**UNIVERSITY OF NAIROBI**


**FACULTY OF LAW**

# ACCESSING JUSTICE IN KENYA THROUGH DEVELOPING SPECIALISED COURTS

**BY:**

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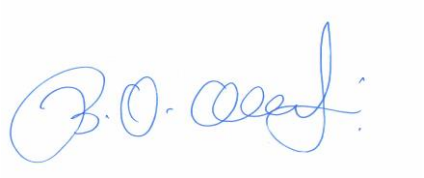
**DATE: 17th May 2022**

## DECLARATION

**This thesis is original work and has not been presented for a degree in any other university.**



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This thesis has been submitted for examination with approval as the University of Nairobi supervisor.

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## DEDICATION

This thesis is dedicated to the late G. N. Odeny, one unsung hero.

## ACKNOWLEDGEMENT

This thesis is the result of a number of distinguished scholars without whom it would not have come to fruition. Towards this end, I wish to sincerely thank my supervisor Dr. Scholastica Omondi for her encouragement to see me conclude it and my correction supervisor Hon. Lady Justice Dr. Nancy Baraza for sacrificing her time to ensure that the warps identified during my defence of this thesis were well reviewed and sealed. Thank you so much for this and may you live long to offer to your valuable expertise and guidance to many others.

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United Nations Declaration on Human Rights (UNDHR).

United Nations International Covenant on Civil and Political Rights (ICCPR).

United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR).

International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

## LIST OF ABBREVIATIONS

| | |
|---|---|
| ACHPR | African Charter in Human and People's Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| ADR | Alternative Disputes Resolution |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | Convention on the Rights of the Child |
| CUC | Court Users Committee |
| ELC | Environment & Land Court |
| ELRC | Employment & Labour Relations Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| JLAC | Judiciary Advisory Council |
| JTF | Judiciary Transformation Network |
| JSC | Judicial Service Commission |
| KLR | Kenya Law Report |
| SJT | Sustainable Judiciary Transformation |
| UK | United Kingdom |
| UNDHR | United Nations Declaration on Human Rights. |

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**Abstract**

The introduction of specialization in the court system has made positive contributions to the fundamental right to access justice. Specialization has made advancement in the development judicial systems and further addressed broader developmental constraints by fast tracking and settling complex cases that require expertise. In Kenya, court specialization was formally institutionalized by her 2010 constitution that saw the establishment of special courts to deal in defined scope of the law such as the environment, land disputes, employment matters, labour relations issues and small claims.

However, the concept of specialized courts in Kenya has not been rosy as challenges are being experienced in their quest to promote access to justice. This has been noted in the legal process of setting them up and maintaining their operations. The noted challenges can be traced from issues to do with the needed information to deciding whether specialization is required in a certain area, the criteria, appropriate model of specialization, and further, the selection and training of the judicial officers to serve in those chosen courts.

In Kenya, it has been argued that neither the constitution nor legislation envisages a scenario where courts are established outside a legislative framework. This has been seen to present serious barriers in accessing justice in matters urgency that necessitate a special court to deal with which cannot wait for parliamentary legislation to bring it forth. The Kenyan legislative process is known to be long, protracted and at times divisive; hence leading to delays in establishing any new court.

Research on international experiences and best practices in this paper demonstrate that the process of establishing and maintaining specialized courts need not be cumbersome as the Kenyan experience. Thus, this research paper looks into the adequacy of the country's legal framework on this subject and draws lessons from other international jurisdictions that the country can learn from. In particular, lessons are drawn from the USA, England, India and South Africa all whom have a well-developed and robust specialized court system. Through the findings and recommendations of this paper, it is hoped that the possible barriers to access justice

in the development of specialized courts shall be identified, isolated and eliminated. This will pave way to improved and seamless establishment and maintenance of new courts in future enhancing greater access to justice.

# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.0 Background

It is the desire of many a litigant to have their matters dealt with expeditiously by an impartial and qualified arbiter. The elimination of all hindrances in accessing justice is essentially what ought to be the main objective of a legal system as this gives confidence to litigants to approach courts to resolve their disputes. Kenya's tumultuous history saw itself at one point where confidence in her courts was wanting. This overtime became one of the reasons that fueled her people's clamor for a change of the constitution that brought with it radical changes in her court system.[1] Access to justice being a fundamental right,[2] it was then thought wise to overhaul the country's entire dispute resolution mechanism and replace it with a more responsive one. One of the noted significances in the overhaul was the introduction of specialization in dispute resolution.[3] This was achieved with the constitutional and legislative establishment of two specialist courts; one to deal with employment and labour relations while the other court to handle land and environment disputes.[4] The two specialist courts being formally divisions of the High Court before their upgrade to fully fledged independent courts. The other development was

[1] The clamour for Kenya to have a new constitution date back decades but gained notorious momentum following the 2007–2008 post-election violence where the Orange Democratic Party (ODM) refused to go to court to challenge the incumbent President Mwai Kibaki's declaration as the winner of the 2007 Presidential elections. ODM refused the court process citing lack of trust in Kenya's judicial system. Once peace was finally brokered, amongst the agreement reached was comprehensive constitutional reform to be undertaken that restructured the entire judiciary to align with the aspirations of Kenyans

[2] Accessing justice is now captured as fundamental right in a number of notable international instruments such as the United Nations Universal Declaration of Human Rights (UNDHR), the United Nations International Covenant on Civil and Political Rights (ICCPR), the United Nations International Covenant on Civil and Political Rights (ICCPR), the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), the Access to Justice Convention, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on the Rights and Welfare of the Child ( ACRWC) all of which shall be expounded in great detail in chapter two of this study

[3] Central European and Eurasian Law Initiative, Specialized Courts; A concept Paper, (1996) p.1 defines a specialised court as one with limited and usually exclusive jurisdiction in a specific field of law. Judges who in specialized courts are experts in the field of law that falls within the court's jurisdiction.

[4] Article 162(2)(a) &(b) of the Constitution of Kenya, 2010

with the various tribunals that were previously under the docket of various ministries. Under the new constitutional dispensation, these tribunals that also specialize in various arrears of the law were transferred to the judiciary to be under control of the Judicial Service Commission (JSC).[5] Post 2010, debate on which arm of the government the tribunals ought to fall was settled in the High Court decision in *Okiya Omtata Okoiti –vs- Judicial Service Commission & 2 Others* [6]that founds the tribunals to be part of the judiciary under the constitution.[7]

Specialization however never really took off upon the promulgation of the new constitution as parliamentary legislation action was still required to have the identified courts set up. This requirement is now noted as one of the biggest hurdles to access to justice in the specialized courts as they have to wait for parliament had to enactment various legislations to establish them. Consequently, this leads to delay in setting up the courts as witnessed with the passage of legislation establishing the Supreme Court,[8] the ELC,[9] the ELRC,[10] and the Small Claims Court Act[11] in compliance with Article 162(4) of the constitution of Kenya[12] which stipulates that the mandate of setting up a court as a function of the constitution and legislation. Neither the constitution nor legislation envisaged a scenario where courts are established outside a legislative framework. This thus presents a challenge in scenarios of urgency on an emerging issue that necessitate specialization that cannot wait for parliament to establish a new court. Recently, an attempt by the chief justice Martha Koome's to set up a specialized court to deal with hate speech during the electioneering period was criticized as unconstitutional. *William Oketch*[13] took issue with it that the law only empowers the constitution and parliament to execute such mandate and not the chief justice. Indeed, the constitution at Article 162 defines the court system as comprising the superior courts and the subordinate courts listed at Article 169. That other than the constitution, parliament is the only other institution constitutionally empowered to establish a

[5] Article 171, constitution of Kenya, 2010 and sec. 13(1)(d) Judicial Service Act No. 1 of 2011

[6] Okiya Omtata Okoiti –vs- JSC & 2 Others; Katiba institute (Interested Party) 2021 eKLR
[7] See Article 169(1)(d) of constitution.
[8] Supreme Court Act No. 7 of 2011
[9] Environment & Land Court Act, No. 19 of 2011
[10] Employment & Labour Relations Court Act, Cap 234B, Laws of Kenya
[11] Small Claims Court Act, 2016
[12] Article 162(4) Constitution of Kenya, 2010
[13] William Oketch, "Plan to set up hate speech courts offers new legal food for thought", *The Standard Newspaper, (Nairobi, 27 October 2021)*

specialized court. The legislation of the law establishing the small claims court is a notable example of parliament's exercise of this mandate. The process took long owing to the nature of law making in Kenya that is known to be long, protracted and at times divisive. This cumbersome process can be understood as one of the primary hindrances to accessing justice. This unfortunately situation ends up defeating the very purpose of establishing specialized courts. *Laibuta*[14] relates such legal delays to the factors that are a hindrance to achievement of access to justice as justice delayed is justice denied.

Legislation aside, the coming into force of the new constitutional dispensation has noted other significant barriers for access to justice in the specialized courts. *Zimmer*[15] lists them as the possibility of shortage of trained experts to preside as judges in the said courts; the potential of disproportion in access to justice; the danger of preferential treatment for specialized cases as opposed to the general ones; limit to resources available for general courts, the temptation to delve into corruption. Since judges, lawyers, experts, and experts who frequent the specialized court keep bumping into each other, over a given period, they tend to refer to each other as colleagues and soon become very familiar with each other hence the possibility of corrupting cases under the bond of watching each other's back; lecture in the development of the law if the same limited number always delivers judgments of persons; the possibility of subjecting judicial officers to negative influence of seasoned practitioners; the risk of its judicial officers developing too subjective in their decisions owing to the fact of repetition of the cases being brought before them over time; and the challenge of additional and more significant resources being put down to set up specialized courts and train its judicial and support staff.[16]

Kenya's decision to embrace specialization was one of the ways it sought to eliminate barriers to access justice. However, specialization in itself has proven to be barrier to access justice when it comes to the procedure of establishing the courts, hence, necessitating a critical look into this process. The concern of this study as such is to find out the adequacy of the country's legal

[14] Laibuta, K.I., "Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Framework (DPhil thesis, University of Nairobi, 2012)
[15] Zimmer (n 3.
[16] Ibid p.1

framework on the development of specialized courts and plausible solutions to the hindrance to access justice in these courts.

### 1.1 Problem Statement

Although specialization is significant in access to justice, Kenya lags behind in the development of the courts. The subsisting situation can be traced to the existence of cumbersome constitutional and statutory procedures behind setting up of courts. Once set up, the said courts face a myriad of challenges in terms of operations, human resource and needed expertise to preside over them, budget constraints, procedural and technicalities in their proceedings, and the conflict and confusion generated with the general courts on questions to do with their jurisdiction or lack thereof. All these pose a challenge to access to justice and which challenge can only be tracked down to the country's legal framework. The study hence seeks to establish the adequacy or lack thereof of the country's existing laws on accessing justice through specialized courts and recommend one in the event the same is found wanting.

