

DETERMINANTS OF EFFECTIVE LEGAL AID SERVICE DELIVERY IN KENYA**Nanjala Christine**

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ABSTRACT

International Conventions and instruments underlines the responsibility of Governments to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all citizens. Access to justice is thus a concept widely acknowledged and accepted but continues to draw debates on its applicability. In Kenya legal aid services have become synonymous to access to justice. From a human rights perspective, provision of legal aid services can be looked at as an affirmation and recognition of the rights of the poor, bringing about equality before the law. It should however be observed that the nexus between the provision of services and the realization of human rights cannot be clearly pointed. Bearing in mind the importance of access to justice and in turn legal aid as an element of access to justice this paper seeks to explore the key determinants of effective legal aid services as provided by legal aid projects in Kenya. The discourse begins with a background and definition of legal aid in Kenya. The legal provisions that encapsulate and strengthen the case for legal aid at the national and international arena are captured herein. Premised on these legal provisions have governments and civil society acted so as to enhance access to justice in Kenya. Funding, capacity of legal aid service providers, accessibility and awareness are some of the key elements that impact on legal aid service delivery. The four aspects are discussed in detail with some comparison from neighboring states. The paper concludes by observing that indeed the four aforementioned aspects have a bearing on legal aid service delivery. It goes on to recommend that service providers engage in public awareness and literacy campaigns to ensure legal literacy. It further urges the government to develop a legal and policy framework for legal aid; expand legal aid service provision to cater for alternative forms of justice; integrate paralegal into the justice system so as to enhance capacity of service providers; consult with law society of Kenya and offer incentives to advocates to engage in pro bono services and to mobilize resources for legal aid activities.

Key Words: *legal aid, access to justice, service delivery*

Introduction

With the passing of time access to justice is emerging as an important modern day legal topic not only in the national arena but also in the international arena. In international law, access to justice norms have provided rights to individuals both within the context of rights but also outside the classical human rights regime of famous multilateral treaties such as the ICCPR (Gruodyte & Kirchner,2012). Though it is still the subject of debate in terms of its meanings and components the concept of access to justice revolves around the ease with which the ordinary citizen are able to make use of the law, legal institutions and procedures to sort out their issues as well ensure the protection and enjoyment of their rights. The components of access to justice premised on the foregoing include having laws that are easy to understand, easy reach, laws that are fair, mechanisms for dispute resolution, simple and affordable procedures towards ensuring justice, fairness in the results and above all a scenario where the means justify the ends (Owiti &Wesslink, 2007).

This recognizes the citizen's right to access and use the legal systems at an affordable cost in an efficient and effective manner, thus making it a matter of right and not of privilege. Access to justice thus begins with the question as to who can seek justice through the judicial, quasi judicial or other duty borne institutions. With the increasing cost of living and ever widening economic gap between the haves and have-nots access to justice especially through the instrumentality of litigation is looked at as a preserve of the haves. Then what use would these contained in law be to persons who by reason of their poverty or exclusion do not know of their existence or even the government's obligation towards them in ensuring enjoyment of basic rights?

Legal aid thus takes foot as a vehicle of providing justice for the poor. Where states have failed is looking at legal aid through the lens of litigation such that social justice is made available through procedural justice. The issues remain the same from the highly developed and sophisticated legal aid system in the United Kingdom to the teething system in Kenya. The question then that begs an answer is whether to sacrifice the quality of legal aid services rendered on the altar of quantity.

In this paper, we explore the legal embodiments at the international and national level with regard to legal aid as a component of access to justice. It takes a journey through the provision of legal aid services in Kenya discussing funding, capacity of service providers, accessibility and awareness as determinants of service delivery from the perspective of a legal aid service provider.

Overview of legal Aid in Kenya

Kenya has come a long way with regard to legal aid service provision. The onset was the pauper brief scheme under the judiciary that was operated on the basis of philanthropy rather than right by the limited public-spirited members of the legal profession who offered pro bono services; to the vibrant civil society organizations that have since seen access to justice become a constitutional embodiment at present. The services offered by the legal aid service providers have evolved over time with the intent of ensuring the legal aid services are accessible and affordable for the poor marginalized and vulnerable within our community.

The government in taking up its mandate as the duty bearer has recognized the saliency of legal aid. The Poverty Reduction Strategy Paper (2001-2004) observes that it is the poor who suffer most from the effects of weak, unaccountable and insensitive legal and judicial systems. It concludes that efficient and easy access to timely, efficient and affordable legal and judicial services encourage the culture of law-abiding citizenry which is a pre-requisite for social, political and economic development.

