

ENHANCING ACCESS TO JUSTICE IN KENYA THROUGH CLINICAL LEGAL
EDUCATION

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ABSTRACT

This thesis examines the endeavours of university law clinics towards enhancing access to justice in Kenya. It isolates the social justice function of clinics in countries with a pressing access to justice need as that of serving the indigent and orienting lawyers towards social justice in society. In exploring the interface between access to justice and legal education, it analyses the legal frameworks, distribution, structures, settings and projects of university law clinics in Kenya in relation to literature on clinical legal education (CLE). The thesis centres on the social justice mission of CLE as a way of aligning legal education with the country's transformative constitutional framework. In this way, it capitalises on the clinics to foster transformative legal education.

The thesis makes an original contribution to knowledge when it addresses the research gap on clinical legal education in Kenya and presents empirical data on the current forms of clinical programs in law schools in the country. It incorporates the voices of clinicians and student leaders and presents the challenges they encounter in their attempt to use clinics to enhance access to justice for indigent persons. The emphasis on social justice as well as the comparison with South Africa's original clinics differentiates this thesis from the growing body of literature that centres on the pedagogical aspects of CLE.

The thesis applies grounded theory, a vigorous qualitative research method to guide the collection and analysis of data. The theoretical explanation of the factors that enhance and those that resist the role of clinics in enhancing access to justice is grounded in data which was collected from purposively selected law schools. The data, obtained inductively from the interviews and focus group discussions, is also used to develop a theoretical explanation of the use of university law clinics to enhance access to justice in a transformative constitutional context.

The thesis establishes a nexus between legal education and transformative constitutionalism as well as between CLE and transformative legal education. It begins by demonstrating the absence of a suitable framework for investigating the factors that resist or enhance clinics' contribution to access to justice in a transformative constitutional setting. The thesis then locates clinics in Kenya in the context of the development of the legal profession,

legal education and the constitutional history of the country. It develops a legal and institutional framework made up of a transformative constitution and legislation governing legal education, the legal profession and national legal aid schemes. Chapter three proceeds to apply this framework to Kenya and finds a legal framework based on strong constitutional foundations that in certain instances is also fragmented, inconsistent and marred by gaps.

The exploration of the CLE experiences in the country is presented in chapter four. These find the curriculum, law students, academic staff and the place of clinic in the university as central to determining the form and structure of CLE in the respective institutions. The forms of clinics are reflective of the broad definitions of CLE that include Street Law and skills courses. They provide evidence of clinics that are skewed towards the social justice mission of CLE. The data also yields aspects of clinics that influence their role in access to justice.

The thesis finds that clinical practice in Kenyan universities takes the form of both curriculum-based and extracurricular clinics, with the latter bearing a strong social justice orientation and the former a pedagogical one. The focus of CLE is inclined towards social justice, while its pedagogical mission remains underutilised. The thesis analyses factors that undermine the promotion of access to justice through CLE in Kenya. Identifying shortfalls in clinical practice in the country, it deduces that the clinical practices are indeed CLE but at its nascent stages.

The findings are in harmony with literature that considers the twin missions of CLE as inseparable orientations that are not mutually exclusive. They show the Constitution of Kenya 2010 and legal aid legislation as providing further impetus for CLE beyond their original goals at inception. However, this impetus is not reciprocated by the policy and legal framework for legal education.

In considering the dysfunction of the legal profession as the dominant institution in providing access to justice, the thesis deliberates on university law clinics as an institutional bypass for the provision of access to justice for the indigent in the country. It proposes university law clinics as the theory of change for the legal profession. The thesis makes suggestions for future research on the understanding that further steps need to be taken in Kenya to optimise both social justice and pedagogy that are the twin missions of clinical practice.

DECLARATION

I declare that this thesis is my own unaided work.

It is submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

A handwritten signature in black ink, appearing to read 'Anne Kotonya', with a stylized, flowing script.

Anne Kotonya

1st August 2021

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Eternal gratitude to the Holy Spirit, *in labore requies*.

DEDICATION

To my parents, who set me on the path to knowledge.

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Clinical Legal Education (CLE) refers to the method of teaching law in which students provide a variety of legal services to indigent clients under the supervision of qualified teaching staff.¹ CLE programmes are predominantly based in law school offices and are referred to as ‘clinics,’ ‘law clinics,’ ‘law school clinics,’ ‘university-based clinics,’ ‘legal-aid clinics’ or by other similar terms.² These different terms are often applied depending on the emphasis of the clinic’s role.

CLE authors applaud the promise that CLE holds for both pedagogical and social justice goals.³ With the majority of clinics originating as a reaction to an unmet legal need and then progressively developing the pedagogical aspects, the authors seem to concur that achieving a balance between these two goals is a universal challenge.⁴ A review of literature from multiple jurisdictions demonstrates that developed clinics are inclined towards a pedagogical focus while developing clinics focus on the social justice mission, with the latter clinics sometimes working purely towards the social justice aspect.⁵ This social justice focus is attributed to the compelling need for legal aid arising from huge indigent populations.

¹ David R Barnhizer ‘The Clinical Method of Legal Instruction: Its Theory and Implementation’ (1979) 30 *Journal of Legal Education* 67 at 72-73. See chapter 1.2.

² Festus Okechukwu Ukwueze and Beatrice Obianuju Obuka ‘Challenges and Strategies for Sustainable Clinical Legal Education in Nigeria’ (2020) 54 *The Law Teacher* 385 at 388; Richard J Wilson ‘Legal Aid and Clinical Legal Education in Europe and the USA: Are They Compatible?’ in Ole Hammerslev and Olaf Halvorsen Ronning (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (2018) at 264; Mizanie Abate, Alebachew Birhanu and Mihret Alemayehu ‘Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities’ (2017) 11 *Mizan Law Review* 1 at 1; Margaret B. Kwoka ‘Intersecting Experiential Education and Social Justice Teaching’ (2013) 6 *Northeastern University Law Journal* 111 at 114; David Mcquoid-Mason, Ernest Ojukwu and George Mukundi Wachira ‘Clinical Legal Education in Africa: Legal Education and Community Service’ in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 23, 27; MA du Plessis ‘University Law Clinics Meeting Particular Student and Community Needs-A South African Perspective’ (2008) 17 *Griffith Law Review* 121 at 126.

³ Jeff Giddings *Promoting Justice Through Clinical Legal Education* (2013) at 14.

⁴ Tribe Mkwebu ‘Research on Clinical Legal Education: Unpacking the Evidence’ in Thomas Linden and Nick Johnson (eds), *The Clinical Legal Education Handbook* (2020) at 284; Paul McKeown and Elaine Hall ‘If We Could Instil Social Justice Values through Clinical Legal Education, Should We?’ (2018) 5 *Journal of International and Comparative Law* 143 at 154.

⁵ See Literature review in Chapter 1.4.

Kenya has 16 law schools most of which provide legal aid in varying degrees.⁶ The role and activity of university law clinics in post-independence Kenya has largely been a *laissez-faire* activity until the 2010 constitutional dispensation.⁷ The Constitution of Kenya 2010 is hailed as one of the most progressive in the continent.⁸ It has a robust bill of rights, which is a complete overhaul of the retired Constitution. Kenya's Constitution 2010 has been described as 'transformative' because of the social change and reform agenda that lies at its core.⁹

One of the rights enshrined in the 2010 Constitution is the right of access to justice for all at a reasonable fee, if any fee is required at all.¹⁰ The Constitution incorporates international law in its provisions relating to access to justice, rights of arrested persons,¹¹ right to a fair hearing¹² and rights of persons held in custody.¹³ The right to a fair hearing includes having an advocate assigned to an accused person at State expense if substantial injustice would otherwise result.¹⁴ Constitutional law scholars opine that such provision of legal aid and counsel may be a task that a developing country such as Kenya may not easily achieve from its own resources.¹⁵

Kenya promulgated the Legal Aid Act of 2016 in order to breathe life into some of these constitutional provisions guaranteeing the provision of legal aid and counsel.¹⁶ This Act foresees the involvement of law clinics in the provision of legal aid thereby formally placing a legal aid expectation on law clinics. Such an engagement is not new globally given that the United Nations principles and guidelines on access to legal aid already foresee the involvement of university law clinics in the provision of legal aid and in the enhancement of access to justice.¹⁷

These legislative developments recognising the involvement of universities as legal aid providers in Kenya have overtaken the existing national legislation governing both legal practice

⁶ Council of Legal Education *Status of Licensed Legal Education Providers* (2019).

⁷ Constitution of Kenya, 2010.

⁸ Kiwinda Mbondenyi and Osogo Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) at 160.

⁹ *Speaker of the Senate and Another v Attorney-General and 4 Others* [2013] eKLR 1 para 51.

¹⁰ Constitution of Kenya, 2010 (n 7) art 48.

¹¹ Constitution of Kenya, 2010 (n 7) art 49.

¹² Constitution of Kenya, 2010 (n 7) art 50.

¹³ Constitution of Kenya, 2010 (n 7) art 51.

¹⁴ Constitution of Kenya, 2010 (n 7) art 50(h).

¹⁵ Mbondenyi and Ambani (n 8) at 194.

¹⁶ Legal Aid Act, No. 6 of 2016.

¹⁷ Model Law on Legal Aid in Criminal Justice Systems with Commentaries 2016; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2013.

and legal education. This is because CLE is not espoused in the policy and framework governing legal education or legal practice, as these do not consider the pedagogical value of clinics as well as the involvement of universities in the provision of access to justice.

Works by eminent clinicians and scholars demonstrate that South Africa's initial clinics offer a wealth of experience on the contribution of university law clinics to the provision of legal aid.¹⁸ Having arguably attained the peak of their social justice mission,¹⁹ their organisation and role in the provision of legal aid in South Africa is insightful for the development of clinics that have a social justice focus.

1.2 CLINICAL LEGAL EDUCATION

Studies indicate that approaches to CLE have grown in diversity, with legal scholars taking differing positions on the meaning of CLE.²⁰ One of the more current definitions of CLE is experiential learning that places students in the position of lawyers attending to persons with legal needs.²¹ It has been viewed as a methodology which uses the practice of law as a context to teach professional skills and ethics, as a subject whose focus is the study of what lawyers actually do in practice and even as a philosophy which aims to change and restructure institutionalised legal education.²² CLE in certain contexts excludes community education or Street Law and skills courses such as legal research and writing.²³

¹⁸ JC Mubangizi and DJ McQuoid-Mason 'The Role of University Law Clinics in Public Interest Litigation, with Specific Reference to South Africa' (2013) 38 *Journal for Juridical Science* 47 at 48; MA du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (2008) 33 *Journal for Juridical Science* 1 at 1; FS Haupt 'Some Aspects Regarding the Origin, Development and Present Position of the University of Pretoria Law Clinic' (2006) 39 *De Jure* 229 at 223; David McQuoid-Mason 'Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries' (2005) 26 *Obiter* 207 at 229.

¹⁹ MA (Riette) du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 12 at 19.

²⁰ Lydia Bleasdale and others 'Law Clinics: What, Why and How?' in Thomas Linden and Nick Johnson (eds), *The Clinical Legal Education Handbook* (2020); Praveen Kosuri 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) 32 *Boston College Journal of Law and Social Justice* 331; Frank S Bloch 'Access to Justice and the Global Clinical Movement' (2008) 28 *Washington University Journal of Law and Policy* 111.

²¹ Adrian Evans and others *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) at 41.

²² Haupt (n 18) at 231.

²³ Peggy Maisel 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn From South Africa' (2006) 30 *Fordham International Law Journal* 374 at 379.

The ideal CLE model is presented as an academic programme that entails experiential learning achieved through the provision of legal services to indigent clients by students who are closely supervised by a practicing attorney.²⁴ The students obtain academic credit for participating in the programme. South Africa is often noted for good practice and is proposed as a model for its neighbouring countries because South African universities have a variety of learner-centred clinical options which are run by recognised academics and are based in institutional curricula that are widely accepted by students and faculty alike²⁵

Although CLE has in certain instances been used to refer to forms and models which are not linked to real clients, close supervision or even the law school curriculum, definitions now focus on a narrower meaning which lays emphasis on the quality of the student learning process.²⁶

The emerging emphasis on the pedagogical aspect is an interesting development, considering that many of the clinics globally were actually inspired by a social justice mission.²⁷ This mission has been described as ‘the provision of legal services for the poor, representation of collective or group interest and preventing disputes in the context of modern society.’²⁸ It also extends to ‘creating opportunities which enable students to recognise injustices in society and inspiring them to make society and the legal system more just.’²⁹ Indeed, many universities across the globe have made their contribution to social justice by enhancing access to justice to the indigent through the implementation of CLE programmes.³⁰

The study of CLE in this research adopts a definition of CLE that incorporates the various forms of clinical programmes in African universities. It cuts across programmes anchored in the curriculum and those that are not. Clinic work is considered CLE regardless of

²⁴ R Wilson ‘Training for Justice: The Global Reach of Clinical Legal Education’ (2004) 22 *Penn State International Law Review* 421 at 423.

²⁵ Maisel (n 23) at 377.

²⁶ Giddings (n 3) at 14.

