

LAW SCHOOLS AS LEGAL AID PROVIDERS IN KENYA: CHALLENGES AND LESSONS LEARNT FROM PRACTICE

Asha Mikinyango¹ and Judith Nguru, Daystar University and Mount Kenya University, Kenya²

Abstract

Legal aid is the provision of free or subsidized legal services to mainly poor and vulnerable people who cannot afford advocate fees. The right to legal aid is well rooted in the international, regional human rights treaty framework to which Kenya party. The provision of legal aid addresses the concerns of the poor and vulnerable by focusing on challenges that foil access to justice. In recognition of this, the Government of Kenya promulgated the Legal Aid Act, 2016 establishing the National Legal Aid Service to provide legal aid services to needy, marginalized, and vulnerable persons. This was a very important move, propelling the Government to prioritize legal aid provision as a right as well as a necessity for promotion of rule of law and access to justice. However, it is imperative to understand that the duty does not squarely fall on the State alone. There is need for non-state actors' support from private entities like law firms, NGOs, Law schools and any other qualified legal personnel. Without a

¹ Asha Mikinyango is an advocate of the High Court of Kenya and teaches law at Daystar University School of Law, Nairobi Kenya. ORCID ID 0000-0002-7346-4709.

² Judith Nguru is an advocate of the High Court of Kenya and a lecturer at Mount Kenya University School of Law. ORCID ID 0000-0002-5768-850X.

doubt, several non-state actors are actively offering free or subsidized legal aid and the purpose of this paper is to look at the lessons faced by a non-state actor from the experience of the authors organizing and running events to offer free legal aid. This includes expounding on challenges faced such as constrained funding, language barrier, illiteracy, and ignorance of legal rights. The punchline here is that there is room for all stakeholder to come together and forge a way forward for an improved legal aid framework in Kenya.

Keywords: Law schools, Legal aid clinics, Legal aid, Free legal services, Kenya, access to justice, rule of law.

1. Introduction

In recent years, the value of law schools involvement in legal aid delivery has gained footing in Kenya. Law schools, through legal aid clinics, have come to play a significant role in providing meaningful legal services that are responsive to the community's demand. This article is designed to assess the role of law schools in promoting the right of legal aid through running legal aid clinics in Kenya. The article highlights the challenges faced by law schools in the provision of legal aid and proposes strategies for sustainable legal aid service. The authors bank on their personal experience in coordinating and organizing legal aid clinics while teaching at a local University.

The article is organized in five parts. Part I generally provides the legal foundation for legal aid provision in Kenya. Part II looks at the role of law schools as legal aid

providers. A contrast is drawn from the status of law school-based legal aid clinics in Kenya with those in South Africa. This is followed by Part III that entails a detailed description of how the legal aid clinics ran by the Mount Kenya University School of Law were organized by the legal aid committee, of which the authors were members of. Thereafter, Part IV sets out the internal and external challenges faced in the running of the legal aid clinics, and lastly Part V discusses the lessons learnt together with proposals on how to mitigate those challenges.

Part I Provision of Legal Aid in Kenya - The Legal Foundation

Legal aid has for long been deemed a necessary component attached to several human rights established by international laws such as of rule of law, right to fair trial and access to justice all of which empower individuals.³ Legal aid refers to providing legal advice, representation in court or alternative dispute resolution mechanisms, as well as creating awareness for persons who cannot afford to pay for legal services.⁴ The right to free legal assistance for persons accused of crimes is a widely accepted principle of law as it is believed to empower individuals and communities, contribute to the reduction of poverty and promote the protection of human rights.⁵ It is therefore

³ Henry Brooke, *The History of Legal Aid 1945 -2010'* (2007) Bach Commission on Access to Justice – Appendix 6 <<file:///C:/Users/User/AppData/Local/Temp/Bach-Commission-Appendix-6-F-1.pdf> > accessed 11 November 2020.

⁴ Section of the Legal Aid Act, No 6 of 2016 (hereinafter known as the Act).

⁵ United Nations Office on Drugs and Crime, *Global Study on Legal Aid: Global Report* (2016) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewi9gOvNl_3sAhUJUBUIHXZ3ASsQFjAAegQIARAC&url=https%3A%2F%2Fwww.unodc.org%2F

an essential tool for providing access to justice and promoting the rule of law. In recognition of this, legal aid programs have been implemented in many States all over the world, including Kenya in the form of the State, bar associations and non-governmental organizations free legal services to the financially challenged citizens.⁶ For example, the Kenyan Constitution paved way for individuals accused of crime punishable by death to be provided an advocate by the State where they could not afford one.⁷ At the same time independent bodies such as the Law Society of Kenya and Kituo cha Sheria were already providing pro bono services.⁸

The global movement on access to legal aid has been strengthened by the adoption of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.⁹ These principles form the first international instrument that deals with legal aid and has propelled member states to provide, protect and promote the right to legal aid as a stand-alone statutory right. These principles provide for both

[documents%2Fjustice-and-prison-reform%2FLegalAid%2FGlobal Study on Legal Aid - FINAL.pdf&usg=AOvVaw3iO7h-ZeuJyedxXDsVpwT1](#)> accessed 12 November 2020.

