

**TOWARD THE PROVISION OF MANDATORY PRO BONO LEGAL SERVICES
IN KENYA**

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Declaration

I, OBONYO DIANA ACHIENG, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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Abstract

The problems of access to justice in Kenya, and other countries, are numerous and may seem insurmountable. Due to the nature of economic reality, where legal services have a monetary cost to access, there will be persons who are unable to pay the fee for access. A number of countries have undertaken to resolve this problem by instating mandatory pro bono rules for lawyers in their jurisdictions. This research was undertaken to determine how mandatory pro bono rules function in select jurisdictions, see how those jurisdictions compare to Kenya and whether a mandatory pro bono rule would work in Kenya. The project covered several jurisdictions; these are Kenya, Uganda, South Africa, and the USA. Its scope was limited to materials available online or in the Strathmore University library. It mainly involved desktop research and the collection of qualitative information which describes the existing situation in these countries. This information was then analysed and conclusions drawn from it. Specifically, the research found that all three jurisdictions chosen for establishing how mandatory pro bono rules work actually do have mandatory pro bono requirements, which vary in the number of hours required, the persons required to undertake the pro bono work and the persons to whom the pro bono services are to be provided. However, the research also found that the rules barely function in practice, with few lawyers actually undertaking to provide pro bono services and little enforcement of the rule. It is recommended that Kenya institutes a mandatory pro bono rule for lawyers to be implemented and enforced by the Law Society of Kenya, with appropriate tracking and enforcement mechanisms as well as proper sanctions for lawyers who do not undertake to complete their hours. Further research in the area of access to justice in Kenya is also recommended, with specific focus on how to enhance access to justice for the indigent.

List of Abbreviations

ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
CLS	Cape Law Society
FSLs	Law Society of the Free State
GDP	Gross Domestic Product
GNI	Gross National Income
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Persons
IT	Information Technology
KZNLS	KwaZulu-Natal Law Society
LLP	Limited Liability Partnership
LSK	Law Society of Kenya
LSNP	Law Society of the Northern Provinces
NGO	Non-Governmental Organisation
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
US/USA	United States of America

Chapter 1: Introduction to the Study

1.1 Background

Legal aid refers to legally aided representation and is the provision of legal assistance to persons who are otherwise unable to access legal services¹. The role of legal aid lies in promoting respect for civil and political rights, particularly the right to fair trial, with reference specifically to access to justice.² It is based on the recognition that there are people who are unable to access these services for various reasons, mostly the poor and underprivileged. This makes justice equally unreachable for them.

In Kenya, although some paralegals and lawyers provide legal aid, most free legal aid is provided by Non-Governmental Organizations (NGOs).³ *Pro bono publico* (or in short, pro bono) service can be defined as work that is undertaken by a professional voluntarily for no pay or for token pay.⁴ Pro bono legal work is celebrated in some jurisdictions, for example in the United Kingdom (UK), there is an annual Pro Bono Week celebrated by law firms and law schools, to encourage provision of pro bono legal services and increase awareness on the issue.⁵ In other jurisdictions, it is recommended. For example, the American Bar Association's ethical rules recommend that lawyers contribute at least 50 hours of pro bono legal work every year.⁶ In yet others, pro bono legal work is mandatory. For example, in South Korea, lawyers are required to provide at least 30 hours of pro bono legal services.⁷ Those who are unable to fulfil this condition for good reason must pay a certain amount per hour in lieu of providing the service.

The Law Society of Kenya (LSK) celebrates a Legal Awareness Week in which members of the LSK offer pro bono services to the public, and organisations that are involved in legal work showcase their services to promote public understanding of their work in legal literacy and advocacy.⁸

¹ Legal Aid Review, *Improving the Legal Aid System: A public discussion paper*, 2009, 4.

² Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

³ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 71 jurisdictions*, 2012, 163.

⁴ McColl-Kennedy JR, Patterson P, Brady MK, Cheung M, Nguyen D, 'To give or not to give professional services to non-paying clients', 26 *Journal of Service Management*, 3 (2015), 427.

⁵ 'Dyer C: Win or lose, no fee: pro bono week promotes free legal services', *The Guardian*, 5 June 2006 <http://www.theguardian.com/uk/2006/jun/05/law.world> on 4 December 2015.

⁶ Rule 6.1, *American Bar Association Model Rules of Professional Conduct* (2012).

⁷ Article 3, *Korean Bar Association Rules*.

⁸ <http://www.lsk.or.ke/index.php/for-the-public>, on 10 December 2015.

Kenya's current constitution provides that it is the state's responsibility to ensure access to justice for all persons,⁹ and that every person has the right to a fair trial, including adequate time and facilities to prepare a defence.¹⁰ 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.

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.¹¹

1.2 Problem statement

Despite the clear language as to the responsibility of the state to provide for the right to fair trial, the Kenyan government only provides lawyers for persons accused of capital offences before the High Court who do not have access to legal representation.¹² In a country where legal services are unaffordable to most, this is a significant hindrance for access to justice.¹³ The Gross National Income (GNI) per capita for Kenya as of 2015 from the Kenya Bureau of Standards is Ksh.124,044 per year, which translates to about Ksh.10,337 per month.¹⁴ Meanwhile, the lowest figure for taking instructions in the Advocates Remuneration Order is Ksh. 45,000 to sue in an ordinary civil suit before the High Court¹⁵ and Ksh. 10,000 in a lower court.¹⁶ There is no minimum fee stipulated with regard to criminal matters, but the fees actually charged are usually unaffordable to the common person.¹⁷ The country's budget for the 2015/2016 financial year amounted to

⁹ Article 48, *Constitution of Kenya* (2010).

¹⁰ Article 50, *Constitution of Kenya* (2010).

¹¹ Article 14, *International Covenant on Civil and Political Rights*.

¹² United States Department of State, *Country Reports on Human Rights Practices, Kenya*, 2006, 7.

¹³ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 71 jurisdictions*, 2012, 162.

¹⁴ Kenya National Bureau of Statistics, *Economic Survey 2015*, 2015, 32.

¹⁵ Section 1, Schedule 6, *Advocates Act Remuneration Amendment* (Order No. 2 of 2014).

¹⁶ Section 1, Schedule 7, *Advocates Act Remuneration Amendment* (Order No. 2 of 2014).

¹⁷ The Open Society Initiative for Eastern Africa, *Kenya: Justice Sector and the rule of law*, 2011, 158.

Ksh. 2 trillion estimated expenditure, which already had a deficit of around 600 billion.¹⁸ Therefore, it is clear that the state is unable to provide a lawyer for every person who needs to access the court, and the responsibility then falls on lawyers to do so. However, lawyers in Kenya have not taken up this mantle voluntarily, as most legal aid is provided by NGOs, despite the LSK's efforts in its pro bono celebration as discussed in the introduction.¹⁹

While other jurisdictions have dealt with the issue by mandating a certain number of minimum required hours of pro bono work for lawyers as stated in the introduction, Kenyan law does not have such a provision. The Legal Aid Act (2016) attempts to address this issue by establishing mechanisms dealing with legal aid, but there is no mention of mandated legal work. Therefore, this prompts the question of how mandatory pro bono rules for lawyers work in other jurisdictions and whether they could work in Kenya.

1.3 Research Objectives

- I. To assess the working of mandatory pro bono rules in select jurisdictions.
- II. To compare these jurisdictions to Kenya.
- III. To assess whether mandatory pro bono would work in Kenya.

1.4 Research Questions

- I. How do mandatory pro bono rules work in select jurisdictions?
- II. How do these jurisdictions compare to Kenya?
- III. Would mandatory pro bono rules work in Kenya?

1.5 Hypothesis

The institution of mandatory pro bono rules for lawyers in any country increases access to justice for the indigent.

¹⁸ Rotich HK, *Budget statement for the fiscal year 2015/2016 (1st July – 30th June)*, 2015, 23.

¹⁹ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 71 jurisdictions*, 2012, 163.

1.6 Assumptions

This study makes a number of assumptions. First, that access to justice problems can be identified and solutions found after this identification. Secondly, the study assumes that where there is information pertaining to other jurisdictions' legal aid services, this information and conclusions drawn from it can be applied to the Kenyan context. Finally, the study assumes that each individual lawyer (and not just law firms) does actually have the time and capacity to provide pro bono legal services.

1.7 Justification for the Study

The average Kenyan is impeded from accessing justice by the cost of legal services, and lawyers have generally been unable or unwilling to offer pro bono services voluntarily. This gives rise to the issue of a mandatory rule with regard to pro bono services. This paper attempts to establish how such a rule would work in Kenya.

A number of people would benefit from such a study. Legislators would be able to use the results to consider how access to justice laws could be implemented. The LSK would be able to use it in considering requirements for lawyers, both practising and prospective. The final beneficiary is, of course, the ordinary Kenyan who may currently be unable to access justice due to the high cost of legal services.

1.8 Literature Review

This literature review was undertaken with a focus on the main objectives of the research. Part 1.8.1 deals with the concept of access to justice and part 1.8.2 presents the various arguments that have been advanced on pro bono.