²⁷ Du Plessis ‘Forty-Five Years of Clinical Legal Education in South Africa’ (n 19); Cynthia F Adcock ‘Curriculum Beyond Externships and Clinics: Integrating Access to Justice’ (2013) 62 *Journal of Legal Education* 566; Stephen Wizner ‘Is Social Justice Still Relevant?’ (2012) 32 *Boston College Journal of Law and Social Justice* 345.

²⁸ Bloch (n 20) at 133.

²⁹ Jane H Aiken and Stephen Wizner ‘Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice’ (2004) 73 *Fordham Law Review* 997 at 1010.

³⁰ Wilson (n 2) at 267; Abate, Birhanu and Alemayehu (n 2) at 11; Willem de Klerk ‘Unity in Adversity: Reflections on the Clinical Movement in South Africa’ (2007) 12 *International Journal of Clinical Legal Education* 95 at 104.

the level of supervision availed to the students. A distinguishing factor is that the clinics must have a social justice element; these are clinics engaged in practical legal work serving live clients from disadvantaged environments that are unable to access legal services. This understanding of CLE excludes simulation clinics because these clinics are a purely pedagogical tool, which do not entail assistance to indigent persons or communities. Distinctions may be drawn between various types of clinics depending on their nature and focus. Therefore, reference to ‘clinics’ in this thesis means university law clinics unless stated otherwise.

1.3 ACCESS TO JUSTICE

The aspect of the social justice mission of CLE that scholars often highlight is its role in advancing access to justice.³¹ This term access to justice is ascribed to Mauro Cappelletti who explains it as ‘the means by which rights are made effective’ in the context of a legal system that is equally accessible to all persons and which leads to individually and socially just decisions.³² Cappelletti identifies the barriers to access to justice as the prohibitive cost of litigation including for small claims, the delays encountered in enforcing decisions, the common reality that many people lack the knowledge required to pursue or defend a claim as well as the complexities that arise when individuals attempt to remedy a collective interest.³³

This concept is approached in both narrow and broad senses. In the narrow sense, access to justice is explained as ‘access to legal advice and legal services and other methods of dispute resolution, before independent and impartial courts, tribunals or forums or through consensual mechanisms such as negotiation or mediation.’³⁴ Relatedly, access to legal information is often considered an important component of access to justice.³⁵

³¹ Oluyemisi Bamgbose ‘Access to Justice through Clinical Legal Education: A Way Forward for Good Governance and Development’ (2015) 15 *African Human Rights Journal* 378; Wizner (n 27); Anon ‘Adopting and Adapting: Clinical Legal Education and Access to Justice in China’ (2007) 120 *Harvard Law Review* 2134.

³² Mauro Cappelletti and Bryant G Garth ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 181 at 182, 185.

³³ Cappelletti and Garth (n 32) at 188-189, 191, 194.

³⁴ David Mcquoid-Mason ‘Access to Justice in South Africa: Are There Enough Lawyers?’ (2013) 3 *Oñati Socio-legal Series* 561 at 565; DJ Mcquoid-Mason ‘Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *’ (2004) 29 *Journal for Juridical Science* 28 at 29.

³⁵ Mcquoid-Mason ‘Access to Justice in South Africa: Are There Enough Lawyers?’ (n 34) at 571.

The broader approach to the concept of access to justice encompasses a variety of factors beyond legal representation before a court of law. It incorporates the factors that Cappelletti identifies as barriers to access to justice. These range from public awareness of the rule of law to the availability of affordable legal services to all persons.³⁶ The concept of access to justice is advanced as a platform which enables individuals to enforce their rights and seek redress when their rights are violated.³⁷ It therefore includes the availability of legal aid as well as physical and financial access to both formal and informal dispute resolution systems without undue delay.³⁸ With these qualities in mind, access to justice enables people to enjoy their rights and freedoms thereby empowering them to contribute to all aspects of their development.³⁹

Access to justice is a right that is enshrined in international and national legal instruments. The Universal Declaration of Human Rights provides for equality before the law at article 17 and for the right to fair trial at article 10. The International Covenant on Civil and Political Rights at article 2 prohibits discrimination of any kind, including financial status. Article 14 of the Covenant provides for the right to fair trial. Additionally, the Constitution of Kenya 2010 at article 48 provides for the right of access to justice. This right acquires prominence because all other rights provided for in legal instruments are rendered meaningless in the absence of effective mechanisms for asserting them.⁴⁰

The Constitution of Kenya is transformative and has social justice as one of its basic values.⁴¹ A consequence of this transformative constitutional framework is the enjoyment of the right of access to justice regardless of ones' economic position.⁴² The transformative Constitution also bears implications for the training and socialisation of future lawyers, which

³⁶ Dorah Caroline Mafabi *Legal Aid: A Tenet of Access to Justice* (2014) 2 at 1.

³⁷ Bloch (n 20) at 118-119.

³⁸ Patricia Kameri-Mbote and Migai Akech *Kenya Justice Sector and the Rule of Law* (2011) at 156-176.

³⁹ Mafabi (n 36) at 2.

⁴⁰ Cappelletti and Garth (n 32) at 185.

⁴¹ Constitution of Kenya, 2010 (n 7) Preamble; Willy Mutunga 'Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution' *2017 Lameck Goma Annual Lecture* (2017).

⁴² Eric Kibet and Charles Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 340 at 366; Willy Mutunga 'Human Rights States and Societies: A Reflection From Kenya' (2015) 2 *The Transnational Human Rights Review* 63; Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 352, 355.

could influence the access to justice function of CLE.⁴³ The provision of access to justice, having been guaranteed in the bill of rights of the Constitution, is arguably the role of the State and the legal fraternity.⁴⁴ It is the case, however, that in Kenya and similar jurisdictions, human rights bodies and public benefit organisations have historically played this role.⁴⁵ CLE programmes in law schools either independently or in conjunction with human rights bodies also provide various forms of legal assistance to indigent persons and communities. This access to justice role of CLE is discussed further in chapter two.

1.4 LITERATURE: CLINICAL LEGAL EDUCATION VIS-A-VIS ACCESS TO JUSTICE

This research begins with an examination of existing literature on CLE vis-a-vis access to justice. Among these are seminal works emanating from jurisdictions where CLE has taken deep root and where the pedagogical aspect of CLE is well developed.⁴⁶ As such, most of the works lay emphasis on the pedagogical aspects of CLE. These include writings on best practices,⁴⁷ problem-based learning, reflective practice, course design⁴⁸ and assessment as discussed below.⁴⁹ These writings provide comparative value and put the discussion of CLE in Kenya in perspective.

⁴³ Peggy Maisel, Shaheda Mahomed and Meetali Jain ‘Clinical Legal Education’s Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present and Future’ (2015) 60 *New York Law School Law Review* 433 at 433; Geo Quinot ‘Transformative Legal Education’ (2012) 129 *South African Law Journal* 411; Karl E Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 at 156.

⁴⁴ Aiken and Wizner (n 29) at 997.

⁴⁵ The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice 2016-2017* (2017) at 252-263; Caroline Amondi ‘Legal Aid in Kenya: Building a Fort for Wanjiku’ in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 205; Bloch (n 20) at 118; Association of Legal Aid Institutions of South Africa and Open Society Justice Initiative *Combining Learning and Legal Aid: Clinics in Africa* (2003) at 6. See chapter 3.1.1.

⁴⁶ Bleasdale and others (n 20); Sarah Buhler ‘Clinical Legal Education in Canada: A Survey of the Scholarship’ [2015] *Canadian Legal Education Annual Review* 1; MA du Plessis ‘Clinical Legal Education Identifying Required Pedagogical Components’ (2015) 40 *Journal for Juridical Science* 64; Rachel Spencer and Matthew Atkinson ‘Towards a Pedagogy of the Integration of Clinical Legal Education within the Law Curriculum: Using De-Identified Clinic Files Within Tutorial Programs’ (2013) 25 *Australia Legal Education Review* 121; Barnhizer (n 1).

⁴⁷ Adrian Evans and others *Best Practices Australian Clinical Legal Education* (2012); Roy et al Stuckey *Best Practices for Legal Education: A Vision and a Roadmap* (2007).

⁴⁸ Leah Wortham and others (eds), *Learning From Practice* (2016); MA du Plessis ‘Clinical Legal Education: Planning a Curriculum That Can Be Assessed’ (2011) 36 *Journal for Juridical Science* 25.

⁴⁹ MA du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2017).

The fact that legal education methodology has evolved from rote learning to more practical and service-oriented approaches is well documented.⁵⁰ Indeed, practical based learning and its models of evaluation are growing in application.⁵¹ CLE has even emerged as a global movement, with collaborations being made between various universities and institutions.⁵² Such collaborations with legal services organisations are enabling even students from the first year of study to be engaged in social justice projects.⁵³

Law schools in the United Kingdom engage both undergraduate students and graduates in their CLE programmes.⁵⁴ Research conducted in Australian universities using case studies, interviews and grounded theory shared in the book entitled *Promoting Justice through Clinical Legal Education* is critical to this study in several ways.⁵⁵ Since Australian clinics are viewed both as valuable learning environments and as community service centers, this research adopts the definition of CLE that the study advances.⁵⁶ It provides perspective to the research because it proffers insights into the origins, history and sustainability of CLE. The discussion on sustainability of clinical programmes is relevant because sustainability is a critical factor for the success of any clinic regardless of its pedagogical or access to justice focus. It provides a litmus test for the study of the progress of law clinics in achieving their access to justice mission. This is applicable to university law clinics generally and to Kenyan universities in particular.

The Central European experience is exemplified by a rich account of the history and structure of clinics in Poland.⁵⁷ The shortcomings of Polish legal education and how these have been mitigated by the establishment of law clinics sheds light on the tension between the

⁵⁰ Haupt (n 18) at 234; Barnhizer (n 1) at 71.

⁵¹ Mkwebu (n 4) 257; Beatrice Shuwa 'The Evolution of Academic and Clinical Legal Education in Nigeria and Selected Common Law Countries' (2014) 17 *Nigerian Law Journal* 102 at 116; Oke Samuel Olugbenga 'Clinical Legal Education in Nigeria-Developments and Challenges' (2008) 17 *Griffith Law Review* 139 at 143.

⁵² Richard A Boswell 'The Global Evolution of Clinical Legal Education: More than a Method' (2018) 67 *Journal of Legal Education* 1081 at 1086; Daniel Bonilla 'Legal Clinics in the Global North and South: Between Equality and Subordination - An Essay' (2013) 16 *Yale Human Rights and Development Law Journal* 1 at 3; Edward Santow and George Mukundi Wachira 'The Global Alliance for Justice Education' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 371.

⁵³ Mary Nicol Bowman 'Engaging First-Year Students through Pro Bono Collaborations in Legal Writing' (2013) 586 *Journal of Legal Education* 586 at 588.

⁵⁴ Bleasdale and others (n 20) at 17.

⁵⁵ Giddings (n 3).

⁵⁶ Giddings (n 3) at 14.

⁵⁷ Isabela Kraniska 'Legal Education and Clinical Legal Education in Poland' (2008) 13 *International Journal of Clinical Legal Education* 47 at 50.

pedagogical role and the social justice mission of clinics.⁵⁸ This experience is one that universities in East Africa could easily relate to, given the large unmet legal need that is common to both regions. This similarity also lends the structure of the Polish clinics a benchmarking value in this study.

Law clinics have been operational in South Africa for over four decades so their social justice mission and pedagogical role are well researched.⁵⁹ These range from reviews of curricula and assessment methods of law clinics in South African Universities⁶⁰ to an examination of the pedagogical role of Practical Legal Studies Programme at the University of the Witwatersrand. Research on the latter finds that the potential of CLE as a teaching methodology is not maximised as long as clinic is offered as an isolated final year course.⁶¹ This is based on the argument that CLE would be maximised if it were applied in all mainstream undergraduate and masters' level courses. Again, the focus of research on CLE's pedagogical aspect is noteworthy.

There is literature on CLE from other parts of Africa such as Ethiopia⁶² and Nigeria,⁶³ which demonstrate the social justice value of clinics.⁶⁴ Besides similarity in history, Nigeria's

⁵⁸ Wilson (n 2) at 278; Lukarz Bojarski 'The Aim of Legal Clinics' in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 27.

⁵⁹ Dave Holness 'Improving Access to Justice through Compulsory Student Work at University Law Clinics' (2013) 16 *Potchefstroom Electronic Law Journal* 327 at 334; F Haupt and SH Mahomed 'Some Thoughts on Assessment Methods Used in Clinical Legal Education Programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic' [2008] *De Jure* 273 at 275; Du Plessis 'University Law Clinics Meeting Particular Student and Community Needs-A South African Perspective' (n 2) at 126.

⁶⁰ MA du Plessis *Assessment Methods in Clinical Legal Education* (Unpublished Phd Thesis, University of the Witwatersrand 2014).

⁶¹ Shaheda Hasim Mahomed *Critical Evaluation of the Practical Legal Studies Programme at the University of the Witwatersrand* (Unpublished Phd Thesis, University of the Witwatersrand 2013) at 192, 205; Willem de Klerk 'Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model' (2006) 39 *De Jure* 244 at 249.

