

**FURTHERING ACCESS TO JUSTICE IN KENYA: A CASE FOR THE  
OPERATIONALIZATION OF THE LEGAL AID FUND**

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By



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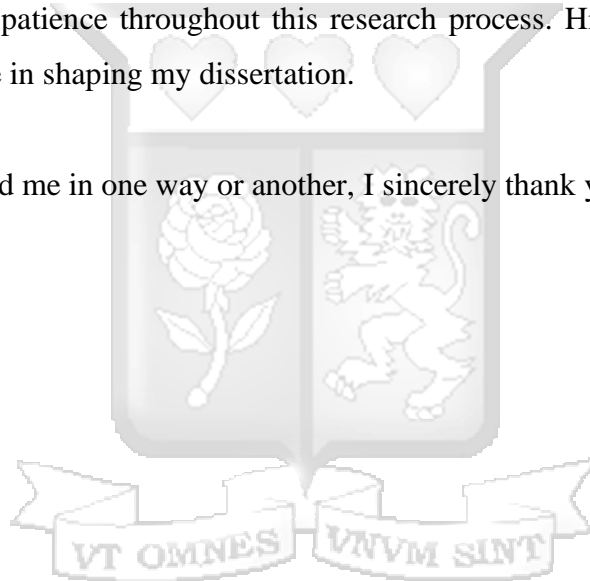


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## LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ACHPR	The African Charter on Human and Peoples' Rights
EACC	Ethics and Anti-Corruption Commission
ICCPR	International Covenant on Civil and Political Rights
LAA	Legal Aid Act
LASAA	Legal Aid South Africa Act
MDGS	Millenium Development Goals
PFMA	Public Finance Management Act
PLEAD	Program for Legal Empowerment and Aid Delivery in Kenya
NLAS	National Legal Aid Service
NGOs	Non- Governmental Organizations
SA	South Africa
SDGs	Sustainable Development Goals
UN	United Nations
UDHR	Universal Declaration of Human Rights

## LIST OF LEGAL INSTRUMENTS

### DOMESTIC INSTRUMENTS

1. *Advocates (Remuneration) (Amendment) Order* (Legal Notice 35 of 2014).
2. *Anti-Bribery Act* (Cap 79B).
3. *Constitution of Kenya* (2010).
4. *Judicial Service Act* (Act no 1 of 2011).
5. *Law Reform Commission Act* (Cap 3).
6. *Law Society of Kenya Act* (Cap 18).
7. *Legal Aid Act* (Act no 6 of 2016).
8. *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).
9. *National Police Service Act* (Cap 84).
10. *National Police Service Act (no 11A of 2011)*.
11. *Penal Code* (Cap 63).
12. *The High Court (Practice and Procedure) Rules* (Gazette Notice 1356 of 1952).
13. *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

### INTERNATIONAL INSTRUMENTS

1. *African Charter on Human and People's Rights*, 1981.
2. CCCPR *General Comment no 32, Article 14, Right to equality before courts and tribunals to fair trial*, 23, August 2007, 3.
3. UNGA, *International Covenant for Civil and Political Rights*, UN A/Res/ 2200A (XXI).
4. *Universal Declaration of Human Rights*, 10<sup>th</sup> December 1948, A/RES/217(III)[A].

## FOREIGN NATIONAL INSTRUMENTS

1. *Legal Aid South Africa Act* (South Africa).
2. *Legal Aid Amendment Act 20 of 1996* (South Africa).
3. *Public Finance Management Act* (South Africa)

## **LIST OF CASES**

1. *Alex Thomas v United Republic of Tanzania*, ACHPR Judgement of 4 July 2019.
2. *Clifford Onyango Odhiambo v Attorney General & 2 others* (2021) eKLR.
3. *Commission for Human Rights & Justice v Victoria Mutuku, Chief Inspector of Police & 5 others* (2021) eKLR.
4. *David Njoroge Macharia v Republic* (2011) eKLR.
5. *Dorcas Chemutai Sang v Republic of Kenya* (2012) eKLR.
6. *Edward Kaguathi Watuku v Republic* (2020) eKLR.
7. *Francis Karioko Muruatetu, Wilson Thirumbu Mwangi v Republic* (2017) eKLR.
8. *Jefta Mokaya v Republic* (2024).
9. *Joseph Kiema Philip v Republic* (2018) eKLR.
10. *Karen Kandie v Alassane Ba & Another* (2017) eKLR.
11. *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 Others* (2020) eKLR.
12. *Legal Aid South Africa v Magidiwana and Others* (2015), Constitutional Court of South Africa.
13. *Law Society of Kenya v Kinyua, The Head of Public Service & 5 others* (2022) eKLR.
14. *Lucky Makhandela v The State* (2005), The High Court of South Africa.
15. *PAK & Another v Attorney General & 3 others* (2022) eKLR
16. *Ramadhan Amukoya Kijana v Republic* (2024) eKLR.
17. *Republic v Chengo & 2 others* (2017) eKLR.
18. *Republic v Chibungu Sanga* (2023) eKLR.

19. *Republic v Fredrick Odhiambo Owuor* (2022) eKLR.
20. *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Attorney General* (2021) eKLR.
21. *Stanley Maira Kaguongo v Isaac Kibiru Kahuthia* (2021) eKLR.
22. *The Equitable Party & 2 others v Independent Electoral and Boundaries Commission* (2022) eKLR.
23. *The State v Luwani and Another* (2003), The High Court of South Africa.
24. *Women's Legal Centre Trust v President of the Republic of South Africa & Others* (2022), Constitutional Court of South Africa



## **ABSTRACT**

The right to access justice is a core entitlement guaranteed by the Constitution of Kenya and supported by both international and regional human rights frameworks. However, many Kenyans, particularly marginalized and vulnerable groups, face significant barriers to obtaining legal representation due to financial constraints, limited awareness, and systemic inefficiencies. The enactment of the Legal Aid Act, of 2014 sought to address these challenges by establishing the National Legal Aid Service and the Legal Aid Fund to facilitate affordable legal representation.

However, the delayed operationalization of the Legal Aid Fund has hindered the full realization of these objectives, leaving many without adequate legal support. This study analyzes the legal and institutional challenges hindering the implementation of Kenya's Legal Aid Fund. It assesses how effectively the Fund's operationalization can bridge existing gaps in access to justice and investigates best practices from South Africa's legal aid framework. By analyzing legislative, policy, and institutional frameworks, the study identifies key regulatory and funding gaps that undermine the impact of legal aid programs.

The research subsequently highlights the potential of a fully operational Legal Aid Fund in improving access to justice through enhanced legal representation, expanded service delivery, and increased legal awareness. Drawing from a comparative analysis with South Africa, the study offers recommendations for ensuring sustainable and efficient legal aid funding, improving stakeholder coordination, and strengthening regulatory mechanisms. The findings underscore the urgent need for government commitment to fully operationalize the Legal Aid Fund as a means of advancing equitable justice in Kenya.

## CHAPTER ONE: INTRODUCTION

### 1.1 Background

One major deficiencies of the Millennium Development Goals (MDGs) was its omission of access to justice,<sup>1</sup> and its importance as an aspect of well-being.<sup>2</sup> To address this, the UN Sustainable Development Goals (SDGs) were expanded, to include target 16.3 which pledges to guarantee equitable access to justice for all.<sup>3</sup> However, as countries such as Kenya, share data through voluntary national reviews, information regarding people's encounters with injustice is increasing.<sup>4</sup> It is becoming evident that the world is not making sufficient progress to achieve this target by 2030.<sup>5</sup>

Baumgartner defines access to justice as the capacity of individuals and groups to present claims of alleged rights violations before a court and have the matter adjudicated impartially, based on evidence and in accordance with applicable legal principles.<sup>6</sup> In Kenya, the right to access justice is enshrined as a constitutional guarantee.<sup>7</sup>

Given constitutional recognition, an obligation is placed on the State,<sup>8</sup> to offer legal aid services and raise awareness to people who can't pay for legal representation.<sup>9</sup> Often, the outcome of a legal

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<sup>1</sup> United Nations, *The Millenium Development Goals Report*, 2015, 4-9.

<sup>2</sup> Rout B, 'Amartya Sen's Ideas of Justice' *5 Indian Journal of Law and Legal Research* 2, 2023, 5-6.

<sup>3</sup> < <https://sdgs.un.org/topics/institutional-frameworks-and-international-cooperation-sustainable-development> > on the 5<sup>th</sup> of March 2024.

<sup>4</sup> National Crime Research Centre, *Public Perceptions and Experiences on the Access to Criminal Justice in Kenya*, 2022, 15.

<sup>5</sup> < <https://www.undp.org/press-releases/progress-peace-justice-and-inclusion-dangerously-track-new-un-report-calls-urgent-action-achieve-sustainable-development-goal-16> > on 19th January 2025.

<sup>6</sup> Baumgartner S, 'Does Access to Justice Improve Compliance with Human Rights Norms - An Empirical Study' *33 Cornell International Law Journal* 4, 2011, 457.

<sup>7</sup> Article 48, *Constitution of Kenya* (2010).

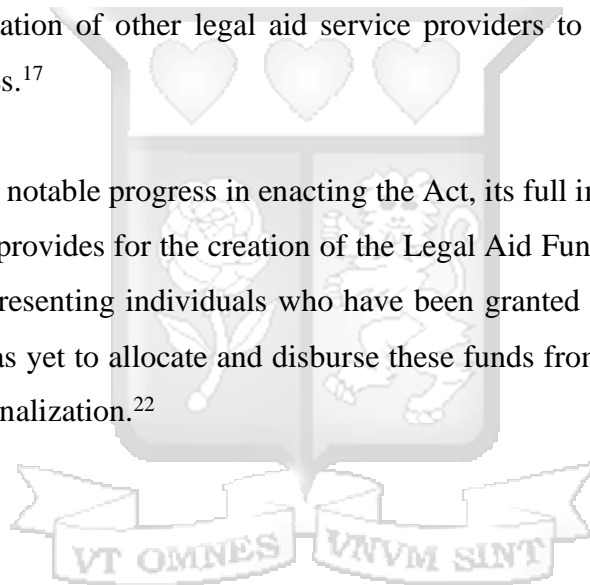
<sup>8</sup> *PAK & Another v Attorney General & 3 others* (2022) eKLR

<sup>9</sup> Baraza N and Maina K, 'Global Overview - Kenya' Global Access to Justice Project, 15th December 2023 - < <https://globalaccesstojustice.com/global-overview-kenya/> > on 15th December 2023.

suit depends less on the merits of the case than on how well a party is represented in court.<sup>10</sup> Legal aid programs ensure access to justice, particularly for marginalized and vulnerable groups by providing legal representation and protecting individual rights.<sup>11</sup> They also create legal awareness, reduce case backlogs, improve court processes and strengthen the rule of law.

In Kenya, the LAA was enacted in 2016,<sup>12</sup> reflecting Kenya's commitment to promoting the rule of law and,<sup>13</sup> fulfilling its international obligations such as those contained in the African Charter on Human and People's Rights which calls for access to justice for all.<sup>14</sup> The Act creates the National Legal Aid Service (NLAS),<sup>15</sup> which is primarily responsible for developing and managing a national legal aid scheme that is affordable, accessible and trustworthy.<sup>16</sup> It also provides for the accreditation of other legal aid service providers to broaden service reach to marginalized communities.<sup>17</sup>

While the State has made notable progress in enacting the Act, its full implementation has not yet been realized.<sup>18</sup> The Act provides for the creation of the Legal Aid Fund,<sup>19</sup> designed to offset the costs associated with representing individuals who have been granted legal aid under the law.<sup>20</sup> The National Treasury has yet to allocate and disburse these funds from the consolidated fund,<sup>21</sup> hindering its full operationalization.<sup>22</sup>



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<sup>10</sup> Open Society Foundation, 'Understanding Effective Access to Justice' OECD Conference Centre Organized by the Organization for Economic Cooperation and Development at Paris, 4 November 2016, 11-12.

<sup>11</sup> *David Njoroge Macharia v Republic* (2011) eKLR.

<sup>12</sup> *Legal Aid Act (Act no 6 of 2016)*.

<sup>13</sup> United States Agency for International Development, *Guide to the Rule of Law Country Analysis: The Rule of Law Framework*, Assessment Framework 2010, 25.

<sup>14</sup> Article 7, *African Charter on Human and People's Rights*, 1981.

<sup>15</sup> Section (5), *Legal Aid Act (Act no 6 of 2016)*.

<sup>16</sup> Section 7, *Legal Aid Act (Act no 6 of 2016)*.

<sup>17</sup> Part vii, *Legal Aid Act (Act no 6 of 2016)*.

<sup>18</sup> Janet Kosgei, 'Why the Time is Ripe for the Full Implementation of the Legal Aid Act, 2016' Kituo cha Sheria, 20 February 2020 - < <https://kituochasheria.wordpress.com/2020/02/20/why-the-time-is-ripe-for-full-implementation-of-the-legal-aid-act-2016/> > on 3 September 2024.