1.8.1 Access to Justice

The concept of access to justice is widely discussed in literature pertaining to mandatory pro bono. It involves effective access to the components of the system of administration

of justice, that is, the systems, procedures, information and the actual locations.²⁰ Ortoleva discusses three distinct aspects of access to justice, the substantive, procedural and symbolic.²¹ 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 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. Where the amount of money one has determines the kind of trial they get, there cannot be said to be equal access to justice.²² A lack of funds for legal fees is recognized as one of the main barriers to access to justice, especially since the layman is not as qualified as a lawyer to navigate the intricacies of the justice system alone.²³ This is where pro bono comes in, as an answer to this challenge. Many modern societies have introduced some form of legal aid system, through both legal aid programmes and mandatory pro bono rules to enhance access to justice.²⁴

1.8.2 Main Arguments on Pro Bono

A number of arguments have been advanced with regard to the pro bono responsibilities of lawyers. The seminal work is that of Justin Hansford because it outlines all the oft-cited arguments on pro bono in four broad categories.²⁵

The first of these categories is that of theoretical arguments for pro bono as charity, which state why pro bono should not be mandatory. One argument is that the practice of law is labour, so making pro bono mandatory would be a violation of individual freedom and would force lawyers to work against their will.²⁶ For Kenya, this would be against the Bill of Rights, which espouses that a person shall not be held in slavery or servitude, nor shall they be required to perform forced labour.²⁷ A further theoretical argument for pro bono

²⁰ Ortoleva S, 'Inaccessible justice: Human rights, persons with disabilities and the legal system', 17 *ILSA Journal of International & Comparative Law*, 2 (2011), 284.

²¹ Ortoleva S, 'Inaccessible justice: Human rights, persons with disabilities and the legal system', 284.

²² Maxeiner JR 'A right to legal aid: The ABA Model Access Act in international perspective', 13 *Loyola Journal of Public Interest Law*, 1 (2011), 61 – 113.

²³ Maxeiner JR 'A right to legal aid: The ABA Model Access Act in international perspective'.

²⁴ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 71 jurisdictions*, 2012.

²⁵ Hansford J, 'Lippman's law: Debating the fifty-hour pro bono requirement for bar admission', 41 *Fordham Urban Law Journal*, 4, (2014), 1141-1188.

²⁶ Hansford J, 'Lippman's law: Debating the fifty-hour pro bono requirement for bar admission'.

²⁷ Article 30, *Constitution of Kenya* (2010).

as charity is that once it becomes mandatory, it loses its moral significance and altruistic character.²⁸

The second category encompasses traditional arguments for pro bono as charity, also meant to justify pro bono not being mandatory. Saint Thomas Aquinas stated, “He that lacks food is no less in need than he that lacks an advocate. Yet he that is able to give food is not always bound to feed the needy. Therefore, neither is an advocate always bound to defend the suits of the poor...”²⁹ According to Maxeiner, the dominant view in the United States since the first century of its independence has been that pro bono work is an act of personal charity, which should not be subject to mandatory rules.³⁰ Traditionally, many professionals offer their services for free voluntarily.³¹

The third category involves traditional arguments for pro bono as duty, which suggest that pro bono should be mandatory. The language of public service as a duty and obligation has endured over the years, despite lack of enforceability.³² With phrases like, “The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer...”³³ and “the profession is a branch of the administration of justice and not a mere money-getting trade,”³⁴ it is clear that public service is considered a duty for lawyers.

The final category is that of theoretical arguments for pro bono as duty, meaning that it should be mandatory. First, law is considered a higher calling, and should therefore be undertaken not only for self-interest but also in the service of others for equal justice under the law.³⁵ This is embodied in what Gordon refers to as the Citizen Lawyer, who always acts for the public good and general welfare because it is his duty.³⁶ New York’s Chief Justice Lippman is one of the most vocal advocates for mandatory pro bono

²⁸ Hansford J, ‘Lippman’s law: Debating the fifty-hour pro bono requirement for bar admission’.

²⁹ Hansford J, ‘Lippman’s law: Debating the fifty-hour pro bono requirement for bar admission’.

³⁰ Maxeiner JR ‘A right to legal aid: The ABA Model Access Act in international perspective’.

³¹ McColl-Kennedy *et al*, ‘To give or not to give professional services to non-paying clients’, 427.

³² Hansford J, ‘Lippman’s law: Debating the fifty-hour pro bono requirement for bar admission’.

³³ EC 2-25, *Model Code of Professional Responsibility* (1983).

³⁴ Canon 12, *Canons of Professional Ethics* (1908).

³⁵ ‘Lippman J: Address at Law Day 2012 Ceremony at the New York Court of Appeals’ *New York State Unified Court System*, <http://www.nycourts.gov/whatsnewATranscript-of-LawDay-Speech-May1-2012.pdf> on 4 January 2016.

³⁶ Gordon RW, ‘The citizen lawyer - A brief informal history of a myth with some basis in reality’, 50 *William and Mary Law Review*, 4 (2009), 1169 - 1206.

because he believes that pro bono is a duty for lawyers.³⁷ Mandatory pro bono in China is said to be viewed in a similar light to paying taxes.³⁸

This author is mainly convinced by the argument that law is a higher calling. Indeed, the practise of law is elevated because it is about serving the needs of justice, which should outweigh financial considerations. For this reason, lawyers have an obligation to serve the needs of the indigent because they are the only ones who can. To ensure this obligation is not shirked lightly, there should be a mandatory requirement.

1.9 Theoretical Framework

There are three main theories that underpin this paper. The first is Critical Theory. Critical Theory applies knowledge from social sciences and humanities in order to assess and critique culture and society.³⁹ Its proponents are critical of injustices and inequalities in everyday life. It advocates for change and seeks emancipation.⁴⁰ Theorists in this school of thought believe that a dominant way of thinking is perpetuated which keep oppressive structures in place.⁴¹ This is the main reason that drew the author to this issue in the first place, the belief that there is injustice in the Kenyan legal system which remains unaddressed due to the status quo. The dominant way of thinking in the practice of law is that when one provides legal services, they must be paid, despite the fact that lawyers know that there are people who deserve justice who will not be able to pay. Mandatory pro bono is a way to deal with the inequality of lack of access to justice.

The second theory is the Public Assets Theory, which espouses that the government provides the lawyer with the product in the form of the law and its accompanying commodities such as the privileged relationship.⁴² The state therefore has a right to place conditions on how it is practised in the fulfilment of its purpose of access to justice.

³⁷ Moy LM, 'Justice, justice, shall you pursue for rich and poor, high and low alike', 75 *Albany Law Review*, 2, (2011), 635.

³⁸ 'Adopting and adapting: Clinical Legal Education and access to justice in China', 120 *Harvard Law Review*, 8, (2007), 2134-2155.

³⁹ Golding MP and Edmundson WA, *The Blackwell Guide to the Philosophy of Law and Legal Studies*, Blackwell Publishing Ltd, Oxford, 2005, 81.

⁴⁰ Freeman M and Vasconcelos E, 'Critical Social Theory: Core tenets, inherent issues', 2010 *New Directions for Evaluation*, 127, (2010), 7 - 19.

⁴¹ Golding MP and Edmundson WA, *The Blackwell Guide to the Philosophy of Law and Legal Studies*, 80.

⁴² Lubet S and Stewart C, 'Public Assets Theory of lawyers' pro bono obligations', 145 *University of Pennsylvania Law Review*, 5, (1997), 1245 – 1307.

Finally, is the ‘Monopoly Approach’.⁴³ Lawyers have a monopoly over legal service provision because of the legal barriers to entry into the profession. Because of this, there is a shortage of legal services affordable to the indigent. If they do not serve them, who will?

1.10 Methodology

1.10.1 Research Design

Most of the literature on pro bono originates from North America, but there is very little literature comparing pro bono policies and practices in different jurisdictions.⁴⁴ The seminal work is by Latham and Watkins LLP.⁴⁵ The survey covers several jurisdictions, including Kenya. It identifies a number of countries which have some form of mandatory pro bono rule, including the three key jurisdictions that this paper will look at, that is South Africa, Uganda and the USA.

The main method of research will be desktop research. This will involve the perusal of both primary and secondary information on mandatory pro bono requirements in certain jurisdictions and how they function. Qualitative information will be collected which describes the existing situation in select jurisdictions, that is, descriptive research. It is also exploratory research as it will seek to determine the efficacy and applicability of a new rule to Kenyan legal practitioners. The rationale for the design is that the study seeks to look at how mandatory pro bono works in the selected places and compare them to Kenya, and this is best done by reviewing available literature on the issues.

The main focus will be on South Africa and Uganda. These two countries were identified by the seminal work of Latham and Watkins as having some form of mandatory pro bono requirements, and are closely related to Kenya because they are African countries. Another country the paper shall focus on is the United States of America. This is not only

⁴³ Marx A, ‘A Restitution Theory of mandatory pro bono’, 22 *Business & Professional Ethics Journal*, 4, (2003), 1-24.

⁴⁴ Maguire R, Shearer G and Field R, ‘Reconsidering pro bono: A comparative analysis of protocols in Australia, the United States, the United Kingdom and Singapore’, 37 *University of New South Wales Law Journal*, 3, (2014), 1164-1197.

⁴⁵ The work is titled “A survey of pro bono practices and opportunities in 71 jurisdictions”, done for The Pro Bono Institute by Latham and Watkins LLP in 2012 and has been referred to a number of times in this paper. Note that while this research paper was being written, a newer version of the research was released in 2016, and will be relied on in the successive chapters.

because most literature available on mandatory pro bono is from North America, but also because it stands apart from the two previously selected due to the implementation of mandatory pro bono requirements for persons seeking to become advocates, as opposed to persons who are already practicing advocates.