⁶ Ibid 3

⁷ Constitution of Kenya 2010, Art 50(2) (g). Also see *John Mbugua and another v the Attorney General and 16 Others* (2013) eKLR

⁸ Also referred to as pauper briefs, mean a case that is conducted by a volunteer advocate at nominal or no cost at all. The Judiciary Government of Kenya, 'What is Pro bono/pauper brief?' (Judiciary) <<https://www.judiciary.go.ke/what/>> accessed 12 November 2020; Kenya Gazette, Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services (Notice no 370) 20 January 2016 <<http://kenyalaw.org/kl/index.php?id=6006>> accessed 12 November 2020.

⁹ United Nations Office on Drugs and Crime, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' Res A/67/458 (20 December 2012) <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf> accessed 12 November 2020.

criminal and civil cases and it encompasses legal advice, legal education and legal drafting.¹⁰

Consequently, the Government of Kenya has promulgated the Legal Aid Act, a *sui generis* legislation that recognizes the right to legal aid.¹¹ Under this Act, the Government undertakes to provide quality and effective legal aid services to all inhabitants of Kenya who are unable to afford legal fees. This entails putting in place functions, processes and systems that ensure the quality requirement of legal aid services is met. This is to be primarily done by the establishment of the National Legal Aid Service to provide legal aid services to needy, marginalized, and vulnerable persons.¹² However, it is imperative to understand that this duty does not squarely fall on the State alone. The increasing demand for legal aid services in Kenya outstrips the supply of State – funded legal services and thus there is an apparent need for non-state actors’ support from entities like law firms, non-governmental organizations, faith – based institutions as well as law schools.¹³

¹⁰ United Nations Office on Drugs and Crime, *Handbook On Ensuring Quality of Legal Aid Services in Criminal Justice Processes :Practical Guidance and Promising Practices* (2019) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewi9gOvNI_3sAhUJUBUIHXZ3ASsQFjABegOIAxAC&url=https%3A%2F%2Fwww.unodc.org%2Fdocuments%2Fjustice-and-prison-reform%2FHB_Ensuring_Quality_Legal_Aid_Services.pdf&usg=AOvVaw0VvN7J-OeU_itafI4uQ9t_ > accessed 12 November 2020.

¹¹ The Legal Aid Act, 2016. For a summary of the National Legal and Policy Framework on Legal Aid in Kenya, see Table 3 of Office of the Attorney General and Department of Justice Kenya, ‘ National Action Plan, Legal Aid 2017 – 2022 Kenya’ 11 (< <https://kecosce.org/national-action-plan-legal-aid-2017-2022-kenya/> > .

¹² Legal Aid Act 2016, s 5.

¹³ Office of the Attorney General and Department of Justice Kenya, ‘ National Action Plan, Legal Aid 2017 – 2022 Kenya’ 22 (< <https://kecosce.org/national-action-plan-legal-aid-2017-2022-kenya/> > accessed 14 December 2020.

In view of this, the Act defines a legal aid provider to include ‘an advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organization, a paralegal; a firm of advocates; a public benefit organization or faith based organization; a University or other institution operating legal aid clinics; or a government agency, accredited under the Act to provide legal aid’.¹⁴ Through this provision, law schools have the ambit to be providers of legal aid services by running legal aid clinics. These legal aid clinics provide a grand opportunity for law students to become agents of social change and transformation as they provide free and professional legal services to indigent persons.

Part II Law Schools as Legal Aid Providers

Like most African countries, the provision of legal aid services by Kenyan law schools is closely associated with the use of clinical legal education. Simply put, clinical legal education is learning by doing whereby the law students play varying degrees of the role of a lawyer representing clients with legal issues.¹⁵ This form of experiential learning ‘enables law students to play an active role in the learning process and to see how the law operates in real-life situations’.¹⁶ Clinical legal education serves two

¹⁴ Legal Aid Act 2016, s 2.

¹⁵ Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017 ANU) 48 < <https://press.anu.edu.au/publications/australian-clinical-legal-education> > accessed 17 December 2020

¹⁶ David McQuoid-Mason and Robin Palmer, *African Law Clinicians Manual*’ (2013) 1 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewivrK6i49HtAhWtOkEAHcOHDrEQFjABegQIAhAC&url=https%3A%2F%2Ffir.canterbury.ac.nz%2Fbitstream%2Fh>

purposes: one of student learning, the other of community service. It allows for law students to gain practical professional skills and values whilst delivering legal services in a social justice environment.¹⁷ The provision of legal aid services by law schools is thereby hinged on the social justice objective. As Iya rightfully puts it, 'law students can play a valuable role in assisting the majority poor and ignorant members of the society by satisfying their needs for access to justice through engaging in a variety of community service programmes, while at the same time acquiring legal or professional skills and values'.¹⁸