### 1.2 Justification of the study

Although specialization is significant in access to justice, Kenya lags behind in the development of the courts owing to lack of a suitable legal framework. Existing literature on this subject tends to focus more on access to justice in the general courts without zeroing in on the isolated and critical role contributed by specialized courts to access justice. As earlier on mentioned in Kenya, a court only comes into operation not by the whims of the judiciary which is the custodian of the law but by parliamentary legislation. This then presents serious barricade to access to justice. The judicial arm is thus left at the mercy and whims of the legislature to dictate if, when, and how a court is to be established and operated. The same applied to the speed in setting it up hence defeating the logic of having special courts to address emerging and urgent challenges to the law in the society. This presents a hindrance to access to justice. For this barricade to be eliminated then we seriously to have all players to rethink the legislative process of establishing and operating courts in a simpler, effective and less cumbersome process.

This study is therefore a crucial researchable topic that will contribute to the existing knowledge on *nexus* between legislation quagmire and access to justice. Once this dichotomy is understood it will no doubt generate further legal discourse on the need to avoid legislation barriers to access to justice when it comes to establishing new courts. It is thought that if access to justice is to be discerned, there is a need to consider having the legal process of establishing courts to be removed from the hands of parliament and delegated to the judiciary which is better placed to identify needy areas that need specialization. The study seeks to make recommendations that can be used to reform the laws and help craft proper administrative policies to better make the establishment of specialized courts simpler and more effective.

### 1.3 Statement of Objective

This study has both a main and specific objective;

#### 1.3.1 Main Objective

To examine the adequacy of Kenya's legal framework on development of specialized courts.

#### 1.3.2 Specific Objectives

1. To examine the theoretical and conceptual underpinnings of access to justice through specialized courts.

2. To study the suitability of the legal framework in place on accessing justice through the development of specialized courts.

3. To identify the international best practice on access to justice through which Kenya can draw lessons from on the development of specialized courts.

4. To make recommendations from experiences of other jurisdictions on the suitable constitutional, parliamentary, policy and administrative measures to access justice in the specialized courts.

### 1.4 Research Question

In any working democracy, the court system plays a pinnacle role in ensuring balance and harmony in any society. This research, therefore, attempts to evaluate the significance of specialization towards this harmony in society by seeking to finding out;

1. What are the theoretical and conceptual underpinnings of access to justice through specialized courts?

2. Does Kenya have a suitable legal framework to access justice in the development specialized courts?

3. What is the best international practice that Kenya can draw lessons on accessing justice through developing her specialized courts?

4. What recommendations can be made from other jurisdictions on the suitable constitutional, legislative, policy and administrative measures towards development of specialized courts to access justice?

### 1.5 Hypothesis

The hypothesis of this research work is that in as much as specialization of courts improves access to justice, Kenya lacks a suitable legal framework to access justice on the development of the courts.

### 1.6 Research Methodology

In this research, the deployed methodology was doctrinal. The study involved interrogation of secondary sources / library research. The literatures in question included books, articles, journals, reports, policies, sessional papers, internet sources and other published papers. The research had access to the University of Nairobi's online library and other internet sources. The study also involved desk top analysis of various texts. Select case studies were adopted for identifying international best practices.

### 1.7 Theoretical Framework

The paper is premised on the jurisprudence on justice as propounded by John Rawls,[17] and also on John Griffith's legal pluralism.[18] Whilst the main aim of the theory of justice here is to define justice in the society and its practical aspects, the theory of legal pluralism blends it in the plight of the right to access to justice.

#### 1.7.1 Theory of Justice

Justice is a broad terminology that has been conceptualized in into four categories being procedural, restorative, retributive, and distributive justice .[19] The general reasoning being justice is not the same across the board. What might may appear as justice to one may interestingly be taken as an injustice by another person. For purposes of our study, we shall concentrate on distributive justice that reasons with fairness in sharing and procedural justice that generally entails fair play.

Rawls postulates that fairness can be derived from two principles; that fairness means neutrality or the independence in decision making devoid of any vested interest, bias or partiality. It is this principle that the Kenyan court system operates. The concept of the independence of the judiciary from influence or bias in the exercise of its judicial functions is provided for under

[17] John Rawls, A Theory of Justice (Harvard University Press, Cambridge, Mass, 1971)
[18] John Griffiths, what is Legal Pluralism, J. Legal Pluralism No. 24 at 1, 2-6 (1986)
[19] Ibid

Chapter 10 of the constitution.[20] Rawls secondly premises that justice as publicly reasonable. In this sense, decisions have to be arguable and supportable on the basis of social stakes or values.

With regard to this study, the theoretical framework furthers the research work by presupposing that no one should be advantaged or disadvantaged over another in accessing justice.

### 1.7.2 Theory of Legal Pluralism

This theory advocates for the existence of multifarious legal systems within a single terrestrial area or populace. Distinct laws are used to deal with specific kinds of cases.[21] The coexisted form of the system has been developed into a principle known as legal centrism which reasons all laws are derived from one entity or authority and it follows that every rule, regulations, rites, and conduct(s) by other recognized institutions such a customary, religious and others are law only to the extent they are permitted by the main authority.[22]

The theory furthers this research work in that it recognizes that divergent forms of laws improve access to justice. Parties to a dispute are guided on the appropriate forum to handle their grievance(s) for expeditious and expertly determination.

## 1.8 Literature Review

The research paper's literature review was based on authoritative, past, and recent sources such as books, journals, and articles. This study shall look into the existing literature works on the same topic and identify the apertures which this study addresses. Some of the literature is examined below whilst the rest is examined during the course of the project. For study purposes, the reviewed materials are presented herein in the thematic arrears revolving around accessing justice; and, the specialized courts.

[20] Chapter 10, Constitution of Kenya, 2010
[21] Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney Law Review 375
[22] Helene Maria Kyed, The Politics of Legal Pluralism: State Policies on Legal Pluralism and Their Local Dynamics in Mozambique, J. Legal Pluralism No. 59 at 87, 88 (2009)

(i) Access to Justice

The term is popular amongst researchers but few if not none has attempted to devote their time to study it in the context of specialized courts. *Cappelleti and Grath* in their 1978 book "Access to Justice: The New Wave in the Worldwide Movement"[23] is identified as the one who come up with the term. Others such as *M.T. Ladan* in his book "Access to Justice as a Human Right Under the Ecowas Community Law,"[24] and *Magdalena Sepuiveda* in "Access to justice for persons living in poverty"[25]are singled out amongst those who refined the definition further amongst many other scholars. *Kariuki Muigai*, in his paper "ADR, Access to Justice and Development "[26]simplified the definition to encompass notion of granting disadvantaged groups in society unrestricted access to the legal systems. The notable significance of *Muigai* is that his definition introduces the reliance of alternative dispute resolution mechanism to resolve disputes.

The above identified scholars' research work is important in this study to explain the concept access to justice but as clearly exhibited, their definitions are not exhaustive in the context of specialization. This study shall attempt a simplified formal version of the concept. The connotation of formal denoting, all courts established by law which include specialized courts. The paper shall also agitate for the need for a seamless and simplified way to establish specialized courts for the new unique and emerging disputes that cannot wait for parliamentary intervention.

*Laibuta* in his PHD thesis "Access to Civil Justice in Kenya: An Appraisal of the policy and Legal Framework"[27] looks into the idea of civil justice and effectiveness of the policy and legal frameworks from the position which courts of law function. In his well-researched work, he relates the legal frameworks to the factors that are a hindrance to achievement of justice. The author however fails to address the quest of access to justice through developing specialized courts and

[23] '"Access to Justice: The Newest Wave in the Worldwide Movement to Make R" by Bryant G. Garth and Mauro Cappelletti' <https://www.repository.law.indiana.edu/facpub/1142/> accessed 6 November 2021
[24] Muhammed Tawfiq Ladan, 'Access to Justice as a Human Right Under the Ecowas Community Law' [2010] SSRN Electronic Journal <http://www.ssrn.com/abstract=2336105> accessed 6 November 2021
[25] Edwin R, Kyra B, and Vessela T, Pursuing the Public Interest: A Handbook for Legal Professionals and Activists, (Columbia Law School, New York, 2001) p. 214
[26] Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya' 25
[27] Laibuta, K.I., "Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Framework (DPhil thesis, University of Nairobi, 2012)

the necessity of a legal framework to address the same. This is what this paper shall be focusing on.

*Okech Owiti* in his paper "Access to Justice in the Kenyan Context"[28] gives clinical assessment on accessing justice in the Kenyan context and addresses himself to several technical issues in furtherance of access to justice including democratic legislative process, legal aid, education and training of judicial personnel, corruption and alternative dispute resolution. In as much as good work was penned by the author, the work was done pre-the 2010 constitution that ushered in the era of specialization. For obvious reasons this question of specialization was not addressed as well as assessing justice through developing specialized courts which is the main topic that this research will be dealing with.

*Kegoro* in his book "Judicial Reforms in the Context of Transitional Justice"[29] and another book by *Mbote and Akech* titled "Justice Sector and the Rule of Law"[30] focus on historical development of reform processes in judiciary and the implementation of the 2010 constitution of Kenya where they respectively addressed their minds on access to justice and proposed the enactment of legislations and policies on the same. The books though fall short of proposing the legislation of a statute to provide for the legal framework for the development of specialized courts.

*Sibusiso Nkomo,* in research finding paper titled "Access to Justice in Kenya: experience and perception"[31] by Afro barometer, a pan African, nonpartisan, nonprofit research network organization in partnership with the University of Nairobi and Katiba Institute carried out a survey between the period 2019 / 2020 on trust levels Kenyans had in the court system and the challenges they faced in accessing justice. The results that came out from their findings showed that the main challenges encountered by citizens in government courts include among others inability to meet costs and fees, inability to be listened to by the judge or magistrate, not being listened to, complexity of court processes and procedures, inability to obtain legal counsel or advice and long queues in handling cases. This data is crucial coming from their field research. However, the paper

[28] Okech Owiti, Access to Justice in the Kenyan context, Justice and Governance Law and Democracy (JGLOS), University of Nairobi School of Law, May 2007
[29] Kegoro, G. "Judicial Reforms in the Context of Transitional Justice" in ICJ Kenya, Looking Ahead and Looking Back: Transitional Justice in Kenya (ICJ) Rule of Law Report 2011-12, ICJ Kenya 2011)38
[30] Mbote. P & Akech, M. Kenya: Justice Sector and the Rule of Law (Open Society Foundations 2014).
[31] Sibusiso Nkomo, 'Access to Justice in Kenya' 23

fails to provide solutions or recommendations to address the challenges of access to justice that had been identified by those interviewed. This research endeavors not only to identify various challenges to access to justice at the courts but also to look for solutions to those challenges.

