

## Enhancing Access to Justice through Law School Legal Aid Clinics: The Dual Role

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### ABSTRACT

*The need for justice in Kenya is ever growing with a large number of Kenyans being in a situation that requires a responsive justice system. However, indigent people are unable to have their legal needs addressed due to high costs of legal services. Most people are unaware of their rights and processes of seeking legal redress when violations occur. Although the Constitution safeguards the right to access to justice, the reality is that the disadvantaged people cannot access justice, afford legal representation, are unaware of their rights and redress mechanisms. Everyone is entitled to equal access to justice. Legal aid is important bridging the gap between the haves and have nots in accessing justice. The Legal Aid Act No. 6 of 2016 recognizes University legal aid clinics as legal service providers through provision of legal advice, representation, drafting of documents and legal literacy and enforcement. This paper looks into the challenges the indigents face in accessing justice and how University legal aid clinics can be used to mitigate the problem. This paper looks at Egerton University Faculty of Law Legal Aid Project (FOLLAP) as a case study in analysing the dual role legal aid plays in legal education. The primary argument made is that effective clinical legal education is attainable through efficient programmes for students under guidance of qualified practitioners. In doing this, the paper examines functional roles of legal aid clinics in other jurisdictions with legal aid for purposes of borrowing lessons intended to strengthen legal aid provision in Kenyan institutions of higher learning.*

**Key Words:** access to justice, indigent, university legal aid clinics, legal aid, pro bono lawyers, foreign legal services delivery, Kenya, foreign jurisdictions, and best practices

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## INTRODUCTION

Access to justice is a cardinal principle of the rule of law. It denotes a fair trial and the right to effective remedy.<sup>1</sup> This definition envisages an ideal situation where citizens know their rights, can access justice institutions and that justice systems are fair and administers justice without discrimination. It also paints a picture that the costs are affordable to all and therefore access is equal to all. This is the converse in reality, as in most cases, the majority of the world population are poor and cannot afford the costs associated with the justice system with far reaching outcome<sup>2</sup>. Several factors limit full access to justice including poverty, limited access to lawyers and lack of knowledge of legal proceedings among others<sup>3</sup>. Access to justice for the indigent is an issue that must be interrogated if the principle of equality for all before the law is to be upheld. The international community has addressed issues of access to justice as a fundamental human right through a raft of legal and policy frameworks, including, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of all forms of Discrimination Against Women, Maputo Protocol on the Rights of Women of Africa and the 2030 Agenda. These instruments and standards recognize access to justice as both a basic human right and a means to protect other universally recognized human rights. In particular Article 11, of the UDHR, the core Instrument on human rights that others stem from, recognizes legal aid as a foundation for the enjoyment of other rights including the right to fair trial that safeguards fundamental fairness and public trust in

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<sup>1</sup> United Nations and the Rule of Law, *Thematic Areas- Access to Justice*. Available at <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>>accessed on 1 March 2021.

<sup>2</sup> United Nations Department of Economic and Social Affairs Division for Social Policy and Development The International Forum for Social Development (2006) Social Justice in an Open World the Role of the United Nations notes that the majority of the world population are poor and cannot afford the costs associated with the justice system pg 1 available online at <https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>. See also World Bank (2021) Understanding Poverty available at <https://www.worldbank.org/en/topic/poverty/overview> accessed on 15 April 2021; See also World Bank Poverty and Shared Prosperity 2018 available at <https://www.worldbank.org/en/publication/poverty-and-shared-prosperity-2018> accessed on 15 April 2021. Despite the tremendous progress in reducing extreme poverty, rates remain stubbornly high in low-income countries and those affected by conflict and political upheaval.

<sup>3</sup> Office of the Attorney General and Department of Justice (2017) *National Action Plan on Legal Aid 2017-2022 Kenya Towards Access to Justice for All*, pg. 5.

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the criminal justice system<sup>4</sup>. The other instruments also impose obligations on governments and the legal profession to ensure that everyone has access to counsel regardless of their means or background to protect the right to equality before the law<sup>5</sup>.

One of the strategies governments have devised to ensure access to justice for the indigent and marginalized population is the integration of legal aid provisions in their national constitutions and statutory law. To fulfil her international and national obligations, the Constitution of Kenya, has a progressive bill of rights that integrates access to justices as a cardinal principle of the rule of law. Article 48 for instance, guarantees every individual the right to access justice. The specific manifestation of this right is evident in several provisions, including, Article 49 (1) (c) which proffers to accused persons the right to communicate with an advocate<sup>6</sup> Article 50 (2) (h) is significant in that it gives an accused person in a criminal trial, the right to have an advocate assigned to him or her at the state expense.<sup>7</sup> Several legislation such as the Legal Aid Act<sup>8</sup>, the Children's Act<sup>9</sup>, Persons with Disabilities Act<sup>10</sup>, Criminal Procedure Code,<sup>11</sup> and Persons Deprived of Liberty Act<sup>12</sup> also recognize legal aid as a way for marginalized and vulnerable members of the community to seek justice.

The enactment of the Legal Aid Act in 2016 expanded the scope and nature of legal services provided to include legal advice, representation, alternative Dispute Resolution, legal drafting, provision of legal information and law-related education, recommending law reform and undertaking advocacy work on behalf of the community<sup>13</sup>. Further, legal aid has been made available to groups of people beyond accused persons, resulting in vulnerable groups, including, women, children, persons with disabilities and indigent having better access to justice.

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<sup>4</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 11 (1).

<sup>5</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013 (A/67/458)) adopted by the General Assembly (AG) adopted during its 60<sup>th</sup> Plenary Meeting 20 December 2012.

<sup>6</sup> Constitution of Kenya 2010.

<sup>7</sup> Constitution of Kenya 2010.

<sup>8</sup> Legal Aid Act No. 6 of 2016.

<sup>9</sup> Children Act, Chapter 141, Laws of Kenya.

<sup>10</sup> Persons with Disabilities Act, No. 14 of 2003.

<sup>11</sup> Criminal Procedure Code, Chapter 75, Laws of Kenya.

<sup>12</sup> Persons Deprived of Liberty, No. 23 of 2014.

<sup>13</sup> Legal Aid Act No. 6 of 2016, sec 2.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa includes a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academic institutions<sup>14</sup>. Further, Paragraph 4 (f) of The UN guidelines and principles recognize the contributions of paralegals, law students and civil society organizations as key actors in legal aid provision services.<sup>15</sup> At the national level, The Legal Aid Act recognizes University ran legal clinics as legal service providers giving law students the opportunity to enhance their practical legal knowledge while providing legal assistance to indigent persons. It is this recognition of law students as actors in legal provision that provides an entry point for law schools or institutions providing legal education to fill the gap in enhancing accessing to justice for the marginalized, the domain of this paper.

This seeks to interrogate the role of law schools, through legal aid programmes, in meeting the justice needs of the community. Egerton University Faculty of Law Legal Aid Project (FOLLAP) is used as a point of reference to demonstrate how law students can be or have been used to provide legal aid in the community, through a critical assessment of its strengths and challenges. Reference is also made to other jurisdictions for purposes of gauging what best practices exist and what can be learnt and borrowed from them. Such lessons are useful in making legal aid services within institutions of higher learning beneficial to the students and the community they serve. They can also generate policy recommendations for reform.