As a pedagogical approach, clinical legal education boasts of a variety of models of learning that are generally called legal clinics.¹⁹ These legal clinics can be defined as offices staffed by law students under the supervision of qualified lawyers, providing free legal services to indigent members of the community. The term 'legal clinic' can broadly extend to clinics that operate to deal with clients or simulated legal practice that does not deal with clients.²⁰ Thus, legal clinics can range from in-house clinics, outreach clinics, externships, street law clinics, simulated clinics to clinical

[andle%2F10092%2F15366%2FAfrican-Law-Clinicians-Manual-McQuoid-Mason.pdf%3Fsequence%3D2&usg=AOvVaw2JKcdhq49yPaI1yLX0YID9](#)> accessed 14 December 2020.

¹⁷ David McQuoid-Mason and Robin Palmer, 'African Law Clinicians Manual' (2013) 1 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewivrK6i49HtAhWtOkEAHcOHDrEQfjABegOIAhAC&url=https%3A%2F%2Ffir.canterbury.ac.nz%2Fbitstream%2Fhandle%2F10092%2F15366%2FAfrican-Law-Clinicians-Manual-McQuoid-Mason.pdf%3Fsequence%3D2&usg=AOvVaw2JKcdhq49yPaI1yLX0YID9>> accessed 14 December 2020.

¹⁸ Phillip F Iya, 'Fighting Africa's Poverty and Ignorance through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) I JCLE 17 <<https://doi.org/10.19164/ijcle.v1i0.128>> accessed 16 December 2020.

¹⁹ The terms 'legal clinic' and 'law clinic' are often used interchangeably.

²⁰ David McQuoid-Mason, 'Teaching Social Justice to Law Students through Community Service – The South African Experience' <<http://clarkcunningham.org/LegalEd/SouthAfricaMason1.pdf>. > accessed 12 December 2020.

components in doctrinal courses.²¹ In this article the focus is on legal aid clinics, which we define as live – client clinics whereby law students offer pro-bono legal aid services under the supervision of qualified academic staff.

Legal aid clinics are invaluable as they offer immense benefits. Grimes best summarizes these benefits to be that ‘clients receive a free, professional and customized service; students learn experientially; law schools serve a wider community mission; and the legal profession stands to inherit lawyers who are beginning to acquire and appreciate the need for legal practice awareness and to develop pragmatic, problem-solving skills’.²² Thus, these clinics provide a win – win situation for all.

The following part looks closely at the status of law school – based legal aid clinics in South Africa for a comparative basis. South Africa’s experience offers an exemplar model for the establishment of these clinics as it has a comparable legal, socio – economic context to Kenya.

²¹Richard Grimes, 'Accessing Justice: The Role of Law School Legal Clinics in Conflict-Affected Societies' (2014) 1 AJLE 73 < <https://doi.org/10.1177/2322005814530327>> accessed 17 December 2020.; Adrian Evans et al *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) 48 < <https://press.anu.edu.au/publications/australian-clinical-legal-education>> accessed 17 December 2020; David McQuoid-Mason and Robin Palmer, *African Law Clinicians Manual* (2013) ch 4 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewivrK6i49HtAhWtQkEAHcOHDrEQFjABegOIAhAC&url=https%3A%2F%2Ffir.canterbury.ac.nz%2Fbitstream%2Fhandle%2F10092%2F15366%2FAfrican-Law-Clinicians-Manual-McQuoid-Mason.pdf%3Fsequence%3D2&usg=AOvVaw2JKcdhq49yPaI1yLX0YID9>> accessed 14 December 2020.

²² Richard Grimes, 'Accessing Justice: The Role of Law School Legal Clinics in Conflict-Affected Societies' (2014) 1 AJLE 86 <https://doi.org/10.1177/2322005814530327> accessed 18 December 2020.

The clinical movement in Africa is still growing - South Africa leading with highly developed clinical programmes based in their law schools. The emergence of legal aid programmes in South African law schools began in the 1970s with the aim of providing access to legal services to the poor and vulnerable.²³ At that time, law schools bridged the gap created between the limited State-funded legal aid system and the increasing social and political needs of the society.²⁴ The typical legal aid clinics that existed were low-budget student run initiatives that were supported by some academics and persons in private practice.²⁵ The type of legal matters carried out in the clinics were mostly civil in nature and consisted mainly of family, employment and housing matters.²⁶

Today, all law schools in South Africa have established legal aid clinics.²⁷ The spur in the numbers of legal aid clinics can be attributed to key motivating factors such as funding received by Universities from the Legal Practitioners Fidelity Fund since the 1990's (formerly the Attorneys Fidelity Fund) and the establishment of the South African University Law Clinics Association (formerly Association of University Legal

²³ MA (Riette) du Plessis, 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 17 <<http://ref.scielo.org/6cwsxx>> accessed 3 December 2020; DJ McQuiod – Mason, 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa – Pre 1970 until 1990: Part 1 (2004) 29(3) JJS 33 <<https://journals.ufs.ac.za/index.php/jjs/article/download/2899/2812>> accessed 18 December 2020.