The importance of having a reliable accessible and affordable dispensation of justice to a well functioning society is reiterated in the Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation (2003-2007). It affirms that a sound system that is speedy, accessible and affordable to the poor, fair and not corrupt promotes and sustains economic development. Though the state is increasingly becoming involved in the provision of legal aid, it is fair to say that legal aid relies extensively on private initiatives, such as the services offered by the legal profession, NGOs and paralegals (NALEAP 2011).

In terms of funding for legal aid, Kenya places itself closest to the charitable model, as most legal aid schemes do not require self-payment by litigants. Kenya to very different extents uses the following legal aid service delivery models: Pro bono legal aid services offered by private lawyers, the cases are mainly referred to them by civil society organizations to which the advocates have signed up to offer their services. Judi-care (state brief) referrals to private lawyers, this is done through the pauper brief scheme under the Judiciary. Justice centres, which use lawyers, jurists and/or paralegals to provide a range of legal aid services, a concept which is being spearheaded in Kenya by Kituo Cha Sheria a civil society organization. Paralegal are also used especially within the community and the prisons. They are either affiliated to civil society organization or registered under their organization Paralegal Support Network. Lastly we have the independent university law clinics (DIHR, 2011).

Objectives of the Study

Legal aid projects are people-centered initiative and as such it is salient to have not only a look but also a feel of the impact they have had over time. Success or failure should be evaluated on the impact of the services as well as the numbers. This paper, discusses the determinants of effective legal aid service delivery in legal aid projects in Kenya. It seeks to shed light on issues that affect service delivery as well as make guiding conclusions and recommendations for bettering delivery of legal aid services with respect to funding, capacity of service providers as well as accessibility and awareness.

Definition of Legal Aid

Legal aid is narrowly understood as free or subsidized services to eligible individuals or groups, mainly poor and vulnerable people, provided as a means to strengthen their access to justice, for example legal information and education, legal advice and assistance, alternative dispute resolution and or legal representation (DIHR 2011).

Within the framework of provision of legal aid services the lowest and simplest level of service delivery and the onset of legal aid services is legal information and education, this is almost cost neutral for every organization. Such knowledge once shared enables one to solve their disputes without reference to the courts. Legal advice entails explanations as to what the law means and how it can be applied in a given context. Assistance is understood as taking the requisite legal

steps to assist one to protect their rights. Representation is considered the most expensive legal aid service and thus placed at the top of the legal aid pyramid. Representation entails securing the services of a legal practitioner at minimal or no cost to facilitate the protection and enforcement of one's rights (UNDP 2011).

In a broader context legal aid services are just but a component of access to justice. This encompasses the recognition that everyone is entitled to the protection of the law and that the conferment of rights are meaningless unless they can be enforced. It refers to the efficient and effective functioning and performance of justice institutions and their staff, capacity to protect the rights of the stakeholders on both the supply and demand sides of justice and further to dispense justice in accordance with the rule of law. Hence access to justice encompasses several aspects such as; Physical access to the justice institutions; Access to and affordability of duty bearers by both the complainants and suspects and equitable access to legal aid services for all.

In fulfillment of these aspects then one can comfortably adopt Hammergren's (2004) definition of access to justice as:

“The ability to use justice institutions to resolve ordinary conflict, protest, abuse and as a means to claiming other constitutionally guaranteed services and goods which is typically depicted as a basic right of all citizens”

Legal Embodiment of Legal Aid

It is instructive to note that there is no specific mention of legal aid in the international bill of rights or in the Universal Declaration of Human rights as is commonly referred. What could be construed to mean legal aid or access to justice is deciphered in the phrases “right to fair trial and due process”. Where due process means that whoever is facing the trial whether civil or criminal understands the process, has representation by a competent lawyer before a competent court. This was also confirmed in the International Bar Association's Report on the Legal System and Independence of the Judiciary in Kenya (1996). The concept of access to justice has been captured in a myriad of international instruments.

International Legal Instruments on Legal Aid

Internationally, the global order has taken cognizance of legal aid as a critical component in accessing justice as evidenced in the various international instruments if liberal and broad interpretation is given to provisions. The Universal Declaration of Human Rights is the first international convention to recognize the right of the individual to equality before the law and equal protection of the law without discrimination. Other conventions and legal instruments followed suit and widely embraced provisions on legal aid.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) identifies access to justice as one of the rights to which all individuals are entitled. Article 10 thus provides that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. In this regard access to justice means and includes: equality before the law with no discrimination; entitlement to unimpeded access to a court of proper jurisdiction; right to representation if failure to do

would result in an unfair trial or hearing and availability of a remedy when one's rights have been violated.

