



Strathmore
UNIVERSITY

**AN ANALYSIS OF EPISTOLARY JURISDICTION AS A VIABLE MEANS OF ACCESS TO
JUSTICE FOR KENYANS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

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JANUARY 2018

ACKNOWLEDGEMENT

I wish to thank God for seeing me through the countless mental blocks and long nights. It is because of his love and blessings that I even managed to make it this far.


I wish to thank Dr John Ambani for being patient with me throughout this process and constantly challenging me to do better, he inspired me to write on this topic. His continued guidance and support allowed me to develop my own understanding of the concept and form my own approach to the research.

I also wish to thank Edward Paranta who helped me find my footing in the initial stages of the study helping me to find my own voice for the research. My good friends Rukhsar Mulji, Natasha Teiye, Patience Maingi and Mildred Okello for reading through my work over and over again and helping me find a flow for my story. I would like to thank my special friend Meikan who urged me to work tirelessly and not to give up. I could not have done it without you.


Lastly I would like to thank my family for supporting me through law school and providing for me tirelessly.

DECLARATION

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

Signed: 
Date: 29/05/18
.....

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

Signed: ^{For Ambani} 
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DR. JOHN AMBANI

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Access to justice consists of the dispute resolution mechanisms which are affordable, within reach and ensure justice without undue delay and whose processes and procedures are understood by anyone seeking redress from the courts.¹ Consequently, this population as a whole might not easily access justice; there is need for mechanisms through which they can seek redress aside from the formal justice system.

The situation in Kenya right now does not allow for the easy commencement of court proceedings without the usual rigorous process that comes before it. This process, as outlined in the Civil Procedure Rules under order 3, is very hard to understand for the average Kenyan and often discourages most if not all people who cannot understand the process of starting proceedings. This is one of the reasons why Epistolary Jurisdiction would be a welcome approach for access to justice. It will ensure that justice for all is sought according to the Article 22 (1) which talks about the right of every person to institute court proceedings based on the claim that a right or fundamental freedom has been infringed,² and that the system accommodates the poor in society as well which is in accordance with Article 22 (3)(b) which allows for the Chief Justice to make rules providing for court proceedings under clause (1) which minimize formalities relating to the commencement of proceedings . Moreover, without equal access to justice, the poor are unable to seek redress against those who wrong them. This is very dangerous as a lot of these people are pushed into an endless cycle of unfair treatment. This further weakens their ability to seek redress, as the lack of a means to justice almost becomes the norm and is dealt with in the silence of homes, never to be spoken of.

¹ 'Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms under the Constitution' Workshop on Access to Justice, Nairobi (Sankara Hotel, Westlands) Tuesday, 23rd October 2012.

² Article 22(1), Constitution of Kenya.

1.2 RESEARCH QUESTIONS

The following are the research questions of this study;

1. Are there steps being taken to solve the problem of inaccessibility of justice in Kenya?
What is the progress of those steps?
2. What is the place of epistolary jurisdiction in Kenya? Is there a legal framework giving it effect and to what extent and if any is there need for more legislation with regards to epistolary jurisdiction?

1.3 RESEARCH OBJECTIVES

The objectives of this study are to;

1. Understand access to justice and the challenges encountered in pursuit of justice.
2. Analyse whether epistolary jurisdiction has a place as a means to access justice in Kenya.
3. Assess whether there is any provision for epistolary jurisdiction in the law.
4. Suggest methods that can be used to cement the place of epistolary jurisdiction in the law.

1.4 JUSTIFICATION OF THE STUDY

The study on 'The obstacles of people living without access to justice' has shown that where the rights of people are infringed upon, they tend to take matters into their own hands and results to frontier justice. This is the means by which people who are dissatisfied with the justice system take matters into their own hands³. Access to justice not only enables people to seek redress for their problems but prevents the likelihood of those problems ever occurring again. This is seen where in instances of theft of land from communities that survive on sale of crops or for subsistence, land grabbing can be a never ending nightmare that drastically changes their way of life. This is because once the aggrieved parties are unable to get help from the court, they become susceptible to more injustices. They are unable to afford the fee of filing complaints as the source of their livelihood has been withdrawn. The concept of a properly functioning democracy is undermined where a nation's people cannot access justice. The freedom of the citizens to elect their leaders is based on their sovereignty. This is coupled with the right to access justice from

³ Avocats Sans Frontieres. The Obstacles of People living in extreme Poverty in Accessing Justice', Pg. 7

the judicial arm of this government. Access to justice solves more than one societal issue. Poverty being one of the main causes of the inability to access justice can slowly be eradicated through epistolary jurisdiction, a more pocket friendly and easy to understand avenue to access justice. People who can seek recourse for injustices done to them are generally more productive and empowered than those who are sitting prey for acts of injustice and with no hope for recourse.

Locus Standi for many years was an essential element required for one to institute court proceedings, the case of *Bandhua Mukti Morcha vs Union of India*⁴ is the perfect example for the justification of the study. In the case, the petitioner was a non-governmental organization that instituted proceedings seeking justice for bonded labourers. The court was unable to find locus standi in the case as the petitioners should have essentially been the labourers themselves. The petitioner must have an interest in the case and will be affected by its outcome. The courts in some instances have chosen to overlook locus standi and observe the fact that a bona fide observer has taken steps towards achieving justice for another party that is unable to do so themselves.

This research therefore seeks to prove that epistolary jurisdiction has a rightful place as a means of access to justice and if so implemented will be the result of change even in the economic and social sectors of society.

1.5 HYPOTHESIS

1. A large number of Kenyan citizens are unable to access justice due to high court fees, technicality of court procedure and the use of legalese.
2. Adopting epistolary jurisdiction as has been done in India and will lead to increased access to justice through affordability, simplicity of procedure and the eradication of language barriers.