The main research method will be document review and analysis. This is appropriate because there are existing documents that address the issues in question. The information will be sourced mainly from books, journals and online resources.

A simple checklist will be used based on the research questions to ensure all relevant bases are covered. For the first research question of how mandatory pro bono rules will work, the checklist items include finding out the rules with regard to pro bono, to whom the rules and how they are implemented. For the second question of how these jurisdictions compare to Kenya, the items to find out include the economic situation, the socio-cultural situation, the ratio of lawyers to population and the functioning of the legal system. Finally, for the last question of whether mandatory rules can work in Kenya, the items to find out and analyse are the factors determining the functioning of pro bono rules and if Kenya has these factors

Once all the checklist bases have been covered, content analysis will be employed to look at the general ways in which the other jurisdictions handle mandatory pro bono and translating that to Kenya through the lens of the Kenyan situation. This is the most appropriate means of analysing such qualitative information.

1.10.2 Limitations

This study seeks to collect information from secondary sources, which are limited and not as reliable as primary sources. The information might also be incomplete. Further, due to the qualitative and exploratory nature of the research, the conclusions that can be drawn are based on generalizations from the information and can offer no guarantee on how a mandatory pro bono rule would actually work; it simply seeks to be the first step in implementing such a rule.

1.11 Chapter Breakdown

Chapter 1: Introduction to the Study: This chapter introduces the study, giving a brief background, stating the problem and the research objectives and questions. It also provides a brief review of the literature on pro bono and a breakdown of the research methodology, along with the limitations of the study.

Chapter 2: Legal Aid in Uganda: This chapter provides a brief country background of Uganda and its justice system. It then undertakes a discussion of legal aid in Uganda and how its mandatory pro bono requirement functions.

Chapter 3: Legal Aid in South Africa: This chapter contains a brief background of South Africa and how its justice system works. It then highlights legal aid in South Africa and how its mandatory pro bono requirement functions.

Chapter 4: Legal Aid in the United States of America: This chapter introduces the USA through a brief country background and a discussion of its justice system, and then discusses its legal aid provision and the mandatory pro bono requirement.

Chapter 5: Jurisdictional Comparison: This chapter undertakes to compare the three jurisdictions looked at in the research project to Kenya, highlighting similarities and differences and drawing conclusions from itself and the previous chapters.

Chapter 6: Key Findings and Analysis: This chapter gives the key findings of the research and analyses them, with a specific focus on the research questions. It also gives the paper's final conclusion and recommendations.

Chapter 7: Conclusions and Recommendations: This chapter provides the conclusion of the dissertation and provides recommendations on both the institution of mandatory pro bono requirements for lawyers in Kenya and further areas of research.

Chapter 2: Legal Aid in Uganda

2.1 Country Background

Uganda is a land-locked country located in East Africa with a population of about 34.6 million people.⁴⁶ The literacy rate of the male adult population (over 15 years) is 79% while that of the female adult population is 62%.⁴⁷ Uganda's annual Gross Domestic Product (GDP) of 2015 is just over 27 billion US Dollars and GDP per capita is about 780 US dollars.⁴⁸ Income inequality in Uganda is high, with a Gini coefficient of 44.3.⁴⁹ The country is ranked 163rd overall in the world in the United Nations Development Programme's (UNDP) Human Development Index.⁵⁰ It is ranked 105th out of 113 jurisdictions in the World Justice Project's Rule of Law Index with a score of 0.39 (scoring is from 0 – 1 with 1 indicating the strongest adherence to the rule of law).⁵¹

2.2 The Justice System

As a former British colony, Uganda's legal system is based on the English common law system.⁵² The constitution of 1995 is the supreme legal document governing the country. It provides for an executive branch headed by a president, a legislature in the form of parliament, and an independent judiciary headed by a Chief Justice.⁵³ It establishes a Supreme Court, Court of Appeal, High Court, and other subordinate courts as may be established by Parliament, including Qadhis' Courts.⁵⁴

The constitution requires justice to be rendered to all without undue regard to legal technicality.⁵⁵ Pursuant to this, the formal justice system has adopted Alternative Dispute Resolution (ADR) mechanisms, paralegals have been deployed to local communities to facilitate resolution through reconciliatory justice modes, and community-based

⁴⁶ Uganda Bureau of Statistics, *The National Population and Housing Census 2014 – Main Report*, 2016, 8.

⁴⁷ World Bank Group, *World development indicators: Education completion and outcomes*, 2016, 4.

⁴⁸ World Bank Group, *World development indicators: Gross Domestic Product 2015*, 2016, 2.

⁴⁹ <http://hdr.undp.org/en/content/income-gini-coefficient>, on 30 October 2016.

⁵⁰ <http://hdr.undp.org/en/composite/HDI>, on 30 October 2016.

⁵¹ World Justice Project, *Rule of Law Index 2016*, 2016, 5.

⁵² African Centre for Research and Legal Studies, *Judiciary staff handbook*, 2006, 8.

⁵³ Chapters 6, 7 and 8, *Constitution of Uganda* (1995).

⁵⁴ Article 129, *Constitution of Uganda* (1995).

⁵⁵ Article 126, *Constitution of Uganda* (1995).

traditional justice systems are in wide use in Uganda, which is similar to Kenya's use of traditional justice systems.⁵⁶

According to a United Nations (UN) report on access to justice in Africa, there are only about 2,000 advocates to serve the entire population of Uganda, which would indicate a severe shortage.⁵⁷ Other problems with access to justice include the fact that a significant proportion of the population live in poverty, the state-funded legal aid is only available in a limited number of districts, and the existence of a huge backlog of cases.⁵⁸ The trend in Uganda's prison population tends toward over 50% of inmates being those on remand, with 55% of the total prison population in 2014 being persons on remand.⁵⁹ This is in addition to the prison population being over double the official prison capacity. An audit conducted by the Ugandan Prisons Service not only found that a significant number of prisoners had exceeded their constitutional remand period and should have been afforded unconditional bail, but also that a majority of the prison population was deprived of effective legal representation and in fact, did not have a proper understanding of the law and their rights.⁶⁰ Poverty remains one of the largest barriers, key personnel in the justice sector often lack the necessary training, a lack of communication and coordination between key actors in the legal system remains a matter of concern and the geographical distribution of justice centres is similarly a problem.⁶¹

The justice system itself has other problems away from access to justice, such as corruption, political interference and the continued abuse of power by personnel in the legal sector e.g. unlawful search and seizure, and unlawful detention of persons.⁶²

Despite these issues, the general access to justice situation has improved, as noted through the perception that existing laws and on-going reforms are moving things in the right direction, the fact that increased use of civil society actors has had positive effects on access to justice and the use of Information Technology (IT) has allowed easy access to case files and information, which enhances access to justice.⁶³

⁵⁶ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 32.

⁵⁷ United Nations Office on Drugs and Crime, *Access to legal aid in criminal justice systems in Africa: Survey report*, 2011, 12.

⁵⁸ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 665.

⁵⁹ <http://www.prisonstudies.org/country/uganda>, on 20 September 2016.

⁶⁰ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 666.

⁶¹ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 33.

⁶² Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 33.

⁶³ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 33.

2.3 Legislative Framework for Legal Aid

There are several different legal aid models in use in Uganda; pro bono services by lawyers, state brief referrals to private lawyers, justice centres (use lawyers and paralegals to provide a range of services), agreements where a national legal aid body contracts specialists to provide aid in a specific area, university law clinics, and paralegal advice offices.⁶⁴ These models work within the legislative framework discussed below:

2.3.1 The Constitution

The Ugandan constitution provides that in the adjudication of civil and criminal case, courts shall administer justice to all, irrespective of their social and economic status.⁶⁵ This raises the question of how this can be done, considering how social and economic status can act as barriers to access to justice. In reality, the constitution only requires the state to ensure legal representation for persons accused of serious crimes that attract a death sentence or life imprisonment.⁶⁶

2.3.2 Advocates Act, Cap. 267

The Act provides for the Law Council exercising general control and supervision over the provision of legal aid and advice to indigent persons.⁶⁷ The Act was further amended to provide that every advocate shall provide services when required to do so by the aforementioned Law Council or to pay a fee prescribed by the Council in lieu of providing these services; and, that the Council shall refuse to issue or renew a practicing certificate to any advocate who fails to comply with this requirement.⁶⁸ There are several pieces of subsidiary legislation made pursuant to this Act:

2.3.2.1 The Advocates (Legal Aid to Indigent Persons) Regulations, S.I No. 12 of 2007

These are regulations made pursuant to the Advocates Act. Their main objectives are to regulate and monitor the quality of legal aid service delivery, ensure it is provided in the most efficient and effective manner, ensure legal aid providers have basic facilities and

⁶⁴ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 45.

⁶⁵ Article 126, *Constitution of Uganda* (1995).

⁶⁶ Article 28(3), *Constitution of Uganda* (1995).

⁶⁷ Section 3, *Advocates Act* (2000).