### **Research Methodology**

This was desktop research on the role of university legal aid clinics in enhancing access to justice. It relied on both primary and secondary data. Primary data was obtained from treaties, conventions, protocols, domestic statutes and statutes from other jurisdictions. Reference was made to secondary data available in books, policies, government reports, journal articles, internet and newspapers, commission reports, policy documents among others, to highlight interventions, gains and challenges and

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<sup>14</sup> Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, November 2004, s 1.

<sup>15</sup> UN Principles and Guidelines on Access to Justice to Legal Aid Guideline No. 4 Para 4(f).

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recommendations and the way forward. Additionally, it relied on experiential data from the FOLLAP. FOLLAP has been in operation for a year now and therefore uses data obtained while providing legal aid services as a source of information for this paper.

### Theoretical Perspective and Conceptual Linkages

Legal education institutions provide opportunities for students to learn and act as stepping stones to legal practice and judicial engagement. This often happens after students pass the bar exams and are admitted to the Roll of Advocates, a journey that is not accomplished overnight. It requires rigorous training which includes hands on exposure that legal aid clinics promise. According to Stromsem, legal education in most countries is insufficient due to expanding needs of citizens, resulting into slow adoption of education models that stress practical methods of instructions as a complement to theoretical alternatives<sup>16</sup>. Manteaw attributes the problem to the historical development of legal education in Africa and its emphasis on the inherited colonial system. The system not only “facilitated the profession’s loss of touch with local realities and with the needs and aspirations of the poor majority” but also revealed “grave inadequacies in the ... legal training that prepared these lawyers for practice in Africa<sup>17</sup>. This inevitably explains structured resistance to *pro bono* lawyering and indeterminate reception of such services. Introducing legal aid or clinical studies in the university law schools has therefore become imperative and finds anchor in human rights principles. It exposes students to the world's legal problems that may inculcate the duty to give back to the community upon completion of the advocates training program.

In proposing the integration of legal aid in law schools, this paper adopts human rights-based approach in its analysis of legal aid services. Legal aid is a concept anchored in international human rights standards which are geared towards promoting and protecting human rights by identifying rights holders and their entitlements as well the corresponding duty bearers and their obligations. This brings to the fore the state’s duty to provide legal aid to the marginalized through the established systems and recognized institutions, such law schools under the Legal Aid Act. This approach is likely to ensure

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<sup>16</sup> Jan Stromsem, *Africa Regional Rule of Law Status Review* (Washington, DC: USAID 2009) 58. Retrieved from: [http://pdf.usaid.gov/pdf\\_docs/PNADO804.pdf](http://pdf.usaid.gov/pdf_docs/PNADO804.pdf) . accessed on 9 March 2021.

<sup>17</sup> Samuel Manteaw, “*Legal Education in Africa: What Type of Lawyer Does Africa Need?*”, 39 *McGeorge, L. R.* (2016) p. 916 available online at <https://scholarlycommons.pacific.edu/mlr/vol39/iss4/> .

mechanisms for ensuring access to justice and essential information, effective participation including representation.

Linking legal aid to human rights offers possibilities of providing legal services to the needy to fulfil their basic rights and to access justice without hindrance. According to the Inter Parliamentary Union,<sup>18</sup> human rights are inherent in all human beings and define relationships between individuals and power structures, especially the State. Additionally, human rights delimit State power and require States to take positive measures ensuring an environment that enables all people to enjoy their human rights<sup>19</sup>. Over the years legal aid has been increasingly considered as a basic human right through national, regional and international legal frameworks. It is considered as an important element of access to justice necessary for attainment of equality, development and peace<sup>20</sup>.

This paper also adopts theory of change in clinical legal education in its analysis of the dual role of legal aid. The goal of clinical legal education is to teach creative lawyering, social justice and fairness among others.<sup>21</sup> It is therefore imperative that clinical legal education be enhanced to enable law students to be client-centred, to improve interviewing skills and to grapple with their roles as lawyers in relation to their clients, the legal system and the greater community<sup>22</sup>. Theory of change articulates explicitly how a project is intended to achieve outcomes through actions<sup>23</sup>.

Universities must have objectives for establishing legal clinics, which is, to enhance access to justice for the marginalized while providing experiential learning to its students. This creates a link between legal aid and the theory

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<sup>18</sup> Inter Parliamentary Union & OCHR 2016 Human Rights Handbook for Parliamentarians HR/PUB/16/4 (UN)19.

<sup>19</sup> *ibid.*

<sup>20</sup> Magdalena Sepulveda, *From Underserving Poor to Right Holders: A human Rights Perspective on Social Protection Systems* 2014, UNRISD, ILO, ECLAC, OCHR UN WOMEM, UNICEF UNAIDS UNECA; See also Kate Donald & Magdalena Sepulveda 2014 *Access to justice for persons living in poverty: a human rights approach* UNRISD, ILO, ECLAC, OCHR UN WOMEM, UNICEF UNAIDS UNECA.

<sup>21</sup> Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education* (13 Am. U. J. Gender Soc. Poly and L. 161 2005).

<sup>22</sup> *ibid.*

<sup>23</sup> Laing K and Todd L, *Theory-Based Methodology: Using Theories of Change in Educational Development, Research and Evaluation* (Research Centre for Learning and Teaching, Newcastle University 2015).

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of change, in that, a university must identify the goals and objectives of the legal clinics and, identify the activities that will enable them achieve the said goals and objectives. Theory of change is important in the development and running of legal aid clinics as a guiding tool for achievement of goals and objectives.

The question is how access to justice can be enhanced to the marginalized and poor and to what law schools can do within their spaces to make justice a reality to the vulnerable. It also questions the legal frameworks available promoting use of academic institutions in this endeavour and the role that it serves to both the students and the community. In the quest to answer some of the questions, the paper analyses obligations, inequalities and vulnerabilities that impact on human rights and which necessitate interventions through legal aid. It also sheds light on the constitutive element what legal aid from a legal education perspective for a better understanding of the services needed and advocacy for policy recommendations and law reform.

### Historical Development of Legal Aid

Legal Aid was introduced in Kenya in 1973 through the establishment of Kituo Cha Mashauri, later named Kituo Cha Sheria, where students from University of Nairobi, Faculty of Law and the Law Society of Kenya would offer free legal advice and education to poor Kenyans<sup>24</sup>. With time, other organizations started to offer free legal aid services such as FIDA-Kenya which was established in 1985, offering services to many women and their children<sup>25</sup>. In May 1998, the Attorney General's Office with other stakeholders established a Legal Aid Steering Committee tasked with developing a legal aid scheme. The Committee came up with the Legal Education and Aid Pilot Programme in 2001<sup>26</sup>. This is the basis of the Legal Education and Aid Programme within Kituo Cha Sheria whose functions include provision of legal services to walk

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<sup>24</sup> Kituo Cha Sheria-Legal Advice Centre, Our History. Available at <http://kituochasheria.or.ke/about-us/#1455270259386-be23d72a-a9f2>, accessed on 29 September 2020.

<sup>25</sup> FIDA KENYA, *About FIDA-Kenya*, available at <https://fidakenya.org/site/history>, accessed on 29 September 2020.