Several publications addressing access to justice by committees of the judiciary have also been published. Notable examples are the *Kotut committee*[32] which considered the improvement in the methods of recording court proceedings in enhancing speedy hearings; the *Kwach committee*[33] which recommended judicial officers being more involved in case management in order to reduce unnecessary adjournments of cases; the *Ringera committee*[34] which confirmed the existence of corruption in the judiciary and came up with a list of corrupt officers some who were investigated and removed from the judiciary; the *Onyango Otieno committee*[35] which recommended amongst other the amendments of the criminal procedure code to grant judicial officers more discretion during the hearing of criminal cases and further the adequate supervision of judicial officers; the *Bosire Taskforce*[36]; the *Kihara Kariuki Committee*[37] that recommended the establishment of the judicial performance evaluation to improve efficiency; and finally, the *Ouko Task force*[38]that recommended amongst others the ways of reducing backlogs of cases, the introduction of monitoring and tracking techniques as well as review and publication of the output of judicial officers and judges; it also proposed the establishment of a 24-hour duty court to address the needs of litigants who may wish to pursue justice as a matter of urgency outside working hours. It also recommended the establishment of alternative databases and need for a proper and reliable and foolproof recording and storage of court proceedings.

Increased public awareness, judicial activism and contribution of non-state actors make access to justice in the courts a dynamic process that requires constant revision and updates. Accordingly, in as much as the above judiciary committee reports were significant in periods in question, emerging trends show that challenges of accessing justice do mutate with times hence the need to keep abreast. Another area is the question on whether a legal framework can be a challenge to

[32] Committee to inquire into the Terms of Service of the Judiciary 1991-1992
[33] Committee on the Administration of Justice
[34] Integrity and Anti-Corruption Committee of the Judiciary
[35] Sub Committee on the Ethics and Governance of the Judiciary
[36] Taskforce on Terms and Conditions of Service for Judicial Staff
[37] Committee on Ethics and Governance of the Judiciary
[38] Taskforce on Judicial Reforms

access to justice. This is what the above reports have failed to address and what this research is bound to capture for posterity purposes.

(ii) Specialized Courts

*William Oketch* in his article "Plan to set up hate speech courts offers new legal food for thought"[39] criticized the Kenyan Chief Justice Martha Koome for proposing to single handedly establish specialized courts to handle hate speech crimes during the election period. The authors argument being that the under the Kenyan law, the Chief Justice's powers relating to court systems is restricted under section 10 of the Judicature Act[40] to making rules governing court proceedings and the operation procedures of the High Court. That there is no any provision enabling the leadership of the judiciary to establish specialized courts. The author may be correct to the extent that the constitution and legislation does not envisage a scenario where courts are established outside the legislative framework which is basically the constitution and parliament. However, the author fails to appreciate that the chief justice is empowered under section 11(1) (b) of the High Court (Organization and Administration) Act,[41] where the workload and the number of judges in a station permit to establish a division of the High Court. The other is the Magistrates Court Act giving credence to the chief justice to gazette special magistrates to deal with exclusively special cases such as the mentioned crime of hate speech. These are however debatable or grey areas of the law that necessitates this research addressing.

*Kroeze in* "The Companies and Business as a Specialized Court"[42] identifies the manner specialized courts can be set up. Here, he mentions the formation of specialized courts functioning separately from operations of the general courts. Here we see examples of the ELC and ELRC courts in Kenya as notable examples. Another formation identified by the author is the setting up of an administratively division of a general court. Here we can see examples of divisions such as commercial and tax, civil, criminal and others. How the court is organized is

[39] William Oketch, "Plan to set up hate speech courts offers new legal food for thought", *The Standard Newspaper, (Nairobi, 27 October 2021)*
[40] Sec. 10 Judicature Act, (Cap 8 Laws) of Kenya
[41] Sec. 11(1)(b) High Court (Organisation and Administration) Act, 2015
[42] 'Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions: Justice System Journal: Vol 26, No 2' <https://www.tandfonline.com/doi/abs/10.1080/0098261X.2005.10767749> accessed 31 January 2021

not essential so long as there is in place safeguards for its proper and independent functioning. *Geoffrey Kiryabwire* in his research paper "The Development of the Commercial Judicial System in Uganda: A study of the Commercial Division, High Court of Uganda,"[43] uses terms "court" and "division" interchangeably to refer to the commercial court in Uganda which by law is just but a division of a general court. The author boasts that the Ugandan court having been established in 1996 is the first commercial court in Africa. *Zimmer* in "Overview of Specialized Courts"[44] tries to decipher what constitutes a specialized court and attempts a definition that limits such a court's jurisdiction to its area of focus. He terms the judges who are employed in such courts as pundits or adept in their respective field. However, it remains debatable whether the divisions of a general court can be categorized as specialized courts.[45]

*Gramckow and Walsh* in their United Nations working paper "Developing Specialized Court Services"[46] noted that there are many forms of judicial specialization. The decided court model should basically reflect the challenges sought to be addressed. As mentioned earlier, the question whether a division of the High Court or one set up administratively from the general court amounts to an independent specialized court is still out there by the jury. Scholars and legal experts are unable to agree on this issue. This research shall seek to explore an answer to this. In that should the divisions constitute a specialized court, then it goes without saying that the said divisions will benefit from the recommendations that shall emanate from this research.

*Jona Razzaque,*[47] in the article, "Access to Environmental Justice; Role of the Judiciary in Bangladesh," explores the role played by national court decisions in promoting the application of internationally recognized principles. This article is significant because it elaborates the challenges specialized courts face especially where the legislature goes to sleep. The article however fails to provide solutions other than to let the courts fill the gaps in legislation with their decisions. The law must be predictive. Decisions and reasoning always change. This paper shall

[43] Geoffrey Kiryabwire, 'The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda' (2008) 2 Journal of Business, Entrepreneurship & the Law 349.
[44] Zimmer (n 3)
[45] See Article 162(4) of the Constitution, 2010
[46] {Citati'819460WP0Devel00Box379851B00PUBLIC0.Pdf <http://documents1.worldbank.org/curated/ar/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf> accessed 25th April 2021.on}
[47] Jona Razzaque, 'Access to Environmental Justice: Role of the Judiciary in Bangladesh' (Social Science Research Network 2000) SSRN Scholarly Paper ID 1865343 <https://papers.ssrn.com/abstract=1865343> accessed 3 July 2021

delve deeper to find a permanent solution to the gaps left by the legislators on the establishment of specialized court by them delegating their mandate to the judiciary on the establishment and development of specialized court to ease access to justice.

*Munyao*[48] In his paper, "Jurisdictional question in Environmental Law" discusses the jurisdiction of the specialized courts as a distinct issue from the jurisdiction of the judges that serve in the same courts. This is an argument in that the court cannot be specialized without having specialized judges serving in the said courts. The analyzed literature however fails to address the training and equipping of the judges serving in the specialized courts in that one cannot have a specialized court with training the specialized judges to serve in them.

*Firas Milhem and Wafa Saada* in their paper "The role of specialized courts and Chambers in Economic Development"[49] identify common rules in place to ensure the effectiveness of a specialized tribunal. They include harmonious laws; independence of the courts, competency of the judges and procedures governing litigation in the specialized courts.

The authors' paper is well researched by coming up with a check list to ensure the success of setting up a specialized court. However, the research failed to note the need for finance and constant training of its personnel to update them with the unique needs of litigants and emerging world trends to keep up to date the specialized court. This shall be looked into in this research paper.

Overall, from the literature review analyzed above, it is clear that though the area of assess to justice has generally been discussed; little has been researched about the barricade of accessing justice in the specialized courts. Indeed, the current Kenyan constitution attracts public awareness towards attainment to justice. Elimination of barricades to accessing justice in the specialized courts is hence significant. One way of achieving this is to steer the process of establishing the specialized courts outside parliament's grip by delegating the same to the judiciary in the same way the mandate of appointing cabinet secretaries is left to the president[50]

[48] Justice Sila Munyao, *Jurisdictional question in Environmental law issue* A Paper presented at the NEMA/ELC conference in Mombasa, June 2014
[49]Firas Milhem and Wafa Saada, 'The Role of Specialized Courts and Chambers in Economic Development' 10.
[50] Article 152(2), Constitution of Kenya, 2010

and committees of parliament left to the legislatures.[51] This is what the study shall endeavor to find out if plausible and accordingly share recommendations on how to go about it in the attainment of access to justice.

### 1.9 Limitations

The study is limited to finding out whether there is suitable legislation in Kenya on accessing justice through the development of specialized courts. A doctrinal approach was adopted herein where the law library of the University of Nairobi come in handy. However, it was not possible to physically access the library owing to its closure due to the covid-19 pandemic[52] and the Ministry of Health's guidelines on restricting access to such public places to stem the spread of the virus. Our doctrinal methodology was as such restricted to the university's internet search engines. This at times proved challenging especially when connection failed due to poor links.

Also, the fact that the study relied principally on existing literature, reports and other documented information in the absence of raw data from the field, the research was deprived of other independent information that would have had an impact on its findings and recommendations.

### 1.10 Chapter Breakdown

For purposes of order and presentation, this paper has five chapters with chapter one giving introduction to the area of study.

Chapter two analyses the historical, conceptual and theoretical underpinnings of specialized courts in access to justice. Here we shall specifically discuss the important concepts and theories of justice, rights, and accessibility underpinning accessing justice.

[51] Article 124 (1) of the Constitution, 2010
[52] 'Coronavirus Disease (COVID-19) – World Health Organization'
<https://www.who.int/emergencies/diseases/novel-coronavirus-2019> accessed 6 November 2021

Chapter three looks at the legislative framework on the development of specialized courts in Kenya. It discusses role played by the constitution of Kenya and effectiveness of various legislation currently in place that establish respective specialized courts and their contribution towards an effective legal framework in accessing justice.

Chapter four tackles international best practices that Kenya can adopt in improving access to justice in the specialized courts.

Chapter five summarizes the desk top findings, and recommendations for a more adequate regulatory framework on accessing justice in Kenya through the development of specialized courts.

## CHAPTER TWO

## THE THEORETICAL AND CONCEPTUAL UNDERPINNINGS OF ACCESS TO JUSTICE

### 2.0 Introduction

The first chapter of this paper looked at the backdrop of the study where the problem statement was defined and the research questions that this study seeks to answer were framed. This second chapter shall review the theoretical and conceptual underpinning of access to justice. In answering the first research question, it is crucial to understand the normative context of accessing justice, its extent and scope.

### 2.1 Comprehending Access to Justice

The concept is broad and has been used in different contexts. The first scholars recorded to have made an attempt to define access to justice is said to be was *Cappelleti and Grath*"[53] when in 1978 they described it as encompassing a mechanical way of guaranteeing reasonable access to legal instruments to all to lead to social justice. *M.T. Ladan*,[54] *Kariuki Muigai*,[55] many other scholars not to mention *the United States Institute for peace*[56] have refined the concept further over bringing to a conclusion that there is no one acceptable definition of the term.

