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**LEGAL AID AND KENYA'S LEGISLATIVE
FRAMEWORK: TOWARDS ACHIEVEMENT OF ACCESS
TO JUSTICE FOR THE POOR IN KENYA**

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INTRODUCTION

Access to legal aid is central to ensuring access to justice, especially for the poorest and most vulnerable people. As emphasised by the United Nations Principles and Guidelines on Access to Legal Aid in Justice Systems, legal aid is an essential aspect of a fair, humane, and efficient justice system based on the rule of law. Without access to legal aid, millions of people around the world are at high risk of having their rights ignored or violated when they interact with a justice system, including through arbitrary pre-trial detention, torture, coerced confessions, and/or wrongful convictions.¹

Due to the nature of Kenya's economic reality where legal services have a monetary cost to access justice, many Kenyans who fall within the poor cadre are unable to pay legal fees. As of 2018 estimates, Kenya had a GDP of \$85.980 billion making it the 69th largest economy in the world. Per capita GDP was estimated at \$1,790.² The distribution of wealth in Kenya is highly unequal (GINI index 47.7 with a global rank of 32).³ Increased levels of poverty means that the living conditions of the vast majority of Kenyans continue to deteriorate. Currently, the country ranks 145 out of 188 countries on the UN Human Development Index.⁴ There is a clear gender element in poverty in Kenya as the country is similarly ranked number 145 on UNDP's Gender Inequality Index.⁵ Widespread poverty translates into an increase in the number of people unable to

¹ Global Study on Legal Aid — Global Report, P IV

² National Action Plan Legal Aid 2017-2022 Kenya: Towards Access to Justice for All. Foreword p vii

³ GINI Index – Kenya <http://mecometer.com/whats/kenya/gini-index/> (accessed 12 January 2017)

⁴ United Nations Development Programme (UNDP), Human Development Report 2015: Work for Human Development (2015) UNDP, p 2.

⁵ UNDP, Human Development Reports: Table 5: Gender Inequality Index available online at accessed 12 January 2017

access justice hence the need for legal aid.⁶ Where the amount of money one has determines the kind of trial they get, there cannot be said to be equal access to justice in Kenya.⁷

Lack of access to justice by the poor around the world has been taken with concern by the international community. Under the international human rights law, states are obligated to guarantee each individual's right to go to court or, in some circumstances, access alternative dispute resolution forum to seek a remedy if it is found that the individual's rights have been denied, violated, infringed or threatened.⁸ The same principle is enshrined in the Constitution of Kenya 2010 which obligates government to guarantee access to justice by ensuring the cost of justice does not impede access. It is thus also an enabling right that helps individuals enforce other rights.⁹ Access to justice is an essential element of the rule of law and democracy which entails a fair trial and the right to an effective remedy.¹⁰

Since 2010, Kenya has made efforts to this end, through enactment of a new constitution which guarantees equality, non-discrimination and access to justice.¹¹ The country has also enacted the Legal Aid Act, 2016. These form the national legal framework for provision of legal aid as a tool for access to justice for the poor. The local mechanisms are intended to ensure that international standards on the provision of legal aid are met at the national level. Yet, not much research has been undertaken to measure Kenya's local standards against the regional and international standards stipulated in the regional and international frameworks.

Examining both regional and international frameworks vis-à-vis the national framework and adopting human rights approach, this article offers insights into the suitability or lack thereof, of the national framework to meet the needs of legal aid for the majority of poor Kenyans to access justice.

THE CONCEPT OF LEGAL AID

The concept of "legal aid" is inseparable from its function as a vital means of access to justice. Access to justice is defined as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards," and it is also seen as fundamental to the protection of human rights.¹² The term "legal aid" is defined in the United Nations Principles and Guidelines as follows:

"Legal aid" includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.¹³

Ortoleva discusses three distinct aspects of access to justice, the substantive, procedural and symbolic.¹⁴ Substantive justice is about the assessment of rights claims, procedural justice is about accessing the system with the opportunities in and barriers to it, while symbolic justice is about the legal regime and to what extent

⁶ Ibid P 1.

⁷ Obonyo Diana Achieng, *Toward the Provision of Mandatory Pro Bono Legal Services in Kenya*. Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School, 2017 p 1.

⁸ Regan, Francis (1999). *The Transformation of Legal Aid: Comparative and Historical Studies*. Oxford University Press. pp. 89–90. ISBN 978-0-19-826589-4.

⁹ UDHR, ICCPR, CEDAW, ACHPR, Maputo Protocol. A more detailed discussion is presented in subsequent sections.

¹⁰ Regan, Francis (n. 8 above) p 90.