⁴ P.N. Bhagwati & C.J. Dias, 'The Judiciary in India: A hunger and thirst for justice', 5 N.U.J.S Law Review, (2012), Pg. 177

1.6 THEORETICAL FRAMEWORK

The following are some theories relevant to this research topic;

1.6.1 Human Rights as a universal concept

Human rights has been a topic of discussion for decades and a serious one at that. The general belief is that human rights are universal in nature meaning that they apply to each and every human being regardless of race, gender, ethnicity, economic standing and background. The Universal Declaration of Human Rights (1948) is the first comprehensive document that covers all the human rights. In article 6 of the document, the right to recognition under the law is outlined⁵. The right to access justice is also inferred under the same document as, 'everyone has the right to an effective remedy by the competent national tribunals for the acts violating the fundamental rights granted to him by the constitution or by law.'⁶

The two articles enforce the right to access to justice as well as the right to recognition under the law as a fundamental human right. Epistolary jurisdiction would be a method in line with these rights as it provides a broader spectrum for the rights to be enforced. This is because of its simplistic nature and informality. India is one of the countries that has the use of epistolary jurisdiction and being a common law system it is proof that if adopted epistolary jurisdiction would be an enabling factor for justice to be served. The World Bank poverty index has ranked Kenya in the low income level. 34-42% of its population live below the poverty line and in India 179.6 million people are living below the poverty line⁷. One of the greatest obstacles towards achieving access to justice for all Kenyans is poverty, this being the case it would serve the greater good of the destitute population for epistolary jurisdiction to be instituted.

⁵ Article 6, Universal Declaration for Human Rights

⁶ Article 8, Universal Declaration for Human Rights

⁷ The World Bank, 'Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya', Edition No.8, June 2013. Available at <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013>. on 11 Nov. 2015

1.6.2 The Social Contract Theory

Concept of social contract has been outlined by various philosophers from Thomas Hobbes to Jean Jacques Rousseau. The theme that is carried through each and every one of their theories is the act of individuals giving up certain rights in exchange for social order and protection. The theories although different carry this theme. The point is best described by Thomas Hobbes. He attributes the need for the 'social contract' to man's natural desire for security and protection. Man gives up all or some of his rights in exchange for security and self-protection. This notion of self also accommodates the items one owns including land.

This theory infers that to date society evolved from a basic form of social contract and thus there is still a social contract between the people of the land who are sovereign and the government who holds the people's rights in trust. Therefore, it is in the people's best interest to receive the protection of their rights which includes the right to access justice. Epistolary jurisdiction is one of the ways that the judiciary can efficiently allow its citizens to access justice and without them having to seek it as a privilege. It is a right to be claimed by all and as such everyone should be able to participate. The government should make a more direct approach to curb the deprivation of access to justice. This method would involve devising methods that take the problem into account so as to be a more efficient remedy.

1.7 ASSUMPTION

The main assumption I'm making is that;

1. Through epistolary jurisdiction, more Kenyan citizens will be able to receive relief for their disputes as well as any other matter that is suitable to be heard and resolved in a court of law.
2. The reason being the method is easy and easy to understand for the average Kenyan Citizen. The aims of the right to access to justice is one that is afforded to every member of the human race. The use of letters will allow the court process to become more accessible as well as suitable for any and all persons.

1.8 CHAPTER BREAKDOWN

Chapter 1: Introduction

This Chapter seeks to define Epistolary Jurisdiction and provide an overview of Access to Justice as a fundamental right protected by the Constitution.

Chapter 2: The history and current situation of the right of access to justice in Kenya

Chapter 2 explores the accessibility of justice in Kenya as well as research on whether or not the systems set in place are being utilized by the citizens adequately. The history of Epistolary Jurisdiction within the Kenyan context.

Chapter 3: An analysis of Jurisdictions that allow for Epistolary Jurisdiction

As a comparative study, this chapter will seek to exhaustively take a look at India, South Africa. These two countries are relevant to this study particularly because they share many similarities with our country both economically and socially. They would therefore be the perfect example in comparison to our country Kenya. The US would be another option for a comparative study as the practice originated there, it would therefore provide some more justification for the study.

Chapter 4: Recommendations and conclusion

Based on the study, through this paper I will be able to give requisite recommendations for the furtherance of Epistolary jurisdiction within Kenya as well as provide possible systems that can be set in place to ensure that the system runs smoothly. The conclusion will tie together all the ideas brought about during the research in a brief recap of the arguments that prove Epistolary Jurisdiction would indeed serve as the best alternative to the usual methods of instituting court proceeding, this includes the process of filing a plaint. It will also recap the other problems that might be addressed as a result of better methods for accessing justice such as strengthening the fight against poverty.

1.9 LITERATURE REVIEW

1. **“Improving Access to Justice: Legislative and Administrative Reforms under the Constitution” By Kariuki Muigua**

The text mainly discusses the systems already set in place for access to justice within the laws of Kenya as well as the recommendations. Access to justice is meant to be affordable, proximate, and speedy in execution and its procedure should be easy to understand. The interpretation of the services also falls under the court's mandate, to ensure that all citizens receive this information. Court fees should be affordable and the public should be allowed to participate in the court process as it ensures transparency of the judicial system⁸.

The challenges facing access to justice in Kenya have been clearly outlined. The court fees are too high, the economic update on Kenya released by the World Bank on June 2013 states that Kenya's poverty rate is estimated to be between 34 and 42 percent of the entire population.⁹ The minimum payable fees for filing a plaint in the High court. This clearly shows that it is too expensive for a large number of Kenyans to feed themselves and this being the case a majority would not bother to divert those funds towards exercising their right to access justice.

2. Article 48 of the Constitution.

This article outlines the right to access justice for all Kenyans, this sets out the basis for the study as a whole. This is because the right to access justice should be protected as seriously as human rights. The Chief Justice is obligated by the Constitution in Article 22 to provide systems in which citizens can exercise this right, and enabling access to justice through epistolary jurisdiction would be a welcome addition within the law expressly stating its use and execution.

