

The State Of Legal Aid

In

Nairobi County

2020



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LEGAL RESOURCES FOUNDATION
Haki Itawale



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We are also grateful to the United Nations Development Program (UNDP) especially *Amkeni Wakenya* for their grant management and counsel as we sought to understand the state of legal aid in Nairobi County.

We recognize that Nairobi County serves as a hub of the many justice sector actors, and findings from this research could by extrapolation likely paint the national picture of legal aid. The process is a going-concern and constantly enriched by stakeholders and players in the administration of justice sector and continue weighing in their input.



Eric Odongo Mukoya
Executive Director

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Foreword

A just and equal society is made possible when all men and women find value in legal, economic and social systems that work to solve challenges and provide opportunities to realize their aspirations. Therefore, access to legal aid especially for the poor, vulnerable, marginalized and the indigent, not only improves manifestation of fair justice, but also fundamentally diminishes opportunities of legal discrimination and inequality.

The knowledge herein provided opens up state and non-state platforms to further canvass on how to create inclusivity in access to justice within the Kenyan context which presently seems skewed against the poor.

Fair trial speaks to Article 48 of the Constitution and is in pursuance to human dignity as espoused in Article 28. In this context legal aid is an essential aspect of a fair, humane, and efficient justice system based on the rule of law. There can be no access to justice where people, especially the poor and marginalized, do not find accountability, credibility and trust in institutions of law enforcement and adjudication. Lack of trust in the justice system leads to fear of institutions, financially draining dispute resolution and less access to information on laws and rights.

In contrast, legal aid advances formal recognition and protection of rights, enables people, especially the poor and vulnerable, to navigate the justice system, to make informed decisions, as well as obtain justice remedies. Legal aid makes critical connection between populations and their justice systems and provides guidance on how to navigate the often difficult-to-understand justice system.

Legal aid encompasses services provided by lawyers and paralegals in criminal matters as well as in civil and administrative matters to individuals who are poor, marginalized, or otherwise in special need for legal protection, to enable them to exercise their rights.

The goal of this study, therefore, is to ensure there are evidence-based initiatives by collating diverse and rich perspectives or experiences from which policy decisions can be grounded. The overriding objective is to suggest concrete recommendations informed by intellectual reflection, empirical evidence, and practical experience of administering legal aid in consonance with the objects of the National Action Plan on Legal Aid 2017-2022 in Kenya.

**Chairperson, Board of Trustees
Legal Resources Foundation Trust**



Prof. Kimani Njogu
Chairperson Board of Trustees
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Overview from the National Legal Aid Service

These findings have come at the right time when the country is inching towards access to justice for all. The urgency to debunk the myth of justice as a preserve for the rich, well-endowed individuals cannot be gainsaid. COVID-19 has reminded us, particularly justice sector actors that human rights are universal for all. The indigent are unable to access legal services during this period of curtailed movement and social distancing just as the wealthy. Quest for human rights and justice must equalize and not separate us. In Kenya today, the subject and concept of access to justice is gaining traction. It is well articulated in the Constitution 2010 at Article 48 and international statutes. In principle, the state is obligated to guarantee each individual's right to attend court and, in some circumstances, access alternative dispute resolution forums to seek remedy whenever

violation, infringement or threat on their right is cited. It is provided that cost of justice does not impede access whatsoever.

We are reminded that fair trial is central to the rule of law and democracy. We are enlightened of government plans and programs to facilitate palatable administration of justice for all consumers. Besides, we are invited to exploit opportunities that reduce discrimination, similarly face challenges which discredit the justice system in Kenya. Government, through the National Legal Aid and Awareness Programme (NALEAP), has developed the National Legal Aid and Awareness Policy (NLAAP), to address issues pertaining to legal aid and access to justice in the country. This policy views legal aid as a critical component of enhancing access to justice in the country; emphasizes the need to ensure the right to legal aid as a constitutional right; recognizes disparities in provision of legal aid and provides relevant policy directions; ensures multi-sectoral approach to addressing poor provision of legal aid in the country; and ensures evidence-based planning and resource allocation. The goal of the NLAAP is to enhance the facilitation of access to justice through a national, sustainable and quality legal aid and awareness framework in line with the Constitution, regional and international human rights standards.

National Legal Aid Service (NLAS) through the National Action Plan (NAP) stands for and articulates access to justice for the indigent, besides offers leadership and implements interventions in collaboration with other state and nonstate agencies to arrive at all-encompassing legal aid and related services, including prioritising investments that dispel doom for the vulnerable and marginalised groups' access and use of the justice system. Despite the challenges facing NLAS, similar to other state agencies, actions which scale down illiteracy on legal rights and operation of the court in adversarial systems, alongside efforts to reduce cost of legal services for the indigent are on. With this findings state and nonstate actors stand to understand, design and implement justice system interventions that prioritize rights of the indigent.

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List of Statutes

African Charter on Human and Peoples Rights

African Charter on the Rights and welfare of the Child

Children Act, No 8 of 2001, Laws of Kenya

Civil Procedure Code

Constitution of Kenya, 2010

Convention on the Rights of the Child, 1990

International Covenant on Civil and Political Rights, 1966

Legal Aid Act, 2016

Penal Code, Cap 63, Laws of Kenya

Persons Deprived of Liberty Act, No 23 of 2014, Laws of Kenya

Small Claims Courts Act



List of Cases

David Njoroge Macharia vs Republic (2011) eKLR

Dominic Kimaru Tanui v Republic HCCRA 12 of 2012 [2014] eKLR;

Re Zipporah Wambui Mathara (2010) eKLR

Rono vs Rono (2005) AHRLR

Pett vs Greyhound Racing Association (1968) ALL ER 545

WNM V Republic Criminal Appeal No 72/2012 [2014]



List of Acronyms

CEFA	Comitato Europeo per la Formazione e l'Agricoltura (European Committee for Training and Agriculture)
CSOs	Civil Society Organizations
EU-PLEAD	European Union Programme for Legal Aid and Delivery in Kenya (PLEAD)
GJLOS	Government Justice Law and Order Sector (GJLOS)
ICJ-K	International Commission of Jurists -Kenya Chapter
IDLO	International Development Law Organization
LRF	Legal Resources Foundation
LSK	Law Society of Kenya (LSK)
NLAAP	National Legal Aid and Awareness Policy
NALEAP	National Legal Aid Programme
NAP	National Action Plan
NLAS	National Legal Aid Service
SDG	Sustainable Development Goals





Chapter One

Introduction

One of the biggest gaps of the Millennium Development Goals was the silence it offered on the issue of justice. To mitigate, the UN Sustainable Goals were made broader and included goal 16 on peace, justice and strong institutions.

Five years have passed since the United Nations Sustainable Development Goals lay out ambitious targets to guide global and national development policies to 2030. The targets include target 16.3's promise to "ensure equal access to justice for all."

However, as countries make data available through the voluntary National Reviews, data on people's experience of (in)justice grows. It is thus becoming clear that the world is not on track to meet this target. Data from the reports illustrates that many people face justice problems, and too few get the justice they need. Justice is a thread that runs through all of the 17 Sustainable Goals Kenya participated in the voluntary reviews in 2017 and 2020.