²⁴ MA (Riette) du Plessis, 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 17 <<http://ref.scielo.org/6cwsxx>> accessed 3 December 2020.

²⁵ Willem De Klerk, 'University Law Clinics in South Africa' (2005) 122 *SALJ* 930.

²⁶ DJ McQuiod – Mason, 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa – Pre 1970 until 1990: Part 1 (2004) 29(3) JJS 35 <<https://journals.ufs.ac.za/index.php/jjs/article/download/2899/2812>> accessed 20 December 2020.

²⁷ DJ McQuiod – Mason, 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Part 2: 1990 until the present (2005) 30(1) JJS 7 <<https://journals.ufs.ac.za/index.php/jjs/article/view/2906>> accessed 20 December 2020.

Aid Institutions).²⁸ Notably, legal aid clinics in South African law schools get significant external funding. The Legal Practitioners Fidelity Fund (LPFF) grants bursaries to legal aid clinics at South African universities to facilitate quality legal education.²⁹ These monies enable the effective operationalization of the clinics and the hiring of clinical staff such as a director of the clinic, attorneys and legal practitioners.³⁰ In addition, the formation of the South African University Law Clinics Association (SAULCA) also promotes the growth of the legal clinics in South African law schools. SAULCA is the umbrella body that represents all law school- based legal aid clinics in South Africa.³¹ It seeks to promote the provision of free legal services to indigent persons and the practical legal education of law students, to lobby and network with relevant stakeholders and to ensure the sustainability of clinics amongst other objectives.³² Through SAULCA, a standard curriculum and teaching manual, a guide to clinical assessment methods, a manual on clinical teaching methodology and a student textbook on clinical education have been developed for a structured approach to clinical legal education.³³

²⁸MA (Riette) du Plessis, 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 18 <<http://ref.scielo.org/6cwsxx>> accessed 3 December 2020.; Willem De Klerk, 'University Law Clinics in South Africa' (2005) 122 *SALJ* 930.

²⁹ Legal Practitioners Fidelity Fund South Africa, 'Bursaries' (Legal Practitioners Fidelity Fund, 2020) <<http://www.fidfund.co.za/bursaries/>> accessed 14 December 2020.

³⁰ David J McQuoid-Mason, 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *FILJ* S111, S129 < <http://clarkcunningham.org/LegalEd/SouthAfrica-MM-Fordham.pdf>. > accessed 14 December 2020.

³¹South African University Law Clinics Association, 'Home' <<https://www.saulca.co.za/>> accessed on 1 December 2020.

³² South African University Law Clinics Association, 'Home' <<https://www.saulca.co.za/>> accessed on 1 December 2020.

³³ Willem De Klerk, 'University Law Clinics in South Africa' (2005) 122 *SALJ* 931.

Legal aid clinics are now a core part of the law degree as they have been integrated into the mainstream law degree curriculum either as mandatory or elective courses.³⁴

The legal aid clinics constitute the clinical experience of a broader clinical course or program.³⁵ Student participation in this clinical experience is based on clinic time or shifts, taking turns to receive walk in clients, assess cases to decide which cases to accept and providing whatever service the client needs, all under supervision.³⁶ This hands – on learning makes the most valuable experience as it has proved to be ‘effective in developing respect for clients, increased student confidence and the educational outcome of rapid, but sustained and comprehensive student learning’.³⁷

Though law school – based legal aid clinics in South Africa have progressed tremendously, they still face some challenges such as meeting the clients and law students’ needs, difficulties in assessing clinical work, imbalances in student learning amongst others.³⁸ Despite these challenges, these clinics continue to greatly impact how the South African citizens access justice.

³⁴ Willem De Klerk, 'University Law Clinics in South Africa' (2005) 122 SALJ 932.

³⁵ The clinical course or program is ideally structured to include a clinical experience, a classroom component and a tutorial session. See M A Du Plessis, *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2017 Juta SA) 26.

³⁶ Donald Nicolson, 'Our Roots Began In (South) Africa: Modelling Law Clinics to Maximise Social Justice Ends' (2016) 23.3 IJCLE < <https://www.northumbriajournals.co.uk/index.php/ijcle/article/view/532/922> > accessed 12 December 2020; MA du Plessis, 'Clinical Legal Education Models: Recommended Assessment Regimes' (2015) 18 < <https://www.ajol.info/index.php/pelj/article/view/131490/121088> > accessed 13 December 2020.

³⁷ MA du Plessis, 'Clinical Legal Education: Identifying required Pedagogical Components' (2015) 40(2) JJS 69 < <https://journals.ufs.ac.za/index.php/jjs/article/view/3260>> accessed 18 December 2020.

³⁸ SH Mahomed, 'United in our challenges: Should the model used in clinical legal education be reviewed?' (2008) JJS 61 < file:///C:/Users/User/AppData/Local/Temp/juridic_v33_specialissue_a4.pdf> accessed 17 December 2020.