3. History of Epistolary Jurisdiction

In the case of *Gideon vs Wainwright*,¹⁰ Clarence Gideon was in and out of prison for minor offences. During his appearance in court, he requested that the judge provided him with

⁸ Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, "The People's Version Informal Justice System" (2011), which defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'; "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011.

⁹ The world bank, Kenya economic update, 2013

¹⁰ 372 U.S. 335 (1963)

representation as he could not afford to pay for it himself. The judge declined to grant him representation as it was only awarded to poor people facing criminal charges. He wrote a letter to the Supreme Court of the United States. Based on his informal written submission the court agreed to hear his case. This was the first instance of use of an informal method to institute court proceedings. As a citizen of the United States, Gideon was entitled to the right to Access to Justice and the means of letter writing gave was an instrument for the fulfilment of his right. Article 50 (h) of the Constitution of Kenya provides for the right to have an advocate assigned to the accused by the state and at the state expense, by denying Gideon the right to have legal representation to help him in his defence the court in process ceased to fulfil their mandate. This is because he was forced to represent himself and even cross-examine the prosecution's witness.

4. The Mutunga Rules

The Mutunga Rules are formally known as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012. These rules are a manifestation of the provisions made under Article 22 and 258. Informal documentation is defined as any publication that is simple and does not conform to any particular form but conveys information. It may not conform to rules of grammar and may be in any language as long as it is possible.¹¹ The main objective of these rules is to ensure that the Court is accessible, fair and efficient. This shall be done in a just, efficient, speedy and at a cost affordable to the parties involved.¹² Under rule 4, the rules establish the opportunity of individuals to institute informal proceedings as well as have a third party institute proceedings on their behalf.¹³ The overriding objective of these rules is to ensure that the Court is accessible, fair and efficient.

¹¹ The Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

¹² The Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

¹³ The Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

1.10 RESEARCH METHODOLOGY

This study will rely mainly on a comparative study based on the jurisprudence established in the courts of India and South Africa, specifically where cases have been instituted by way of informal letters and proceeded to be heard and decided. This analysis will help bring together the thought process of each judge faced with deciding these cases which will help shed light on the overall objective of the study which is to improve access to justice by providing Epistolary jurisdiction as a viable means. This will serve as the primary means. "Improving Access to Justice: Legislative and Administrative Reforms under the Constitution" By Kariuki Muigua is a source that will accompany the comparative study. The book highlights the systems set in place with regards to access to justice in Kenya. Which will serve as a good text to the research on other jurisdictions.

CHAPTER 2: THE HISTORY AND THE CURRENT SITUATION OF ACCESS TO JUSTICE IN KENYA

2.1 INTRODUCTION

Access to justice is defined as the ability of people to seek and obtain a remedy through the formal and informal institutions of justice for grievances¹⁴. A grievance is further defined as a gross injury or loss that constitutes a violation of a countries criminal or civil law or international human rights norms and standards¹⁵. Based on the definition, access to justice is said to be one of the main qualities of a civilised society. Different societies have achieved different levels of enhancing access to justice for citizens based on their unique historical backgrounds. In first world countries which mainly include European nations and the United States there is a higher regard for ensuring access to justice as their poverty and illiteracy levels are immensely lower than our own.

In the previous chapter, poverty, illiteracy and the inability of an individual to go directly to the court to seek redress on their behalf all can lead to the inability to access justice. Epistolary jurisdiction then serves as a remedy for this problem. The concept of access to justice within the African context is not new and for centuries, dispute resolution mechanisms have been adopted across communities all over the continent. The nature of these proceedings was largely restorative and the procedure fairly simple.

In a bid to answer the research questions asked in chapter 1, this chapter will provide a synopsis of the place in history of access to justice in Kenya from pre-colonial times to the present. This aims at providing a background of the Kenyan justice system and how the concept of access to justice came into focus. It will further seek to address the hypothesis referred to earlier that states, a large number of Kenyan citizens are unable to access justice due to high court fees, technicality of court procedure and the use of legalese.

In order to understand how epistolary jurisdiction will improve access to justice in Kenya, we first have to look at whether there are steps being taken to improve accessibility. The

¹⁴ UNDP. "Access to justice" 2004.

¹⁵ UNDP. "Access to justice" 2004.

concept of epistolary jurisdiction is not new, we shall therefore through the historical background of access to justice, look at when and if epistolary jurisdiction was first practiced and whether there is any legislation outlining its practice.

2.2 PRE-COLONIAL KENYA

Before the coming of the missionaries and later the colonialists, the people of Kenya had traditional methods of dispute resolution that had been in operation for hundreds of years. Settled in their respective tribes, these methods though administered in different ways carried many elements of similarity. Whenever conflicts arose, the disputants were given direction by the council of elders or their family members which more often than not resulted in the maintenance of an amicable relationship between the parties involved. The council of elders usually comprised of wise old men, who had a vast understanding of the community norms and traditions. The *Pokot* and *Marakwet* referred to them as *kokwo* and the *Agikuyu* referred to them as the *kiama*.¹⁶

The emphasis of these mechanisms have been to foster togetherness over individual interests and seeking the best solution for all parties involved. In the case of the perpetrator, an effort to help him amend his crooked ways and integrate back into society and with regards to the person who has been wronged a suitable remedy. These methods are more restorative than punitive in nature as well as the inquisition into the root cause of the problem hence a reducing the likelihood of a repeat offence which is the most desirable outcome.

2.2.1 Advantages of Traditional Methods of Dispute Resolution

The beauty of epistolary jurisdiction as a means of access to justice lies with its simplicity. The ability to be heard regardless of ones' adherence to procedural technicalities, and the ability to express oneself in a language of choice giving an account of the injustices suffered and having the opportunity to be heard in court. This is quite similar to traditional methods of dispute resolution a further serve as an advantage.