¹¹ See the Constitution of Kenya 2010.

¹² United Nations Development Programme, *Access to Justice Practice Note* (2004). United Nations Office on Drugs and Crime, *Access to Justice: Legal Defence and Legal Aid* (2006). In *Global Study on Legal Aid Global Report*

¹³ General Assembly resolution 67/187, para. 8

¹⁴ Ortoleva S, 'Inaccessible justice: Human rights, persons with disabilities and the legal system', 284

it promotes citizens in terms of belonging and empowerment. Legal fees as a barrier can be said to fit in the procedural aspect, as they are a barrier to access to justice.¹⁵

Legal aid is a key component in ensuring access to justice, and a core principle of development and rule of law. In Kenya, many people are not able to afford legal services. This has a negative impact on access to justice. Lord Denning affirmed the essence of this right in *Pett vs Greyhound Racing association*¹⁶ in which he stated as follows:

It is not every man who has the ability to defend himself on his own, he cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused and wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day...

Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.¹⁷ According to Cappelletti and Garth, the expression 'access to justice' serves to focus on two basic purposes of the 'legal system'.¹⁸ Access to justice means, first of all, that the legal system must be equally accessible to all. Plaintiffs must be empowered to bring a claim before a court. Therefore, the procedural rules and practicalities shaping the legal system, such as standards on standing, litigation costs, availability of legal aid, or access to legal representation, may allow or restrict the ability of plaintiffs, especially the poor and disadvantaged, to bring a claim. Access to justice cannot be achieved when plaintiffs face many obstacles that prevent them from filing a lawsuit. Access to justice also means that the legal system must lead to results that are 'individually and socially just'.¹⁹

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.²⁰ Access to justice is more than improving an individual's access to courts or guaranteeing legal representation.²¹ The rule of law is the legal principle that law should govern a nation, as opposed to its being governed by the arbitrary decisions of individual government officials. Primarily, it refers to the influence and authority of law within society, particularly as a constraint upon behaviour, including the behaviour of government officials [28], with the basic principle that "no person is above the law".²²

One of the most important conditions for the 'establishment of the rule of law' is effective access to justice,²³ which 'concerns the ability of ordinary citizens to avail themselves of the instruments of the law, in a word the system of justice'.²⁴ Having full access to justice results in a positive connection between citizens and the justice system, mirrored in the 'respect for the rule of law and confidence in the justice system'.²⁵ Importantly,

¹⁵ OBONYO DIANA ACHIENG, TOWARD THE PROVISION OF MANDATORY PRO BONO LEGAL SERVICES IN KENYA Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School, 2017 p 5.

¹⁶ (1968) 2 All E R 545.

¹⁷ United Nations and the Rule of Law. <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

¹⁸ Cappelletti and Bryant have defined legal systems as 'the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the State.' See Cappelletti, M. & Garth, B., 'Access to justice: the newest wave in the worldwide movement to make rights effective' (1978), 27 Buffalo Review 181; 182.

¹⁹ Ibid; See also FRA, Annual Report 2011, Chapter 8 Access to efficient and independent justice, p.182

²⁰ Ibid

²¹ Ibid

²² C. Fleck, "The Rule of Law," LexisNexis, 2016 <http://www.lexisnexis.co.za/ruleoflaw/rule-of-law.aspx#Citizens,FreeAccess>, Free Access, (accessed 11/01/2016)

²³ ADR Centre Development website, Access to justice, available at: <http://www.adrcenterinternational.com/areasof-expertise/adr-and-access-to-justice/>.

²⁴ Greenleaf, G. & Peruginelli, G., A comprehensive free access legal information system for Europe (February 29, 2012). Online access to legal information, Firenze, Italy, May 2011; UNSW Law Research Paper No. 2012-9, p.1. 18 Ibid, p.2

²⁵ Ibid p.2.

access to justice cuts across civil, criminal and administrative law and is crucial for individuals seeking to benefit from other procedural and substantive rights.²⁶ For the United Nations:²⁷

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order...The rule of law, is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between governments and governed.²⁸ The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all ... citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law.²⁹

Access to justice is two-pronged. It involves procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for violation of one's rights).³⁰ In terms of Article 27 of the Constitution of Kenya 2010, access to justice requires equality before the law, by ensuring that all persons, regardless of race, ethnic origins or gender, are entitled to equal opportunities in all fields, use of community facilities and access to services. Thus, without justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.³¹