Going by the foregoing scholars, the term can be understood to imply the capacity of people to obtain reasonable assistance through formal and informal institutions of justice for solution of

[53] '"Access to Justice: The Newest Wave in the Worldwide Movement to Make R" by Bryant G. Garth and Mauro Cappelletti' (n 26)
[54] Ladan (n 24)
[55] Muigua and Francis (n 25)
[56] 'Necessary Condition: Access to Justice' (*United States Institute of Peace*) <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> accessed 12 November 2021.

their grievance(s).[57] Access to justice can also comprise procedural access and substantive justice. Access to courts and administrative procedures can also be inferred under the context accessibility as well as the effective use of the judicial and *quasi-judicial* institutions in pursuit of rights.

In contextualizing and problematizing the understanding the term access to justice by scholars, they have classified its normative content into four. The first is by *Cappelletti and Garth*[58] where they described the historical emergence of access to justice in terms of triple movement. These encompass legal aid; group and collective rights and the last being alternative dispute resolution (ADR). The second category is by the Open Society Foundation for South Africa[59] and *Kollapen*[60] which is premised on the broader idea of social, economic and environmental justice. This is marked to be away from the traditional adversarial court litigation. The third classification is by *Bowd*[61] who denotes the term as imposing a condition on states to ensure a proper legal system that guarantees equal justice to all irrespective of legal, social or economic standing. Here, there is the element of equality before the law, access to legal services, and national equity.

### 2.2 Justice underpinning Access to Justice

The term justice has preoccupied a central place in humanity's history. Scholars over the centuries have baffled in an attempt to define it.[62] This is so because justice varies all over the world due to differences in culture, religion and customs. Hence, on account of its comprehension, justice is dynamic. Besides, its comprehension challenge, it is also compounded

[57] UNDP, (2004) "Access to Justice"
[58] M. Cappelletti and B. Garth (eds), Access to Justice: A World Survey, Vol. I, Sitjoff and Noordhoff – Alpehenaandenrijin, Milan, 978
[59] Open Society Foundation for South Africa Access to Justice Rudn-Table Discussion (Parktonian Hotel, Johannesburg 2003 -07-22) 5
[60] Kollapen "Access to Justice within the South African Context" Keynote Address to access to Justice Roudn Tabe Discussion 5
[61] Richard Bowd, 'Access to Justice in Africa Comparisons between Sierra Leone, Tanzania and Zambia' (*Africa Portal*, 1 October 2009) <https://www.africaportal.org/publications/access-to-justice-in-africa-comparisons-between-sierra-leone-tanzania-and-zambia/> accessed 21 November 2021
[62] J. Harris, Legal Philosophies (second, Butterworths 1997)

and not possible to standardize. According to *J C. Johai*, the rudimentary impetus of law is to be the pursuit of justice which is to be dispensed.[63]

Justice being a broad terminology, *Aristotle*[64] conceptualized it in four categories: Distributive, procedural, restorative and retributive justice. For purposes of our study, we shall concentrate on only two categories; Distributive and Procedural justice.

Distributive justice is often conceived as economic justice. It is concerned with fairness in the allocation of goods. It provides moral guidelines for the political process of distributing the material goods and burdens of society. The strict egalitarianism propounds for the equal allocation of material goods to all. *Rawls* was a critic to the above and advances his different principle.[65] *Rawls'* difference principle presently informs the arguments for affirmative action which has been captured under Article 56 of the Kenyan constitution.[66] The distributive theory advocates for the design and assessment of distributive principles anchored on maximization and distribution of welfare. Procedural justice on the other hand encompasses notions of fair play in dispute resolution. Procedure often referred to as the handmaid of justice. In the absence of a just procedure, an impartial judgment or decision cannot be heard. Procedural justice is important in Kenya's adversarial legal system so that one party does not take advantage of his or her opponent. Procedural justice also secures the legitimacy and integrity of decisions made by judges. This attracts confidence in its consumers.

Thriving civilizations rely on the law to ensure maximum good for the majority if not all for the advancement of the society. According to *John Locke*,[67] for a maximum good in society to be achieved, people must respect the basic rights of others. *John Rawls*[68] reasoned justice to be an organization and internal divisions in a society thus seeks to pursue the greatest good for the greatest number. This jurisprudence however can be faulted in that it seems to be consistent with

[63] JC Johari, *Contemporary Political Theory: New Dimensions, Basic Concepts and Major Trends* (Sterling Publishers Pvt Ltd 1987)
[64] Afifeh Hamedi, 'The Concept of Justice In Greek Philosophy (Plato and Aristotle)' (2014) 5 Mediterranean Journal of Social Sciences 1163
[65] 'Distributive Justice' (*Routledge & CRC Press*) <https://www.routledge.com/Distributive-Justice/Lamont/p/book/9780754629740> accessed 13 November 2021.
[66] Article 56, Constitution of Kenya 2010
[67] A theory of justice, Cambridge, MA: Harvard University Press. Revised edition, 1999
[68] 'A Theory of Justice' (*Corporate Finance Institute*) <https://corporatefinanceinstitute.com/resources/knowledge/other/a-theory-of-justice/> accessed 21 November 2021

the infamous idea of tyranny of numbers at the detriment of the rights of the minorities. *Rawls'* claim is that justice as fairness can be derived from two principles; that fairness means neutrality or the independence in decision making devoid of any vested interest, bias or partiality. It is this principle that the Kenyan court system operates. The concept of the independence of the judiciary from influence or bias in the exercise of its judicial functions is provided for under Chapter 10 of the constitution.[69] *Rawl*s' secondly premises that justice as publicly reasonable. In this sense, decisions have to be arguable and supportable on the basis of social stakes or values. In deriving the two principles above, *Rawls* uses the hypothetical contract and reflective equilibrium. In hypothetical contract; liberties are equally enjoyed by all. Societies recognize certain rules as applicable to all. However, in its application it is conceded injustice is tolerable if necessary to avoid greater injustice. In the enjoyment of rights, conflicts arise as individuals strive to achieve their greatest happiness. Utilitarianism recognizes the need therefore to limit enjoyment of individual liberties so as to realize the greater benefit. For instance, in the Kenyan situation, life is a right guaranteed by Article 26(1) of the constitution while sub-Article 26(3) authorizes the deprivation of life in accordance with the law. This limitation justifies the death penalty in capital offences in Kenya and the self-defense immunity.

On the reflective equilibrium; according to *Rawls*, people ignorant of the position they will hold in society are more likely to accept a negotiated advantage for the least advantaged. *Rawls* uses the example of separation of the function of cake cutting and distribution which would make it more likely the cake cutter would be fair as possible for he does not know which piece he will end up with. The original position or the hypothetical contract coincides with the state of nature. In this stage people are likely to choose the best of the worst possible alternatives.[70] In summary, there must be as much liberty for each person as is compatible with the liberty of everyone else, while departure from equal distribution is justified only if they are necessary for the benefit of the least advantaged. Institutions have to primarily be just otherwise they be abolished.

### 2.3 Rights underpinning Access to Justice

[69] Chapter 10, Constitution of Kenya, 2010
[70] 'John Locke | Philosophy, Social Contract, Two Treatises of Government, & Facts | Britannica' <https://www.britannica.com/biography/John-Locke> accessed 19 August 2021

Rights are entitlements to perform or not to perform certain actions. *Paul Vinagradoff* [71]defines rights as an attitude of demand however, not every person can form an attitude of demand for instance, infants and lunatics. *Oliver Wendell Holme*[72]*s* on the other hand defines rights as permission to exercise natural powers so as to get protection, restitution, or compensation sanctioned by the authority upon certain conditions. *Allen*[73] defines it as a warrant to realize an interest, while, *Gray*[74] defines justice as a power of enforcing the correlative duty though this is not always the case in criminal law. It is apparent that from the above definitions of rights it elicits more confusion than it does clarity. According to *Brian Bix*,[75] the issue of rights has become a common thread and perhaps an unwelcome one in the solving of contemporary legal problems.

Over the centuries, human rights have taken a positive trajectory that saw the development of rights pass through three generations. Today, many countries including Kenya have domesticated these rights and made them binding in their constitutions.[76] With the promulgation of the constitution, more Kenyans are seeking the realization of their rights through constitutional petitions in that the constitution[77] grants individuals the right to approach the court on claims that a right as provided for in the bill of rights has been denied, violated, infringed or threatened. The courts have been provided with the relevant dominion to hear and determine such applications and in essence uphold the bill of rights.

### 2.4 Equality underpinning Access to Justice

The notion of equality before the law is the bedrock of legal processes in Kenya. This is also what forms the legal process in many other legal systems in the world. *Aristotle* ironically points

[71] Weinar, L, Rights, Stanford Encyclopaedia of Philosophy, first published Mon Dec 19 2005, 1
[72] Elizabeth R Purdy, 'Oliver Wendell Holmes Jr.' <https://www.mtsu.edu/first-amendment/article/1337/oliver-wendell-holmes-jr> accessed 12 November 2021
[73] C.K. Allen, Legal Duties and Other Essays in Jurisprudence (Clarendon Press, Oxford 1931) p. 183
[74] J.C. Gray, 'The Nature and Sources of the Law'(Macmillan, New York 1924) p. 18
[75] Brian Bix, Jurisprudence and Legal Context, 6th Edition Sweet and Maxwell, 2003
[76] See Articles 2(5) & (6) and also Articles 26-39 of the Constitution of Kenya
[77] Article 22, constitution of Kenya 2010

out that justice is for those who are equal[78] while Egalitarians[79] believe that justice relate to equality and hence people should be treated as equals. *Lockean*[80] approach believes that where there is crowding people should take turns; hence, all persons have an equal right to use resources. The *Marxists*[81]support the egalitarian theory, through urging the elimination of inequalities established by capitalist market economy.

Various articles of the Kenyan constitution give the philosophy of equality [82] and the guarantee that one will not face any form of discrimination. The right to access justice is also one of them. Equality can also be substantive to the extent of attaining equitable results as well as opportunities.[83] It takes into account past discrimination and its effects which give rise to multiple- discrimination. This is seen when the constitution tries to remedy this by defining a "marginalized group" at Article 260[84] which is seen in calls for affirmative action to protect minorities and marginalized groups identified in the constitution.

### 2.5 International & Regional instruments underpinning Access to Justice

International and regional instruments recognize that accessing justice is a fundamental human right. This is exhibited in many internationals such UNDHR[85] which provides for the rights and freedoms outlined in its declaration, that includes amongst others, the rights of accused persons and the right to fair hearing. Upon the foundation of this instrument, various regional charters were developed including the ACHPR,[86] the EU treaty[87] and the ACHR.[88] The provisions of UDHR and

[78] 'Aristotle, Politics, Book 3, Section 1280a' <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D3%3Asection%3D1280a> accessed 14 November 2021
[79] Kai Nielsen, 'Radical Egalitarian Justice: Justice as Equality' (1979) 5 Social Theory and Practice 209.
[80] Simon Stacey, 'A Lockean Approach to Transitional Justice' (2004) 66 The Review of Politics 55.
[81] Karl Marx, 'The Critique of the Gotha Program'
[82] Article 27(1), constitution of Kenya 2010
[83] Richard Arneson, 'Equality of Opportunity' (2002).
[84] Article 260, constitution of Kenya 2010
[85] United Nations Declaration on Human Rights (UNDHR)
[86] African Charter on Human and People's Rights (ACHPR)
[87] European Union treaty (EU)
[88] American Convention on Human Rights (ACHR)

various conventions and Treaties have largely formed the basis for national constitutions across the world, especially as they relate to accessing justice.