However, all caution should be taken in reference to the UDHR as it is not a legally binding instrument but its provisions are taken into regard when interpreting other international human rights instruments. The UDHR forms part of the international customary law.

International Convention on Civil and Political Rights

In further propagation of the need for legal aid a critical look at The International Covenant on Civil and Political Rights (ICCPR) which is the main international instrument for the protection the civil and political rights reveals precise obligations on states to provide free legal aid. To this end the Covenant obligates state parties to respect and ensure all individuals within the territory and subject to its jurisdiction the rights recognized in the Covenant (Art. 2). Of special interest is Article 14(3) d of the ICCPR that mandates state parties to make available, without cost, legal representation where a criminal defendant has insufficient means to pay. It specifically makes provisions in the following terms:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it”

It is noteworthy; there are limitations on the availability of legal aid as provided for under the ICCPR. The ICCPR provides for provision of legal aid only where the interests of justice so require and if the beneficiary does not have sufficient means to pay for it. Another limitation to the enjoyment of this right is on the right to counsel. Such that when a counsel is provided by the state there is no scope for choice of counsel by the individual. On the brighter side ICCPR sets minimum standards that obligate states parties to make justice accessible to all indigent people through legal aid. However it is noteworthy that the convention is silent on the matter of legal aid in civil cases.

Regional Human Rights Treaties

The African continent embraced the legal aid concept as internationally recognized and further domesticated it to fit its need. The African Charter on Human and Peoples Rights (ACHPR) is a regional convention which mandates state parties to take legislative or other measures to give effect to the rights it guarantees as stated in Article 62. In its provisions it is very explicit that an accused person has the right to a fair trial which encompass right to defence as well as right to be defended by a counsel of his choice among others as provided for under Article 7(c). In strict interpretation of this provision one can comfortably state that free legal aid is not explicitly provided.

The African Charter on the Rights and Welfare of the Child (ACRWC), adopted in 1999 entails some provisions that are relevant for legal aid. Article 17 (1)

“Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others”.

More specifically, the charter (art.17 (2) (c)) requires the state to ensure that minors are “afforded legal and other appropriate assistance in the preparation and presentation of his defence”. This must be assumed to entail an obligation for the state to assign legal counsel to minors in criminal cases, regardless of the nature of the offence and the severity of a possible sentence.

In addition to the foregoing there is, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (the Maputo Protocol) requires that women have “effective access to judicial and legal services, including legal aid” (art. 8 (a)) as well as encouraging “support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid” (art. 8 (b)).

In furtherance to the provision of this covenant, there some soft law international instruments that have focused on selected aspects of legal aid. For instance the Lilongwe declaration makes it clear that the primary responsibility for providing legal aid rests with the government. It also recognizes the role and responsibility of the legal profession in promoting legal aid services.

The Kyiv Declaration adopted in 2007 also reiterates the responsibility of the legal profession to ensure that the poor and vulnerable have access to legal aid schemes. It also encourages government to cooperate with other legal aid providers to ensure access to justice for the poor and vulnerable in society.

Domestic Law on Legal Aid

Transcending into the national arena Kenya prides itself with legislation that addresses legal aid in both criminal and civil cases. The Constitution, 2010, Article 2(5) and (6) allows for automatic application of international law that Kenya has ratified thus it follows that all instruments related to issues of access to justice that Kenya has ratified now form part of the Kenyan legal system and can be used as to regulate legal aid service provision.

The Constitution however focuses more on provision of legal aid to matters criminal rather than civil such that it obligates the government to ensure access to justice for all persons in Article 48. Article 48 has created a window of opportunity for legal aid in civil cases which had very limited space in the civil procedure with rigorous and complex procedures that eventually become an impediment to the indigent. The Constitution has fully embodied the concept of access to justice and further provided for the rights of persons held in detention in Article 49 and rights of accused person in Article 52. Additionally, the constitution has elaborately encoded and encapsulated what a fair hearing entails under Article 50 (2). Of specific relevance to legal aid is the right of an accused to be represented by an advocate assigned by the state at the expense of the state if substantial injustice is likely to occur.

Before the advent of the Constitution 2010, legal aid provisions were captured in various statutes. The Civil Procedure Act (Cap 21 Laws of Kenya), there is a leeway for free legal aid

services under the banner of pauper suits. The Act defines a pauper as someone who does not possess sufficient means to enable him to pay the fee prescribed by law for the institution of a suit (Order 33). Its technicality lies on the fact that one must be subjected to rigorous examinations by the court all in a bid to prove that they are indeed paupers so as to be allowed to pursue justice. Though the court fees are waived one shall have to pay them if the compensation arising from the matter is substantial as to cater for legal fees.