<sup>19</sup> Section 29 (1), *Legal Aid Act (Act no 6 of 2016)*.

<sup>20</sup> Section 30, *Legal Aid Act (Act no 6 of 2016)*.

<sup>21</sup> Article 2016, *Constitution of Kenya* (2010).

<sup>22</sup> Section 29 (2(a), *Legal Aid Act (Act no 6 of 2016)*.

The failure to operationalize the Legal Aid Fund often leaves NLAS reliant on donor funding,<sup>23</sup> such as the European Union's support through the PLEAD program.<sup>24</sup> This lack of funding severely restricts legal aid in Kenya, hampering NLAS's operations by preventing it from covering representation expenses for eligible individuals. A 2022 study carried out by the National Crime Research Centre, confirmed that 20.8 percent of Kenyans still face problems accessing criminal justice due to high costs of legal representation.<sup>25</sup>

Second, it is worth highlighting that the National Assembly has already enacted regulations that provide guidance on certain provisions of the Principal Act, including establishing a code of conduct for accredited legal aid service providers and,<sup>26</sup> setting criteria for the means test in the general regulations.<sup>27</sup> For instance, the regulations state that a person qualifies for legal aid to a criminal or civil case if their net monthly income after tax does not exceed thirty thousand shillings.<sup>28</sup> However, there is no subsidiary legislation guiding the operation of the Fund, particularly in terms of how funds will be allocated from the NLAS to other legal aid service providers, posing a regulatory gap.

South Africa is one of the few African Countries with a well-established legal aid scheme that is predominantly financed through the national budget,<sup>29</sup> and which handles a whopping over 581,000 cases a year.<sup>30</sup> South Africa's Legal Aid Act, establishes Legal Aid South Africa with the objective of offering legal representation to individuals in need, funded by the state.<sup>31</sup> This has led to an increase in human right protections as more people are able to access the justice system.<sup>32</sup>

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<sup>23</sup> Section 29 (2)(c), *Legal Aid Act Kenya* (Cap 16A).

<sup>24</sup> United Nations Office on Drugs and Crime, *PLEAD II at a glance*, 2022,1.

<sup>25</sup> National Crime Research Centre, *Public Perceptions and Experiences on the Access to Criminal Justice in Kenya*, 2022, 19.

<sup>26</sup> Part II, *The Legal Aid Code of Conduct for Accredited Legal Aid Service Providers* (Legal Notice 87 of 2022).

<sup>27</sup> *The Legal Aid (General) Regulations* (Legal Notice 187 of 2021).

<sup>28</sup> Section 4 (1), *The Legal Aid (General) Regulations* (Legal Notice 187 of 2021).

<sup>29</sup> Legal Aid South Africa, *Integrated Annual Report 2022-2023*, 2023, 86.

<sup>30</sup> Legal Aid South Africa, *Integrated Annual Report 2022-2023*, 2023, 26.

<sup>31</sup> Section 3 (b), Chapter 2, *Legal Aid South Africa Act* (South Africa).

<sup>32</sup> Legal Aid South Africa, *Annual Report 2022-2023*, 2023, 50-52.

Legal Aid SA has an extensive network of justice centers across the country.<sup>33</sup> This decentralized approach ensures that legal aid services are accessible even in rural and remote areas. Each justice center is well-staffed with lawyers and paralegals who can handle a variety of cases.<sup>34</sup>

## 1.2 Problem Statement

Kenya's international and constitutional obligations including Article 48 of the Constitution, guarantee access to justice. International instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, underscore the importance of an efficient legal aid system. The establishment of NLAS through the LAA of 2016 was intended to provide a comprehensive framework for achieving this goal.

However, delays by the National Treasury in allocating resources for the Legal Aid Fund coupled with the lack of subsidiary legislation guiding the operation of how the funds will be allocated to other legal aid service providers, poses a regulatory gap. This gap undermines the institutional and operational capacity of NLAS significantly constraining its ability to fulfill its mandate of facilitating access to justice effectively.

Without funding, legal aid organizations struggle to hire and retain adequate staff such as lawyers and paralegals. This results in overstretched personnel unable to meet client demands effectively leading to delayed service delivery. Furthermore, limited financial resources restrict the geographical reach of legal aid services. This leaves rural and underserved areas without access to representation. Additionally, the lack of operationalization of the Legal Aid Fund limits the ability of the NLAS and other accredited legal aid service providers to handle specialized cases particularly those related to persons with disabilities, children and human rights violations which require specific expertise and resources.

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<sup>33</sup> Legal Aid South Africa, *Annual Report 2022-2023*, 2023, 4.

<sup>34</sup> Legal Aid South Africa, *Annual Report 2022-2023*, 2023, 5.

### 1.3 Research Objectives

This study critically examines the legal obstacles impeding the operationalization of the Legal Aid Fund in Kenya. Therefore, this research is aimed at pursuing the following objectives:

1. Analyze the legal challenges in the current legislative, regulatory, policy, and institutional frameworks on access to justice through legal aid programs in Kenya.
2. Evaluate whether the operationalization of the Legal Aid Fund addresses legal challenges in access to justice through legal aid programs in Kenya.
3. Recommend best practices based on a comparative study with South Africa that Kenya can adopt to ensure access to justice through legal aid programs.

### 1.4 Hypothesis

The operationalization of the Legal Aid Fund mitigates legal barriers to access justice by supporting legal aid programs in Kenya.

### 1.5 Research Questions

Consequently, these questions will be answered whilst advancing the objectives.

1. What are the legal challenges in the current legislative, regulatory, policy, and institutional frameworks governing access to justice through legal aid programs in Kenya?
2. Can the operationalization of the Legal Aid Fund address legal challenges in access to justice through legal aid programs in Kenya?
3. What recommendations can be offered based on a comparative study with South Africa?

### 1.6 Significance of the Study

This study addresses a critical gap in Kenya's justice system caused by the delayed operationalization of the Legal Aid Fund. By examining Kenya's legal framework, it highlights

the benefits of fully implementing the Fund such as expanding access to justice, improved system efficiency and the alignment with both international and constitutional obligations. The findings are particularly relevant to NLAS and other legal aid service providers as it offers practical recommendations to enhance resource allocations and service delivery. Additionally, this research fills a gap in literature by providing a comparative analysis with South Africa's legal aid system to inform Kenya's approach with best practices it can adopt to achieve nation-wide access to justice.

## 1.7 Theoretical Framework

This research adopts John Rawl's theory of justice as a lens to address the systemic inequalities in accessing justice.<sup>35</sup> His theory advances both the veil of ignorance and the original position, concepts that are designed to ensure that principles of justice are chosen impartially.<sup>36</sup> In this hypothetical scenario, rational individuals, independent of their social and economic standing, would establish two key principles: the principle of justice and the difference principle.<sup>37</sup>

The principle of justice ensures access to fundamental liberties, including the right to legal aid which is integral to realizing access to justice for all.<sup>38</sup> By guaranteeing equality in distributing these liberties, Rawls emphasizes the importance of removing financial and structural barriers to justice - a goal that aligns with the operationalization of Kenya's Legal Aid Fund.<sup>39</sup> The difference principle justifies socio-economic inequalities if they benefit the least advantaged and ensure fair opportunities for all.<sup>40</sup> In the context of Kenya, this principle supports the allocation of resources

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<sup>35</sup> Bix B, *Jurisprudence: Theory and Context*, 6<sup>th</sup> ed, Carolina Academic Press, Durham, 2012, 109.

<sup>36</sup> Rawls J, *'A Theory of Justice'*, Belknap Press of Harvard University Press, Cambridge Massachusetts, 1971, 72-75.

<sup>37</sup> Dworkin R, *'Sovereign Virtue: The Theory and Practice of Equality'*, Harvard University Press, Cambridge Mass, 2000, 73.

<sup>38</sup> Rawls J, *'A Theory of Justice'*, 60.

<sup>39</sup> Gourevitch V, 'Rawls on justice' 28 *The Review of Metaphysics* 3, 1975, 488.

<sup>40</sup> Thibaut J, Walker L, LaTour S, Houlden P, 'Procedural Justice as Fairness', 26(6), *Stanford Law Review*, 1974, 1287-1289.

to address disparities in seeking legal redress through the NLAS.<sup>41</sup> It highlights the State's obligation to prioritize marginalized groups and promote equitable access to justice.<sup>42</sup>

Rawls' critique of systemic privilege is particularly relevant to Kenya, where legal and social institutions have historically favored the wealthy, leaving vulnerable groups at a disadvantage.<sup>43</sup> The full implementation of the Legal Aid Fund aligns with Rawl's vision of a just society by providing the means to rectify such inequalities,<sup>44</sup> enabling the NLAS and other accredited legal aid service providers to extend their reach and impact.<sup>45</sup>

By applying Rawl's principles, the operationalization of the Legal Aid Fund is not merely a constitutional mandate but a practical step toward achieving justice<sup>46</sup> It guarantees that justice is not a privilege reserved for a select few but a fundamental right accessible to everyone, strengthening the credibility of Kenya's legal and social institutions.

## 1.8 Literature Review

This study has reviewed the report issued by the Legal Resources Foundation Trust in Kenya and,<sup>47</sup> Joireman's academic work which both highlight the history of legal aid in Kenya. The report reveals that during the colonial period, the formal legal system was exclusionary.<sup>48</sup> Native Kenyans were served by an informal justice system, provided their actions did not challenge the colonialists the peaceful domination of the colonialists.<sup>49</sup> As Joireman notes, the formal legal system during the colonial era, remained restrictive in its admission of native legal practitioners and its

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<sup>41</sup> Section 29, *Legal Aid Act* (Cap 16 A).

<sup>42</sup> Article 21, *Constitution of Kenya* (2010).

<sup>43</sup> Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey: Evidence from Households in Kenya*, 2023, 51.

<sup>44</sup> Lawrence M, 'Justice and Fairness Guiding Judicial Principle: Remembering John Rawls and Warren Court' 81 *Brooklyn Law Review* 2, 2016, 673-695.

<sup>45</sup> Section 7(a), *Legal Aid Act* (Cap 16A).

<sup>46</sup> Afreen I, 'John Rawls Theory of Justice', 7 *International Journal of Law Management and Humanities* 2, 2024, 3052.

<sup>47</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi Country*, 2020, 16.

<sup>48</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi Country*, 2020, 17.

<sup>49</sup> Ndege P, 'Colonialism and its Legacies in Kenya' Fullbright- Hays Group Project Abroad Program at Moi University Main Campus, Nairobi, 6<sup>th</sup> August 2009, 3-4.

application to disputes between native applicants.<sup>50</sup> post-independence, native Kenyans became subject to the formal court system.<sup>51</sup>

Despite this progressive step, the colonial laws at the time were neither repealed or amended to allow for the admission and training of native legal practitioners.<sup>52</sup> Many Kenyans faced a disadvantage due to illiteracy and limited awareness of the law. Interestingly, the report highlights that at the time, the Independence Constitution only envisaged legal representation as the only form of legal aid.<sup>53</sup> Efforts to address these challenges began in the 1970s with the establishment of the University of Nairobi making legal education available to Kenyans locally, to address the skewed justice system.<sup>54</sup>

Furthermore, Kituo cha Sheria and the Public Law Institute were established with the aim of providing *pro bono* legal services, training paralegals and introducing legal aid clinics.<sup>55</sup> The 1990s saw the rise of civil society organizations such as the Legal Resources Foundation Trust, which refined the paralegal education.<sup>56</sup>

The 2010 Constitution placed a fundamental duty on the State to observe, respect, protect and promote the protected rights and freedoms including the right to access justice.<sup>57</sup> This shift culminated in the enactment of the LAA, 2016 which institutionalized legal aid under the NLAS.<sup>58</sup> The Act formalized the role of paralegals,<sup>59</sup> outlined eligibility criteria and established mechanisms for accrediting legal aid providers.<sup>60</sup> The National Action Plan on Legal Aid operationalized these provisions, emphasizing sustainable and accessible legal aid.<sup>61</sup>

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<sup>50</sup> Joireman S, 'The Evolution of the Common Law: Legal Development in Kenya and India' 4 *The Journal of Commonwealth and Comparative Politics* 2, 2006, 201.

<sup>51</sup> Joireman S, 'The Evolution of the Common Law: Legal Development in Kenya and India', 202.

<sup>52</sup> Odenyo A, 'Professionalization: Amidst Change: The Case of the Emerging Legal Profession in Kenya' 22 *African Studies Review* 3, 1979, 34 – 35.

<sup>53</sup> Section 21(2)(d), *Constitution of Kenya* (1963).

<sup>54</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi Country*, 2020, 17.

<sup>55</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi Country*, 2020, 17.

<sup>56</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi Country*, 2020, 17.

<sup>57</sup> Article 21 (1), *Constitution of Kenya* (2010).

<sup>58</sup> Section 7, *Legal Aid Act* (Cap 16A).

<sup>59</sup> Section 68, *Legal Aid Act* (Cap 16A).

<sup>60</sup> Part III, Legal Aid (General) Regulations (Legal Aid Notice 86 of 2022).