In contrast, Kenya's clinical movement is under – developed. This clinical movement can be considered to be in the 'first wave of modern clinical legal education' that was characterized by the sprouting of voluntary student programs for practicing lawyering skills and advancing a social justice mission.³⁹ While evaluating the development of clinical legal education in Kenyan law schools, Osiemo observed that, 'CLE [clinical legal education] is applied in some Kenyan universities to varying extents, but not in a systematic or sustainable manner as happens in many other universities in other countries around the world. Although efforts have been made over the years to establish law clinics in a number of law faculties, most remain at levels that do not meet the characteristic features of CLE'.⁴⁰ Thus, this status of clinical programs in Kenyan law schools is mirrored in the embryonic state of law school – based legal aid clinics in Kenya.

Most of the legal aid clinics that exist in Kenyan law schools run as extra – curricula activities separate from the mainstream law curriculum. For instance, in the University of Nairobi, legal aid clinics are organized by the Students Association for Legal Aid and Research (SALAR).⁴¹ SALAR is a student club that works in conjunction

³⁹Margaret Martin Barry; Jon C Dubin; Peter A Joy, 'Clinical Education for This Millennium: The Third Wave' (2000)7(1) CLR 6 < <file:///C:/Users/User/AppData/Local/Temp/SSRN-id2548228.pdf>> accessed 17 December 2020.

⁴⁰ Lynette Osiemo and Anton Kok, 'Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education (2020) 64 (2) JAL 191; For a detailed description of the clinical programs in Kenyan law schools, see Anne Kotonya, 'Defining the role of the university law clinician: perspectives from Kenya clinician: (2020) The Law Teacher, DOI:10.1080/03069400.2020.1840054.

⁴¹ UON SALAR, 'The Students' Association for Legal Aid and Research' (SALAR) <<https://www.uonsalar.org/Activities.html>> accessed 17 November 2020.

with non-government organisations to offer legal assistance that includes employment and labour disputes, human rights, matrimonial disputes, land disputes and child-related matters.⁴² Strathmore University also runs the Strathmore Law Clinic which is a student-led institution that seeks to further access to justice by running legal literacy programs in criminal justice entrepreneurship and human rights.⁴³ Students at the Kabarak University School of Law offer legal aid advice through the Kabarak University Law Students Association (KULSA) to inmates in prisons and also to the surrounding Kabarak community.⁴⁴ The student-led Public Interest and Awareness Programme run by the law students at Kenyatta University School of Law offers legal awareness and assistance services in different parts of the country.⁴⁵ There also exists a walk – in legal aid clinic that offers generalist legal services. Despite the clinic being extra-curricular, it is supervised by a law lecturer.⁴⁶

⁴² 'SALAR – Legal Aid' available at <https://www.uonsalar.org/legal-aid.html>, accessed on 12 March 2018. See also Yohana Ouma and Esther Chege, Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide' <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi7u6LRiJHtAhX1WxUIHYHRBmIQFjAAegQIARAC&url=https%3A%2F%2Fpdfs.semanticscholar.org%2Fcb0f%2F975d4b75613c92a0311599981fdbcdceb32d.pdf&usg=AOvVaw239a6-p-AOOK61qn0vIG61>> accessed 17 November 2020.

⁴³ Strathmore University Law Clinic, Annual Report 2019, Strathmore University Law School 2019 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjY6sa0tYXuAhUFXhUIHUF2DwoQFjAAegQIARAC&url=https%3A%2F%2Fwww.strathmore.edu%2Fwp-content%2Fuploads%2F2020%2F09%2FSU-2019-Annual-Report.pdf&usg=AOvVaw2NURGVUTdP25uDaBUvRNGt>> accessed 16 November 2020; Emma Senge Wabuke, Arnold Nciko and Abdullahi Abdirahman, Promoting Access to Justice in Kenya: Making the Case for Law Clinics (The Platform October 11 2018) <<https://theplatform.co.ke/promoting-access-to-justice-in-kenya-making-the-case-for-law-clinics/>> accessed 16 November 2020

⁴⁴ 'KULSA Programmes' available at <<http://law.kabarak.ac.ke/kulsaprogrammes.php>> accessed 12 March 2018.

⁴⁵ Kenyatta University, 'Public Interest and Awareness Programme' (Kenyatta University, 17 April 2015) <<http://law.ku.ac.ke/index.php/97-school-news/169-legal-aid-awareness>> accessed 17 November 2020.

⁴⁶ Anne Kotonya, 'Defining the role of the university law clinician: perspectives from Kenya clinician: (2020) The Law Teacher 8 DOI:10.1080/03069400.2020.1840054.

The emerging core features of legal aid clinics in Kenyan law schools are that they are mostly student-led, extra-curricular clinics that offer legal assistance through advice-only clinics and street law programmes. Because these student-led clinics are not incorporated in the mainstream law degree curriculum, they tend to operate in a less formal manner.⁴⁷ They lack the structure and use of interactive learning methods that more established clinical programs have. It is therefore argued that the failure to integrate legal aid clinics into the wider law degree curriculum does affect the effectiveness and sustainability of the clinics.