Legal aid is explicitly stipulated for children under section 77 of the Children's Act (No. 8 of 2001). The Act mandates the court to order for a legal representation of a child brought before court under any proceedings where such child is not represented (Section 77(1)). It imposes duty on parliament to defray expenses arising from and incidental to such representation (Section 77 (2)). Of particular relevance too is section 183 which deals procedures of dealing with children who are in conflict with the law. The Act obligates government to provide legal assistance to a child in conflict with the law if he or she is unable to obtain one (Section 186 (b)).

The Law Society of Kenya Act (Cap 18 Laws of Kenya) liberally interpreted infer that the society in under a duty to give advice to the public on matter incidental and auxiliary to the law (Section 4 (e)). This section imposes a duty on the law society through its members to take up cases pro bono on behalf of the public as spelt out as one of the primary objects of the law society. It is a provision that is not utilized in a formalized manner and needs to be explored in a bid to enhance access to justice through legal representation.

The entry of the National Legal Aid and Awareness Program (a state funded legal aid program) spearheaded the development of a National Legal Aid Policy and the Legal Aid Bill 2012. This has given the government an opportunity to own the process and fulfill its obligation as the duty bearer under Article 48 of the Constitution. The legal provisions once in force will bring under one umbrella all legal aid service providers and lay out the model for legal aid service delivery to be adopted within the country. It will also ensure quality of services by setting standards against which legal service providers shall offer their services.

Funding in Legal Aid

Access to justice is salient in every developed and developing nation as it fosters economic growth by ensuring effective and efficient service delivery to the citizenry. It enhances maintenance of the rule of law which is fundamental to economy prosperity as it allows planning and underpins social and economic development. It also essential as an element of the rule of law that frames the relationship between state and society, founded upon an accepted set of social, political and economic norms. It also enables protection of people's rights against infringement by other people, bodies and the government and ensures accountability breaking down barriers to justice enforce poverty and social exclusion. Lastly it assists in ensuring that the law is applied correctly and thus the justice system returns an effective outcome (Skinnider,1999).

Despite the fact that the foregoing makes a strong case for the provision of legal aid there several challenges with regard to funding of legal aid services. To be determined are; who is responsible for provision of funding for legal aid; what is the adequate and efficient level of funding to ensure effective service delivery and lastly which is the most efficient and effective structure for fund allocation. Unfortunately these are salient issues that are tackled at a glance without in-depth analysis of the modalities and the effects they have on legal aid service delivery.

In legal aid service provision there several costs that are incurred in the path of justice such as lawyers' or paralegals fees; experts' and expert witnesses' fees; court filing fees; notary's fees; services for summons; travel expenses; costs for communication; witnesses' compensation; copying and other overheads and bribes and other unofficial payments just to mention but a few. All this expenses are borne by the parties seeking justice. These costs have made justice inaccessible to the poor, marginalized and vulnerable in the community.

The legal aid schemes available in East Africa are funded in various ways;

For instance the legal aid schemes available in Uganda, state run and private interventions, are funded in various ways. To begin with the state-run legal aid initiatives, the government's general budget and international donors play the most important role. For instance the Uganda Human Rights Commission received around 4.7 billion USH (around 2 million USD) in the 2007/08 financial year and around 4.4 billion USH (around 1.9 million USD) in the 2008/09 financial year from the government, and around 2 billion USH (around 850.000 USD) from international donors in the 2007/08 financial year and around 2.7 billion USH in the 2008/09 financial year (around 1.2 million USD). The Ugandan Judiciary also runs a state brief system which is directly financed through the judiciary as well as the ULC; it is supported through the Legal Aid Basket Fund which receives very limited funding from the government. On the other hand the Justice Centres Pilot Project is financed through the Legal Aid Basket Fund. The legal profession also engages in legal aid activities through the legal aid schemes under the law society. The Legal aid schemes offered by the legal profession are mostly funded by membership subscriptions by the members of the Uganda Law Society, international donors for particular projects and the Legal Aid Basket Fund for the implementation of ULS' pro bono pilot project. Legal aid schemes put in place by civil society organizations are mainly funded by international donors sometimes this funding goes via the Legal Aid Basket Fund (DIHR, 2011).

In Tanzania mainland legal aid activities and projects are funded in various ways. To begin with they receive government-funding through the judiciary for the state brief system. Membership subscriptions of the Tanzania Law Society and funding from the LSRP are availed for the administration of the law society's pro bono scheme. Just like the other east African countries local and international donors are sources of funding for the legal aid schemes run by civil society organizations.

