

Placing Access to Justice at the Centre of Legal Education in Kenya

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ABSTRACT

This paper examines the role of legal education providers in the context of enhancing access to justice in Kenya through clinical legal education initiatives. The paper explores the significance of placing access to justice at the center of legal education. Kenya is at a critical moment where numerous challenges in accessing justice have been documented. They are among others, poor legal awareness, insufficient legal services, corruption within the justice sectors, geographical barriers, financial barriers, institutional barriers, discriminatory norms, illiteracy, and stigma. These challenges threaten the legal profession's most fundamental legal ideals. When people lack effective representation to help with their most pressing problems, our legal system fuels alienation and inequality, and when the justice system fails those in poverty and facing inequality, violence can result. In this state of affairs, access to justice doesn't simply make a difference; it protects lives. Therefore, this paper contends that the legal education providers have a role in preparing the next generation of lawyers the values, skills and knowledge necessary for the delivery of the constitutional promise of access to justice. This calls for the legal education providers in Kenya to place the issue of access to justice at the center of legal education with an understanding that access to justice is fundamental to establishing and maintaining the rule of law as a constitutional principle and value. This would enable Kenyans and especially the vulnerable members of the society to have their voices heard even as they exercise their legal rights. Indeed, access to justice is an indispensable factor in promoting

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citizens' empowerment, in securing access to equal human dignity and in social and economic development.

There is need for legal education providers to develop strategies that would make access to justice more central in legal education. Further, it is argued that a framework that focuses on clinical legal education aligned with other people-oriented and critical skill sets are not only useful but also deemed necessary for enhancing access to justice in our country. Clinical legal education will not only provide these future lawyers with the skills necessary for becoming a better lawyer but also enact positive change in the society. Law schools must confront the legal system's limitations. The main conclusion reached is that by placing access to justice at the center of what they do, legal education providers can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under law.

Key Words: Access to justice, clinical legal education, Legal education providers, lawyers.

INTRODUCTION AND BACKGROUND

This paper examines the role of legal education providers in the context of enhancing access to justice in Kenya through clinical legal education initiatives. The paper explores the significance of placing access to justice at the center of legal education.

Access to justice is fundamental to the establishment and maintenance of the rule of law, because it enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment and securing access to equal human dignity. Moreover, a mutually supportive link exists between, on the one hand, improving, facilitating and expanding individual and collective access to law and justice, and, on the other hand, economic and social development.¹

¹ J. Beqiraj and L. McNamara, International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014), International Bar

According to Chappe *et al*,² access to justice to all citizens can only be possible by giving legal advice and legal assistance to all people who cannot afford the services of a lawyer. Indeed, access to justice is one of the fundamental rights that the citizens of a country are entitled to enjoy in the exercise of their liberty, equality, and dignity³. It is because of this nature that bills of rights have unanimously recognized not only as right in itself alone but also as an instrumental right safeguarding the protection of other rights⁴. This is the nature of the right, however, the conceptual underpinning of the rights and the extent of the enjoyment of the right are far from uniform acceptance by all jurisdictions⁵. Particularly, problems relating to the enforcement of this right have been the most worrying subject for jurists, human rights activists and everybody that are concerned about the dignity of human-beings on equal footing and without distinction on the basis of race, color, financial capacity and the like⁶.

This paper seeks to make a humble input to the ways that legal education providers can use clinical legal education to realize access to justice in Kenya, particularly by the marginalized, poor and vulnerable members of our society. The clinical legal education may be seen as a fairly new element within the Kenyan legal system, commonly referred to as legal aid. This paper contends that with appropriate support and attention, clinical legal education can have great and meaningful impact on the realization of access to justice by the aforementioned members of society. Indeed, the fundamental purpose of this paper is to highlight the significance of clinical legal education in realizing access to justice particularly by the poor, marginalized and vulnerable members of the Kenyan society.

Kenya is at a critical moment where numerous challenges in accessing justice have been documented. They are among others, poor legal awareness, insufficient legal services, corruption within the justice sectors, geographical barriers, financial barriers, institutional barriers, discriminatory norms,

Association, 2014. Available at websites of the IBA Access to Justice and Legal Aid Committee www.ibanet.org. p.8. Accessed on 13 November 2020.

² Nathalie Chappe *et al* (2012) Access to Justice and Legal Aid (University of Franche-Comte)

³ Gurmessa F. Anbesie (2018), The Role of University-Based Legal Aid Centers in ensuring Access to justice in Ethiopia. <http://creativecommons.org/licenses/4.0/> accessed on 30th May 2021.

⁴ *ibid* at 3.

⁵ *ibid*.

⁶ *ibid*.

illiteracy, and stigma. These challenges threaten the legal profession's most fundamental legal ideals. When people lack effective representation to help with their most pressing problems, our legal system fuels alienation and inequality, and when the justice system fails those in poverty and facing inequality, violence can result. In this state of affairs, access to justice doesn't simply make a difference; it protects lives.

This paper is divided into four parts. The first part gives an overview of the concept of access to justice and its international recognition as a human right. The second part deals with access to justice in Kenya, particularly in the context of legal and structural challenges. The third part looks at enhancing access to justice through clinical legal education initiatives and the significance of clinical legal education as well as recommendation on the structure, programmes and curriculum of the University Law Clinic in Kenya. In the fourth part, the paper makes some concluding remarks.

Access to Justice as a Concept:

An Overview

Access to justice, according to Cappelletti and Grath⁷, encompasses first, a system that is equally accessible to all, and leads to results that are individually and socially just. Justice Majanja in the case of *Dry Associates Limited v Capital Markets Authority & Another*,⁸ at paragraph 110 stated that access to justice is a broad concept that defies easy definition. According to the judge, access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law, access to information, equality in the protection of right; access to justice systems particularly the formal adjudicatory processes; availability of physical legal structures; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay. Indeed, in the Kenyan's context, the right of access to justice is to be found at **Article 48** of the Constitution of Kenya which provides thus:

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice⁹.

⁷ Cappelletti and Grath (1978), Access to justice: The newest wave in the worldwide movement to make rights effective. P. 6.

⁸ [2012] eKLR.

⁹ Constitution of Kenya, 2010 Article 48.

According to United Nations Development Programme (UNDP),¹⁰ access to justice is more than improving an individual's access to courts or guaranteeing legal representation. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.¹¹ For UNDP, there is no access to justice where citizens, especially marginalized groups, fear the system, and see it as alien; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Further, it is the position of UNDP that, access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.¹²

The right to have access to justice is a basic and inviolable right as guaranteed under international human rights instruments and national constitution as will be shown in this paper. Moreover, marginalized social groups are universally identified as beneficiaries of this fundamental right; these socio-economically disadvantaged groups include the "rural poor, women and children, people with diseases and disabilities, ethnic minorities, among others¹³."

Furthermore, access to justice involves equality in accessing legal services by all persons regardless of means, and access to effective dispute resolution mechanisms necessary to protect their rights and interests. It further, calls for national equity in that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy. In addition, it requires equality before the law, by ensuring that all persons, regardless of race, ethnic origin, gender and disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.¹⁴ Therefore, in the absence of access to

¹⁰ United Nations Development Programme, "Access to Justice Practice Note" 2004.

¹¹ United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Bangkok, UNDP, 2005.

¹² UNDP, *Strengthening Judicial Integrity through enhanced access to justice*, <http://europeandcis.undp.org>, (2013) accessed on 30th May 2021.

¹³ UNDP, *Programming for Justice: Access for All*, 2005, p.3.