¹⁶ 'Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms under the

Each party has the opportunity to state their case before the council of elders and this in turn reflected the importance of the right to be heard. The fact that the council took each case and deliberated upon it based on the verbal submission of the parties enhanced the notion of access to justice. The parties did not need to undergo any formal procedures and the speedy nature of this method ensured that justice was indeed administered to all parties and without undue delay.

The second advantage of this method of access to justice is the ability of disputants to state their problems in their native tongue which would be understood by the council of elders. This was the case in most if not all regions of Africa during pre-colonial times. Different communities had different methods of dispute resolution however the systems were generally similar and the relevant languages applied. As a child born in a particular community, the only method of communication at the time was through native languages this therefore meant that everyone was able to express themselves in a similar tongue.

The council of elders were located within the community hence in close proximity to the people they served. This meant that the disputants and the objects of the dispute were within the reach of the council. With the new era in the judicial history of Kenya came the use of complex legal terms that ordinary Kenyans are unable to understand. The language and communication barriers serve as a great deterrent when in pursuit of justice for the majority of Kenyans.

2.3 COLONIAL KENYA

The British Empire established the East African Protectorate in 1895, which later came to be known as the Kenyan Colony in 1920.¹⁷ They had however already settled in the Country and established the first court in 1890. This court only handled matters relating to British nationals and other foreigners and the laws favoured the British and had no regard for the natives. The legal system was shaped by the English Legal system which it takes after until today.¹⁸

The colonialists empowered village elders, headmen and chiefs to adjudicate cases regarding Africans through their already established traditional methods of dispute resolution. These took on the status of tribunals and in 1907 gained official recognition as such through the

¹⁷ http://www.kenyarep-jp.com/kenya/history_e.html on 16 January 2018.

¹⁸ <http://www.judiciary.go.ke/judiciary/about-us/our-history/> on 16 January 2018.

promulgation of the Native Courts Ordinance.¹⁹ The tribunals sought to serve the interests of all the ethnic communities residing within the borders of the colony.

The colonial administration reviewed the court system with regards to indigenous Africans making the lowest courts the panel of elders from native law or area with appeals going to the Native Appeals Tribunal, the District Commissioner and lastly the Provincial Commissioner.²⁰ Towards the end of the colonial era, Kenyans had undergone massive human rights violations as well as the imposition of an illiberal democracy. The Constitution at the time barely had any provisions that provided for the natives.

2.4 THE CONSTITUTION OF 2010 AND BEYOND

The promulgation of the new Constitution came with a heap of promises for Kenyans to be enforced through their elected leaders in the government and in this case, the judiciary. Access to justice is provided for under Article 48 which provides for the States mandate to ensure access to justice for all and in the event that a fee is necessary that it be reasonable and not an impediment to justice.²¹ This mandate is followed by the right awarded to every Kenyan to institute court proceedings when claiming that a fundamental right or freedom has been denied, violated or infringed.²² The two read together infer that the Judiciary has the mandate to do everything within its power to ensure that every citizen is accorded access to justice.

Article 22(3) of the Constitution provides that, "*The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that--*

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) the court, while observing the rules of natural justice, shall not be unreasonably restricted by

¹⁹ <http://www.judiciary.go.ke/judiciary/about-us/our-history/> on 17 January 2018.

²⁰ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems.'

²¹ Article 48, Constitution of Kenya, 2010.

²² Article 22, Constitution of Kenya, 2010.

procedural technicalities"□

Chapter 10 of the Constitution then provides for Judicial Authority under Article 159. It begins by asserting that this authority is derived from the people and is exercised by the courts and tribunals established under the Constitution.²³ It goes on to outline the principles with which judicial officers carry out their duties. Those essential to epistolary jurisdiction are as follows: justice shall be done to all irrespective of status, justice shall not be delayed, justice shall be done with undue regard to procedural technicalities and that the purpose and principles of the Constitution shall be protected and promoted.²⁴ The very essence of the concept of epistolary jurisdiction falls in line with these principles. Enabling those who cannot understand the technicalities of the court process, those who cannot afford to pay the fees for instituting court proceedings as well as those who are not in a position to present a case themselves and have the opportunity to seek relief from the court.

The recognition of human rights and fundamental freedoms to enable the preservation of human dignity is pertinent to promoting peace and social justice and the realisation of the potential of all human beings.²⁵ Article 20(3) of the Constitution gives the court powers that they may exercise in the application of the bill of Rights. These include; developing the law to the extent that it does not give effect to a right or fundamental freedom and adopting the interpretation that most favours the enforcement of a right or fundamental freedom.²⁶

In 2006, the Kenya Literacy Survey was carried out to enumerate which Kenyans were subject to illiteracy. It was found that 38.5% of adults in Kenya are completely illiterate meaning lack the capability to read and write.²⁷ This does not even speak to their ability to comprehend or communicate efficiently what they are reading and writing. Ten years after this survey the Uwezo Kenya Organization conducted a learning assessment report that covered mostly primary school children and standard two pupils in particular. It was found that of the 130,653 students

²³ Art 159, Constitution of Kenya, 2010

²⁴ Article 159, Constitution of Kenya, 2010.

²⁵ Article 19, Constitution of Kenya, 2010.

²⁶ Article 20(3), Constitution of Kenya, 2010.

²⁷ UNESCO, Kenya National Literacy Survey Report, January 2007

assessed. On average, 1 out of 10 children in Kenyan primary schools are completing Class 8 without having acquired the basic competencies expected of a child completing Class 2.²⁸ Based on these figures it is reasonable to assume that understanding the methods through which cases are filed in court is not easy for a majority of Kenyans who so desperately require access to justice.

The Constitution guarantees every person a right to an expeditious, efficient, lawful, reasonable and procedurally fair court action.²⁹ In accordance with these provisions, the Chief Justice composed a set of rules that outline the minimum payable fee to file a plaint in the High Court of Kenya is 1,500 shillings.³⁰ According to an economic update on Kenya released by the World Bank on June 2013, Kenya's poverty rate is estimated to between 34 and 42 percent of the total population. This, therefore, means at least 13.6 million Kenyans are living on less than 1.25 dollars a day. Raising 1500 shillings alone without other costs involved is quite challenging for a person earning less than 1.25 dollars a day.³¹ The result of this yet again is the barring of deserving Kenyans from fully enjoying their right to access justice which is unfair. Epistolary jurisdiction once again provides a good opportunity for affordable access to the courts.

