

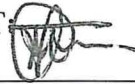
THE HIGH COST OF JUSTICE IN KENYA

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE
BACHELOR OF LAWS DEGREE**

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STUDENT'S DECLARATION

I the undersigned, declare that this is my original work and has not been submitted to any other college, institution or university other than Strathmore University in Nairobi for academic credit.

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ABSTRACT

The purpose of this study was to look at how poverty is an impediment to access to justice here in Nairobi. The study was guided by the following research questions: What is the concept and rationale behind access to justice? What is the history of access to justice in Kenya? Is poverty an impediment to access to justice for persons living below the poverty line in Nairobi, Kenya? Looking at both past and current legislation relating to access to justice, has there been an improvement in the process of accessing justice for the poor? The research results will help to shed some light on the ways in which poverty acts as a hindrance to access to justice for so many.

The research design adopted in the study was a descriptive desk study. The research process involved reading through numerous blog post entries, documents, journals, books and articles that relate to access to justice. A lot of focus was directed towards literature that focused more on developing countries, as their situations are closest to that of Kenya.

Key findings revealed that poverty, among other factors is a huge impediment to justice on Kenya. Some of the main factors that were seen to prevent the poor from accessing justice included: lack of information, economic costs, corruption, and overreliance on technical formalities, fear and mistrust, court delays as well as geographical causes. In addition to this, the budgetary restraints on the state counsel were found to have caused a shortage in the amount of legal representation offered by the state, which is a hindrance to access to justice for those who could not afford legal representation. The area of legal aid was also found to be lacking, which furthered the difficulty in accessing justice for the less fortunate in Kenya.

Conclusions drawn from the study confirm that poverty is in fact a great impediment to access to justice in Kenya, as it is in many other developing countries around the world, as well as in developed countries, to a lesser degree.

Recommendations for the improvement of access to justice for the poor focused mainly on the removal of court fees that hinder some from seeking justice from the court system, using alternative forms of dispute resolution, removal of any ambiguities for the law that bar access to justice as well as putting place legislation that deals with access to justice in



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conformity with the Constitution of Kenya 2010. Based on the findings of this study, further, more detailed studies are necessary on the influence of poverty on access to justice in Kenya.



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DEDICATION

I dedicate this work to my family. I could not have gone this far without your love, cooperation and untiring support.



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CHAPTER I: INTRODUCTION

1.0 BACKGROUND

The Constitution declares access to justice to be a fundamental right of all Kenyans. The law requires the state to ensure that access to justice is available to all persons, and, if any fee is required by the court, it should be one that is reasonable, affordable to all and not impede access to justice.¹

Many definitions of access to justice focus on outcomes and remedies rather than merely on institutions. Access to justice involves a framework of legal protection which should set out acceptable substantive and procedural standards.² This means that the basic underlying concept of access to justice is to protect the legal rights of individuals, and as such there should be some standards that are outlined to ensure that these rights are protected.

Access to justice also involves legal awareness on the part of providers and users.³ This means that there should be awareness, especially by the recipient or user of this concept of access to justice, of his or her rights, and the legal obligation of the state to ensure that these rights are available when needed, and that they are not infringed upon. With more specific regard to access to justice, a person should be aware of his or her right under the constitution⁴, as well as the various ways in which this right can be enforced.

Another aspect of access to justice is the availability of legal services needed to link needs to enforceable remedies, including legal aid and counsel.⁵ Legal aid can be described as free or subsidized and inexpensive legal assistance that is given by legal

¹ Article 48, Constitution of Kenya 2010

² *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, A report by the Danish

³ *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, A report by the Danish

⁴ *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, A report by the Danish Article

48, Constitution of Kenya 2010

⁵



professionals to persons who cannot afford it, but need it. Often, the situation to be contested needs a 50-50 percent chance of succeeding in the court to be considered for legal aid. Usually, legal aid is only afforded to those who do not have alternative funding options for legal counsel. It is also not allowed for cases relating to matters of wills inheritance, trusts or corporate matters, usually because it is assumed that the parties to such cases have alternative means of funding.⁶ The access to justice framework should include the possibility of legal aid for those who cannot afford legal counsel to enable them access the court systems and the remedies due to them if any. The government is charged with providing legal aid through their state counsel. However, in Kenya, this task is split between the government, Non-Governmental Organizations (NGOs) and some legal professionals who volunteer their services and time.

In addition, for access to justice to be fully present, adjudication of disputes should be fair and effective.⁷ All disputes should be presented before an impartial tribunal and an unbiased judgment or ruling rendered.

Finally, the remedies must be enforced whether the parties consider them favorable or not. The option for appeal by unsatisfied parties is also essential to access to justice.⁸

For the purposes of this research, however, it was important that access to justice was seen as a step-by-step process, and not merely a situation. For this process of access to justice to be said to be effectively running, it is important that people, especially those who cannot afford access to justice are able to have appropriate means to address their grievances and have enforceable solutions presented to them, as well as means of prevention in future. These grievances are addressed by the state or non-state institutions through the application of state, religious or customary law.⁹

⁶<http://thelawdictionary.org/legal-aid/> title="LEGAL AID" on 5 March 2015

⁷*Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, A report by the Danish*

⁸*Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011*

⁹<http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-to-justice/the-concept.html> on 15 February 2015



The Global Alliance against Traffic of Women (GAATW) has also posited several discussions on access to justice. According to them, traditionally, the term access to justice refers to opening up the formal systems and structures of societies to disadvantaged groups in society. This includes removing barriers, legal and financial, as well as social barriers, such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹⁰

The research paper sought to look into poverty, as an impediment to access to justice, for a large number of the people living in Kenya. Poverty, according to Bhandari, can further be broken down into three broad categories; Exclusion in terms of access to court, inequality in terms of treatment during the course of the trial and delay caused, and the uncertainty and non-uniformity during sentencing.¹¹

A visit to any of the law courts around Kenya causes one to realize just how much the social status of a person may affect their fundamental right of access to justice.¹² Many times, a person's financial status will prevent him from accessing the courts, and in the occasion that he is able to access the courts, other factors, like the mindset of the court, legal fees, court fees and illiteracy on how the court works will impede his fundamental right of access to justice. This is not as a result of absence of the relevant laws. There is, however, a disconnect between the law and theory, and what actually happens in practice.

¹⁰<http://www.gaatw.org/atj/> on 15February 2015

¹¹ Bhandari B, 'Law in Theory v Law in Action: Impediments to Access to Justice' *National Law School of India University 2*

¹² Kinuthia ML, Strathmore University, *Judicial Attachment Report: The Application of Legal Theories in the Practice of Law*, 2014



1.1 STATEMENT OF THE PROBLEM

It seems to be extremely difficult – almost impossible – for a substantially large number of the people in Kenya to access the courts, when they have had an injustice committed against them. This is because they cannot afford the process. There exists a big gap between the existing laws which grant access to justice to all Kenyans and actual access to justice. This research paper sought to look into the evidence that this gap exists as well as reasons for its existence.

1.2 JUSTIFICATION OF THE STUDY

The Constitution guarantees the right of access to justice as a fundamental right of all Kenyans.¹³ In addition, there are several other requirements and standards on legal aid which are derived from International Human Rights Law. The Universal Declaration of Human Rights¹⁴ (UDHR) states that anyone charged with a penal offence should be granted ‘all the guarantees necessary for his or her defense’. This has been interpreted in many fora to mean that an accused person should be entitled to legal aid.

Under the International Covenant on Civil and Political Rights (ICCPR)¹⁵, which is legally binding in Kenya, an obligation is created to ensure that an accused person has adequate time and facilities for preparation of his or her case, the right to be present and trial, to defend himself/herself or have legal assistance or if not, have state assigned counsel paid for by the state. In Kenya, an accused person is assigned state counsel, paid for by the state, if they have been accused of committing a capital offence and cannot afford their own counsel.

¹³ Article 48, *Constitution of Kenya 2010*

¹⁴ Article 11(1), *The Universal Declaration Of Human Rights* General Assembly Resolution 217 A (III), 10 December 1948

¹⁵ Article 14(d)(3), *International Covenant on Civil and Political Rights*, 1 May 1972



In the past there has been some research that has been done to benefit disadvantaged groups in their quest of access to justice, for example in Latin America¹⁶, Indonesia¹⁷, and India¹⁸ as well as by the United Nations (UN).¹⁹ However, there still has not been any research conducted to specifically address the difficulties faced by Kenyans, in their quest for access to justice.

1.3 STATEMENT OF OBJECTIVES

The purpose of this research was to:

1. Examine the concept of access to justice
2. Discuss poverty as a hindrance to access to justice, and more specifically as a barrier to access to the court system.
3. Compare the current laws on access to justice with those that have existed in the past, analyze whether there has been any improvement in access to justice for Kenyans.

¹⁶ Gargarella R, Access to Justice for the Poor: The Case of Latin America

¹⁷ Rollgejser M, Access to Justice: Empowering female heads of households in Indonesia

¹⁸ Galanter M & Krishnan J, "Bread for the Poor": Access to Justice and the Rights of the Needy in India

¹⁹ Carmona M & Donald K, Access to justice for persons living in poverty: A human rights approach



1.4 RESEARCH QUESTION

This research paper aimed to tackle the following research questions:

1. What is the concept and rationale behind access to justice?
2. Is poverty an impediment to access to justice for persons living below the poverty line in Nairobi, Kenya?
3. Looking at both past and current legislation relating to access to justice, has there been an improvement in the process of accessing justice for the poor?

1.5 LITERATURE REVIEW

Several authors have written on the topic of access to justice, the impediments to access to justice, and access to justice for the poor, but none have focused solely on access to justice for persons living below the poverty line anywhere. There have been almost similar studies, however, which have been done on access to justice for women heads of households in places like Indonesia and India. This paper focused primarily on the high cost of access to justice for many Kenyans.

Durkheim, in his study titled *Crime and Deviance*, posited that when individuals from a particular class of people (generally lower class) are selected for treatment as deviants, they create a permanent class of deviants²⁰. This occurs because of the discrimination they are subject to, on account of being labeled as deviants and hence accepted norms conflict with social reality. Even the innocent people in such a class get labeled as per their stereotype, which is contrary to the principle of ‘innocent until proven guilty,’ and this lack of access to justice may lead to perverse circumstances where citizens decide to take up the law in their hands.²¹ This research paper focuses on a group of people who may have been grouped in a class of “deviants”, and because of this stereotype, it is difficult for them to access justice. This research paper seeks to look further into this

²⁰ Durkheim E, *Deviant View of Deviance*

²¹ Giddens A, *Sociology*, 4th edition, Oxford: Blackwell Publishers Ltd, 2001



stereotypical classifications and whether they impede access to justice, especially for the poor.