In Africa, advanced legal aid regimes like South Africa where legal aid services are offered using various methodologies, funding is pooled from various sources. The state-funded Legal Aid Board operates on a budget of about \$37 million and uses three main methods of delivery and two experimental methods. These are: judicare or referral to private lawyers; Legal Aid Board law clinics; and a public defender office. Funding for law clinics is provided by outside donors, mainly through the Attorneys Fidelity Fund, which subsidizes accredited clinics by providing funds to enable them to employ a legal practitioner to manage the clinic. Recently, the Association of University Legal Aid Institutions ("AULAI") has set up the AULAI Trust with an endowment from the Ford Foundation to strengthen the funding of the legal aid clinics (McQuoid-Mason, 2000). The independent university law clinics play a valuable role in supplementing the work of the Board, and it has been suggested that they receive some funding from the Board for their services.

Generally the South African government shoulders the responsibility of providing the funding for legal aid programmes across the country.

In Kenya the state legal aid initiatives, including the NALEAP, have been allocated an amount of 200 million KSH (approximately 2.5 million USD) over the past 2 years. This funding comes from general budget allocation of the government, a basket fund under the GJLOS reform programme and international donors (DIHR, 2011). The legal aid offered by civil society organizations and paralegals is funded primarily by international donors. Owing to the fact that donor funding is the basis of many of the legal aid projects undertaken in Kenya. This dependence has forced organizations to tailor their interventions and activities in a manner that accommodates the interests of the donors. The activities undertaken are then dictated by the donors who restrict how far they can reach and the activities that can be rolled out (Tendler 1975). As a result of this the legal aid sector has failed to come up with homegrown solutions for domestic legal issues.

It is noteworthy that in the Kenyan Criminal Justice system, the state accords legal assistance and representation to the accused persons. So far the state has assumed financial responsibility though only in capital punishment cases, using the pauper brief system; a judicare system that in reality only covers murder trials and treason cases in the High Court (Laws of Kenya CAP 75). This system relies on private lawyers appointed and paid by the judiciary on a case-by-case basis, but has been deemed inefficient in part due to the poor fees offered to lawyers (DIHR, 2011).

Funding has proved inadequate in legal aid service provision as the demand has far outweighs the supply. This has forced the service providers to adopt a way of sifting the wheat from the chaff. To this end an eligibility criterion has been developed and adopted by several organizations that look at either the means of the client or the merit of the client's case and in rare cases a combination of both. This criterion for eligibility leaves out majority of deserving cases who are needy and cannot afford the services offered by private lawyers (NALEAP, 2011). Despite the sifting some organizations still request clients to make some payment to defray the administrative costs; for instance the client caters for court filing fees, photocopy and transport however the services of an advocate provided at no cost the client. This arrangement makes access to justice quite expensive for the indigent in society. It also does away with the notion that legal aid services are free of cost.

Funding has played a key role in determining the legal aid delivery model adopted by the organization, the type and quality of activities and the staff capacity that can be maintained in the organization. A tilt on one side causes an imbalance on the aforementioned that is illuminated in the quality of services rendered. The burden of funding cannot be squarely placed on one actor, neither can the methodology of allocation of funds be cast in stone. That said then, levels of funding will squarely depend on the method of service delivery and the burden is to be borne by both claim holders and duty bearers but in unequal measure.

It is trite that the nature and effectiveness of a legal aid scheme in any country will depend upon the size of the budget provided by the state, the political will of the government, and the amount of cooperation that the scheme receives from the private sector. Where systems and structures

are functional then funding flows from one duty bearer to the next ensuring a seamless flow of service delivery.

Capacity of personnel

The demand side of justice outstrips the supply side such that the clients have overwhelmed the service providers. It thus follows that the organizations have a big clientele base that is ever increasing, in contrast, the numbers of the organizational staff remain constant. The staff is thin and overstretched and cannot effectively deal with cases that come to the institutions, this in turn also affects the servicing of clients outside the organizational bases. This is evidenced by some institutions having offices in Nairobi or two other branches in major urban areas leaving the semi-urban population locked out and requiring of them to travel long distances to get legal aid services (NALEAP 2011).

Manteaw (2008) charts the historical development of legal education in Africa and observes how the emphasis on the inherited colonial system not only facilitated the profession's loss of touch with local realities and with the needs and aspirations of the poor majority but also revealed grave inadequacies in the legal training that prepared these lawyers for practice in Africa. He goes on to note that legal training paid no attention to the problems of practicing in an underdeveloped country with multiple systems of law and that there was too much emphasis on litigation and too little emphasis on other means of resolving disputes. Further he observes that while Africa needs well-trained lawyers, African legal education should produce the different types of lawyers Africa needs experts in mediation, arbitration, health, environment, natural resources, joint ventures and project finance. African law schools need rich curricula for students to sample a wide array of course and clinic options.