<sup>26</sup> Caroline Amondi, Legal Aid in Kenya: Building a Fort for Wanjiku in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and The New Constitutional Order in Kenya*, 2014.

in clients and through mobile clinics, and training community groups and paralegal officers in order to enhance their capacity in legal aid work<sup>27</sup>.

The National Legal Aid and Awareness Programme (NALEAP) was established in 2007 by the then Ministry of Justice National Cohesion and Constitutional Affairs. The role of NALEAP was to advise government on matters of access to justice for the establishment of a national legal aid scheme<sup>28</sup>. National Legal Aid and Awareness Steering Committee was also established to oversee and coordinate the programme for legal aid provision in Kenya<sup>29</sup>. The 2010 Taskforce on Judicial Reforms noted that legal aid was only available to persons charged with murder<sup>30</sup>. The Taskforce recommended a policy and legislative framework for the establishment, adoption and implementation of a national legal aid system., and for judicial officers to ensure the vulnerable are accorded a fair hearing<sup>31</sup>.

Kenya Vision 2030 is a development programme whose goals include enacting and implementing a legal and institutional framework that is key in promoting fair, affordable and equitable access to justice.<sup>32</sup> The 2<sup>nd</sup> Medium Term Plan of Vision 2030 seeks to implement legal aid and education in Kenya through operationalization of a country-wide legal aid scheme, legislation of the Legal Aid Bill and development of legal aid guidelines<sup>33</sup>. Further, it recognizes the need to develop a regulatory framework for legal aid and to enhance the capacity of non-state actors<sup>34</sup>.

The enactment of the Legal Aid Act in 2016 provided an opportunity for the poor and vulnerable to access Justice. It expanded the type of persons who can access free legal aid and the services provided<sup>35</sup>. The Act acknowledges other legal service providers such as university legal clinics as major contributors to access to justice for the indigent<sup>36</sup>. Even though universities

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<sup>27</sup> Kituo Cha Sheria, Legal Aid and Education (LEAP) Programme available at: <http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/>, accessed on 29 September 2020.

<sup>28</sup> National Action Plan, Legal Aid 2017-2022, Kenya.

<sup>29</sup> *ibid.*

<sup>30</sup> Government of Kenya, *Final Report of the Taskforce on Judicial Reforms* OUKO Report (July 2010).

<sup>31</sup> *ibid.*

<sup>32</sup> Republic of Kenya, Vision 2030 (Popular Version), 2007.

<sup>33</sup> Republic of Kenya, Vision 2030, Second Medium-Term Plan, 2013-2017.

<sup>34</sup> *ibid.*

<sup>35</sup> Legal Aid Act, No. 6 of 2016, sec 2.

<sup>36</sup> *ibid.*



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like Moi University legal aid programme under Ampath provided legal aid in specific cases, there was no proper legislation that properly acknowledged the role of universities in providing legal aid services.

As a process of operationalizing the Legal Aid Act, the National Action Plan Legal Aid 2017-2022 (NAP) was launched with broad objectives to strengthen frameworks for policies, laws and administrative processes to ensure quality access to justice<sup>37</sup>. Other objectives were to provide quality legal services to the marginalized and to enhance access to justice through legal aid<sup>38</sup>. It is important to note that the NAP is a very progressive document with a full-fledged implementation matrix stipulating roles and responsibilities of every actor in the provision of legal aid services in Kenya. The historical background of legal aid in Kenya demonstrates Kenya's commitment to ensure all its citizens' rights to access to justice. Through collective contribution of the State and non-state actors, access to justice for all can be realized.

### **Legal Aid, Legal Clinics and the Law**

Kenya has signed, acceded to and ratified, without reservation, various international instruments, covenants, conventions and declarations that protect and promote human rights and access to justice. Being a state party to such international instruments, the country therefore is under an obligation to adhere to their provisions particularly in provision of legal aid services. International frameworks provide minimum rights standards that governments must uphold. Public universities being part of government are bound by the standard under the principle of due diligence to ensure justice for all. *Article 13 (3)(d)* of the ICCPR which mandates states to provide legal assistance for persons charged with criminal offences, including legal aid, for those who cannot afford to pay. *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012* guide member states on the principles on which a legal aid system in criminal justice should be based on. Principle 1 obligates states to guarantee the right to legal aid in their national legal system and in their constitutions. Principle 14 recognizes the contribution of university legal clinics and requires member states to recognize and encourage university law schools and other non-state legal aid providers in providing legal aid. This is an important provision in so far as anchoring legal aid in curricula in the universities and use that opportunity to provide legal aid using the students. It is imperative given consistency of student population at admission and consistency in legal aid provision.

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<sup>37</sup> National Action Plan, 2017-2022.

<sup>38</sup> *ibid.*

*The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, particularly rule 61 (3) requires prisoners to have access to effective legal aid. *The Basic Principles on the Role of Lawyers (1990)*, the third principle obligates member states to provide sufficient funding and other resources for legal services to the poor and other disadvantaged persons with the cooperation of professional associations of lawyers who are required to organize and provide legal services, facilities and other resources. It therefore imposes a duty on governments to establish funding schemes that legal aid actors can draw from to roll out legal aid activities in their institutions.

Other instruments include: Article 8 of the *UDHR* which guarantees everyone a right to an effective remedy by competent national tribunals for acts violating the fundamental rights. Similarly, Article 2 (c) of *CEDAW* mandates states to establish legal protection of the rights of women on an equal basis with men. Article 37 (d) of the *Convention on the Rights of the Child* obligates States to protect children deprived of their liberty, including right to access legal aid and appropriate assistance.

Regionally, there are instruments that also advocate for access to justice for all including legal aid. For instance, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)* recognises the right of an individual to legal assistance at no cost where the interests of justice so require. Article 8 of the *Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa (2003)* requires member states to ensure effective access to judicial and legal services, including legal aid by women. Additionally, they are required to support local, national, regional and continental initiatives directed at providing women access to legal services including legal aid through various institutions such as schools of law.

Paragraph 1 of the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004)* encourages states to adopt measures and allocate sufficient funds for the delivery of an effective legal aid system that ensures indigent persons especially women and children access justice. The Declaration at paragraph 3 stipulates that a legal aid program should provide legal assistance at all stages of the criminal process. Paragraph 9 mandates governments, the private sector, and development partners to appropriate funds, provide professional services and establish infrastructure to satisfy community needs in the long-term. Such requirements can work if the university legal clinics are sufficiently funded to roll out legal aid activities.

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*The Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of 2004*, recognizes that legal aid reduces excessive and arbitrary pre-trial detention, improves the administration of justice, increases public trust in justice and can boost socio-economic development at the family and community level. Its recommendation calls upon legal aid providers to continue providing meaningful legal aid to indigent persons and for systems to utilize legal service providers and develop partnerships with each other in order to facilitate access to legal aid for indigents. Article 17 (2)(c)(iii) of the *African Charter on the Rights and Welfare of the Child (1999)* obligates member states to provide legal assistance to children criminal offenders and other assistance in preparation of their case where they cannot afford services or lawyers.

At the national level, there are also legal frameworks addressing legal aid and access to justice. For instance, Article 50 (2) (g) of the Constitution provides that an accused person has a right to choose and be represented by an advocate and to be informed of this right. Article 50 (2) (h) obligates the state, at its expense, to have an advocate assigned to the accused person if substantial injustice would otherwise result, and to be informed of this right promptly.