Jill Cottrell in her book *Marginalized Communities and Access to Justice*, discusses the problems victims face while trying get access to courts or access to justice, even when the matter reaches a court.²² She further discussed the difficulties faced by various groups, including women, in their struggle for access to justice, and as they try to access the court systems in Kenya.

According to the Hansard, there are millions and millions of Kenyans who have problems that require access to justice, but cannot get justice because it is too expensive to litigate.²³ This has been said to be a big problem in Kenya that requires attention from the government as soon as possible.

The main jurisprudential theories behind the proposed research are the rule of law and the fundamental human rights that are made inherent to all persons by the law.

The rule of law is somewhat an ambiguous term that is interpreted in different ways for different purposes. However, the most basic definition of the rule of law is that individuals, persons and government shall submit to, obey and be regulated by law, and not arbitrary action by an individual or a group of individuals.²⁴ Based on this definition, every person is equal in the eyes of the law. As a result, access to justice is, therefore, a fundamental right equally inherent to all, regardless of any factors that may impede access to justice, like poverty. Therefore, justice through court processes should be made available to all people.

One of the oldest philosophies on human rights is that human rights stem directly from natural law. Natural law is the basic law within each individual that informs him on right and wrong. Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language,

²² Cottrell J, *Marginalized Communities an Access to Justice*, 2009, at 13

²³ Kenya National Assembly Official Record (Hansard), 29 June 1995

²⁴ <http://www.duhaime.org/LegalDictionary/R/RuleofLaw.aspx> on 23 February 2015



or any other status. Each person is equally entitled to his or her human rights without discrimination. These rights are all interrelated, interdependent and indivisible.²⁵

Under the Constitution of Kenya²⁶, access to justice is listed as one of the fundamental rights of all Kenyan citizens. According to the Constitution, the State has the duty to ensure that every person has the ability to access justice, whatever their financial situation may be. Consequently, every citizen of Kenya is entitled to his or her right of access to justice, without being subject to any discrimination. Moreover, the government of Kenya has an obligation to ensure that every Kenyan citizen can claim this right, and if there are any impediments to accessing justice, like poverty, the government is required to provide service that enable citizens access it.

²⁵<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> on 23 February 2015

²⁶ Article 48, Constitution of Kenya, 2010



CHAPTER II: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 INTRODUCTION

This chapter presents the perspective through which the topic of this research paper is examined. It establishes a vision through which the problem is directed, and form a basis on which the issues under study will be analyzed.

2.2 THEORETICAL FRAMEWORK

The two main jurisprudential theories behind this study are the rule of law and the fundamental human rights that are made inherent to all persons by the law.

2.2.1 Human Rights

Under the Constitution of Kenya 2010²⁷, access to justice is a fundamental human right, inherent in all Kenyan people. The state, under the constitution, is entrusted with the duty of ensuring that the right of every person to access justice is not impeded, and if any fee is required, the state must ensure that it is reasonable for all Kenyan persons.

2.2.1.1 What are Human Rights and what makes them fundamental?

Human rights are commonly understood as being those rights which are inherent to the human being.²⁸ Human rights are inherent in every single individual without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All persons are equally entitled to

²⁷ Article 48, Constitution of Kenya, 2010

²⁸ Human Rights, A Basic Handbook for UN Staff



human rights without discrimination. These rights are all interrelated, interdependent and indivisible.²⁹

Human rights law is the means through which human rights are legally guaranteed to all individuals, and through these human rights laws, persons are protected against actions which interfere with fundamental freedoms and human dignity. These human rights are usually espoused in treaties, customary international law, bodies of principles and other sources of law. Human rights law place an obligation on all states to put in place municipal laws that protect human rights. States are also prohibited from engaging in certain activities that go against human rights law. Involvement in such activities would lead to prosecution by international courts or tribunals, for example the International Criminal Court (ICC) which prosecutes war crimes and crimes against humanity. However, human rights are not an establishment of the law. The law has neither the ability, nor the power to create human rights. It can only protect them. Human rights are inherent entitlement that come to every person by virtue of being human.

Human rights are universal, inalienable, indivisible, interrelated and interdependent. This simply means that human rights apply equally to all persons and cannot be take away from a person, except under certain specific situations. For example, under the Kenyan constitution, has the right to free movement.³⁰ However, this right may be curtailed when a person is arrested and imprisoned with good reason. In practice, all human rights are interrelated and none is independent of the other. This means that the violation of right in most cases affects a number of other rights. Because of this interdependence and interrelation, all human rights should then be seen as being equally important and deserving the same level of protection from the law.

Human rights can further be classified as fundamental right, which are basically those rights that are guaranteed by a country to all its citizens, through a country's constitution. These rights usually have legal sanctions and can be challenged by affected individuals in a court of law. Fundamental rights are usually those that a country considers to be most important for its citizens, based on the situation in which the country is in. For example,

²⁹www.ohchr.org on 10th September 2015

³⁰ Article 39, Constitution of Kenya, 2010



in many developing nations, the right to water can be found to be a fundamental right, because of the difficulties faced by the citizens of these developing countries, while it may not be a fundamental right in developed countries, as water is more easily available to their citizens. Other fundamental rights in Kenya include the right to life,³¹ human dignity,³² and access to information³³ and the right to property.³⁴

The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and are subject only to the limitations contemplated in the Constitution.³⁵

There are several differences that exist between human rights and fundamental rights, first being that fundamental rights have sanctions. This means that when one's human rights are impeded by another individual, this person has the ability to seek legal recourse from the courts. Second, human rights are universally applicable, while fundamental rights are country specific. Fundamental rights are usually legislated based a lot on the history and culture of the country, and therefore can only apply to the specific country. Human rights on the other hand are fairly basic, to enable them apply to all human beings across the world, without any discrimination.