<sup>61</sup> Office of the Attorney General and Department of Justice, *National Action Plan on Legal Aid 2017-2022*, 23-37.

Despite these significant advancements, the report notes that numerous challenges still exist. Limited funding, reliance on donor support and inadequate public awareness hinders the full realization of legal aid objectives.<sup>62</sup> The implementation of the LAA remains inconsistent, and infrastructure gaps continue to impede access for marginalized communities.<sup>63</sup>

While the reviewed source provides a strong historical foundation on legal aid in Kenya, it has several limitations that leave critical gaps in understanding the operationalization of the legal aid fund. The report and Joireman's work focus primarily on the evolution of legal aid from the colonial era to the post-independence period, highlighting the exclusionary nature of the legal system and the gradual establishment of legal aid institutions.

However, they do not engage in a detailed analysis of the Legal Aid Fund structure, allocation mechanisms or sustainability challenges under the LAA. Although funding constraints are acknowledged as a significant barrier, the source does not provide an in-depth evaluation of how financial resources are disbursed or sustained to support access to justice effectively. Additionally, while the role of civil society and paralegal is mentioned, the study does not sufficiently explore alternative legal aid financing models, such as public-private partnerships.

Building on these findings, this study seeks to bridge these gaps by providing a contemporary assessment of the legal aid funds, implementation and effectiveness. It will analyze specific operational challenges faced by the fund, including financial constraints, bureaucratic inefficiencies, and accessibility issues for marginalized communities. Moreover, by assessing legislative and policy gaps, this study proposes concrete measures to improve the accessibility and sustainability of legal assistance programs in Kenya.

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<sup>62</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi County*, 2020, 27.

<sup>63</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi County*, 2020, 23-25.

Kameri-Mbote and Aketch provide a detailed analysis access to justice in Kenya, highlighting financial, geographical, and systemic barriers.<sup>64</sup> They discuss the expensive nature of legal services, the urban concentration of courts, and the limited availability of legal aid, noting that many Kenyans turn to informal dispute resolution mechanisms.<sup>65</sup> While they propose reforms such as increased legal education and improved court accessibility, their analysis does not specifically address the operationalization of the legal aid fund.<sup>66</sup> This study builds on their work by examining how funding delays and regulatory gaps undermine the delivery of legal aid services. Unlike their broader discussion, it focuses on the Legal Aid Fund's role in expanding access to justice, particularly for marginalized groups. Through a comparative study with South Africa, it identifies best practices Kenya can adopt to strengthen its legal aid framework.

Nanjala provides valuable insights into key factors affecting access to justice, including funding constraints, limited legal awareness, and the capacity of legal aid service providers.<sup>67</sup> The study also highlights the reliance on donor funding, the inadequacy of government support, and the need for structured legal aid frameworks to enhance service delivery.<sup>68</sup> It also emphasizes the role of paralegals and alternative dispute resolution in expanding access to justice.<sup>69</sup>

However, while Nanjala broadly discusses legal aid challenges. The study does not focus on the operationalization of the legal aid fund and its impact on legal aid institutions. This study addresses this gap by critically analyzing the delays in funding allocation and the absence of clear regulatory guidelines, which hinder the effectiveness of legal aid programs.

Henni Van As in his academic work, identifies two primary models of legal aid provision. The first relies on legal professionals offering pro bono services, justified by their state granted

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<sup>64</sup> Kameri-Mbote P & Aketch M, Kenya: 'Justice and the Rule of Law Ideal: Theory and Practice' in Nowrojee B (ed), 1<sup>st</sup> ed, *Kenya: Justice Sector and The Rule of Law*, Open Society Initiative for Eastern Africa, 2011, 22.

<sup>65</sup> Kameri-Mbote P & Aketch M, Kenya: 'Access to Justice' in Nowrojee B (ed), 1<sup>st</sup> ed, *Kenya: Justice Sector and The Rule of Law*, Open Society Initiative for Eastern Africa, 2011, 156.

<sup>66</sup> Kameri-Mbote P & Aketch M, Kenya: 'Access to Justice' 157-159.

<sup>67</sup> Nanjala C, 'Determinants of Effective Legal Aid Service Delivery in Kenya' *5 International Journal of Social Sciences and Entrepreneurship* 1, 2013, 10.

<sup>68</sup> Nanjala C, 'Determinants of Effective Legal Aid Service Delivery in Kenya' 11.

<sup>69</sup> Nanjala C, 'Determinants of Effective Legal Aid Service Delivery in Kenya' 11.

monopoly over legal practice. The second involves a more active role by the State, either through salaried public defenders or by compensating private lawyers for their services.<sup>70</sup> He emphasizes that it is the duty of the State to ensure access to justice for all individuals. This responsibility suggests that the State should actively engage in providing legal aid rather than leaving it solely to the legal profession.<sup>71</sup>

The author highlights the drawbacks of depending on the legal profession to deliver *pro bono* services. He notes that while this approach can be beneficial, it may not adequately address everyone's needs.<sup>72</sup> The author recognizes the need for a sustainable and effective legal aid system that can conduct public legal education, promote public interest litigation and encourage the adoption of alternative dispute resolution mechanisms. A State driven approach is seen as more capable of addressing these systemic challenges and guaranteeing that legal aid is available to those who need it the most.<sup>73</sup>

This study acknowledges that the constitutional right to a fair hearing,<sup>74</sup> and access to justice are guaranteed rights under the Constitution of Kenya.<sup>75</sup> Since these rights are constitutionally recognized,<sup>76</sup> the State has a duty to proactively offer legal aid and promote awareness for individuals who cannot afford legal representation.<sup>77</sup> This study intends to build on Van Ans's academic work by assessing the practical benefits that would be realized upon the full implementation of the Legal Aid Fund to the justice system and to marginalized communities in Kenya.

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<sup>70</sup> As H, 'Legal Aid in South Africa: Making Justice a Reality' 49 *Journal of African Law* 1, 2005, 54.

<sup>71</sup> As H, 'Legal Aid in South Africa: Making Justice a Reality' 56.

<sup>72</sup> As H, 'Legal Aid in South Africa: Making Justice a Reality' 57.

<sup>73</sup> As H, 'Legal Aid in South Africa: Making Justice a Reality' 63-64.

<sup>74</sup> Article 50, *Constitution of Kenya* (2010).

<sup>75</sup> Article 48, *Constitution of Kenya* (2010).

<sup>76</sup> *PAK & Another v Attorney General & 3 others* (2022) eKLR

<sup>77</sup> Baraza N and Maina K, 'Global Overview - Kenya' Global Access to Justice Project, 15th December 2023 - <<https://globalaccesstojustice.com/global-overview-kenya/>> on 15th December 2023.

A review of Preložnjak's academic work highlights that legal aid accessibility and economic growth have a symbiotic relationship.<sup>78</sup> The withdrawal of State funding has consequences for the judicial system, leading to increased backlogs as self-represented litigants struggle to navigate complex legal procedures. This inefficiency burdens courts and undermines trust in the legal system.<sup>79</sup>

The author argues that contrary to the perception that legal aid is merely financial burden on the State, research suggests that accessible legal aid has tangible economic benefits.<sup>80</sup> A well-funded legal aid system contributes to economic stability by preventing costly legal disputes, reducing court congestion and facilitates timely dispute resolution. Preložnjak's posits that legal aid plays a major role in labor market stability by assisting individuals in cases of wrongful termination, wage disputes or workplace discrimination.<sup>81</sup> Without accessible legal representation, employees may be unfairly dismissed or exploited, reducing workforce productivity and economic participation.<sup>82</sup> The findings of this study will build on this existing research by evaluating the potential benefits of fully operationalizing the Legal Aid Fund and strengthening Kenya's Legal aid structure.

However, while the research effectively demonstrates the economic benefits of legal aid, it does not address the practical challenges of implementing a legal aid fund or the regulatory and policy gaps that affect its effectiveness. This research intends to build on Preložnjak's findings by focusing on the operationalization of the legal aid fund in Kenya and how it's proper implementation could enhance access to justice.

## 1.9 Research Methodology

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<sup>78</sup> Preložnjak B, 'Impact of Cuts to Legal Aid – Comparative View and Economic Prospects', 4 *Journal for International and European Law, Economics and Market Integrations* 2, 2017,35. This research

<sup>79</sup> Preložnjak B, 'Impact of Cuts to Legal Aid – Comparative View and Economic Prospects', 36.

<sup>80</sup> Preložnjak B, 'Impact of Cuts to Legal Aid – Comparative View and Economic Prospects', 52.

<sup>81</sup> Preložnjak B, 'Impact of Cuts to Legal Aid – Comparative View and Economic Prospects', 54.

<sup>82</sup> Preložnjak B, 'Impact of Cuts to Legal Aid – Comparative View and Economic Prospects', 54.

This research adopted a combination of qualitative and doctrinal methodologies, drawing on various sources such as statutes, books, journal articles, legal commentaries, credible publications and reputable newspaper articles. Additionally, the study utilized a comparative approach, examining South Africa as a reference point to analyze similarities and differences within the Kenyan context. South Africa was selected for comparison due to its shared status as a developing country that has faced challenges related to unequal access to justice. Moreover, both Kenya and South Africa introduced legal aid frameworks within a similar time frame, between 2014 and 2016.

### **1.10 Assumptions**

The research operates under the assumption that the Legal Aid Fund will not be operationalized during the conduct of the study.

### **1.12 Chapter Breakdown**

This study has five Chapters.

#### **Chapter One: Introduction**

This chapter introduces the study by giving the background, the problem statement, the research questions, research methodology, and the justification. This chapter also reviews existing literature with a view of identifying gaps in the literature.

#### **Chapter Two: Legal Challenges in Access to Justice Through Legal Aid Programs in Kenya: An Analysis of the Existing Legislative, Policy, Regulatory, and Institutional Frameworks**

Chapter two addresses the first research question by analyzing the current legislative, regulatory, policy, and institutional frameworks governing access to justice in Kenya through legal aid programs.

### **Chapter Three: Can the Operationalization of the Legal Aid Fund Address the Legal Challenges in Access to Justice Through Legal Aid Programs in Kenya?**

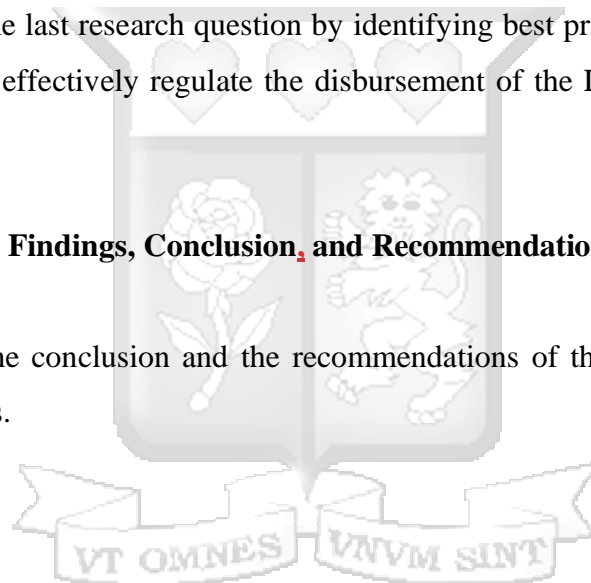
This chapter addresses the second research question by evaluating whether the operationalization of the Legal Aid Fund can address the legal challenges highlighted in chapter two as hindrances to access to justice through legal aid programs in Kenya. Thus, this chapter starts by highlighting key challenges hindering access to justice in Kenya through legal aid programs.

### **Chapter Four: Access to Justice Through Legal Aid Programs in South Africa**

This chapter addresses the last research question by identifying best practices from South Africa that Kenya can adopt to effectively regulate the disbursement of the Legal Aid Fund to ensure access to justice.

### **Chapter Five: Research Findings, Conclusion, and Recommendations**

This Chapter provides the conclusion and the recommendations of the study according to the discussion of the findings.



# CHAPTER TWO: LEGAL CHALLENGES IN ACCESS TO JUSTICE THROUGH LEGAL AID PROGRAMS IN KENYA: AN ANALYSIS OF THE EXISTING LEGISLATIVE, POLICY AND REGULATORY INSTITUTIONAL FRAMEWORKS

## 2.1 Introduction

This chapter explores the current legislative, regulatory, policy and institutional frameworks that oversee the delivery of State-Funded legal aid in Kenya. It does this by first providing an insight into the justice system, emphasizing relevant and regional and international instruments and outlining domestic legislative provisions that support access to justice. This exploration sets the stage for identifying gaps in implementation of the Legal Aid Fund and areas for improvement.