In conclusion, Kenyan law schools can gain from emulating the best practices of South African law schools. Seemingly, the quality, productivity and sustainability of legal aid clinics and clinical programs at large can be improved if a holistic approach is followed. This approach could include adopting strategies like: the curricular integration of legal aid clinics, the development of training materials for clinical legal education, networking and collaboration amongst law schools and also with other legal aid providers and broadening the spectrum of funding to include both internal and external funding sources.

⁴⁷ Law schools in Kenya are not obligated by law to incorporate clinical programs into their law degree curriculum.

Part III The establishment of the Mount Kenya University School of Law

Legal Aid Clinic

The authors were members of the legal aid committee at the Mount Kenya University School of Law (MKUSOL) that offered free legal services through legal aid clinics.⁴⁸ Legal aid clinics were incorporated in the undergraduate law degree curriculum in a mandatory course dubbed 'Public Legal Clinics'. The course engaged fourth year law students and it was akin to a capstone course. It sought to inculcate a variety of skills necessary in the practice of law namely interviewing skills, legal writing skills, drafting of legal documents, legal analysis reasoning, ethical and professional rules and trial advocacy. The same class of students would be required to participate in a legal aid clinic set up by the law school's legal aid committee so as to hone those practical skills.

The design of the legal aid clinic was premised on the advice - only model where legal advice was rendered to the general public. The location of these clinics deferred from areas with a low - income populace like Kibera, Mukurwe Kwa Njenga, Kawangware to prisons such as Langata Women's Prison and the Nairobi Remand and Allocation Maximum Prison.⁴⁹ These legal aid clinics were also generalist clinics offering legal

⁴⁸ Ms. Mikinyango and Ms. Nguru were part of a four - member team that comprised the Legal Aid Committee during the period between 2015 and 2018 at Mount Kenya University School of Law. Ms. Nguru doubled up as the chair of the committee as well as the course instructor for the Public Legal Clinics course.

⁴⁹ Kibera and Mukuru kwa Njenga are both slums situated in Nairobi where residents face financial challenges accessing essential services as reported by Amnesty International, 'Kenya The Unseen Majority: Nairobi's Two Million Slum Dwellers (2009) < <https://www.refworld.org/pdfile/4a3660e82.pdf> > accessed 7 November 2020

Practice Report

advice on a wide range of legal issues. The nature of legal work highly depended on the target community's needs. For instance, the remandees in prisons needed assistance in understanding the court procedure in criminal cases, while the members of the community mainly sought advice on family and property matters. Others sought a better understanding of various human rights.

The mandate of organizing and coordinating the legal aid clinics lay on the legal aid committee working closely with the law school's administrative staff. The legal aid committee was made up of several lecturers, who are Advocates of the High Court of Kenya, and were assisted by administrative staff from the law school. The committee members played several clinician's roles that included being liaisons to the law school's and University management, creating strategic partnerships with Government officials and local partners, supervision of the clinic, financial management of the clinic resources and the overall coordination of the clinics.⁵⁰

The legal aid clinic were usually scheduled for the end of semester once students had completed the course content. The committee had the task to organize a clinic every semester and this meant that at least three legal aid initiatives would be organized in a year.⁵¹ The location of the clinics would be identified by the legal aid committee together with the attending class of students. The selected area would have to be

⁵⁰ For a description of the various roles of a Kenyan clinician see Anne Kotonya, 'Defining the role of the university law clinician: perspectives from Kenya clinician: (2020) *The Law Teacher* 11 DOI:10.1080/03069400.2020.1840054.

⁵¹ There are three semesters in the academic year in the Mount Kenya University Law School of Law.

Practice Report

populated by citizens that may not be able to afford legal fees in Nairobi and its environs. Once the area has been identified, the next step would be to engage any relevant administrative authority in the area. These could be Government agencies such as County Government officials, Chiefs, the Commissioner of Prisons in Kenya, or Non-Governmental Organizations and Faith-based institutions such as churches. This was a necessary step as the committee's sought partnership and sponsorship in a bid to lessen the University's financial burden. For instance, one legal aid clinic was hosted by a church that offered its church hall and seats. Building relations with community leaders was also crucial as it allowed for buy – in from the community and helped negate the negative public perceptions. One example is when the legal aid committee was allowed access to the community WhatsApp groups to raise awareness of the upcoming initiatives.

The budgetary costs were borne primarily by the University. The committee would need financial support for all these activities and it would submit a budget detailing the operational and administrative costs for running each legal aid clinic. The operational and administrative costs entailed utilities such as telephone call costs, transport, stationery, promotional materials, field visits, hired tents and furniture, meals and refreshments for students. At times, the budget would be subsidized, and this would affect the outreach and quality of legal aid delivered. Also of importance was attaining the necessary licenses to host these clinics as well as creating public awareness to the targeted community. On one occasion, the committee undertook to

do a roadshow in Thika town to create public awareness which required licenses from the County Government and even a license from the Music Copyright Society of Kenya permitting the playing of music during the roadshow.