Other relevant instruments that have contributed to accessing justice include the ICCPR[89] which gives states an obligation to among others respect and protect all persons within their territory and to enjoy the rights recognized in the present covenant. Another is the rights of persons within the state to accessing courts, and equal treatment of all persons.[90] ICCPR is basically intended to secure equal treatment for the protection of rights.

The ICESCR is another instrument[91]which imposes on member states to ensure the rights of men and women to enjoy all economic, social, and cultural rights outlined in the covenant is protected.

The Hague Convention on International Access to Justice that was ratified in 1997[92] is another instrument that promotes justice. It purposes to harmonize national laws of countries who are signatories to the convention on accessing justice. It provides for non-discrimination with respect to legal service and safe custody of accused persons. Others are CERD,[93] purposes to eliminate or prohibit all forms of racial discrimination which violate human rights and fundamental freedom.[94] Then, there is the CRC,[95] and CEDAW,[96] both are geared towards eliminating or prohibiting all forms of discrimination against children and women. Member states are obligated to ensure equality between men and women, through enactment of compliant laws or other material means. These instruments provide for the right to access justice and puts measures in place to be undertaken by states to ensure compliance.

### 2.6 Domestic instruments underpinning Access to Justice

[89] United Nations International Covenant on Civil and Political Rights (ICCPR)
[90] Article 14, United Nations International Covenant on Civil and Political Rights (ICCPR)
[91] United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR)
[92] Access to Justice Convention
[93] International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
[94] Article 6 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
[95] Convention on the Rights of the Child (CRC)
[96] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

At national scale, access to justice has been given constitutional recognition at Article 48 of the constitution[97] which has made initiatives that promote access to justice, national values, and governance principles by grounding them in various legal documents. It is through these legal instruments that access to justice owes its existence as per the aspirations of the Constitution. This aspiration is framed in the preamble and various articles of the constitution alongside other statutes. For instance, the requirement on the state to take legislative, policy and other measures to ensure enjoyment of rights stipulated in the constitution.[98] Then there is the Bill of Rights that spells out various rights and fundamental freedoms and proceeds to provide for the means of their implementation(s) such as victim of violations of their rights are granted the right to institute court proceedings claiming a right of fundamental freedom in the bill is, or has been violated, denied or threatened. [99]The provisions further compel the chief justice to make rules for the provision of access to justice for those who seek to enforce their fundamental human rights.

The constitution also guarantees everyone equal protection and equal benefit of the law.[100] Further, every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[101] The rights of arrested persons including right to a fair hearing is as well engraved.[102] Finally, the constitution upholds the exercise of the judicial authority and the independence of the judiciary[103]. This ensures that justice shall apply to all equally without distinction or discrimination where procedural technicality is not a barrier to justice.

There are other existing statutes designed to promote to justice in the courts such as the Employment Act[104] that obligates the state and presiding court to ensure equality of opportunity in employment with the key intention of preventing discrimination in employment. Another is Section 76(1) of the Children Act[105] that acknowledges the interest of the child as very important in every determination of the court and where possible expedites the hearing. This right to expedited hearing is also embodied in the overriding objectives of the rules of procedure in

[97] Article 48 Constitution of Kenya 2010
[98] Article 10, constitution of Kenya, 2010
[99] Article 22, constitution of Kenya, 2010
[100] Article 27, constitution of Kenya, 2010
[101] Article 47, constitution of Kenya, 2010
[102] Articles 49, and 50, constitution of Kenya, 2010
[103] Articles 159, and 150, constitution of Kenya, 2010
[104] Sec 5, Employment Act
[105] Sec 76(1), Children Act

courts.[106] The law governing procedure and its rules thereunder have the objective to ensure a just determination of civil disputes. Civil Procedure Act[107] also has rules to guarantee access to justice to those suffering poverty. It provides for the right of audience to be granted to paupers unable to pay the court filing fees.

The Legal Aid Act[108] is the latest addition to the statues passed in Kenya that promote access to justice. The objective of the Act is set out in its preamble to promote justice. It establishes a legal aid service to oversee its mandate, and facilitate the provision of legal aid, and funding of legal aid in Kenya. The law has enabled accessing justice become easy by bringing justice closer to the poor masses at no fee. This enables Kenyans to now have a legal basis of claiming legal aid and assistance from Government.

### 2.7 Specialized Courts underpinning Access to justice

Specialization in the court system is now a rapidly gaining momentum across the world.[109] This is attributed to the demand for access to justice for higher quality decisions by experts in respective fields. Introduction of the said courts has seen outstanding experts handle cases in their field leading to better decisions. As a positive contribution the specialized courts have witnessed efficiency, better hearing procedures, and well-trained staff and judges serving in their various courts. Furthermore, the specialized courts have assisted the general courts reduce their backlogs by diverting cases that need specialization from the general courts to the specialized courts. Finally, there is also the uniformity of decisions from the specialized courts that have settled jurisprudential questions.

There are two sides to the same coin. Specialization can as well have adverse effects. These include the potential of inequalities in that there are challenges of having specialists in all subjects, the wrong perception of preferential treatment of specialized courts as opposed to

[106] Sec 1A and 81(2) of the Civil Procedure Act
[107] Sec 1A and 1B, Civil Procedure Act, (Cap 21) Laws of Kenya
[108] Legal Aid Act No. 6 of 2016
[109] '819460WP0Devel00Box379851B00PUBLIC0.Pdf <http://documents1.worldbank.org/curated/ar/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf> accessed 25th April 2021

general courts; Limit to resources available for general courts; the temptation to delve into corruption. There is a saying that goes familiarity breeds contempt. Since judges, lawyers, and experts who frequent the specialized court keep bumping into each other, over a given period, they tend to refer to each other as colleagues and soon become very familiar with each other hence the possibility of corrupting cases under the bond of watching each other's back; Risk of having a narrow approach to issues hence not development the law. Additional and more significant resources will be put down to set up specialized courts and train its judicial officers and support staff. In overall, the benefits of specialization far out way its negative aspects in that justice is basically the consideration when litigants go to court.

As previously discussed, there are various forms of justice. For purposes of this sub heading, we shall examine the judicial approaches and social economic approach to justice. The former referring to the narrow approach while the latter is the broad approach. The difference in approaches is also a result of competing theoretical foundations to the question of justice, from the *Lockean* theory of natural justice[110] *to Bentham's* utilitarian exposition of legal realism.[111] The judicial approach focuses on the narrow notion of the concept of justice which places lawyers and judges at the center of accessing justice hence creating a limitation of definition to legal services and the mode of accessing the courts to adjudicate. This is problematic to the extent that it is very narrow in scope as it only focuses on judicial justice. It fails to recognize and address other forms of justice that are critical in any society. For human development to be attained there is a need to give the concept of access to justice a broader meaning. This embodies the principles outlined in the constitution on equality, administration and the deployment of ADR in deserving cases.

The social-economic approach argues that the courts do not have the exclusive rights to justice. J*ohn Rawls*[112] for instance developed the principle of distributive justice which is basically advocates for the social just allocation of resources. *Bentham* argues for maximum income equality while preserving the individual's incentive to engage in productive activity.[113]This reflects the Kenyan constitution, which attempts to avail justice in a wider sense. Various players like the

[110] Francesco Fagiani, 'Natural Law and History in Locke's Theory of Distributive Justice' (1983) 2 Topoi 163
[111] 'Bentham's Exposition to Common Law on JSTOR' <https://www.jstor.org/stable/44980888> accessed 20 November 2021
[112] 'Distributive Justice' (n 69)
[113] 'Bentham's Exposition of Common Law on JSTOR' (n 127)

government, and non-governmental organizations all play an important role in achievement of this justice. The constitution provides for social justice. It also provides for economic and social rights. Natural resources and their benefits must also be shared equitably. Despite all this rosy efforts put in place to access justice, judicial justice remains elusive and inaccessible to a lot of people in Kenya because of many factors such as; the lack of trained experts to preside on complex cases that require specialization, complexity of rules and procedure, geographical location of courts, the deployment of technical legal terms by the law practitioners, lack of quality human resource, financial challenges, ineffective remedies, delays in hearing of cases, poor awareness of alternative dispute resolutions (ADR), and the prohibitive costs such as lawyer's fees, filing fees and increased extra expenses occasioned by delays. All these are hindrances to access to judicial justice.

## 2.8 Conclusion

The formulation of this chapter was to discuss the theoretical and conceptual underpinnings of accessing justice in the normative context of specialized courts. Discussions confirmed the nonexistence of an agreed definition of the concept which is broad and has since attained the international status of a fundamental right. It is argued that state sovereignty, which was once considered the cornerstone of international law, is taking a back seat in favour of the recognition that law that does not uphold fundamental rights is illegitimate. The idea of internationalizing access to justice seems to promote common values in the international community and hence regulates relations between nation states. Kenya as seen from the discussion is leading the international community in this area by having constitutionalized justice and further passed various legislations underpinning accessing justice. However, in the context of specialized courts, a lot needs to be put in place. The fact of establishing a specialized court may only address the aspect of judicial approach to justice but there is also the social-economic approach that goes beyond the courts. Justice should underpin the process of ensuring that legal outcomes are just as well as equitable.[114]In other words, there must also be the need for the social just allocation of resources. This is when access to justice can be said to have been fully realized.

[114] 'Family Law: Just and Equitable (Adjective)' <https://www.franklaw.com.au/blog/family-law-just-and-equitable-adjective> accessed 20 November 2021

## CHAPTER THREE

## THE LEGAL FRAMEWORK OF SPECIALISED COURTS

### 3.0 Introduction

The previous chapter looked at the theoretical and conceptual underpinnings of accessing justice in the context of specialized courts. This third chapter shall now proceed to analyze the legal framework of specialized courts in Kenya. We shall specifically look at the pre and post the 2010 constitution, the various statutes establishing specialized courts in Kenya and discuss their suitability in promoting access to justice.