Manteaw observations points out the genesis of the problem in legal aid. To begin with legal aid is deemed as a foreign concept rather than the norm in our economic times. To this end little emphasis is given to this area of law during an advocates training years. In Kenya the Law Society totaled the number of legal professionals on the main roll at ten thousand three hundred and eight (10,308). Of these, five thousand six hundred and seventy five (5,675) hold a practicing certificate, three thousand two hundred and forty (3,240) are inactive while the rest are either unknown, deceased, suspended or struck off the Roll of Advocates. Out of the active members with practicing certificates only three hundred (300) are registered with the Law Society of Kenya as providing legal aid services pro bono as at 2011. The number is said to have increased but the quality of work is daunting.

The total number of paralegals in Kenya is unknown to date however those who have been trained and recognized under umbrella organization Paralegal Support Network are two thousand (2,000) as at 2011.

The pro-bono advocates and paralegals engage their acquired knowledge and skill in the provision of legal aid services. Alternative dispute resolution and traditional justice systems have not been formally recognized and explored in the legal aid service provision. In the absence of these two methods of dispute delivery we have limited legal minds offering the services against a population of thirty nine (39) million Kenyans and growing. The other side of this deficiency of service providers is the beneficiary who is often than not exposed to ill equipped and unprofessional staff within the organizations that they seek help.

The picture cannot be painted better than this. All said and done, the number of service providers against the populous in addition to ill-equipped, ill educated, demoralized and overworked staff has greatly affected the quality of services offered in legal aid.

Accessibility and Awareness

The justice system is a continuum. It begins from points of entry where service of the system is sought, to the enforcement of a right, determination of a case, enforcement of judgment or the serving sentence. The idea of accessibility is broad and goes beyond physical accessibility of legal institutions to include affordability, cultural appropriateness such as language, social acceptability and relevance of applicable norms and processes, simplicity, convenience and friendliness of processes and agents of the law; fairness of treatment throughout the process and of outcomes; and timeliness and efficiency of delivery among others. It therefore includes law enforcement agents such as the police, administration agents in charge of order and security such as the provincial administration, Criminal Investigation and Intelligence agents, lawyers, judicial officers, and prison agencies. It is relevant to matters of language, dress, procedure, cost, physical accessibility, legal representation, sentencing, judicial legal development, impartiality, independence of judicial officers and general efficiency and effectiveness of the entire system (Ngondi- Houghton, 2006).

Language and presentation of the Law

The language and style of laws in Kenya is complex and archaic English done in small print thus making it difficult not only to read but also to comprehend. To ingrain ignorance was the requirement that the laws be purchased from Nairobi. These factors compounded worked to limit peoples' understanding of the law in a context where ignorance of the law is no defense. To cure this mischief the Law Reporting Council has sought to make the laws available online, this has increased accessibility. Unfortunately legal illiteracy is on the rise in spite of ease of internet connectivity and accessibility.

Gate-Keepers to the System

Hostile entry points into the justice systems inhibit many from entering or even approaching the system. Police in Kenya are often rough, insensitive and dismissive in their handling of both complainants and suspects. There have been many reported cases of people being arrested when they have gone to report a crime, women being detained within police stations, women being dismissed and humiliated when they have gone to report domestic violence incidents, and long periods of un-necessary delays at the police stations and response of police to distress calls. The resulting fear of the police has created a psychological barrier in people's mind and mistrust of the police and provincial administration officers such as chiefs and assistant chiefs (Ngondi-Houghton, 2006).

Ignorance of the law and lack of relevant information

Legal illiteracy is a malady with no cure in Kenya as of yet. This has caused legal aid service providers to toils for years on end with little result. Kenyans especially those in the rural areas do not know their rights, and are unaware of the provisions or requirements of the law or legal procedure as well as the organizations that can offer assistance or the role of the duty bearers (NALEAP 2011).

Delays

The key challenge associated with the courts is the delay of cases. Many cases filed on behalf of beneficiaries take so long to finalize whether civil or criminal cases. There is a large backlog of unfinished cases that the hue and cry from mwananchi caused the government to commission a study into the backlog in the judiciary in 1998. The study indicated that the High Court of Nairobi alone, with a capacity of 15 judges had over 20000 pending cases. It also revealed that the average period of a case in Kenya is 4-5 years. As a result of these massive delays there has been increasing lack of confidence in the judicial machinery, with people often giving up their rights after weighing the time and money costs of the whole process. It has also led to the development of some alternative undesirable extra-legal phenomena that is antithetical to the rule of law such as *'mob-justice'*, where communities seek justice for themselves by communally executing suspects on the spot.