The structure of the legal aid clinic was simple. On the date of the clinic, there would be a briefing session with the law students and the members of the legal aid committee on site. The purpose was to update them on their student responsibilities during the clinic, the potential clients and legal issues they would handle and remind them of their ethical duty of professionalism and confidentiality. The law students would thereafter be grouped into small groups of three to four to counsel and advise walk in clients under the supervision of the members of the legal aid committee. There would be a group of students tasked to welcome clients, ushering them to the reception so as to register and ensure they are appointed students to advise them accordingly. During the sessions, the students would jot down key facts in attendance notes and offer advice based on their legal knowledge.⁵² When needed, the members of the committee would step in to assist the group of students. Clients with legal issues that required legal representation were referred to the relevant legal aid providers. After the legal clinics were completed, the legal aid committee would hold debriefing sessions with the attending class of students to share their experiences, give feedback and reflect

⁵² Student participation in the clinics and the marks from the assessment of the attendance notes would contribute towards the grade of the law students.

upon their learning. The information received from these debriefing sessions would work as the benchmark of the effectiveness of the initiatives.

The above discourse reveals that Kenyan law schools are well on their way to becoming formidable partners in legal aid delivery. More specifically, this initial step to establish MKUSOL legal aid clinics gives new impetus to reinvent clinics that pass the quality indicators of legal aid clinic activities.⁵³ A reflection on the challenges faced and the lessons learnt by the MKUSOL can give insight on what to look out for when establishing viable law school – based legal aid clinics. These are discussed in the next two parts.

Part IV - Challenges faced by The Law School – Based Legal Aid Clinic

This part discusses the challenges faced in the organization and delivery of legal aid services at Mount Kenya University School of Law (MKUSOL). These have been broadly classified into internal and external challenges. Whereas the internal challenges were faced by the law school inwardly, the external challenges were faced while aiding the general public.

⁵³ For a discussion on quality indicators of activities of legal clinics, see Andrii Halai, 'Quality Indicators of Activities of Legal Clinics: Ukrainian Experience (2016) 3(2) AJLE 209 <<https://doi.org/10.1177/2322005816640341>> accessed 20 December 2020.

4.1 Internal challenges

The following section outlines the internal challenges faced by the law school and its students.

4.1.1 Constrained funding

As already established, a University seeking to provide legal aid contributes significantly to the quality of legal education for students and the promotion of equality of justice for the community.

As such the Mount Kenya University, through its law school, ran the legal aid clinics as part of the undergraduate law degree. The University was therefore the primary financial source for the activities related to these clinics. The expenditure on operational and administrative needs did rack up quite a bill. Inevitably, the amount of budgetary funds allocated for the clinics started to decrease, making it harder for the committee to organize legal aid initiatives every semester. The constrained budget also meant that the clinic could not afford to employ administrative staff to assist in following up the clients served. Many times, clients served at the legal aid clinic would express the wish to reach out in case of follow up questions or need for advice but the legal aid committee did not have an operating office open to the public. This curtailed extensive legal aid delivery and the ability to evaluate the efficiency of the clinics. The financial burden on the University consequently led to lack of sustainability of these clinics as there were no funds to keep running them.

4.1.2 Inadequate law student supervision

Another challenge faced in legal aid clinics was the low student to faculty members' ratio supervising and participating in the clinics. The low turnout of faculty members would limit the quality of supervision granted to the law students as they offered legal advice. With constrained funding, the law school through the legal aid committee was unable to cover the operational costs of having extra faculty members. Additionally, the scheduling of these clinics would fall on Saturdays when the public would generally be available – this timing would conflict with the professional and personal interests of faculty members. As a result, few faculty members were motivated to volunteer their time when called upon.

4.1.3 Law students restriction to providing legal advice

Following the definition of legal aid by the Act, legal aid includes several services such as legal advice, legal representation, drafting of relevant documents and creating legal awareness among other services.⁵⁴ Because the legal aid clinics at the University primarily relies on law students, the services offered are limited to giving legal advice in the form of opinions and provision of legal information. The law students are barred by law from legal representation as such they can only run advice – only legal clinics.⁵⁵ This limited the extent of legal assistance granted to those unable to afford

⁵⁴Legal Aid Act 2016, s 2

⁵⁵ Advocates Act Cap 16 Laws of Kenya, s 9, 31.

legal advice and legal representation. Anyone in need of such services would be referred to legal aid providers offering such legal aid services in Kenya, without guarantee of help.

4.2 External challenges

Other than the internal challenges, external challenges were faced by the law school as it engaged the general public and these include the following.