The Mutunga rules were the first set of rules by the Chief Justice at the time William Mutunga, as is prescribed under section 22(3), 23, 159, 165 (3)(b) and article 258 of the Constitution. These rules paved the way for informal applications by way of epistolary jurisdiction to have an audience in court. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others 2015J eKLR* the formal nature of the petition was put into question. The court determined that as long as there was proof that a fundamental right and freedom had been infringed a court with the constitutional mandate has taken the matter up,

²⁸ Uwezo Kenya: Are Our Children Learning? Uwezo Kenya Sixth Learning Assessment Report Nairobi: Twaweza East Africa, 2016.

²⁹ Article 47, Constitution of Kenya (2010)

³⁰Section 3(b), Schedule to part IX, Judiciary of Kenya; Guide to Assessment of Court fees. <http://www.judiciary.go.ke/portal/page/fees-and-costs> accessed on 3rd January 2017

³¹ The World Bank, 'Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya', Edition No.8, June 2013.

Available at <http://www.worldbank.org/contentdam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013.pdf> accessed on 3rd January 2017

investigate duly as well as determine and conclude the matter. In this case, the court took notice of the Indian judiciary approach to actively look into cases in which fundamental rights and freedoms had been infringed upon.

The Mutunga rules at rule 2 define informal documentation as, “Any legible document in any language that is simple, does not conform to any particular form or rules of grammar and conveys information.”³² Rule 10 of these rules commonly referred to as the ‘Mutunga Rules’ states that, “Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”³³

Technicality is described by Justice Merete in the case of *James Mangeli Musoo v Ezetec Limited [2014J eKLR* as follows, “A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.” This description does not however, force the courts to disregard procedure solely on the basis of an informal petition.

As is described in the case of *Raila Odinga v. I.E.B.C & others (2013) eKLR* the blanket application of article 159 shall not be practiced. The provisions of article 159(2) (d) shall only apply epistolary jurisdiction in circumstances where the court shall cannot ignore the violation of fundamental rights and freedoms due to procedural technicalities. The court further emphasized this in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR* where it was stated that, the court cannot aid in the circumventing of even handed procedure, these rules are meant to make judicial proceedings more fair, just even-handed and certain.

³² Protection of Rights and Fundamental Freedoms: Practice and procedure rules, 2013. Constitution of Kenya.

³³ Protection of Rights and Fundamental Freedoms: Practice and procedure rules, 2013. Constitution of Kenya.

2.5 CONCLUSION

In conclusion, it is important to emphasize that the practice of epistolary jurisdiction as a means to accessing justice through the judicial system is not a new practice in Kenya. This paper seeks to emphasize that although in practice there are people who have managed to receive an audience in court on the basis of an informal petition, for the full benefit of the provisions of article 159 of the Constitution to be experienced by Kenyans, there needs to be an active effort to better the infrastructure and law around the subject. The questions that this chapter sought to answer are as follows, a) whether the ideology of access to justice existed in Kenyan history prior to colonization b) whether during colonial times there were measures in place to ensure access to justice for Kenyan natives c) whether after colonization the principles that governed access to justice in pre-colonial times were inculcated into the Constitution d) whether the spirit of access to justice and epistolary jurisdiction have influenced the Constitution of Kenya 2010.

The legal principle of *ubi jus ibi remedium* dictates that for every wrong, the law provides a remedy.³⁴ In this day and age, it is common for third world countries to wrestle with the lack of access to justice for their citizens due to the underlying challenges such as widespread poverty and illiteracy with regards to the legal system. The judiciary, as the custodian of rights and fundamental freedoms, is tasked with ensuring that where a right has been violated the victim of this violation is able to receive adequate relief. As was stated in the case of *Paul Pkach Anupa & Another v Attorney General*, access to justice should be availed to all regardless of socio-economic background, disability, race, gender and this is hallmark of a democratic society as it is within this environment that that the rule of law can flourish.³⁵

³⁴ <https://indianlawnews.wordpress.com/2016/02/18/ubi-jus-ibi-remedium-for-every-wrong-the-law-provides-a-remedy/> accessed on 20th February 2018

³⁵ *Paul Pkach Anupa & Another V Attorney General & Another* [2012] eKLR

CHAPTER 3: AN ANALYSIS OF JURISDICTIONS THAT ALLOW EPISTOLARY JURISDICTION AS A MEANS OF ACCESS TO JUSTICE

3.1 INTRODUCTION

When seeking to analyse the viability of unconventional civil procedure methods, it is important to observe jurisdictions who have already succeeded in integrating these methods into their law. India is one of the countries that have embraced epistolary jurisdiction and put it into practice over the decades. This chapter will seek to take a look at India as an example of a jurisdiction that practices epistolary jurisdiction. It shall take a historical approach so as to map out exactly how the concept came into practice and how it has been developed to date.

The previous chapters have canvassed the practice of epistolary jurisdiction locally as well as the problems facing access to justice in Kenya. India would act as a perfect case study being a common law jurisdiction as well as a third world country a comparison would be more realistic.³⁶ It would therefore be prudent to assume that the methods and processes implored to further the process of epistolary jurisdiction in India would be beneficial to improve the infrastructure around epistolary jurisdiction in our own jurisdiction.