### 3.1 The Pre-colonial era

The background of resolving disputes in Kenya predates history. Internal dispute resolution mechanism is common in African Societies and differed from one community to another. Dispute resolution was expected to be primarily patriarchal, involving groups of male elders who were tasked with resolving disagreements in society. Notable ones that still exist today is the Njuri Nceke, amongst the Ameru community. The elders of Njuri Nceke to date still determine disputes in their community and many litigants from that community prefer them as opposed to the main stream courts when it comes to private law. *Sarah Kinyanjui* [115] identified the key objective of the determination by the elders as the necessity not to establish guilt but reconciliation between the warring parties in order to foster unity in the community. This explains their preference. *Gabriel Lubale*[116] shares similar sentiments that the family and local shrines were used as a *forum* to resolve disputes before their escalation. This still applies today in

[115] Sarah Kinyanjui, '• Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' (2010) 10 Tribal Law Journal

[116] 'Courts System in Kenya – Gabriel Lubale' <https://gabriellubale.com/courts-system-in-kenya/> accessed 26 November 2021

that many African people institute formal court action as the last resort. This reinforces the known African position on dispute resolution that emphasize on peace, harmony, and togetherness over individual interest. The South Africans coin it '*Obuntu'* which signifies that the life of another is at least as valuable as your own.[117]

### 3.2 The colonial era

The coming of the settlers and eventually the colonial governments, herald the dawn of formal court systems in Africa. The interests of the settlers completely altered societal relations in Kenya and, with it, transformed the concept of accessing justice.[118] Formal dispute settlement mechanisms had to be thought of to resolve differences that arose between transactions involving the settlers and the local communities. With it also came legislations to govern territories such as the Zanzibar Order in Council of 1886. This provided jurisdiction over British subjects and certain protected persons. Meanwhile, the Muslim Court was set up to operate with its Kadhi nominated by the Sultan. The year 1897 saw the East African Order in Council where natives were for the first time subjected to legal instruments paving the way for the Native Court regulation 1897 that operationalized the 1897 East African Order in Council that outlined the applicable law to Africans.[119] The dual system of application of English Law for European settlers and African native law for Africans existed beyond the independence of Kenya to 1967.[120]

### 3.3 The Post-colonial era

Kenya's independence was in 1963, but it was not until 1967 that the court system in Kenya was unified with the passing of key legislations that established the courts and their manner of operation. The statutes in question were the Judicature Act, Magistrates Court Act, and the Kadhi's Court Act.  These specific laws abrogated other laws other than the Lancaster

[117] C Himonga, M Taylor and A Pope, 'Reflections on Judicial Views of *Ubuntu*' (2014) 16 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 369
[118] 'The Colonization of Kenya - Black History Month 2021' <https://www.blackhistorymonth.org.uk/article/section/african-history/the-colonisation-of-kenya/> accessed 27 November 2021
[119] *Ibid*
[120] Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27 Journal of African Law 42.

constitution of 1963,[121] to have laws that the courts shall apply. However, owing to her colonial history, the Kenyan legal system still had traces of the British common law system as seen in the Judicature Act.[122] The independence court system remained in place until September 2010 when Kenya obtained a new constitution that formally introduced specialization in her court system.

### 3.4 The Constitution of Kenya

The new constitution is transformative having formally introduced specialization in the court system.[123] It categorized courts into superior and subordinate; The superior ones being the Supreme Court headed by a president, the Court of Appeal also headed by a president, and the High Court and two other courts of concurrent jurisdiction each headed by a principal judge. The two courts of current jurisdiction with the High Court have one dealing with employment and labour relations matters and the other handling environment and land disputes. Parliament has the sole mandate to decide on their jurisdiction and functions.[124] The two courts were formally divisions of the High Court before their upgrade to independent courts. The decision in *Republic –vs- Chengo & 2 Others*[125] settled the question of their jurisdiction whereby the intentions of the constitution was understood to be one that promoted specialization in the judiciary.

In line with the constitutional requirements to decide on the jurisdiction of the two specialist courts, parliament enacted Environment and Land court Act[126] (ELC Act) which created the ELC Court and the Employment and Labour Relations Court Act[127] (ELRC Act) also established the ELRC court. This precluded other courts including the high court from handling cases reserved for specialist courts. This is also on the understanding that the specialist courts were equally barred from handling cases reserved for the other courts.

[121] '1962 Lancaster House Conference - [2001] KECKRC 1' <http://www.commonlii.org/ke/other/KECKRC/2001/1.html> accessed 27 November 2021
[122] Judicature Act, (Cap 8) Laws of Kenya
[123] 'Judiciary Transformation Framework (JTF) – The Judiciary of Kenya' <https://www.judiciary.go.ke/download/judiciary-transformation-framework-jtf/> accessed 27 June 2021.
[124] Article 162(1) of the constitution, 2010
[125] Republic –vs- Chengo & 2 Others (2017) eKLR
[126] Environment and Land Court Act, No. 19 of 2011
[127] Employment and Labour Relations Court Act, No. 20 of 2011

To ensure the most deserving and competent persons occupy the position of a Judge in the judiciary, the constitution under Article 166(2) lists stringent qualifications for one to be appointed judge. Furthermore, upon appointment, the judge's security of tenure and independence is guaranteed until his/her retirement. Other than laying down the structure of the specialized courts, the constitution goes further to bind the courts to be guided by the principle of sustainable development,[128] judicial authority,[129]national values, governance, values and public service.[130] The judges who serve in the said courts are also commanded to operate on specific principles such as not to sacrifice justice in the alter of technicalities.

Alternative dispute resolution is also emphasized and promoted by the constitution[131] because of their flexibility and the need that they are known for. This was affirmed from the findings by *Kariuki Muigai,*'[132] that ADR helps in fast-tracking cases. He reasons that the traditional litigation mechanism disadvantages resolution of disputes owing to the long-time parties spend in court alongside the considerable cost implication. ADR however is not to be applied blankly as the constitution provides a proviso to its application to the extent that it is not against the law or public policy.

The radical changes brought by the constitution on specialization bore fruits in that litigants are now able to obtain high quality decisions especially in complex matters. Efficiency in these two courts is at its highest with well streamlined operations and processing of cases. The backlogs which used to be a feature in the regular courts was drastically reduced owing to the transfer of thousands of cases to the specialized courts. This in addition to the construction of new court buildings to house the new specialized courts and their staff has seen the enhancement of access to justice.[133]

[128] Article 10(2)(d) of the constitution, 2010
[129] Article 159 of the constitution, 2010
[130] Article 232(1), of the constitution, 2010
[131] See Article 159(2)(c), of the constitution 2010
[132] Kariuki Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' 30.
[133] 'Judiciary Transformation Framework (JTF) – The Judiciary of Kenya' (n 139)

### 3.5 The Environment and Land Court Act No. 19 of 2011

Its preamble sets out its objective. The Act was passed to establishment of the ELC court to determine disputes involving the environment and land as envisaged by the constitution.[134] The Act comprises of 31 sections divided into five parts. The first part deals with preliminary, the second is on setting the court, the third on jurisdiction, fourth on proceedings and finally the fifth is on miscellaneous provisions.

The act sets out the overriding objectives,[135] the establishment of the court, its jurisdiction,[136] the principles to guide the courts' operations, quorum,[137]powers of the court,[138]as well as its limitations that prevents the court from relying on procedural technicalities at the expense of substantial justice. Overall, establishment, functions and operations of this court are purely dictated by parliament.

### 3.6 The Employment and Labour Relations Court Act (Cap 234B) Laws of Kenya

Similar to the law establishing the sister court, the law establishing the ELRC has a preamble that sets up the tempo and reason behind the new law which is simply to establish the ELRC court and determine its functions[139] in line with the provisions of the constitution.

This law is composed of 35 sections divided into Five Parts. The first part deals with Preliminary, the second part the court's jurisdiction, the third part is on court proceedings, the fourth part is on the rules committee and finally the fifth part is on miscellaneous provisions.

[134] Preamble to the Environment & Land Court Act No. 19 of 2011
[135] Ibid Sec 3
[136] Ibid sec 13
[137] Section 19 of the Environment and Land Court Act, No. 19 of 2011
[138] Ibid sec 19
[139] The preamble to the Employment and Labour Relations Court Act (Cap 234B) Laws of Kenya

The Act lists its objectives,[140] powers of the court under the Act, the guiding principles the court is to adopt, composition of the judge(s), the exclusive original and appellate powers of the court relating to its area, court proceedings, quorum of the court, and composition of its bench by the chief justice on matters certified matters that may require constitutional interpretation.

Similarly, to ELC court, we see the ELRC a subject of legislation as far as its establishment and operations is concerned.

### 3.7 The High Court (Organization and Administration) Act, 2015

As opposed to ELC and ELRC, the High Court does not have an Act of parliament establishing it having already been established by the constitution that spelt out its jurisdiction. Instead, the High Court has a law that governs its organization and administration.[141]

This law provides for the principles the court should be guided on in exercise of its authority,[142] the composition of the judges with a Principal Judge as the head, the maximum number of High Court appointed judges, and establishment of divisions of the court.[143]

Unlike the two previously discussed laws that are the determinant on the establishment of their respective courts, the High Court (Organization and Administration) Act is not responsible for the establishment of the High Court but basically provides guidance with respect to its functions and operations as the constitution had already established it. Despite this feature, parliament still has the final say under the Act, as far as management of affairs of the court in concerned.

### 3.8 Small Claims Court Act No. 2 of 2016

[140] Ibid sec 3
[141] Preamble to the High Court (Organisation and Administration) Act, 2015
[142] Ibid sec 3(1)
[143] Ibid sec 11(1)

This Act was enacted by of Parliament to establish small claims court.[144] The Act is composed of 51 sections divided into six parts. The first part being the preliminary, the second is on establishment, organization and administration of small claims court, the third is jurisdiction of the court, the fourth is procedure before the court, the fifth is execution of the decree, the sixth is miscellaneous provisions.

Unlike the ELC and the ELRC, this court is not a creature of constitution but that of statute. Meaning that it is created solely by parliament. This gives credence to the argument that from a reading of the constitution, the mandate to establish specialized courts rests with the constitution and parliament only.[145]

In this law, it provides for the main objective of small claims court,[146] the jurisdiction of the court,[147] its composition, rules governing the operations of the court, the time frame of determining disputes to ensure justice is dispensed within the shortest time possible. Just like its sister specialist courts discussed above, the establishment and operations of this court is purely at the hands of parliament.

### 3.9 The Inadequacy of the Legal Framework

As observed by the foregoing statutes, neither the constitution nor legislation envisages a scenario where courts are established outside a legislative framework. This presents a challenge especially in scenarios of urgency to address an emerging issue that necessitate specialization but cannot wait for parliament to establish one. Recently, an attempt by the chief justice Martha Koome's to set up a specialized court to deal with hate speech during the electioneering period was criticized. One of the notable critics is *William Oketch*[148] who reasoned that the law only empowers the constitution and parliament the authority of establishing courts and one else. The intention of the Chief Justice was coming months to the general elections where hate speech and

[144] Preamble to the Small Claims Court Act, No. 2 of 2016
[145] Article 159(1)(d), constitution of Kenya, 2010
[146] 'Small Claims Courts – The Judiciary of Kenya' <https://www.judiciary.go.ke/courts/surbordinate/small-claims-courts/> accessed 27 November 2021
[147] Section 12, Small Claims Act
[148] William Oketch, "Plan to set up hate speech courts offers new legal food for thought", *The Standard Newspaper, (Nairobi, 27 October 2021)*

other vices that accompany heated campaigns are unpleasant common scenarios. Owing to the little time left it would not be humanly possible for parliament exercising its legislative powers to establish a hate speech court nor even confer jurisdiction under Article 162 (2) on the courts already established therein to specialize on hate speech. This was explained by *Oketch* to be because the process of law making can be protracted, long winded and divisive owing to the constitutional provisions that that obligates Parliament to conduct public participation before legislation. Legislators will foremost have an interest on the success of such legislation even before it heads for public participation due to the fact that the proposed new law is designed to control their conducts during the campaigns. Hence, there is no possibility of the same being enacted and operational before the next general elections in 2022.