This "justice gap" allows impunity to thrive as it undermines human development, worsens conflicts, and reinforces inequality and poverty traps. As such, as the global justice gap continues to grow leaving many a poor and vulnerable people negatively affected. Two-third of the world's population-an estimated 5.1 billion- lack meaningful access to justice (World Justice Project, 2019)

Therefore, the burden of this global justice gap falls disproportionately on the most vulnerable, including women, children, persons with disability, minorities and those disadvantaged because of their age, ethnicity.

Lack of access to justice may be understood in three broad ways. First, people who are excluded from opportunities the law provides; second, people who live in extreme conditions of injustice, and three, people who cannot obtain justice for everyday civil, administrative, or criminal justice problems.

A number of tools can be deployed to ensure access to justice but legal aid is central to all as it ensures access to justice, especially for the poorest and most vulnerable people. Access to justice is a critical component for any society that aspires to be just, fair and inclusive (Danish Institute of Human Rights, 2011)

Legal aid is an essential aspect of an accessible, fair, humane, and efficient justice system based on the rule of law (world Bank). Without access to legal aid, millions of people in the country are at a high risk of having their rights ignored or violated when they interact with the criminal justice system, including

¹ The World Justice Project,

through arbitrary pretrial detention, torture, coerced confessions, and/or wrongful convictions. Interactions with the civil law system equally present challenges for unrepresented litigants or where they are represented at initial stages but subsequently become unable to afford representation (LRF, Experiential learning, 2003-2020).

Legal aid plays a crucial role in enabling people, especially the poor and vulnerable, to navigate the justice system, to make informed decisions, as well as 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 (Mbote & Migai, 2011). Legal aid encompasses services provided by lawyers and paralegals in criminal matters as well as in civil and administrative issues to individuals who are poor, marginalised, or otherwise in special need for legal protection, to enable them to exercise their rights (Senge Wabuke, Abdulrahman & Nciko, 2018).

For nearly two decades now, Kenya has committed to developing a modern legal aid system, with all attendant rights and responsibilities. The Kenyan government, civil society, Law Society of Kenya, select universities and the donor community have piloted and experimented with various models of legal aid service delivery (EU-PLEAD 2015, IDLO, 2017). Such earlier efforts were augmented by the enactment of the Constitution of Kenya which guarantees access to justice for all persons and obliges the State to ensure that where any fee is required it must not impede those whose seek to access justice [Article 19 (2); 48; 50 (2) g and h].

The Kenyan government, in fulfillment of its constitutional and international obligations, especially Sustainable Development Goal 16, target 3, has enacted the Legal Aid Act, 2016, developed the National Legal Aid and Awareness policy, 2015 and established the National Legal Aid Service (NLAS), having graduated this from the National Legal Aid Programme (NALEAP). The first five -year programme was initiated with the launch of the National Action Plan, Legal Aid 2017-2022. It is now in its third year.

To understand the situation better, the Legal Resources Foundation Trust initiated a study on the state of legal aid and assistance in Nairobi County. This study is not only timely but critically important as Kenya starts the journey of preparing its voluntary Sustainable Development Goals (SDGs) review.



Chapter Two

Methodology

The study site is Nairobi County. It is the country's political, commercial and industrial capital. According to the 2019 Kenya Population and Housing Census Demographic, Nairobi county has a population of 4,397,073 people distributed across the 8 sub-counties/constituencies. It thus has the highest population compared to the rest of the 46 counties in the country.

As the national hub, Nairobi may enjoy some of the best services but also experience the emblematic challenges in the delivery of legal aid and related services. It hosts all the superior courts and tribunals. It also has the highest number of subordinate courts but also continues to experience the highest volume of case backlogs within the court system. Also since the roll out of National Legal Aid Service, Nairobi continues to record the highest number of cases. For instance, according to records from NLAS, 9,189 of the 23651 cases handled by NALAP from the financial year 2013/2014 to 2016/2017 were in Nairobi county. The percentage of the cases relative to other counties has continued to increase from 39 per cent to 40.4 per cent in 2017/2018 when the county recorded 5294 of the 13,091. The same trend was exhibited in the financial year 2018/19 when Nairobi recorded 6053 cases of the 15294 cases supported by NLAS across the country

Further, a number of non-state actors providing legal aid services are also based in Nairobi just as most of an estimated 18,000 advocates operating in the country.

To meet the objectives of this study, Legal Resources Foundation employed a consultation process. After a stakeholder process was held, the scoping study by design sought expert opinion from various professionals and institutions whose mandate and roles are in area of access to justice. A number of approaches were employed which include: Desk literature review to provide general understanding of the sector; face-to-face interviews with key informants; focused group discussions with consumers of justice; and online administration of questionnaires.

The study in general applied purposive sampling as a non-probability criterion. This entailed a deliberate selection of respondents while ensuring the sample is representative.

The following key actors in legal aid service delivery in Nairobi county were interviewed during the study:

- .. Attorney General
- .. National Legal Aid Service

²It is the site of the Supreme Court, Court of Appeal and High Court -7 divisions; 10 of the 124 magistrate courts, Kadhi court and 20 tribunals.

³State of the Judiciary and the Administration of Justice Annual Report, 2018/2019 at pages 34,38,46 and 61 respectively available at <https://www.judiciary.go.ke/resources/reports/> accessed on 30th April 2020.

- .. Director of Public prosecutions
- .. Judiciary
- .. National Police service
- .. Kenya Prisons Service
- .. Kenya National Commission on Human Rights
- .. Legal Resources Foundation
- .. Law Society of Kenya
- .. Namati
- .. CEFA- Comitato Europeo per la Formazione e l'Agricoltura (European Committee for Training and Agriculture)
- .. Raoul Wallenberg Institute of Human Rights
- .. CESVI- Kenya- Italian, "cooperazione e sviluppo", cooperation and development) - one of the biggest humanitarian organizations in Italy
- .. Centre for Rights Education and Awareness (CREAW)
- .. Kituo cha Sheria
- .. FIDA-Kenya- Federacion Internacional de Abogadas-Kenya International Federation of Women Lawyers (IFWL)
- .. Kenya Human Rights Commission

However, the study has some limitations. Due to limitation of time and resources, the study did not deploy extensive qualitative research methods to undertake case reviews or quantitative field work where beneficiaries of legal aid would have given their views on extent and satisfaction with legal aid services provided. These two areas could be avenues for subsequent studies.



Chapter Three

THE HISTORY AND DEVELOPMENT OF LEGAL AID IN KENYA

Introduction

Throughout history as different societies and civilizations have advanced, respect for the rule of law has been a major pillar in guaranteeing economic, social and political stability. The observance and enforcement of this principle has largely been a function of various government agencies, most notably, the judiciary, whose adherence to this principle forms the backbone of a populace's trust and confidence in its court system and government.