⁶⁸ Section 15A, *Advocates Act* (2000).

qualified personnel needed, establish criteria to be followed by legal aid providers when reviewing applications for legal aid and to generally encourage the provision of legal aid throughout the country.⁶⁹

2.3.2.2 The Advocates (Student Practice) Regulations, S.I No. 70 of 2004

Also made pursuant to the Advocates Act, these regulations provide for participation of students who have fulfilled the eligibility criteria to appear before a court of law, but requires the student to neither ask for nor receive any compensation for services rendered under these regulations.⁷⁰ This constitutes a form of legal aid, since the student is not receiving payment for rendering legal services. It is of interest to note that the regulations provide for a supervising lawyer to be in charge of the student in their provision of these services but does not proscribe the supervising lawyer charging the client for services of the student, which would then not be legal aid.⁷¹

2.3.2.3 The Advocates (Pro-bono Services to Indigent Persons) Regulations, S.I No. 39 of 2009

These are the final relevant set of regulations made pursuant to the Advocates Act and are the main regulations establishing mandatory pro bono for lawyers in Uganda, the details of which shall be discussed extensively below.

2.3.3 Poor Person's Defence Act, Cap 20

This is an Act which aims to make provision for the defence of poor persons at trial before the High Court.⁷² The most important provision is Section 2 of the Act, which states that if it appears desirable for whatever reason, in the interests of justice, that a prisoner should have legal aid in preparation and conduct of their defence at trial and that their means are insufficient to enable them to obtain such aid by themselves then either a certifying officer, upon the committal of the prisoner for trial or a certifying officer at any time after reading the summary of the case submitted at the committal proceedings, may certify that the prisoner should have legal aid.⁷³ In addition, if an indictment is filed

⁶⁹ Regulation 2, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁷⁰ Regulation 7, *The Advocates (Student Practice) Regulations* (S.I No. 70 of 2004).

⁷¹ Regulation 8, *The Advocates (Student Practice) Regulations* (S.I No. 70 of 2004).

⁷² Preamble, *Poor Persons Defence Act* (1998).

⁷³ Section 2, *Poor Persons Defence Act* (1998).

against the prisoner and it is possible to get an advocate, they shall be entitled to have an advocate assigned to them.

This Act is further supplemented by the *Poor Persons Defence Rules*.

2.3.4 Law Development Centre Act, Cap 132

This Act establishes the Law Development Centre and provides for its functions, including that of assisting in provision of legal aid and advice to indigent persons.⁷⁴

2.4 Mandatory Pro Bono

With respect to the main issue for this paper, legislation was adopted in Uganda to make it mandatory for all lawyers to offer pro bono legal services for at least 40 hours in a year.⁷⁵ Lawyers must undertake to offer pro bono services for the 40 hours every year, or pay a fine in lieu of service under this legislation. The fine is to pay the equivalent of one currency point to the Law Council for every two professional hours missed, with a currency point being equivalent to 20,000 Ugandan shillings.⁷⁶ The same regulations establishing the requirement also provide for the pro bono services to be offered, including giving advice or providing representation to indigent persons; involvement in free community legal education and involvement in giving free legal advice or representation to a charitable or community organization or to a client of such an organization.⁷⁷ The services can be professional services relating to administrative law; business law, in relation to a non-profit making organization; child care and protection; criminal law; debt and credit; discrimination; employment and industrial law; family and succession law; wills and estates; human rights; land rights; tenancies; women's rights; environment and health; and any other matter approved by the Law Council or a body delegated by the Law Council for that purpose.⁷⁸

There are specific services that are proscribed for the pro bono scheme however, and these are business law in relation to profit making organizations; intractable disputes

⁷⁴ Section 2 and 3, *Law Development Centre Act* (1970).

⁷⁵ Regulation 3, *The Advocates (Pro-bono Services to Indigent Persons) Regulations* (SI No. 39 of 2009).

⁷⁶ Regulation 4, *The Advocates (Pro-bono Services to Indigent Persons) Regulations* (SI No. 39 of 2009).

⁷⁷ Regulation 3, *The Advocates (Pro-bono Services to Indigent Persons) Regulations* (SI No. 39 of 2009).

⁷⁸ Regulation 3, *The Advocates (Pro-bono Services to Indigent Persons) Regulations* (SI No. 39 of 2009).

between neighbours; personal injury and professional negligence; traffic matters; motor vehicle accidents and local government and planning issues.⁷⁹

All legal aid provision in Uganda is generally supervised and controlled by the Law Council of Uganda.⁸⁰ As stated above, the requirement is for *all advocates* to provide the 40 hours a year worth of pro bono services. The services are to be provided to indigent persons, who are defined in The Advocates (Legal Aid to Indigent Persons) Regulations of 2007. These regulations provide that a person is eligible for legal aid if they have insufficient means to be able to afford the services of an advocate on their own, they have reasonable grounds for initiating, carrying on or defending the legal matter in question or it is of public interest, and the person is in need of or would benefit from legal aid.⁸¹ If the matter in question is a civil one however, there must be a reasonable prospect of success or recovery. The regulations also provide that a legal aid provider may grant legal aid to an applicant for any other sufficient reason, allowing for situations that the law may not have foreseen.⁸² In an attempt to care for the vulnerable, there are certain persons and matters to be given priority by legal aid providers. For persons, the elderly, widows, orphans, children, persons living with disabilities, Internally Displaced Persons (IDPs), persons living with HIV/AIDS, prisoners currently on remand and refugees are all to be given priority before others.⁸³ In terms of matters, issues with regard to land disputes, inheritance and succession disputes, domestic violence, child maintenance and custody, torture and other forms of human rights abuse are all matters to be given priority over others by legal aid providers.⁸⁴

The mandatory pro bono legislation has been beneficial to lawyers. Law firms that actively provide pro bono services have become attractive places to work especially for newly qualified advocates who can gain early experience in their careers, and the requirement has provided a clear avenue for advocates to give back to the community, enhancing morale, provided training and skill development and formed new connections between advocates and clients.⁸⁵

⁷⁹ <http://www.uls.or.ug/projects/pro-bono-project/pro-bono-project/>, on 12 October 2016.

⁸⁰ Regulation 5, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁸¹ Regulation 23, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁸² Regulation 23, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁸³ Regulation 25, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁸⁴ Regulation 25, *The Advocates (Legal Aid to Indigent Persons) Regulations* (SI No. 6 of 2007).

⁸⁵ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 667.

In practice, many lawyers manage to go around the requirement of mandatory pro bono by simply paying the penalty fee.⁸⁶ This can present a problem because it decreases the number of lawyers actually carrying out pro bono work. More importantly, the pro bono requirement is undermined by the fact that the Law Council has yet to operationalize an account to receive the mandated penalty fees, so in practice, few advocates actually provide voluntary pro bono services.⁸⁷ Finally, even with the requirement, most advocates are located in the urban centres while most of the population (87%) is located in the rural areas, which limits the reach of their services anyway.⁸⁸

⁸⁶ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 47.

⁸⁷ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 668.

⁸⁸ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 668.

Chapter 3: Legal Aid in South Africa

3.1 Country Background

South Africa is a country on the Southern tip of the African continent, with a population of 55.6 million people.⁸⁹ Its annual GDP of 2015 is 314 billion US dollars, with a GDP per capita of 5,647 US dollars.⁹⁰ In terms of adult literacy, the male literacy rate is 95% and female literacy rate is 93%.⁹¹ South Africa has a very high income inequality rate, with a Gini coefficient of 63.1.⁹² It holds the 116th position on the UNDP Human Development Index.⁹³ In the Rule of Law Index, it has a score of 0.59 and ranks 43rd overall.⁹⁴

3.2 The Justice System

South Africa uses a hybrid legal system whose foundation is Roman-Dutch common law, on top of which there is the use of English law and the recognition of traditional African customary law post-apartheid.⁹⁵ The supreme law of the land in South Africa is the constitution adopted in 1996.⁹⁶ Like Uganda's, it provides for a national executive, parliament and an independent judiciary headed by a Chief Justice.⁹⁷ The constitution establishes a Constitutional Court, a Supreme Court of Appeal, a High Court of South Africa, Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament of either High Court or Magistrates' Courts status.⁹⁸

The practising legal profession in South Africa is divided into two branches; attorneys (solicitors), with whom persons make first contact when seeking legal advice or if faced with a legal problem and who traditionally did not appear before the higher courts but are now allowed to do so in limited circumstances; and advocates (barristers), who deal mostly with presentation of cases to court and tend to have specialised expertise in

⁸⁹ Statistics South Africa, *Community survey 2016: Statistical release*, 2016, 21.

⁹⁰ World Bank Group, *World development indicators: Gross Domestic Product 2015*, 2016, 1.

⁹¹ World Bank Group, *World development indicators: Education completion and outcomes*, 2016, 3.

⁹² <http://hdr.undp.org/en/content/income-gini-coefficient>, on 30 October 2016.

⁹³ <http://hdr.undp.org/en/composite/HDI>, on 30 October 2016.

⁹⁴ World Justice Project, *Rule of Law Index 2016*, 2016, 5.

⁹⁵ <http://www.justice.gov.za/sca/historysca.htm>, on 15 September 2016.

⁹⁶ Preamble, *Constitution of South Africa* (1996).

⁹⁷ Chapter 4, 5 and 8, *Constitution of South Africa* (1996).