⁶² Anbesie Fura Gurmesssa 'The Role of University-Based Legal Aid Centers in Ensuring Access to Justice in Ethiopia' (2018) 9 *Beijing Law Review* 357; Abate, Birhanu and Alemayehu (n 2); Desta Gebremichael Gidey 'The Pedagogical and Social Utility of Introducing Clinical Legal Education in Ethiopian Law Schools: Rethinking Beyond the Curricular Reform' (2010) 1 *Mekelle University Law Journal* 97.

⁶³ Shuwa (n 51) at 116; Olugbenga (n 51) at 143.

⁶⁴ Maryam Idris Abdulkadir 'Appraisal of the Role of Law Clinics in Internally Displaced Persons and Refugee Camps in Nigeria' (2019) 6 *Asian Journal of Legal Education* 29; Olanike S Adedokun-Odeyemi 'Role of Clinical Legal Education in Social Justice in Nigeria' (2017) 3 *Asian Journal of Legal Education* 88; Cosmos Nike Nwedu 'Enhancing Legal Aid through University Law Student Engagement: A Case Study of the EBSU Law Clinic Model' (2017) 24 *International Journal of Clinical Legal Education* 98

<<https://www.northumbria-journals.co.uk/index.php/ijcle/article/view/669>>; Sam Erugo 'Legal Assistance by Clinical Law Students: A Nigerian Experience in Increasing Access to Justice for the Unrepresented' (2016) 3 *Asian Journal of Legal Education* 160; Bamgbose (n 31); Ibijoke Patricia Byron 'The Relationship Between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic, Faculty of Law, University of Ibadan,

CLE has grown in more than 15 years in circumstances comparable to those of the clinics in Kenya. Unlike Kenya however, Nigeria legislated clinical pedagogies as part of its legal education reforms.⁶⁵ Assessments of these clinical developments have also been published.⁶⁶ These experiences are utilised to support various arguments in the thesis without the countries being proffered for comparison because they lack the transformative constitutionalism nexus that is central to the study. Even though there is less research and documentation about clinics in other regions, it is noteworthy that clinics in the latter regions have worked either independently or alongside public benefit organisations largely in the promotion of access to justice through the provision of legal aid.⁶⁷

The establishment of many law schools in East Africa is a relatively recent development.⁶⁸ This increase in the number of universities in the East African region has brought with it various difficulties.⁶⁹ These include over-stretched resources for teaching and research.⁷⁰ Thus, most schools perpetuate the traditional rote-learning model while striving to achieve their goal of training lawyers who are capable of contributing to the development of the region.

Nigeria' (2014) 20 *International Journal of Clinical Legal Education* 563

<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/22/27>>.

⁶⁵ Ukwueze and Obuka (n 2) at 388; Charles Olufemi Adekoya 'Meeting the Required Reforms in Legal Education in Nigeria: Clinical Legal Education – Ten Years After' (2014) 20 *International Journal of Clinical Legal Education* 603 <<http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/25/30>>; National Universities Commission *Benchmark Minimum Academic Standards for Undergraduate Programmes for Nigerian Universities* (2014); National Universities Commission and Council for Legal Education *Guidelines and Conditions for the Establishment of Faculties of Law in Nigeria* (2009).

⁶⁶ Augustine Edobor Arimoro 'Clinical Legal Education: Vision and Strategy for Start-up Clinics in Nigeria' (2019) 26 *International Journal of Clinical Legal Education* 132; Omolade Olomola and Oluyemisi Bamgbose 'Collaborating with Other Disciplines: Best Practice For Legal Clinics- A Case Study of the Women's Law Clinic University of Ibadan Nigeria' (2013) 19 *International Journal of Clinical Legal Education* 355; Ernest Ojukwu, Odinakaonye Lagi and Sam Erugo *Impact Assessment of Clinical Legal Education in Nigeria* (2013).

⁶⁷ Yohana Ouma and Esther Chege 'Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide' (2016) 23 *International Journal of Clinical Legal Education* 107 at 125, 130

<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/download/567/982>>.

⁶⁸ JB Ojwang and DR Salter 'Legal Education in Kenya' (1989) 33 *Journal of African Law* 78 at 79, 81; G. Kamau 'Current Problems of Legal Education in Kenya' (1979) 9 *Journal of Eastern African Research and Development* 33 at 43; William Twining 'Legal Education in East Africa' [1966] *International and Comparative Law Quarterly* 115 at 116.

⁶⁹ Patricia Kameri-Mbote 'Legal Education and Lawyers' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 128; Damtew Teferra and Philip G Altbach 'African Higher Education: Challenges for the 21st Century' (2004) 47 *Journal of Higher Education* 21 at 25.

⁷⁰ Thomas F Geraghty and Emmanuel K Quansah 'African Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to A Neglected Means of Securing Human Rights and Legal Predictability' (2007) 5 *Loyola University Chicago International Law Review* 87 at 98.

Teaching through lectures is often preferred because one lecturer can have hundreds of students in one class.⁷¹ This method is both affordable and necessary if there are inadequate teaching materials and textbooks. Considering that similar challenges have been encountered and mitigated to some degree in the history of CLE in South Africa and other jurisdictions, they are experiences from which nascent law clinics can draw lessons.⁷² One occasion for this was the first all Africa Colloquium on Clinical Legal Education which was held in 2003. It discussed the clinical experiences in the continent including those in Kenya and South Africa.⁷³ Nevertheless, the access to justice potential of law clinics in East Africa remains under-researched.

Research into the role of law clinics in teaching human rights appears to have been carried out in various degrees in South Africa.⁷⁴ This is not the case in East Africa and more specifically, Kenya where the application of law clinics both as a social justice tool and a pedagogical instrument appears underutilised. Indeed, proponents of reform of African law schools recommend the establishment of clinics as one of the ways of imparting practical and legal skills to students.⁷⁵

It is noteworthy that one of the functions of Council of Legal Education in Kenya is to generate policy on legal education in the country.⁷⁶ This policy has been implemented in the strategic plan at the Kenya School of Law. The strategy aims at contributing to national development through the provision of legal aid, community street law programmes and provision of paralegal training among other activities.⁷⁷

In practice, only a few reports of collaborative activity between law students from various universities and partner organisations in the provision of legal aid are available. The majority of

⁷¹ Geraghty and Quansah (n 70) at 100, 102.

⁷² Maisel (n 23) at 377.

⁷³ Association of Legal Aid Institutions of South Africa and Open Society Justice Initiative (n 45) at 5.

⁷⁴ Philip F Iya 'Enhancing the Teaching of Human Rights in African Universities: What Role for Law School Clinics?' (2005) 7 *International Journal of Clinical Legal Education* 20 at 25
<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/94/411>>.

⁷⁵ Lynette Osiemo and Anton Kok 'Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education' (2020) 64 *Journal of African Law* 173 at 175; Samuel O Manteaw 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' (2008) 39 *McGeorge Law Review* 903 at 962; Geraghty and Quansah (n 70) at 100.

⁷⁶ Council of Legal Education (CLE) *Handbook for Legal Education Accreditation* (2011) at 11.

⁷⁷ Council of Legal Education (CLE) *2009-2012 Strategic Plan* (2012) at 5.

these activities neither contribute to the student's grades nor are they anchored on the school curriculum but remain merely voluntary or club activities.⁷⁸

There is, however, one article published on the application of CLE and the establishment of a law clinic at Moi University.⁷⁹ It describes the CLE experience in the institution, highlighting several challenges faced by this programme. The authors note an apparent uncertainty regarding the status of the clinic vis-a-vis the school as well as difficulties in finding staff that are available to supervise students.⁸⁰ This uncertainty in turn contributes to the clinics' lack of independence when pursuing litigation, independence in funding and funding systems as well as in decision-making processes. Since students in Kenya do not have legal capacity to represent clients in court, the clinics prefer to instruct advocates in private practice who then file the suits in their own capacity whenever these arise.⁸¹ The students lack support in determining their roles, boundaries and even in accessing the clinic that is quite far from their campus resulting in low morale on their part.⁸² Given the duration that has elapsed, it is likely that the situation as described may have changed since the study was undertaken.

Problems of quality of both teaching and learning, poor integration of clinics within the university, staffing demands, lack of resources, supervision and assessment difficulties are not new in CLE.⁸³ Other jurisdictions have grappled with similar difficulties and found innovative ways of tackling them. These include the incorporation of CLE into skills courses and the recognition of clinic staff as part of the university faculty.⁸⁴ Clinics have successfully carried out fundraising activities in collaboration with national clinic organisations, entered into agreements with the private bar as well as prudently stretched their existing resources through hiring new law graduates and encouraging senior students to tutor the students in the junior years.⁸⁵ This

⁷⁸ Arnold Nciko 'Ignorance of the Law Is No Defence: Street Law as a Means to Reconcile This Maxim with the Rule of Law' (2018) 3 *Strathmore Law Review* 25 at 40; Association of Legal Aid Institutions of South Africa and Open Society Justice Initiative (n 45) at 5.

⁷⁹ TO Ojienda and M Oduor 'Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya' (2002) 2 *International Journal of Clinical Legal Education* 49 at 49
<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/view/123/122>>.

⁸⁰ Ojienda and Oduor (n 79) at 61.

⁸¹ Ojienda and Oduor (n 79) at 63.

⁸² Ojienda and Oduor (n 79) at 62.

⁸³ Geraghty and Quansah (n 70); Maisel (n 23) at 67.

⁸⁴ Wilson (n 24) at 428.

⁸⁵ McKeown and Hall (n 4) at 152.

study acknowledges that some of the factors hindering the access to justice mission of clinics in Kenya can be mitigated through adopting and adapting some of these ingenious solutions where the local context allows.

1.5 ENHANCING ACCESS TO JUSTICE THROUGH CLE IN KENYA

Whereas there exists a huge global contribution to literature on law clinics, there appears to be a gap in research and documentation of CLE in East Africa and in Kenya in particular. This paucity is not reflective of the actual activity that is taking place in this region. For instance, Twining and other luminaries were engaged in forms of CLE in Africa in the 1970s period.⁸⁶ Three decades later, Ojienda describes the experience at a university established with CLE as a pedagogical mission.⁸⁷ The work does not focus on the social justice aspect of CLE. The period covered by Ojienda precedes 2002 while the focus in the present research is the period after 2010, with the defining factor being the promulgation of the 2010 Constitution and the Legal Aid Act of 2016. More recent scholarship based on analysis of available documentation from some clinics in the country decries the absence of current data on clinical practice countrywide.⁸⁸

This study of the enhancement of access to justice in Kenya through CLE is novel and has not been carried out before. The research is original in its nationwide scope, subject matter and social justice focus, empirical methodology, comparative aspects as well as post-constitutional timeframe. The study is on developments premised on the 2010 Constitution and resulting legal aid legislation in Kenya. The focus is on the social justice aspect of CLE, which differentiates it from the corpus of literature from around the world on the pedagogical aspect of CLE. The comparative aspect also lends originality to it, as it seeks to draw lessons from literature on South Africa's original clinics that were purely social justice clinics. Information generated from the literature is triangulated with that from the empirical aspect therefore bringing prevailing circumstances to knowledge. The research incorporates the voices and experiences of students and clinicians running law clinics; these are usually absent from clinical

⁸⁶ Mcquoid-Mason, Ojukwu and Wachira (n 2) at 23; John A Harrington and Ambreena Manji 'Mind with Mind and Spirit with Spirit: Lord Denning and African Legal Education' (2003) 30 *Journal of Law and Society* 376 at 23; Twining (n 68) at 396.

⁸⁷ Ojienda and Oduor (n 79).

⁸⁸ Osiemo and Kok (n 75) at 193.

scholarship and so add to the contribution to knowledge. This study thereby builds on the literature on the social justice aspect of CLE in Kenya in the 2010 constitutional dispensation.

1.6 CENTRAL QUESTIONS AND OUTLINE OF THE THESIS

Access to justice facilitates the enjoyment of rights and freedoms thereby promoting social, economic, political and legal development.⁸⁹ Whereas access to justice is a constitutional right in Kenya, the unmet legal need remains exceedingly high.⁹⁰ Indeed, it has long been recognised that members of the legal profession in Kenya cannot adequately meet the legal needs of the entire population.⁹¹ Researchers therefore acknowledge the capacity and contribution that public benefit organisations make in the provision of legal services to the indigent in the country.⁹²

Kenya's first Legal Aid Act was passed in April 2016 to facilitate access to justice and social justice in the country.⁹³ This law recognises accredited university law clinics among the providers of legal aid services. Although the university clinics' capacity and potential are recognised, their status, activities, contribution and challenges in this field remain under-researched.⁹⁴ The overall aim of this research is to investigate how access to justice can be enhanced in Kenya through CLE in the 2010 constitutional dispensation.

This study therefore sought to meet five objectives. The first objective was to conceptualise the role of CLE in the enhancement of access to justice. The second objective was to draw lessons on access to justice from documentation on the initial CLE experience in South Africa. The third objective was to appraise the prevailing legal and institutional framework for the enhancement of access to justice through CLE in Kenya. The fourth objective was to analyse the legal and institutional factors that hinder the contribution of CLE to access to justice in

⁸⁹ Mbondenyei and Ambani (n 8) at 192; Bojarski (n 58) at 21.