Access to justice is a key element of the rule of law principle. Article 48 of the 2010 Constitution provides that

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

While it is clear that the State has an obligation to ensure access to justice, like many other countries, Kenya still has challenges, particularly with regard to access to legal representation. The United Nations Office on Drugs and Crime (UNODC) conducted a global study on legal aid involving 49 countries and released the findings in 2016. Among these were South Africa, China, Afghanistan, the Netherlands, New Zealand, Chile, Tunisia, etc. Each of these countries use different approaches to legal aid. Some of the approaches used by the countries in the study include: public defender systems, assigned counsel, contract service systems, civil society providers and/or hybrid systems.

When asked to identify some of the main barriers to effective provision of legal aid in their countries, reasons cited include (i) Lack of an organized legal aid system; (ii) Low pay for legal aid work (hence lawyers are unwilling to take up legal aid matters); (iii) Challenges in the legal infrastructure e.g. limited number of lawyers; (iv) Lack of publicity around legal aid services – people generally don't know where to find legal aid; and (v) Poor quality of legal aid services. Despite the cross-cutting nature of these challenges, some are more prevalent in certain areas than others.

Most Kenyans will agree that Advocates' fees are far out of their reach and because they are unable to meet legal costs, many will appear before courts unrepresented while in the case of victims and plaintiffs, they may abandon their cases altogether.

Aside from the non-affordability of Advocates in the country, the challenges listed above are not unheard of within our jurisdiction. Indeed, these have contributed greatly to the miscarriage of justice in courts here in Kenya.

Fortunately, over the last few decades various stakeholders in the justice system have recognised the need for solutions to address this shortcoming within the system. Discussions and efforts geared towards developing a system that offers legal aid have taken centre stage in many forums. What

⁴For historical perspective on legal aid, see among others Mauro cappelletti. *Towards equal justice: A Comparative Study of Legal Aid in Modern Societies and Regan Francis(1999)The transformation of Legal Aid: Comparative and historical studies. Oxford university press pp.89-110*

⁵The Judiciary, *Sustaining Judiciary Transformation: A Service Delivery Agenda* [2017-2021], page 62 http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf accessed on 24th April 2020.

⁶The Constitution of Kenya [2010], Article 48.

⁷The United Nations Office on Drugs and Crime, *Global Study on Legal Aid*, page 12 https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf accessed on 24th April 2020.

⁸Ibid, page 39.

many people may not be aware of is how far back these efforts and discussions began.

Legal Aid in the context of the Independence Constitution.

Legal exclusion has been a debate in Kenya for considerable long time. In colonial times, the natives (indigenous Kenyans) were served by an informal justice system for as long their actions did not threaten the peaceful domination of the white (colonialists).

Nonetheless, whenever they raised arms and engaged actions towards emancipation from the shackles of colonial oppression, they were then taken through a formal justice system for trial and subsequent conviction. This trend never ceased even with the coming into force of the independence constitution in 1963.

The dual system separated the masters who were mostly whites and the indigenous people, who were reduced to serve in the colonial plantations. Nevertheless, the colonial masters were served by the formal legal system based on judicial principles. The African informal justice system involved dispute resolution through traditional mechanisms facilitated by local administrators. The legal and judicial system was exclusionary in its admission of natives as legal professionals and its application to disputes between native applicants. This changed after independence and native Africans became subject to the formal court system.

Nevertheless, the colonial laws were neither repealed nor amended to consider the rights of natives therefore the laws remained inherently unjust and discriminatory against Africans. In addition, illiteracy and lack of knowledge on the laws put many Kenyans at a disadvantage. It is interesting to note that republic constitution only envisaged legal representation as the only form of legal aid. At section 21(2)(d), it stated

“Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice.”

Years that follow from the 1970s, there was formal recognition of a state with a discriminatory legal system, hence skewed justice. Deliberate opportunities commenced to change this scenario. In 1970 a Faculty of Law at the University of Nairobi was established making legal education available for Africans. The first students graduated in 1972.

Further development came about as from 9th July 1973, when Kituo cha Mashauri (later renamed Kituo cha Sheria) was established by a group of young legal professionals that were committed to ensure poor in Kenya had access to legal advice and justice. Mostly, they offered pro bono services, volunteering their free time to provide advice, draft pleadings and direct helpless litigants. Their work inspired other professionals and social justice advocates to offer legal aid and advice. Many of these went on to join the Law Society of Kenya (LSK).

The wide gap between the poor and well to do in accessing legal services became apparent when in 1983, the National Christian Council of Kenya (NCCCK) jointly with the Law Society of Kenya (LSK) formed the Public Law Institute (PLI) whose main objective included the establishment of a national legal aid and advisory infrastructure.

While PLI is best known for spearheading public legal education, it specifically made efforts to redress public wrongs or check encroachment on public interest. To do so, PLI employed strategies such as: Written or verbal representations to the proper authorities, could have been a ministry, agency, organization or industry; publication of research data and findings or opinions and other related information; educated the public regarding their legal rights and duties and the modalities for protecting these rights and their duties; and took legal proceedings to protect the public interest, or getting authoritative judicial pronouncements on contentious public issues.

Besides the aforementioned areas of focus, the institution extended legal aid clinics to rural areas by 1986, having experimented with paralegals offering legal advice and education to local communities way back in 1980. This context motivated PLI to embark on setting up a national pilot training programme for community-based paralegal workers.

⁹Ibid, page 60-61.

¹⁰Chanan Singh, The Republican Constitution of Kenya: Historical Background and Analysis, International & Comparative Law Quarterly, (Vol. 1, No. 1 - Vol. 63, No. 4) Cambridge University Press

H. Abigail Moy, Kenya's Community Based Paralegals, <https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-communitybased-paralegals/564986EF9694059DFB7C0C0DA7656A72/core-reader> accessed on 9th April 2020.

The desire to replicate and build on legal aid successes by PLI led to proliferation of many other Civil Society Organisation (CSOs) in the 1990s. These included Kenya Human Rights Commission (KHRC), Legal Resources Foundation (LRF), the Centre for Legal Education and Aid Networks (CLEAN), the Widows and Orphans Welfare Society of Kenya (WOWEK), the Education Centre for Women in Democracy (ECWD) and CRADLE (the Children's Foundation).

These organizations embraced and refined the paralegal model and began training and deploying paralegals in programmes promoting legal awareness, rights promotion and conflict resolution. Since then, paralegal networks continued to grow and in 2000, over 20 paralegal movements came together to form the Paralegal Support Network (PASUNE) (a network whose establishment was spearheaded by Legal Resources Foundation).

The emergence of the various CSOs focusing on legal aid, highlighted the need to protect legal aid even in its slimmest form, a concern that originated from blatant onslaught against the constitution leading to amendments that removed the guarantee of the right as provided at section 77 (14) limiting the section 77 (2) (d) provisions formerly captured at section 21 (2) (d). The limitation was stated thus;

“Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense.”

The position at section 77 (14) demonstrated the rigidity by which the state had approached legal aid, and this manifested in consequent judicial decisions. In *David Njoroge Macharia v. Republic* the appellant was charged and convicted of the crime of robbery with violence.