¹⁴ L. Schetzer *et al.*, "Access to justice & Legal Needs; a project to identify Legal Needs, Pathways and barriers for advantaged People in NSW," Available at; [http://www.lawfoundation.net.au/ljf/site/articleids/6ffeb98d3c8d21f1ca25707e0024d3eb/\\$file/older_law_report.pdf](http://www.lawfoundation.net.au/ljf/site/articleids/6ffeb98d3c8d21f1ca25707e0024d3eb/$file/older_law_report.pdf) accessed on 13 November 2020.

justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable.¹⁵

Kokebe W. Jemaneh¹⁶, makes a very powerful link between the rule of law and access to justice. In his chapter *Reconsidering Access to justice in Ethiopia: Towards A Human Rights-Based Approach*, he asserts that it has been long since the idea that rule of law is central to a properly functioning state is widely accepted. Bedner A. & Jaquelin A.C.Vel opine that, although there are differences in understanding of the concept of rule of law, it is now widely accepted that the notion of rule of law requires that government officials and citizens be bound by and act in accordance with written, publicly disclosed laws which are consistent with universally accepted human rights norms and standards and which should be enforced in accordance with established procedures.¹⁷

The rule of law is a fundamental protection to people guaranteeing that the society's laws will be respected and upheld. It is a guarantee that, if adhered to strictly, will enable society to live in the most fulfilling social order. It underpins economic and social cooperation and is fundamental to ensuring economic development, political stability and social justice.¹⁸ According to Domingo, the rule of law means less corruption, protected and enforceable legal rights, due process, good governance, transparent and accountable government.¹⁹

At the core of the rule of law principle is to be found access to justice, for otherwise rule of law will lose its validity and significance if citizens are unable to access justice services to address grievance and limit governmental

¹⁵ *ibid.*

¹⁶ Toggia Pieta S. *Et al*, "Access to justice in Ethiopia: Towards an Inventory of Issues", Centre for Human Rights Addis Ababa University, (2014).

¹⁷ Bedner A. & Jaquelin A.C.Vel, 'An Analytical Framework for Empirical Research on Access to Justice', *Law, Social Development & Global Development Journal (LGD) e-journal*, 2010(1), p. 20; available at: http://www.go.warwick.ac.uk/elj/lgd/20010_1/bedner_vel. Accessed on 30th May 2021.

¹⁸ The link between rule of law and economic prosperity is clear from the World Economic Forum's Global Competitiveness Index which uses elements of rule of law as part of the requirements for global economic competitiveness. World Economic Forum, *Global Competitiveness Report 2008-2009*, World Economic Forum, Geneva, 2008, p. 4.

¹⁹ Domingo, P., *Why the Rule of Law Matters for Development?*, Overseas Development Institute (ODI), London, 2009, p.131.

authority.²⁰ According to Kokebe, it is not enough to formally state that government officials and citizens must act in accordance with established rules; there must be a mechanism to seek justice and redress where rights are not protected and promoted or have been violated. This highlights the central place that access to justice assumes in the modern state. It is perhaps the most inspiring ideal of any society and one of the reasons for which entire legal systems exist.²¹

Despite its prominent importance in the modern democratic state, there is no uniform understanding of the term 'access to justice.' Like other companion concepts in the study of law and justice, it is a term that is used without precise and clear definition. Although some of its elements are clearly protected, it is not a term that is often expressly used or defined by international human rights conventions.²² However, an evaluation of literature and policy papers on the issue of access to justice reveals that there are two approaches to the meaning of the term.

The first sense in which the term access to justice is used equates it with access to judicial remedies to vindicate rights recognized by law and/or resolve disputes. In many instances it is used to refer to particular procedural elements of access to justice such as access to courts, the right to fair hearing, access to legal services, adequate redress, and timely resolution of disputes. This is the narrower understanding of the concept of access to justice. Programming designed to enhance access to justice according to this conception focuses on developing means of overcoming the obstacles faced by individuals in making use of the formal justice process established to provide redress. In the past these have included legal advice and representation, the adoption of special procedures (such as class action and public interest litigation) to represent diffuse group and public interest, the simplification of procedures, and the promotion of alternatives to the formal judicial process to settle disputes.²³

However, according to Kokebe, reformers and commentators on access to justice have, however, noted the apparent inadequacies of this conception of

²⁰ Davis W. & Turku, H., 'Access to Justice and Alternative Disputes Resolution', *Journal of Dispute Resolution*, Vol.47, no. 1, 2011, P. 49.

²¹ *Supra* (n.16).

²² *ibid.*

²³ Cappelletti, M.& Garth, B., 'Access to Justice: The Newest Wave in the WorldWide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, 1977-1978, pp. 181- 292.

access to justice. They called for a broader and comprehensive conception of access to justice which goes beyond formal aspects of access to legal services and justice dispensing institutions and reflect better all aspects of the justice process that guarantees not merely formal justice (equality in accessing the justice system) but substantive justice. While for a long-time access to justice has been understood as access to courts and the availability of legal service, this approach is changing. This is premised on the idea that expanding access to the court will not necessarily help the poor and vulnerable if the law does not address their concerns.²⁴ Indeed, as has been noted in this paper, and especially in the context of UNDP, it has been established that courts are not necessarily the only suppliers of justice, and thus access to justice has increasingly been defined in a boarder manner than the essentially access to court approach, with the focus being more on ensuring that dispute resolution outcomes are just and equitable.²⁵

This broader conception of access to justice is concerned with the substantive aspect of justice: the use of the legal system as a tool to achieve overall social justice, and is a result of a growing international movement to re-conceptualize access to justice in a comprehensive manner based on human rights standards. It is an integral part of a human rights-based approach to development theory that is normatively based on international human rights standards and operationally directed at ensuring social justice.²⁶

Access to Justice: Its Significance

This paper underscores the significance of access to justice due to its remarkable link with the rule of law. It is an essential element of the rule of law and democracy. The institutions of justice, afford people the protection of their rights against infringement by other people or bodies in society, and allow parties to bring actions against government thus limiting the power of the executive and hence guarantee governmental accountability. If people are unable to access these institutions to protect their rights, respect for the rule of law is diminished.²⁷

²⁴ Sinnar, S., 'Access to Justice-Topic Brief' (World Bank), available at www.worldbank.org accessed on 8 November 2020.

²⁵ Supra (n 13).

²⁶ Supra (n 16).

²⁷ Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009.

Further, upholding of the rule of law is fundamental to economic and social development of a country, and its prosperity. It enables people to plan and live their life as they choose and underpins social and economic development. According to UNDP, barriers to justice also reinforce poverty and exclusion.²⁸

The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.²⁹ When there is no proper protection afforded to access to justice, the rule of law will deal a blow and greatly compromised, giving rise to negative impact on security and development.

The concept of access to justice plays a significant role to security and development of a country in multiple ways: Firstly, the enforcement of a body of rules and rights which govern the relationship between the state and individuals, and among individuals, depends on citizens' access to and confidence in the justice system³⁰. In order to create a stable social, political and economic environment a state must be able to provide dispute resolution mechanisms to all citizens.³¹ A strong justice system is necessary for the promotion and protection of social justice.³² If a properly functioning and responsive justice system is lacking, individuals will take the law into their own hands, thereby resulting in the loss of legitimacy of the state³³ and the breakdown of law and order. Access to justice can also help to hold governments accountable and transparent thereby preventing them from degenerating into tyrannical regimes.³⁴ Thus, access to justice helps to consolidate peace and support reconciliation by creating the necessary conditions that allow people to resolve legitimate grievances which might otherwise lead even to broader social conflicts³⁵.