2.2.1.2 Access to Justice as a fundamental human right

The main reason behind having access to justice among the fundamental rights listed in the Constitution of Kenya 2010 is the historical injustices that were faced by the Africans during the colonial and early post-colonial periods.

³¹ Article 26, Constitution of Kenya, 2010

³² Article 28, Constitution of Kenya, 2010

³³ Article 35, Constitution of Kenya, 2010

³⁴ Article 40, Constitution of Kenya, 2010

³⁵ Article 19, Constitution of Kenya, 2010



Equal access to justice is a right that is based on human rights obligations. Equal access to justice guarantees that there is no exclusion based on any grounds, including lack of the required finances. Access to justice means that people are able to claim their rights, without experiencing any exclusion or inequality. Justice is among basic services that all persons should have access to. This is because, justice is the means through which persons can protect their rights, and the respect and protection of human rights is the way in which persons in any society are able to coexist harmoniously. A well-functioning justice system offers a mechanism to solve disputes without violence and weapons, but through fora like courts and tribunal, or even through more traditional forms of dispute resolution. The strengthening of access to justice is extremely important in all societies.

2.2.1.3 Access to Justice and Customary International Law

Access to Justice first appeared in customary international law as a subset of the law of state responsibility for injury to aliens.³⁶

2.2.2 Rule of Law

2.2.2.1 What is Rule of Law?

The rule of law is the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behavior, including the behavior of government officials. It is the supremacy of regular as opposed to arbitrary power.³⁷ To the layman, the rule of law basically means that, in the eyes of the law, all men are equal.

Historically, Rule of Law can be traced back to the 16th Century in Britain. After that, it was seen to be used more widely around the continent. The phrase, Rule of Law, was

³⁶ Francioni F, *The Rights of Access to Justice under Customary International Law*, 2007

³⁷ Black's Law Dictionary, 9th Edition, p. 1448



more 'codified' and popularized by a British Jurist, A.V. Dicey in the 19th Century, in his book, *An Introduction to the Study of the Law of the Constitution*, which was first published in 1885.

2.2.2.2 A. V. Dicey and the Rule of Law

In the 19th Century, Albert Dicey was credited with providing the logical foundation upon which the modern notion of the rule of law is based. He laid out his three principles of the rule of law³⁸;

1. Everyone is equal before the law.
2. No one can be punished unless they are in clear breach of the law.
3. There is no set of laws which are above the courts. D44

2.2.2.3 The Rule of Law and Access to Justice

The principle of access to justice states that all persons are equal before the law. Based on this definition, every person is equal in the eyes of the law. As a result, access to justice is therefore a fundamental right equally inherent to all, regardless of any factors that may impede access to justice, like poverty. Therefore, justice through court processes, should be made available to all people.

The idea that even rulers are ruled by laws has informed thinking about the use and abuse of power for a number of centuries. Key to this is an independent and impartial judiciary, and access to justice. Often times, persons are denied their right to access to justice due to poverty. This in turn has a negative effect on the Rule of law. The rule of law and legal empowerment contribute to an enabling environment for access to justice, especially for the poor and marginalized.³⁹

³⁸ Dicey A.V, *An Introduction to the Study of the Law of the Constitution*, 1885

³⁹ www.undp.org on 10th September 2015



2.3 RESEARCH METHODOLOGY

This research paper was a desk study. The research methods used for this paper were:

- Comparing both past and current laws and looking at how they are being implemented to improve access to justice. For one to properly establish where they are headed, it is important to look at their past, and learn from all that was done wrong. Therefore, this research paper compared and contrast past and current legislation, and the effects these legislations have had on access to justice.
- A desk study on numerous books, journal articles, lectures etc. on access to justice in various parts of the world, looking especially at poverty as an impediment to access to justice.

This research paper was limited to looking at persons who are unable to access the court system in Kenya due to financial reasons, and the difficulties that created these barriers.



CHAPTER III: POVERTY AND ACCESS TO JUSTICE

3.1 INTRODUCTION

This chapter presents an analysis and discussion of the concept and rationale behind access to justice. In addition, it provides a comparison of past and present legislation on access to justice in Kenya.

3.2 THE CONCEPT AND RATIONALE BEHIND ACCESS TO JUSTICE

One of the most commonly used definitions of access to justice posits that access to justice is a process through which dispute resolution mechanisms are provided to those in need of them. These mechanisms must be affordable, proximate and ensure speedy justice, as well as be easily understandable to their users.⁴⁰ When looked at in a broader context, access to justice includes issues to do with accessibility of the courts - including geographical location as well as accessibility for persons with disabilities – the language of the court proceedings, court fees and availability of all the necessary information.

Access to justice involves a framework of legal protection which should set out acceptable substantive and procedural standards. This means that the basic underlying concept of access to justice is to protect the legal rights of individuals, and as such there should be some standards that are outlined to ensure that these rights are protected.