Access to justice is recognised in the UN Principles and Guidelines as "an essential element of a fair, humane, and efficient criminal justice system."³² Legal aid plays a crucial role in enabling people to navigate the justice system, to make informed decisions, as well as to obtain justice remedies. Legal aid makes a critical connection between populations and their justice systems and provides guidance on how to navigate the often difficult-to-understand justice system.³³ Access to legal aid is central to ensuring access to justice, especially for the poorest and most vulnerable people. According to the UN, legal aid is an essential aspect of a fair, humane, and efficient criminal justice system based on the rule of law. Without access to legal aid, millions of people around the world are at high risk of having their rights ignored or violated when they interact with a criminal justice system, including through arbitrary pre-trial detention, torture, coerced confessions, and/or wrongful convictions.³⁴

²⁶ FRA, 2016 Handbook, p. 16

²⁷ Secretary-General, United Nations, "The rule of law and transitional justice in conflict and post-conflict societies," Report of the Secretary General, 2004, S/2004/616, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (accessed 11/01/2016).

²⁸ T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford; Oxford University Press, 1993, pp.21-22

²⁹ Ibid

³⁰ *Kenya Bus Service Ltd & another v Minister of Transport & 2 others* [2012]eKLR.

³¹ Francis Kariuki and Kariuki Muigua, "Alternative Dispute Resolution, Access to Justice and Development" (2015) 1(1) *Strathmore Law Journal* 1-21, 6

³² *Global Study on Legal Aid Global Report*

³³ Ibid

³⁴ Ibid

HISTORICAL CONTEXT OF LEGAL AID IN KENYA

The right to legal representation under Kenya's current constitution is a fairly new concept. Hon Dr. Smokin Wanjala did state that access to justice has been elusive for the poor for many respects" and had become "an extremely rare commodity for the majority of the people".³⁵ The old constitution under section 77 allowed but not developed the right to legal representation. Section 77(2) allowed persons charged with criminal offences to be present in court and have legal representation of their own choice. This essentially meant that a person could choose which legal counsel she or she wanted to represent him.³⁶

However, the old constitution reserved this right to criminal offences only. It did not state the nature of the criminal offences in which counsel could be provided. This right was also tasked to at the 'individual's expense and not at the state's expense. This provided a difficulty in that though it was a right, its fulfilment was at the person's expense making it a preserve of the rich. Indigent defendants could not be assured of being provided counsel at state's expense.

There were no legal aid clinics to help in the attainment of this right.³⁷ However, there were personal initiatives through nongovernmental organisations such as the law society of Kenya, kituo cha sheria, FIDA which provided legal aid to those who could not afford legal representation. Only people suspected to have committed serious offences were offered counsel by the state, this composed of murder cases in which the state provided legal counsel and treason. It is important to note that these offences were only triable by the high court after committal proceedings were in the nature of inquiries and not trials. There was a high probability of accused making self-incriminating evidence. However, not all serious offences got counsel by the state. In offences such as robbery with violence the onus was on the accused to find counsel for himself or herself.

The old constitution recognised in some way that counsel was an integral part to a fair trial but failed to recognise this. Under the civil procedures act cap 21 order 33 recognises paupers by providing procedures for pauper briefs which are free, however, free legal assistance is not assured of them The is also a form of state legal aid admixture by the chief justice through the registrar and deputy registrar of the high court and court of appeal by appointing advocates to defend accused persons who are unable to afford services of an advocate. The scheme is popularly known as 'pauper briefs.' However, most experienced advocates avoided taking pauper briefs because of the little monetary terms it attracted. This was left to young advocates who were still trying to make a name in the field of advocacy.³⁸

Kenya was also not a party to a number of international treaties touching on the rights to legal representation. There was no express recognition of the right to legal representation enshrined in international treaties. In *Okunda vs. Republic*,³⁹ the high court limited the sources of law in Kenya to those listed under the judicature act. The court held that international laws not being one of the listed sources of of law unless domesticated through either a constitutional amendment or an act of parliament, international laws had no legal effect on the laws of Kenya.⁴⁰

INTERNATIONAL REGULATION AND STANDARDS ON LEGAL AID

The right to legal aid within the international legal framework developed in a piecemeal fashion over time.⁴¹ The right to legal aid, mostly in the context of the right to free legal assistance for criminal defendants who are unable to afford a lawyer, and in connection with the right to defence and the right to a fair trial, was

³⁵ Smokin Wanjala (ed), *Law and Access to justice in East Africa* (Claripress, Nairobi, 2004)

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Global Study on Legal Aid Global Report P 14

embedded in various international and regional treaties and declarations. Until the adoption of the UN Principles and Guidelines¹² in 2012, there had been no standalone international normative instrument dedicated exclusively to the right to legal aid.⁴²

International instruments

The normative framework for access to justice is found in international instruments, setting principles and minimum rules for the administration of justice. They comprise the Universal Declaration of Human Rights, the international human rights law and specific conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations.⁴³