⁹⁸ Section 166, *Constitution of South Africa* (1996).

various areas of law.⁹⁹ Attorneys are registered with any of four provincial law societies, which are in turn constituent members of the Law Society of South Africa.¹⁰⁰ Mandatory legal aid for attorneys is based on the rules of these societies, as shall be discussed below. Advocates are registered in any one of ten societies of practicing advocates called bars, which are found at the seat of every provincial and local division of the High Court of South Africa.¹⁰¹ The ten bars are in turn members of the General Council of the Bar of South Africa, a federal body which represents the advocates' profession. In the same manner as the attorneys, advocates mandatory pro bono rules are made and enforced by these societies, but because the bar is a referral profession, advocates must wait to have pro bono cases referred to them by attorneys e.g. each member of the Cape Bar is required to perform at least 20 hours of pro bono services in a year, but applications for assistance are made to the Cape Bar by the attorney acting for the litigant, and then the Pro Bono Committee of the Cape Bar allocates counsels to litigants as they see fit.¹⁰² For this reason, this paper shall mostly focus on mandatory pro bono in the attorneys' profession in South Africa, since advocates are not actively involved in the pro bono process and must wait to receive referrals.

One of the single greatest problems that face South Africa's justice system is the fact that indigent persons are unable to afford the costs of legal services, which are prohibitive.¹⁰³ For example, the High Court Tariffs list 15 minutes in court or in a consultation are listed at R177.50 and documents drafted at R50 per page. The prohibitive nature of these costs constitute an effective barrier of access to justice, although there is wide availability of legal aid in criminal matters as provided by Legal Aid South Africa, so the problem would seem to arise more in civil matters.¹⁰⁴ Over 90% of the state funded Legal Aid South Africa's budget is spent on criminal legal aid, leaving indigent civil litigants with few options.¹⁰⁵

⁹⁹ Law Society of South Africa, *Career guide to the legal profession*, 2016, 7 – 8.

¹⁰⁰ <http://www.lssa.org.za/about-us/this-is-the-lssa>, on accessed 28 August 2016.

¹⁰¹ <http://www.sabar.co.za/legal-system.html>, on 12 September 2016.

¹⁰² <https://capebar.co.za/cape-bar/pro-bono/>, on 12 September 2016.

¹⁰³ D Holness, 'Recent developments in the provision of pro bono legal services by attorneys in South Africa', 16 *Potchefstroom Electronic Law Journal*, 1, (2013), 129-130.

¹⁰⁴ D Holness, 'Recent developments in the provision of pro bono legal services by attorneys in South Africa', 130.

¹⁰⁵ McQuoid-Mason D, 'Access to justice in South Africa: Are there enough lawyers?', 3 *Oñati Socio-legal Series*, 3, (2013), 566.

The access to justice problems faced in South Africa are identified in the Legal Services Sector Charter of 2007. Challenges of access to legal services include systemic social and economic inequality that characterises the South African community due to historical injustices, and in particular factors such as socio-economic status, race, gender, disability, and geographic location form significant obstacles to access to legal services.¹⁰⁶ Challenges of access to courts include courts that are poorly resourced and maintained, infrastructure that is in a state of disrepair, inaccessibility of courts for people with disabilities, lack of adequate interpretation services for those not conversant with the language used in courts, and a backlog of cases and delays in the finalisation of cases due to inadequate staff and poor training.¹⁰⁷ Other hurdles include a lack of state infrastructure and scarcity of legal skills in poor areas.¹⁰⁸

There is also a shortage of legal practitioners as a result of historical barriers to entry into the profession.¹⁰⁹ There are over 20,000 practising attorneys and over 2,000 practising advocates who serve the population of South Africa.¹¹⁰

3.3 Legislative Framework for Legal Aid

There are several different providers of legal aid in South Africa, such as Legal Aid South Africa, community-based advice offices, Non-Governmental Organisations (NGOs) and university legal aid clinics; who use different models, such as the use of justice centres, judicare, cooperation agreements, agency agreements, paralegal services, and call centres.¹¹¹ These function under the following framework:

3.3.1 The Constitution

The South African constitution provides for the right of every person to have any dispute that can be resolved by law decided in a fair and public hearing before some form of independent and impartial tribunal, and provides for the right to legal representation in criminal matters.¹¹² This can be seen as the basis for legal aid in both civil and criminal

¹⁰⁶ Law Society of South Africa, *Legal Services Sector Charter*, 2007, 8.

¹⁰⁷ Law Society of South Africa, *Legal Services Sector Charter*, 2007, 10.

¹⁰⁸ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 603.

¹⁰⁹ Law Society of South Africa, *Legal Services Sector Charter*, 2007, 11.

¹¹⁰ McQuoid-Mason D, 'Access to justice in South Africa: Are there enough lawyers?', 565.

¹¹¹ Legal Aid South Africa, *Country report*, 2015, 2 – 15.

¹¹² Section 34 and 35, *Constitution of South Africa* (1996).

matters, since it has been earlier established in this paper that the right to representation is a requirement for the enjoyment of the right to a fair hearing.

3.3.2 Legal Aid South Africa Act, Act No. 39 of 2014

This is an Act made for the actual purpose of ensuring access to justice and the realisation of the right to representation and to make legal aid and legal advice available.¹¹³ For this purpose, the Act establishes a national public entity called Legal Aid South Africa which has as its objectives making legal aid or advice available, providing legal representations to persons at the expense of the state and providing education and information about legal rights and obligations.¹¹⁴

3.3.3 Attorneys Act, Act No. 53 of 1979

This is an Act to regulate the general admission and practice of attorneys and their law societies.¹¹⁵ Although it does not specifically mention the issue of pro bono legal services, it creates the enabling provision under which law societies made rules regarding legal aid.¹¹⁶ Rules were then enacted pursuant to this provision:

3.3.3.1 Rules for the Attorneys Profession, 2016

Coming into effect in March of 2016, these are made pursuant to section 74 of the Attorneys Act and replaced the rules previously enacted by the various regional law societies, although their enforcement is still to be done by the regional law societies.¹¹⁷ The Rules created a uniform mandatory pro bono obligation on all attorneys in South Africa who are members of any of the regional law societies, which shall be discussed in detail below.

3.3.4 Legal Services Sector Charter, 2007

Although not an Act of Parliament, this document was drafted by the legal profession in consultation with the Department of Justice and Constitutional Development, and is a binding and guiding principle on all members of the legal profession in South Africa.¹¹⁸

¹¹³ Preamble, *Legal Aid South Africa Act* (Act No. 39 of 2014).

¹¹⁴ Section 3, *Legal Aid South Africa Act* (Act No. 39 of 2014).

¹¹⁵ Preamble, *Attorneys Act* (Act No. 53 of 1979).

¹¹⁶ Section 74, *Attorneys Act* (Act No. 53 of 1979).

¹¹⁷ Introduction, *Rules for the Attorneys Profession*, 2016.

¹¹⁸ Law Society of South Africa, *Legal Services Sector Charter*, 2007, 2 -3.

Clause 2.2.2 of the Charter outlines certain responsibilities for all legal practitioners, such as the obligation to perform pro bono legal work. It is this clause that creates the basis for the obligation of mandatory pro bono hours placed on lawyers in South Africa, and a refusal to perform one's hours without good reason amounts to unprofessional conduct.¹¹⁹

3.4 Mandatory Pro Bono

For attorneys, the Cape Law Society (CLS) was the first to introduce a mandatory pro bono obligation for its members, by requiring 24 hours a year of pro bono services since 2003.¹²⁰ It was later followed by similar rules, for example the mandatory pro bono requirement for the members of the KwaZulu-Natal Law Society (KZNLS).¹²¹ All the various societies rules were replaced in 2016 by the Rules for the Attorneys Profession of 2016, whose Rule 25 creates and regulates the mandatory pro bono requirements for all attorneys, although the rules for the members of the KZNLS, the Law Society of the Free State (FSLs) and the Law Society of the Northern Provinces (LSNP) are different from those for the members of the CLS.¹²²

All practising members of the LSNP, KZNLS and FSLs who have practised for less than 40 years and/or are less than 60 years old shall perform pro bono services of at least 24 hours in a calendar year, subject to being asked to do so.¹²³ These hours are pro-rated for attorneys who become practising attorneys in the course of the year. All practising members of the CLS shall perform pro bono services of at least 24 hours in a calendar year, similarly pro-rated for attorneys who become practising members in the course of the year.¹²⁴ The services to be provided pro bono include advice, opinion or assistance in areas to be listed by the Council of the Society (in this case LSNP, KZNLS and FSLs) from time to time, but are not limited to those services and members can propose areas of professional services to be recognised.¹²⁵ For CLS members, the services shall include but

¹¹⁹ D Holness, 'Recent developments in the provision of pro bono legal services by attorneys in South Africa', 137.

¹²⁰ Rule 21, *Cape Law Society Rules*.

¹²¹ Rule 27, *KwaZulu-Natal Law Society Rules*.

¹²² Explanatory Notes, *Rules for the Attorneys Profession*, 2016.

¹²³ Rule 25.2 as applies to LSNP, KZNLS and FSLs only, *Rules for the Attorneys Profession*, 2016.

¹²⁴ Rule 25.3 as applies to CLS only, *Rules for the Attorneys Profession*, 2016.

¹²⁵ Rule 25.1 as applies to LSNP, KZNLS and FSLs only, *Rules for the Attorneys Profession*, 2016.

are not limited to advice, opinion, or assistance in matters falling within the professional competence of an attorney.¹²⁶

The pro bono services have to be rendered through recognised structures, which for CLS include those in the list of structures that the CLS shall publish from time to time, with which joint venture agreements have been concluded for the delivery of pro bono services.¹²⁷ For the others, the recognised structures include but are not limited to office of the Registrars of the High Court when issuing *in forma pauperis* instructions, small claims courts, community (non-commercial) advice offices, university law clinics, non-government organisations, the office of the Inspectorate of Prisons, and circle and specialist committees of the society.¹²⁸

Refusal to deliver pro bono services without good cause by a member who has not performed pro bono services for all their required hours for the year shall be unprofessional conduct.¹²⁹¹³⁰ The Rules (in rule 25) provide for reporting and recording mechanisms in order for attorneys to record their hours and report them to the Council, who are to keep a record.