## 2.2 Structure and functioning of Kenya's justice System

Kenya's legal system operates on an adversarial model,<sup>83</sup> in which advocates represent the parties and manage the presentation of information to the court, which subsequently issues a judgement.<sup>84</sup> It incorporates statutory, customary, common and Islamic law, alongside the doctrine of precedent.<sup>85</sup> The Constitution of Kenya stands as the country's supreme law.<sup>86</sup> The justice system involves various stakeholders, including the community, police, judiciary, witnesses, probation officers and prison services.<sup>87</sup>

The police are responsible for arresting suspects, receiving and recording complaints, conducting investigations and preparing charge sheets.<sup>88</sup> The judiciary, as the guardian of justice, adjudicates cases presented before it. Reforms in both the civil and criminal justice system are spearheaded by the Kenya Law Reform Commission and,<sup>89</sup> the National Council on the Administration of

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<sup>83</sup> *Dorcas Chemutai Sang v Republic of Kenya* (2012) eKLR.

<sup>84</sup> Black's Law Dictionary, 3ed.

<sup>85</sup> Kibwana K, 'Law for the Layman: Sources of Law in Kenya' 4 *Wajibu* 3, 1989, 23-24.

<sup>86</sup> Article 2, *Constitution of Kenya* (2010).

<sup>87</sup> Peace Building Initiative, 'Traditional & Informal Justice Systems: Actors & Activities' International Association for Humanitarian Policy and Research, April 6<sup>th</sup>, 2009 - <<http://www.peacebuildinginitiative.org/index4472.html?pageId=1877> >

<sup>88</sup> Part VII, *National Police Service Act (no 11A of 2011)*.

<sup>89</sup> Section 2, *Law Reform Commission Act (Cap 3)*.

Justice.<sup>90</sup> The standard of proof in civil cases is that of a balance of probabilities.<sup>91</sup> The standard of proof required in criminal cases is proof beyond reasonable doubt.<sup>92</sup>

Access to free legal representation is therefore crucial in ensuring equality and fairness in the administration of justice. This is particularly important in the criminal justice system as capital offences such as murder, carry a death sentence in addition to,<sup>93</sup> the loss of freedom.

The 2023/24 Judiciary Annual Report highlights significant advancements in Kenya's access to justice efforts. Notable developments include the establishment of five new High Court stations, 27 new Small Claim Courts in underserved areas, and 57 Mobile Courts that have reduced the average distance of Court access to 80 kilometers.<sup>94</sup>

Technological innovations have further improved accessibility,<sup>95</sup> with the nationwide E-filing system enabling remote case filing and the case tracking system enhancing efficiency, contributing to 99% case clearance rate.<sup>96</sup> Despite these gains, the report highlights ongoing financial constraints that impede full access to justice. The judiciary's budget remains below the recommended 3% of the national budget, limiting infrastructure and expansion, staffing, and legal aid services.<sup>97</sup>

## **2.3 Existing Legislative, Policy, Regulatory and Institutional Frameworks on Access to Justice in Kenya Through Legal Aid Programs.**

### **2.3.1 Constitution of Kenya**

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<sup>90</sup> Section 34, *Judicial Service Act* (Act no 1 of 2011).

<sup>91</sup> *Stanley Maira Kaguongo v Isaac Kibiru Kahuthia* (2021) eKLR.

<sup>92</sup> *Republic v Fredrick Odhiambo Owuor* (2022) eKLR.

<sup>93</sup> Section 204, *Penal Code* (Cap 63).

<sup>94</sup> Judiciary, State of the Judiciary and The Administration of Justice, 2023-2024, 4-6.

<sup>95</sup> Judiciary, State of the Judiciary and The Administration of Justice, 2023-2024, 13.

<sup>96</sup> Judiciary, State of the Judiciary and The Administration of Justice, 2023-2024, 18.

<sup>97</sup> Judiciary, State of the Judiciary and The Administration of Justice, 2023-2024, 7.

On 27<sup>th</sup> August 2010, Kenya promulgated the 2010 Constitution, which serves as the country's supreme law and applies to all individuals and state organs at both national and county levels.<sup>98</sup> The 2010 Constitution can be regarded as a transformative charter,<sup>99</sup> embodying Kenya's dedication to the ongoing process of constitutional development, interpretation and enforcement aimed at reshaping the nation's political and social institutions and power dynamics toward greater democracy and equality.<sup>100</sup>

This is especially evident in the extensive Bill of Rights, which encompasses a broad range of socio-economic rights.<sup>101</sup> It recognizes that protecting human rights and freedoms is vital for dignity, social justice and individual growth.<sup>102</sup> The Constitution affirms,<sup>103</sup> that all individuals are equal before the law.<sup>104</sup>

The Constitution guarantees an accused person's right to state-appointed legal representation at the State's expense if failing to provide such assistance would result in substantial injustice;<sup>105</sup> this safeguard is part of the broader right to a fair trial.<sup>106</sup> The right to a fair trial and legal aid are closely intertwined, as legal aid often serves as practical mechanism to ensure the realization of justice, particularly for those who are financially disadvantaged. The right to a fair trial is a right that must not be limited.<sup>107</sup> Most of all, the Constitution requires the State to ensure that everyone can seek and obtain legal redress.<sup>108</sup>

It is within this context that the LAA of 2016 was enacted to facilitate the full realization of the protected rights and freedoms,<sup>109</sup> as well as to establish the national Legal Aid Fund as well as the

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<sup>98</sup> Article 2(1), *Constitution of Kenya (2010)*.

<sup>99</sup> Glinz C, 'Kenya's New Constitution: A transforming Document or Less than meets the Eye?' 44 *Law and Politics in Africa, Asia and Latin America* 1, 2011, 64.

<sup>100</sup> Klare K 'Legal Culture and Transformative Constitutionalism' 14 *South African Journal on Human Rights* 1, 1998, 150.

<sup>101</sup> Chapter 4, *Constitution of Kenya (2010)*.

<sup>102</sup> Article 19 (2), *Constitution of Kenya (2010)*.

<sup>103</sup> Article 27 (1), *Constitution of Kenya (2010)*.

<sup>104</sup> *Clifford Onyango Odhiambo v Attorney General & 2 others (2021) eKLR*.

<sup>105</sup> Article 50 (2(h)), *Constitution of Kenya (2010)*.

<sup>106</sup> Article 50 (1), *Constitution of Kenya (2010)*.

<sup>107</sup> Article 25 (c), *Constitution of Kenya (2010)*.

<sup>108</sup> Article 48, *Constitution of Kenya (2010)*.

<sup>109</sup> *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Attorney General (2021) eKLR*.

NLAS. In *David Njoroge*, the Court of Appeal emphasized that the entitlement to State-funded legal counsel is not unconditional; it depends on the risk of significant injustice arising in its absence.<sup>110</sup>

Similarly, in *Karisa Chengo*, the Supreme Court clarified that while the right to legal representation is fundamental, the entitlement to State-funded legal counsel is conditional. The court outline factors to consider in determining the necessity of State-funded legal counsel, such as the seriousness of the offence, the severity of the potential sentence, the accused's ability to afford private counsel, the complexity of the case and the accused's personal circumstances, including literacy and vulnerability.<sup>111</sup>

### 2.3.2 Legal Aid Act of 2016

The LAA of 2016 formulated a comprehensive legal aid structure that is consistent with constitutional provisions on fundamental freedoms and access to justice. The primary objective of the LAA is to ensure that legal aid services are delivered to underprivileged individuals in Kenya.<sup>112</sup> The LAA establishes the NLAS, a State agency mandated to coordinate the provision of legal aid services in Kenya.<sup>113</sup> Previously, these services were primarily offered by non-governmental organizations such as Kituo cha Sheria.<sup>114</sup> The NLAS was created to ensure a regulated, collaborative approach to legal aid while promoting standardization and quality assurance.<sup>115</sup> It takes over from the National Legal Aid Awareness Programme (NALEAP) which existed before the enactment of the LAA.<sup>116</sup>

The Act provides for the establishment of the Legal Aid Fund, which is managed by NLAS.<sup>117</sup> The Legal Aid Fund comprises of funds allocated to it by Parliament, any grants or donations made to

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<sup>110</sup> *David Njoroge Macharia v Republic* (2011) eKLR.

<sup>111</sup> *Republic v Chengo & 2 others* (2017) eKLR.

<sup>112</sup> Preamble, *Legal Aid Act* (Cap 16A).

<sup>113</sup> Section 6, *Legal Aid Act* (Cap 16A).

<sup>114</sup> Legal Resources Foundation Trust, *The State of legal Aid in Nairobi County*, 2020, 18.

<sup>115</sup> Section 7, *Legal Aid Act* (Cap 16A).

<sup>116</sup> < <https://www.nlas.go.ke/background-information> > on 3<sup>rd</sup> December 2024.

<sup>117</sup> Section 29(1), *Legal Aid Act* (Cap 16A).

the Fund and money from any other lawful source.<sup>118</sup> As outlined in the statute, NLAS may use the monies accumulated in the Fund to defray expenses incurred by legal aid providers in providing services in the representation of persons.<sup>119</sup>

The LAA provides for legal aid both criminal and civil cases.<sup>120</sup> To qualify for legal aid, an individual must be a Kenyan citizen, a child, a refugee, a victim of human trafficking, an internally displaced person, or a stateless person. Eligibility is subject to NLAS's assessment of the individuals' financial resources and whether the cost of the proceedings is reasonable in relation to the anticipated benefits.<sup>121</sup> Additionally, the LAA excludes certain civil matters from legal aid coverage, including insolvency and bankruptcy cases, defamation, tax-related disputes, debt recovery, and cases involving artificial persons such as companies.<sup>122</sup>

Any person seeking legal aid must submit a written application to NLAS before the matter is conclusively determined by a court or any other forum.<sup>123</sup> The LAA provides for the accreditation of other legal aid service providers as well as, establishing the duties of an accredited legal aid providers through subsidiary legislation.<sup>124</sup>

The LAA is supplemented by subsidiary legislation that provides further guidance on the accreditation of legal aid providers, administration of the legal aid fund, and procedures for the provision of legal aid services. The Legal Aid (General) Regulations 2022 set out detailed requirements for the accreditation of advocates, law firms, civil society organizations and paralegals offering legal aid services.<sup>125</sup> The regulation ensures that legal aid providers meet prescribed standards before they can be recognized by the national legal aid service.

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<sup>118</sup> Section 29(2), *Legal Aid Act* (Cap 16A).

<sup>119</sup> Section 30, *Legal Aid Act* (Act 16A).

<sup>120</sup> Section 35(2), *Legal Aid Act* (Cap 16A).

<sup>121</sup> *Joseph Kiema Philip v Republic* (2018) eKLR.

<sup>122</sup> Section 37, *Legal Aid Act* (Cap 16A).

<sup>123</sup> Section 40, *Legal Aid Act* (Cap 16A).

<sup>124</sup> Part II, *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

<sup>125</sup> Part III, *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).

Accredited legal aid service providers are required to renew their accreditation periodically with application submitted to end less at least one month before expiry.<sup>126</sup> The regulations further outlined the process for withdrawal from the legal aid scheme, including the transfer of case files to ensure continuity of representation.<sup>127</sup> Additionally, legal aid providers may engage experts, investigators or consultants with the approval of the director of end less, provided such engagements are justified and expenses incurred are drawn from the legal aid fund.<sup>128</sup>

The regulations reinforce the structured implementation of legal aid services by clarifying the responsibilities of accredited providers and streamlining the administration of the legal aid fund. They aim to enhance the efficiency and accountability of legal aid services while ensuring that those in need receive quality legal assistance.

Building upon the foundational framework established by the LAA, The Legal Aid Code of Conduct for Accredited Legal Aid Providers, 2022, delineates ethical and professional standards for those offering legal aid services in Kenya.<sup>129</sup> This code highlights the need to protect the rights and interests of aided persons, requiring providers to demonstrate competence, diligence and integrity in their practice. It underscores the necessity for confidentiality, requiring providers to safeguard all information pertaining to their clients, thereby fostering trust and ensuring the integrity of the legal process.<sup>130</sup>

Furthermore, the code addresses potential conflicts of interest, obligating legal aid providers to prioritize their welfare of their clients above personal or external interests.<sup>131</sup> It also mandates adherence to the ethical standards set by respective professional bodies, ensuring that all actions are aligned with the broader legal community's expectations.<sup>132</sup> By setting these comprehensive guidelines the code aims to standardize the quality of legal aid services, ensuring that underprivileged individuals receive competent and ethical representation.

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<sup>126</sup> Section 31, *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).

<sup>127</sup> Section 34, *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).

<sup>128</sup> Section 36, *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).

<sup>129</sup> Section 2, *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

<sup>130</sup> Section 7, *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

<sup>131</sup> Section 8, *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

<sup>132</sup> Section 16, *The Legal Aid Code of Conduct for Accredited Legal Aid Providers* (Legal Notice 87 of 2022).

### 2.3.3 Law Society of Kenya

The Law Society of Kenya, is a corporate body established with the mandate of regulating and representing the legal profession, upholding ethical standards, advise on legal matters as well as to advocate for the rule of law.<sup>133</sup> In recognition of its mandate to advance the rule of law, the LSK has adopted *pro bono* service programs such as the LSK Legal Awareness week and,<sup>134</sup> conducting public interest litigation.<sup>135</sup> For instance, in *Migot-Adholla*,<sup>136</sup> the LSK challenged directives that sought to reallocate land belonging to Kenyatta University to various institutions without following due process as provided in the Land Act.<sup>137</sup> The Environment and Land Court agreed, emphasizing the importance of adhering to constitutional and statutory procedures in land allocation matters.