⁹⁰ Mbondenyei and Ambani (n 8) at 192.

⁹¹ Ojienda and Oduor (n 62) at 51.

⁹² Amondi (n 45) at 205; Jedidhah Wakonyo Waruhiu and John Justice Odhiambo Otieno 'Access to Justice: The Paralegal Approach' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 190.

⁹³ Act No. 6 of 2016 (n 16).

⁹⁴ Philip F Iya 'Fighting Africa's Poverty and Ignorance through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Journal of Clinical Legal Education* 13 at 19 <www.northumbriajournals.co.uk/index.php/ijcle/article/viewFile/128/127>.

Kenya. The fifth objective was to explore recommendations on how to enhance access to justice in Kenya through CLE.

Scholarship on CLE from the United States (US),⁹⁵ the United Kingdom (UK),⁹⁶ Canada⁹⁷ and Australia⁹⁸ is widely available. Existing African scholarship is focused on developments in South Africa,⁹⁹ Ethiopia¹⁰⁰ and Nigeria.¹⁰¹ It is notable that the majority of these are jurisdictions where CLE is rooted in the educational programmes and has been practiced for significant periods of time.

This is not the case in East Africa and more specifically Kenya, where the paucity of CLE literature reflects the gap in empirical research on the CLE experience. CLE has the potential of playing a more active role in enhancing access to justice by preparing lawyers in the country to address structural problems in the delivery of legal services and the administration of justice.¹⁰² The region has a need for competent and responsible lawyers who are alive to the needs of their people.¹⁰³

It is noteworthy that in August 2005, bold recommendations were made for the redesign of legal education in Kenya.¹⁰⁴ The majority of these recommendations have been progressively implemented. The Taskforce on Legal Sector Reforms made further recommendations in 2017.¹⁰⁵ However, the recommendations did not address matters related to the development of law clinics and CLE. Despite this, some law schools have taken the initiative and developed CLE

⁹⁵ Wilson (n 2); Adcock (n 27); Bowman (n 53); Aiken and Wizner (n 29); Mark Spiegel 'Theory and Practice in Legal Education: An Essay on Clinical Legal Education' (1987) 34 *UCLA Law Review* 577.

⁹⁶ Bleasdale and others (n 20); McKeown and Hall (n 4).

⁹⁷ Buhler (n 46); Shelley AM Gavigan 'Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35 *Osgoode Hall Law Journal* 443.

⁹⁸ Spencer and Atkinson (n 46); Evans and others (n 47); Jeffrey Michael Giddings 'Contemplating the Future of Clinical Legal Education' (2008) 17 *Griffith Law Review* 1.

⁹⁹ MA (Riëtte) du Plessis 'Designing an Appropriate and Assessable Curriculum for Clinical Legal Education' (2016) 1 *De Jure* 1; Holness (n 59); Haupt and Mahomed (n 59); Elsabe Steenhuisen 'Goals of Clinical Legal Education' in De Klerk et al (ed), *Clinical Law in SA: Values, Knowledge, Skills* (2006).

¹⁰⁰ Gurmessa (n 62); Abate, Birhanu and Alemayehu (n 2).

¹⁰¹ Abdulkadir (n 64); Bamgbose (n 31).

¹⁰² Bamgbose (n 31) at 386.

¹⁰³ Robert Machatha Kibugi 'Training Lawyers for the Sub-Saharan African Market: What Role for Academics? Perspectives from Kenya' (2009) 43 *Law Teacher* 37 at 41; Manteaw (n 75) at 940.

¹⁰⁴ Muigai Prof Githu *Report of the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya* (2005) at 19-128.

¹⁰⁵ Fred Ojiambo *Report of the Taskforce on Legal Sector Reforms* (2017) at 119-145.

programmes and law clinics from which they organise outreach programmes in conjunction with civil society and public benefit organisations.

In meeting the research objectives, it was essential to address five questions:

- a) What role does CLE play in the enhancement of access to justice?
- b) What lessons does literature on the initial CLE experience in South Africa offer for access to justice?
- c) How does the current legal and institutional framework enhance access to justice through CLE in Kenya?
- d) What legal and institutional factors undermine the promotion of access to justice through CLE in Kenya?
- e) What recommendations can be made in order to enhance access to justice in Kenya through CLE?

This research is justified as it answers questions on the state of CLE in Kenya, the contribution CLE makes to access to justice and the challenges experienced in this endeavour. It yields a framework for the enhancement of access to justice in a transformative constitutional setting and makes recommendations for both CLE and access to justice in Kenya.

1.7 METHODOLOGY

Review and analysis of literature were critical in establishing the research gap that this work fills. It was also useful in theorising the access to justice role of CLE and thereby assisting in responding to the first and second research questions.

This study draws lessons from documentation on the early South African clinic model, especially because of their long history and general success in their social justice focus. The relevance of the South African legal aid system for Kenya is to be found not only in the fact that both are developing countries with constitutional provisions for legal representation but also that South Africa has a well-established university law clinic network which is a recognised contributor to the national legal aid system. The experience of the initial South African law clinic

model has been used in the establishment of social justice clinics in other jurisdictions and could be said to provide a blueprint for the establishment of social justice clinics elsewhere.¹⁰⁶

Information on the institutional framework and design of the various clinics in Kenya is not available in literature or legislation. It was therefore necessary to meet the clinic staff and student leaders to obtain this information. While some of the factors that hinder the contribution of CLE to access to justice could be extracted from critical analysis of literature and legislation, other factors had to be obtained from the experience of CLE stakeholders. This data gathered contributed to answering the third, fourth and fifth research questions.

Semi-structured interviews were conducted with CLE staff and clinic partner institutions. Processing of ethics clearances and research permits preceded this engagement. The kinds of questions that were asked related to their work with law clinics, what kinds of legal aid activities are carried out by law clinics and the challenges experienced in the provision of legal aid as well as any proposals they had on how these challenges could be overcome. Focus group discussions were held with law clinic student leaders from each institution under study, on the same kinds of questions, in order to provide a complete picture of clinics from the perspective of both the staff and students.

1.7.1 Research Design

The selected design for the research was qualitative. This is because the research questions in the study seek an understanding of the CLE process and its contribution to access to justice. Quantitative or statistical analysis cannot sufficiently measure this phenomenon. The choice of research design is consistent with Creswell's recommendation of qualitative research for 'exploring and understanding the meaning individuals or groups ascribe to a social or human problem.'¹⁰⁷

The strategy of inquiry was a grounded theory approach. Charmaz describes grounded theory as 'a set of flexible analytic guidelines that enable researchers to focus their data collection and to build inductive middle-range theories through successive levels of data analysis

¹⁰⁶ Donald Nicolson "'Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (2016) 23 *International Journal of Clinical Legal Education* 87 at 91

<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/download/532/922>>.

¹⁰⁷ John W Creswell *Qualitative Inquiry and Research Design* (2013) at 44.

and conceptual development.’¹⁰⁸ Creswell identifies two characteristics of grounded theory on the basis of seminal works by Chamarz, Strauss and Corbin. These are the ‘constant comparison of data with emerging categories and theoretical sampling of different groups to maximise the similarities and differences of information.’¹⁰⁹

Although the present research focuses on the social justice aspects of CLE, studies have been conducted in other jurisdictions on the pedagogical aspect of CLE¹¹⁰ and on sustainability of CLE programmes.¹¹¹ These employed a grounded theory approach because of the nature of research focusing on the CLE process. Indeed, Charmaz considers social justice inquiry as one of the areas in which ‘researchers can fruitfully apply grounded theory methods’ because they provide tools for analysing processes.¹¹²

1.7.2 Inclusion/Exclusion criteria

The research aimed at studying the contribution of CLE to access to justice in Kenya. CLE is usually conducted in law clinics hosted by law schools at universities. The research participants were therefore identified and selected because of their capacity as university academic staff in charge of law clinics or as student leaders responsible for the running of the clinics.

There are 16 law schools, at different levels of accreditation, in the country.¹¹³ Each has its unique clinic model and experience. All the 11 the law schools that had operational clinical programmes were identified for this study thereby making the results as representative of the country as possible. Thus, a purposive sampling of the total population was carried out. This was consistent with the rationale behind purposive sampling that is to offer ‘insight about the phenomenon and not empirical generalisation from a sample population.’¹¹⁴

The inclusion criteria applied was that the research would deliberately be carried out only in law schools that have clinics; thus 11 law schools were eligible for the study because these

¹⁰⁸ Kathy Charmaz ‘Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies’ in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (2005) at 507.

¹⁰⁹ Creswell (n 107) at 83.

¹¹⁰ Du Plessis ‘Designing an Appropriate and Assessable Curriculum for Clinical Legal Education’ (n 99) at 6.

¹¹¹ Giddings (n 3) at 18.

¹¹² Charmaz (n 108) at 507-508.

¹¹³ Council of Legal education (n 6).

¹¹⁴ Michael Quinn Patton *Qualitative Research and Evaluation Methods* (2015) at 46.

comprise the population in which law clinics operate. This eliminated the risk of bias while providing comprehensive state of knowledge.

The organisations that support legal aid activities by clinics were identified because of the partnership with and support they offer to a wide range of university law clinics.

1.7.3 Research instruments

Semi-structured interviews were conducted with CLE staff and representatives of stakeholder institutions. The stakeholder institutions included officers of the National Legal Aid Service and the Law Society of Kenya (LSK), two bodies that actively collaborate with several clinics in their legal aid work. The kinds of questions that were asked related to their work with law clinics, the kinds of activities that were actually carried out by law clinics and the challenges they experienced therein as well as any proposals they had on how these challenges could be overcome.

Focus group discussions were held with law clinic student leaders from each institution under study, on the same kinds of questions, in order to provide a complete picture of clinics both from the perspective of the staff and students.

The questions in the interview schedule and focus group discussion guide were refined and presented to the ethics clearance committee for ethical clearance. The clearance was obtained and research permits secured.¹¹⁵

1.7.4 Data collection procedures

The data was collected from all the 10 law schools that positively responded to the invitation to participate. The institutions and research participants were identified and selected based on those who met the inclusion profile. The sampling was therefore purposive. Since each law school has a clinic model that is convenient for the respective universities, the study examined all the clinics in search of the experiences and characteristics which were shared and those which distinguished

¹¹⁵ University of the Witwatersrand Human Research Ethics Committee (Non-medical) Ethics Clearance Certificate Protocol Number H18/10/17 (2019); Strathmore University Institutional Ethics Review Committee Approval Letter SU-IERC0260/18 (2018); National Commission for Science Technology and Innovation Research Permit No. NACOSTI/P/18/44934/25918 (2018).

the various models. The entire population was studied and so probability sampling was not necessary.

The representatives from the two organisations that collaborate with a wide range of university law clinics in their legal aid work were interviewed. This set of interviews provided a different source of data that was triangulated with data from the other interviews and focus group discussions to form one body of data.

1.7.5 Consent process

Participation in the research was voluntary and participants were enabled to make an informed choice about whether they wanted to take part in the research or not. This entailed contacting the law clinics by phone and email and informing them about the research. Thereafter, each participant was provided with a detailed participant information sheet and an explanation of any sections that they did not understand.

The sheet contained information introducing the researcher. It then provided a brief description of the research, its aims and potential benefits. The recipient was then invited to become involved in the study. This invitation was preceded by a brief explanation of how and why they were selected. It was followed by an explanation of what ‘involvement’ in the study would require potential participants to do. It clarified that the research did not entail treatment or any form of payment; that participation was voluntary and that refusal to participate would not result in any penalty or loss of benefits to the participant.

The participant information sheet also contained information on how issues of anonymity and confidentiality would be canvassed. Participants were assured that they could decline to respond to questions about which they felt uncomfortable. They were at liberty to withdraw from the study at any time without penalty or loss of benefits. They received an explanation of any foreseeable risks, discomforts, side effects or benefits and an explanation of how the study would be reported, where it would be available and to whom. Potential participants were invited to contact the researcher should they have questions.

This information was conveyed together with an informed consent form which was to be signed by all participants before they could take part in the study.

1.7.6 Confidentiality and privacy

Privacy of the research participants was guaranteed by ensuring that the interviews remained anonymous. The researcher did not ask for names or any identifying information. The information from the interview was held securely on a password-protected hard drive. Research participants were expressly notified in the participant information and informed consent form that complete anonymity could not be guaranteed because it was possible for third parties to identify them because of the leadership office they held in the clinic.

A pseudonym was used to represent their participation in the final research report that would be available in an institutional repository and publications. Confidentiality of the information obtained from the interviews could not therefore be assured.

Anonymity of the research participants in the focus groups was assured to the extent that the researcher did not ask for names or identifying information and the information provided in the focus group was held securely on a password-protected hard drive. The research participants were alerted that complete anonymity could not be guaranteed because of the nature of the group discussion and that it was possible for third parties to identify the participants because of the leadership office they held in the clinic. The researcher used a pseudonym to represent their participation in the final research report. The research report would be available in an institutional repository and publications. Confidentiality of the information obtained from the focus groups could not therefore be assured.