The Universal Declaration of Human Rights⁴⁴ (1948, UDHR) was the first international instrument to proclaim that all persons were entitled to “equal protection of the law”¹⁴, as well as the right to a fair trial. Though the Universal Declaration of Human Rights (UDHR) is not a legally binding instrument, it is taken into regard when interpreting other international human rights instruments and many of its provisions are considered to form part of international customary law. The UDHR sets in general terms, as a common standard of achievement for all peoples and all nations, that everyone charged with a penal offence should be granted “all the guarantees necessary for his defence” (art. 11 (1)).⁸ However, the UDHR does not define what exactly should be understood by “all the guarantees necessary for his defence”, thus offering little guidance on the role of legal aid in criminal justice. The UDHR does not entail requirements to legal aid in civil cases.⁴⁵

The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty which all of the countries covered in this report are party to, lays down a number of more specific requirements to how criminal trials should be conducted. These include an obligation for the state to ensure that the accused has “adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” (art. 14 (3) (b)), and a right for the accused 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 such case if he does not have sufficient means to pay for it” (art. 14 (3) (d)).⁴⁶

Some guidance for the interpretation of art. 14 (d) (3) may be found in the practice of the European Court of Human Rights (ECHR).⁴⁷ Though this practice concerns the European Convention of Human Rights rather than the ICCPR, the provisions dealt with are similar, and the practice of the ECHR may thus have some relevance for interpreting the ICCPR.⁴⁸¹⁴ According to the ECHR, factors that must be taken into consideration in order to determine when the interests of justice require that free legal assistance be given include the severity of the penalty risked by the accused, the complexity of the case and the capability of the accused to defend himself.⁴⁹

⁴² Ibid

⁴³ M. Anderson, “Access to justice and Justice and legal process; Making Legal Institution Responsive to the poor” (2003) LCD WORKING PAPER 178

⁴⁴ General Assembly resolution 217 A (III) of 10 December 1948.

⁴⁵ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, P 19.

⁴⁶ Ibid P 19

⁴⁷ Ibid P 20

⁴⁸ The European Convention on Human Rights art. 6.3 stipulates that “Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself on person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

⁴⁹ European Court of Human Rights, Case of Quaranta vs. Switzerland, Appl. No 12744/87, 24 May 1991, paras. 33 and 34, see also European Court of Human Rights, Case of Benham vs. United Kingdom, Appl. No. 19380/92, 23. January 1995, para. 61.

While not expressly addressing the right to legal assistance, the International Covenant on Economic, Social and Cultural Rights²¹ (1966, ICESCR) asserts State parties' obligation to uphold rights without discrimination,⁵⁰ and to ensure the equal rights of men and women to the protections arising from the ICESCR.⁵¹

The Convention on the Elimination of all forms of Discrimination Against Women (1979, CEDAW),⁵² which is the key international instrument for achieving equality between men and women, includes a reference to the "establish [ment of] legal protection of the rights of women on an equal basis with men ... through competent national tribunals and other public institutions [for] the effective protection of women against any act of discrimination."⁵³ In addition, the CEDAW Committee published a General Recommendation 33 in 2015, which includes guidelines on strengthening access to legal aid services for women, including promoting gender-sensitive services, improving accountability and legal awareness.⁵⁴

States parties to the United Nations Convention on the Rights of the Child (1989, CRC)⁵⁵ undertake to treat accused children "in a manner consistent with the promotion of the child's sense of dignity and worth," including access to "legal or other appropriate assistance" to enable the child to prepare his or her defence.⁵⁶ The CRC reiterates the priority established in other international instruments to provide "conditions of equality" and non-discrimination, with a right to an effective remedy as stipulated in the Optional Protocol 3 on the Involvement of Children in Armed Conflict.⁵⁷

Although the Convention and its concomitant optional protocols do not specifically address the right to legal aid at no cost to the child (or his parents), the Committee on the Rights of the Child addressed this in General Comment 10: Children's Rights in Juvenile Justice, which provides that "legal or other appropriate assistance in the preparation and presentation of his/her defence ... should be free of charge".⁵⁸ The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990, the Havana Rules)⁵⁹ urge that children be entitled to legal assistance "and be enabled to apply for free legal aid, where such aid is available[.]"⁶⁰ The Havana Rules further stipulate that the right to legal aid is triggered by arrest or the status of awaiting trial.⁶¹³²

The Convention on the Rights of Persons with Disability⁶² (2007) also includes provisions on access to justice for persons with disabilities. Specifically, the Convention stipulates in Article 13 that the States parties "shall ensure effective access to justice for persons with disabilities on an equal basis with others ... in all legal

⁵⁰ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, p 22.