He sought to appeal the Court's decision for a second time after the promulgation of the 2010 Constitution citing the violation of his right to legal representation at state expense as one among several grounds. The appellant attempted to argue that Kenya had an obligation to comply with international conventions and treaties, particularly Article 14 (3) (d) of the International Covenant on Civil and Political Rights (ICCPR) which states that a person charged with a criminal offence has a right:

... 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.

Justice Alnasir Visram discussed the applicability of international law in Kenya. Under the repealed Constitution, Kenya was a dualist state thereby requiring international law to first be incorporated either by new legislation or existing legislation before it became part and parcel of national law. In effect, the provision cited by the appellant was unenforceable domestically and therefore could not be used as a basis for bringing an action before the Court.

The Court also referred to section 77 of the repealed Constitution and determined that although the new Constitution recognizes state funded representation as a right where substantial injustice would result, the appellant's trial had taken place under the repealed Constitution therefore he would not be entitled to free legal representation at trial. Furthermore, the law couldn't apply retrogressively.

Despite this position, a report tabled by the Government Justice Law and Order Sector (GJLOS) in 2005 showed that state legal aid was made available particularly for persons charged with murder or treason.

Order 33 and 44 of the Civil Procedure Rules provided for suits and appeals by paupers respectively, outlining the applications and legal procedures to be followed by indigent persons when filing suits. However, scholars have argued that these rules are still too intricate and complex for persons they

¹²<http://kituochasheria.or.ke/about-us/#1455270343273-7e3e1793-8d17> accessed on 9th April 2020.

The Kenya Independence Order in Council [The 1963 Constitution], Section 21 (2) (d) http://kenyalaw.org/kl/fileadmin/pdfdownloads/1963_Constitution.pdf accessed on 9th April 2020.

¹³Ibid.

¹⁴<http://kituochasheria.or.ke/about-us/#1455270288731-3d25e4e2-febc> accessed on 9th April 2020.

¹⁵Oki Ooko-Ombaka, 'Education for Alternative Development: The Role of the Public Law Institute' (1985), Third World Legal Series, Volume 4, page 171

<https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1130&context=twls> accessed on 9th April 2020.

are aimed at assisting, thus still impeding justice.

In 1998, the Attorney General's office and various stakeholders in the justice system formed the 'Working Group Committee' to organize a legal aid workshop in Mombasa. The workshop resolved that there was an urgent need for a legal aid scheme. Participants went ahead to think through a possible model for the legal aid scheme and in September 1999 a stakeholder-based Legal Aid Steering committee was established and mandated to design a pilot programme that would be tested and hopefully developed into a National Legal Aid Scheme in Kenya. Consultations produced a report containing the design of a legal education and aid pilot programme (LEAPP) in 2001 which, to-date functions as the Legal Education and Aid Programme (LEAP).

From the late 1990s and early 2000s the legal aid service delivery model was largely spearheaded by civil society organizations while attempts at policy and legislative reform were undertaken in conjunction with Government actors.

Redefining Legal Aid: the lenses within the New Constitution

Prior to the promulgation of the 2010 Constitution efforts were still being made to establish a legal aid framework. This process led to the establishment of the National Legal Aid and Awareness Programme (NALEAP) in 2007 by the Ministry of Justice, National Cohesion and Constitutional Affairs. NALEAP was set up mainly to create awareness among the citizenry about legal aid and to create a practical, affordable and effective legal awareness and legal aid service delivery scheme that increases access to justice for the poor, marginalized and vulnerable in the society.

The National Legal Aid and Awareness Steering Committee was established in 2009 and immediately rolled out six pilot schemes implemented for three years in collaboration with the civil society. While this was happening, initiatives to develop legislation and policy on legal aid were undertaken through consultative processes between the Government and civil society organizations.

The 2010 Constitution altered the repealed Constitution's position regarding legal aid and representation. Articles 27 (1) and 48 the right to equal protection and equal benefit of the law respectively. Article 50 (2) (g) and (h) which is the authority on legal representation for accused persons, stating:

“Every 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.”

NALEAP developed the Legal Aid Bill of 2013 and the draft National Legal Aid and Awareness Policy. Cabinet approved the policy in May 2015 and shortly thereafter in 2016, the Legal Aid Act was passed by the National Assembly to give effect to Article 27, 48, 49 and 50 (2) (g) and (h). Some of the key features of the Act are:

- It provides a broader definition of some key terms i.e. legal aid and legal aid provider.
- It gives formal recognition to paralegals as legal aid providers;
- Clearly outlines the persons that are eligible for legal aid;
- Establishes the National Legal Aid Service (NLAS); and
- Outlines various processes such as how to apply for legal aid and the process of accreditation of legal aid providers.

In addition, the Chief Justice also gazetted Practice Directions relating to the pauper briefs scheme and pro bono services. Pro bono services will be available in both lower courts and superior courts.

The same will be accessible to persons accused of capital offences and children in conflict with the law in the Magistrate Courts.

¹⁷Ibid, page 176.

¹⁸<https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-communitybased-paralegals/564986EF9694059DFB7C0C0DA7656A72/core-reader> accessed on 9th April 2020.

¹⁹The Constitution of Kenya (repealed) [2008], Section 77 (2).

²⁰Ibid, (n, 3)

²¹The Constitution of Kenya (repealed), section 77 (14).

²²David Njoroge Macharia .v. R [2011] eKLR.

In 2017 the Attorney General, Prof. Githu Muigai, launched the National Action Plan on Legal Aid for 2017-2022. The action plan outlines a broad policy, legal and institutional framework to ensure sustainable and quality legal aid, and operationalizes the National Legal Aid and Awareness Policy 2015 and the Legal Aid Act 2016.

While the Act envisions that the National Legal Aid Service will establish justice advisory centres across the country, this is yet to be done.

At present, a few community justice centres run by trained community paralegals function as justice advisory centres offering legal assistance to indigent persons. Many of these can be found in informal settlements e.g. Korogocho, Kayole, Dandora, etc.

One can argue with confidence that this country suffers no legal aid nor policy poverty, because there are many laws and policies that provide for the provision for legal aid to the indigent. The law has established National Legal Aid Service (NLAS) and anticipates that its services will be made available to different beneficiaries across the country. With continued stakeholder engagement and collaborative efforts between government, civil society and the international community, every effort to make justice accessible will progressively bear fruit. The future is right if the relevant infrastructure is put in place.

Justice in Humanitarian Circumstances

There is a realization that disasters, calamities and emergencies negatively affect many sectors and people. In the past, floods have sometimes flowed to some courthouses and largely cut off consumers of justice from reaching relevant institutions for service, due to dilapidated road infrastructure. The emergence of the coronavirus has presented a number of scenarios that call for re-thinking of the justice sector's operations. The spread of the virus and the disease it causes, COVID-19, has disrupted many aspects of life. It has tested the architecture of legal aid, including the orientation of state and non-state institutions offering it.

It is thus imperative that legal aid service providers design mechanisms and approaches that can ensure they continue to offer services but minimise risks attendant to physical contact in compliance with public health directives, both non-state and state actors have scaled down operations, changed times of work in respect of curfew(s) demands, created and tested innovative paralegal offers.

Besides, many non-state actors (being donor funded) repurposed their budget lines and negotiated funding terms in order to respond to COVID-19. However, most non-state actors continue to struggle to intervene for the poor and marginalised, because most have less than sufficient funding.