Secondly, improving, facilitating, and expanding individual and collective access to justice supports economic and social development.³⁶ According to the World Development Report, "legal institutions play a key role in the

²⁸ United Nations Development Programme's Commission on Legal Empowerment of the Poor, "Making the law work for everyone" (2008) 1, 33.

²⁹ Supra (n 27).

³⁰ Supra (n 16).

³¹ Davis W. & Turku, H., 'Access to Justice and Alternative Disputes Resolution', Journal of Dispute Resolution, Vol.47, no. 1, 2011, P. 49.

³² *ibid* (n 16).

³³ *ibid*.

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ *ibid*.

distribution of power and rights, and that they also underpin the forms and function of other institutions that deliver public service and regulate market forces.³⁷ According to UNDP, it is increasingly recognized that lack of effective access to justice is a major impediment to eradicate poverty.³⁸ Further, the link between poverty and the absence of legal protection for the poor has also been recognized by the International Commission on Legal Empowerment of the Poor.³⁹

In his book, *Development as Freedom*, Amartya Sen opines that development is increasingly understood not as increase in per capita income, but "...as a process of expanding the real freedoms that people enjoy."⁴⁰ Thus development or eradication of poverty is about enhancing the capability of disadvantaged section of the society.⁴¹ Certain sections of the society are considered as disadvantaged because their inability to access justice remedies in existing systems increases their vulnerability to poverty, and in turn their poverty hinders them from accessing justice systems to assert their rights.⁴²

A justice system that is accessible for the disadvantaged segment of society helps them to enforce their rights which will further enhance their ability to have control over factors that affect their life such as security, livelihood, access to essential resources, and participation in public decision-making process.⁴³ This is particularly important in the context of power inequalities. An effective system for access to justice that responds to the needs of the poor, can hold governments and private actors accountable, and can address power imbalances that permit the elite to capture resources and the disempowerment of the poor.⁴⁴

Access to Justice in Kenya: Legal and Structural Challenges

³⁷ World Bank, *World Development Report 2006: Equity and Development*, New York: Oxford University Press, 2005, p. 156.

³⁸ *Ibid* Note No. 13

³⁹ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, UNDP, New York, 2008, Vol. 1, p. 33.

⁴⁰ Sen, A., *Development as Freedom*, Alfred A. Knopf, New York, 1999, p.3.

⁴¹ *Supra* (n 16).

⁴² *Supra* (n 13) p. 4.

⁴³ *Supra* (n 13).

⁴⁴ *Supra* (n 39) Pp 31 – 32.

Introduction

The normative framework for access to justice is found in international instruments, setting principles and minimum rules for the administration of justice. They comprise the Universal Declaration of Human Rights, the international human rights law and specific conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations.⁴⁵

In Kenya, adoption of the 2010 Constitution has brought hope on the issue of access to justice being that the same is now a fundamental right guaranteed therein. Article 48 of the Constitution obligates the state to ensure access to justice for all persons. The said article is geared towards enhancing access to justice for all persons in Kenya especially the poor.

Whereas article 48 of the Constitution of Kenya 2010 has made access to justice a fundamental right, there are other provisions that are geared toward enhancing equal access to judicial and other administrative institutions and mechanism in the same Constitution.

Under Article 22 of the Constitution, the Chief Justice is required to make rules to provide for the right of every person to access courts and seek the enforcement of rights and fundamental freedom in the Bill of Rights that has been denied, violated, infringed or threatened.⁴⁶

Article 22 (3) is intended to ensure that no impediment whatsoever shall stand on the way to access to justice by ensuring that no fees are charged for commencing proceedings, removing the strict legal provisions of *locus standi*, minimizing procedural formalities, entertaining the commencement of proceedings on the basis of informal documents and allowing experts to appear as friends of the court.

The Constitution, under article 35, acknowledges the right of access to information held by the state and information held by another person and required for the exercise or protection of any right and fundamental freedom.⁴⁷

⁴⁵ M. Anderson, "Access to justice and Justice and legal process; Making Legal Institution Responsive to the poor" (2003) LCD WORKING PAPER 178.

⁴⁶ Article 22 of the Constitution of Kenya, 2010.

⁴⁷ Article 35 of the Constitution of Kenya, 2010.

Under article 47, there is provision for fair administrative action and thus provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It further calls for written reason where a Right or a fundamental freedom of a person has been or is likely to be adversely affected by an administrative action.⁴⁸

Article 48 enjoins the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.⁴⁹

Article 50 makes the provision for fair hearing, and further provides for the right of every person to have an advocate assigned by the state and at the state expenses, if substantial justice would otherwise result and to be informed of this right promptly. This article thus provides for easy access to justice for capital offenders to be represented especially in circumstances where they are not able to afford an advocate.⁵⁰

Under article 159, the principles that should guide the courts and tribunals are outlined. They are called upon to be guided by the fact that justice shall be done to all irrespective of status, justice shall not be delayed, alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promote, judicial justice be administered without undue regard to procedural technicalities and the purpose of the constitution be promote/d and protected.⁵¹

Kenya has also key statutes touching on access to justice. Section 1 A (1) of the Civil Procedure Act provides that the overriding object of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.⁵² The Act enjoins the Court to exercise its powers and interpretation of the Civil Procedure to give effect to the overriding object.⁵³

The Legal Aid Act No. 6 of 2016, establishes a legal and institutional framework to promote access to justice.⁵⁴ The Act seeks to promote access

⁴⁸ Article 47 of the Constitution of Kenya, 2010.

⁴⁹ Article 48 of the Constitution of Kenya, 2010.

⁵⁰ Article 50 of the Constitution of Kenya, 2010.

⁵¹ Article 159 of the Constitution of Kenya, 2010.

⁵² The Civil Procedure Act, Chapter 21.

⁵³ Section 1A of the Civil Procedure Act, Chapter 21.

⁵⁴ Section 3 (The Object of the Act) of the Legal Aid Act, No. 6 of 2016.

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to justice in Kenya by: (a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution; (b) providing a legal aid scheme to assist indigent persons to access legal aid; (c) promoting legal awareness; (d) supporting community legal services by funding justice advisory centers, education, and research; and (e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

Section 4 of the Act, provides for the guiding principles thus: (a) the national values and principles of governance set out in Article 10 of the Constitution; (b) the values and principles of the public service set out in Article 232 of the Constitution; (c) the principles of impartiality, gender equality and gender equity; (d) the principles of inclusiveness, non-discrimination and (e) protection of marginalized groups; (f) the rules of natural justice; and (g) the provisions of any treaty or convention ratified by Kenya, relating to the provision of legal aid.⁵⁵

The Act, by dint of section 5 establishes the National Legal Aid Service which is a body corporate and whose functions include to: (a) establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; (b) advise the Cabinet Secretary on matters relating to legal aid in Kenya; (c) encourage and facilitate the settlement of disputes through alternative dispute resolution; (d) undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; (e) take necessary steps to promote public interest litigation with regard to consumer protection, environmental protection and any other matter of special concern to the marginalized groups; (f) provide grants in aid for specific schemes to various voluntary social service institutions, for the implementation of legal aid services under this Act; (g) develop and issue guidelines and standards for the establishment of legal aid schemes by Non-Governmental Agencies; (h) in consultation with the Council of Legal Education, develop programs for legal aid education and the training and certification of paralegals; (i) promote, and supervise the establishment and working of legal aid services in universities, colleges and other institutions; (j) promote the use of alternative dispute resolution methods; (k) take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws; (l) facilitate

⁵⁵ Section 4 (Guiding Principles) of the Legal Aid Act No. 6 of 2016

the representation of persons granted legal aid under this Act; (m) assign legal aid providers to persons granted legal aid under this Act; (n) establish, coordinate, monitor and evaluate justice advisory centers; (o) coordinate, monitor and evaluate paralegals and other legal service providers and give general directions for the proper implementation of legal aid programs; (p) administer and manage the Legal Aid Fund; and (q) perform such other functions as may be assigned to it under this Act or any other written law.⁵⁶

In addition to the direct constitutional guarantee of access to justice, Kenya has incorporated the access to justice requirements of various international instruments into its domestic law through Article 2(5) and (6) which recognize international law as part of Kenya's law.⁵⁷

Key among the international instruments include, the International Convention on Civil and Political Rights (ICCPR); Universal declaration of Human Rights (UDHR); Convention on the Elimination of All forms of Discrimination Against Women (CEDAW); African Charter on Human and People's Right.