*Section 2 of the Legal Aid Act*, gives statutory recognition to Universities legal aid clinics and other institutions operating legal aid clinics as legal aid providers. Section 7 (i) requires the National Legal Aid Service to promote, and supervise the establishment and working of legal aid services in universities, colleges and other institutions. Section 36 (1) has made Legal aid accessible to, other than accused persons, to children, and refugees under the Refugees Act No. 13 of 2006, victims of human trafficking, internally displaced persons and stateless persons.

Other legislations include Section 77 of the Children's Act which provides that Courts, where the child is unrepresented, may give orders for the child to be granted legal representation at the expense of Parliament. Section 38 of the Persons with Disabilities Act provides that the Attorney General in Consultation with the National Council for Persons Living with Disabilities and the Law Society of Kenya should make regulations for free legal services for persons with disabilities. Sections 137F and 193 of the Criminal Procedure Code provides for the right of the defenders to legal representation of their own choice or where necessary, to court appointed legal representation. The Persons Deprived of Liberty Act, No. 23 of 2014 emphasizes the rights of

arrested persons to be notified of legal aid where it is available and its use as provided in the Constitution of Kenya, 2010<sup>39</sup>. The Act also protects the rights of aliens to legal aid where consular assistance is not available<sup>40</sup>.

In summary the legal framework imposes an obligation on the government to ensure access to justice to her citizens and to eliminate unjust distribution of power that impede access to justice. Since government is not in a position to fully guarantee provision of legal aid services, the instruments takes cognizance of the gap and encourages a multi-sectoral approach to this particular service delivery by imploring civil societies, religious institutions and learning institutions to partner with government. This is how Egerton University as a learning institution of legal education took up the challenge.

### Legal Aid

The Report of the Commission on Legal Empowerment of the Poor<sup>41</sup> reveals that the poor, vulnerable and marginalized people are far from the protection of the law and are susceptible to abuse, discrimination and corruption in their day to day lives as well as in their pursuit for justice<sup>42</sup>. The Report recognizes that legal empowerment is key in the reform process of the justice sector to protect the rights of the disadvantaged. It defines legal empowerment as a process of systematic change through which the indigent become able to use the law, the legal system and legal services to protect and advance their rights and interests as citizens<sup>43</sup>. The report finds broadening the scope of legal services to the poor necessary for justice to be more accessible. This can be done through designing efficient legal aid system which emphasizes on legal assistance provided by paralegals and law students<sup>44</sup>.

The Legal Aid Act provides an entry point for University Legal Aid Clinics to provide legal assistance to the indigent citizens<sup>45</sup>. Law students have the

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<sup>39</sup> Section 6, Persons Deprived of Liberty Act, No. 23 of 2014.

<sup>40</sup> Section 11, Persons Deprived of Liberty Act, 2014.

<sup>41</sup> Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone, Report of the Commission on Legal Empowerment of the Poor*, Volume I, 2008. Available at [https://www.un.org/ruleoflaw/files/Making\\_the\\_Law\\_Work\\_for\\_Everyone.pdf](https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf) accessed on 10 March 2021.

<sup>42</sup> *ibid.*

<sup>43</sup> Report of the Commission on Legal Empowerment of the Poor, Volume I, 2008, 3.

<sup>44</sup> *ibid.* at pg. 62.

<sup>45</sup> Legal Aid Act No. 6 of 2016, sec 2.

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legal knowledge acquired in class to provide legal services, including legal advice, education and awareness, at the basic level. Therefore, students should take up the responsibility of reforming the justice sector and empowering the indigent persons in the community. Legal Aid plays an important role in the education and development of law students. Clinical Legal Education provides a learning environment where students interact with real clients under supervision of the faculty staff at the law school<sup>46</sup>. Legal Aid enables students to gain first-hand experience on legal practice as they interact with the clients, gain advocacy skills, and deepen their legal knowledge thus preparing them for actual practice.

To this end, legal aid plays a dual role for both students and the community who would otherwise find justice inaccessible due to their economic inequalities, exacerbated poverty. This is two-fold that is, students gain practical legal skills while providing free legal services to the marginalized while the community benefits from the services offered:

### **Benefit to Persons Seeking Legal Services**

Many Kenyans lack sufficient resources to institute a suit or to access legal representation, lack of information about their rights, the different laws and the procedure of instituting a suit or defend themselves<sup>47</sup>. Legal aid counters some of the barriers faced in accessing justice. Legal aid enables individuals to be aware of their rights, to be aware of the legal process and remedies available to them where there is infringement of their rights. It also enables the poor and marginalized to access justice without financial requirements, and enables all individuals to be equal before the law and to have a fair hearing.

### ***Legal Awareness and Literacy***

Chapter IV of the Kenyan Constitution lays down the Bill of Rights that every Kenyan is entitled to, including the right to access justice and fair administrative action<sup>48</sup>. The poor and marginalized are at risk of breach and violation of their human rights due to lack of awareness of existence of such rights and availability of remedies for redress. For instance, the right to acquire and own property and not to be deprived of it arbitrarily is protected under Article 40 of the Constitution. However, many women are unaware of

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<sup>46</sup> Lewis Richard, *Clinical Legal Education Revisited*, Available at <https://core.ac.uk/download/pdf/8816908.pdf> accessed on 10 March 2021.

<sup>47</sup> National Action Plan on Legal Aid 2017-2022 pg. 6 takes cognizance of this fact.

<sup>48</sup> Constitution of Kenya 2010, Art. 47 and 48.

this right and when widowed do not know how to institute succession causes. This inevitably results in the loss of property to unscrupulous third parties<sup>49</sup>. Additionally, the large number of laws applicable, and which are drenched in legalese, may be difficult to understand hampering for laypeople, therefore access to justice<sup>50</sup>.

The scope of legal aid extends to provision of legal information and law-related education<sup>51</sup>. The recognition, by the Act, of the importance of legal awareness by every individual is a positive step towards reforming the justice sector. Legal aid enables indigent persons to better understand their rights and to use the law to advance their rights and interests. A study conducted on the impact of legal empowerment programmes on health and human rights revealed that persons who had received training on legal and human rights issues had greater awareness of how and where to access legal services to safeguard their rights<sup>52</sup>.

A Report of the Commission on Legal Empowerment of the Poor demonstrates that, legal empowerment is only realized when the poor are able to use the law, the legal system and services to protect and advance their rights. Therefore, legal aid can spearhead legal empowerment by raising awareness and educating the marginalized on their rights and how to enforce them.

### ***Legal Aid and Pro Bono Lawyering***

Access to justice envisages a situation where an individual can lodge a complaint, have access to legal representation and their legal needs addressed within reasonable time. The nature of the Kenyan justice system which is adversarial requires one to either have legal knowledge or legal representation<sup>53</sup>. Article 50 (2) of the Constitution provides several rights of an accused person including the right to have adequate time and facilities to prepare a defence, to be informed in advance of evidence the prosecution intends to rely on and to have reasonable access to it and to adduce and challenge evidence. An arrested person requires sufficient knowledge of

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<sup>49</sup> FIDA Kenya, *Women's Land and Property Rights in Kenya, A Training Handbook*.

<sup>50</sup> Emma Senge Wabuke, Arnold Nciko and Abdullahi Abdirahman, *Promoting Access to Justice in Kenya: Making the Case for Law Clinics*, October 2018.

