents. Griffin goes on to explain agency by breaking it down to what one must have to be an agent:

One must (first) choose ones own path through life-that is not to be dominated by someone or something else (call it ‘autonomy’). And (second) ones choice must be real-one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is one must have at least a minimum provision of resources and capabilities that it takes (call all of this ‘minimum provision’). And none of this is any good if someone then blocks one; so (third) others must not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’). Because we attach such value to our individual personhood, we see its domain of exercise as privileged and protected.³⁰⁸

The importance of human rights being founded on personhood is that the conventional list of human rights can be generated from the notion of personhood, and ‘the generative capacities of the notion of personhood are quite great.’³⁰⁹ Does the account of personhood as presented by Griffin have the capacity to generate a human right to legal care? A consideration of the role legal aid plays by providing ‘minimum provision’ is necessary.

³⁰⁷ James Griffin, *On Human Rights* (Oxford University Press, 2009) at page 32. He cites as examples, the right to life, without which he says personhood is not possible, the right to free expression, without which the exercise of autonomy will be hollow. He also mentions that personhood generates positive freedom (although he mentions that it is hotly debated). Positive freedom has in it the right to education and minimum provision needed for existence as a person.

³⁰⁸ Ibid at page 32-33.

³⁰⁹ Ibid, at page 33.

3.6 The Human Right to Legal Aid

A human right is said to be fundamentally important, only if it implies an obligation on the part of other people, one in which other people are obligated to use their power and resources to ‘make things happen’. Kant said a right of any kind gives the right holder ‘a title to compel’. This is the status that ought to be given to legal aid.

Provided the poor are able to access and enjoy them, human rights can help to equalize the distribution and exercise of power both within and between societies.³¹⁰ One of such entitlements is the right to participate. Enhancing participation of marginalized groups (especially) and persons generally in the society, and ensuring legal empowerment is one of the key roles of legal aid. Legal aid serves as the contact point between the law and people who are excluded in the society.³¹¹ People who do not have to go to the court, still engage with the forces of the law in their everyday lives through government legislation and policies such as imposition of taxes and rights to benefits. The inability of people to have a say in choices made by government through laws regulating their everyday life, is a violation of the free exercise of autonomy. This is especially the case in Countries such as Nigeria where people are not entitled to challenge policy decisions on Socio-economic rights in Courts.³¹² Since it is the responsibility of the government to ensure that human rights are protected, whether they be civil, political, social economic, then the government has the responsibility to ensure that the ‘minimum provision’ of recourses and capabilities that it takes to protect the human status, which is also called ‘personhood’ is protected.

³¹⁰ Human Rights and Poverty Reduction: A Conceptual Framework, at page 14.

<http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>

³¹¹ Legal Empowerment of the Poor and Eradication of Poverty, Ibid at page 5. The report quotes the Special Rapporteur on the independence of judges and lawyers as saying that free legal aid remains the only form of legal assistance accessible to large portions of the population.

³¹² See the discussion under the Section on Citizenship and Social Rights in Nigeria.

In this era of globalization, with reduced emphasis on the sovereignty of states towards their citizens, the increased need for substantive equality and social justice, the utilization of human rights as the premise for ensuring governments' responsibility in making right to legal care effective is a better approach.

CHAPTER FOUR- CONCLUSION AND RECOMMENDATION

4.1 Conclusion-Legal Aid a Dynamic Concept

*'[A] new model for priority-setting within the legal aid system should be based on consultation, environmental scanning of needs, a blending of system-wide and local strategic planning for the system, and the integration of a range of service-delivery models into priority-setting exercises.... [The] range of considerations taken into account in setting priorities needs to be less dominated by a focus on the liberty of the subject and to be more inclusive of the variety of other interests that create serious needs for legal services.... [The] system should enhance its capacity to determine its priorities strategically in order to achieve the greatest impact possible with available resources. Finally, we have noted that priority setting must be subject to revision in the light of experience and the changing social and legal environment.'*³¹³

In Chapter 1, a review of the relationship between access to justice and legal aid was made. This review showed that legal aid has mostly been influenced by changing notions of prevalent in societies. It concluded by assessing the understanding of legal in relation to access to justice, in terms of procedural justice, or access to the courts.³¹⁴ This form of intervention has been referred to as *ex post* in view of the fact that, legal needs are defined in terms of representation of individuals in contested proceedings.³¹⁵

³¹³ Report of the Ontario Legal Aid Review: A Blueprint for Publicly funded legal services in Comparing and Understanding Legal Aid Priorities, a paper prepared for Legal Aid Ontario, Mary Jane Mossman, April 2009, at page 26.

³¹⁴ Even though there have been developments around the issue of access to Justice, in terms of legal aid, it has remained within what Mauro Cappelletti has referred to as the first wave of access to justice. The third wave which has as its central focus Alternative Forms of Dispute Resolution does not mention legal aid as forming a part of this wave. See Mauro Cappelletti, Bryant Garth, Florence Access to Justice Florence Project, *Ibid.*

³¹⁵ Access to Justice in a World of Expanding Social Capability, <http://www.thefreelibrary.com/Access+to+justice+in+a+world+of+expanding+social+capability-a0224166842> last assessed on 18th of November 2010 at 4:45pm. This is different from *ex ante* where legal aid would have

Chapter two explored the influence of early conceptions on the development of legal aid institutions. It considered limitations that legal aid encountered in the three jurisdictions under review. It revealed restrictions that were placed on legal aid service provision because of its administration at the direction of the law society in England and Wales, the lack of a comprehensive government policy and racial citizenship legislations in South Africa, and excessive government interference and the plurality of the justice system in the functioning of the institution in Nigeria.