Access to justice also involves legal awareness on the part of providers and users. This means that there should be awareness, especially by the recipient or user of this concept of access to justice, of his or her rights, and the legal obligation of the state to ensure that these rights are available when needed and that they are not infringed upon. With more specific regard to access to justice, a person should be aware of his or her right under the constitution⁴¹, as well as the various ways in which this right can be enforced.

⁴⁰ Muigua K, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*. See also, *Draft Report Audit of Laws on Access to Justice*, KLRC, March 2012

⁴¹ Article 48, Constitution of Kenya 2010



Another aspect of access to justice is the availability of legal services needed to link needs to enforceable remedies, including legal aid and counsel, which is free or inexpensive legal advice for persons who cannot afford it.⁴²

The access to justice framework should include the possibility of legal aid for those who cannot afford legal counsel to enable them access the court systems and the remedies due to them if any. The government is charged with providing legal aid through their state counsel. However, in Kenya, this task is split between the government, Non-Governmental Organizations (NGOs) and some legal professionals who volunteer their services and time.

In addition, for access to justice to be fully present, adjudication of disputes should be fair and effective. All disputes should be presented before an impartial tribunal and an unbiased judgment or ruling rendered.

Finally, the remedies must be enforced whether the parties consider them favorable or not. The option for appeal by unsatisfied parties is also essential to access to justice.⁴³

For the purpose of this research, access to justice has been taken not only to mean a mere situation, but a process as well. Access to justice exists if people, notably the poor and vulnerable who are suffering from various injustices have the ability to make their grievances to be listened to and to obtain proper justice of these grievances by state or non-state institutions, leading to redress of those injustices on the basis of rules or principles of state law, religious law or customary law and in accordance with the rule of law.⁴⁴

The Global Alliance against Traffic of Women (GAATW) has also posited several discussions on access to justice. According to them, traditionally, the term refers to opening up the formal systems and structures of societies to disadvantaged groups in

⁴²[LEGAL AID](http://thelawdictionary.org/legal-aid/ "LEGAL AID") on 5 March 2015

⁴³*Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011

⁴⁴<http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-to-justice/the-concept.html> on 15 February 2015



society. This includes removing barriers, legal and financial, as well as social barriers, such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.⁴⁵

3.3 POVERTY AS AN IMEDEMMENT TO ACCESS TO JUSTICE

According to Bhandari, poverty as one of the impediments to access to justice can further be broken down into three broad categories; Exclusion in terms of access to court, inequality in terms of treatment during the course of the trial and delay caused, and the uncertainty and non-uniformity during sentencing.⁴⁶

3.3.1 *Exclusion in terms of court access*

Exclusion here is taken to be in comparison to the more advantaged members of society and can be divided into two stages:

1. Physical exclusion which refers to prohibitive costs that make it difficult to appear before a court of law, or the mentality that the police have of those financially disadvantage people.
2. Material exclusion which refers to the scarcity of some resources such as good legal representation.⁴⁷

3.3.2 *Inequalities in terms of treatment during the course of the trial and delay caused*

Once the citizens get past the police, they come to the courts, where they are faced with seemingly insurmountable delays, legalese, difficult procedures and the lawyers who take them for a ride. Thus, they have to engage the services of a lawyer, who is generally not

⁴⁵<http://www.gaatw.org/atj/> on 15February 2015

⁴⁶ Bhandari B, 'Law in Theory v Law in Action: Impediments to Access to Justice' *National Law School of India University 2*

⁴⁷ Bhandari B, 'Law in Theory v Law in Action: Impediments to Access to Justice' *National Law School of India University 2*



as well-connected, powerful and effective. This affects the accused, in terms of ‘making the bail’ and getting released. But the bail aspect is a small part of the legal trial proceedings and the difficulties which the citizen is faced with. The larger problems deal with the delay in cases, which go on due to either absence of witnesses or accused, and because of the absence of legal counsel that cannot be afforded, or presence of poorly paid unmotivated counsel, little or no effort is put into remedying these situations.

One of the ways to circumvent this problem might be an increased awareness and use of alternate dispute resolution measures, which focuses on mediation, negotiation, conciliation, as well as traditional dispute resolution mechanisms (TDRMS).

3.3.3 Uncertainties and non-uniformity during sentencing

During the course of sentencing, there are several biases that come into play.⁴⁸ Judges ascribe to biases on the basis of stereotypes which relate to the physical attributes of the accused person, whether or not the accused person is seen to be a potential threat to society based on past actions, the perceived reason the accused may have had for committing the crime, and the judge’s disposition on the given day.⁴⁹

Many times, a person’s financial status will prevent him from accessing the courts, and in the occasion that he is able to access the courts, other factors, like the mindset of the court, legal fees, court fees and illiteracy on how the court works will impede his fundamental right of access to justice. This is not as a result of absence of the relevant laws. There is, however, a disconnect between the law and theory, and what actually happens in practice.

Kenya’s national (absolute) rural poverty line is set at 1,562 Kenya Shillings (Kshs) per month per person, while the urban line is 2,913 Kshs per month per person. Both estimates cover minimum food and non-food expenditures based on household

⁴⁸ Scrutton LJ, ‘How can a labour man and a trade unionist get impartial justice

⁴⁹ Bhandari B, ‘Law in Theory v Law in Action: Impediments to Access to Justice’ National Law School of India University 2



consumption data in the 2005-2006.⁵⁰In 2012, 46% of Kenya's population was living below the poverty line⁵¹, and 20% of these live in severe poverty.⁵²

These 46% are people who are unable to afford justice. This is slightly more than half of the 44 million people living in Kenya. This makes it difficult – almost impossible – for them to access the courts whenever they have any grievances. Though there are the necessary laws that have been put in place in the country, the application of these laws is lacking.