<sup>51</sup> Legal Aid Act 2016, sec 2.

<sup>52</sup> Gruskin S *et al*, *Access to Justice: Evaluating law, health and human rights programmes in Kenya*, Journal of the International Aids Society, 2013.

<sup>53</sup> National Action Plan: Legal Aid 2017-2022 Kenya.

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these rights as well as the correct laws and procedures applicable in his or her case in order to effectively defend themselves.

Thus, it is necessary for a person seeking justice to have legal representation in order to have a just legal process. However, the poor and marginalized are unable to access legal representation due to lack of financial capability to not only seek legal counsel, but also cater for other unavoidable expenses such as court fees, filing fees, service, transportation to court for attendances and disbursements among others. The financial inequality discourages and prevents the poor from accessing justice.

Adequate funding is necessary to ensure legal aid covers the full range of services to be provided to those seeking legal assistance. States are obligated to establish a legal aid fund to support legal aid schemes and legal aid providers at public and private levels, including university legal clinics<sup>54</sup>. To this end, the Legal Aid Act has established the Legal Aid Fund to be used *et al* to pay the expenses incurred in the representation of persons granted legal aid and to meet the expenses incurred by legal aid providers in providing legal aid services although the same is yet to be operationalized<sup>55</sup>. It is therefore imperative that the legal aid fund be operationalized in order to fund legal aid clinics and other legal aid providers so as to broaden their reach on poor and marginalized persons in Kenya.

### **Benefits for Law Students**

The Kenyan legal education curricula focuses mostly on theoretical pedagogy while vocational and continuing professional education is handled by the Kenya School of Law<sup>56</sup>. With primary emphasis placed on theoretical legal knowledge for the better part of their learning process, law students become ill-equipped for actual legal practice once they are admitted to the bar. The skills and knowledge law students acquire in school heavily influences their career and practice. It is therefore imperative that practical knowledge be

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<sup>54</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, Guideline 12.

<sup>55</sup> Legal Aid Act 2016, sec 30.

<sup>56</sup> Patricia Kameri-Mbote, Legal Education and Lawyers (2014), in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and the New Constitutional Order*, Strathmore University Press, pg. 132.

imparted from the beginning of their education.<sup>57</sup> Legal clinics provide an avenue for students to gain practical experience and translate theoretical knowledge into actual practice. A report by Kenya Institute of Policy Research and Analysis (KIPPRA) in 2019 indicated that the foundational training at undergraduate level which focuses strictly on academic principles may not be adequately preparing lawyers who are undertaking the training programme.<sup>58</sup> The report recommended universities to introduce courses in their curricula for practical training. Clinical Legal Education would provide a hands-on learning by experience to would be lawyers. This is how legal aid and clinical education becomes important in playing the dual role. It is worth noting that a number of law faculties now offer varied legal education that embellishes traditional legal education with clinical education in various versions and degrees<sup>59</sup>.

Legal aid clinics gauge communication and interviewing skills of students. The students are required to interact with clients, to identify the pertinent legal issues based on the interview, do proper analysis and give sound legal advice to the clients in a language they understand. The experience enables students to sharpen their interviewing skills, which entails, effective communication techniques, how to effectively interact with clients from different social, economic and ethnic backgrounds, strengthened emotional awareness of their clients' situations, counselling skills, proper identification of legal issues from the information provided by the clients and translating the same into admissible evidence and finally, legal professionalism<sup>60</sup>. With proper supervision and guidance from legal practitioners who are part of the clinic, students can develop their interviewing skills, a skill paramount in the legal practice.

Legal research and writing skills are necessary for the practise of law. A legal practitioner should be able to identify the pertinent legal issues from the facts

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<sup>57</sup> Silecchia L.A., *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996). Available at <https://core.ac.uk/download/pdf/232606629.pdf>, accessed on 10<sup>th</sup> March 2021.

<sup>58</sup> Report (2019). *Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions*. Para168 pg. 62.

<sup>59</sup> Ouma, Yohana & Chege, Esther, *Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide*. International Journal of Clinical Legal Education (2016).

<sup>60</sup> MA (Riëtte) Du Plessis, *Clinical Legal Education: Interviewing skills*, De Jure Law Journal Vol 51, n.1 pp. 140-162, 2018. Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-71602018000100010&lng=en&nrm=iso#back\\_fn4](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602018000100010&lng=en&nrm=iso#back_fn4) accessed on 15 March 2021.



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provided by a client, conduct research on the applicable laws and apply the laws to the issues in order to give a credible legal opinion or give sound advice to the client. The same applies in legal clinics where students are required to provide legal assistance to clients concerning real issues affecting their lives. Therefore, Legal Aid enables students to gain and sharpen their legal writing and research skills and preparing them for the legal practice adequately.

Advocates in Kenya are guided by the principle of professionalism in their dealings with clients, fellow practitioners, third parties and the judiciary, and to be competent and diligent in provision of legal services.<sup>61</sup> Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct requires advocates to be competent by possessing the necessary skills and knowledge to handle a matter before them or to refer the client to a specialist if the matter is too complex, and to diligently protect the interests of the client in a timely manner including meeting court deadlines in filing legal documents and keeping them up to date. The same applies in provision of legal aid services, especially for those clients who require legal representation and assistance in drafting and filing necessary legal documents. Law students through the clinics therefore learn the importance of providing legal assistance to their clients competently and in a timely manner, and to be professional in how they deal with fellow practitioners, the judiciary and other parties.

Legal aid is meant to reach different individuals with different types of legal issues. This is evident from Section 35 (2) of the Legal Aid Act which does not limit the type of matters or areas of law that a service provider can handle. Therefore, Legal aid exposes law students to different legal fields which consequently enables them from an early stage to not only hone their skills, but also make informed decisions concerning the career they may want to pursue in future. Lastly, legal aid gives students an understanding of the difficulties indigent persons face as they seek legal assistance, thus giving them a sense of responsibility when they begin their practice to provide legal assistance to marginalized persons in the society and to participate in legal aid programmes for the benefit of such persons<sup>62</sup>.

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<sup>61</sup> Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, June 2016, Pt 11, Principle 8.

<sup>62</sup> Quintin Johnstone, Law School Legal Aid Clinics, *Journal of Legal Education*, Summer, (1951), Vol. 3 No. 4, pp.535-554. Available at <https://www.istor.org/stable/42890509?seq=1> accessed on 12 October 2020.

### **Egerton University Faculty of Law Clinic (FOLLAP)**

The Egerton University Faculty of Law was established in 2015 and its undergraduate program accredited in February 2016. FOLLAP was established in October 2019 to enable the marginalized people within Nakuru County to access justice and to establish a structured legal aid service within the county while providing clinical legal education to its students<sup>63</sup>. FOLLAP aims at providing legal services to marginalized persons especially the poor, persons living with HIV/AIDs, persons living with disabilities, the youth and women within Nakuru County. Some of the objectives include enhancing access to justice for the poor and marginalized, building sustained and structural Legal Aid Services, empowering the community to identify and report human rights and to create awareness on human rights, alternative dispute resolution and the land laws.