The International Convention on Civil and Political Rights (ICCPR) guarantees the right of access to the courts and provides that, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Moreover, the Convention, guarantees that all persons shall be equal before the courts and tribunal.⁵⁸

Additionally, Article 14 of the ICCPR expressly guarantees that all persons shall be equal before the courts and tribunal. The provision may have been intended only to secure equal treatment when a person appears before a court. However, the treatment can hardly be considered equal if an entire segment of the citizenry is effectively denied access to the means to secure and protect their rights.

On its part, and just like ICCPR above, the Universal Declaration of Human Rights (UDHR) recognizes access to justice and access to the courts as a human right themselves. It provides, under article 10,⁵⁹ that each individual has the right in full equality to a fair and public hearing by an independent and

⁵⁶ Section 7 of the Legal Aid Act, No. 6 of 2016

⁵⁷ Article 2 (5) & (6) of the Constitution, 2010

⁵⁸ Article 14 of the ICCPR.

⁵⁹ Article 10 of the Universal Declaration of Human Rights.

impartial tribunal, in the determination of their rights and obligations. The Declaration provides the right of individuals to an effective remedy as determined by the courts for violation of the fundamental rights granted by him by the Constitution or by the Law as per article 8 of the Declaration.⁶⁰

According to the Convention on Elimination of All forms of Discrimination, state parties shall ensure everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violates his human rights and fundamental freedom as well as the right to seek from such tribunal just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.⁶¹ This therefore means that the Convention obliges state parties to protect its citizens' right against racial discrimination which includes an obligation to provide individuals with a mean of seeking redress in a national court or tribunal for a violation of that right.

With regard to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the States have the obligation to ensure equality between men and women both theoretically and practically, through law or other material means.⁶² The Convention provides for a right to access to justice but further measures must be taken by the state to ensure that these rights exist not only in theory but also effectively in practice. Further, the Convention acknowledges that one of the main barriers to access to justice is the poor knowledge of the law, especially among rural women. Therefore, the Convention enjoins the state to widely diffuse the law, for example through periodic awareness-raising campaign, in the language of the state concerned.

Finally, the African Charter on Human and Peoples' Rights under article 7 makes a provision requiring every individual to have a right to be heard which includes the right to an appeal to competent national organs against acts of violating his fundamentals rights as recognized and guaranteed by conventions, laws, regulations and customs in force.⁶³ The Charter further provides under article 3 which provides that every individual shall be entitled to equal protection of the law.

⁶⁰ Article 8 of the Universal Declaration of Human Rights.

⁶¹ Article 6 of the Convention on Elimination of All forms of Discrimination.

⁶² Article 2 of the Convention on the Elimination of All forms of Discrimination against Women.

⁶³ African Charter on Human and Peoples' Rights (ACHPR).

Indeed, the African Commission on Human and peoples' Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa in the year 2001. The Principles and Guidelines expressly recognized the necessity of access to the courts to redress human rights violations by stating that States must ensure, through adoption of national legislation that in regard to human right violation, which are matters of public concern, any individual, group of individual non-governmental organization is entitled to bring an issue before judicial bodies for determination.⁶⁴

Challenges to Access to Justice

According to Sida,⁶⁵ the reasons why people living in poverty incur challenges when accessing justice vary from one community to another and context to the other, but many typically relate to under development of the legal framework and discriminatory norms, poor legal awareness, insufficient legal services, problems relating to legal capacity and corruption within existing justice sectors or generally inability of the justice system to reach beyond the interest sphere of the more affluent and influential members of the society.

Societal and Cultural Barriers

According to Beqiraj and McNamara, access to justice is affected by the social and characteristics of jurisdiction, including economic factors. Characteristics may include average income, inequality gaps, economic structure, urbanization, religion and level of literacy and education.⁶⁶ In the following paragraphs this paper briefly discusses some of the ways in which social barriers may be a hindrance to access to justice. They include the following:

Poverty

According to the authors,⁶⁷ poverty is both a cause and a consequence of inadequate levels of access to justice. On the one hand, reduced financial

⁶⁴ In 2001, the African Commission on Human and peoples' Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa.

⁶⁵ Sida, "Equal Access to Justice, A Mapping of Experiences" (2011) www.sida.se accessed on 30th of May 2021.

⁶⁶ J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014)*, International Bar Association, October, 2014.

⁶⁷ *ibid* (n 66).

and human resource allocations to justice institutions produce failures in the justice system. They assert that failures in turn have a disproportionate impact on the poor, precisely because of their lack of individual economic resources enabling them to overcome systemic failures.⁶⁸ Further, the authors are of the view that when equal access to justice is denied, people living in poverty are less able to enforce their economic and social rights, including property and labour rights, and to avoid exploitation⁶⁹. Moreover, poverty as a barrier to access to justice is exacerbated by other structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information, limited political say, stigmatization and discrimination.⁷⁰ The authors opine that poverty may affect large portions of populations, but some groups will be disproportionately represented among the poor. Socially marginalized and otherwise disadvantaged people will be more seriously affected than the general population. Ensuring access to justice for these groups is a key focus of poverty eradication and empowerment.⁷¹ The authors see combating access to justice failures that affect the poor is crucial because poverty is deeply embedded in some countries.⁷²

Stigma

Due to deeply entrenched discriminatory stereotype that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest and undeserving,⁷³ the society including criminal police officers, court staff and other justice sectional personnel, reflect a discriminatory attitude of the wider society, often show discrimination or bias against persons living on poverty in their decision or behavior.⁷⁴ As a consequence, persons living in poverty are not treated fairly, efficiently and efficiently through the justice chain or informal adjudication mechanism.⁷⁵ Stigmatization and prejudicial attitude generate a sense of shame,⁷⁶ and discouraging to persons living in poverty from approaching public officials and seeking the support that they need, not wishing to expose themselves to even

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Magdalena Carmona Magdalena Carmona *et al* "Access to justice for persons living in poverty, a human right approach"

⁷⁵ *ibid.*

⁷⁶ Office of the High Commissioner for Human Right in Nepal, (2011) P.63

greater social discrimination or abuse by the authorities, they may refrain from claiming entitlements or challenging abuses.⁷⁷

Illiteracy

Literacy and education empower individuals, increasing their capacity to understand and insist on the enforcement of their right. Low level of literacy and education reduce access to economic resources and the capacity to understand and enforce rights, resulting to low level s of access to justice.⁷⁸ For one to comprehend the existence of rights and the ways in which such rights can be invoked and enforced by judicial and adjudicatory mechanisms, is fundamental to the appreciation of the phenomenon of access to justice.