3.4 A COMPARISON OF PAST AND PRESENT LEGISLATION ON ACCESS TO JUSTICE

Under the Repealed Constitution of Kenya, there was no mention of access to justice. It was an issue that was dealt with more by Non-Governmental Organizations (NGOs), and any other group or individual that was concern about access to justice for the people. One example of these NGOs is Kituo Cha Sheria (KITUO). Kituo Cha Sheria is a human rights NGO that works tirelessly to help disadvantage persons in Kenya who cannot afford access to justice due to extreme poverty.⁵³ It was the first legal aid Centre established in Kenya in 1973. Kituo Cha Sheria was established by a group of advocates that realized that a large group of people went without having their grievances addressed, because of their inability to afford legal costs. KITUO's services are provided to the poor and marginalized through various strategies, which include the provision of legal advice, legal representation, litigation, and community mobilization and organization.

With the promulgation of the Constitution of Kenya 2010, several provisions relating to access to justice came into play.⁵⁴ Apart from Article 48 providing for the right to access

⁵⁰ KIHBS and KNBS poverty report 2007

⁵¹http://www.unicef.org/kenya/overview_4616.html on 17 February 2015

⁵² Abdulahi J, Poverty Assessment Kenya

⁵³ www.kituochasheria.or.ke, on 5th February 2016

⁵⁴ Article 48, Constitution of Kenya, 2010; See also, Schedule 5, Constitution of Kenya, 2010



to justice for all there are other provisions that are geared towards enhancing equal access to judicial and other administrative institutions and mechanisms for protection of rights, that adjudication of claims is fair, impartial, expeditious and effective and that those who are in violation are treated humanely and are given a reasonable chance to right their wrongs.⁵⁵ Article 22 obligates the Chief Justice to make rules to provide for the right of every person to access courts and seek the enforcement of rights or fundamental freedoms in the Bill of Rights that has been denied, violated or infringed or is threatened.⁵⁶ Article 22 (3) is geared towards ensuring that there are no factors that will impede access to justice when enforcing the Bill of Rights by ensuring that no fees are charged for commencing proceedings; removing the strict legal requirement of proving locus standi; minimizing procedural formalities, entertaining the commencement of proceedings on the basis of informal documentation and allowing experts to appear as friends of the court where necessary.

Access to justice is further guaranteed by articles 49, 50 and 51 providing for the rights of arrested persons, fair hearing and the rights of persons who are detained, held in custody or imprisoned respectively. Article 49 (1) (c) and 50 (7) seem to allow paralegals to intervene in court proceedings on behalf of the accused or victims which may improve access to justice in criminal justice as it is likely to enhance the role of paralegals in offering legal representation.⁵⁷

Article 50 (2) (h) provides for the right of every accused person to have an advocate assigned [...] by the State and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly.⁵⁸

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of that authority courts and tribunals shall be guided by principles, inter alia, that justice shall be done to all, irrespective of status.⁵⁹ By stipulating that “Justice shall be done to all, irrespective of status” Article 159 echoes the

⁵⁵ Muigua K, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*

⁵⁶ Article 22, Constitution of Kenya, 2010

⁵⁷ Article 49, Constitution of Kenya, 2010

⁵⁸ Article 50, Constitution of Kenya, 2010

⁵⁹ Article 159, Constitution of Kenya, 2010



right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also mirrors the spirit of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. To ensure that justice is done to all the concerns of the poor and vulnerable in the society need to be included in legislation, strategies, policies, programs, conception and design from the outset so that they do not fall through the cracks of justice reform.

Schedule Five of the Constitution provides for legislation to be put in place by parliament so as to give effect to Article 48 of the Constitution.⁶⁰ It should be noted that this legislation has not been enacted. The legislature should expeditiously enact a legislation which shall give effect to Article 48 of the constitution.

⁶⁰ Schedule 5, Constitution of Kenya, 2010



CHAPTER IV: DISCUSSION

4.1 INTRODUCTION

The objective of presenting the findings of the research in this section will be to present and explain the data/evidence. The research findings are further discussed and reviewed in this chapter.

4.2 FINDINGS/EVIDENCE AND DISCUSSION

Some of the factors that prevent the poor from accessing justice include:

First, lack of information is one of the main factors that prevent the poor from accessing justice. Among the many obstacles to justice, lack of information always ranks top. For example, in his classical study on the topic, Mauro Cappelletti referred to what he called the problem of “legal poverty” and considered it one of the most important obstacles to legal access. The poor lack basic information about their legal rights. The general problem of lack of information encompasses many subsidiary ones: not knowing what rights one has; not knowing where to go and what to do in order to demand one’s rights; not knowing the legal language and the legal procedures, etc.

Another major factor is economic costs. At least as important as the information problem are the economic costs of justice. In principle, these difficulties appear in all countries and affect all kinds of people. However, these problems are more serious in poor countries and for poor people. Poor countries tend to have more problems in guaranteeing decent minimum social protection and good education for all. At the same time, poor people are more likely to be unable even to initiate a legal process, let alone carrying it through. First of all, they would have to afford the high costs of paying a good lawyer and the court fees. It must be taken into account that without a good lawyer the chance of succeeding in a lawsuit is drastically reduced. Judges have to adjudicate in numerous cases that clearly exceed the capacity of even the most committed magistrate. In addition to the direct economic costs, there is a plethora of smaller costs that all poor clients have



to meet. They may need to travel long distances to the towns where the courts are normally located and “survive” there while completing the formalities; they need to pay to obtain basic documents. These items may not count as obstacles for most people but could represent serious barriers for the poor.