The Project is currently funded by UNDP-Amkeni Wakenya, a facility which provides financial and technical support to Civil Society Organizations that among others, promotes human rights<sup>64</sup>. FOLLAP has collaborated with other stakeholders such as LSK Rift Valley Branch, National Legal Aid Services-Nakuru, and the County Government of Nakuru in order to ensure that the members of the public have access to an efficient legal aid programme within Nakuru County<sup>65</sup>. The president of the Rift Valley law society, Ochang' Ajigo acknowledges the role played by students, under supervision of advocates, during legal aid clinics and the hands-on approach adopted by FOLLAP inculcating legal skills while providing legal aid services to the community"<sup>66</sup>. This is clear indication of the importance of partnerships within the legal aid structures.

FOLLAP has been in operation for at least one year and has already been implemented in several sub-counties such as Nakuru Town West, Naivasha, Subukia, Molo, Bahati and Rongai. The areas of law conducted by FOLLAP are criminal matters, family matters, children welfare, land rights, public

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<sup>63</sup> Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Newsletter Vol. 1, Issue 1, July 2020.

<sup>64</sup> <https://www.ke.undp.org/content/kenya/en/home/projects/amkeni-wakenya.html>, accessed on the 12 October 2020.

<sup>65</sup> Faculty of Law Legal Aid Project, 'About FOLLAP' available at <https://follap.egerton.ac.ke/explore/about>, accessed on the 12 October 2020.

<sup>66</sup> Message from the President Rift Valley Society, Mr. Ochang' Ajigo as contained in Egerton University Faculty of Law Legal Aid Project, One Year of FOLLAP, Newsletter, Vol 1. Issue 2, September 2020, pg.1.

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interest matters and governance matters. The Project provides legal advice, awareness and education to the community members through a mobile legal clinic. This involves going to the people, giving them the opportunity to state their legal problems and thereafter provide the necessary assistance. The mobile clinic is run by students under guidance of faculty staff members and commissioned pro bono lawyers. The clinics provide an opportunity for students to gain practical and meaningful knowledge and skills that are crucial to their future legal practice, as well as encouraging them, to participate in community legal empowerment projects upon admission to the bar<sup>67</sup>.

The faculty trains students for the external clinic by organizing simulated internal clinics which are supervised by faculty staff<sup>68</sup>. Subsequently, students are divided into groups, and under the guidance of faculty staff, provide legal assistance to clients in the mobile clinics<sup>69</sup>. FOLLAP also provides legal services to individuals through the embedded legal clinics at the faculty<sup>70</sup>. Members of the public can book a free legal aid appointment and visit the faculty for consultations on Tuesdays and Thursdays for legal assistance<sup>71</sup>. The law students stationed at the clinic can provide legal advice to the clients and, under proper supervision, draft legal documents such as demand letters on behalf of the clients. Additionally, clients who require further legal assistance are referred to relevant institutions, including advocates who collaborate with the Project.

Additionally, the faculty conducts training to various groups, such as chiefs, on various issues concerning human rights, including, alternative dispute resolution mechanisms. During a scheduled training, one of the chiefs mentioned that chiefs are killed while others injured in the line of duty<sup>72</sup>. Such testimonies are clear indicators of the need for more legal awareness and education through legal aid. The faculty also has a call centre that is operational at all times to provide legal assistance to persons who are not

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<sup>67</sup> FOLLAP, 'Our Legal Aid Clinic Program' Available at <https://follap.egerton.ac.ke/knowledge-repository/our-legal-aid-clinic-program>, accessed on 10 October 2020.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> The Embedded clinic operates on Tuesdays and Thursdays. Clients can book a free appointment from FOLLAP's website, available at <https://follap.egerton.ac.ke/explore/appointment>, accessed on 10 October 2020.

<sup>71</sup> FOLLAP, 'Appointment', Available at <https://follap.egerton.ac.ke/explore/appointment>, accessed on 10 October 2020.

<sup>72</sup> Francis Mureithi, Egerton University trains chiefs on dispute resolution *Daily Nation*, (6 February 2020-updated 29 June 2020).

able to physically access the legal clinics<sup>73</sup>.

Since its establishment, FOLLAP has reached over two thousand beneficiaries through its different activities<sup>74</sup>. The project has conducted 8 legal clinics in several sub-counties, 5 trainings and 6 public forums for different groups of people such as grassroot and community leaders, women and youth<sup>75</sup>. Various legal mobile aid clinics have been conducted in Naivasha, Kabazi, Kampi ya Moto, Rurii location, Witethie, Hell's gate, Bahati, Subukia, Shabab, Kiamunyi and Ruiyobei in Rongai within Nakuru County<sup>76</sup>. FOLLAP has trained 40 chiefs selected from Nakuru West, Subukia, Naivasha, Molo, Bahati and Rongai Sub-counties on legal aid to equip them with effective problem solving mechanisms as well as ensuring the community has awareness and access to basic legal aid information<sup>77</sup>. An assistant chief who participated in the mediation training indicated that she had been equipped with the right skills to handle a matter which ended up to being a great success<sup>78</sup>. Therefore, FOLLAP has moved beyond providing legal assistance as a way of enhancing access to justice for the marginalized to educating and training them to be aware of and enforce their rights.

FOLLAP has provided an opportunity for its students, who actively participate in the legal clinics, to gain skills and knowledge critical in the law practice while giving them first-hand experience on the various challenges marginalized individuals face in accessing justice. FOLLAP is unique in how it contributes to the holistic training for the future legal professionals coming days<sup>79</sup>. The Project has given students a first-hand experience on how the law interplays and responds to real life situations. This is affirmed by one of

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<sup>73</sup> Egerton University FOLLAP, *Understanding Legal Aid*, Newsletter Vol. 1, Issue 1, July 2020.

<sup>74</sup> Over 2,000 beneficiaries reached through FOLLAP activities, Egerton University Faculty of Law Legal Aid Project, One Year of FOLLAP, Newsletter, Vol 1. Issue 2, September 2020, pg. 7.

<sup>75</sup> *ibid.*

<sup>76</sup> FOLLAP, 'Our Timeline of Activities' Available at <https://follap.egerton.ac.ke/explore/our-timeline>, accessed on 10 October 2020.

<sup>77</sup> Francis Mureithi, Egerton University Trains 40 Nakuru Chiefs on Legal Aid, *Daily Nation* (26 September 2020).

<sup>78</sup> How mediation skills are impacting communities: the case of Chief Florence Wambui in in Egerton University Faculty of Law Legal Aid Project, *Understanding Legal Aid*, Vol. 1, Issue 2, September 2020 pg 6.

<sup>79</sup> Message from the Team Leader and Getanda's summary on FOLLAPs contribution to Egerton's LLB Program, pg 1 and 2 as contained in Egerton University Faculty of Law Legal Aid Project, *Understanding Legal Aid*, Vol. 1, Issue 1, July 2020.

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the students had this to say, “FOLLAP provides an opportunity for us to educate the community on their human rights and obligations... participating in legal aid has been an important step in my legal career... good platform to transfer the skills learnt in the classroom into practice; a forum to engage with people on a personal level and acquire useful interpersonal skills; an arena to learn about the society in general and the legal issues that need to be addressed”<sup>80</sup>.

Although FOLLAP has made great strides towards enhancing access to justice for the marginalized communities in Nakuru County, it also has challenges. The project has focused on providing legal advice and legal awareness through the clinics. Thus, clients who seek further assistance, such as legal representation are referred to relevant institutions. Although the students gain practical knowledge while providing legal advice, they miss out on court representations. Matters are referred to *pro bono* lawyers through the *pro bono* scheme that the faculty established with the Rift Valley Law Society or taken up by a faculty staff.