Other reasons causing delays and backlog include: laxity of officers due to laid back supervision; congestion in the registries leading to loss of files; delays in procuring the AG' consent; the attendance of expert witnesses, such as document examiners of which there is only one in Kenya and ballistic experts of which there is only two in the country; unprepared and late-coming and absentee advocates also leads to delays as these practices lead to many and repeated adjournments; and procedural bottlenecks such as preparation and presentation of appeal files in criminal matters, and summons for directions in civil matters. Others include recording of proceedings in long hand and ignoring geographical jurisdiction in filing suits, especially running down cases, and the annual 90 day vacations of the judges of the High Court and Court of appeal (RoK, 1998).

Hostile environment in court, adversarial process

Courts are seen as insensitive to those who have no legal representation even if the person may have been trained on the legal processes to self represent himself or herself by one of the legal aid providers. Language and speech of the judicial officers is foreign and often very harsh to litigants, shouting them down and intimidating them when they make a mistake, or are inaudible. In addition the manner of dress, the wigs and gowns, is quite and intimidating. Also of concern is conduct of proceedings is complex and the general demeanor of officers of the court is unfamiliar and unbending towards litigants. This intimidates them, and many do not return to the system for justice. Some even withdraw their cases.

The adversarial process of court proceedings often pitches the rich versus the poor or stronger versus the weak creating a conflict environment. The weak and poor are often intimidated outside of court or otherwise compromised to withdraw cases by the richer and stronger parties. Even where the weak or poor do win cases, they are not restored to their peaceful state as they are often followed with threats and sometimes harm from the richer losers.

This has led to preference for the traditional justice systems in the rural and remote areas of this country. The traditional courts and justice systems are considered fast, impartial based on the oath-taking and able to restore the complainant to their peaceful state. For instance in Northern Kenya the people opt to use the traditional courts referred to as Maslah. Maslah courts are presided over by elders who are powerful and respected by the community based on their status and their vast knowledge on clan history, culture and tradition. Maslah is a cultural practice

coated with religious teachings that has been in existence to handle matters of justice for generations. The panel should have some religious leaders for guidance. Those who seat in the Maslah panel are from both parties but they can choose a moderator from a neutral clan. Unlike other parts of the country where courts and police crime reporting desks are overwhelmed with criminal cases for redress, residents of the North Eastern Province rarely rush to police stations or courts to seek justice for the numerous killings, injuries, assaults, rape, defilement, land disputes, marital problems. Maslah summons are slapped through an individual and his/her clan members. Although it is an individual who is accused of committing a crime, the clan to which he belongs shoulders the crime. And when it comes to actual compensation it is a communal affair where each sub-clan of the larger family has to contribute. The Maslah system is resorted to because it is cheap unlike the state courts which involve expenses in travelling, accommodation and hiring lawyers (NALEAP 2011).

Poor infrastructure and capacity

Some regions have scarce courts infrastructure such as Turkana District in North Eastern Province that has only one court covering the 77000 sq km of the district. This defeats accessibility of court processes, as litigants and witnesses have to walk long distances to attend court due to poor of transport infrastructure. These conditions lock out women, the old and children from accessing formal judicial processes.

Cost of justice too high

Filing fees and legal fees are too high for most Kenyans. This in addition to time cost and transport costs also keep many away from the system. Women, children and poor men are the ones most affected by this lack of affordability. There is no reliable or functional state provided legal aid scheme. Civil society organizations have stepped to provide legal aid and advice to the poor and women. They are only able to reach a very small percentage and usually only offer aid for civil matters not criminal.

Conclusion and Recommendations

Access to justice is an internationally recognized concept in law both nationally and internationally. It is regarded as part of social justice within the legal systems and thus salient for development and economic growth for any country. From the foregoing discussions on factors that determine legal aid service delivery, a component of access to justice one can observe that legal aid is not specifically mentioned in any international instruments but it is implied as one of the ways of enhancing access to justice.

The funds provided for legal aid are limited with few governments taking it upon themselves to provide budgetary allocations for the service. Kenya is such one country that is coming to the realization of the importance of access to justice. To this end a bill has been published that provides for establishment of a legal aid fund.

The demand for legal aid by the public is quite high. This in turn has strained the capacity of organizations offering this service to the common mwananchi. Quality of service and effectiveness has since been put to questions and this has raised concern over the type of training offered in institutions to cater for social justice in Kenya.