Although the National Legal Aid Service (NALS) has a national mandate, their services were largely scaled down during the pandemic. Their programme of regular training for self-representing litigants, mediation services and timely referrals for select cases have suffered most.

But all is not lost. A considerable number of development partners have worked with their grantees to re-purpose some of their budget lines as a response to coronavirus pandemic. But many others have abandoned the access to justice sector and rallied their resources towards provision of humanitarian relief.

Response in Public Health Protocols and Parameters

To mitigate the ravaging effects of Covid-19, the Kenyan government, just like many around the globe, has insisted on social distancing, frequent sanitisation and washing of hands and routine disinfection of commonly touched surfaces to reduce chances of infections. Further, the government ordered closure of certain businesses prone to crowding, instituted a curfew across the country to limit night travel. It also instituted cessation of movements in certain regions and closure of select country and county borders to all commuters.

In this regard, the Judiciary, Kenya Prison Services, non-state actors and individuals, especially

²³ Governance, Justice, Law and Order Sector (GJLOS) Reform Programme, *Administrative Data Collection and Analysis Report*, <https://acjr.org.za/resource-centre/governance-justice-and-law-and-order-sector-reform-programme-administrative-data-collection-and-analysis-report> accessed on 10th April 2020.

²⁴Civil Procedure Rules [2010], Order 33 and 44.

²⁵Kibaya Imaana Laibuta, *Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks* [2012] Page 168, 307

paralegals have been largely been curtailed from performing their functions optimally. Court sessions and proceedings that require physical presence have largely been suspended. Some mentions and judgements are now being rendered virtually.

The Kenya remand and prison facilities have banned visits even from lawyers. The inmates are now experiencing reduced opportunities for access to justice. Non-state actors such as Legal Resources Foundation and others have only limited access to the various institutions and persons, making access to legal aid services difficult to achieve. While the national police services were requested to consider diversion and police bonds (free bonds) for what is considered to be petty offenses, no proper oversight mechanisms exist leaving the poor in a blackhole.

Consequences of the government response

There is decreased physical court sessions and many of the judicial officers have been advised to conduct virtual/digital sessions for mentions, plea taking and reviews of bail and bond terms. An overall delay in conduct and conclusion of both civil and criminal matters is now commonplace. Most community justice centres have equally closed down for fear of spreading coronavirus among gatherings. A few others that had put up proper protocols to allow their operation have been like the Eastleigh one managed by Peace of Heart Initiative Kenya have been rendered ineffective because of cessation of movement orders.

Cessation of movement from certain areas into Eastleigh or into Nairobi has drastically reduced the numbers of those seeking legal aid, advice, assistance and other services available by paralegals. Similarly, majority state and non-state actors have generally focused on interventions that reduce infections, such as buying of sanitizers, masks, gloves and provision of disinfectant services in public areas.

According to records from the police, fewer people have been arrested for the many petty crimes. However, there has been an increase in arrests of those offending anti-pandemic emergency measures. A further increase in sexual and gender-based violations directed at women, coupled with massive child rights abuses have been reported across the country. In addition, job losses, declaration of redundancies, salary deductions are just part of the many employment-related legal issues that are afflicting many a Kenyan as they struggle with the covid-19 challenges. Further, there have been cases of evictions by state and private actors jeopardizing right to housing; access to sanitation; access to food and healthcare.

Nonetheless, there is increased frequency and appreciation in the use of internet supported approaches to access legal aid. Legal aid service providers have developed measures to offer assistance through mobile-assisted and web-based approaches but such measures are still not accessible for many indigent people who lack access to affordable internet and mobile telephony.

Additionally, legal aid like care work and oftentimes emotional connections makes a world of difference.

²⁶<http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/> accessed on 10th April 2020.

²⁷A Publication of the Office of the Attorney General and Department of Justice, *Mwanasheria Mkuu*, Edition 3 (July-December) [2018], page 39.

²⁸<https://www.statelaw.go.ke/national-legal-aid-service/> accessed on 10th April 2020.

²⁹ Office of the Attorney General and Department of Justice, *National Action Plan on Legal Aid [2017-2022]*, page 5.

³⁰Constitution of Kenya [2010], Article 50 (2) (h).



Chapter Four

Findings

Robust legal aid framework

There is now a robust and solid legal aid framework in the country. Before the passage of a comprehensive legal aid law and since independence, legal aid was provided by state and non-state actors, but largely by the latter, operating without a clear, coherent legal, institutional and coordination framework. The law and the policy offer a clear framework that calls for rigorous implementation even as some of the rough edges are amended and improved upon. A brief of the legal framework suffices.

The right to access justice is protected by provisions Article 6-11 of the Universal Declaration of Human Rights, and given legal force by Article 14 (3) (d) of the International Covenant on the Civil and Political Rights. At the regional level, Article 3 and 7 of the African Charter on Human and People's Rights (ACHPR) guarantees the right to access justice in general and right to legal aid in particular.

The Constitution of Kenya, 2010 in Article 48 provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. In the subsequent articles it provides for rights of accused persons, and minimums for ensuring a fair hearing.

The Legal Aid Act, 2016 is the primary legislation that provides for legal aid and establishes the institutional design for the provision of legal aid services in Kenya. It establishes the National Legal Aid Service.

The right for legal representation for children and juveniles is provided for under section 77 of the Children Act, 2001. It states that where a child has been brought before a court of law under the Act or under any other written law, the court may, where unrepresented, order the child to be granted legal representation. While section 77 seems to leave the discretion to the judicial officer, section 186 makes it mandatory for the state to offer assistance but falls short in making it clear whether the assistance is ensuring legal representation to children in conflict with the law to ensure fair trials.

Other secondary legislations, regulations and policies in support of legal aid include the Civil Procedure Code, Code Small Claims Court Act, 2016; the National Legal Aid and Awareness Policy, 2015; National Action Plan on Legal Aid; the Practice Directions relating to Pauper Briefs Scheme and Pro Bono Services. Persons Deprived of Liberty Act, 2014 addresses the needs of aliens and all persons deprived of liberty who might require legal aid and assistance. It requires those in authority to notify them where legal aid is available and its use.

The Civil Procedure Code provides for the pauper brief system where an accused person charged with murder or treason but cannot afford to hire an advocate is offered legal representation at the expense of the state.

For those charged with robbery with violence, legal representation was only available at the expense of the state on first appeal at the High Court and on subsequent appeal to the Court of Appeal. This has since changed as the Practice Directions relating to Pauper Briefs and Pro Bono Services now spell out that such services will be available in lower and superior courts and to all those accused of capital offences-murder, treason, robbery with violence and attempted robbery with violence- and to children in conflict with the law.

Under this scheme, advocates register with the Registrar of the High Court who in turn allocates cases to them at a small fee of Ksh 30,000. A number of respondents during this study, pointed out that the system has little if any incentive for well-established advocates to offer their invaluable experience in legal representation.