FOLLAP does not have a compulsory or optional clinical education course to better equip the students for the mobile clinics. Thus, students rely on internal clinics to prepare for the actual mobile clinics. Even though the students are engaged in active internal moots as prepared by the faculty staff to prepare them for court process, this is insufficient. The Project is donor-funded and sustainability may not be viable on termination of donor support. There is no special fund dedicated to the project by the university or government.

### **Cross-Jurisdictional Experiences and Lessons**

This section examines legal aid programmes from established jurisdictions in order to draw lessons that can strengthen Kenya’s legal aid programmes and clinical education. Jurisdictions examined are South Africa, Australia and United States of America. The Australian and USA legal aid models were selected for this study because of their near-mirror common law legal landscape which would make it easier and suitable for adoption at Kenya’s municipal level. South Africa on the other hand is relevant to the studies methodological approach being an African country having a near similar constitutional provisions on legal aid. On an implementation basis therefore,

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<sup>80</sup> Message from Ronald Kihali, “I will forever be indebted to FOLLAP” as contained in Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Vol. 1, Issue 2, September 2020 pg. 2.

South Africa's approach to legal aid has made commendable institutional progress.

### South Africa

Article 35 of Constitution of the Republic of South Africa protects the right to legal aid of accused and detained persons at the State's expense, if substantial injustice would otherwise result. Legal aid is made available to the marginalized through State-funded legal aid institutions and civil society organizations. Legal Aid South Africa is the body mandated to offer legal aid as established by the Legal Aid South Africa Act No. 39 of 2014. The Body employs legal practitioners, candidate attorneys, paralegals and other entities through cooperation agreements, including Universities to provide legal aid<sup>81</sup>.

South African universities have included Clinical Legal Education in their curricula so as to enhance access to justice for the poor while providing students with practical training. CLE is a compulsory course for some universities or an elective for others. For instance, the University of Witwatersrand (WITS) provides a compulsory course called Practical Legal Studies. The students attend lectures and tutorials, consult in the school's clinics, attend tutorials and work on case files<sup>82</sup>. On the other hand, the University of Cape Town provides an elective Legal Practice Course which provides an opportunity for students to work with real clients under the supervision of attorneys at the clinic<sup>83</sup>. Students attend lectures on practical aspects of law, clinics and office appointments where they consult with clients, and also participate in a mock trial before a magistrate<sup>84</sup>. All students at UCT must complete 30 hours of community service at a Faculty-accredited legal services provider.

The sustainability and effectiveness of legal clinics in South African Universities is enhanced by Law Clinics Associations. Many law clinics are part of voluntary associations, such as the South Africa University Law Clinics Association (SAULCA), which, among other functions provides financial

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<sup>81</sup> Hennie van As, *Legal Aid in South Africa: Making Justice Reality*, (Journal of African Law Vol 49, No. 1, 2005).

<sup>82</sup> Ma Du Plessis, *Clinical Legal Education Models: Recommended Assessment Regimes*, PER/PELJ Vol. 18, No. 7, 2015. Available at [file:///C:/Users/Stephanie/Downloads/131490-Article%20Text-354826-1-10-20160304%20\(1\).pdf](file:///C:/Users/Stephanie/Downloads/131490-Article%20Text-354826-1-10-20160304%20(1).pdf), accessed on 13 October, 2020.

<sup>83</sup> University of Cape Town Law Clinic, *Student Handbook*, 2019.

<sup>84</sup> *ibid.*

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support to its members and strives to promote high quality Clinical Legal Education programs at South African universities<sup>85</sup>. This kind of association is however lacking in the Kenyan set up.

### Australia

State funded legal-aid is available to all eligible persons through the Legal Aid Commissions (ACTs) found in the states and territories of Australia. The ACTs are independent bodies established under section 6 of the Legal Aid Act of 1977. Section 8 (2) of the Legal Aid Act enables the ACTs to provide legal assistance through arrangement with private legal practitioners, at the Commission's expense. Section 10 (j) of the Legal Aid Act encourages and permits law students to participate in provision of legal services on voluntary basis and under professional supervision.

Clinical legal education places students in the role of lawyers representing clients and therefore provides students with real-life referencing points for learning law legal problems<sup>86</sup>. There are five main models of clinical legal education, that is, in-house live-client clinic which is wholly funded by the law school, in-house live-client clinic with some external funding, external live-client clinic conducted in agency clinics, externships and clinical components in other courses<sup>87</sup>.

In-house live-client clinics that are wholly funded by the law school are established for the purposes of student education. In-house live-client clinics that are partly funded by the law school with some external funding are established for student education while providing clients with legal assistance<sup>88</sup>. External live-client clinics in agency clinics provides an opportunity for students to learn by placing them in agency clinics under the supervision or the agency, assessed by the law school with input from the

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<sup>85</sup> South African University Law Clinics Association (SAULCA), 'Vision, Mission and Objectives' Available at <https://www.saulca.co.za/#:~:text=South%20African%20University%20Law%20Clinics,and%20goals%20of%20its%20members>, accessed on 13 October 2020.

<sup>86</sup> Evans A. *et al.* Australian clinical legal education: Models and definitions. In *Australian Clinical Legal Education: Designing and operating a best practice clinical program in an Australian law school* (pp. 39-66). Acton ACT, Australia: ANU Press. (2017). Retrieved 21 October 2020, available <http://www.jstor.org/stable/j.ctt1q1crv4.8>, accessed on the 17 October 2020.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

agency<sup>89</sup>. Externships involve placing students in independent bodies such as community service centres where supervision and assessment is done by independent bodies and the law school respectively.<sup>90</sup> Clinical components in other courses is a model where a substantive law course includes within it a clinical section, for instance, including negotiation scenarios within the substantive law course<sup>91</sup>.

## United States of America

The 6<sup>th</sup> Amendment to the Constitution of the United States recognizes the right of an accused person to a fair trial and the right to have the assistance of counsel for his defence. The civil legal aid on the other hand is not provided in law, however, the service is available to low income or middle-income individuals, enabling them to access basic necessities, for instance, on matters of family law and domestic violence.<sup>92</sup> Legal aid service providers include licensed lawyers who offer pro bono services, full time criminal and civil legal aid lawyers, University-based Law Clinics and Paralegals<sup>93</sup>. American Bar Association-Accredited law schools provide legal aid services through legal clinics which aim to provide legal services to indigents while giving students an opportunity to learn through experience by providing legal representation under the supervision of clinical faculty members<sup>94</sup>.

All law schools in the USA are required to offer a curriculum that requires students to complete one or more experiential course(s) for at least six credit hours, that is, a simulation course, a law clinic, or field placement<sup>95</sup>. Further, the law school is required to provide an opportunity for law clinics, field placements and for the students to participate in pro bono legal services<sup>96</sup>. Standard 304 defines experiential courses provide students with substantial

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<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> The United States Department of Justice, 'Legal Aid Inter Agency Roundtable-Civil Legal Aid 101' Available at <https://www.justice.gov/lair/file/828346/download>, accessed on the 20 of October 2020.