Chapter Three considered concepts which have been used as the normative basis for the provision of legal aid, and the limitations inherent in those concepts to achieving social justice. It also considered International Instruments acknowledging the existence of a right to legal aid. It considered that legal aid has developed as crucial in human development circles.

This thesis in the end has revealed that the role of legal aid in development has reached a stage that legal aid should be considered as a human right to legal care. The reason for this being that human rights provide a legitimate claim on the government to provide the institutions and services necessary to make rights meaningful.

This thesis has proved that the narrow interpretation given to access to justice cannot be sustained anymore because of the inherent limitations given to the notion of 'justice.' This traditional notion of justice cannot ensure that government responsibility is guaranteed for legal aid outside formal proceedings. There is a need to re-conceptualize the understanding of

been instrumental in deciding whether or not to enter into a specific contract, how to scrutinize legal documents, and even whether to take a matter to trial or not.

access to justice to meet present rhetoric of legal aid as vital to combat poverty and social exclusion.

This thesis has also shown that even though there are universal principles applicable to legal aid, the interpretation of what legal needs maybe will varies from society to society. It is important that the universal principle of a right to legal care is interpreted in a way that the rights of persons are protected, but it also important that when best practices for justice delivery are to be used, they are adapted to reflect what the society needs.

4.2 Recommendations

4.2.1 Mainstreaming Access to Justice and Legal Care

What methodology may be utilized to ensure that the human right to legal care is made meaningful? The Human Rights approach will say that access to justice and legal aid should be mainstreamed in government policy. So for example, when the government is to engage in reform of the justice sector, the fundamental concern should be what reform measure can be used to ensure the protection of human rights. The policy of Government in England and Wales has been criticized, not because it is less efficient or effective, but because the measures that the government has employed to ensure the efficiency and effectiveness of the system has focused on the need to get value for money and not the overall justice needs of people. So even though there is more quality control, there is less ‘justice’ for less people.

4.2.2 Obligation of States to Provide Effective Access to Justice

The Human Rights Approach also places the responsibility of government at the core of ensuring effective access to justice. A human right to legal care is not a normative principle but it is a legal objective. What this translates to in practice therefore is that the State is under the obligation to ensure that access to justice institutions provide effective access to justice by

either removing barriers that hinder access or by providing the means through which accessibility is enhanced. This means that in Nigeria for example, the Government is obliged to comply with International Instruments to ensure that Social rights are both respected and enforced. The Government is also be placed under an obligation to expand the mandate of the Legal Aid Council to provide legal care for persons to access institutions they need to enjoy these rights.

4.2.3 Understanding and implementing the dynamic role of Legal Aid

An understanding of the role of legal aid, according to changing legal needs in society makes it necessary for the Government to review from time to time what the legal needs of persons are and to ensure that the legal aid delivery is tailored to meet those needs.

4.2.4 Recommendations Specific to Nigeria

4.2.4.i Normative Framework

Nigeria is already committed at the International level to ensuring the realization of the Millennium Development Goals. The Nigerian Government can adopt a National Action Plan on Social Inclusion and Poverty Eradication. A Committee to supervise Implementation of this National Action Plan can also be constituted to work together with other human rights institutions to ensure that Access to justice and legal aid through the use of legal empowerment is at the centre of the programmes of such institutions.

4.2.4ii Strengthening of Existing Structures in Nigeria-The Legal Aid Council of Nigeria

Independence and Quality Assurance

Without some degree of Independence in its decision making, the Legal Aid Council will continue to suffer interference from the government and will lack the ability to carry out its

functions independently. For example, it is suggested that the Legal Aid Council be granted the power to enable it institute public interest litigation cases against the government on behalf of marginalized groups. The Council cannot do this when its budget is controlled by the Ministry of Justice, and the Ministry usurps legal aid projects on behalf of the Council.³¹⁶

Quality Measures should be developed by the Council

This will be to ensure that both the salaried Lawyer Scheme and especially the Judicare Scheme are subject to some degree of supervision. The legal aid council should have the authority to supervise pro bono services given by lawyers through the establishment of a pro bono unit.³¹⁷ Law offices and human rights organizations wishing to take part in pro bono service delivery should be made to register with the Legal Aid Council.

Restructuring Legal Aid Service Provision- Community Legal Service

The Legal Aid Council should design programmes that aim at ensuring the goal of social inclusion is realized. Community based Services should be focused and targeted on empowerment of the poor through the provision of information and education on rights awareness and enforcement. Such CLS offices should be situated in the local government councils, where geographical access to the offices is assured. Members constituting the CLS should also be representative of the Community themselves to increase communal participation. Nigeria could learn from the ‘Law Interns in Rural Law Firms’ project in South Africa. The Law interns provide access to justice in rural areas and provide legal services to disadvantaged persons.

³¹⁶ Such as the unsuccessful prison decongestion project of the Ministry of Justice where lawyers were paid Hundreds and Thousands of Naira to decongest prisons. This project was commissioned regardless of the fact that the Legal Aid Council is seriously under funded and the legal aid council carries out the functions these lawyers were contracted to carry out, at much less sums.

³¹⁷ It has been proposed that pro bono should be institutionalised in Nigeria. Pro bono is to be made a pre-condition for getting the highest level of recognition of Legal Practice in Nigeria, which is the status of Senior Advocate of Nigeria (SAN).

Incorporating a Holistic Approach to Service Delivery

In the delivery of services, the Legal Aid Council can employ a holistic approach by not only focusing on the legal needs of the persons but a multi-dimensional and multi-disciplinary approach that responds to peoples broader needs beyond legal representation. This approach is client centered and looks at the client as a whole person. It necessitates the incorporation of non-lawyers as part of the staff of legal aid centers.

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