3.2 THE BIRTH OF EPISTOLARY JURISDICTION

India in the late 1970's went into a state of emergency during which all fundamental rights protected under Article 19 of the Constitution were suspended for the duration of the emergency period.³⁷ These rights include; the freedom of speech and expression, the freedom to assemble peaceably and without arms, to move freely within the territory of India, to form associations or unions and the freedom to practice any occupation or trade.³⁸

The concept of epistolary jurisdiction was coined in the 1970's by Judges of the High Court as a response to the need to make justice more available to the poor, oppressed and socially disadvantaged members of society. This also arose from their constitutionally enshrined duty to protect the rights of all citizens which includes the right to access justice. This right is inferred by the right to equality before the law as well as equality in light of discrimination based

³⁶ Kale S and Weir K, 'Marketing Third World Countries to the Western Traveller: The Case of India'

³⁷ <http://www.legalservicesindia.com/article/article/position-of-fundamental-rights-during-emergency-589-1.html> accessed on 20 January 2018. Harshit Khare: Position of Fundamental Rights during Emergency, March 15, 2011.

³⁸ Article 19, Constitution of India, 2015.

on caste and place of birth.³⁹ This action began as a method of 'Public Interest Litigation' through Judicial Activism, which in turn meant that judges would divert from their original position as interpreters of the law to law makers which is primarily the duty of the legislative arm of the government.

The main reasons behind the introduction of epistolary jurisdiction in the Supreme Court of India were drawn from observations after the state of emergency came to an end. They include: to repair the damaged reputation of the Court, the strict rule of *locus standi* adversely affected development which led to social-economic change, the failure of the court to discharge its Constitutional obligations as well as the voluntary abdication of powers by the Legislature and Executive arms of government, the poor conditions in which people were being held and as an accountability measure of the other arms of government.⁴⁰

Justice Krishna Iyer, a patron to the concept of public interest litigation ensured that during his time of service the concept flourished allowing the judiciary to further meet the ends of justice. The former Supreme Court judge believed that in Countries where such a large number of the citizens lived below the poverty line, public interest litigation was a fundamental ideology that was basically poverty jurisprudence and integral to law. He believed that those who were 'allergic' to public interest litigation had no interest in meeting the true ends of justice.⁴¹

The concept of Public Interest Litigation was birthed in the American legal system in the 1960's due to the case of *Gideon v Wainwright*⁴² which saw the beginning of a new era in the litigation process. In the case, a prisoner was denied court assigned legal counsel due to the fact that he did not meet the courts requirements which were that a person seeking aid must be financially disadvantaged as well as having been charged with a capital offence which he had not been. He then sent a letter to the Supreme Court which was then treated as a petition.⁴³ To enable

³⁹ Article 14 and 15, Constitution of India, 2015.

⁴⁰ Sushimita, The Inception of Epistolary Jurisdiction Law Constitutional Administrative Essay

⁴¹ <http://www.thehindu.com/todays-paper/tp-national/tp-kerala/Public-interest-litigation-key-to-poverty-jurisprudence-jurist/article16553816.ece> accessed on 22 January 2018. Public interest litigation key to poverty jurisprudence: jurist.

⁴² (1963) 372 U.S. 335.

⁴³ (1963) 372 U.S. 335.

the ends of justice to be met the rules governing access to justice would have to be lenient to allow for all members of society to fully reap these benefits.

Another great propagator of the principles behind public interest litigation is the former Chief Justice of India P.N Bhagwati who advanced that, "*Public interest litigation is brought before the Court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically backward position should not go unnoticed and unredressed.*"⁴⁴ His statement encompasses the true meaning of public interest litigation which is essentially the protection of the public interest achieved through the justice system.

In the case of *S.P Gupta v Union of India*,⁴⁵ the court held that: "*Where a legal wrong or legal injury is caused to a person or to a determinate class of persons and such persons are unable to approach the Court due to socially or economically disadvantaged position, any member of the public acting bona fide and having sufficient interest in the matter can maintain an application for appropriate directions or orders.*"

Y.V Chandrachud is one such judge who served in the Supreme Court and he describes the judicial scene saying, "*I am no pessimist but at times I see dark clouds gathering over law's rarefied atmosphere... Long and interminable arguments, whisperings of heavy professional fees, the unethically expensive impost of court fees by the State which does not plough back its profits from justice by undertaking programmes like free legal aid, the chronic delays in disposal of cases and, may I say, the not-so-chronic delay in decision-making are all matters which require of the men of law, a careful and urgent attention.*"⁴⁶ His sentiments clearly highlight the reasons for which epistolary jurisdiction exists, to ensure that justice is served expeditiously and to all who seek redress regardless of social status or financial capability.

⁴⁴ Basant Lal Wadehra, *Public Interest Litigation: A Handbook, with Model PIL Formats*, Universal Law Publishing, 200.

⁴⁵ *S.P. Gupta v. Union of India*, AIR 1982 SC 1491

⁴⁶ Former Chief Justice of India speaking on Law Day function on 26th November, 1980.

The recognition of letters as writ petitions has gone a long way in ensuring that Indian nationals who otherwise would not be able to seek justice, do. In instances where a letter is addressed by an individual acting *pro bono publico* the court will readily and unhesitatingly cast aside the technical rules procedure and treat the letter of a person acting on behalf of another as a writ petition and act in it.

3.3 The implementation of Epistolary jurisdiction in India

It is inevitable that with the freedom and ease epistolary jurisdiction comes, challenges soon follow. The act of addressing letters to a particular judge may raise preliminary questions as to whether indeed the person sought to have the favour of the judge with regards to the matter. This may be apparent based on the fact that the letter is addressed to an individual judge and the law prescribes for neutrality in the court process which includes the presence of a neutral judge however, the intention of the claimant may not necessarily be to achieve unfair results. If they are making a genuine claim, then there is a solution to the problem.

One solution that has been adopted in the Indian courts is requiring judges to pass on the letter to the registrar who would then file a writ petition and have the case move through the regular court process. Article 32(1) of the Indian Constitution provides that, “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.”⁴⁷ The rationale of which is covered by the lack of specificity under Article 32(1) of the Indian Constitution which does not state who shall have the right to move to the Supreme Court nor by what proceedings.⁴⁸

The Chief Justice in 1986 P. N. Bhagwati outlined a set of principles to be used in the exercise of epistolary jurisdiction to help curb the potential challenges that arise. They are;

1. To invoke Epistolary jurisdiction informal petition by way of letter, telegram or by laying information before the court must be addressed to the court and not to a particular Judge.