⁵¹ Ibid

⁵² United Nations, Treaty Series, vol. 1249, p. 13.

⁵³ Ibid., art. 2(c)

⁵⁴ Committee on the Elimination of Discrimination against Women, General Recommendation 33 on Women's Access to Justice, 3 August 2015 (CEDAW/C/GC/33).

⁵⁵ United Nations, Treaty Series, vol. 1577, No. 27531.

⁵⁶ Ibid., art. 40

⁵⁷ General Assembly resolution 54/263.

⁵⁸ Committee on the Rights of the Child, General Comment No. 10 on Children's Rights in Juvenile Justice, 25 April 2007 (CRC/C/GC/10, para. 49).

⁵⁹ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, p 30.

⁶⁰ . Ibid., III (18)(a). See also, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), General Assembly resolution 40/33, arts. 7(1) and 15(1); and Guidelines for Action on Children in the Criminal Justice System (The "Vienna Guidelines"), Economic and Social Council resolution 1997/30, para. 16. Additionally, the Guidelines on Justice in Matters involving Child Victims and Witnesses, Economic and Social Council resolution 2005/20, lay out the right to access to professional and legal assistance, stressing that such professional should have adequate training (paras. 40-42).

⁶¹ Ibid., II (15) and III (18)(a)

⁶² United Nations, Treaty Series, vol. 2515, p. 3.

proceedings, including at investigative and other preliminary stages.”⁶³ The Convention further provides that States parties provide “reasonable accommodation” as may be necessary to ensure that persons with disabilities deprived of their liberty are “entitled to guarantees in accordance with international human rights law.”⁶⁴

In line with the ICCPR, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families⁶⁵39 emphasizes the right of those facing criminal charges to consult with “counsel of their own choosing,” to be informed of this right and to receive legal assistance without payment “where the interests of justice so require ... if they do not have sufficient means to pay.”⁶⁶40 The Convention relating to the Status of Refugees (1951) also notes the importance for refugees to be able to access the courts; Article 16 of the Convention states that a “refugee shall enjoy in the Contracting State in which he [or she] has his [or her] habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.”⁶⁷

Regional human rights treaties

Besides international human rights treaties, some regional arrangements are of interest for understanding the state’s obligation to offer legal aid in the 3 countries under assessment in this report. The African Charter on Human and People’s Rights (the Banjul Charter)⁶⁸17 contains a provision regarding fair trial which stipulates that the accused has “the right to defence, including the right to be defended by counsel of his choice” (art. 7 (1) (c)).⁶⁹

Though the Banjul Charter does not explicitly say that defence counsel must be provided free of charge when the accused cannot afford to pay, a duty of the government to provide for such would seem to be present if no other legal aid schemes are available to ensure the defendant’s rights, as the right in art. 7 (1) (c) would otherwise only be theoretical. Furthermore, art. 4 of the Banjul Charter protects the right to life.⁷⁰18 Since a judgment that sentences a person to death, without a defence lawyer having been present during the court hearings, would seem to constitute an arbitrary deprivation of life, the Banjul Charter must be understood to require as a minimum that defendants in capital punishment cases are offered free legal aid by the state if they cannot afford to pay on their own. The Banjul Charter does not deal with legal aid in civil cases.⁷¹

Besides the Banjul Charter, the African Charter on the Rights and Welfare of the Child,⁷² which entered into force on 29 November 1999 and has been ratified by all of the countries covered in this report,²⁰ entails some provisions that are relevant for legal aid. According to art. 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.

⁶³ Ibid., art. 13(1)

⁶⁴ Ibid., art. 14(2)

⁶⁵ United Nations, Treaty Series, vol. 2220, p.3.

⁶⁶ Ibid., art. 18(3)(d).

⁶⁷ United Nations, Treaty Series, vol. 189, No 2545.

⁶⁸ The Banjul Charter was adopted 27 June 1981 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), and entered into force 21 October 1986.