The researcher safeguarded the recording of the interviews and focus group discussions on a password-protected drive that was stored securely.

1.7.7 Role of the researcher

The researcher conducted the semi-structured interviews with staff and representatives of the clinics in the identified stakeholder institutions. The researcher also led the focus group discussions held with law clinic student leaders from each institution under study. The researcher recorded the interviews and focus group discussions and transcribed them for analysis.

1.7.8 Data analysis

The first aspect of the data analysis plan was to present the framework upon which the study is premised. This framework was developed from the review and analysis of literature on global clinic experience with a focus on South African initial clinics. This review and analysis of literature was applied to theorise and conceptualise the role of CLE in the enhancement of access to justice generally and to distil some critical factors in the initial CLE experience and their contribution to access to justice in South Africa. This addressed the first and second research questions.

The resulting conceptual framework provided the lens with which the adequacy of the prevailing legal framework for CLE in Kenya in enhancing access to justice was examined. This addressed the third research question and part of the fourth research question.

The fourth and fifth research questions were addressed by analysis of data from the interviews and focus group discussions. Analysis entailed identifying themes, patterns and commonalities in the entire body of data by finding connections and associations in it. This is what Charmaz referred to as coding, ‘taking an analytic stance towards the data.’¹¹⁶ Information gathered from this empirical aspect was triangulated with literature for confirmation and completeness.

1.7.9 Statement of positionality

Good research practice is rooted in researcher reflexivity and positionality. These are processes that reveal the researcher’s influence on the process of gathering and analysing data. They are the relationships between the researcher and the research participants such as perceived differences in power arising from factors such as knowledge of the subject, funding etc.¹¹⁷ A researcher may present as an insider, or as an outsider to the research participants’ context, depending on the existing degree of commonalities.¹¹⁸

¹¹⁶ Charmaz (n 108) at 517.

¹¹⁷ Sumaya Laher, Angelo Fynn and Sherianne Kramer ‘Trends in Social Science Research in Africa: Rigour, Relevance and Responsibility’ in Sumaya Laher, Angelo Fynn and Sherianne Kramer (eds), *Transforming Research Methods in the Social Sciences: Case Studies From South Africa* (2019) at 399.

¹¹⁸ Brian Bourke ‘Positionality: Reflecting on the Research Process’ (2014) 19 *The Qualitative Report* 1 at 5.

This research was approached with prior experience in access to justice work that was conducted initially as a way of giving back to society, learning and ultimately in a professional capacity. The experience was obtained from university law clinics in Kenya and in legal aid projects carried out by public benefit organisations with which the researcher retained fleeting personal contact. A significant duration had elapsed between these engagements and the present research, thereby creating some distance between the researcher and the research.

The first part of the research process was the literature review on access to justice and CLE in international jurisdictions. This review then concentrated more specifically on CLE and access to justice in Africa and more specifically in South Africa. The review of literature was influential in the formulation of the research generally. It provided clarity and focus to the research questions, which were then narrowed down and reframed.

The existence of a valid government research permit and license facilitated access and entry into the data collection institutions. It was a recognised and credible process of gaining access to institutions with which the researcher had previous educational or professional connections. The researcher is a lawyer and an academic and the data collection institutions were also law and academia-related institutions. Thus, there was a shared history of experiences in access to justice work between the researcher and the research participants that created harmony. These commonalities fostered access to the institutions. It is noteworthy that the researcher is employed as a lecturer in one of the institutions under study. However, the relationship between the researcher and her institution did not yield a conflict of interest because four years had elapsed since she ceased leadership of the clinic.

Whereas age was not problematic in the interactions with the clinic directors, there were obvious age differences between the researcher and the student leaders. This factor, combined with the authority lecturers yield over students, resulted in a deference that the researcher was accustomed to as being typical of relations between students and their teachers in Kenya.

The literature review process entailed an examination of global literature on clinics. The constructs identified from the literature review influenced the data collection process because they provided reference points to look out for during the collection of data. The interviews were conducted with clinic directors and clinic student leaders. Focus groups were conducted with groups of student leaders from the same university. Both the interviews and focus groups were

recorded. The audio recordings were first transcribed, then coded and analysed by the researcher. The emerging frames were therefore grounded in the data obtained from the focus group discussions and the interviews.

1.8 RISK-BENEFITS ANALYSIS OF THE STUDY

The researcher and research participants were exposed to minimal risk. The chance and degree of harm anticipated in the study was equal to that ordinarily encountered in daily life. The study did not pose a risk of physical or psychological harm. The economic risk that the participants anticipated was mitigated by the researcher travelling to the research sites and convening meetings at places that did not require the participants to incur additional expenditure.

Precaution was taken against social or legal risk that could arise from injury to participants resulting from breach of confidentiality. This was taken by ensuring that the interviews remained anonymous, as the researcher did not ask for names or any identifying information. The information from the interview would be held securely on a password-protected hard drive. Research participants were expressly notified in the participant information and informed consent form that complete anonymity could not be guaranteed because it was possible for third parties to identify them because of the leadership office they held in the clinic. A pseudonym would be used to represent their participation in the final research report that would be available in an institutional repository.

Precaution against social or legal risk in the focus groups was provided by assuring anonymity of the participants to the extent that the researcher would not be asking for names or identifying information and the information provided in the focus group would be held securely on a password-protected hard drive. Participants were alerted that complete anonymity could not be guaranteed because of the nature of the group discussion and that it was possible for third parties to identify the participants because of the leadership office they held in the clinic. In the final research report, the researcher would use a pseudonym to represent their participation.

The age range of all persons involved in the study was between 18 and 65 years. Any person belonging to a vulnerable category such as prisoners, children and cognitively impaired individuals was excluded from the study as a way of avoiding exposure to risk.

The research is beneficial to society because it reviews the application of CLE in the training of lawyers in Kenya. It also examines CLE practices in other jurisdictions such as South Africa's transformative constitutional context with a view to enhancing access to justice through CLE.

The research forms the basis of recommendations which could promote the implementation of the 2010 Constitution, the Legal Aid Act as well as;

- a) Establish standards of good practice in the application of CLE;
- b) Improve social justice training of lawyers in Kenya and
- c) Promote access to justice by indigent persons in Kenya.

Given that Kenyan universities attract students from Kenya and the East African region, the study can contribute comprehensively to the national efforts in improving legal education and promoting access to justice in the region.

Consequently, the risk undertaken appears reasonable in relation to the potential benefits the study offers to participants and to society.

1.9 DISSEMINATION OF FINDINGS

There are five key audiences for this research. These are academia and legal education bodies, legal practitioners and legislators, organisations which partner with law clinics, law students and the public.

The following dissemination strategy was developed to ensure that the outputs from the research inform practice and thereby maximise the benefit to law schools and the public:

- a) Presentation at stakeholders' workshops and annual conferences.¹¹⁹
- b) Publication of the research in academic journals, books as well as professional and institutional repositories.¹²⁰

¹¹⁹ Conference presentation was made at the fourth annual conference of the Law and Development Research Network (LDRN) on the The Plurality of Law and Development organised by the Chair for Public Law and Comparative Law at Humboldt University of Berlin from 25-27 September 2019. A presentation was also made at the National Conference on Strengthening Access to Justice through Legal Aid in Kenya organised by Egerton University's Faculty of Law Legal Aid Project (FOLLAP) in Nakuru County, Kenya on 8-12th December 2020.

- c) Engagement with secondary audiences emerging from the study through further stakeholder engagement and posting of materials on our law school website.¹²¹

This will pass on the potential benefits of the research to the wider community.

1.10 SCOPE OF THE STUDY

The study is focused on the issues arising from the 2010 constitutional dispensation and the legislation promulgated in support of this legal framework. The scope of the research is limited to the nexus between the access to justice rights as enshrined in the 2010 Constitution and the legal aid role of universities as provided for in the Legal Aid Act. The study takes a transformative constitutional approach when examining the access to justice role of CLE. Thus, only universities engaged in law clinics or some forms of CLE in Kenya are studied in this work. It does not empirically engage clinics in other jurisdictions but takes cognisance of existing research on the learning and service roles of clinics.

1.11 CHAPTER BREAKDOWN

Chapter one provides a background to the research, situating it within the global body of literature on CLE and access to justice. It clarifies the objectives of the research whose overall aim is to investigate how access to justice can be enhanced in Kenya through CLE in the 2010 constitutional dispensation. It locates the research gap within both global and African experiences of CLE. The chapter presents five research questions, the statement of the problem and the methodology that was employed in the study.

Chapter two explores the concept of CLE vis-à-vis access to justice. It discusses literature on the place of access to justice in CLE and in legal education. Scholarship on the organisation and role of the initial legal aid clinics in the enhancement of access to justice in

¹²⁰ The General Rules of University of the Witwatersrand requires every post-graduate student to submit a corrected copy of the research report/dissertation in electronic format. These are available electronically at the university's Institutional repositories and Wits Institutional Repository on DSpace (WIREDSPACE).

¹²¹ A stakeholder engagement workshop was held on 26th April 2019 at Strathmore University Law School, with support from the Global Alliance for Justice Education.

South Africa is also analysed in chapter two. The chapter presents the framework through which this study of the access to justice role of CLE in Kenya is conducted.

The legislative framework for CLE and access to justice in Kenya is examined in chapter three. This consists of the Constitution of Kenya 2010, the Legal Aid Act and the legislations governing universities, legal education and the legal profession.

Chapter four is a discussion of the experience of CLE in Kenya based on the engagements and interactions with stakeholders in the various law clinics. This examines the prevailing models or designs of clinics and the work they carry out in enhancing access to justice. It includes the history, aims, how the programmes are organised, administered, managed and sustained, their legal form, partner institutions as well as types of legal assistance they offer. It then explores the factors that hinder the contribution of CLE to access to justice in the various clinical programmes in Kenya

Chapter five discusses these challenges to access to justice and CLE and analyses them in light of the research objectives, the local context and global best practice on CLE. Conclusions and recommendations generated from the study are presented in chapter six.

CHAPTER 2: FRAMEWORKS FOR ENHANCING ACCESS TO JUSTICE THROUGH CLE

2.1 INTRODUCTION

Chapter two is presented in four sections. The first section is a discussion of the place of access to justice in the social justice mission of CLE. The second section examines CLE vis-a-vis access to justice in South Africa's initial legal aid clinics. This entails an analysis of scholarship on the organisation, development and role of the legal aid clinics in the enhancement of access to justice in South Africa. It then proceeds with a discussion of transformative constitutionalism and what this phenomenon portends for access to justice, CLE and legal education in general. Against the background of these three sections, the final section draws out frameworks for enhancing access to justice through CLE.

While the arguments in this chapter are drawn from studies on CLE in different contexts, the chapter presents a framework through which CLE is studied in a country with a nascent transformative constitutional setting. This perspective sharpens the goals of both access to justice and CLE and presents CLE in a new and different light from traditional studies on CLE.

Chapter two addresses the first research question regarding the role of CLE in the enhancement of access to justice. It also addresses the second research question regarding the access to justice lessons offered by scholarship on the initial CLE experience in South Africa. It thereby develops and presents the framework for the study of CLE and access to justice in Kenya.

2.2 LOCATING ACCESS TO JUSTICE IN THE SOCIAL JUSTICE MISSION OF CLE

CLE scholarship demonstrates the prevalence of a widespread tension between the social justice and the pedagogical aims of CLE.¹ As a pedagogical tool, CLE offers several advantages. Students learning using CLE develop skills in reflection, self-examination and client

¹ Tribe Mkwebu 'Research on Clinical Legal Education: Unpacking the Evidence' in Thomas Linden and Nick Johnson (eds), *The Clinical Legal Education Handbook* (2020) at 283; Shaheda Hasim Mahomed *Critical Evaluation of the Practical Legal Studies Programme at the University of the Witwatersrand* (Unpublished Phd Thesis, University of the Witwatersrand 2013) at 51; Shelley AM Gavigan 'Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35 *Osgoode Hall Law Journal* 443 at 460.

interviewing.² They also learn professional responsibility, which is critical to law practice.³ CLE confers on students other competencies that are equally necessary for legal practice such as technical lawyering skills, handling multiple facts, collaborating with others, cross-cultural awareness and problem solving.⁴ With the social justice mission of CLE being so widely acclaimed, the inculcation of social justice values is often articulated as a critical course aim for CLE courses.⁵

Since the social justice mission of CLE encourages interactions between law schools and the communities in which they operate, CLE is recognised as an outstanding way in which legal education fosters and implements social justice in society.⁶ Working with live clients motivates students to seek solutions to their problems and to legal problems in society.⁷ It is sometimes the case that meeting client needs overshadows the teaching and learning process.⁸ Conversely, there is the risk that the client and his needs may be lost in the face of course outcomes, assessment and student learning activities. This is exemplified by clinic experiences in which compelling societal needs for access to justice compete with the clinics' pedagogical functions.⁹ As a result, the proper balance between the social justice and the pedagogical aims of CLE is a perennial source of tension which remains the subject of both research and debate.¹⁰

² MA (Riëtte) du Plessis 'Clinical Legal Education: Interviewing Skills' [2018] *De Jure* 140 at 159.