### 2.3.4 International Instruments

In *Karen Kandie*,<sup>138</sup> the Court of Appeal affirmed that Kenya transitioned from a dualist to a monist state through the enactment of the 2010 Constitution, meaning that once a treaty or convention is ratified, it becomes part of the country's legal framework without requiring a separate domesticating statute.<sup>139</sup> The enactment of the LAA, which establishes the NLAS,<sup>140</sup> reflects the State's commitment to fulfilling its constitutional duty to ensure access to justice, as well as its regional and international obligations.<sup>141</sup>

Kenya has ratified both the UDHR and the ICCPR. The UDHR affirms that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'<sup>142</sup> Additionally,

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<sup>133</sup> Section 4, *Law Society of Kenya Act* (Cap 18).

<sup>134</sup> < <https://lsk.or.ke/public-resources/legal-awareness-week/>> on 4<sup>th</sup> December 2024.

<sup>135</sup> *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 Others* (2020) eKLR.

<sup>136</sup> *Law Society of Kenya v Kinyua, The Head of Public Service & 5 others* (2022) eKLR.

<sup>137</sup> Section 12, *Land Act* (Cap 280).

<sup>138</sup> *Karen Kandie v Alassane Ba & Another* (2017) eKLR.

<sup>139</sup> Article 2(5,6), *Constitution of Kenya* (2010)

<sup>140</sup> Section 5, *Legal Aid Act* (Cap 16A).

<sup>141</sup> Article 48, *Constitution of Kenya* (2010).

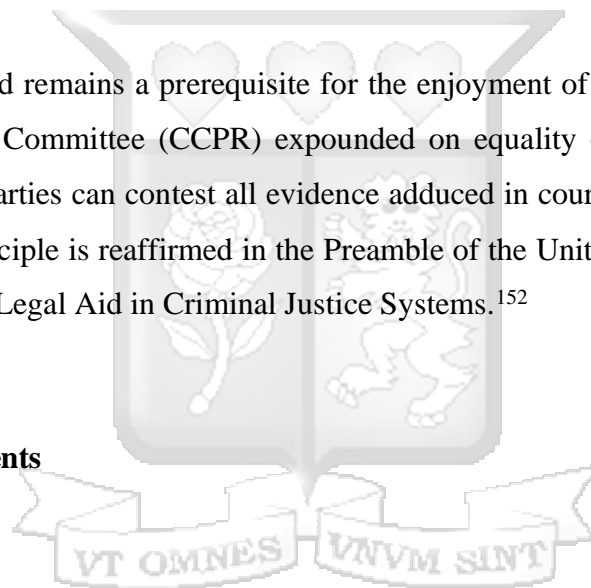
<sup>142</sup> Article 10, *Universal Declaration of Human Rights*, 10<sup>th</sup> December 1948, A/RES/217(III)[A].

it protects the presumption of innocence of the accused, until proven guilty.<sup>143</sup> Given that the UDHR has attained the status of Customary International Law, it is binding on all States, including Kenya, regardless of ratification.<sup>144</sup>

The ICCPR,<sup>145</sup> underscores the inherent dignity of every individual and affirms the right of accused persons to legal representation when they lack the means to secure it.<sup>146</sup> This provision is categorized as one of the minimum guarantees to which every accused person is entitled.<sup>147</sup> As a State party to the ICCPR, Kenya is obligated to observe, respect and protect these rights.<sup>148</sup> Further, the ICCPR safeguards the right of accused individuals to a fair and public hearing before a competent, impartial and independent tribunal established by the law.<sup>149</sup>

The provision of legal aid remains a prerequisite for the enjoyment of the right to a fair trial.<sup>150</sup> The UN Human Rights Committee (CCPR) expounded on equality of arms,<sup>151</sup> as procedural fairness, whereby both parties can contest all evidence adduced in court and arguments given by the other party. This principle is reaffirmed in the Preamble of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.<sup>152</sup>

### 2.3.5 Regional Instruments



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<sup>143</sup> Article 11, *Universal Declaration of Human Rights*.

<sup>144</sup> Esterling S, 'Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples', *28 International Journal on Minority and Group Rights* 2, 2021, 283-295.

<sup>145</sup> UNGA, *International Covenant for Civil and Political Rights*, UN A/Res/ 2200A (XXI). Article 14.

<sup>146</sup> Marasinghe C, 'The Right to Legal Assistance in International Law, with Special Reference to the ICCPR, The ECHR and the ACHR', *5 Asian Yearbook of International Law* 1, 1995, 16.

<sup>147</sup> UNGA, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. See *Principle 1*.

<sup>148</sup> Article 2(5), *Constitution of Kenya* (2010).

<sup>149</sup> UNGA, *International Covenant for Civil and Political Rights*. Article 14(1).

<sup>150</sup> Weissbrodt D, Hallendorf M, 'Travaux Préparatoires of the Fair Trial Provisions Article 8 to 11- Of the Universal Declaration of Human Rights' *21 Human Rights Quarterly* 4, 1999, 1070.

<sup>151</sup> CCCPR *General Comment no 32, Article 14, Right to equality before courts and tribunals to fair trial*, 23, August 2007, 3.

<sup>152</sup> UNGA, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN A/Res/67/187 (28<sup>th</sup> March 2013).

In its preamble and purposes, the African Charter on Human and Peoples Rights (ACHPR) reaffirms the principles of the UN Charter and the UDHR.<sup>153</sup> It affirms that every individual shall be equal before the law.<sup>154</sup> In article 7, the ACHPR protects the right of an appeal, the presumption of innocence and the right of an individual to be defended by a counsel of his choice.<sup>155</sup> The African Court on Human and Peoples Rights has also been established to deliver binding judgements on compliance with the African Charter.<sup>156</sup>

For instance, in the *Alex Thomas*, the Court emphasized the importance of legal representation as a component of the right to a fair trial under article 7 of the ACHPR.<sup>157</sup> The court held that the failure to provide legal aid to an indigent accused person, particularly in serious criminal cases, constitutes a violation of their right to a fair trial. This decision underscores the obligation of states to ensure that legal is available to those who cannot afford legal representation, particularly in cases where the deprivation of liberty is at stake.

Additionally, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles and Guidelines),<sup>158</sup> have been formalized to streamline compliance with the ACHPR.<sup>159</sup> It calls on States to guarantee access to lawyers in both civil criminal cases, without discrimination based on race, gender, language, religion or any other status.<sup>160</sup> The Principles and Guidelines also protect the right to legal assistance for both civil and criminal cases where the interest of justice so requires without payment where the party does not have sufficient means to pay for it.<sup>161</sup>

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<sup>153</sup> Umozurike U. 'The African Charter on Human and Peoples' Rights' 77 *The American Journal of International Law* 4, 1983, 902.

<sup>154</sup> Article 3, *African Charter on Human and Peoples' Rights*, 27<sup>th</sup> June 1981, 1520, UNTS 217.

<sup>155</sup> Article 7, *African Charter on Human and Peoples' Rights*.

<sup>156</sup> Article 3, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights*, 10<sup>th</sup> June 1988, OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>157</sup> *Alex Thomas v United Republic of Tanzania*, ACHPR Judgement of 4 July 2019.

<sup>158</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003.

<sup>159</sup> Article 45(c), *African Charter on Human and Peoples' Rights*.

<sup>160</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, 7. See Principle G.

<sup>161</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, 7. See Principle H.

According to the Principles and Guidelines, the interests of justice should be determined in civil matters by considering the complexity of the case and the ability of the party to adequately represent themselves, the rights that are affected and the likely impact of the outcome of the case on the wider community.<sup>162</sup> For criminal matters, the interests of justice entails examining, the seriousness of the offence and the severity of the offence.<sup>163</sup>

Moreover, the Lilongwe Declaration notes that the primary responsibility of providing legal aid rests with the States.<sup>164</sup> It further emphasizes that a comprehensive legal aid program should offer legal assistance throughout all stages of the criminal process, including investigation, arrest, pre-trial detention, bail hearings, trials, appeals and other proceedings brought to ensure that human rights are protected.<sup>165</sup>

The Lilongwe Plan of Action for Accessing Legal in the Criminal Justice in Africa calls on national governments to create an independent legal aid institution separate from public justice institutions. It also recommends establishing a Legal Aid Fund to manage public defender programs, support university law clinics and fund networks of NGOs and other entities to deliver legal aid services, particularly in rural areas.<sup>166</sup>

## 2.4 Conclusion

In conclusion, this chapter has examined the legal, policy and institutional frameworks that govern access to justice through legal aid programs in Kenya. It has highlighted the constitutional and

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<sup>162</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, 7. See Principle G.

<sup>163</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, 7. See Principle G.

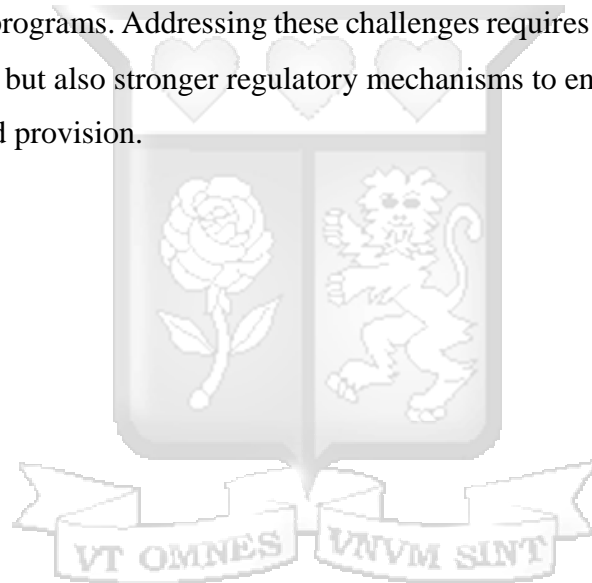
<sup>164</sup> Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers and Other Service Providers, Lilongwe, 22-24 November 2004, 3. See Declaration 1

<sup>165</sup> Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers and Other Service Providers, Lilongwe, 22-24 November 2004, 3. See Declaration 3.

<sup>166</sup> Lilongwe Plan of Action for Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers and Other Service Providers, Lilongwe, 22-24 November 2024, 6.

statutory foundations of legal aid, the role of the LAA in establishing the legal aid fund and the NLAS, and the subsidiary regulations that guide the accreditation and conduct of legal aid providers. Furthermore, the chapter has analyzed regional and international commitments that reinforce Kenya's obligations to ensure access to justice, particularly for indigent and vulnerable individuals.

Despite the existence of this frameworks, significant challenges remain in their implementation. Financial constraints, bureaucratic inefficiencies and gaps in enforcement continue to limit the effectiveness of legal aid services. While Kenya has made strides in expanding access to justice, operationalizing the legal aid fund remains a crucial step toward ensuring the sustainability and accessibility of legal aid programs. Addressing these challenges requires not only improve funding and institutional capacity but also stronger regulatory mechanisms to enhance coordination and accountability in legal aid provision.



# CHAPTER THREE: CAN THE OPERATIONALIZATION OF THE LEGAL AID FUND ADDRESS THE LEGAL CHALLENGES IN ACCESS TO JUSTICE THROUGH LEGAL AID PROGRAMS IN KENYA?

## 3.1 Introduction

Access to justice is a fundamental principle enshrined in the Constitution of Kenya. Despite being a fundamental principle enshrined in the Constitution, the complete attainment of the right to access justice has historically been hindered by various barriers, including economic challenges, geographical limitations and systemic issues.<sup>167</sup>

The establishment of the Legal Aid Fund under the LAA 2016,<sup>168</sup> was a significant step toward ensuring equitable access to justice for all Kenyans.<sup>169</sup> This chapter evaluates whether the Legal Aid Fund's operationalization can effectively address the legal barriers associated with accessing justice, considering both its potential strengths and challenges it faces.

## 3.2 Barriers to Accessing Justice in Kenya

Kenya's justice system is plagued by multiple challenges that hinder access, particularly for vulnerable and marginalized groups.<sup>170</sup>

### 3.2.1. Economic Constraints

A 2024 report by the Kenya National Bureau of Statistics highlights that over 33% of the population struggles with poverty.<sup>171</sup> Economic constraints remain a critical challenge, as many

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<sup>167</sup> Meene I, Rooij B, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation*, Leiden University Press, Leiden, 10-11.

<sup>168</sup> Section 29, *Legal Aid Act* (Act no 6 of 2016).

<sup>169</sup> Kaguru M, 'Right to Legal Representation in Criminal Proceedings in Kenya: A case for with Prejudice Appeals in the Court of Appeal' Social Science Research Network, 2007, 16.

<sup>170</sup> Kameri-Mbote P & Aketch M, Kenya: 'Access to Justice' in Nowrojee B (ed), 1<sup>st</sup> ed, *Kenya: Justice Sector and The Rule of Law*, Open Society Initiative for Eastern Africa, 2011, 156.