Further, all the statutes in place on specialized courts have failed to address pertinent issues such as shortage of trained experts to preside as judges in the said courts; limit to resources available for general courts, the temptation to delve into corruption. Since judges, lawyers, experts, and experts who frequent the specialized court keep bumping into each other, over a given period, they tend to refer to each other as colleagues and soon become very familiar with each other hence the possibility of corrupting cases under the bond of watching each other's back; the fear of the laxity to develop the law further if the same limited number always delivers judgments of persons; additional and more significant resources will be put down to set up specialized courts and train its judicial officers and support staff.[149]

On the issue concerning financing the operations of the judiciary; though in words there is the statement of the independence of the judiciary, this is not the position in reality. Without proper financial independence, the judiciary will always be at the mercy of the other two arms of government hence leading to hindrance to access to justice.[150] The judiciary has been facing this challenge of budget cuts to tame their independence which leads overall to its limits to dispense justice. There is thus the need to avoid such by reviewing this situation. The statutes in place do not help the situation as they are silent on the same leaving the executive and the legislature to

[149] Central European and Eurasian Law Initiative, Specialized Courts; A concept Paper, (1996) p.1
[150] 'Factchecking Kenya's Chief Justice on Judiciary Funding and Backlog of Cases' (*Africa Check*, 0909-1717 2020) <http://africacheck.org/fact-checks/reports/factchecking-kenyas-chief-justice-judiciary-funding-and-backlog-cases> accessed 27 November 2021

determine their fate. The discussion shall become more engaging in the next chapter on international best practice that Kenya can adopt to avoid subjecting its courts to financial constraints in the right to access justice.

### 3.10 Conclusion

This chapter has exclusively dealt with the legal framework of statutes establishing specialized courts in Kenya. It has also reviewed the constitutional and statutory provisions in place on assessing justice. These consist of both substantive and procedural legal aspects. The concern for now is the clarity on the question whether the said statutes are an adequate legal framework on accessing justice through the specialized courts. The finding from this chapter gives a negative answer. The emerging challenges discovered in the statutes in question shall be revisited in the fourth chapter on international best practice that Kenya can take lessons and eventually form part of the recommendations for the research paper in the final fifth chapter.

# CHAPTER FOUR

# INTERNATIONAL BEST PRACTICES ON DEVELOPING SPECIALISED COURTS

## 4.0 Introduction & Justification

The preceding chapter studied the adequacy of Kenya's legal framework on accessing justice through the specialized courts. The conclusion arrived at was that there was an inadequacy at some levels.

The opportunities provided by specialized courts are not unique Kenya. Many international legal jurisdictions have grappled with the challenges of how to make specialization in their court systems to work. This chapter shall now analyze other international jurisdictions' best practices that Kenya can draw lessons. As already mentioned in chapter one's research methodology, particular interest was taken in the USA, South Africa, England, and India's court system in that they had well developed specialized courts. The United States of America for her robust and ever evolving court system; England being Kenya's colonial master from whom she inherited her court system from, then South Africa and India for their successful revolutionizing modern court systems that have centralized specialization in their court systems.

The chapter shall highlight some of the international best practices in themes such as setting up of the specialized courts, the data required to determine if specialization is required in a

particular area, the specialization model that may be considered most appropriate, drawbacks to specialization, and a case study of India's Special Court Act and barriers to access to justice.

### 4.1 Setting up of specialized courts

Chapter one of this research revealed that studies from other international jurisdictions that have adopted specialization in their court system show that specialization helps in resolving complex cases.[151] *Brian Preston* argues that worldwide, these specialist courts were set up to manage different kinds of cases according to the complexity and speedy processing. This supports the argument that specialization leads to better efficiency hence its popularity.[152]

Looking at various jurisdictions, one cannot fail to note that there is a distinct difference across the world when it comes to the establishment of specialized courts. *Baum*[153] reasons that this can be traced to the history of legal systems divided into either civil[154]or common law.[155] *Gramckow*[156] posits that although specialization can result from constitutional requirements, it in some cases arise out of peculiar needs, pressure or demands most often results from particular needs or demands, as a result of internal or external sources that have to be carefully looked into before arriving to the conclusion of setting up a court. Legal demands to create a specialized court tend to result from external demand as opposed to the internal needs which may only focus on better handling of cases and decision making. The external demands are usually driven by the capability of courts to provide services and to meet its consumers demands, or even wider jurisdiction requirements on their part to attend to peculiar cases.[157]

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[151] Zimmer (n 15)
[152] See Brian Preston, "The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse – Part 1" (2008) 19 Australian Dispute Resolution Journal 72 and "The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse – Part 2" (2008) 19 Australasian Dispute Resolution Journal 144
[153] Baum, Specializing the Court
[154] 'Public - Private - Partnership Legal Resource Centre' (Public - Private - Partnership Legal Resource Centre) <https://ppp.worldbank.org/public-private-partnership/> accessed 24th December 2021
[155] ibid
[156] {Citati'819460WP0Devel00Box379851B00PUBLIC0.Pdf <http://documents1.worldbank.org/curated/ar/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf> accessed 25th April 2021.on}
[157] ibid

### 4.2 Criteria to adopt for specialized courts

To enable them to achieve their mandate, countries that embraced specialization have adopted various criteria in establishing their courts. Towards this end, many external and internal factors influence the criteria in deciding on the court system to adopt. For instance, the USA is a federation governed by a national or federal government, hence the need for two systems of court. One for the national or federal courts and the other for the state courts. Under national also called federal courts, there are specialized courts as follows; the U.S Tax Court to deal with tax-related disputes, the USA Court of Appeal for the Armed forces to provide a civilian appellate court from decisions of the military court, USA Court of Appeals for Veterans Claim which is a tribunal with national intermediate appellate jurisdiction handling veterans of the USA armed forces, the bankruptcy courts for both individual and corporate, USA Court of Federal Claims tasked with adjudicating, the Federal Circuit Court of Appeals for USA, Court of International Trade. In addition, the State Courts have specialized courts dealing with the following arears; family, environment, probate, tax, workers compensation, water, administrative, small claims, and juvenile.

In the 1980s, the United States formed a Federal Courts Study Committee to evaluate many issues that impact on establishment and operations of their legal system in accessing justice. This included the overall performance of the specialized courts.[158] In 1990 the committee came up with a report listing certain recommendations that include the criteria to apply when deciding when to establish a specialized court. *Dr. Heike Gramckow*[159] who addressed the said committee suggested that some adjustments in the general courts was necessary to adequately respond to the external complaints and demands. These included tracking the changes proposed for improvement and some level of public participation in responding to external pressures.[160]

[158] 'Report of the Federal Courts Study Committee | Federal Judicial Center' <https://www.fjc.gov/content/report-federal-courts-study-committee-0> accessed 3rd July 2021
[159] *ibid*
[160] See Joan E. Jacoby, Edward C. Ratledge, and Heike P. Gramckow, "Expedited Drug Case Management Programs: Issues for Program Development" (Washington, DC: National Institute of Justice, 1992)

In England, *Edward Cazalet*[161] identified more criteria or determinants on the question on the need for a specialized court. He listed them as the needs for the specialized court need to be reviewed continuously hence the need to first have a pilot project to test the demands, critical legislation to be identified from the pilot test to address emerging challenges once and for all, special handling or expertise to be identified and trained; noting inconsistent judgments or decisions in a specific area, taking into account general reluctance and reasons behind litigants refusal to bring their cases before that court; cause of any case backlog, reasons behind the delay in settling cases in a specific field of law, the costs involved in the delay by both the court and litigants.[162]

In South Africa, parliament is tasked with the mandate to establish courts. South Africa is also advanced in the field of judicial specialization. Specialist courts have been set up to handle specific types of cases. The specialist courts have exclusive jurisdiction from those for magistracy or high court. In South Africa, before a decision is made for the establishment of a specialist court, two requirements must be met. The first being an appropriate review of previous court practices must be noted and the second is after running a carefully assessed pilot program to ascertain the need for setting up a new court.[163] A notable significance in the South African justice system is the existence of the heads of court meetings that keeps reviewing the criteria by monitoring court performance. This meeting is held three times a year chaired by the Chief Justice along with all other the judges who head their respective courts. The Office of the Chief Justice must action all the decisions taken by the Heads of Court as the support organization to the judiciary.[164]

### 4.3 Model of specialized courts

[161] '37 The Committees 1990 Report among Other Recommendations Set out Criteria for | Course Hero' <https://www.coursehero.com/file/p6e96v3/37-The-Committees-1990-report-among-other-recommendations-set-out-criteria-for/> accessed 3rd July 2021
[162] Peter Coffey and Robert Riley, *Reform of the International Institutions* (Edward Elgar Publishing 2006) <http://www.elgaronline.com/view/9781843760269.xml> accessed 25th April 2021
[163] 'Specialized Courts' <https://www.judiciary.org.za/index.php/about-us/102-specialised-courts> accessed 3rd July 2021
[164] ibid

The choice of the specialization model depends on many issues with the main issue being sufficiency of the volume of matters to justify allocating judicial officers to exclusively handle a particular case type.[165] If there is such a volume to warrant action, a special court or division may be appropriate. However, to avoid these pitfalls and before a choice is made on specialization, it is prudent to first establish that there is indeed a need for an expert judge to handle such a field and the consequence that specialist judge might have on the court and its users.[166]

A notable example is the case study of Tanzania that *David L. Finnegan undertook.*[167] Tanzania is reported to have created a commercial division in 1999 to improve service delivery of commercial dispute resolution. Key intention was to fast-track cases by use of experts in commerce with the hope that it will assist in encouraging private sector development hence investor confidence. However, caseloads still increased in the general and specialized commercial court as the study revealed that the new commercial division did not have any importance on the country's business climate. This was traced to the subject matter of jurisdiction, which was not well thought out as it was shared by other divisions. Hence there was lots of forum shopping. Somehow, matters conveniently ended up being moved by parties from other divisions to the commercial division in large numbers. As a result, of this forum shopping, there was increased caseloads in both courts. *Martin Shapiro*[168] questioned the move to establish he division in the first place which had involved investment of extensive judicial expertise and advised on the need to moderation for quality improvements. The argument here is that specialization only duplicates the work of other experts without adding a more effective review of decisions. Hence, even though specialization may increase better performance by courts, there is a possibility that it may not work in certain quarters in the absence of pilot tests hence leading to the unplanned specialized court not being able to achieve its mandate.