³ Mark Spiegel 'Theory and Practice in Legal Education: An Essay on Clinical Legal Education' (1987) 34 *UCLA Law Review* 577.

⁴ Jon C Dubin 'Clinical Design for Social Justice Imperatives' (1998) 51 *SMU Law Review* 1461 at 1479.

⁵ Adrian Evans and others *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) at 75.

⁶ Jeff Giddings and Jennifer Lyman 'Bridging Different Interests' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 305.

⁷ Jane H Aiken and Stephen Wizner 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997 at 1008.

⁸ MA du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (2008) 33 *Journal for Juridical Science* 1 at 6.

⁹ JC Mubangizi and DJ McQuoid-Mason 'The Role of University Law Clinics in Public Interest Litigation, with Specific Reference to South Africa' (2013) 38 *Journal for Juridical Science* 47 at 62.

¹⁰ MA (Riëtte) du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 12 at 19; Mahomed (n 1) at 43; Frank S Bloch 'Access to Justice and the Global Clinical Movement' (2008) 28 *Washington University Journal of Law and Policy* 111 at 126.

2.2.1 Social justice and legal education

Social justice is broadly explained as:

‘the fair distribution of health, housing, welfare, education and legal resources in society including where necessary, the distribution of such resources on an affirmative action basis to disadvantaged members of the community and is concerned with the needs rather than the wants of society.’¹¹

It entails overcoming the legal barriers to inequality in order to attain social and economic equality in society.¹²

There are multiple conceptions of social justice, with no universal consensus.¹³ Nevertheless, certain tenets cut across these definitions. The first is the redistribution of resources for the benefit of the disadvantaged while the second principle is that this redistribution is prescribed as a matter of right and not mere charity or compassion.¹⁴

Legal educators justify their teaching of social justice to law students by the impact the students will have on society as professionals engaged in making and enforcing laws as well as influencing human lives and livelihoods.¹⁵ Some go as far as to blame the societal ills perpetuated by the legal profession on the content of the law curriculum and the traditional approaches to legal education which marginalise clinical and externships courses,¹⁶ while emphasising classroom lectures, case law and socratic methods. They criticise the teaching of

¹¹ David Mcquoid-Mason ‘Access to Justice in South Africa: Are There Enough Lawyers?’ (2013) 3 *Oñati Socio-legal Series* 561; AM Honore ‘Social Justice’ (1962) 8 *McGill Law Review* 77 at 105.

¹² Radley Henrico ‘Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu’ (2016) 13 *US-China Law Review* 817 at 825.

¹³ Neil Shenvi and Pat Sawyer ‘Critical Theory and the Social Justice Movement’ (2020) 10 *Journal of Christian Legal Thought* 10 at 10.

¹⁴ Rosa Castello ‘Incorporating Social Justice into the Law School Curriculum with a Hybrid Doctrinal/Writing Course’ (2017) 50 *John Marshall Law Review* 221 at 224; Carl L Blankston III ‘Social Justice: Cultural Origins of a Perspective and a Theory’ (2010) 15 *The Independent Review* 165 at 165.

¹⁵ Castello (n 14) at 221.

¹⁶ Roni A Elias ‘Law School Curriculum Reform as an Instrument for Promoting Social Justice and Social Responsibility in the Legal Profession’ (2016) 11 *Journal of Law and Social Deviance* 205 at 227, 252; Jessica Davis ‘Social Justice and Legal Education: Mandatory Pro Bono Legal Services’ (2006) 1 *Charleston Law Review* 85 at 92. Clinical externship courses are discussed further in chapter 4.3.2.2.

law without teaching justice, a situation which results in student experiences of law school that erode their initial resolve towards social justice careers.¹⁷

Strategies of promoting social justice within the law school setting take the form of inculcating social justice in the curriculum by presenting the impact of law on society.¹⁸ This entails exposing the students to social binaries in matters such as race, gender, identity, poverty, historical and current injustices, as well as the lack of neutrality in the way laws are drafted and applied.¹⁹ Efforts by law schools to deal empathetically with diversity could go as far as adjusting the delivery of legal education to be inclusive of a greater variety of student, staff and community circumstances.²⁰ Promoting social justice within the law school setting also involves training students to identify just legal outcomes and to understand the limits of legal interventions.²¹ Scholars suggest the setting of social justice teaching within the experiential modules of the substantive law courses to demonstrate its significance for the profession.²² This is in alignment with explanations of the educational goal of CLE of exposing students to the functions and malfunctions of the legal system thereby instilling in them values and duties of public service.²³

2.2.2 The social justice mission of CLE

Clinical scholarship makes use of both the terms social justice and access to justice. One of the contributions that CLE makes to access to justice is to offer appropriate training to law students who will represent members of society before justice institutions after attaining their professional qualifications.²⁴ A more direct engagement with access to justice is when CLE programmes

¹⁷ William P Quigley 'Letter to a Law Student Interested in Social Justice' (2007) 1 *DePaul Journal for Social Justice* 7 at 9, 16.

¹⁸ Julie D Lawton 'Teaching Social Justice in Law Schools: Whose Morality Is It' (2017) 50 *Indiana Law Review* 813 at 836.

¹⁹ Castello (n 14) at 221-222.

²⁰ Michael Kaufman 'Social Justice and the American Law School Today: Since We Are Made for Love' (2017) 40 *Seattle University Law Review* 1187 at 1224.

²¹ Margaret B. Kwoka 'Intersecting Experiential Education and Social Justice Teaching' (2013) 6 *Northeastern University Law Journal* 111 at 118.

²² Kwoka (n 21) at 120.

²³ Stephen Wizner 'The Law School Clinic: Legal Education in the Interests of Justice' (2002) 70 *Fordham Law Review* 1929 at 1934.

²⁴ Simao Paxi-Cato and Yvonne McDermott 'The Role of Legal Education, Regulation and Government in Protecting Access to Justice' (2018) 27 *Nottingham Law Journal* 1 at 2.

address the unmet legal needs of the indigent in society.²⁵ These access to justice activities that law clinics conduct fall within the social justice mission of CLE.

The social justice mission of CLE is categorised as being either direct or indirect.²⁶ It is direct when the students provide legal services to indigent persons under the supervision of qualified staff. Social justice is also fostered when clinics seek legal and social reform on behalf of disadvantaged clients and communities.²⁷ Thus, the students are exposed to the inequalities in society even before they join the legal profession. This offers them the prospect of inculcating a social justice mission in their future legal practice.²⁸ The latter is considered the ‘indirect’ social justice mission of CLE. This indirect mission which inspires students to choose careers that serve social justice is, however, only supported by anecdotal evidence.²⁹ Both categories of the social justice mission of CLE justify the strong associations that clinical scholars draw between CLE, social justice and public service.³⁰

The social justice history of CLE globally is traced to legal education reforms in America. CLE in American law schools was initially motivated in the late 1800s by the need for practical learning, a need that preceded the surge of the legal aid movement of the early 1900s.³¹ Researchers denote the existence of voluntary student-led legal aid societies in the 1920s in a number of law schools in America.³² By the 1950s, CLE was already being popularised by its twin educational and social justice missions expressed as ‘the double purpose of legal aid to the poor as a public service and legal education by the clinical method.’³³ Having previously been

²⁵ Paxi-Cato and McDermott (n 24) at 4.

²⁶ Donald Nicolson “‘Our Roots Began in (South) Africa’: Modelling Law Clinics to Maximise Social Justice Ends’ (2016) 23 *International Journal of Clinical Legal Education* 87 at 96
<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/download/532/922>>.

²⁷ Jacqueline Kinghan ‘Teaching Access to Justice’ in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (2018) at 8; Dubin (n 4) at 1475.

²⁸ Cynthia F Adcock ‘Curriculum Beyond Externships and Clinics: Integrating Access to Justice’ (2013) 62 *Journal of Legal Education* 566 at 574.

²⁹ Giddings and Lyman (n 6) at 305; Rebecca Sandefur and Jeffrey Selbin ‘The Clinic Effect’ (2009) 16 *Clinical Law Review* 57 at 82.

³⁰ Lynette Osiemo and Anton Kok ‘Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education’ (2020) 64 *Journal of African Law* 173 at 179; Paul McKeown and Elaine Hall ‘If We Could Instil Social Justice Values through Clinical Legal Education, Should We?’ (2018) 5 *Journal of International and Comparative Law* 143 at 155; Bloch (n 10) at 121.

³¹ Dubin (n 4) at 1463.

³² Richard J Wilson ‘Legal Aid and Clinical Legal Education in Europe and the USA: Are They Compatible?’ in Ole Hammerslev and Olaf Halvorsen Ronning (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (2018) at 267.

³³ Dubin (n 4) at 1464.

applied since the 1930s to improve the training of practitioners before falling into disuse, CLE in American law schools was revived in the 1960s with a new purpose of providing legal services to disadvantaged citizens.³⁴ The late 1960s and early 1970s saw the zenith of social justice clinical programmes resulting from student interest, activism as well as the availability of financial support for social justice clinics from institutions such as the Ford Foundation.³⁵ From the 1980s, the social justice focus diminished with the decline in funding coupled with the renewed interest and prioritisation in the transmission of practical legal skills at law schools.³⁶ Ultimately, the advancement of CLE in America became a model for other continents, with CLE in these countries emerging from legal aid origins.³⁷

2.2.3 Criticisms of social justice and CLE

The relationships between law schools and indigent communities are criticised as being ‘symbiotic and pragmatic’ because law schools need the indigent persons to offer their services to, while the indigent persons are in need of free legal services.³⁸ Furthermore, the widely held promise that CLE generates lawyers who perpetuate social justice values in their practice is unsupported by empirical evidence.³⁹ Such objections are counteracted by arguments for values that students gain upon reflection on their clinic work which empower them to develop a critical view of the law and the legal system.⁴⁰ This is buttressed by the anecdotal evidence supporting the inspiration students get from CLE to incorporate social justice ends in their careers.⁴¹ Additionally, there is no evidence disproving this social justice effect of CLE on law students.

Critics also argue that since there is a variety of interpretations of social justice, law teachers may be imposing their personal social justice ideals on students when they make CLE mandatory with limited options of social justice ideals by only exposing students to specific

³⁴ Jerold S Auerbach ‘What Has Legal Education to Do with Justice’ (1977) 3 *Social Responsibility: Journalism, Law, Medicine* 36 at 43.

³⁵ Wizner (n 23) at 1933; Dubin (n 4) at 1465.

³⁶ Dubin (n 4) at 1466; Frank S Bloch and Iqbal S Ishar ‘Legal Aid, Public Service and Clinical Legal Education: Future Directions from India and the United States’ (1990) 12 *Michigan Journal of International Law* 92 at 109.

³⁷ Frank S Bloch and Mary Anne Noone ‘Legal Aid Origins of Clinical Legal Education’ in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 157.

³⁸ McKeown and Hall (n 30) at 178.

³⁹ McKeown and Hall (n 30) at 179; Sandefur and Selbin (n 29) at 79 101.

⁴⁰ Wizner (n 23) 1930.

⁴¹ Giddings and Lyman (n 6) at 305.

cadres in society.⁴² This is the case in jurisdictions that perpetuate value neutrality in pedagogy. The criticism extends to clinics that may limit the values promoted in experiential learning to social justice with a focus on societal disparities, selective application of law and misuse of power.⁴³ This second critique is attributed to scholars who prioritise the pedagogical mission of clinics over obtaining justice for disadvantaged persons and educating lawyers in the pursuit of justice.⁴⁴ To these critics, scholars offering social justice courses respond that even when the course is mandatory care is taken to respect the freedom of students regarding the variety of social justice views as well as on the importance of social justice.⁴⁵

2.2.4 The Constitution, social justice and access to justice

This research on enhancing access to justice through CLE is conducted in Kenya, a country whose Constitution provides for social justice as one of the national values and principles of governance.⁴⁶ It joins countries such as the Philippines, Republic of South Africa and Spain, who have also entrenched social justice in their Constitutions.⁴⁷ The social justice focus of this research is directed at drawing a nexus between the Constitution of Kenya 2010 and CLE practice in the country.

The Constitutional provisions for access to justice exist in the realm of rights. Human rights and social justice belong to different normative spheres, with human rights being included in social justice and social justice encompassing equality beyond the scope of human rights.⁴⁸ These entitlements in the bill of rights are couched within the constitutional value of social justice that is more expansive in the inequalities and exclusions it covers. Such emphasis on social justice values arises from the endeavour to mitigate historical injustices as will be explained in chapter 3.1.1. Nevertheless, that is not to say that social justice practices do not prevail in countries whose constitutions do not institutionalise them.

⁴² Julie D Lawton 'The Imposition of a Social Justice Morality in Legal Education' (2014) 4 *Indiana Journal of Law and Social Equality* 57; Lawton (n 18) at 817, 847; Praveen Kosuri 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) 32 *Boston College Journal of Law and Social Justice* 331.

⁴³ Kosuri (n 42) at 340, 342.