However, while the nature of the offence an accused person has been charged with is instrumental in deciding whether an accused person is qualified for state sponsored legal representation or not, there remains a big question whether substantial injustice can only occur in cases where a person is accused of capital offences and where children are in conflict with the law. Perhaps a better and well formulated criterion must be developed to also take into consideration the type of sanctions like life sentences, the complexity of the case and applicable law, public interest among many others variables. The emerging jurisprudence from the Kenyan courts also seem to point at the reality that the state must provide legal representation for persons accused of capital offences and those whose sentences include loss of life or life imprisonment. This is critical given that by dint Article 2 (5) and (6) of the Constitution of Kenya, the normative international law principles are of direct application to the country. The effect therefore is that the state is under obligation in international law to provide legal representation at its own expense to its citizens, whenever the need arises not just in a select few cases.

It is prudent that the section 77 and 186 of Children Act are amended to provide for a mandatory legal representation, at state expense, for all children in conflict with the law.

Emergence of Innovative legal aid instruments

After the promulgation of the 2010 Constitution and the subsequent enactment of legislations and amendments to breathe life into the legal aid law; various innovative legal instruments like plea bargaining, diversions, court annexed mediation, alternative justice systems and others have emerged. The afore-described innovations have gone a long way towards guaranteeing access to justice to the indigent. And although the instruments are at their nascent stages, their true effect will surely be felt in years to come.

For instance, according to the Chief Registrar of the Judiciary, the Court Annexed Mediation (CAM) has resulted in fast-tracking of hearing and determination of cases. In the financial year 2018/2019, 2905 matters were referred to mediation where 1879 of them were processed. This is a 65 per cent processing rate. An estimated 50 per cent of the processed cases reached a settlement. Commercial and Tax Division of the Milimani High Court in Nairobi had the highest value of matters referred to mediation at Ksh 21 billion followed by Family Division at Ksh 8 billion.

The task force on alternative Justice Systems appointed by the then Chief Justice Willy Mutunga in 2015, had a clear role to help the judiciary develop a policy to promote Alternative Justice systems (AJS) as a strategy of enhancing access to and expeditious delivery of justice. The mechanisms adopted seek to provide alternative and affordable dispute resolution mechanisms to promote effective and affordable access to justice for everyone. While the report of the task force is not yet publicly available, a member of the group indicated that the team recommends four pathways.

First is the autonomous AJS mechanisms annexed by third-party institutions. “This is common in cosmopolitan areas and involves use of contextual or cultural norms by third parties to mediate access to justice or resolving justice.” Dr Akoth added that the task force was more supportive of the first three approaches.

Second, an AJS institution that is autonomous-where processes and mechanisms are run entirely by the community. Here, justice questions and disputes are resolved according to the laws, rules and practices that govern communities.

Third, the task force also recommends that court-annexed mechanisms that may work through a referral system between the court, court users' committees (CUCs), the AJS processes and other stakeholders such as the Director of Public Prosecutions (ODPP), the Probation Office and the Children's Office. These are linked to the court's system and case management actors as seen in the Court-Annexed Mediation referred to above.

Fourth are the regulated ones, which involve practices where AJS mechanisms are created, regulated and practiced entirely or partially by state-based law or statute. These include traditional courts incorporated in the court system as part of the judicial mechanism or local government. Examples of found in South Sudan, South Africa, and to some extent, Botswana.

However, there is a scarcity of well documented case studies on each of the novel ways in which different legal aid service providers are deploying their refreshing approaches. Thus, little is known

Financial Year	Annual Total No. of cases (Countrywide)	Annual Total No. of Cases Nairobi
2013/2014	4168	1359
2014/2015	4348	1398
2015/2016	6310	2437
2016/2017	8825	3995
2017/2018	13091	5294
2018/2019	15294	6053

about how best they can be standardized and replicated.

Progressive departure from stereotypic assumptions of legal aid practices

Although a good number of persons in need receive legal aid, there exists an outdated, yet popular, statistic that most Kenyans do not access the formal justice system. From the responses so far received, there is now an increased use and satisfaction with the formal courts. Their fairness and accessibility throughout Nairobi is also rising. This finding could be gleaned from the number of cases recorded in every succeeding year. The numbers have been increasing.

*** Source National Legal Aid Service Reports, 2019**

However, a number of actors pointed out that there is little public awareness on the services offered by NLAS and its physical location remains inaccessible to most poor people who live in the eight constituencies around the city. There is need to perhaps ensure that we have satellite offices attached to all police and court stations.

Most respondents to the study in concurrence with NLAS indicated that increasingly most people seek legal aid services for child custody issues, marital disputes and labour/employment disputes.

Legal aid administration and management remains the weakest link

Kenya has a legal aid board as the body responsible for the management and administration of legal aid. The board is composed of the chairperson, 10 members who serve on a part-time basis, and the director.

Five members are appointed to represent different state agencies namely the Office of Director of Public Prosecutors, the judiciary, Ministry of Finance; Ministry of Interior and National Coordination, and Office of the Attorney General and Department of Justice.

Another five members are appointed from three nominees presented by Law Society of Kenya, Kenya National Commission on Human Rights, Council of Legal Education, Public Benefits Organisation and National Council of Persons with Disabilities.

The chair is appointed by the President for a single non-renewable term of six years. The other members are appointed by the Attorney General and serve for a single non-renewable term of five

years.

While the inaugural board members are serving the penultimate year of their terms and the law does not invalidate the work and decisions of those in office by virtue of having vacancies, some of the board members have left their nominating agencies. Thus, there is dire need to declare the slots held by them vacant and have them duly filled. This is the case for Njee Muturi, Janet Munywoki, and Jedidah Wakonyo. The board is also not fully constituted as the nominee of the Principal Secretary in charge of finances was never appointed. A substantive director has never been appointed since the inception of NLAS. It remains unclear who has acted as the secretary during the board meetings.

NLAS has offered legal aid services to many deserving cases over the last four years. However, given that the board is not fully constituted, it has neither fully operationalised NLAS nor undertaken some of its core functions as required by law. Further, the board and NLAS are not operationally independent. It has not managed to be an autonomous body corporate. They remain subservient to the Attorney General's Office and have not since inception even had a dedicated budget annually. Their meagre allocation over the years is often whimsically cut.

Infrastructure support and coordination

The presence of National Legal Aid Service (NLAS) is a significant step forward to the institutionalization of provision of legal aid in Kenya. NLAS is a critical body to the realization of the right to access justice for the poor, indigent and vulnerable communities.

It is the vanguard in ensuring the state meets its obligations of ensuring provision of quality legal aid to those most deserving. Nonetheless, responses from various actors demonstrate that NLAS is facing a number of challenges that hinder its effectiveness. First there is the question of human and financial resources. Observations and preliminary feedback point to NLAS highly relying on donor funding to execute its mandate. There is no clear budget for legal aid in the national budget nor in the state Law Office and Department of Justice. Similarly, the judiciary was not forthcoming with details of the budget for the pauper briefs annually. This gap points to many other attendant challenges identified below.