Rule 25 of the Rules as applies to LSNP, KZNLS and FSLS only identify persons who ordinarily qualify for assistance as “those who cannot afford to pay.”¹³¹ For CLS members, the persons to be assisted are individuals, groups of people, organisations and small businesses who comply with the means test as determined and prescribed by CLS.¹³²

The mandatory pro bono requirement seems to be more theoretical, since there is actually very little enforcement of the rule.¹³³ In addition, case-processing and organizational capacity for handling pro bono intake is constrained, for example fewer than 50% of the applications for pro bono services to the law societies were actually approved and

¹²⁶ Rule 25.1 as applies to CLS only, *Rules for the Attorneys Profession*, 2016.

¹²⁷ Rule 25.1 and 25.7 as applies to CLS only, *Rules for the Attorneys Profession*, 2016.

¹²⁸ Rule 25.1 as applies to LSNP, KZNLS and FSLS only, *Rules for the Attorneys Profession*, 2016.

¹²⁹ Rule 25.15 as applies to LSNP, KZNLS and FSLS only, *Rules for the Attorneys Profession*, 2016.

¹³⁰ Rule 25.11.1 as applies to CLS only, *Rules for the Attorneys Profession*, 2016.

¹³¹ Rule 25.1 as applies to LSNP, KZNLS and FSLS only, *Rules for the Attorneys Profession*, 2016.

¹³² Rule 25.1 as applies to CLS only, *Rules for the Attorneys Profession*, 2016.

¹³³ D Holness, ‘Recent developments in the provision of pro bono legal services by attorneys in South Africa’, 137.

referred to attorneys.¹³⁴ Attorneys are not always able to reach people in the rural areas who need these services, even when they are willing.

¹³⁴ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 604.

Chapter 4: Legal Aid in the United States of America

4.1 Country Background

The United States of America is a country in North America with a population of about 323 million people.¹³⁵ Its annual GDP is 18 trillion US dollars and per capita GDP is 55,727 US dollars.¹³⁶ The USA's income inequality as measured by the Gini coefficient is 40.8, while it is ranked 8th overall on the UNDP Human Development Index.¹³⁷¹³⁸ The US Rule of Law score is 0.74 and it ranks 18th out of 113 on the Rule of Law Index.¹³⁹

4.2 The Justice System

The American constitution of 1787 is the supreme law of the USA. It provides for the federal government to be structured in the traditional three branches; the legislature in the form of the Senate and the House of Representatives, the executive in the form of the president, and the judiciary headed by a Chief Justice.¹⁴⁰ It creates a Supreme Court that is the highest federal court of the USA and allows the US Congress to create other federal courts.¹⁴¹ The US system of federalism is also established by the constitution, with Articles 4 – 6 describing the relationship between the states and the federal government and their responsibilities. The judiciary is a complex system due to the structure of the federal system. It has a common law system, but two separate and distinct judiciary systems; federal and state.¹⁴²

The American Bar Association, the national association of attorneys, lists the number of licensed lawyers in the USA as 1,300,705 as of 2015.¹⁴³ Access to justice issues are mostly found in civil cases in the US because it is generally accepted that there is no right to legal representation in civil cases even though there is such a right in criminal cases and a public defender is appointed for criminal defendants who are unable to afford

¹³⁵ <https://www.census.gov/quickfacts/table/PST045216/00>, on 1 Jan 2017.

¹³⁶ World Bank Group, *World development indicators: Gross Domestic Product 2015*, 2016, 1.

¹³⁷ <http://hdr.undp.org/en/content/income-gini-coefficient>, on 30 October 2016.

¹³⁸ <http://hdr.undp.org/en/composite/HDI>, on 30 October 2016.

¹³⁹ World Justice Project, *Rule of Law Index 2016*, 2016, 5.

¹⁴⁰ Articles 1 – 3, *Constitution of the United States of America (1787)*.

¹⁴¹ Article 3, *Constitution of the United States of America (1787)*.

¹⁴² Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 687.

¹⁴³ American Bar Association, *Lawyer demographics: Year 2015*, 2015, 1.

one.¹⁴⁴ Nonetheless, the US generally fares better than the other jurisdictions discussed above when it comes to the functioning of its justice system and access to justice overall, with high scores in matters such as absence of corruption, fundamental rights and regulatory enforcement in the Rule of Law Index.¹⁴⁵ That being said, problem areas include accessibility and affordability of justice in civil cases, non-discrimination, and the low effectiveness of the criminal justice system.¹⁴⁶

4.3 Legislative Framework for Legal Aid

As discussed above, a public defender is usually appointed for any defendant facing a prison sentence in a criminal case. This means that issues of legal aid only appear in civil cases. Legal aid in civil cases is primarily provided by private sources and barely has any legislation on the matter.¹⁴⁷

4.3.1 Legal Services Corporation Act, 1974

This Act established the Legal Services Corporation, for the purpose of providing financial support for legal assistance in civil matters to indigent persons.¹⁴⁸ It has the power to provide financial assistance to programs that provide legal assistance but it cannot participate in litigation itself unless it is a party to the case.¹⁴⁹

4.3.2 Rules of the Court of Appeals for Admission of Attorneys and Counselors at Law, 22 N.Y.C.R.R. Part 520

These rules regulate the admission of attorneys to the bar in the state of New York, and are where the only mandatory pro bono rule in the US is found. This shall be discussed further below.

¹⁴⁴ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 691.

¹⁴⁵ World Justice Project, *Rule of Law Index 2016*, 2016, 153.

¹⁴⁶ World Justice Project, *Rule of Law Index 2016*, 2016, 153.

¹⁴⁷ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 691.

¹⁴⁸ Sec. 1003, *Legal Services Corporation Act (1974)* (USA).

¹⁴⁹ Sec. 1006, *Legal Services Corporation Act (1974)* (USA).

4.4 Mandatory Pro Bono

The only mandatory pro bono requirement found in the USA is in the state of New York, which will be the focus of this section. All applicants for admission to the New York Bar (other than applicants for admission without examination) from 1 January 2015 must demonstrate that they have completed at least 50 hours of qualifying pro bono work.¹⁵⁰

Pro bono work in this case is defined as supervised, pre-admission law related work which either assists in the provision of legal services without charge for persons of limited means, NGOs or persons seeking to secure or promote access to justice, including, but not limited to, the protection of civil rights, civil liberties or public rights; assists in the provision of legal assistance in public service for a judicial, legislative, executive or other governmental entity; or provides legal services pursuant to judiciary law, or pursuant to equivalent legal authority in the jurisdiction where the services are performed.¹⁵¹ The work must be supervised by a member of a law school faculty or instructor employed by a law school, a practising attorney in good standing or by a judge or attorney employed by the court system in the case of a clerkship or externship in a court system. The applicant must provide documentation of the service, with their supervisor certifying the work and hours performed. It is prohibited to perform the work by engaging in partisan political activities.

Due to the recent nature of the rule, it may be too soon to see its effects. However, the New York County Lawyer's Association carried out research on it after its introduction (in 2012) but before its implementation (in 2015), and had a number of findings in its report titled '*Report on New York State's 50-hour pro bono bar admission requirement*' that are relevant to this paper. The report finds that law schools both inside and outside of New York State are aware of the rule and taking measures to help students and alumni meet it. However, more than 60% of respondents in the survey of law firms and corporate legal departments foresaw difficulties in the implementation of the rule, such as providing appropriate projects and supervision, and this seemed to be more of a concern for the smaller firms than the larger firms. It was also noted that many law school graduates who did not go immediately to the larger firms look to bar associations as a source of pro

¹⁵⁰ Rule 520.16, *Rules of the Court of Appeals for Admission of Attorneys and Counselors at Law* (22 N.Y.C.R.R. Part 520).

¹⁵¹ Rule 520.16, *Rules of the Court of Appeals for Admission of Attorneys and Counselors at Law* (22 N.Y.C.R.R. Part 520).

bono work. Finally, it found that the process of compliance should be made electronic to both provide information and be convenient for recording and tracking the pro bono activities and hours.¹⁵²

¹⁵² New York County Lawyers' Association, *Report on New York State's 50-hour pro bono bar admission requirement*, 2014, 3 – 4.

Chapter 5: Jurisdictional Comparison

Having established the ways in which these pro bono rules function in the selected jurisdictions, one must look at how these jurisdictions compare to Kenya.

5.1 Socio-Economic Comparison

Kenya has a population of 43 million as of the last census.¹⁵³ The 2015 GDP is 63 billion US dollars and per capita GDP is 1,465 US dollars.¹⁵⁴ This places it well below the US and South Africa in terms of both GDP and GDP per capita, but above Uganda and in fact the GDP per capita is almost double that of Uganda.

Kenya's adult literacy rate is 78% for males and 67% for females.¹⁵⁵ This is similar to Uganda's at 79% for males and 62% for females, but dissimilar to South Africa whose male literacy rate is 95% and female literacy rate is 93%. The US does not provide similar basic literacy statistics.