⁴⁴ Davis (n 16) at 89; Wizner (n 23) at 1935.

⁴⁵ Castello (n 14) at 223.

⁴⁶ Constitution of Kenya, 2010 art 10(2)(b).

⁴⁷ Christian S Monsod 'Social Justice' (2014) 59 *Peace Review* 691 at 695.

⁴⁸ Neil Hibbert 'Human Rights and Social Justice' (2017) 6 *Laws* 1 at 2.

The intersection between social justice and human rights is palpable in the categorisation of lawyers engaged in human rights advocacy as social justice lawyers.⁴⁹ This connection arises because equality in accessing resources often entails accessing the justice system that is tied to having legal representation by lawyers.⁵⁰ Given the widespread disparities in the distribution of resources in many countries, the cost of legal services is beyond the reach of many people. This being the case, legal aid ensures that persons who cannot afford legal services can still access legal representation when the State pays for private lawyers, hires public-salaried lawyers or organises combined models of legal aid.⁵¹

2.2.5 The place of access to justice in CLE

The discussion below presents the divergent opinions by CLE scholars on the role of CLE in advancing access to justice. On one end of the spectrum are those who argue that it is the duty of the legal profession to assist indigent members of the community. This position is bolstered by arguments that the role of law school is simply that of teaching and preparing competent future legal practitioners. On the opposite end of the spectrum are scholars who consider social justice a duty of law schools emanating from the supposition that taxpayers fund their education. Scholars who claim that education or social justice goals of clinic are not mutually exclusive but are merely a question of focus occupy the centre position.

In affirming the access to justice role of university law clinics, several scholars have taken the position that the legal profession has a legal and moral duty to assist those who cannot afford legal services.⁵² Clinics are therefore acknowledged as the fruit of efforts by both the legal profession and the academy to contribute to the society's access to justice needs. Other scholars contend that access to justice is the role of the State and the legal profession alone, although law schools could make some contribution to this function.⁵³ As such, clinics that focus on access to

⁴⁹ Quigley (n 17) at 12.

⁵⁰ Mauro Cappelletti and Bryant G Garth 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181 at 182.

⁵¹ Cappelletti and Garth (n 50) at 199, 202, 205.

⁵² Jeremy Sarkin 'Promoting Access to Justice in South Africa: Should the Legal Profession Have a Voluntary or Mandatory Role in Providing Legal Services to the Poor' (2002) 18 *South African Journal on Human Rights* 630 at 631.

⁵³ Aiken and Wizner (n 7) at 997.

justice do so because states and members of the bar have failed to take up their responsibility.⁵⁴ This position is reinforced by arguments that law schools train lawyers who then contribute to meeting society's access to justice needs upon attaining the necessary qualifications. While still at school, it is possible for the law schools to contribute to these needs through research, teaching, public education and public service.⁵⁵

A related view is that law clinics are obliged to focus on legal education because teaching, and not access to justice, is the core business of universities.⁵⁶ Universities have objectives which are clearly identified and reflected in the curriculum. These are teaching, community service and academic research.⁵⁷ As such, it is argued that university clinics ought to align themselves to these goals when rendering free legal services to the local communities.⁵⁸ Thus, the education mission ensures that faculty closely supervises the students to ensure they provide quality legal services. This resolves the apprehension that giving prominence to the service mission of CLE will fail both goals of CLE whereas highlighting the educational role goes to serve both missions of CLE.⁵⁹

Proponents of the access to justice role of clinics hold the resounding view that law schools have a special access to justice duty towards the poor in their communities because they benefit from public funding and are surrounded by seas of poverty.⁶⁰ The rationale behind the social justice obligation of African universities is arguably that they 'operate as a privileged island of resources in a sea of scarcity'.⁶¹

⁵⁴ R Wilson 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 *Penn State International Law Review* 421 at 430.

⁵⁵ Debora L Rhode *Access to Justice* (2004) at 192.

⁵⁶ MA du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (2013) 38 *Journal for Juridical Science* 17 at 21; Mahomed (n 1) at 65.

⁵⁷ MA du Plessis 'Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training' (2007) 32 *Journal for Juridical Science* 44 at 47.

⁵⁸ Du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (n 8) at 2.

⁵⁹ Wilson (n 54) at 430.

⁶⁰ DJ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *' (2004) 29 *Journal for Juridical Science* 28 at 29.

⁶¹ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *' (n 60) at 14.

Aligned to this view is the argument that taxpayers fund legal education therefore lawyers have the moral obligation to pay it forward by serving society.⁶² They do this directly through clinic work with the community and service to persons who cannot afford the generally high legal fees. The experience of modelling clinics in Scotland after the South African initial clinic model demonstrates that a social justice orientation does not conflict with educational goals or the awarding of credits especially when there is clarity on what exactly is being assessed.⁶³ For instance, this could be either commitment to community service or skills and knowledge gained.

Some middle-ground position is found in discussing the social justice versus academic orientation of clinics as a question of emphasis and not as exclusive or alternative goals.⁶⁴ University clinics with a social justice orientation have great capacity to spread awareness and knowledge of legal rights and to spread access to law. In this way, they complement the work carried out by the State and public benefit organisations that play the biggest role in this.⁶⁵

It is noteworthy that law students tend to provide access to justice services in countries where the State does not adequately meet the access to justice needs of its people.⁶⁶ The rationale behind clinics in Africa preferring the live client model to simulations is to make up for the widespread deficiency in national legal aid schemes across the continent, thus clinics in both East and South African countries arose out of the common need to serve the indigent in society as well as to augment theory with practical skills.⁶⁷

Given that the service orientation of clinics was a response to particular events in history, clinic designs vary in accordance with needs of a particular country.⁶⁸ It is therefore the case that majority of clinics have their origins in the provision of legal aid after which they morphed into

⁶² Donald Nicolson 'Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World' (2015) 22 *International Journal of the Legal Profession* 51 at 56.

⁶³ Nicolson (n 26) at 104.

⁶⁴ Nicolson (n 26) at 98.

⁶⁵ Nicolson (n 26) at 89, 92.

⁶⁶ Mahomed (n 1) at 53, 55.

⁶⁷ David Mcquoid-Mason, Ernest Ojukwu and George Mukundi Wachira 'Clinical Legal Education in Africa: Legal Education and Community Service' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 23.

⁶⁸ McKeown and Hall (n 30) at 154; Grady Jessup 'Symbiotic Relations: Clinical Methodology-Fostering New Paradigms in African Legal Education' (2002) 8 *Clinical Law Review* 377 at 400.

various models of clinics that currently exist.⁶⁹ That notwithstanding, some countries have recently developed renewed appreciation of the role CLE plays in addressing access to justice. This is in spite of CLE's evolving definition, purpose, educational value and models.⁷⁰ Clinicians in countries such as Poland, for instance, acknowledge the great need for student assistance while preserving the educational function as their *raison d'être*.⁷¹

Research demonstrates that there are jurisdictions where CLE is still actively used as a tool to promote access to justice.⁷² For example, CLE continues to play a critical role in developing countries by providing services to the indigent.⁷³ The strong linkage between access to justice and CLE therefore continues to be demonstrated in these cases.⁷⁴ The justification behind this practice is that the number of lawyers in some of these countries is too low to meet the requirements of the populations they are expected to serve.⁷⁵ It is also the case that there are huge populations who simply cannot afford legal services.⁷⁶ CLE is actually promoted and relied upon as one among the many ways of diversifying the provision of access to justice.⁷⁷ In these circumstances, CLE surpasses its role as a tool to help students recognise social injustices and which can inspire them to propose reforms.⁷⁸

⁶⁹ Giddings and Lyman (n 6) at 156.

⁷⁰ Sarah Buhler 'Clinical Legal Education in Canada: A Survey of the Scholarship' [2015] *Canadian Legal Education Annual Review* 1 at 2, 4.

⁷¹ Lukarz Bojarski 'The Aim of Legal Clinics' in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 27.

⁷² Festus Okechukwu Ukwueze and Beatrice Obianuju Obuka 'Challenges and Strategies for Sustainable Clinical Legal Education in Nigeria' (2020) 54 *The Law Teacher* 385 at 387; Oluyemisi Bamgbose 'Access to Justice through Clinical Legal Education: A Way Forward for Good Governance and Development' (2015) 15 *African Human Rights Journal* 378 at 378.

⁷³ Taiye Joshua Omidoyin and Omolade Oniyinde 'Law Clinics and Access to Justice for Pretrial Detainees in Nigeria' (2019) 10 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 101 at 103; Mizanie Abate, Alebachew Birhanu and Mihret Alemayehu 'Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities' (2017) 11 *Mizan Law Review* 1 at 11.

⁷⁴ Ibijoke Patricia Byron 'The Relationship Between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria' (2014) 20 *International Journal of Clinical Legal Education* 563 at 576 <<http://www.northumbriaajournals.co.uk/index.php/ijcle/article/view/22/27>>.

⁷⁵ David Mcquoid-Mason 'Challenges When Drafting Legal Aid Legislation to Ensure Access to Justice in African and Other Developing Countries with Small Numbers of Lawyers: Overcoming Obstacles to Including the Use of Non-Lawyers to Assist Persons in Conflict with the Law' (2018) 18 *African Human Rights Law Journal* 486 at 493; Association of Legal Aid Institutions of South Africa and Open Society Justice Initiative *Combining Learning and Legal Aid: Clinics in Africa* (2003) at 6.

⁷⁶ Robert Machatha Kibugi 'Training Lawyers for the Sub-Saharan African Market: What Role for Academics? Perspectives from Kenya' (2009) 43 *Law Teacher* 37 at 40; Bojarski (n 71) at 26.

⁷⁷ Bamgbose (n 72) at 378; *African Law Deans' Forum Report* (2012) at 6.

⁷⁸ Aiken and Wizner (n 7) at 997.

It is a common experience that CLE is resource-intensive in terms of funding, faculty, labour, time and energy.⁷⁹ Therefore, although the number of law schools in Kenya is gradually increasing, the pedagogical application of CLE in Kenya is not widespread.⁸⁰ That notwithstanding, the Kenyan legislators have acknowledged the potential that universities and their law clinics have for the promotion of access to justice through the provision of legal aid.⁸¹ It is therefore worthwhile to examine the clinic experience from elsewhere in the continent and draw transferrable lessons from successful clinical programmes.

Lessons can be drawn from documentation on the early South African clinic model, especially because of South Africa's long clinical history and realisation of their social justice focus.⁸² The relevance of the South African CLE and legal aid system for Kenya is to be found in the fact that both are developing countries with transformative constitutions that provide for legal representation and that South Africa has a well-established university law clinic network that is a recognised contributor to the national legal aid system. The experience of the initial South African law clinic model has been used in the establishment of social justice clinics in other jurisdictions and therefore provides a model for the establishment of social justice clinics elsewhere.⁸³

The review of CLE across the various stages of South Africa's history demonstrates the access to justice contribution that university clinics have made. It also sets the stage for the evolution of clinic work, culminating in the 1996 Constitution whose transformative character necessitates the evolution of the role and mission of university law clinics. The factors that enhanced the access to justice role of these clinics are likewise palpable in this account.

⁷⁹ Willem de Klerk 'University Law Clinics in South Africa' (2005) 122 *South African Law Journal* 929 at 38.

⁸⁰ Yohana Ouma and Esther Chege 'Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide' (2016) 23 *International Journal of Clinical Legal Education* 107 at 133
<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/download/567/982>>.

⁸¹ Legal Aid Act, No. 6 of 2016 s 2(e).

⁸² Du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (n 10) at 17.

⁸³ Mcquoid-Mason, Ojukwu and Wachira (n 67) at 24; Peggy Maisel 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn From South Africa' (2006) 30 *Fordham International Law Journal* 374 at 388.

2.3 CLE IN SOUTH AFRICA

This section is an examination of the organisation and role of the initial legal aid clinics and post-constitution clinics in the enhancement of access to justice in South Africa. It yields insights into factors that fostered CLE's significant contribution to access to justice in South Africa. It also provides perspective into the influence of the Constitution on the role of law clinics in South African universities.

The development of CLE in South Africa is the most robust in Africa. It is arguably only comparable to that in the United States⁸⁴ and Australia.⁸⁵ All the law schools in South Africa have clinics and most have flourishing clinical programmes which offer live client clinical courses.⁸⁶ More than half of these schools make clinical courses compulsory. While bearing in mind that historical and contextual factors affect the choice of clinic model, clinics in South Africa and elsewhere stand to benefit from exploring some aspects of the first law clinics to be established in South Africa.⁸⁷

The CLE movements that began in the United States in the 1960s only reached South Africa in the 1970s.⁸⁸ South African clinics provided access to justice for those who lacked legal representation during its turbulent history preceding the democratic Constitution which was adopted in 1996. The constitutional provisions on access to justice shifted the focus of clinic work. This shift renders both the pre-constitution and post-constitution phases of CLE in South Africa of interest to the present study.

South Africa's history forms an important backdrop to understanding the development of its clinical and access to justice movement. During the period between 1948 and early 1990s, the South African government formulated and enforced laws which segregated the people along racial lines in a political and social system known as apartheid.⁸⁹ These laws were oppressive to the black South Africans resulting in widespread political violence, turmoil and violation of

⁸⁴ De Klerk (n 79) at 932.