Awareness and accessibility of legal aid services are issues to be reckoned with. A myriad of factors are hampering the citizen's ability to access justice institutions key of them being the lack of adequate information about the organizations, their services and procedures. This has greatly impacted on the quality of services being offered by legal aid institutions.

It is premised on this are the following recommendations:

Public Education and Legal Literacy Campaigns

Knowledge is power so it is said thus the legal rights education is paramount in access to justice the Kenyan context. There is need for concerted public education on legal rights entitlements and sensitize the public on violations and the procedures for reporting. A list of legal aid service providers should be made public indicating the organizations key competencies, eligibility criteria as well as the locations to assist beneficiaries make informed decisions as to where they can get help. Educational material should be developed for public consumption that educates the public on their role and responsibilities as well as that of the duty bearers. Such material should be simple to read and understand even to those at the community level. Public campaigns on legal aid should also be carried out where the educational information is discussed with members of the public. Judicial officers should ensure that litigants especially children and other vulnerable groups, without counsel are accorded a fair hearing within a reasonable time.

Resource Mobilization for Legal Aid Activities

There is a huge demand for legal aid service and the demand outweighs the supply. Besides there is no specific vote for pauper briefs from the exchequer but it is lumped up with the vote for the judicial activities. It's upon the officer in charge to figure out what goes to what activities at the judicial level once the fund has been dispensed to their office. Government must mobilize resources to ensure the service delivery is meaningful to the indigent by providing budgetary allocations from treasury as they do with other government programmes. They can also collaborate or reach out to the private sector to provide funds for supplement. They can also reach out to development partners to fund some aspects of the programmes such as legal rights awareness and education, capacity building for providers in the justice system and some administrative costs.

Provide Incentives to Lawyers to Take Up *Pro Bono* Work

To enhance the capacity of legal aid organizations and other justice institutions it would be prudent to provide better incentives to advocates so that they can take up more pro bono work. It is evidenced in other jurisdictions that where there is a structured legal aid scheme with better incentives, majority of lawyers take up *pro bono* work including senior lawyers because of some resulting benefits arising are associated with the work. It is therefore important for the government in consultation with the Law Society of Kenya to develop rules of engagement with the pro bono advocates that clearly outlines the incentives and rewarding system. Some of the incentives could be conditions attached to senior public offices such as being a judge, or any commission, any advocate who needs such appointment one of the eligibilities could be pegged on pro bono work undertaken by such an advocate.

Integration of Para-legalism in the Justice Sector

To also assist in enhancing effectiveness of service delivery it is recommended that Government should employ paralegals to work with police, prisons and the court as they play crucial role that

links the community or those in need with the various structures that administer justice. The paralegals provide free legal services to the community they live in.

The service must however be streamlined with the establishment of an oversight authority that shall be instrumental in developing the training curriculum, registration, supervision and discipline of the paralegals. Such a step would cushion the advocates and gain their support allaying fears that the paralegals shall take up their work.

Expand the existing provision of legal aid services

In this regard there should be recognition and focus on the traditional justice systems which are used by many of the indigenous people in Kenya as well as the alternative dispute resolution methods. Alternative dispute resolution (ADR) and mediation assists in settling cases out of court as a result decongest the courts by having small claims handled at location level through a well structure ADR mechanism. What needs to be explored therefore is how the capacity of the elders can be built to enable them deal with issues in a fair and transparent manner to deliver justice. This will in effect see few cases go to court, help in decongesting the formal courts reduce backlog of cases and as a result increase effectiveness of legal aid services.

Develop a Legal and Policy Framework to Address Legal Aid Services

As Kenya stands today it does not have specific legislation or policies that address legal aid issues other than scattered provisions in various legislations, the constitution and international covenants. There is need to have unified legislation to deal with legal aid. Such law would help close existing gaps such as a framework for operationalizing the activities as well as providing guidelines on coordination of activities of those providing legal aid services. The National Legal Aid Bill and the Legal Aid Policy of 2013 presents opportunities for streamlining legal aid services in Kenya.

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INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples Rights

African Charter on the Rights and Welfare of the Child

Dakar Declaration on the Right to Fair Trial and Legal Assistance in Africa

Declaration and recommendation of the Dakar Declaration on the Right to a Fair Trial and Legal Assistance

International Convention on Civic and Political Rights

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

The Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa

Universal Declaration of Human Rights

Declaration on the Right to Fair Trial and Legal Assistance

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

STATUTES

The Constitution 2010

The Civil Procedure Act

The Children's Act

The Law Society Act