Persons living in poverty are mostly illiterate and thus have very little or no understanding of the law and its applicability in their circumstances. They are unaware of the existence of their legal rights and the entitlement of the state's obligation and duty towards them and how to secure the assistance they need. In most circumstances they have no idea where the laws can be found and even where the laws are availed to them, they can hardly read nor comprehend its content.⁷⁹

The research suggest that some of the ways that could contribute in addressing social barriers include advocacy for changing legislations, Awareness arising of legal rights and judicial information through campaigns and programs, employing digital technology to disseminate general information and to provide informal legal education.⁸⁰

Geographical Barriers

While excessive police deployment is problematic in some communities living in poverty, the absence of police and other institutions necessary for the administration of justice in rural, poor and marginalized areas is a common problem.⁸¹ Courts, especially appeal courts are often located only in the Capital cities while police officer and lawyers are also concentrated in urban areas along with registries for lands, birth, death and marriages. In the circumstance, persons living in poverty often have to travel long distances at

⁷⁷ *ibid.*

⁷⁸ M Anderson, "Access to justice and legal process; Making Legal institutions Responsive to poor people in LCD"S WORKING PAPER" (2003) p.178.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *Supra* (n 78).

great costs to engage with the justice system, exposing them to unfamiliar environment and unsafe conditions.⁸² Such factors often act as a persuasive deterrent against seeking redress from judicial and adjudicatory mechanisms, or may indeed represent an insurmountable obstacle for the poorest and most marginalized.⁸³ Those who experience limited mobility such as older persons or persons with disabilities are affected. For the poor people, the need to travel long distance to reach police stations, court houses or public registries often implies that they are in practice unable to seek redress or protection from violence, abuse and exploitation, and have greater difficulty in accessing documents such as birth certificates and title deed that are essential as evidence of their rights when they are contested, in land or inheritance proceedings.⁸⁴ Such distance may also affect the efficacy of the justice system and imply delays and needless lengthy detention periods. The poor are also disproportionately impacted when courts and police stations are not designed to ensure accessibility for those with physical impediments, and when court processes are not adaptable to the needs of persons with disabilities.⁸⁵

Financial Barriers

Persons living in poverty face daunting financial hurdles to engage with the justice system on a fair and equal basis, not only the costs of legal assistance but also the direct and indirect costs.

Lack of Quality Legal Assistance

Legal aid is particularly important for persons living in poverty who are accused or victims of crime, as they face a range of obstacles such as negotiating for bail procedures, pre-trial detention, trial and sentencing and appeals.⁸⁶ In civil matters when a person does not have sufficient resources to pay for legal assistance she is prevented from asserting her rights.⁸⁷ Lack of legal aid for Civil matters can seriously prejudice the rights and interests of persons living in poverty as they are unable to contest tenancy disputes,

⁸² A Report by the Danish Institute for Human Rights based on a cooperation with the East Africa Law Society, "Access to Justice and Legal Aid in East Africa" (2011).

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Asian Center for Human Rights, (2012) p.2.

⁸⁷ Centre for poverty solutions, "making law work for everyone-volume 1"(2008) New York.

eviction decisions, immigration or asylum decisions and many more.⁸⁸ The legal process which relate to such civil matters are often extremely complex and there requirement onerous making it impossible for poor persons to represent themselves.⁸⁹

Fees and Costs

In addition to legal fees, there are other numerous costs associated with accessing the justice system, which constitute a major barrier for those who simply cannot afford them. Costs are encountered at every stage of the legal process, alongside several direct costs, such as obtaining a legal document, commissioning of documents, photo copy and phone calls whose cumulative impact is a crucial factor in preventing the poor from accessing and benefiting from the justice system.⁹⁰ In criminal matters, costs are particularly burdensome where large sums of money is needed to pay bail or risk long periods of pre-trial detention. In addition to formal administrative fee, persons living in poverty encounter other collateral costs in accessing justice. The costs are severe for those living in the rural areas and who may have to travel days to access the justice system.⁹¹ Persons who are employed in the informal sector may not be able to get permission from work thus they risk losing their work. Care givers, the majority being women may not be able to leave home to submit a claim or attend court hearings.⁹²

Institutional Barriers

Several systematic problems in the operation of the justice system impact harshly on people living in poverty thus obstructing them at every stage of the justice chain.

Inadequate Capacity and Resources

Shortfalls in financial and human resource allocations to courts, police and prosecution corps, and insufficient training and capacity building for judicial and law enforcement officers, translate into failure in the judicial system that infringe upon access to justice.⁹³ Such failures including delays, flawed into insufficient evidence gathering, lack of enforcement, and abuse, undermine

⁸⁸ Supra (n 87).

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² International commission of Jurist, 2012 p.67.

⁹³ Open Society Foundation "Open Society Justice Initiative, The Socio-Economic Impact of pre-trial detention," (2011).

the effective functioning of judicial and adjudicatory mechanisms and undermine human rights. Poor functioning of the justice system particularly affect the poor, because perusing justice requires a much greater effort and investment in terms of money and time for them, while their chances of a just and favorable outcome are worse.⁹⁴ When judicial systems receive inadequate financial and human resource allocation from state budget, police stations, prosecutors and courts are understaffed and poorly equipped, and benches are deprived of adequate number of judges.

The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the most disadvantaged, whose cases are usually under prioritized. None registration of complaints by the police is a practice common in overburdened and under resourced criminal systems.⁹⁵ In such cases, it is usually the complains of persons living in poverty that go unregistered due to bias, discrimination, and their disempowerment and lack of knowledge and information about their rights.⁹⁶ Rights and interest of women are thus especially compromised by badly resourced and trained judicial systems, police officers, state organs that traditionally reflect and prioritize the interest of men and are dominated by men.⁹⁷ Not only do women living in poverty come up against stark power imbalances, discriminatory cultural norms and other social structures when instituting legal proceedings, they are also disadvantaged by the lack of training afforded to officials on the application of the laws related to gender based violence and the improper treatment of victims and handling of complains.⁹⁸

Excessive Delay

Due to lack of adequate resources and qualified staff, limited budget and inadequate infrastructure, there are unnecessary delays in adjudication of cases and enforcement of judgments.⁹⁹ While these problems affect all persons seeking justice through the formal justice system, they have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation. Often their cases are under prioritized due to biased preferential treatment to the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimant. Those with power and resources are not only able to

⁹⁴ *ibid.*

⁹⁵ *ibid* at 60.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ United Nations office on drugs and crime, 2011 p.23.

assume the costs of the long waiting period, but also have access to informal ways to speed up a process.

Corruption

In Kenya partly due to overstretched and unfunded judicial system, corruption is epidemic within the police force, prosecution lawyers, and among judicial officials. Illicit payments and favors enable those with financial and social capital to access the justice system with greater efficiency and effectiveness, and even to secure a certain outcome. When people living in poverty cannot afford to pay requested bribes for services that should be free, their claims and cases are delayed, denied or discontinued.¹⁰⁰ Moreover, bribes represent a greater burden for persons living in poverty, often meaning that they have to sell or sacrifice their health or education costs to meet such demands.¹⁰¹

Persons living in poverty are not only denied access to justice when they are unable to meet the costs of bribe or engage in other corrupt activities, but they are also deterred from accessing the justice system when they perceive the system to be corrupt. Such perception can have the seriously detrimental consequence of deterring people living in poverty from even attempting to access the justice system to have their rights enforced and to claim remedies from violations.

Procedural Barriers

High cost, complexities, excessive documentation requirements, geographically distinct offices and time-consuming processes of registration are great disincentives to accessing access to justice for the poor and the most marginalized.¹⁰²

Formalism

¹⁰⁰ People living in poverty are more likely than other individuals to be confronted with requests for bribes, and to resort to paying bribes. In Burundi, a “certificate d’indigence” is to ensure that people living in poverty benefit from free legal advice and legal fee waivers” Transparency international, 2007, p.13.