<sup>171</sup> Kenya National Bureau of Statistics, *The Kenya Poverty Report*, 2024, 45.

lack the means to afford legal representation in accordance with the remuneration order and,<sup>172</sup> court fees.<sup>173</sup>

### 3.2.2 Exclusion of Certain Groups

Additionally, the limited access to legal aid for non-Kenyan citizens further compounds these challenges, as eligibility is generally restricted to Kenyan nationals. However, the Act provides exceptions for certain vulnerable groups such as refugees and stateless persons, ensuring they are not left without recourse to justice.<sup>174</sup> The exclusion of other foreign nationals raises concerns about equality before the law, a right guaranteed by the Constitution, which affirms that all individuals are entitled to fully and equally enjoy their rights and fundamental freedoms.<sup>175</sup>

### 3.2.3 Geographical Remoteness.

Geographical remoteness worsens the issue, as legal resources such as courts and legal professionals tend to be centralized in urban centers, resulting in limited access for rural and remote communities.<sup>176</sup> Counties such as Turkana, Mandera, and Wajir remain underserved in terms of courts equipped to handle distinct types of cases such as tribunals, despite ongoing efforts to expand judicial services.<sup>177</sup>

### 3.2.4 Corruption

Furthermore, corruption within the police and the judiciary poses a major barrier to achieving justice for the marginalized. The National Police Service as the initial contact point for most criminal cases within the justice system.<sup>178</sup> Their responsibilities include arresting suspects, conducting investigations and initiating charges.<sup>179</sup> A study conducted on the public's perceptions

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<sup>172</sup> Section 4, *Advocates (Remuneration) (Amendment) Order* (Legal Notice 221 of 2023).

<sup>173</sup> Schedule to Part IX, *The High Court (Practice and Procedure) Rules* (Legal Notice 221 of 2023).

<sup>174</sup> Section 36, *Legal Aid Act* (Act no 6 of 2016).

<sup>175</sup> Article 27 (2), *Constitution of Kenya* (2010).

<sup>176</sup> Bingham Centre for the Rule of Law, *International Access to Justice: Barriers and Solutions*, 2014, 21.

<sup>177</sup> The Judiciary, *State of the Judiciary and the Administration of Justice*, 2024, 154.

<sup>178</sup> *Republic v Chibungu Sanga* (2023) eKLR.

<sup>179</sup> Section 24, *National Police Service Act* (Cap 84).

and experiences on the accessibility of criminal justice revealed that 6 out of 10 respondents were not satisfied with the performance of the police service due to corruption.<sup>180</sup> It is no secret that the justiciability of a matter is likely to fail if the National Police fail to conduct proper investigations or bring witnesses to corroborate the facts.<sup>181</sup> The Anti-Bribery Act, criminalizes corruption and provides penalties for individuals involved in such activities.<sup>182</sup> However, enforcement remains weak.

The case of *Victoria Mutuku* highlights the challenges of holding police officers accountable, particularly the overreliance on internal oversight mechanisms, which are often slow and ineffective.<sup>183</sup> The court emphasized the principle of presumption of innocence and the doctrine of exhaustion, requiring complaints to first seek redress through bodies such as the Independent Policing Oversight Authority before turning to the courts.<sup>184</sup> This procedural rigidity can delay justice and shield officers from immediate disciplinary action. Similarly, corruption in the judiciary has a negative implication on the public's perception of the justice system by enabling the wealthy to secure favorable outcomes. This undermines the constitutional guarantee of equal treatment before the law.<sup>185</sup>

### **3.2.5 Lack of Rights Awareness.**

Access to justice relies heavily on individuals being aware of their rights.<sup>186</sup> A clear understanding of protected rights enables individuals to navigate appropriate avenues for protection and resolution.<sup>187</sup> However, a lack of rights awareness is widely regarded as a significant impediment to justice, particularly for marginalized and undereducated populations. Many remain unaware of the constitutional and legislative rights afforded to them, perpetuating perceptions of justice

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<sup>180</sup> National Crime Research Centre, *Public Perceptions and Experiences on the Access to Criminal Justice in Kenya*, 2022, 16-18.

<sup>181</sup> *Edward Kaguathi Watuku v Republic* (2020) eKLR.

<sup>182</sup> Part 2, *Anti-Bribery Act* (Cap 79B).

<sup>183</sup> *Commission for Human Rights & Justice v Victoria Mutuku, Chief Inspector of Police & 5 others* (2021) eKLR.

<sup>184</sup> *Commission for Human Rights & Justice v Victoria Mutuku, Chief Inspector of Police & 5 others* (2021) eKLR.

<sup>185</sup> Article 27 (1), *Constitution of Kenya* (2010).

<sup>186</sup> Kameri-Mbote P & Aketch M, Kenya: 'Access to Justice' 156.

<sup>187</sup> Mukherjee B, 'Awareness of Legal Rights Among Married Women and their Status' *5 Indian Anthropologist* 2, 1975, 30.

institutions as inaccessible, bureaucratic and intimidating.<sup>188</sup> Insufficient public education initiatives exacerbate this issue, leaving a critical gap in the effective realization of justice.

### **3.2.6 Over-Reliance on Litigation and Judicial Delays**

The over-reliance on litigation as the primary dispute resolution mechanism has significantly hindered access to justice by contributing to a persistent case backlog in the judiciary. The Judiciary's annual reports consistently highlight the slow pace of case resolution with some cases taking years if not decades to conclude.<sup>189</sup> This delay stems from multiple factors, including limited judicial resources and the rigidity of procedural rules in both criminal and civil matters.<sup>190</sup> While these rules are designed to maintain legal order, their stringent application often leads to unnecessary adjournments.

### **3.3 Can the Operationalization of the Legal Aid Fund Address the Legal Challenges in Access to Justice Through Legal Aid Programs in Kenya?**

The operationalization of the legal aid fund presents an opportunity to address key legal challenges that hinder access to justice in Kenya. In addition to its ability to eradicate most barriers to justice through the endless, its operationalization has broader implications for Kenya's social political and economic landscape. For instance, the operationalization of the Legal Aid Fund contributes to the realization of Kenya's obligations under international instruments such as the ICCPR and,<sup>191</sup> the African Charter on Human and People's rights.<sup>192</sup>

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<sup>188</sup> Helbling J, Kalin W, Nobirabo P, 'Access to Justice, Impunity and Legal Pluralism in Kenya' 47 *The Journal of Legal Pluralism and Unofficial Law* 2, 2015, 347.

<sup>189</sup> The Judiciary, *State of the Judiciary and the Administration of Justice*, 2024, 33-40.

<sup>190</sup> *The Equitable Party & 2 others v Independent Electoral and Boundaries Commission* (2022) eKLR.

<sup>191</sup> UNGA, *International Covenant for Civil and Political Rights*. Article 14(1).

<sup>192</sup> Article 7, *African Charter on Human and Peoples' Rights*.

This section examines how the fund can mitigate economic constraints, exclusion of endurable groups, geographical remoteness, corruption, lack of rights awareness and over-reliance of litigation.

### 3.3.1 Economic Constraints

As previously highlighted, the cost of legal representation remains a primary barrier to accessing justice.<sup>193</sup> Many individuals cannot afford legal fees prescribed under the Advocates Remuneration Order or,<sup>194</sup> meet prescribed court fees.<sup>195</sup> Once implemented, the Legal Aid Fund would offer financial assistance to disadvantaged litigants, addressing legal fees and related costs to prevent financial constraints from hindering fair access to the justice system.<sup>196</sup> Additionally, extending support to accredited legal aid service providers would enhance institutional capacity and expand service delivery to marginalized communities.<sup>197</sup>

However, the Fund's effectiveness may be hindered by inadequate financing and bureaucratic inefficiencies in fund disbursement. The Legal Aid Fund relies heavily on allocations from the parliament from the consolidated fund, which are often constrained by competing national interests.<sup>198</sup> Donations and grants although helpful are not always consistent which raises concerns about the Legal Aid Funds long-term viability.<sup>199</sup> To mitigate these risks, the government must ensure sustainable funding through dedicated budgetary allocations, donor contributions and private sector partnerships.<sup>200</sup>

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<sup>193</sup> *Jefta Mokaya v Republic (2024) eKLR*.

<sup>194</sup> Section 4, *Advocates (Remuneration) (Amendment) Order* (Legal Notice 35 of 2014).

<sup>195</sup> Part IX, *The High Court (Practice and Procedure) Rules* (Gazette Notice 1356 of 1952).

<sup>196</sup> Section 29 (2) (c), *Legal Aid Act* (Act no 6 of 2016).

<sup>197</sup> Part II, *Legal Aid (General) Regulations* (Legal Notice 86 of 2022).

<sup>198</sup> Section 29 (2)(a), *Legal Aid Act* (Act no 6 of 2016).

<sup>199</sup> < <https://www.fundsforngos.org/all-questions-answered/20-what-are-some-potential-downsides-or-limitations-of-relying-on-ngo-grant-funding/> > on 16<sup>th</sup> January 2020.

<sup>200</sup> Article 206, *Constitution of Kenya* (2010).

### 3.3.2 Exclusion of Certain Groups.

The LAA primarily extends assistance to Kenyan citizens but makes exceptions for refugees, stateless persons, victims of human trafficking, and internally displaced persons.<sup>201</sup> However, non-Kenyan foreign nationals are generally excluded, raising concerns about equal protection under the law.<sup>202</sup> Operationalizing the Legal Aid Fund could facilitate the review of eligibility criteria to extend aid to other vulnerable groups where exclusion would lead to injustice. The fund could also support pro bono legal service initiatives to bridge this gap.

A challenge in implementing this expansion is the strain it may place on available resources. To address this, the government could establish clear eligibility guidelines and prioritize cases with significant socio-legal implications.

### 3.3.3 Geographical Remoteness.

Legal aid services are predominantly available in urban centers, resulting in limited access to legal representation for rural communities. The operationalization of the legal aid would enable the establishment of legal aid centers in remote regions, reducing geographical disparities in access to justice.<sup>203</sup> The Fund could also support mobile legal aid units to reach underserved communities.<sup>204</sup>

Nevertheless, logistical constraints, including inadequate infrastructure and personnel shortages, may hinder the success of these initiatives. A viable solution is to integrate technology-driven legal aid services, such as virtual legal consultations and digital legal awareness campaigns, to supplement physical outreach efforts.<sup>205</sup>

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<sup>201</sup> Section 36, Legal Aid Act (Act no 6 of 2016).

<sup>202</sup> Article 27, *Constitution of Kenya* (2010).

<sup>203</sup> Section 63, *Legal Aid Act* (Act no 6 of 2016).

<sup>204</sup> Section 30(c), *Legal Aid Act* (Act no 6 of 2016).

<sup>205</sup> Serah Y, Jha G, 'Raising Public Legal Awareness in the Digital Age: Global Practices and Indonesia's Path Forward' 6 *Journal of Law and Legal Reform* 1, 2025, 213-218.

### 3.3.4 Corruption and Systemic Inefficiencies

Corruption within police and judiciary significantly obstructs access to justice. Bribery often determines case progression and systemic inefficiencies delay proceedings. The *Victoria Mutuku* case illustrates the difficulty of holding police officers accountable due to bureaucratic concerns to bureaucratic barriers and reliance on internal oversight mechanisms, which slow down disciplinary processes.<sup>206</sup> Operationalizing the Legal Aid Fund could strengthen legal aid providers' capacity to pursue strategic litigation against corruption, advocate for police accountability and provide representation in cases involving victims of police misconduct.<sup>207</sup>

However, combating corruption within the legal aid system itself is crucial. Robust oversight mechanisms, transparent allocation of funds, and regular audits of NLAS are necessary to prevent mismanagement and ensure resources are used effectively.<sup>208</sup>

### 3.3.5 Lack of Rights Awareness

Limited legal knowledge prevents many individuals from asserting their rights effectively. The mandate of the NLAS includes promoting legal literacy and raising public awareness through strategies such as mass media campaigns, outreach programs and public meetings.<sup>209</sup> By operationalizing the Legal Aid Fund, the NLAS would be better equipped to fulfill this mandate, addressing a critical gap in access to justice by empowering individuals with the necessary knowledge and resources necessary to navigate the justice system effectively.<sup>210</sup>

A potential challenge in implementing legal awareness programs is public apathy and resistance to legal education. To enhance engagement, NLAS could collaborate with local religious

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<sup>206</sup> *Commission for Human Rights & Justice v Victoria Mutuku, Chief Inspector of Police & 5 others* (2021) eKLR.

<sup>207</sup> Section 7(1) (e), *Legal Aid Act* (Act no 6 of 2016).

<sup>208</sup> Article 226, *Constitution of Kenya* (2010).

<sup>209</sup> Section 7(1) (k), *Legal Aid Act* (Act no 6 of 2016).