Second, though NLAS is a national body, its skeleton staff inhibits its effectiveness in offering the necessary services considered legal aid as espoused in their mandate. The Nairobi office has 20 members of staff with just two deputy registrars who are qualified advocates. Seven of the staff are administrative staff and six are project specific staff that support the donor funded children's project. The organisation lacks a substantive national director/coordinator; deputy coordinator, monitoring and evaluation officer, communications officer and secretary. This skeletal staff issue in Nairobi could be emblematic for the whole country. Most of the legal aid service providers are ill resourced and services are left to unsupervised interns, volunteers and paralegals.

Third, NLAS lacks the requisite information management system to digitise and automate all cases to enable it to undertake realtime tracking and analysis of trends. Such a system will also require the employment of Information Technology and Systems experts. The system will also enable NLAS to isolate resources for the neediest areas/counties or thematic areas. As is currently it is therefore difficult for NLAS to undertake proper monitoring, supervision and coordination. They are also not able to effectively undertake evidence-driven resource mobilization and allocation.

High dependency on donor supported interventions

The few actors in this sector are mostly non-state. They highly rely on donor funding to undertake the work on legal aid. The justice centres built by non-state actors are temporary in nature because there is difficulty in sustaining personnel and administrative costs associated with such a facility. This dependence on donor funds and technical capacity reduces the sustainability of legal aid work in the county.

Absence of standardised legal aid framework

By dint of Sections 5 and 5 (3) of the Legal Aid Act, 2016, the National Legal Aid Services (NLAS) is established as a body corporate and a successor to NALEAP. One of the key functions of NLAS is to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable to different stakeholders among other. The board is responsible for oversight of the NLAS staff and also setting and monitoring standards for the establishment and operations of legal aid schemes.

Responses so far suggest a lack of a framework which gives guide to what constitutes legal aid. The many actors currently offering service dubbed legal aid are mostly involved in proliferating plea bargain, training pre-trial detainees on self-representation through court counsel desks, and drafting pleadings and other court required documentation for case processing.

Others include dispute resolution through alternative methods such as mediation at institutional offices or community justice centres. The absence of a threshold points to difficulty to monitor and develop replicable interventions. This entrenches sectoral and selective approaches often by non-state actors to the extent that proposals (contractual obligations) bind them.

A part from practice directions on pauper briefs, no clear framework exists to gauge quality of legal representation after the judiciary allocate a case to an advocate. Similarly, there are many incidents where judicial officers make orders in individual cases after the accused complain of poor representation but such orders are not aggregated to inform the practice.

Guideline or rules for engagement would go a long way in forging a common script on legal aid.

Poor Record about Service Providers

NLAS has failed to meet its obligations under section 60 of the Legal Aid Act, 2016. The law provides that

Register all accredited legal aid service providers

- 1) The Service shall maintain a register of accredited legal aid providers containing-
 - a) the personal details and contact addresses of all accredited legal aid providers;
 - b) in the case of a registered association or a public benefit organization, the nature of the association or organization and the particulars of its registration;
 - c) the nature of services in respect of which the legal aid providers are accredited;
 - d) the number of cases being handled by the legal aid provider at any given time; and
 - e) any other matter prescribed by regulations.
2. The Service shall ensure that the register maintained under subsection (1)—
 - a) is publicized, placed or posted and made available for inspection at no charge by members of the public at police stations, courts, prisons and such other public places as may be determined by the Service; and
 - b) is available in electronic form or other accessible formats.

The actors working in the space of legal aid and their areas of specialisation, if any, are not well known, which points to absence of a relevant register as expected by the law. Without a credible register, it is problematic to make referrals and even monitor the quality of services offered.

The bigger scenario is the absence of a framework to coordinate legal aid work in the county. Save for the non-state actors working in this space such as Legal Resources Foundation Trust (LRF-T), Kituo Cha Sheria, Kariobangi Paralegal Network, Cradle and the emerging community justice centres in Mathare and Dandora, very little is known about the other actors. Some run specific periodic donor projects and go quiet for long periods without taking in clients in need of legal aid.

But all is not lost. While acknowledging that they lacked comprehensive and reliable data on the

number of paralegals practicing in Nairobi, Kariobangi Paralegal Network said given time they are able to compile a comprehensive list. They estimated that there are 200 paralegals operating in Nairobi.

Undocumented work on legal aid

There is a lot of work being done in the communities and many of Kenyan prisons especially to support pre-trial detainees. This is being done by various organisations, mostly non-state actors including churches and a few private sector players. The unfortunate bit is that this kind of work goes unrecorded.

They are mostly left with individual institution(s) mostly prison facilities in the county. A lot of work being carried out in courts and police stations is also largely undocumented. The little documentation done is mostly for purposes of fulfilling project commitments. It is our observation that this should be used for national interventions and especially actions to operationalise and realise Article 48 of the Constitution.

Absence of reliable data on legal aid

The afore-discussed situation is a pointer to the absence reliable data that can be referred to while trying to understand the state of legal aid. It is thus difficult to gauge the extent and quality of legal aid happens in community justice centres, prison facilities, courts or other criminal justice institutions. This makes it difficult to offer interventions that are evidence-driven.

There is need to have a central information sharing portal or platform, besides an easy-to-access mechanism to ensure that ongoing or planned work on legal aid reaches the right audiences, especially decision and policy makers.

NLAS must accredit all legal aid service providers as required by law and require them to submit periodic reports into a portal in formats that are accessible to all. The judiciary must also file their reports with NLAS to ensure we have one-stop-shop for legal aid matters.

Low awareness of legal aid instruments

There is high general understanding of legal aid in Nairobi but low knowledge on the various instruments in law for legal aid. This demonstrates low awareness level that seems to deter good and thriving application of the various legal innovations on legal aid. Most would-be users have low knowledge on the presence of these tools. And even when aware, many tend to shy away for the little understanding on their efficacy. Instruments such as plea bargain, diversion, victim offender mediation and pauper briefs are not well-known to those respondents who provided information on legal aid.

Regulation of service providers

Service providers with regard to legal aid require an oversight framework, placing their work under scrutiny and inspection. Every respondent points this regulation to NLAS, but notes there is no regulatory framework to make work by NLAS easier or manageable. Further, apart from the practice directions,

On the other hand, paralegals work under their different mother agencies key among them Legal Resources Foundation, Kituo cha Sheria, ICJ-Kenya and Ecumenical Centre for Peace and Justice. And although an affiliate body, the Paralegal Support Network (PASUNE), offers support in terms of code of conduct and modus operandi, a lot more needs to be done.

The presence of LSK is strategic as well, but the pro bono engagements are limited and does not encourage the professional development of advocates' practice. With regulation, there could be

structured and thematic directions to various actors based on their strengths, thus avoiding duplicity and unnecessary competition over the same or similar audiences.

Inter-agency coordination/cooperation

Legal aid sits in several agencies of the state, and many of the non-state actors work within their own understanding and preferences. This makes it difficult to draw and develop clear inter-agency mechanism that could assist in understanding what roles the different agencies are playing and which synergies could be drawn from their varied actions/interventions. How NLAS works with these actors (especially the state ones) requires more discussion.

The NLAS board has a duty to convene sector specific meetings to develop a memorandum of understanding with each actor.