⁴⁷ Article 32(1), Constitution of India, 2015.

⁴⁸ <http://shodhganga.inflibnet.ac.in/bitstream/10603/141322/13/m%20chapterv%20epistolary%20and%20creeping%20jurisdiction%20of%20the%20su.pdf> accessed on the 20 January 2018. Epistolary and Creeping Jurisdictions of the Supreme Court of India.

2. Informal petitions containing allegation regarding violation of human rights should only be treated as writ petition when such informal petition is preferred on behalf of socially in advanced people or class of people when such people or class of peoples suffers from any sort of disability; monetary or physical especially when such person is a detainee. □
3. There should be a public distress cell within the Supreme Court administration, which will consider these informal petitions and send the same to the appropriate bench for consideration of the same as writ by the Judges on their leave. □
4. When any such informal petition on behalf of people in taken as writ, general notification in the newspaper must be made allowing impleading parties in the writ either in favor or against the cause. □
5. The court shall appoint amicus curie in the case and on public hearing decide the matter.
6. If any of the judges desire to act on any information published in the news paper he must act through the Chief Justice.⁴⁹

It is easy to assume based on the views of a majority of the judges in India that none of them are skeptical of the concept of epistolary jurisdiction however, there have been a few critiques who have presented their reasoning for going against the grain.

In the case of *Neerja Chaudhary v. State of M.P.*,⁵⁰ a regular writ petition was filed in substitution of the letter before notice is issued to the respondent. Former Chief Justice of India Pathak R.S.J expressed that the mere presentation of a letters which are then treated as writ petitions is not sufficient for the court to undertake a matter. This is due to the fact that notice has not yet been issued to the respondent at this point and it is quite possible for people to begin to abuse the legal process. The filing of an affidavit that accompanies a petition is pertinent to the justice process as is required by the Civil Procedure Code, solely for the purpose of ascertaining

⁴⁹ A.F.M Abdur Rahman, 'Upholding human rights of the poor; Epistolary jurisdiction could be instrumental' pg.3, [http://www.hrpb.org.bd/imagesIPDF File %20RPBIJustice%20A%20F%20M%20Abdur%20Rahman.pdf](http://www.hrpb.org.bd/imagesIPDF%20File%20RPBIJustice%20A%20F%20M%20Abdur%20Rahman.pdf) on 9th February 2018.

⁵⁰ AIR 1984 SC 1099.

that the claim being made is genuine and the claimant willing to disclose his/her details fully.⁵¹ There is then left room for frivolous claims to be presented and as a result the time and resources of the court wasted which in turn causes other deserving claims to get delayed. The *Bandhua Mukti Morcha case* falls as an exception due to the time at which it was decided, after which the the litigation floodgates were open.

In the case of *Chhetriya Pradushan Mukti Sangharsh Samiti v. State of Uttar Pradesh and others* Chief Justice Sabyasachi Mukherji observed that whereas it is the duty of the court to enforce fundamental rights, it also has a duty to ensure this power pursuant to Article 32 is not misused or abused preventing genuine violations from being considered by the courts.⁵²

In order to avoid the misuse of court resources, the Supreme Court of India set up the public interest and litigation and information cell with trained staff to deal exclusively with its epistolary jurisdiction.⁵³ On 1st December 1988, the Court in line with its administrative powers issued a notification outlining what matters it would be entertain as public interest litigation. These matters include those concerning; bonded labour, neglected children, petitions from prisoners, petitions against atrocities on women, children and scheduled castes and scheduled tribes, environmental matters, adulteration of drugs and food, maintenance of heritage and culture as well as any other matter of public importance. Issues that would not be entertained have also been highlighted they include; land-lord tenant disputes, service matters and admission into medical or educational institutions.

The notification further provided for directions to be followed to give proper direction to the letters received, to be put before the Supreme Court;

1. The letters are to be scrutinized by the staff, employed exclusively for this purpose.

⁵¹ AIR 1984 SC 1099.

⁵² AIR 1990 SC 2060 at 2062, Para 8

⁵³ Sangeeta Ahuja, "People, Law & Justice; Cases and Materials on PIL," Orient Longman, Delhi, 1996, Volume 11,860; Also available at <http://www.publishyourarticles.net/eng/articles2/epistolary-jurisdiction-a-breif-analysisl2095/> on 3rd February 2018

2. Letters addressed by or on behalf of persons in custody or for vindication of fundamental rights of women, children or other class of groups of disadvantaged persons, who an account of poverty, disability or socially or economically disadvantaged position cannot approach the courts of justice, such letters are placed before the court by way of Public Interest Litigation.
3. Where it is found that the letter complains of infraction of fundamental right but is on behalf of an individual, it is sent to the Supreme Court Legal aid committee for appropriate action.
4. Where a letter complains of a legal right as distinct from a fundamental right, the Public Interest Litigation cell sends it to the appropriate Legal Aid Board for the purpose of contacting the person who had written the letter and providing him legal aid assistance for enforcing his right.
5. The PIL cell also provides information to the Litigants about their cases which are pending or which they wish to file in the Supreme Court and also gives to the members of the public whatever assistance they require in regard to the procedure for filing of cases in the Supreme Court. Through this all, practice of sending anonymous letters, vague allegations can be prevented.⁵⁴

3.3 CONCLUSION

It is clear that in the case of India, the state of emergency and the chaos that ensued thereafter led to the judicial arm of government taking charge of their role as the protector of fundamental rights and freedoms due to the derogation that occurred during that period. There was a need to shift focus to the under privileged in society and empower them with regards to their constitutional right to access justice.