<sup>210</sup> Ngugi C, 'The Case for Legal Awareness and Legal Aid in Kenya' 7 *Wajibu: A Journal of Social & Religious Concern* 2, 1992, 10-11.



organizations and civil society organizations to deliver targeted and culturally sensitive legal education.<sup>211</sup>

### 3.3.6 Over-Reliance on Litigation and Judicial Delays

Kenya's dependence on litigation has led to a backlog of cases, delaying justice for many. The LAA provides for alternative dispute resolution mechanisms (ADR) to ease court congestion and facilitate faster dispute resolution. The Funds operationalization would allow NLAS to expand ADR programs, providing resources for mediation and arbitration services, particularly in civil disputes.<sup>212</sup> This aligns with the Constitution and the need to expedite the delivery to justice.<sup>213</sup> ADR encompasses all decision-making processes outside of formal litigation, including litigation, mediation, conciliation and arbitration.<sup>214</sup>

A key challenge in Promoting ADR is the lack of awareness and trust in these mechanisms. To overcome this, public legal education should emphasize the benefits of ADR and legal aid providers should be trained in dispute resolution.

### 3.4 Conclusion

The Operationalization of the Legal Aid Fund is a crucial step forward to overcoming the legal challenges that limit access to justice in Kenya. By offering financial assistance, raising legal awareness and extending services to marginalized communities, the Fund has the potential to ease

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<sup>211</sup> Dennis Ondieki, 'Advancing Equal Access to Justice in Kenya-Bridging the Gap for Marginalized Communities' Medium, 18<sup>th</sup> October 2023 – < <https://ondieki.medium.com/advancing-equal-access-to-justice-in-kenya-bridging-the-gap-for-marginalized-communities-69055c0f9667> > on 16<sup>th</sup> March 2025.

<sup>212</sup> Section 7(1) (j), *Legal Aid Act* (Act no 6 of 2016).

<sup>213</sup> Article 159 (2)c), *Constitution of Kenya (2010)*.

<sup>214</sup> Muigua K, Francis K 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' 1 *Strathmore Law Journal* 1, 2015, 6.

economic and geographic obstacles to accessing justice. However, its impact will largely depend on proper implementation, sustainable funding and strong collaboration among key players.

Tackling inefficiencies within the system and ensuring effective oversight will be essential in fulfilling the Funds' goal of making justice accessible to all Kenyans. If it is managed well, the Legal Aid Fund could play a transformative role in closing the justice gap and safeguarding the constitutional right to legal assistance.



## CHAPTER FOUR: ACCESS TO JUSTICE THROUGH LEGAL AID PROGRAMS IN SOUTH AFRICA

### 4.1 Introduction

South Africa's legal aid system has undergone significant transformation, evolving from a fragmented and underfunded model during the apartheid era to a robust State funded system post 1996. This chapter examines the historical development, legislative framework, and operational mechanisms of South Africa's legal aid system, with a focus on the Legal Aid South Africa Act of 2014. By analyzing the country's transition from a *judicare* model to a public defender system, this chapter highlights the tangible benefits of a well-funded and efficiently managed legal aid scheme.

### 4.2 Historical Evolution of Legal Aid in South Africa

The delivery of legal aid in SA has evolved significantly, from early attempts at institutionalization to its present form as a constitutional right.<sup>215</sup> The first formal effort to establish legal aid services began in 1935 when the South African Institute of Race Relations, working alongside the department of justice and the incorporated law society of the Transvaal, organized a conference to discuss the matter.<sup>216</sup> This led to the creation of a Legal Aid Bureau (Bureau) in Johannesburg in 1937, which primarily provided free legal advice and assistance.<sup>217</sup>

The Bureau aimed to furnish professional representation in criminal cases for accused persons unable to afford legal counsel.<sup>218</sup> In civil matters, its services were more limited, offering only basic legal advice to impoverished individuals.<sup>219</sup> To support its work, panels of barristers and solicitors were formed, with those providing legal assistance receiving reduced funds.<sup>220</sup> The Bureau's funding came from grants provided by the institutes and donations from private

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<sup>215</sup> Section 35(3)(g), *Constitution of South Africa* (1996).

<sup>216</sup> Hassard-Short A, 'Legal Aid for the Poor', 23 *Journal of Comparative Legislation and International Law* 1, 1941, 34.

<sup>217</sup> Hayman J, 'Legal Aid for the Poor in South Africa', 26 *Journal of Comparative Legislation and International Law* 4, 1944, 12.

<sup>218</sup> Hayman J, 'Legal Aid for the Poor in South Africa', 12.

<sup>219</sup> Hayman J, 'Legal Aid for the Poor in South Africa', 12.

<sup>220</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 55.

individuals, ensuring that access to justice was extended to the most vulnerable members of society.<sup>221</sup>

However, despite the establishment of additional bureaus, by 1960, only four bureaus remained operational due to government resistance, particularly under the apartheid regime.<sup>222</sup> The State maintained that legal representation was unnecessary, as the justice system purportedly ensured fairness on its own.<sup>223</sup>

Despite this, NGOs such as the International Defense and Aid Fund,<sup>224</sup> remained instrumental in delivering legal aid, particularly in cases related to persecution under Apartheid laws.<sup>225</sup> This was before it was banned, sparking an international outcry, which pressured the apartheid government to promise funding for legal defense in political trials – only when a chief magistrate had approved an application.<sup>226</sup> This was formalized through the establishment of the Legal Aid Board, under the provisions of the Legal Aid Act of 1969.<sup>227</sup>

The Legal Aid Board started operating in 1971 with an initial budget of Fifty Thousand South African Rands.<sup>228</sup> Despite this transition, the Legal Aid Board remained largely ineffective in ensuring access to justice in its early years, focusing primarily on civil matters like divorces and personal injury over criminal matters.<sup>229</sup> The Legal Aid Board offered legal services through a *Judicare* model, which entailed delivering legal aid by instructing attorneys in private practice to represent indigent people.<sup>230</sup>

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<sup>221</sup> Hassard-Short A, 'Legal Aid for the Poor', 34.

<sup>222</sup> Iya P, 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges' 51 *Journal of Legal Education* 3, 2001, 357.

<sup>223</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 55.

<sup>224</sup> Lenta M, 'History effaced: The International Defence and Aid Letters' 34 *Social Dynamics* 2, 2008, 1.

<sup>225</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 56.

<sup>226</sup> Dugard J, 'Human Rights and the South African Legal Order' 1<sup>st</sup> ed, Princeton University Press, Princeton, 2015, 246.

<sup>227</sup> Section 2, *Legal Aid Act* (South Africa).

<sup>228</sup> Klaaren J, 'Legal Aid SA as a Successful Post-Apartheid Institution Supporting the Rule of Law' Research Gate, 12 September 2020 –

< [https://www.researchgate.net/publication/344215236\\_Legal\\_Aid\\_SA\\_as\\_a\\_Successful\\_Post-Apartheid\\_Institution\\_Supporting\\_the\\_Rule\\_of\\_Law](https://www.researchgate.net/publication/344215236_Legal_Aid_SA_as_a_Successful_Post-Apartheid_Institution_Supporting_the_Rule_of_Law) > on the 4<sup>th</sup> of February 2025.

<sup>229</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 56.

<sup>230</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 56.

### 4.3 Implications of the 1996 Constitution on Legal Aid: A New Era?

The election of a legitimate government in South Africa and the adoption of a Constitution guaranteeing the right to legal representation in criminal cases marked the start of a new era,<sup>231</sup> characterized by a stronger assertion of the rights of accused persons.<sup>232</sup> The Constitution explicitly guarantees every accused persons right to choose and be represented by a legal practitioner, and, if substantial injustice would otherwise occur, have a legal practitioner provided at the States expense. However, the constitution does not provide a direct guarantee for legal aid in civil matters, leaving such assistance subject to judicial discretion based on the circumstances of each case.<sup>233</sup>

Legal Aid in post-1996 South Africa could be accessed through two primary avenues: A court order mandating State-Funded legal representation or,<sup>234</sup> an application to the Legal Aid Board.<sup>235</sup> A court may order legal representation at the State expense if it determines that the accused meets the necessary criteria, such as financial inability, the likelihood of a substantial prison sentence, and the need for legal counsel to ensure a fair trial.<sup>236</sup> In such cases, a legal aid officer had no discretion and must comply with the courts order. Alternatively, an accused person could apply for legal aid directly from the Legal Aid Board.<sup>237</sup> If the application met the Board's criteria, legal aid was granted. If denied, the court would then step in and refer the matter to the Board for further evaluation.<sup>238</sup> To manage administrative burdens, courts typically allowed accused persons reasonable time to apply for legal aid before considering a referral.<sup>239</sup>

It is essential to clarify that the Legal Aid Board was not established the 1996 Constitution but rather by legislation, specifically the LAA of 1969. The Boards role evolved significantly

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<sup>231</sup> Section 35(3) (g), *Constitution of South Africa* (1996).

<sup>232</sup> Vawda Y, 'Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor', 26 *Obiter* 2, 2005, 236.

<sup>233</sup> *Legal Aid South Africa v Magidiwana and Others* (2015), Constitutional Court of South Africa.

<sup>234</sup> Section 3B (1) (a), *Legal Aid Amendment Act 20 of 1996* (South Africa).

<sup>235</sup> As H, 'Taking Legal Aid to the People: Unleashing Local Potential in South Africa', 26 *Obiter* 2, 2005, 193.

<sup>236</sup> *Lucky Makhandela v The State* (2005), The High Court of South Africa.

<sup>237</sup> Section 3B (1) (a), *Legal Aid Amendment Act 20 of 1996* (South Africa).

<sup>238</sup> Section 3B (2), *Legal Aid Amendment Act 20 of 1996* (South Africa).

<sup>239</sup> *The State v Luwani and Another* (2003), The High Court of South Africa.

following the constitutional reforms, leading to the expansion of its mandate and operational structure to align with the constitutional commitment to equitable access to justice.

It is widely acknowledged that the rise of democratic governance and the dedication to ensuring equitable access to justice significantly increased the demand for legal aid – a demand that the judicare system could not cope with.<sup>240</sup> This was in addition to delayed payments to private practitioners and widespread fraudulent claims.<sup>241</sup> These financial problems adversely affected both lawyers, many of whom depended on the system for their income, and defendants, whose legal representatives withdrew from ongoing cases and declined to take on new ones.<sup>242</sup> Acknowledging these challenges, the Legal Aid Board organized a National Legal Aid Forum in 1998 which proposed shifting from the judicare model to a public defender model.<sup>243</sup>

The establishment of Justice Centers marked a significant shift in legal aid delivery, replacing the traditional reliance on private attorneys with the public defender system that employed salaried legal practitioners.<sup>244</sup> By 2003, there were several operational justice centers, ensuring a more direct and efficient service delivery of legal aid. These centers employed full time attorneys, candidate attorneys and support staff focusing primarily on criminal cases which constituted most of the matters.<sup>245</sup>

Beyond Justice Centers, the Legal Aid Board partnered with NGOs, university law clinics and, legal aid organizations to expand access.<sup>246</sup> By 2003, most agreements were with universities and human right groups, balancing cost control with the need to ensure broader legal coverage.<sup>247</sup> The Board also pursued impact litigations to address systemic injustices and launched a national legal

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<sup>240</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 59.

<sup>241</sup> Ogletree C, 'The Challenge of Providing Legal Representation in the United States, South Africa and China' 7 *Washington Journal of Law and Policy* 1, 2001, 52.

<sup>242</sup> Ogletree C, 'The Challenge of Providing Legal Representation in the United States, South Africa and China' 53.

<sup>243</sup> McQuoid-Mason D, 'Lessons From South Africa For the Delivery of Legal Aid in Small and Developing Commonwealth Countries', 26 *Obiter* 2, 2005, 215.

<sup>244</sup> Vawda Y, 'Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor', 236.

<sup>245</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 59-60

<sup>246</sup> As H, 'Taking Legal Aid to the People: Unleashing Local Potential in South Africa', 195.

<sup>247</sup> Mubangizi J, Mc-Quoid-Mason D, 'The role of Universities Law Clinics in Public Interest Litigation, With Specific reference to South Africa' 38 *Journal of Juridical Science* 1, 2013, 56.

internship program,<sup>248</sup> both strengthening service delivery and providing practical training for young lawyers.<sup>249</sup> The fees payable to legal aid service providers were standardized and regularly updated through circulars.<sup>250</sup> By establishing fixed rates, the Legal Aid Board ensured effective budget management while also providing clarity to service providers regarding the remuneration for various legal services, thereby preventing disputes over fees.