In addition to that, corruption is another major factor that bars the poor from accessing justice. Justice is costly in many different ways, but particularly in an economic sense. However, economic costs are not only those normally associated with setting the machinery of justice into motion. It is a widespread perception in Africa, and in Kenya that justice is costly because it requires additional money to “guarantee” a favoured outcome. This perception leads many people to think that justice can only be obtained by rich people; wealth and justice become closely associated. Jorge Correa Sutil points out that in poor countries poor people stand a lesser chance of legal redress than do rich people, given the way in which the legal process is organized. Rich litigants, Correa maintains, make it more difficult for the poor to obtain justice, because the latter are unable to accede to diligent lawyers or to ensure the informal payments that are necessary for speeding up the legal steps of the cases.⁶¹

Furthermore, an overreliance on technical formalities by the courts hinders a majority of the less fortunate people from seeking justice from the courts. The administration of justice is distinguished by excessively formalistic and bureaucratic procedures that transform justice into something exclusive, which only “experts” can understand. The legal language is so complex that even well educated people find it difficult to understand. This fact not only excludes most citizens from the legal world but also reinforces existing inequalities in various ways, making it mandatory to pay for an experienced lawyer. Clearly, within this formalistic context, a lawyer will perform better when he or she knows how to deal with these complexities and how to exploit them to his or her advantage. Therefore, the outcome of a case commonly depends not on questions of substantive justice but rather on procedural matters and formal subtleties. A criminal may be released or a debt forgiven owing to the clever exploitation of formal details. To understand the depth of this problem, however, one should not reduce it to a matter of

⁶¹ Sutil, J.C, ‘Access to Justice and Judicial Reforms in Latin America, 2000



language. The formalities of justice transcend legal rhetoric and extend to the way in which lawyers and justices dress or behave, even to the structure and architecture of the courts themselves, which are commonly known as “palaces of justice”. Ultimately, all these formalities contribute to establishing barriers against the people and to reinforcing the perception that justice is not for all.⁶²

Another one of the factors that prevent the poor from accessing justice is fear and mistrust. Other important factors bearing on the reluctance of the poor to litigate in the courts – very much connected with the previous two – include fear and mistrust of the justice system. The poor are inclined to fear different kinds of abuse of authority. Some public officers may use the presentation of the poor in the courts as a pretext for prosecuting them; others may take the opportunity to humiliate the poor during trial; some judges/magistrates may opt to rule against the poor out of sheer class prejudice. On this basis, the poor may reasonably conclude that to bring a case before the tribunals may not be a good idea. It might be wiser for them to remain quiet, acquiescing in their fate.

The extreme court delays that are experienced in almost all cases also contribute to the reduced access to justice for the poor. One of the most common answers to questions about reluctance to go to court is inordinate delay. The courts take a lifetime to decide a case. Court delays derive from numerous circumstances, some of which are understandable in principle, while others are not. For example, it is true that on many occasions, there are too few judges and magistrates, whose workloads are too heavy; they lack both adequate equipment and assistance in their work. It is also true, however, that on other occasions judges simply do not care about the urgent needs of poor claimants, or prefer to direct their attention to other cases, which may be more important in terms of prestige or power. Whatever the reasons, court delays discourage people who are in need of help from seeking redress and aggravate their situation.

Finally, geographical causes play a significant role in the prevention of access to justice for the poor. In many parts of Kenya, the courts are located in the bigger towns, or the capitals of the counties. Thus, those living in less populated areas – usually in rural districts – or in the periphery of the main cities and towns, do not have easy access to the

⁶² Thomas, J, ‘Access to Justice and Equity: A study of seven Latin American countries’, 2000



tribunals. For example, a woman living in Mai Mahui, in Nakuru country, would have to travel about 150 kilometres to Nakuru to access a court. These geographical obstacles often take on major proportions, because travel costs are significant and need to be paid repeatedly, whenever the legal process requires. Also, one has to take into account that for many people the trip downtown is emotionally taxing: the city is an unfamiliar environment and arriving there may become a problem in itself. This point is particularly important because it suggests how the judicial system was originally conceived. The underlying idea was not to develop it from the people to the judges, quite the opposite. Even worse, the idea was not to spread the tribunals throughout the country in order to reach all the people, particularly the weakest segments of the population. Rather, it seems that the tribunals were “planted out there,” just for those who are able to reach them.

4.3 OPPORTUNITIES FOR IMPROVING ACCESS TO JUSTICE

Most poor people are facing and will continue to face problems when seeking justice. This, however, does not mean that the poor have no alternative means of confronting the violation of their fundamental right of access to justice.

Gargarella posits that there is a formal and an informal legal approach with regard to improving access to justice.⁶³ Informal legal approaches refer to means not provided by the central government, but used by the underprivileged in order to prevent or remedy the violation of their rights. An example of an informal legal approach in Kenya are the traditional dispute resolution mechanisms (TDRMs). On the other hand, formal legal approaches include those offered and administered by the state. Informal approaches have been adopted in many different countries, either due to the incapacity of the state to administer justice in certain areas, to the “absence” of the state, or to the people’s dissatisfaction with the ways in which the state was administering justice.