¹⁰¹ 147Evidence show that women are more likely to be affected by demands for bribes and in many cases, they are always subjected to harassment or abuse by law enforcement officers themselves., UN Women, 2011 p. 54.

¹⁰² Sen, A. “Poor, Relatively Speaking,” Oxford Economic Paper, PP35, Oxford University press.

Without the resources to retain private legal assistance, and with restricted access to legal aid, persons living in poverty are often forced to navigate the judicial system alone.¹⁰³ In doing so, they encounter a complex labyrinth of laws, traditions and interaction with copious paperwork, the use of legal jargon, mainstream languages and restrictive time limits, all of which can deter the poor from seeking justice under formal system and impede fair outcomes.¹⁰⁴ These barriers are particularly damaging in areas of the law that frequent impact upon the most marginalized. Person living in poverty may be unfamiliar with, and often intimidated by, regulations regarding dress codes, the hierarchy of the court system, confrontational design of court rooms, and traditions about when to sit, stand and address the judge. As a result they are in an unequal and disadvantaged position before they even walk into the courtroom. Requirements of high evidentiary proof before civil claims can be instituted can have a disproportionate impact on the poor who are hampered by their lack of financial resources, time, and understanding of the law and the legal process.¹⁰⁵ Collecting evidence, obtaining expert opinion and preparing forms in the correct language can be an impossible without the assistance of a competent legal representative. Persons living in poverty are even further disadvantaged when they are conducting proceedings or making claim against corporate entities. This is particularly evident in criminal cases, where the state controls the collation and production of evidence.¹⁰⁶ The process of collecting exculpatory evidence or obtaining expert testimony may prove prohibitively costly for the poor thus giving them very little hope at the trial.

Complexity of Procedure

While many people find it difficult to understand legal or judicial terminology, the complexities increase in multilingual and multiethnic societies like Kenya where legal proceed are conducted in English making it difficult for the very poor who only speak their local dialect. Similarly, judicial systems like ours that are heavily reliant on paper forms and written submissions put illiterate persons in a disadvantaged position. While individuals facing a criminal charge have the right to a free interpreter under international human rights law¹⁰⁷ in practice this service is often limited, unavailable or reserved for those who speak foreign language, rather than a minority language or local dialect,

¹⁰³ *ibid* at 60.

¹⁰⁴ *ibid* at 74.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*.

¹⁰⁷ Article 14.3 (f) of ICCPR.

and is rarely provided for in civil cases. Even when the predominant language is spoken, cultural differences can impede communication within the judicial system. In some cultural groups, different terminology maybe used for specific occasions or to speak to people in a different terminology may be described in different ways.¹⁰⁸ Furthermore inter cultural communication between indigenous people and the judicial officers can be impeded by difference in perception of politeness, cultural taboos which prevent the giving of certain evidence.¹⁰⁹

Enhancing Access to Justice Through Clinical Legal Education Initiatives

Clinical legal education is the defining term for a form of legal education which exposes students to the practical application of law and puts them in the position of using their legal knowledge to respond to real life issues.¹¹⁰

Indeed, this paper's focus is on clinical legal education on those public-facing initiatives through which students provide legal advice to members of the public on their legal problems, under the supervision of academics and/or legal practitioners. The development of this type of legal education is designed to meet multiple goals. First, to provide education, through high quality teaching and research; second, to deliver social justice by being responsive to justice problems highlighted in the foregoing sections of this paper; third, to add value to the student experience by developing professionally relevant skills in students and enhancing their employability. Dr. McKeever in his research contends that there are, however, tensions between the core university objectives of teaching, research and the student experience and the ambition to promote or develop social justice.¹¹¹

In the early 1900's Harlan Fiske Stone (1911:733), lawyer and Dean of Columbia Law School, declared:

"If it is true that the function of the law school is to approach the study of law from the theoretical and scholarly side, it is equally true that it must not become so academic as to separate itself from the

¹⁰⁸ *ibid* at 74.

¹⁰⁹ *ibid* at 65.

¹¹⁰ Dr. Grainne McKeever, "The Role of University Law Clinics in Delivering Access to Justice", Knowledge Exchange Seminar Series (KESS) 2015-2016. www.niassembly.gov.uk accessed on 28th May 2021.

¹¹¹ *ibid* at 110

*profession which it represents and for the practice of which it undertakes to train its students”.*¹¹²

But the discussion about law clinics had begun much earlier. Indeed, Professor Alexander I. Lyublinsky in 1901 expressed the need for a new approach in the training of lawyers.¹¹³ He opined that the approach to the training of lawyers ought to be similar to the clinical approach used in the training of medical practitioners. In the training of medical practitioners, medical students are expected to train with real patients, under the guidance and supervisions of experienced physicians. Law students are expected to acquire skills which they require to practice law by dealing directly with real life cases and scenarios.¹¹⁴

According to Ulla, doctrine, theory, and skills cannot be appreciated if they are introduced without engaging the pathos of the human issues that the lawyer encounters when representing clients.¹¹⁵ Since the start of the 21st century there has been a vast movement towards clinical legal education approach. It is believed that this approach will serve a dual purpose in developing countries. By dealing with real life scenarios, students familiarize themselves with the direct impact of the law on the lives people, how to think critically and apply the law to the cases which they are confronted with through in-depth research, analysis and critical thinking and how to deliver legal services ethically.¹¹⁶

It is therefore the contention of this paper that clinical legal education is a vital tool which is needed in the new Kenyan legal education pedagogy. Thus, attendance and participation of students at the law clinics will build the capacity of law students and help them to understand their role as upholders of the law in their society.

¹¹² Vicky Kemp *et al*, “Clinical Legal education: Looking to the Future.” The University of Manchester, The School of Law, (2016).

¹¹³ Sarker SP (ed.) *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (2015) 22.

¹¹⁴ Sarumi Rofia, “Legal Education in Nigeria and the potential role of university law clinics in facilitating access to justice and the realisation of human rights in Nigeria.

¹¹⁵ Ulla S „Clinical legal education, role of lawyers and jurists in establishment and functioning of clinics” available at <http://www.academia.edu/10837482/Clinical> Legal Education Role of lawyers and Jurists in Establishment and Functioning of Clinics.

¹¹⁶ Supra (n 114).

The word 'clinic' or 'clinical' is applied where real or realistic situations serve for students to engage in legal casework or address and analyze legal issues. It follows that learning of this type is experiential, and involves both the experience and a structured facility for reflection and (possibly) re-application.¹¹⁷ Without having some form of structured opportunity for reflection, most clinicians agree that student exposure to real or realistic cases is little more than 'work experience'.¹¹⁸ Clinic also describes a constructivist teaching methodology in which learning is not something that happens passively but requires students to participate actively and construct their own knowledge.¹¹⁹ According to Sylvester, although constructionist teaching methodology facilitates discipline and procedural legal knowledge it is recognized more for teaching legal and intellectual skills and inculcating professional values and ethics as a result of involvement in social justice.¹²⁰

As with the traditional approach to the training of lawyers in Kenya, students at the LLB undergraduate level do not get the opportunity to actively participate in projects or programs which engage the society and which expose them to the practical aspects of the legal profession. This is unlike the situation in developed countries like the United States of America where undergraduate law students are given the opportunity to build the skills of the profession as students.¹²¹

This paper maintains that the interaction of students with the poor community members will perform two roles in their academic achievements. It will boost their understanding of the theoretical aspects of the law while helping them to build the skills which they require to practice as lawyers and advocates of the High Court. While the clinical legal education pedagogy will facilitate access

¹¹⁷ Grimes, R. and Gibbons, J. (2016) 'Assessing Experiential Learning – Us, Them and the Others', *International Journal of Clinical Legal Education* 23:1. <http://dx.doi.org/10.19164/ijcle.v23i1.492>

¹¹⁸ *ibid.*

¹¹⁹ Ledvinka, G. (2006) 'Reflection and Assessment in Clinical Legal Education: Do You See What I See'. *International Journal of Clinical Legal Education*, 9, 29. <http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/86/89> accessed on 23rd May 2021.