⁶⁹ “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

International standards and norms

The above international and regional instruments have contributed to the establishment of the right to legal aid as a key element in protecting fundamental rights, such as the right to defence, the right to a fair trial and the right to equal protection of the law. More specific guidance on principles, guidelines and best practices on legal aid in various contexts of the criminal justice system can be found in a number of international and regional standards and norms.⁷³ Though these instruments and declarations are not legally binding in a strict sense, they have value for understanding the scope of state obligations under treaty law as well as they may lay down standards that are relevant for evaluating the performance of states and other legal aid providers.⁷⁴ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁷⁵ (1988) recognises the right to legal aid for persons deprived of liberty. In particular, Principle 17 provides that “[a] detained person shall be entitled to have the assistance of a legal counsel. He [or she] shall be informed of his [or her] right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it,” and that “[i]f a detained person does not have a legal counsel of his [or her] own choice, he [or she] shall be entitled to have a legal counsel assigned to him [or her] by a judicial or other authority in all cases where the interests of justice so require and without payment by him [or her] if he [or she] does not have sufficient means to pay.”⁷⁶

Similarly, the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty⁷⁷ (1984), recognises “the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.”⁷⁸ The Basic Principles on the Role of Lawyers⁷⁹ (1990) provides guidance to States in “their task of promoting and ensuring the proper role of lawyers”, including their obligations to inform the public of “their right to be assisted by a lawyer of their choice upon arrest or detention or when charged with a criminal offence” and to provide prompt access to lawyers possessing “experience and competence commensurate with the nature of the offense”, whose services must be free of charge when the interests of justice so require. The Basic Principles also require that lawyers undergo periodic training, uphold the principle of non-discrimination and ensure that lawyers respect their client’s interest. It also notes the responsibility of the State to ensure that lawyers are free from intimidation and improper interference so that lawyers are able to independently perform their professional functions.⁸⁰

The United Nations Standard Minimum Rules for the Treatment of Prisoners⁸¹ (2015, the Nelson Mandela Rules), which was first adopted in 1957 and revised by the UN General Assembly in 2015, provides that “[p]risoners should have access to effective legal aid”. This also applies to untried prisoners— “[i]f an untried prisoner does not have a legal adviser of his or her own choice, he or she shall be entitled to have a legal adviser assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by the untried prisoner if he or she does not have sufficient means to pay. Denial of access to a legal adviser shall be subject to independent review without delay”.⁸²

⁷³ Global Study on Legal Aid Global Report p 20.

⁷⁴ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, P 19

⁷⁵ General Assembly resolution 43/173, annex

⁷⁶ Ibid., principle 17.

⁷⁷ Economic and Social Council resolution 1984/50, annex.

⁷⁸ . Ibid., para. 5.

⁷⁹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

⁸⁰ Global Study on Legal Aid Global Report p 2.

⁸¹ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, p 30.

⁸² Ibid

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders⁸³ (2011, the Bangkok Rules) complement the Nelson Mandela Rules by giving guidance to States on reducing imprisonment of women and meeting the specific needs of women in imprisonment. Noting the “particular vulnerability” of newly arrived women prisoners, the Bangkok Rules state that they shall be provided with “access to legal advice” upon admission. The Rules also provide that “prison authorities shall help [...] women [who have suffered sexual abuse or other forms of violence before or during detention secure] access to legal assistance”.⁸⁴

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012, UN Principles and Guidelines) is the first international instrument dedicated to the right to legal aid; they highlight and reaffirm that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law; a foundation for the enjoyment of other rights, including the right to a fair trial; and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process and enables access to justice. The UN Principles and Guidelines provide States with 14 principles and 18 guidelines on the establishment, reform or administration of national legal aid systems in the context of criminal justice, and on ways to ensure that legal aid is “accessible, effective, sustainable and credible.”⁸⁵ Collectively, they offer detailed guidance on the provision of legal aid at various stages of criminal justice proceedings and for various types of beneficiaries. When adopting the UN Principles and Guidelines, the General Assembly urged States to establish, strengthen and expand legal aid “to the maximum extent possible.”⁸⁶

In 2014, the Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,⁸⁷ 65 which emerged from the International Conference on Access to Legal Aid in Criminal Justice Systems held in Johannesburg, South Africa, called upon States to fully implement the UN Principles and Guidelines and provisions related to legal aid contained in international and regional instruments.⁸⁸

Not only is the importance of access to legal aid being recognized and affirmed in the international community through legal instruments, standards and norms, but also in the recommendations that States make to each other as they undergo the Universal Periodic Review (UPR) process under the auspices of the Human Rights Council (see Annex III). The UPR is a review mechanism under which States are given an opportunity to declare what they have done to improve the human rights situation in their countries, and to make recommendations to other States on how to do so. The UPR provides a useful basis from which to identify good practices worldwide on the provision of legal aid, as well as effective remedial actions that States have taken to strengthen national justice systems and to ensure access to justice for all.⁸⁹

⁸³ General Assembly resolution 65/229, annex.

⁸⁴ Ibid, rules 2(1), 7 and 25(2).