4.2.1 Lack of buy-in and mistrust from the legal aided persons

A major challenge arose relating to the target beneficiaries of the clinics gaining public confidence and trust in the initiatives. The negative public perception of lawyers coupled with their twisted notion of free services being offered perplexed the community, many questioning the motive behind providing an expensive, elusive service for free. This mistrust arose partly from the public's growing perception that lawyers are individualistic persons who care less for the society, limited public awareness about legal aid and the social bias against free things. Additionally, the legal aided persons had lost hope in attaining justice the judicial way and preferred to explore other unconventional providers of justice.

4.2.2 Illiteracy and language barrier

Another challenge that arose when serving clients was the inability to communicate because of illiteracy and inability to communicate in either in English or Swahili. Based on the financial constraints, it was impracticable to have proficient interpreters and depending on students or the committee members to translate was not always reliable. As a result, some clients would shy away.

4.2.3 Lack of strategic partnerships with other legal aid providers

As mentioned earlier, the legal aid committee would partner with community leaders, Government agencies and other key institutions to ensure buy-in from the community. However, the lack of a coordinated network of legal aid providers hindered the escalation and final determination of some clients' legal issues. Such a network would also assist in identifying the nearest legal aid provider to the client in need and inadvertently, save on costs and result in effective case management. In some instances, once a client was advised on their rights, the legal issues and the next course of action, they would still need aid in drafting court documents, filing and representation.

The experience of the MKUSOL legal aid clinic depicts the reality facing law school – based legal aid clinics in developing countries. In the words of McQuoid – Mason,

...law schools in developing countries can make a significant contribution to access to justice in both repressive and democratic political environments. They can make a similar contribution by educating ordinary citizens about their legal rights. What sets developing countries apart from developed countries is that law schools in the former have a special duty to serve their communities. This is because they often operate as a privileged island of resources in a sea of scarcity, particularly when it comes to providing access to justice for the poor.⁵⁶

Arguably, the role of law schools in the provisions of legal aid can be enhanced if the above internal and external challenges are systematically addressed with obvious benefits amounting to the law students, law schools and communities at large.

Part V – Lessons Learnt from Practice

This part highlights the lessons learnt from implementing legal aid clinics and offers strategies that can be employed to mitigate the mentioned challenges.

For the successful running of legal aid clinics, there is need for extensive financial and human resources. The law school solely depended on the University to fund its initiatives thus continuity and sustainability of the clinics was pegged on the University's ability to provide. Funding constraints would have a domino effect

⁵⁶ DJ McQuiod – Mason, 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Part 2: 1990 until the present (2005) 30(1) JJS 14 <<https://journals.ufs.ac.za/index.php/jjs/article/view/2906>> accessed 20 December 2020.

resulting in other challenges such as loose supervision of law student by faculty members and the downsizing of operational costs. Law schools need to explore alternative models of funding. Avenues like partnering with like-minded local and international institutions and exploring public-private partnerships through their Universities can be targeted for fundraising.

Legally aided persons came to us to find justice, however our power to help was curtailed to giving legal advice on legal issues. It became blatantly clear that there was need to have coordinated efforts amongst legal aid providers that offered essential legal services like court representation in criminal and civil matters. A referral system formalized between law schools and with other legal aid institutions would offer a start – to- finish solution resulting in better legal aid delivery.

Gleaning in from South Africa's best practices, the formation of an association of law schools with school – based legal aid clinics could significantly change the effectiveness of these clinics and accelerate the development of the clinical movement in Kenya. The association would consolidate the efforts of all law schools, explore fundraising opportunities, carry out evidence – based research, offer capacity building to clinicians and create a platform for lobbying and networking. The association could also develop student and teacher manuals for structured training. Lastly, the

association could promote the financial sustainability of legal aid clinics by targeting the National Legal Aid Fund.⁵⁷

Finally, integrating of legal aid clinics into the law degree curriculum has the potential of anchoring these social justice efforts. By designing the goals, interactive learning methods and assessment criteria of a legal aid clinic could ensure that law students inculcate the necessary legal skills and values for professional competency. A worthwhile proposal is the amendment of The Legal Education [Accreditation and Quality Assurance] Regulations to incorporate clinical courses (including legal aid clinics) as one of the core courses in all law degree curricula in Kenya.⁵⁸

Part VI. Conclusion

Undoubtedly, law schools play an instrumental role in the provision of legal aid services to the Kenyan citizenry. Law schools can achieve high impact with well-established and institutionalized legal aid clinics, adequate funding, and renewed motivation of faculty members coupled with the necessary support from State and Non- State actors. For law schools, the sky is the limit – the sky here being the provision of sustainable and quality legal aid.

⁵⁷ Section 29 of the Legal Aid Act establishes the Legal Aid Fund that is to be managed by the National Legal Aid Service.

⁵⁸ Legal Education [Accreditation and Quality Assurance] Regulations Legal Notice Number 15 of 2016. Through these regulations, the Council of Legal Education exercises its accreditation and quality assurance mandate. This regulation and others relating to legal education in Kenya are administered by the Council of Legal Education established by s 4 of the Legal Education Act, 2012.

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