¹²⁰ Sylvester, C. (2016) 'Through a Glass Darkly: Assessment of Real Client, Compulsory Clinic in an Undergraduate Law Programme', *International Journal of Clinical Legal Education*, 1, 23. <https://www.northumbria.ac.uk/media/6285011/through-a-glass-darkly-assessment-of-a-real-client-compulsory-clinic-in-an-undergraduate-programme-cath-sylvester.pdf> accessed on 23rd May 2021.

¹²¹ Wilson RJ "Training for Justice: The Global Reach of Clinical Legal Education." (2003) 22 *Pennsylvania State International Law Review* 421.

to justice in the community, the focus is on the advancement of the students. Thus, by participating in clinical law programmes, students would gain skills which are essential for fact-finding, investigation, interviewing, and legal research and writing.¹²² In addition to the skills acquired, students would also develop sensitivity and responsiveness to the plight of the people they work with. These are the main drivers of social justice, and these would propel law students into the right paths as harbingers of justice.¹²³

The Role of Legal Clinics in Promoting Access to Justice

In order to understand the role legal clinics can play in promoting access to justice to the poor and vulnerable members of the community, it is imperative to understand the nature and goals of Clinical Legal Education (CLE) which gives the framework for the operation of legal clinics.

CLE can be defined as “a program that teaches through direct experience of lawyering, under the supervision of practicing attorneys/teachers, characteristically in work that advances social justice or the public interest.”¹²⁴ From this definition, it must be clear that any teaching model that aims at instilling skill to law students is not CLE. For the teaching approach to be taken as CLE, it should combine community service with practical student learning.¹²⁵ Thus, a legal education model exclusively relied on simulation is not CLE as it does not allow students’ “involvement with real clients in an environment supervised and controlled directly by the law school.”¹²⁶ Moreover, the participation of law students in the provisions of legal aid services in law schools legal aid centers cannot be regarded as clinical education. This is because students are not required to register as a course, assessed based on their performance and do not earn academic grades for their activities. One important point to add is that as long as clinical programs are incorporated in law curriculum with a broader mission of exposing law

¹²² Kalantry S, Brundige E and Gupta P, *Promoting Clinical Legal Education in India: A Case Study of the Citizen Participation Clinic* Cornell Law Faculty Publications. Paper 1401 (2012)1.

¹²³ Atim P’Odong P, Mbazira C and Oryema S *Educating Lawyers for Social Change: The Role of University Based Legal Clinic: The Case of Pilac (Public Interest Law Clinic University of Uganda)* available at <http://pilac.mak.ac.ug/sites/default/file/educating> lawyers for social change.

¹²⁴ Clinical Legal Education Association Handbook for New Clinical Teachers, April 2007, p.10.

¹²⁵ Jeff Giddings, *Promoting justice through clinical legal education*, Justice Press, 2013, p. 4.

¹²⁶ Richard Lewis, *Clinical Legal Education Revisited*, p. 6.

students to experiential learning and promoting social justices, there is no single way for their operation. CLE may follow quite a diversity of approaches depending on the curriculum of law schools, legal setting of jurisdictions in which it operates, types of social justice issues it seeks to address and resources available in law schools.¹²⁷

CLE as a teaching methodology was originally introduced in a few law schools of the United States and was later expanded to all US law schools and transplanted by law schools of other countries around the world. Writers believe that the first wave of clinical legal education in the United States started at the beginning of the twentieth century.¹²⁸ There were, however, a few law schools that had clinical legal education programs until the 1960s mainly due to the fact that “law schools of this era were terribly underfunded and clinical legal education courses with intensive faculty supervision were not as economical as large classes employing the casebook Socratic Method.”¹²⁹ Availing themselves of initial funding from the Ford Foundation and driven by the need to promote social justice, the majority the US law schools introduced CLE in the late 1960s and early 1970s.¹³⁰ Nowadays, CLE is implemented in all US law schools and other law schools in Canada, Great Britain, Australia, Latin America, Europe, China, India Israel, and Africa.¹³¹

The authors further submit that be it in the US or other countries, the main reason for consolidation and expansion of clinical legal education is the need to promote social justice in general and access to justice to the poor and vulnerable members of communities in particular.¹³² Although it is globally recognized principle that “any country’s system of justice must be accessible to all of its citizens,” the situation on the ground tells us that lower income and other disfavored groups of citizens “are unable to benefit from relief that might be available through their local legal systems.”¹³³ Legal clinics played and

¹²⁷ Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, Wash. U. J. L. & Pol’y, 2008, Vol. 28, p. 118.

¹²⁸ New York State Judicial Institute *Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar* Introduction to Clinical Legal Education May 9, 2005, p. 1.

¹²⁹ *ibid.*

¹³⁰ Wizner, Stephen, "The Law School Clinic: Legal Education in the Interests of Justice" *Fordham Law Review*, Vol. 70 (2002), pp. 1933-34.

¹³¹ See also T.O. Ojienda and M. Oduor, *Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya*, *International Journal of Clinical Legal Education* 2002, Vol. 2, 52.

¹³² *Supra* (n 124).

¹³³ *Supra* (n 120).

continue to play their pivotal role towards meeting the access to justice needs of these members of the community. They do this in three ways.

Firstly, lack of money is the main obstacle that prevents people from accessing justice in some countries. When access to justice is hindered for lack of money, provision of legal aid to the indigent is an approach country have adopted to address the problem. The legal aid to be provided may extend from provision of legal advice to representation of these people before judicial and quasi-judicial bodies. Legal clinics play important role in the provision of legal aid in civil and criminal matters in many countries.¹³⁴ Secondly, in many developing countries, “justice is inaccessible to a large number of people simply because they are unaware of laws and legal institutions, not to mention specific legal rights.”¹³⁵

To address this specific problem of access to justice, several countries have employed legal literacy programs and campaigns with a view to instilling basic legal awareness to citizens. These kinds of programs have been applied, for example, in India, Chile and South Africa partly through the involvement of legal clinics.¹³⁶ Thirdly, in some cases, citizens do not access justice not just because they do have the means or do not know the institutions, laws and their rights but because the legal system itself restricts access to legal and justice institution or legal remedies.¹³⁷ In this case, legal clinics can play an important role by challenging the status quo and pushing for legal reform.

As elsewhere, the purpose of inclusion of clinical courses in LL.B curriculum and establishment of legal clinics in Kenya is twofold.¹³⁸ First, they are meant to be legal laboratories in which students learn the practical application of the law. Second, they are intended to be avenues through which law school students contribute to the furtherance of access to justice to the poor and vulnerable members of the community.

Thus, given the legal and practical challenges that hinder the utilization of the various mechanisms of ensuring access to justice to the marginalized and the

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ See Mizanie Abate Tadesse, *The Manual on HIV/AIDS Legal Clinic* (Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009), art. 3(1) [Herein after *Manual on HIV/AIDS Legal Clinic*].

poor, law school legal clinics are attractive and viable options to meet the access to justice needs of the poor and the vulnerable in Kenya.