Kenya's Gini coefficient is comparable to the other jurisdictions listed above at 47.7, alongside USA at 40.8 and Uganda at 44.3 (South Africa is an outlier at 63.1).¹⁵⁶ This means that the level of inequality in Kenya is similar to the level of inequality in the other countries, and Kenya should be as concerned about the inequality as the other countries are. In terms of overall development, the UNDP's Human Development Index ranks Kenya at 145, which puts it between South Africa at 116 and Uganda at 163.¹⁵⁷ The USA is far ahead since it ranks 8th overall in the world.

5.2 Justice System Comparison

Like each of the countries above, Kenya has a constitution that provides for an independent judiciary with a Chief Justice at the helm. Kenya's legal system is closest to Uganda because Kenya is also a common law system country which recognises traditional African community systems and customs. Although South Africa recognizes

¹⁵³ Kenya National Bureau of Statistics, *Facts and figures 2015*, 2015, 1.

¹⁵⁴ World Bank Group, *World development indicators: Gross Domestic Product 2015*, 2016, 2.

¹⁵⁵ World Bank Group, *World development indicators: Education completion and outcomes*, 2016, 2.

¹⁵⁶ <http://hdr.undp.org/en/content/income-gini-coefficient>, on 30 October 2016.

¹⁵⁷ <http://hdr.undp.org/en/composite/HDI>, on 30 October 2016.

these customs, its legal system is very different from Kenya because it is a hybrid based on Roman-Dutch common law. The US legal system is the most different though, due to the federal system with federal and state level courts and legislation. All of these countries have the right to legal representation in criminal cases, but only the US actually provides a lawyer for all criminal defendants.

The internationally recommended ratio of lawyers to people in the general population of a country is 1 lawyer for every 600 people.¹⁵⁸ From the statistics above, one can calculate the ratios for each of the jurisdictions. Uganda's ratio is 1 lawyer for every 17,300 people. The US has 1 lawyer for every 248 people. In South Africa, the ratio for attorneys is 1 attorney for every 2,780 people and the ratio for advocates is 1 advocate for every 27,800 people. The Law Society of Kenya currently has over 13,000 advocates as members.¹⁵⁹ This means Kenya's ratio is 1 lawyer for every 3,307 people, which is only comparable to South Africa's ratio for attorneys and still well below the recommended standard. One of the factors that differentiate Kenya and Uganda from the likes of the USA is that the poor and vulnerable in the poorer countries usually have very little legal knowledge, particularly as pertains to their rights and legal procedure.¹⁶⁰

Kenya's place on the Rule of Law Index is at position number 100 with a score of 0.43.¹⁶¹ It is closest to Uganda at 105th with a score of 0.39 and far from South Africa at 43 with a score of 0.59 and the US at 18 with a score of 0.74. Although slightly better than Uganda, Kenya's performance on this index is still incredibly poor and indicates severe problems with the system of justice that need to be taken seriously and addressed, including access to justice.

5.3 Comparison Conclusion

It is clear that Kenya is most comparable to Uganda from the above, even though it just slightly outranks Uganda in all measures. The measures show that Kenya's development and access to justice are very poor by international standards, which would indicate that some measures need to be taken beyond seeking voluntary pro bono from lawyers. This is

¹⁵⁸ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 604.

¹⁵⁹ <http://www.lsk.or.ke/index.php/membership>, on 1 December 2016.

¹⁶⁰ Danish Institute for Human Rights, *Access to justice and legal aid in East Africa*, 2011, 42.

¹⁶¹ World Justice Project, *Rule of Law Index 2016*, 2016, 5.

especially clear from the fact that countries which are far better placed than Kenya in both justice and development (in this case South Africa and the USA) have taken the drastic measure of instituting mandatory pro bono to address the issue.

Chapter 6: Key Findings and Analysis

This chapter summarises the key findings of the research and gives their analysis. It will seek to directly answer the research questions.

6.1 How does mandatory pro bono function in the select jurisdictions?

In Uganda, all advocates are required to provide at least 40 hours of pro bono services every year to an indigent person, or pay a fee in lieu of providing the services. The regulations provide for the kind of services to be offered and the persons and issues to be given priority when deciding to offer services. The persons qualifying to receive legal aid are identified as those without the means to afford an advocate on their own, who have reasonable grounds for being involved in the suit and they are in need of or would benefit from legal aid. If it is a civil suit, there must also be a reasonable prospect of success. All legal aid provision in Uganda is supervised by the Law Council of Uganda. The introduction of the rule has been beneficial to lawyers in a few ways. Law firms that provide pro bono services have become attractive places to work as advocates seek to fulfil their hours. The requirement provides an avenue to give back and learn new skills or improve those that one has, enhancing morale for lawyers, and building new connections with clients. In practice though, very few lawyers actually undertake to provide pro bono legal services, despite the rule. The requirement is severely undermined by the fact that the Law Council is yet to operationalize an account that receives the penalty fees to be paid in lieu of providing the service.

In South Africa, the legal profession is divided into two, advocates and attorneys. Although both are required to provide mandatory pro bono services, this paper focused mainly on attorneys because they are the first point of contact for the indigent who are looking for legal services. Advocates generally wait to have a case referred to them by an attorney. For attorneys, the requirement to provide pro bono services depends on one's law society. While all members of the CLS are required to provide at least 24 hours a year of pro bono legal services, only members who have practised for less than 40 years and/or are less than 60 years old in the LSNP, KZNLS and FSLs are required to provide the 24 hours a year of pro bono services and this is subject to them being asked to do so. Although there are prescribed services and structures for the provision, these are not

limited and members may propose services and structures to be recognised. The rules also provide for the reporting and recording mechanisms for attorneys. The provision is supervised and tracked by the Council of the Society. There are different requirements as to who qualifies to receive the services, with the LSNP, KZNLS and FSLs only identifying persons who qualify as “those unable to pay” and CLS identifying individuals, groups of people, organisations and small businesses who comply with a means test as those qualifying to receive the services. In reality, there is very little enforcement of the rule. Case processing and organizational capacity of the societies is limited, with them being unable or unwilling to handle at least half of the cases from persons who approach them who are in need of pro bono services.

In the USA, the mandatory pro bono requirement is found in New York State. Applicants for admission to the New York Bar (other than applicants for admission without examination) are required to demonstrate completion of at least 50 hours qualifying pro bono legal services. The rule defines the type of work that qualifies and that it must be undertaken under qualified supervision from a person approved by the same rule. Documentation of the times the work was undertaken and the hours completed must be provided, and such documentation must be signed by the supervisor. The persons who qualify for the provision of the services are persons who have limited means and NGOs or persons seeking to secure or promote access to justice. Due to the rule’s recent application, it is too early to gauge its practice and effects.

As established in the first section of this paper, Critical Theory espouses that there is a dominant way of thinking which keeps oppressive structures in place. This can be clearly seen from the discussion on the way that the rules function in the various jurisdictions. This research has established that even though the rules on mandatory pro bono exist on paper, most lawyers do not actually undertake pro bono services in practice. The status quo is that a lawyer provides services and is paid for those services, and so this is the dominant way of thinking, such that even where it is established that they are required to provide free legal services to the indigent for the aims of justice, most lawyers are unwilling to do so. The fact remains that there is a large percentage of people in these countries who simply cannot afford legal services, which makes the justice system actually unjust to them and therefore oppressive, and yet the only people who are qualified and able to do so simply will not even where required to. This ties in to the ideas of the Public Assets Theory and the Monopoly Approach, also discussed before. The

government creates these legal goods for the good of the citizens and hands them over to lawyers, while placing barriers to entry on their use, through for example restrictions on who may enter into the profession. By instituting mandatory pro bono rules, it has been shown that legal goods are public assets on which certain conditions may apply. Although lawyers in these jurisdictions do not have a monopoly on legal knowledge, they do have a monopoly on qualified legal representation. It is possible to teach people basic legal information such as rights and court procedure, but that does not compare to actual qualified legal representation from a competent lawyer. Lawyers hold a monopoly on these public assets, and where the asset in question is something as important as justice for the underprivileged, there simply must be a duty to perform.

6.2 How do these jurisdictions compare to Kenya?

Economically, Kenya is below both the USA and South Africa by far, but is above Uganda. It is also comparable to Uganda on literacy, but they are both well below South Africa which has high literacy statistics. In terms of inequality in the country, Kenya, Uganda and South Africa are all quite similar with Gini coefficients in the 40s, but South Africa is an outlier with a coefficient that is actually above 60. As expected the USA is far ahead of the three African countries in development, while Kenya is between South Africa and Uganda and all three are in positions above 100 on the UNDP's Human Development Index.

Although all the countries have elements of the English common law system, Kenya is most comparable to Uganda since South Africa's system is actually based on Roman-Dutch common law and the USA has a federal and state system of justice. South Africa is also different because of the division between attorneys and advocates. The three African countries all recognise African traditional systems to varying degrees. Although all four countries have a right to legal representation in criminal cases, only the USA provides a public defendant for all accused persons who are unable to get legal representation. It would seem understandable considering their level of development and their GDP; the USA can afford to do so while the rest of the countries cannot.