4.4 LEGAL AID AND ITS IMPACT ON ACCESS TO JUSTICE

⁶³ Gargarella, R, “Too far removed from the people “Access to Justice for the Poor: The Case of Latin America”



The provision of legal aid has been promoted as an effective means to ensure access to justice for the less fortunate, the right to legal counsel and the right to a fair trial. Ensuring access to affordable legal representation and adequate legal aid is often a determinant in access to justice for the poor, and has proven particularly useful in helping overcome practical and economic barriers.⁶⁴

Under the current Constitution of Kenya, an accused person has the right to have an advocate assigned to him/her by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.⁶⁵ Ideally, access to legal aid should be facilitated in both criminal and civil cases, whether the person is a complainant or a defendant. However, due to the restraint caused by the budget, state counsel in Kenya is only provided for capital offences.

Ensuring access to legal aid is but one possible solution. The quality of legal advice and representation obtained through such aid is equally important. Those who need legal aid usually come from disadvantaged or particularly vulnerable groups. Case-handlers may not be aware of the issues faced by such persons, which can lead to a failure in presenting evidence, or in an inability to establish a relationship of trust. The impact of budgetary restraints in a context of financial and economic crisis may also negatively impact the quality of such legal representation. In particular, the introduction of fixed fees instead of charging by the hour can lead to situations where lawyers will not be paid for the hours needed to represent clients in complex cases. This can translate into a discouragement to diligently represent the client.⁶⁶

⁶⁴ GEC, Equal Access of Women to Justice, 2013

⁶⁵ Article 50 (2)(h), Constitution of Kenya, 2010

⁶⁶ GEC, Equal Access of Justice for Women, 2013



CHAPTER V: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The objective of this final chapter is to provide a concise review of the research findings that have been outlined in the previous chapters, as well as to make several recommendations of solutions that could be implemented in future, to improve access to justice for the poor in Kenya.

5.2 RECOMMENDATIONS

Some of the recommendations that have been brought forward on how to improve access to justice in in view of the current constitutional provisions on access to justice include:

1. Schedule Five of the Constitution provides for legislation to be put in place by parliament so as to give effect to Article 48 of the Constitution. The legislation contemplated in Schedule Five should be enacted and all laws dealing with access to justice brought into conformity with the constitution and that Act.⁶⁷
2. There is need for the enactment of legislation to make provision for the use of ADR and TDRM in the resolution of conflicts and the proper linking of these mechanisms with the courts. This Act will consolidate and harmonize all laws touching on ADR and TDRMs.⁶⁸
3. Amendment and review of all sectoral laws relating to access to justice should be done forthwith so as to remove ambiguities and other barriers to access to justice.⁶⁹ Review of the laws relating to access to justice will also consolidate and harmonize them in line with the constitution. This will be geared towards meeting the constitutional threshold in relation to access to justice.

⁶⁷ Muigua K, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*

⁶⁸ Muigua K, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*

⁶⁹ Muigua K, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*



4. Procedural technicalities and other procedural barriers including some evidential rules applied in court should be reviewed forthwith.⁷⁰
5. There is need for a comprehensive national policy on access to justice to consolidate and harmonize the activities of the various actors offering legal aid and awareness in the nation.⁷¹ This will implement the provisions of Article 59 (2) and (4) of the Constitution.⁷²
6. In the long run government should provide the necessary funding for the construction of courts in major towns and at least a High Court station in every county.⁷³ That is devolution of legal services to the devolved units as envisaged under Article 174 of the constitution. This will bring justice closer to the people and hence overcome geographical barriers to access to justice. The judiciary is doing pretty well in building more court stations and using mobile courts.⁷⁴
7. The court infrastructure should be constructed in such a way that it considers the special needs of persons with disabilities. Regard should also be had to providing services needed by the deaf and blind persons in using court facilities.⁷⁵
8. The language of courts both the superior and magistrates courts should be both English and Swahili. This will ensure that even the illiterate can access the courts.⁷⁶
9. Judicial training will be essential in equipping judges, magistrates and other judicial officers with the pertinent knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT, environmental law and ADR and traditional dispute resolution mechanisms.⁷⁷

⁷⁰ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷¹ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷² Article 59 (2),(4), Constitution of Kenya, 2010

⁷³ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷⁴ Article 174, Constitution of Kenya 2010

⁷⁵ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷⁶ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷⁷ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution



10. Civic education will be quintessential especially among the poor and vulnerable groups based in the rural areas, where there are very few legal clinics, advocacy groups and civic educators so as to strengthen and expand their presence.⁷⁸
11. There should be the possibility of incorporating the provision of legal aid as part of the mandatory curriculum in law schools. This has remained a major shortcoming in legal aid provision. This would provide law students with invaluable practical experience, but above all it would drastically increase the amount of available volunteers providing legal aid. It would also contribute to raising community awareness and perhaps incentivize students to return to this line of work later on.⁷⁹

5.3 CONCLUSION

From the findings discussed above, one could conclude that poverty is in fact a huge impediment to access to justice for many in Kenya. In this case, poverty does not only apply to those living below the poverty line, but many who make a decent living but are unable to afford access to justice.

Based on the findings of this study, further, more detailed studies are necessary on the influence of poverty on access to justice in Kenya.

⁷⁸ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution

⁷⁹ Muigua K, Improving Access to Justice: Legislative and Administrative Reforms under the Constitution



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