Justice Krishna Iyer, a propagator of the notion of public interest litigation via epistolary jurisdiction believed that the fact that so many citizens lived under the poverty line, there was a need to coin ways more suitable to their circumstances for the fulfilment of their rights. Kenya as described in chapter one, has over a third of its citizens living under the poverty line. It is

⁵⁴ Sangeeta Ahuja, "People, Law & Justice; Cases and Materials on PIL," Orient Longman, Delhi, 1996, Volume 11,860; Also available at <http://www.publishyourarticles.net/eng/articles2/epistolary-jurisdiction-a-brief-analysis12095/> on 3rd February 2018

important to re-iterate that the government through its judicial and legislative arms permits the use of epistolary jurisdiction to enhance access to justice for these citizens.

CHAPTER 4: RECOMMENDATIONS AND CONCLUSION

4.1 INTRODUCTION

It is clear from the guidelines already establishing epistolary jurisdiction as a viable means of access to justice in Kenya i.e. the Constitution and the Mutunga rules, that it would be possible to further the practice. The effects of lack of access to justice result in an increased level of the very circumstances that lead to its inaccessibility. The regulations and case law that have established and nurtured the concept of epistolary jurisdiction in India can serve as a template for the furtherance of our own implementation of the concept.

This chapter seeks to sum up the answers provided in chapter 2 and 3 based on the hypotheses and research questions. It will go further and state what the contents of draft legislation with regards to epistolary jurisdiction should contain taking into account the examples set out in chapter 3 from India. Using these findings, seek to suggest possible mechanisms that the Kenyan judiciary can set in place to ensure that epistolary jurisdiction is practiced in an efficient manner.

4.2 RESTATING THE INITIAL PROBLEM

This study was inspired by the the lack of access to justice for citizens who have the constitutionally awarded right regardless of any factors that may cause bias. It is with this in mind that it was posited earlier that a large number of Kenyans are unable to access justice due to high court fees, technicality of court procedure as well as the use of legalese. Adopting epistolary jurisdiction as has been done in jurisdictions such as India will lead to increased access to justice through affordability, simplicity of procedure and the eradication of language barriers.

The World Bank economic update that was carried out in 2013 estimates Kenya's poverty rate between 34-42 percent. This is quite a large number of people who are left vulnerable in the face of injustices. Epistolary jurisdiction in widespread practice would allow millions of Kenyans to exercise their right to access justice. India, like Kenya, is classified as a third world country. It would therefore serve as a perfect example as to the manifestation of the concept.

4.3 RECOMMENDATIONS

Based on the entire study, the following are recommendations for the efficient implementation of Epistolary jurisdiction in Kenya.

4.3.1 The enactment of substantive rules of procedure

It is also important to for the substantive guidelines to be accompanied by civil procedure rules instructing the process of sending the letters, their reception at the registry and the process of determining which judges hear what cases. All these issues need to be clearly outlined and the process made known to the public. This is to ensure that the courts are able to deal with the influx of civil claims and develop a sorting mechanism to determine which claims are frivolous and which ones are genuine.

4.3.2 The education of citizens on epistolary jurisdiction

The Mutunga rules are the closest thing we have to formal legislation on the practice. The rules give the basic guidelines to be followed when instituting informal court proceedings. The court under its constitutional mandate enshrined in Article 159 is obligated to facilitate the just, speedy and expeditious access to justice without undue regard to technical technical procedure. The Mutunga rules provide a basic framework for the practice of epistolary jurisdiction however for the process to be seamless, it is important for citizens to be educated on their Constitutional right to access to justice. When one is not aware of the benefits that they can enjoy when practicing their rights, it is impossible for them to experience their full extent.

4.3.3 The education of the judges, magistrates and relevant staff

Once the procedure is clear, the next step would be to educate judges and Magistrates and registry staff members on the use of epistolary jurisdiction. Rule 4 of the Mutunga Rules states that where any right or fundamental freedom has been denied, infringed or threatened, a person so affected or likely to be affected, may make an application (formal or informal) to a Subordinate Court or to the High Court in accordance to these rules.⁵⁵ The Court can only fully exercise its mandate when all the

⁵⁵ The Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012

judges and magistrates are duly informed on procedure. It is not uncommon for judges to dismiss cases solely due to procedural technicalities. Before judges and magistrates are presented with an application, the office of the registrar is tasked with receiving petitions and entering them into the Courts record. It is therefore paramount that all staff members tasked with handling informal petitions are aware of the relevant procedure involved with informal petitions and know which ones exactly deserve to have an audience in Court. It is therefore important that once standard procedure and requisite principles are established, judges and magistrates be informed accordingly to further institutionalize the exercise of the process.⁵⁶

4.3.4 The establishment of an epistolary jurisdiction cell in each of the courts

For epistolary jurisdiction to go on successfully, there needs to be offices dedicated to ensuring that the filtration of informal petitions into Court happens effectively. As was discussed in chapter 3, India in 1988 established a Public Interest Litigation and Information cell to handle all informal applications and apply the rules and principles that were outlined. It therefore would be plausible for Kenya to implement the same mechanisms. Without the relevant structures set in place, the Mutunga Rules remain susceptible to exploitation. The establishment of this cell would ensure the movement of informal petitions through the Court process while ensuring the efficient use of Court resources and time. This will be done by staff members who will sort the applications and present them on the basis of their urgency based on the principles that will be created.

4.4 CONCLUSION

In conclusion, for the concept of Epistolary jurisdiction to be fully implemented and its benefits fully realized the above stated recommendations should actively be put into practice. The participation of the judiciary and the general public in ensuring that every party plays their role. This concept would serve to benefit thousands and possibly millions of Kenyans. It will further assist in fighting the war against poverty, insecurity as well as ensuring that fundamental

⁵⁶ Paranta E, 'Access to justice: Epistolary jurisdiction as a means of improving access to justice in Kenya' Unpublished LLB Dissertation, Strathmore University, 10 February 2018, 27.

rights and freedoms are safeguarded especially for the less fortunate and more vulnerable members of society.

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