Specialist courts take a variety of forms.[169] The weight of the underlying problem is said to mostly dictate the model of specialization chosen. Also, the higher number of cases that require

[165] Peter Coffey and Robert Riley, *Reform of the International Institutions* (Edward Elgar Publishing 2006) <http://www.elgaronline.com/view/9781843760269.xml> accessed 25th April 2021.
[166] ibid
[167] David L. Finnegan, "Observations on Tanzania's commercial court. A case study" (Paper for the World Bank Conference on "Empowerment, Security and Opportunity Through Law and Justice, Washington DC, 2005)
[168] Martin Shapiro, The Supreme Court and Administrative Agencies ( New York: Free Press, 1968)
[169] Peter Coffey and Robert Riley, *Reform of the International Institutions* (Edward Elgar Publishing 2006) <http://www.elgaronline.com/view/9781843760269.xml> accessed 25th April 2021

attention in the form of expertise the greater the need for specialization. For example, in Germany, a specialized court can be modeled to apply different processes. The courts have an independent system that is composed of many other separate branches. Each branch with its hierarchy and served by an appeal court which is well funded not mentioning independently organized.[170]

In commonwealth countries like Uganda, India and New Zealand, Kenya included have created specialized court divisions or benches within a court. These are set up easily with less formality in comparison with legislation by parliament. A court division of this kind has several judicial officers and courtrooms assigned to it, and in most cases, it operates as if established by an Act of parliament. The specialized divisions or benches are known to be flexible, easier to manage administratively save on costs of establishment.[171]

### 4.4 Drawback to specialization

As much as specialization has been touted to be significant in accessing justice, it also has adverse effects that Kenya ought to take notice. For example, *Baum* notes that in the United States, some of the noted negative consequences of specialization include reduction of resources to the general courts.[172] *Friederike Henke* undertook a study of specialized courts in India noted familiarity in the specialized courts breeding contempt.[173] *John Pendergrass*, in the meanwhile, points out the value of non-specialized judges posted in the specialized courts as bringing broader experience to the cases before them, which have an economic and social implications in the court decisions.

[170] Department of Justice Government of Canada, 'The Judicial Structure - About Canada's System of Justice' (7th September 2016) <https://www.justice.gc.ca/eng/csj-sjc/just/07.html> accessed 24th December 2021
[171] See Supreme Court of Korea, "Annual Report" ( Seoul: Supreme Court of Korea, 2012), 21
[172] Peter Coffey and Robert Riley, *Reform of the International Institutions* (Edward Elgar Publishing 2006) <http://www.elgaronline.com/view/9781843760269.xml> accessed 25th April 2021
[173] Friederike Henke, "Specialised Court System. Comparative Paper Analysing the possibilities of Implementing a Specialised Court System in Indi," 2005

The report issued by the Working Party of the Consultative Council of European Judges (CCJE)[174] which was a study carried out in specialized courts in Europe, noted numerous concerns about specialization in the participating countries where the study was undertaken. The concerns were outlined as the possibility of disintegration of the unity of the judiciary and concern on the independence and impartiality of judges.[175]

### 4.5 Case study of India's Special Court Act

To address the need for a seamless establishment of specialized courts without the need to keep revisiting the legislature whenever such a need arises, India, on 16th May 1979, enacted the Special Courts Law[176] for flexible and speedy trial of a particular class of offenses. The central government of India is mandated under that legislation to establish an adequate number of courts to be called special courts. The central government is empowered to make declarations of cases to be delt with by the new court.[177]However, such declarations are subject to the same being laid before parliament for approval. This is meant to curb any excesses of the executive to abuse the court. The specialist court also seems limited to certain offenses and do not have mandate on other areas of the law such as civil, commercial, and or family.

The supreme court of India has the power to transfer cases from one special court to another[178], which exercise of the power is based on expediency to ensure the ends of justice are met. Appeals from the special courts lie to the supreme court. The supreme court also has the powers to make rules for the special court for better carrying out the Act.[179]

The significance borrowed from this Indian law on the specialized court is the delegation aspect of establishing specialized courts from the legislature. The duties of setting up special courts

[174] Working Party of the CCJE, "Report of the 22nd Meeting"
[175] 'Legal Systems in the UK (England and Wales): Overview | Practical Law' <https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 24 December 2021
[176] 'The Special Courts Act, 1979' <https://indiankanoon.org/doc/701797/> accessed 24th December 2021
[177] Ibd section 5
[178] Ibid section 10
[179] Ibid section 12

under the law of India rest with the central government. This eliminates the protracted lawmaking process to establish a specific specialized court that can be long-winded and divisive. The central government is also checked to submit any declaration for setting a specialized court to parliament for approval. The rationale of the law settling on the executive other than the judiciary on setting up specialized court has not been explained. One may, however, assume that it all has to do with resource mobilization and budgetary allocations, which is the preserve of the executive. The judiciary, however, ought to have played the central part if not part of the role of establishing the specialist court.

### 4.6 Conclusion

The chapter has exclusively dealt with international best practices from which Kenya can draw lessons. A comparative analysis was undertaken from select countries that have embraced specialization in their court system, and results from that place shall be synthesized in chapter five of this paper. By way of an indication of what the recommendations in this paper will be is that lessons from the various jurisdictions reveal that the mandate of establishing specialized courts in the advanced jurisdictions is not parliament's forte. Committees and workings groups in the judiciary hold this crucial mission and guided by data collected they are in a position to tell when a specialized court is needed, where the specialized court should be established, how the specialized court shall operate and how it will be financed. This is a far cry from our situation in where the judiciary is under the mercy of the legislature as far as establishment of the specialized court is concerned and equally at the mercy of the executive to finance its operations. Indeed, Kenya's scenario can only be described as the lack of suitable legal framework to facilitate the establishment and operation of specialized courts to access justice.

# CHAPTER FIVE

# GENERAL CONCLUSION AND RECOMMENDATION

## 5.0 Conclusion

The chapter summarizes findings from foregoing chapters which will then be linked to the recommendations that will align with the study's objectives and research questions. The hypothesis of the study will be tested in this chapter.

To begin, the paper's research topic is accessing justice in Kenya through developing specialized courts. For a logical flow, the project was divided into five chapters where chapter one introduced the area of study. The paper proceeded to chapter two on the conceptual and theoretical underpinning of access to justice was undertaken. In chapter three, a scrutiny of the suitability of the country's legal framework on accessing justice was discussed. Chapter four undertook an analysis of best practices from other international jurisdictions that Kenya would draw lessons in developing her specialized courts. Finally, chapter five of this research shall summarize the findings and make recommendations where needed.

The study proceeded on the fact that although specialization plays a crucial role in access to justice, Kenya lags behind in developing specialized courts. The subsisting situation in Kenya is the existence of cumbersome constitutional and statutory procedures in the setting up specialized courts. Moreover, once set up, the said courts face a myriad of challenges in their development in terms of operations, shortage of experts to preside over them, budget constraints, procedural and technicalities in their proceedings, and the conflict and confusion generated with the general courts on questions to do with their jurisdiction or lack thereof. All these pose a hindrance to access to justice. The study thus necessitated the need to establish the adequacy of the country's existing laws governing specialized courts in accessing justice and make recommendations to it in the event the same is found wanting.

The first research question of the study was answered, whereby the theoretical and conceptual underpinnings of access to justice were identified and discussed. Access to justice was understood to be a broad concept; in this context, it encapsulated the best process of establishing specialized courts, their models, functioning, and efficiency.

The study's second research question exclusively dealt with the legal framework of statutes establishing specialized courts in Kenya. It reviewed the constitutional and statutory provisions in place in the context of assessing justice in the specialized courts. The study noted several emerging legal challenges in establishing specialized courts in Kenya. These consist of both substantive and procedural legal aspects, and the conclusion arrived at was a negative answer that Kenya does not have a suitable legal framework in accessing justice in the development of specialized courts.

The third research question was on international best practices that Kenya can draw lessons to best access justice through the specialized courts. Lessons were drawn from United States of America, South Africa, England, and India all who have well-developed specialized court systems. Issues highlighted included the necessity to establish the courts, data needed to determine if specialization is necessary, and modes of establishing the court, the specialization model, and barriers towards access to justice. A case study of India's Special Court Act was undertaken. The study concluded that the realization of accessing justice in new courts necessitated a suitable legal framework.

The fourth research question now seeks recommendations that can be made on the appropriate legislative, policy, and administrative measures to make justice accessible through the development of specialized courts.

## 5.1 Recommendations

The following are the recommendations to accessing justice in the development of specialized courts in Kenya;

The need to consider an independent standing statute that governs establishments of specialized courts without further intervention by parliament fashioned like the one of India but more comprehensive to the point of permitting all areas of law to be covered with legislative mandate donated to the judiciary in setting up the courts on a need-by-need basis is paramount. The departure with the Indian Specialist Court Act being that the proposed one should grant the sole mandate to establishing specialized courts to the judiciary and not the executive.

Already, Kenya has an Act of parliament which empowers the chief justice to set up specialized divisions of the High Court. However, as already discussed in chapter four, the Act it is only limited to the administrative management of the High Court. There are no express provisions in that law on how the said divisions can be developed into full-fledged independent specialized courts. Having an excellent independent statute to address this will also address the delays of the legislature in establishing special courts in Kenya. There should be no delay in establishing courts where an urgent need is identified.

The proposed new law should include comprehensive criteria on establishment of the specialized courts other than that of caseloads and judges that the current Act limits itself to. It ought to consider issues to do with the current practical demands of a court station, the types of cases that likely develop backlogs, reasons behind the backlog, cases with high appeal rates, cases that demand priority treatment, reasons for the priority, and public interest cases. Further issues concerning available skills within the judiciary ought to be looked into especially the gaps that need to be closed. A proper policy ought to be in pace to guide collection of the above date for ease of processing and decision making.

Then, there is also the need to train judicial officers and personnel on the areas of specialty that they have chosen to work. There is a need only to recruit those with both academic and experience expertise upon conclusion of their training. The various law schools ought to expand their curriculum to address the emerging needs of specialization and even introduce refresher courses. In addition, the judicial officers serving in the specialized courts must be compelled to attend periodic continuing legal or professional development education periodically to sharpen their skills and update them with the emerging global trends in their field of expertise. Through such measures, access to justice in the specialized courts will be fully attained and enjoyed by its consumers.

Last but not least concerns removal of societal, cultural and institutional barriers in the court process as identified from international best practices; under cultural and societal barriers, there is a need to promote and guarantee litigants rights to access courts. A proper awareness program ought to be put in place to sensitize communities on the same. On discrimination, austerity measures ought to be put in place to eliminate any form of discrimination as provided for in the constitution. Discriminative rules ought to be done away with. Under institutional barriers, courts should find a way of bringing justice to closer.

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