Inadequate funding and distribution of technical competencies

Legal aid has largely been associated with formal justice system, where courts, police, prosecution and prisons are major players. Many respondents believe that many of these formal institutions do not access optimum resources to enable them work effectively. This also interferes with their ability to build or attract relevant competencies to undertake their work on legal aid.

There is dire need for justice actors to develop emergency responsive approaches and parameters

There is considerable realisation that Public health directives have worked against administration of justice to a noticeable extent. The appeal for reduced crowding, social distancing and ban in prison visits, did lessen opportunities for lawyers and paralegals to access their clients. Similarly, there was slowed litigation of both civil and criminal matters. Several actors, through various webinars alongside one-on-one conversations with select judicial, prison officers and members of Justice Community Centres, have called for the urgent need for the justice sector to develop a Justice Responsive Framework against emergency scenarios such as COVID-19. Such a framework will have a Standard Operating Procedure or practice guidelines for the whole justice cycle.

Shortness of Traditional Justice Dispensation Approaches

Like elsewhere in the world, COVID-19 has disrupted the traditional approaches of legal aid and thrown many legal aid seekers and provider institutions into a spin. For a while, some have been forced to retreat and are yet to find footing. Others quickly re-evaluated their strategies seeing them continue providing legal aid using various platforms or shifted to analyse remedial initiatives and likely impacts. It was clear that opportunity to offer legal aid in pandemic-like situations lied in the ability to collect data that exposes the shortfall and challenges within the traditional justice service to improve delivery of justice to the indigent and marginalised.

Uncoordinated IT support

COVID-19 provides a platform to highlight some of the likely scenarios in continuing to provide legal aid. Finding an interplay of Information Communication Technology (ICT) and reduced physical interactions was not only necessary but strategic. While the court and ODPP had their plans well catered for, Kenya Police and Kenya Prisons seemed to lack all of the basics to enable effective virtual litigation processes. There was sheer absence of IT equipment, and many of the sessions held relied on laptops provided by non-state actors such as Legal Resources Foundation. Nevertheless, the laptops were not as effective. This weighed against the threshold of adjudicating, hearing and other aspects of criminal justice litigation processes.

Need to induct officers to Enhance their Competencies to use IT supported justice system

While considerable number of actors responded through IT oriented remedial measures to

circumvent challenges posed by coronavirus, it was noticed that many of their agents lacked necessary skills to install, manage and operate an effective IT system. The slowness experienced during the virtual sessions was to a great extent due to less effective skills among the state justice officers to effectively use IT equipment. Similarly, the nonstate actors who provided the prerequisite support did not exhibit higher aptitude in the same field, thus reducing import of the IT innovations and approaches employed then. Considering the future of IT driven justice sector is real, there is need for resources focus in this area.

Opportunity to strengthen National Council on Administration of Justice (NCAJ)

Open and mutual relationships between nonstate and state justice actors came in handy to hand justice to consumers in terms of litigation and legal aid. While there were restrictions with regard to prison visit(s) and less congregation in courts, Legal Resources Foundation alongside a few other organisations managed to offer legal aid and assistance, besides internet bundles to facilitate virtual court sessions for mentions, plea taking and review of bail and bond terms. In the same vein, Law Society of Kenya (LSK) managed to get their matters going after going to court for advocates to be declared as essential services, a position similar to frontline workers. There was importance to harmonise interventions that made advocates essential service(s). LSK didn't have to go to court, while NCAJ was in existence. Coronavirus created urgency to make NCAJ a body that drives the justice sector, to ensure that nonstate and state actors work in higher levels of mutuality, and such symbiosis to outrun the institutional differences of the members.

Positive reforms' attitude and acceptability

Old habits die hard. Although many people, especially pre-trial detainees who received assistance appreciated the import of IT driven sessions, there was noticeable resistance from some of the state agencies on its viability. The need to cultivate supportive attitudes on the use of IT driven litigation processes is key to the realisation of full-scale IT aligned justice sector. There exists a Criminal Justice Bill, which is still open to proposals, and covid-19 provides a forum to commence conversations with justice actors to adopt attitudes which support the need to mobilise financial and technical resources for shifting to IT driven justice sector(s).

Strengthening and activating alternative dispute resolution approaches

The urgency to activate and strengthen mechanisms that could fall within the Alternative Dispute handling mechanisms is evident. Fear of crowding, and response to reduced movements (which did cut courts from people seeking its services) opens this country for working with local institutions to promote justice without the formality of the court system. The testing of non-formal approaches to resolving disputes within local communities thereby reducing need to attend courts and other formal dispute resolution platforms. This could speak to the proposals provided for in the Alternative Justice system task force report. Additional, is a chance to support community-based justice advisory centers as focal points for provision of legal aid. This reduces need to travel and in the event a given area is on restricted movement people can still access services. The centers can play an intermediary role with other legal aid institutions.

Opportunities for Funding Legal Aid Innovations

There was appreciation that many of the development partners including *Amkeni Wakenya*, under the UNDP Fund, allowed their grantees such as Legal Resources Foundation to re-purpose the funds towards covid-19 responses enhancing legal aid and assistance. While this seemed short lived, it presented scenario to encourage development partners to re-evaluate their support to innovative justice delivery initiatives. The shift from “traditional justice procedures” is likely permanent, and the need for donor community to upscale and mainstream such innovations into the ordinary justice sector approaches.



Chapter Five

Recommendations

The study makes the following recommendations;

- Retain and support the mixed model of legal aid service delivery for providers. This is in recognition of the presence of state and nonstate actors in the sector. It is important to retain and support the mixed model of legal aid service delivery to ensure expanded access to legal aid. Additionally, needed is a model that incorporates advocates, lawyers and paralegals. However, paralegals must meet certain minimum requirements and be attached to a lawyer for supervision;
- Preserve and support institutional service providers. Formation of partnerships with institutional service providers will enhance delivery of legal aid without inviting competition. This model will allow specialization among different legal aid service providers and enrich the quality of legal aid;
- Continue to develop and use information management system to ensure NLAS is able to coordinate and identify critical populations in need of legal aid;
- Substantially amend the Legal Aid Act to ensure the board and secretariat are functional and independent and report to the National Assembly annually;
- Develop and implement a clear guide for determination of financial eligibility for legal aid in civil matters. Such a guide will spell out whether one is eligible for full or partial representation, emergency representation and so on;
- In consultation with legal aid service providers including the LSK, develop and implement a policy for the pro bono requirement on advocates including incentives;
- Support the NLAS secretariat. Currently the secretariat is operating far below its approved competence. It has no substantive director and its board is not fully constituted. It lacks sufficient number of staff to manage data so that legal aid is informed by trends and needs;
- Integration of IT supported justice system approaches that is considerate of the disparities within and between the key justice state actors that include Kenya Prison services, judiciary, Office of the Director of Public Prosecutions and National Police Service
- Amend the Criminal Procedure Code and other connected laws to ensure that all suspects facing charges, where substantial injustice is likely to occur, are accorded mandatory legal aid within the criminal justice system; and
- Fast-tracking the operationalization of the Legal Aid Act and the Small Claims Court Act 2016.



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