⁸⁵ UN Principles and Guidelines (see footnote 2), principle 2(15). See also, the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, General Assembly resolution 60/177, annex, and the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, General Assembly resolution 65/230, annex reiterating the role of legal aid in delivering access to justice

⁸⁶ General Assembly resolution 67/187, para. 4; see also UN Principles and Guidelines (see footnote 2), para. 10. These may involve public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others.

⁸⁷ The Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Johannesburg, 24-26 June 2014.

⁸⁸ Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors . A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011, p 30

⁸⁹ United Nations, Treaty Series, vol. 2220, p.

Regional Norms and standards

In Africa, the Dakar Declaration recommends that state parties to the Banjul Charter “urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes”. The declaration also recommends that the state parties “in collaboration with Bar Associations and NGOs enable innovative and additional legal assistance programs to be established including allowing paralegals to provide legal assistance to indigent suspects at the pre-trial stage and pro bono representation for accused in criminal proceedings”.⁹⁰

Furthermore, the declaration articulates a need for the state parties to encourage “the contribution of the judiciary, human rights NGOs and professional associations” in delivering legal aid. In other words, the Dakar Declaration urges the government to cooperate with other legal aid providers as well as it urges some form of coordination from the side of the government.⁹¹

Secondly, in accordance with the Dakar Declaration, in 2001 the African Commission on Human and People’s Rights adopted the “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa”.⁹² These principles should be incorporated into national legislation by the state parties to the Banjul Charter. The principles define 2 criteria which should be taken into account when deciding whether “the interest of justice” require the state to offer legal aid free of charge in criminal cases: “the seriousness of the offence” and “the severity of the sentence”. It is stipulated that “the interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon”. The principles also lay down some specific requirements concerning how lawyers appointed by state-run legal aid schemes (criminal as well as civil law) should operate.⁹³

The Lilongwe Declaration recognises that “the vast majority of people affected by the criminal justice system are poor and have no resources with which to protect their rights”, and notes that the government has the “primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system”. Accordingly, the declaration urges governments to “adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice”. The importance of providing legal assistance during all the aspects of criminal proceedings is also emphasised in the declaration.⁹⁴

Fourthly, the Kyiv Declaration on the Right to Legal Aid, adopted by a 2007 conference which was attended by government officials, legal aid practitioners, academics, and representatives from human rights, legal advocacy, and legal and justice sector reform organisations, entails a number of standards on legal aid that are relevant for assessing the performance of governments and other stakeholders.⁹⁵ The declaration recognises that the poor and vulnerable have a right to legal aid, and stipulates that the state has the primary responsibility for creating legal aid schemes.⁹⁶

The Declaration encourages governments to cooperate with other legal aid providers: “Governments should establish cooperative arrangements with a wide range of stakeholders – such as non-governmental organisations, community-based organisations, religious and non-religious charitable organisations, professional bodies and associations and academic institutions – and ensure effective public participation in the formulation of legal aid policies, programs and legislation”.⁹⁷

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid P 24

⁹³ Ibid P 24

⁹⁴ Ibid P 25

⁹⁵ Ibid P 26

⁹⁶ Ibid

⁹⁷ Ibid

NATIONAL LEGAL FRAMEWORK FOR KENYA

The adoption of the UN Principles and Guidelines by the UN General Assembly in 2012 reflects an increasing consensus among States on the importance of legal aid in ensuring access to justice, protecting human rights and strengthening the rule of law. These guidelines reflect the best practices drawn from national experiences around the world. In most countries, the right to legal aid is part of national legal frameworks — from constitutions to specific national laws and dedicated policies on legal aid.⁹⁸

The Constitution

In Kenya until the passing of the Constitution in 2010 which recognized access to justice as a fundamental human right, no law existed that guaranteed poor Kenyans a right to access justice and thus most poor people ended up suffering due to the inability to access justice.⁹⁹ The preamble of the constitution recognises some values that are key in the lives of Kenyans. Some of these values include equality, social justice and the rule of law. Article 10 advocates for values such as social justice. Legal aid enables people of the lower social class to access justice regardless of their social status.

Kenya's constitution provides that it is the state's responsibility to ensure access to justice for all persons,¹⁰⁰ and that every person has the right to a fair trial, including adequate time and facilities to prepare a defence. It specifically provides for the responsibility of the state. Article 48 states that "The State shall ensure access to justice for all persons...." Article 50 on the other hand, additionally provides that an accused person has the right to a fair trial which includes having an advocate assigned to them by the state at its own expense if substantial injustice would occur otherwise. Article 25 further provides that the rights that cannot be limited include the right to a fair trial. Article 27 provides for equality amongst all persons before the law, including full and equal enjoyment of all rights and fundamental freedoms. As stated above, the right to fair trial is enunciated internationally in the International Covenant on Civil and Political Rights (ICCPR), which also provides for equality before the courts and adequate time and facilities to prepare a defence.¹⁰¹