<sup>93</sup> *ibid.*

<sup>94</sup> William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor* (Akron Law Review, Vol. 28:3 1995).

<sup>95</sup> American Bar Associations 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, standard 303 (a).

<sup>96</sup> ABA 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, standard 303 (b).



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experience similar to the experience of actual lawyers including advising and representing clients, in the case of law clinics. The Standard further requires the courses to include a classroom instructional component such as scheduled tutorials, supervision and feedback from a faculty member or site supervisor. By making clinical legal education compulsory in all law schools, all law students have an opportunity to gain practical experiences that will adequately prepare them for actual practice.

Perhaps the most notable feature of the clinical legal education curriculum is the opportunity for certified students<sup>97</sup> to appear in court on behalf of their clients. In the state of California, certified students appear in court on behalf of the client in depositions or on various matters listed in the California Rules of Court, including in any public trial, hearing or arbitration; and to appear on behalf of a government agency in the prosecution of criminal actions for minor offences or infractions including any public trials<sup>98</sup>. Other states such as Michigan permits students, as members of a legal aid clinic to appear in any Michigan court except the Supreme Court on behalf of a client provided the indigent person consents in writing to the representation<sup>99</sup>. Permitting students to actively participate in court activities gives them even more experience and thus prepares them adequately for the legal practice. This is a good practice that Kenya can emulate.

### **Provision of Legal Aid and Implementation Challenges**

While Kenya has shown her commitment to upholding the rights of the poor and marginalized, there are several challenges that impede establishment of a sustainable legal aid system. They include:

#### ***Limited Funding***

The Act establishes the Legal Aid Fund which consists of monies allocated by parliament for the purposes of legal services, grants, gifts, donations and loans and other lawful sources of funds<sup>100</sup>, however, the Fund is yet to be operationalized. Legal aid clinics therefore, have to seek private sources of funds which are inadequate to conduct large scale legal clinics. The

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<sup>97</sup> California Rules of Court, r 9.42 defines a certified student as a law student who has a currently effective certificate of registration as a certified law student from the state bar.

<sup>98</sup> California Rules of Court 2013, r 9.42. The Rules also requires the students to be accompanied by a supervising attorney who is a member of the State bar.

<sup>99</sup> Michigan Court Rules 2013, r 8.130 (D).

<sup>100</sup> Legal Aid Act 2016, s 29 (2).

government should avail funds to run all legal aid clinics including those run by the law schools.

### ***Lack of Awareness***

Many individuals are unaware that they have a right to legal aid. The Global Study on Legal Aid reported that 78% of Respondents in Sub-Saharan Africa were not aware that they can receive legal aid services at no cost<sup>101</sup>.

### ***Lack of Confidence in the Justice System and the Quality of Legal Services***

Many indigent persons lack confidence in the formal justice system and opt for informal justice systems which do not require the assistance of legal service providers unless they are recognized as alternative dispute resolution mechanisms by the law. Therefore, limiting the services they can receive from legal aid service providers. There is an assumption that legal services provided through legal aid are of poor quality since they are offered at no cost<sup>102</sup>. This causes many individuals to avoid seeking legal assistance from legal aid clinics.

There is a need to raise awareness that legal practitioners are bound by law to provide legal services regardless of whether the matter is being handled at a certain cost or for free. Further, students who carry out legal clinics are also given sufficient training and work under the guidance and supervision of highly competent and experienced legal practitioners.

### ***Insufficient Number of Legal Practitioners and Centres who offer Free Legal Services***

There is a limited number of legal practitioners who offer free legal services or participate in legal clinics<sup>103</sup>. There is disparity in the number of legal service providers to that of persons seeking legal assistance prevents the legal service providers from providing assistance to all persons in need. More funds should therefore be allocated to the provision of legal aid services. Further, more legal practitioners should be encouraged to take up cases on pro bono basis.

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<sup>101</sup> UNODC, *Global Study on Legal Aid Global Report*, 2016.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

***Lack of a Proper Clinical Legal Education Curriculum in Universities***

The Kenyan clinical legal education is optional for students and thus not all students get the opportunity to gain practical legal experience, unlike other jurisdictions who either have a compulsory course for their final students or require the students to undertake community service at approved legal clinic centres. Further, the training received by students before going to external clinics is not sufficient in equipping them with the skills and knowledge required to carry out legal aid effectively. Law schools should be encouraged to introduce compulsory law-related community service in their curriculum.

***Limited Services Provided by Students***

The legal services provided by law students are limited to legal research, legal advice, drafting of necessary documents and providing legal awareness. However, they do not get to represent their clients in courts of law. The Kenyan law requires that all legal representatives must be advocates with valid a practising certificates<sup>104</sup>. This limits the clinical legal education received by students who do not get to practice in actual courts. The Legal Aid Act should be reformed to give students the opportunity, under supervision from advocates, to represent clients in courts. This will give them an opportunity to sharpen their advocacy skills and prepare them for actual practice while enabling the clients to have their legal needs from start to completion.

***Lack of University Legal Aid Association***

Kenya does not have a common association to unify all law schools that conduct legal clinics. As seen in South Africa, legal clinic associations such as SAULCA provides an opportunity for legal clinics to work together to provide legal services, to provide financial support for the running of legal clinics, to facilitate access to justice, to assist legal clinics in the provision of their services and to ensure the legal services they provide are quality.<sup>105</sup> Kenyan law schools need to come together and form an association where they can join and participate voluntarily.

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<sup>104</sup> Advocates Act Cap 16 Laws of Kenya, sec 9.

<sup>105</sup> South African Universities Legal Aid Clinics Association (SAULCA), Vision, Mission and Objectives. Available at <https://www.saulca.co.za/>, accessed on 22 October 2020.

## **CONCLUSION**

This paper has highlighted the key role university legal clinics play towards bridging the gap between indigent and able Kenyans to access to justice by providing the experience of FOLLAP. This is a project established to provide free legal services to indigent persons while promoting practical or hands on learning for the law students through interacting with the social problems the community face in preparation of their future career in the profession.

The diverse nature of FOLLAP enables it to provide a wide range of services to the community and therefore positively impacts access to justice for members of the community in Rift Valley. The same can be borrowed and applied by legal aid providers including other law schools across the country, where legal aid is not limited to providing legal advice and court representations, but extends to legal awareness as well as training community members and the leaders on the law.

The paper has also looked at unique features in legal aid programmes in other jurisdictions such as South Africa, Australia and the United States which have enabled them to develop sustainable legal aid systems. These include provision of practical legal courses, and opportunities to represent clients in court. Kenya can incorporate such best practices in order to establish a sustainable legal aid system which benefits marginalized persons in the society as well as law students.

In conclusion, university legal aid clinics play a pivotal role in the development and reform of the justice sector by facilitating equal access to justice to all citizens by providing legal assistance to the poor and marginalized who would otherwise lack the capability to claim and enforce their legal rights and interests. The legal aid clinics also have a core role in advancing the legal knowledge of law students by imparting practical skills and awareness that builds a strong foundation for their law practice and shape them to be practitioners that champion the rights of the poor, vulnerable and marginalized groups in the society. There is need for advocacy for law reform, particularly the Legal Aid Act and the Advocates Act to allow students to take up cases and represent clients in the lower courts under the guidance of an advocate who can either be a faculty staff or advocate from private practice to strengthen this noble cause.