Therefore, this paper contends that the legal education providers have a role in preparing the next generation of lawyers the values, skills and knowledge necessary for the delivery of the constitutional promise of access to justice. This calls for the legal education providers in Kenya to place the issue of access to justice at the center of legal education with an understanding that access to justice is fundamental to establishing and maintaining the rule of law as a constitutional principle and value. This would enable Kenyans and especially the vulnerable members of the society to have their voices heard even as they seek to exercise their legal rights. Furthermore, access to justice is an indispensable factor in promoting citizens' empowerment, in securing access to equal human dignity and in social and economic development.

This paper calls on legal education providers in Kenya to do more to educate themselves, their students and the public about the systematic challenges and failures in the Kenyan justice system. They should make a commitment for implanting values of equal justice in its students, and should have their priorities reflecting that commitment.

There is need for legal education providers to develop strategies that would make access to justice more central in legal education. Further, it is argued that a framework that focuses on clinical legal education aligned with other people-oriented and critical skill sets are not only useful but also deemed necessary for enhancing access to justice in our country. Clinical legal education will not only provide these future lawyers with the skills necessary for becoming a better lawyer but also enact positive change in the society.

Indeed, teaching the next generation of lawyers the values, knowledge and skills needed to deliver on the promise of access to justice is paramount. In order to achieve this, this paper contends that law schools in the country should position the issue of access to justice at the center of legal education.

In 2015 the United Nation Member States, in the 2030 Agenda for Sustainable development, adopted Sustainable development Goals in recognition of continuing poverty around the globe. Goal 16 specifically directs all countries to provide access to justice to their residents.¹³⁹ Drawing on the power of the data revolution, and explicitly asserting that access to justice reduces poverty,

¹³⁹ <https://sdgs.un.org/goals> accessed on 25th of May 2021.

the sustainable goals require countries to track, publish and compare data as a means of accelerating progress to achieve those goals. The said goal 16 enjoins all member States to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.¹⁴⁰

This paper calls upon all law schools in the country to rise up and confront the legal system's limitations, and to do this we must come to the realization that the legal profession has a direct stake in ensuring that every student appreciates the importance of access to justice to enable every person to secure the rights implicit in the promise of equal dignity under the Constitution. Fortunately, a number of law schools are taking critical steps in the right direction. The Egerton University Faculty of Law Legal Aid Project with main objective of facilitating enhanced access to justice by the marginalized and poor in Nakuru County, is timely and a bold step in dealing with justice gaps in the region. While this paper acknowledges the existence of similar legal aid programmes in other law schools University of Nairobi, Strathmore University and Moi University, the paper contends that there is need for a more structured legal aid programmes within all law schools in the country.

The paper suggests that all law schools in the country must seek to bring the significance of adequate representation to the fore throughout their law curriculums, educating students about the justice gaps and opportunities for reform. This may call for inclusion of community service as one of the core missions for universities apart from teaching and research. This Paper while being cognizant of the fact that access to justice is the mandate of the state as provided for in the international, regional and domestic legal instruments as has been highlighted in this paper, the universities must realize that they have a moral duty to for community service.

This paper is well aware of the difficulties facing legal education and that they are many, including financial constraints, challenging job market for new lawyers, but the paper submits that legal clinics will help every law student to appreciate and understand the value of access to justice to every client, and as legal education comes to grips with the challenges, prioritizing access to justice through legal clinics aligns with the best and highest goals of the legal profession. It also provides meaning to law students. They come to law school to launch careers, whether in private practice or public service, that relies on the law to make a difference in people's lives.

¹⁴⁰ *ibid.*

Other actors in our legal system — from our courts, which are already a site for innovation and reform, to the bar and many other international and local organizations — are already working together to confront deep inequities in our justice system. In joining in these efforts, and placing access to justice at the center of what they do, law schools in the country can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under our Constitution. This paper maintains that through the law clinics which are attached to the faculties of law in the Kenyan Universities, law students can translate the legal principles which they are taught into relevant legal advice which will be useful for members of their communities especially in civil and criminal matters. This will be on a *pro bono* basis and while the services will facilitate access to justice for the indigent and vulnerable members of the society, it will also build the capacity of the law students and help them to develop the skills which they need to become better lawyers.

Recommendation on the Structure, Programmes and Curriculum of the University Law Clinic in Kenya

In order to meet the purpose of the law clinic, it is important that the law clinic engages in programmes which will facilitate the development of lawyering skills in students and which ensure access to justice especially for the poor people within the communities. In order to achieve the objectives for the creation of the law clinic, the following structure, programmes and curriculum are suggested:

(i) Organisation

Setting up the law clinic on a strong administrative structure and foundation is important as this will go a long way in ensuring the achievement of its aims. It is recommended that the law clinic is situated within the law faculty and the staff of the law faculty should head the administration of law clinic. The members of staff are also the most appropriate personnel to direct the activities of the clinical groups. The law students who are registered for the clinical modules can also volunteer as staff of the clinic.

According to Qafisheh, it is most appropriate that the law clinic be positioned as a department within the law faculty and not as a project of the law faculty.¹⁴¹ It is therefore necessary that in order to achieve success in facilitating access to justice and to serve as a laboratory for students, the law clinic must be given an individualistic and distinctive status. This structure must be similar to a research center within the law faculty.

(ii) Curriculum and Programmes

As earlier noted in this paper in the foregoing sections, the main role of the law clinic is to serve as a laboratory where undergraduate law students can learn lawyering skills by handling real life cases from within their communities. In the process, they will facilitate access to justice for the clients whom they deal with at the law clinic.

This paper contends that clinical projects need to form a huge part of the curriculum of the undergraduate legal education in Kenya. The clinical projects should be offered for credits and these should be graded according to the university regulations. Students who participate in the practical modules should be required to volunteer in *pro bono* activities where they would earn points and these points would be added to their final grades.

(iii) Accessibility

Accessibility refers to the physical and substantial access of the law clinic to the members of the community. The location of the law clinic should take the members of the community into account. It is important that the law clinic is situated at a place which is assessable to the members of the community especially if it is situated within the premises of the host University or law faculty. Universities are landmarks and are often accessible to the general public. It is nonetheless necessary for communities to be made aware of the existence of law clinics and the fact that they provide free legal services.

The clinic should also endeavor to provide services to people in the languages which they understand and which they feel most comfortable in. Thus, students should be able to communicate in local languages so that they can secure the confidence of their clients.

¹⁴¹ Qafisheh MM, "The Role of Legal Clinics in Leading Legal Education: The Model from the Middle East" (2012) 1 (22) *Legal Education Review* 177.

CONCLUSION

There is no denial that access to justice though a fundamental right as provided for in the Kenyan's constitution and other international instruments as briefly discussed in this paper, there exists justice gaps within the Kenyan's society as demonstrated in part one of this paper. It is also the case that law clinics have been instrumental in securing social change in many countries of the world. It is also a fact that the current Kenyan's undergraduate legal education curriculum offers a lot for facilitating the students' understanding of the traditional legal theories which are crucial to the training of lawyers. It is nonetheless crucial that the curriculum embraces the global trends in the training lawyers so that it meets the ever-changing needs of the legal profession and the society at large.

The introduction of clinical legal education into the undergraduate legal education curriculum exposes students to the skills which are essential for successes in the legal profession. Clinical legal education helps students to contribute to the realization of social justice and facilitation of access to justice to the poor and marginalized groups their communities. Therefore, it is this paper's contention that by placing access to justice at the center of what they do, legal education providers can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under our Constitution.