In terms of the ratio of lawyers to population, the USA is far ahead of the internationally recommended ratio, while the rest are far below. Kenya and South Africa are comparable,

although only when considering the ratio of attorneys to the population in South Africa, the ratio of advocates to the population is very different. This would signal that lawyers in Kenya should at least try to do more since they are much fewer than they should be based on international standards. Additionally, most of the legal aid models were developed in the wealthier countries, where basic legal information is widely available, so they pay very little attention to legal awareness raising. Legal aid in Kenya and Uganda would therefore involve a lot of legal education, as compared to the US which can afford to focus its mandatory pro bono program on simply doing legal work.

In terms of rule of law in the countries, both the USA and South Africa are in the top 50 of the Rule of Law Index while Kenya and Uganda are in the bottom 17, with Kenya at 100 and Uganda at 105.

Although the comparison shows that Kenya is most similar to Uganda, it is necessary to highlight three of the most relevant facts when it comes to access to justice; inequality, rule of law and ratio of lawyers to population. Kenya has high inequality between the rich and the poor, as indicated by the Gini coefficient of 47.7. If countries who have the same level of inequality between the rich and the poor such as Uganda and the USA felt the need to institute mandatory pro bono for lawyers, Kenya should certainly endeavour to do something. Secondly, the Rule of Law Index shows that even though the USA and South Africa have high inequality, they more or less have functional justice systems while Kenya and Uganda's justice systems function very poorly. This is an issue that would compound the problem of inequality, since not only is there high inequality between the rich and the poor, there are also severe problems with the justice system itself, which no doubt affects the poor the most. As espoused by Critical Theory, the oppressive system stays in place because it is the status quo. This paper seeks to apply the theory by throwing off the status quo of lawyers only providing services to those who pay since there are clearly people who cannot afford to pay but also deserve justice. Finally, the most damning statistic is the ratio of lawyers to population. Kenya's ratio of 1 lawyer for every 3,307 people while above Uganda, comparable to South Africa and below the USA is still far below the internationally recommended ratio of 1 to 600. This means that there are far fewer lawyers than there should be in the first place, so the obligation should surely fall on the lawyers who are actually there to serve the indigent. Once again, this brings us back to the Monopoly Approach. The few lawyers who actually exist have a monopoly on legal services since there are barriers to entry which would stop more

lawyers coming in, and this monopoly itself creates a problem of access to justice since there are people who cannot afford the lawyers services. Therefore, the monopoly must find a way to serve the needs of those unable to access justice, and the best way is by all lawyers contributing a small portion of their time to those unable to pay. Since they are not currently doing so willingly, they should be required to.

6.3 Would mandatory pro bono work in Kenya?

Initially, this research set out to determine the factors that make mandatory pro bono rules function in the selected jurisdictions, and then compare those jurisdictions to Kenya to identify whether Kenya has those factors. However, from the foregoing it has become apparent that these rules barely function in practice for Uganda and South Africa. For the USA, the rule just came into place in New York, which is only one of 50 states, and it only applies to persons seeking bar admission. In practice therefore, the mandatory pro bono rules in these jurisdictions have little impact so far, so it is difficult to establish factors that make them work since they do not actually do so at the moment. It is however possible to determine why they do not work from the foregoing, which would be useful for Kenya in implementing the rule.

To begin with, it is clear that there are two great obstacles to the functioning of mandatory pro bono rules: lack of support from lawyers and lack of enforcement. In both South Africa and Uganda, the rule was enacted to apply to all lawyers, but few lawyers undertake to do pro bono work. In both cases, despite the fact that there are sanctions for lawyers who do not undertake the work, there is no enforcement of the rule by the law societies. The situation in New York is different; since pro bono work has been made a requisite of bar admission, persons who wish to be admitted simply must perform the work. But this rule also would not work without actual enforcement, since people could simply disregard it if it was not enforced. Therefore, for mandatory pro bono to work in Kenya, the first step must be getting the support of at least a substantial amount of lawyers, and putting in place an appropriate and strong enforcement mechanism.

On the question of whether it would work in actually assisting with access to justice, it should go without saying that a system of free legal services which is not solely reliant on voluntary legal aid providers but instead harnesses a few hours a year of every advocate

in a country would have a greater impact in providing access to justice for the indigent than could be had by an entirely voluntary system, since there will be more people providing the service.¹⁶² For a concrete example, in Uganda, from 2005 to 2015, the percentage of persons on remand in the total prison population fell from 64% to 55%.¹⁶³ This coincided with the institution of a Paralegal Advisory Service which aimed to assist detainees with basic legal assistance, for example by educating them on their rights and the procedures and workings of the justice system.¹⁶⁴ This clearly shows that a system that provides additional legal services free of charge would be beneficial to the indigent in Kenya, especially considering the similarities of Kenya and Uganda as established by the previous section.

However, other obstacles have been observed in the foregoing jurisdictions which would be obstacles to Kenya. It is possible that a good number of lawyers will simply take whatever penalty is placed in lieu of performing the pro bono work, which would defeat the rule in the first place. For it to work in Kenya, lawyers have to be sensitised on the value of pro bono work and the access to justice problems in the country.

Another problem that was noted in both Uganda and South Africa was access to the rural population. Kenya might experience a similar problem in enacting the rule, where lawyers (who are concentrated in the urban areas) might want to assist but be unable to reach those in the rural areas. This would be a difficult problem to solve, as it would require either extensive resources devoted to reaching the rural populations or an improvement in the country's infrastructure.

In terms of enacting the rule for law students, the findings on the New York rule earlier are instructive. Law schools would need to be involved and active in assisting students with fulfilling any pro bono requirements. There would also need to be some kind of coordination and cooperation between the law society's pro bono arm and law schools, law firms and corporate legal departments on getting the pro bono opportunities and allocating them to students/recent graduates. There can be difficulty in the implementation of a mandatory pro bono rule for smaller law firms, as indicated by the New York report. In this case, implementation of the rule should ideally take into account

¹⁶² D Holness, 'Recent developments in the provision of pro bono legal services by attorneys in South Africa', 134.

¹⁶³ <http://www.prisonstudies.org/country/uganda>, on 8 September 2016.

¹⁶⁴ Latham & Watkins LLP, *A survey of pro bono practices and opportunities in 84 jurisdictions*, 2016, 666.

the size of the law firm. It is possible to have a graduated scale of hours that are to be performed depending on the size of the firm one is operating in, for those operating in firms. The same report also highlighted the important role of law societies, a role which is similarly highlighted by a look at the other jurisdictions. Law societies should be the first place where indigent persons are able to apply for pro bono services, and the societies should have a mechanism in place for evaluation and allocating them to appropriate lawyers/students. They should similarly have some mechanism for tracking the actual hours logged and keeping the records of each lawyer, for which an electronic means has been recommended.

Apart from increasing access to justice through availing more pro bono services for more indigent people, it has also been noted that a mandatory pro bono rule can be beneficial to lawyers. It can allow lawyers to gain experience in areas they otherwise would not, which is especially attractive for newly qualified lawyers and law students. It would also provide an avenue for lawyers to give back to the community, which some lawyers may not currently have. This allows forming a connection with the community that could be beneficial to the members of the firm both socially and financially, since it can open up new personal and professional networks.

Chapter 7: Conclusion and Recommendations

This research project set out to find out three things; how mandatory pro bono rules function in select jurisdictions, how those jurisdictions compare to Kenya, and whether mandatory pro bono rules would function in Kenya based on the answers to the first two questions. The purpose of this was to attempt to establish a model for mandatory pro bono from which Kenya could build a legal aid program, due to the severe access to justice problems in the country. However, it soon became apparent in the conduct of the research that the mandatory pro bono rules do not actually function in practice in the selected jurisdictions, at least not to an extent as to be considered impactful for the entire country. This shows how difficult it is to actually have a functional mandatory legal aid program. It then became necessary to analyse why they do not work, and see the lessons that can be learned for Kenya from these. From this, it is recommended that Kenya institute a mandatory legal aid program through the Law Society of Kenya, which will handle requests for pro bono work and allocating the needy to lawyers, sensitising lawyers on the need for and benefits of pro bono work, and monitoring lawyers' actual performance of pro bono work. It would also be necessary to establish appropriate enforcement mechanisms, such as having proper sanctions and allocating persons who will follow up on the sanctions where lawyers are not compliant. The services to be provided in the requirement should include but not be limited to legal advice, handling of court cases and legal education.

For further research on the subject, this researcher recommends widening the scope of this research by looking at the other jurisdictions that have mandatory pro bono rules; how the rules function in those jurisdictions and whether they actually work. This is bound to produce further lessons on how to go about it in Kenya, or even any other country that would be interested in instituting mandatory pro bono rules. It is also important to research into other ways in which to increase access to justice for the indigent, apart from mandatory pro bono for lawyers and the basic legal aid provision that has been provided for Kenya's Legal Aid Act (2016). Finally, for Kenya, it is imperative to research on the actual causes of access to justice problems because it is not always an issue of being unable to afford legal services, there can also be issues of proximity to justice centres or discrimination in the process. Access to justice problems which have

nothing to do with being unable to afford legal services will not be solved through the institution of mandatory pro bono for lawyers.

Inevitably, the issue of pro bono would seem to come down to a single sentiment; while voluntary pro bono is preferable and should be encouraged, where the keepers of justice do not show willingness to attend to the needs of the indigent, it may be best to adopt mandatory models to ensure justice is served for the underprivileged. For Kenya, a mandatory pro bono rule could certainly work for everyone involved as long as the issues outlined above are taken into consideration. Like any rule, it is best to conduct extensive research on the best way to go about it before enacting it.

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