Article 50(2)(h) is specific on legal aid. The *Article* enshrines the right to counsel at public expense. The Article provides that "[e]very accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

The Constitution of Kenya 2010 has other raft of provisions on promoting access to justice for all, specifically Articles, 159 and 174. By dint of article 2 (5) and (6) of the Constitution, Kenya has domesticated all international human rights instruments such as the ICCPR, the ICESCR, CEDAW, ICRC among others. This means that discussions on legal aid are informed by both domestic considerations as well as international human rights law. Additionally, the government has developed a robust legal and policy framework aimed at promoting legal aid to expand access to justice to her citizens. It is therefore correct to state that there is a strong legal basis under Kenyan law for the development of a Legal Aid National Action Plan. This includes not only national but international and regional legal frameworks.

Legislation

Kenya enacted the Legal Aid Act in 2016. The main reason for enacting the Legal aid act was to operationalise article 48 and article 50 (2) h of the constitution. According to the preamble to the act, it aims to establish a legislative framework to offer affordable legal aid services and access to justice. The salient features of the Act reveal an ambitious and comprehensive legal regime. The preamble, guiding principles and

⁹⁸ Global Study on Legal Aid Global Report p 23.

⁹⁹ Pauline Mudeshi Muhanda, Access to Justice for Persons Living in Poverty the Legal and Institutional Framework in Kenya. LLM thesis, University of Nairobi, 2016.

¹⁰⁰ Ibid

¹⁰¹ Article 14, International Covenant on Civil and Political Rights.

objects of the Act are anchored on constitutional provisions and spirit contained under articles 19 on the rights to fundamental freedoms, article 48 on right to access to justice, article 59 (2) (g) (h) on the right to choose counsel and be informed of legal representation at the expense of the state. A key feature of the Act is that it creates as legal aid service as a state agency with broad functions.

Some of the central functions include but not limited to the agency and these are governance, administration of the legal aid fund including accreditation of legal aid providers, development of standards and guidelines, promotion of alternative dispute resolution and public interest, research in the field of legal aid with special reference to the needs among indigent persons and marginalised groups. The act defines who is eligible and what constitutes legal aid. It provides that for purposes of the Act, legal aid includes legal advice, representation, and drafting of relevant documents, giving effect to ADR and out of court settlements, awareness raising and recommendations for law reform.

It sets up a National Legal Aid Service, and guarantee legal aid for individuals accused of criminal offences punishable by death, or when substantial injustice is likely to occur if no legal aid is provided. A revolutionary aspect of the Bill is that the legal aid scheme would also be available to support public interest litigation that meets the criteria to be established by the relevant Cabinet Secretary. The Act excludes certain matters from the support of legal aid, including cases on taxation, defamation and collection of debts. While the Bill does not explicitly say so, it is anticipated that legal aid would also be applied to other areas of law, such as family and civil matters but on a sliding priority largely based on the availability of funds.¹⁰²

CONCLUSION AND RECOMMENDATIONS

It can be said that Kenya has put in place a legal framework that can deliver legal aid to meet the ends of access to justice. However, countries with functional legal aid schemes face constant and mostly similar types of challenges. The most common is failure by the state to allocate sufficient funds. No doubt, this will remain a key challenge in Kenya. However, the state ought to know that because certain aspects of legal aid support are constitutionally protected, it is important that it be ready to provide enough funds that will ensure the legal aid scheme is able to discharge the state's minimum constitutional obligation, especially under Article 50(2)(h).

Another challenge, and which no doubt will be an issue in Kenya is to ensure that representation through legal aid is effective. Generally, because legal aid scheme cannot, and in fact should not, pay the very high and sometime exorbitant rates charged by advocates in private practice, it is common for advocates who accept to represent persons who are being supported through legal aid not to pay sufficient attention to their cases. This effectively defeats the rationale for having a legal aid scheme – ensuring equality before the law, and that justice is done to all irrespective of status.

A legal, policy and institutional framework exist in Kenya relating to the right to legal aid, both in civil and criminal procedures. However, the legal system is faced with procedural, structural, human resource, fiscal, and administrative limitations, thus the indigent are unable to exercise this right. For example in the criminal justice system remandees endure inordinately long remand periods for reasons ranging from missing investigation files, long case lists, missing court files, failure of witnesses to attend court, among others. This is a situation that is further compounded by lack of legal representation.¹⁰³

¹⁰² Ibid

¹⁰³ National Action Plan Legal Aid 2017-2022 Kenya: Towards Access to Justice for All, P 17.