#### **4.4 Legislative and Institutional Framework: The Legal Aid South Africa Act of 2014**

The LASAA was enacted to replace the outdated act of 1969, aligning SA's legal aid framework with its post-1996 constitutional framework.<sup>251</sup> It sought to establish and clarify Legal Aid SA's role as a national public entity and improve administrative and funding efficiency.<sup>252</sup>

The Act sought to articulate that legal aid services were not only provided by the State but also extended through cooperation agreements with other legal aid service providers, such as private attorneys, NGOs, and university law clinics.<sup>253</sup> Another key aspect of the 2014 Act was the reintroduction of the *judicare* approach under certain circumstances, recognizing the need to supplement the services provided by salaried legal aid practitioners.<sup>254</sup> To regulate the disbursements of funds, both judicial practitioners and those entering cooperation agreements must be registered in a government's central supplier database.<sup>255</sup> The requirement for registration ensures that only vetted suppliers can bid for contracts therefore reducing fraud, corruption and favoritism.<sup>256</sup>

A significant reform introduced by LASAA is the co-payment mechanism, which requires individuals earning above a certain threshold to contribute to their legal fees while still qualifying

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<sup>248</sup> Ogletree C, 'The Challenge of Providing Legal Representation in the United States, South Africa and China' 70-73.

<sup>249</sup> As H, 'Taking Legal Aid to the People: Unleashing Local Potential in South Africa', 200.

<sup>250</sup> Legal Aid Board, *Circular no:3, 2002*.

<sup>251</sup> Section 35(3) (g), *Constitution of South Africa* (1996).

<sup>252</sup> Chapter 2, *Legal Aid South Africa Act* (South Africa).

<sup>253</sup> Section 4, *Legal Aid South Africa Act* (South Africa).

<sup>254</sup> Section 4(a) (iii), *Legal Aid South Africa Act* (South Africa).

<sup>255</sup> Legal Aid South Africa, *Legal Aid Manual, 2023*. See page 37, 38, 51,55.

<sup>256</sup> Nkwanyana N, 'Bettering Procurement by Central Supplier Database in the Public Sector: A Panacea or A Fallacy?' *12 Africa's Public Service Delivery and Performance Review* 1, 2024, 4.

for legal aid.<sup>257</sup> Eligibility is determined through a means test,<sup>258</sup> where applicants disclose their income, assets and liabilities; if their financial situation exceeds the set threshold, they may be required to make a partial contribution.<sup>259</sup> This system ensures that limited legal aid funds are allocated to those most in need while reducing the financial burden on public resources and promoting broader access to justice.<sup>260</sup>

Legal Aid SA is regulated under the Public Finance Management Act,<sup>261</sup> which sets out principles of financial accountability, transparency and expenditure control.<sup>262</sup> As a Schedule 3 public entity, Legal Aid SA is subject to strict financial management and reporting requirements to ensure responsible use of public funds.<sup>263</sup>

The PFMA governs the allocation and utilization of funds by Legal Aid SA, requiring that the entity's budget and corporate plan be presented annually to the executive and legislature for approval.<sup>264</sup> Legal aid service providers such as those operating under cooperation agreements and judicare are also subject to stringent financial reporting mechanisms to claim payments monthly for the services offered to eligible clients.<sup>265</sup>

#### **4.5 Socio-Economic and Legal Impacts of South Africa's Legal Aid System**

The implementation of the LASAA significantly enhanced access to justice through State allocated funds. According to the 2023 Annual Report, Legal Aid SA finalized 355,384 matters, a significant increase from the previous years.<sup>266</sup> One key measure of success has been its financial sustainability and accountability. Legal Aid SA has maintained an unqualified audit opinion since

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<sup>257</sup> Legal Aid South Africa, *Legal Aid Manual*, 2023, Annexure A.

<sup>258</sup> Section 27, *Legal Aid South Africa Regulations* (South Africa).

<sup>259</sup> Section 31, *Legal Aid South Africa Regulations* (South Africa).

<sup>260</sup> Hacothen M, 'Striving to Square the Circle: Quality Legal Aid in Age of Shrinking Budgets' in Rekosh E (ed), 1<sup>st</sup> ed, *Making Legal Aid a Reality*, Public Law Institute, 2009, 57.

<sup>261</sup> Section 2 (1), *Legal Aid South Africa Act* (South Africa).

<sup>262</sup> Section 51, *Public Finance Management Act* (South Africa).

<sup>263</sup> Schedule 3, *Public Finance Management Act* (South Africa).

<sup>264</sup> Section 53, *Public Finance Management Act* (South Africa)

<sup>265</sup> Legal Aid South Africa, *Legal Aid Manual*, 2023, 46.

<sup>266</sup> Legal Aid South Africa, *Integrated Annual Report:2022-2023*, 5.

its inception, reflecting the effective management of government funds and the impact of good regulations.<sup>267</sup>

There are no universally defined standards regarding the proportion of a national budget that should be allocated to legal aid or the annual per capita expenditure on such services.<sup>268</sup> The structure and reach of a legal aid system largely depends on the financial resources provided by the State,<sup>269</sup> which are influenced by both economic capacity and political commitment to justice.<sup>270</sup> In SA, the Legal Aid Board initially received inadequate funding, reflecting the apartheid's governments minimal commitment to legal aid.<sup>271</sup> In the 1990s, as the country moved towards democracy, government funding for legal aid saw a substantial increase.

Furthermore, Legal Aid SA has also played a critical role in strategic interest litigation where it has been at the center of bringing significant legal changes. In the case against the *President of South Africa*, Legal Aid SA funded the legal challenge for recognition for Muslim marriages in SA.<sup>272</sup> The Court held that the failure to recognize Muslim marriages violated the Constitution.<sup>273</sup> Despite these improvements, challenges remain. The demand for legal aid continues to outstrip available funding, and some rural areas still struggle with access to legal representation.<sup>274</sup> Moreover, individuals receiving legal aid in civil cases still face the risk of adverse cost orders, which could leave them liable for the opposing parties legal costs if they lose. This potential financial burden can deter individuals from seeking legal redress, further limiting access to justice.

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<sup>267</sup> Legal Aid South Africa, *Integrated Annual Report:2022-2023*, 175-180.

<sup>268</sup> McQuoid-Mason D, 'Lessons From South Africa For the Delivery of Legal Aid in Small and Developing Commonwealth Countries', 216.

<sup>269</sup> Klaaren J, 'Legal Aid SA as a Successful Post-Apartheid Institution Supporting The Rule of Law' Research Gate, 12 September 2020 – < [https://www.researchgate.net/publication/344215236\\_Legal\\_Aid\\_SA\\_as\\_a\\_Successful\\_Post-Apartheid\\_Institution\\_Supporting\\_the\\_Rule\\_of\\_Law](https://www.researchgate.net/publication/344215236_Legal_Aid_SA_as_a_Successful_Post-Apartheid_Institution_Supporting_the_Rule_of_Law) > on the 4<sup>th</sup> of February 2025. 7.

<sup>270</sup> Santiso C, 'Understanding the Politics of the Budget: What Drives Change in the Budget Process?' IMF Public Finance Management Blog' 14<sup>TH</sup> January 2008 - < <https://blog-pfm.imf.org/en/pfmblog/2008/01/understanding-t> > on 6<sup>th</sup> of February 2025.

<sup>271</sup> As H, 'Legal Aid in South Africa: Making Justice Reality', 57.

<sup>272</sup> *Women's Legal Centre Trust v President of the Republic of South Africa & Others* (2022), Constitutional Court of South Africa.

<sup>273</sup> Section 15, *Constitution of South Africa* (South Africa).

<sup>274</sup> Mkhize S, 'Legal Aid Bodies and Access to Justice in South Africa' 21 *ESR Review: Economics and Social Rights in South Africa* 4, 2020, 17.

Nevertheless, the operationalization of the Legal Aid Fund has undeniably brought SA closer to reducing barriers to justice.

#### **4.6 Best Practices from South Africa for Kenya’s Legal Aid Fund Operationalization.**

SA’s legal aid framework offers valuable lessons for Kenya in operationalizing its Legal Aid Fund. Key best practices include sustainable funding, decentralized service delivery, financial accountability, and integration of alternative dispute resolution (ADR). Adopting these strategies would enhance Kenya’s legal aid system and improve access to justice for marginalized communities.

##### **4.6.1 Sustainable and Structured Funding Mechanisms**

A key strength of SA’s legal aid system lies in its dedicated funding under the LASAA, complemented by oversight from the PFMA. To enhance Kenya’s Legal Aid Fund, a similar approach is essential – securing predictable government funding and implementing regulatory safeguards to promote responsible financial management and efficient resource allocation.

Unlike other public services, there is no universal standard dictating how much funding a country should allocate legal aid. Instead, financial commitment largely hinges on political will and the governments prioritization of access to justice. SA’s model exemplifies this commitment, combining clear regulatory frameworks with robust financial oversight to ensure equal representation.

##### **4.6.2 Decentralized Legal Aid Service Delivery**

SA shifted from a judicare system to a public defender model, establishing Justice Centers staffed by full-time attorneys. Kenya can adopt a similar approach by strengthening regional legal aid centers under NLAS. Decentralization would expand legal aid coverage, particularly in rural areas, and improve service delivery.

##### **4.6.3 Strengthening Financial Oversight and Accountability**

SA enforces strict financial controls, requiring legal aid providers to register in a central supplier database for transparency and fraud prevention. Kenya should adopt similar financial oversight mechanisms, including rigorous reporting requirements, periodic audits, and compliance checks to safeguard the Legal Aid Fund from mismanagement.

#### **4.6.4 Co-Payment Mechanism for Legal Aid Provision**

SA employs a Co-payment system where individuals earning above a certain threshold contribute to their legal fees while still qualifying for legal aid. This approach helps ensure financial stability sustainability of the system while allowing lower-middle income earners to access subsidized legal services. Kenya could implement a similar model within its legal aid fund to extend services to a broader population while still maintaining financial viability.

#### **4.6.5 Integrating Alternative Dispute Resolution (ADR)**

SA actively uses ADR to reduce court congestion and speed up dispute resolution. While Kenya's LAA recognizes ADR, its implementation is limited. The Legal Aid Fund could support ADR programs, providing resources for mediation and arbitration, making justice more accessible and reducing reliance on lengthy court processes.

#### **4.7 Conclusion**

SA legal aid system demonstrates how a well-structured and properly funded system can significantly improve access to justice. The transition from relying primarily on private lawyers to employing full time legal aid lawyers has expanded legal representation for marginalized communities. Partnerships with universities, NGOs and other service providers under cooperation agreements have further strengthened the system, ensuring a broader reach and

Despite challenges such as funding constraints and increasing demand for legal aid, SA's model offers valuable lessons for Kenya. It highlights the importance of strong legal frameworks, government commitment, and collaboration with various legal aid service providers. By adopting similar best practices, Kenya can effectively operationalize its Legal Aid Fund, strengthen financial accountability, and ensure greater access to justice for vulnerable populations.

## **CHAPTER 5: RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter presents the study's findings, concludes the analysis and draws lessons from South Africa's legal system to inform practical recommendations for the effective operationalization of Kenya's legal aid fund.

### **5.2 Key Findings**

This study established that Kenya's legal aid framework, despite being well-structured under the LAA, remains largely ineffective due to the non-operationalization of the Legal Aid Fund. The absence of government funding has significantly hindered access to justice for marginalized populations, leaving legal aid providers heavily reliant on donor support.

In addition to funding challenges, the concentration of legal aid services in urban areas has further excluded rural and underserved communities. Compounding these barriers is the lack of subsidiary legislation to guide the disbursement of the Legal Aid Fund once operationalized, creating regulatory uncertainty and impeding effective implementation.

A comparative analysis with South Africa revealed that consistent government funding, decentralized legal aid services, and strong financial oversight have played a crucial role in enhancing access to justice. South Africa's LASAA introduced several measures to improve efficiency and accountability, including co-payment mechanisms, public defender services, and a centralized supplier registration system. These reforms have significantly strengthened South Africa's legal aid framework.

Drawing from this comparative analysis, Kenya can adopt similar reforms to improve its legal aid system. The operationalization of the Legal Aid Fund presents a viable solution to many of the identified challenges. A fully funded and effectively managed Fund would: enhance financial accessibility to legal services, expand geographical coverage of legal aid services and facilitate greater inclusion of marginalized populations.

Addressing these challenges will be crucial to improving access to justice in Kenya and fulfilling its constitutional and international commitments under SDG 16.3, the ICCPR, and the ACHPR.

### 5.3 Conclusion

The Legal Aid Fund, if fully implemented, has the potential to bridge Kenya's access to justice gap by addressing financial and institutional barriers. However, its success depends on sustainable funding, clear regulations, decentralized service delivery, and strong accountability measures. Lessons from South Africa highlight the need for structured financial management, partnerships with legal service providers, and innovative funding mechanisms to ensure legal aid reaches the most in need.

### 5.4 Recommendations

1. **Sustainable funding.** The government should allocate consistent funding for the Legal Aid Fund in the national budget and explore supplementary funding from donors and the private sector.
2. **Regulatory and financial oversight.** Enacting subsidiary legislation to guide fund disbursement and implementing a central supplier registration system will enhance transparency and prevent corruption.
3. **Collaboration with service providers.** Strengthening partnerships with NGOs, law clinics and private legal practitioners can expand legal aid access.
4. **Co-payment mechanism.** Adopting a means-tested system would require those above a set income threshold to contribute partially to legal fees, ensuring aid reaches the most disadvantaged while maintaining fund sustainability.

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