⁸⁵ Jeff Giddings *Promoting Justice Through Clinical Legal Education* (2013).

⁸⁶ De Klerk (n 79) at 938.

⁸⁷ Nicolson (n 26) at 91.

⁸⁸ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *' (n 60) at 31.

⁸⁹ Lesley Greenbaum 'Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with Our Educational Legacy' (2015) 60 *New York Law School Law Review* 463 at 465.

human rights.⁹⁰ They perpetuated the marginalisation and disenfranchisement of black communities.⁹¹ A few legal academics condemned the injustices of the system and were shunned by the profession for a variety of reasons.⁹² Although law schools did not directly drive the change from the apartheid system, they contributed to assuaging legal needs encountered by the indigent persons in a country whose divide between the poor and rich was deplorable.⁹³ The development of clinics in South Africa is exemplar of the power of university law clinics both in times of political instability and in times of peace.

2.3.1 Pre-Constitution ‘initial’ legal aid clinics in South Africa

Access to justice work by law school clinics was unheard of in South Africa before the 1970s. The only contribution law schools made to access to justice was in increasing the numbers of lawyers by training students in the country’s legal rules in preparation for their future legal practice.⁹⁴ The prevailing legislation governing legal aid was the Legal Aid Act of 1969.⁹⁵ It established the Legal Aid Board, which focused on proffering legal aid in criminal cases thereby overturning the focus on civil cases by the Legal Aid Bureau that preceded it.⁹⁶

The first university clinic was a student-led and student-run clinic established at the University of Cape-town in 1971.⁹⁷ By 1973, the University of the Witwatersrand also had a clinic from which its Practical Legal Studies course sprang.⁹⁸ A survey conducted in 1997 revealed that all the 21 law schools in South Africa had clinics thereby demonstrating a dramatic improvement from the position in 1973.⁹⁹

⁹⁰ Trevor Noah *Born a Crime: Stories from a South African Childhood* (2016).

⁹¹ FS Haupt ‘Some Aspects Regarding the Origin, Development and Present Position of the University of Pretoria Law Clinic’ (2006) 39 *De Jure* 229 at 232.

⁹² McQuoid-Mason ‘Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *’ (n 60) at 30.

⁹³ De Klerk (n 79) at 940.

⁹⁴ Greenbaum (n 89) at 467.

⁹⁵ Legal Aid Act No. 22 of 1969.

⁹⁶ H Hennie ‘Legal Aid in South Africa: Making Justice Reality’ (2005) 49 *Journal of African Law* 54 at 55-56.

⁹⁷ David McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) at 139.

⁹⁸ Mahomed (n 1) at 73.

⁹⁹ DJ McQuoid-Mason ‘Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Part 2: 1990 until the Present *’ (2005) 30 *Journal for Juridical Science* 1 at 7.

CLE in South Africa emerged as a response by law schools to an unmet legal need in the society.¹⁰⁰ This need reposed in underprivileged communities, vestiges of the apartheid system, which barely had access to legal services and other socioeconomic needs.¹⁰¹ Even with the existence of the national legal aid scheme established by the government in the early 1970s, the majority of the university clinics were initially set up with the sole focus of social justice.¹⁰² The clinic work was complementary to the work of the Legal Aid Board, which provided very limited assistance in civil cases.¹⁰³ Legal aid clinics therefore performed a social service by operating in harmony with the national scheme. The clinics assisted indigent persons who were not covered by the scheme. They also assisted persons who qualified for State aid but could not abide by the office hours of State legal aid offices due to work, family or other commitments. These clinics initially handled all cases and thereby somehow contributed to making the national scheme better known when they referred eligible clients to the Legal Aid Board.¹⁰⁴ The effort of these clinics towards access to justice is illustrative of their community service and social justice impact.

The establishment, growth and development of clinics in South Africa was triggered by several factors. One prominent factor was that South Africa had pioneers who were keen on the involvement of law schools in the provision of legal aid and who had the courage and resilience to drive this process.¹⁰⁵ The university students also played a critical role in the development of these clinics. This is seen from the fact that South Africa's clinics were largely student-led and run.¹⁰⁶

These proponents of law clinics clearly perceived the tremendous influence clinics could have on access to justice despite the tumultuous political events unfolding in the country. They therefore inspired and spearheaded the 1973 legal aid conference.¹⁰⁷ This conference brought together law schools, legal practitioners and clinicians from South Africa and other countries.

¹⁰⁰ Haupt (n 91) at 229.

¹⁰¹ Hennie (n 96) at 71.

¹⁰² Du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (n 10) at 17.

¹⁰³ De Klerk (n 79) at 940.

¹⁰⁴ McQuoid-Mason (n 97) at 172.

¹⁰⁵ Maisel (n 83) at 381.

¹⁰⁶ Haupt (n 91) at 232.

¹⁰⁷ Elsabe Steenhuisen 'Goals of Clinical Legal Education' in De Klerk et al (ed), *Clinical Law in SA: Values, Knowledge, Skills* (2006) at 264.

Apart from introducing South Africa to the CLE experience in other jurisdictions, the 1973 legal aid conference further catapulted the growth and spread of clinics in the country.¹⁰⁸

With sponsorship from the Ford Foundation, the conference was held at the faculty of law of the University of Natal in Durban.¹⁰⁹ Its aim was to stimulate interest in legal aid in South Africa. The legal aid conference generated recommendations on how the State, the legal professions and law schools could further contribute to enhancing access to justice such as the incorporation of university representation on the Legal Aid Board and the possibility of enlisting students to supplement the shortage of manpower in the national scheme's legal aid offices.¹¹⁰ A second national conference focusing on legal aid issues in South Africa was held in 1983.¹¹¹

The establishment, growth and development of clinics in South Africa faced some challenges. A crucial one was the lack of support from the Law Society of South Africa. The Society was initially suspicious of clinic work and did not approve of it partly because they were not satisfied that clinic work was legal work and not merely social welfare work.¹¹² Although various statutory and court-made provisions existed, early South African law lacked a uniform legal aid scheme in which clinic work could neatly fit into.

The clinics continued to engage with the Law Society and to address the issues they had raised about access to justice work by law schools. Ultimately, the Law Society shifted from its critical standpoint to becoming strong collaborators of the access to justice work conducted by clinics. This respite was reached because the Law Society was won over by the educational value of clinics.¹¹³ The Law Society's concerns that the students would bring the profession to disrepute by engaging in unprofessional advertising and that the students would not have adequate supervision hence would offer poor quality services were assuaged by the understanding that the law students would be supervised and that their work would supplement the work carried out by the legal aid scheme as had been demonstrated by statistical data from these clinics.¹¹⁴

¹⁰⁸ Haupt (n 91) at 230.

¹⁰⁹ Steenhuisen (n 107) at 264.

¹¹⁰ McQuoid-Mason (n 97) at 121.

¹¹¹ Maisel (n 83) at 382.

¹¹² McQuoid-Mason (n 97) at 164.

¹¹³ McQuoid-Mason, Ojukwu and Wachira (n 67) at 27.

¹¹⁴ McQuoid-Mason (n 97) at 40.

The Attorneys Fidelity Fund (currently known as the Legal Practitioners Fidelity Fund) was utilised to subsidise the payment of legal practitioners engaged in legal education and research by serving as directors of law clinics.¹¹⁵ In addition, an amendment of the Attorneys Act allowed candidate attorneys to perform community service under a contract of service (currently known as vocational training) in clinics accredited by the Attorneys Act,¹¹⁶ a function that had always been the preserve of law firms in the form of articulated clerkships. Since funding is a perennial drawback for university law clinics, the contribution of this recognition and support by the Fidelity Fund to the growth and sustainability of South African clinics cannot be underestimated.

Furthermore, South African clinics continued to flourish due to the availability of donor funding. The clinics benefited from the synergies generated from the formation of the Association of University Legal Aid Institutes (AULAI), an association of clinics. AULAI was involved in managing the clinics' funding obtained from grants.¹¹⁷ The law clinics remain members of this voluntary association which is presently referred to as SAULCA (South African University Law Clinics Association). Its objective is 'to promote and protect the values, interests and goals of its members.'¹¹⁸

From the foregoing discussion, it is plausible that the strengthening of the CLE programmes in South Africa's pre-constitutional period can be attributed not to the appreciation of CLE by law schools but to the access to justice role that it played.

2.3.2 South Africa's clinics after the 1996 Constitution

The promulgation of the Constitution of the Republic of South Africa in 1996 heralded South Africa's democratic constitutional dispensation. This Constitution founded the democratic State on the values of equality, human dignity and the rule of law. The bill of rights expressed the components of access to justice as access to courts¹¹⁹ and the right to legal representation.¹²⁰

¹¹⁵ Legal Practice Act, No 28 of 2014 s 57(2)(d); Maisel (n 83) at 388.

¹¹⁶ Attorneys Amendment Act, No 115 of 1993 s 2.

¹¹⁷ De Klerk (n 79) at 946.

¹¹⁸ 'South African University Law Clinics Association (SAULCA)' <<https://www.saulca.co.za/>>.

¹¹⁹ Constitution of the Republic of South Africa, Act No. 108 of 1996 s 34.

¹²⁰ Act No. 108 of 1996 (n 119) s 35.

Thus, every arrested, detained and accused person was accorded the right to have a legal practitioner assigned to him or her by the State and at State expense.

Pursuant to the 1996 Constitution, the national legal aid scheme was established to work towards providing legal representation to indigent persons in criminal matters. The constitutional provisions on access to justice have been construed to guarantee State representation in criminal matters, to the neglect of civil matters.¹²¹ The neglect of civil matters in the State's provision of 'access to justice' propelled clinics to work with civil cases and clients who fell outside the scope of the Legal Aid Board.¹²² In this way, clinics continued to supplement the legal aid offered by the State in light of the guarantees of the 1996 Constitution. This situation thereby strengthened the access to justice role played by the clinics.

Additionally, support from the legal profession remains unwavering. The profession through the South African Legal Practice Council (SALPC) is cognisant of clinics' access to justice role in the post-constitution dispensation as demonstrated in their Legal Practice Act. The Act was passed in 2014 to 'restructure and transform the legal profession in line with constitutional imperatives.'¹²³ This Act provides for the sorts of institutions that can establish law clinics and circumstances under which clinics are permitted to offer legal services. The Legal Practise Act recognises clinics set up by law faculties of universities as a form of legal practice for advocates and attorneys and allows clinics to provide legal services, which must be available to the public without charge, only under the supervision of attorneys.¹²⁴ Law clinics may engage candidate legal practitioners under rules prescribed by the SALPC.

Although the Legal Practitioners' Fidelity Fund now under the purview of the Legal Practise Act continues to assist clinic work, adequate and sustained funding remains a perennial problem for South African clinics.¹²⁵ A survey of South African clinics reveals other issues that these clinics grapple with. With the intensity of their involvement in clinic work, clinical faculty

¹²¹ Dave Holness 'The Constitutional Justification for Free Legal Services in Civil Matters in South Africa' (2013) 2 *Speculum Juris* 1 at 2.

¹²² David Holness 'Improving Access to Justice through Law Graduate Post-Study Community Service in South Africa D Holness' [2020] *Potchefstroom Electronic Law Journal* 1 at 2; De Klerk (n 79) at 947.

¹²³ Act No 28 of 2014 (n 115).

¹²⁴ Act No 28 of 2014 (n 115) s 34.

¹²⁵ Maisel (n 83) at 370.

lack time to carry out research.¹²⁶ They also do not have support to boost their academic qualifications or acquire security of tenure. Clinics are inadequately staffed and the few members of staff that are available are poorly remunerated.¹²⁷ These challenges, coupled with the changes resulting from constitutional guarantees of access to justice by the State, prompted clinics to evolve in order to retain their relevance.

A sharp distinction between the clinic of the 1970s to the 1990s and that after 1996 is evident from the preceding discussion. While the former was clearly a social justice clinic, the latter's educational focus has taken centre stage. There has been an unmistakable shift in emphasis, from a strictly social justice institution to an academic activity. CLE in South Africa has changed from a process presenting incidental learning to a systematic university curriculum, from the provision of informal faculty support to a scheme of structured supervision.¹²⁸ Presently, South African university law clinics provide legal service to indigent persons as part of their clinical courses and with a clear and dominant academic focus.¹²⁹ With the educational goal in mind, clinics such as those at the Universities of Kwazulu-Natal, Witwatersrand, North-West and Stellenbosch have successfully taken up public interest litigation matters on behalf of the indigent.¹³⁰

It has always been the case that the academic focus of CLE does not entirely eliminate its social justice function. The double mission of CLE is reinforced by the middle ground view that the social justice vis-a-vis academic orientation of clinics is a matter of emphasis and not exclusive or alternative goals.¹³¹ The social justice function of CLE continues to be served in two ways. The first of these is when students learn about real life issues from the clients and are

¹²⁶ Peggy Maisel, Shaheda Mahomed and Meetali Jain 'Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present and Future' (2015) 60 *New York Law School Law Review* 433 at 444.

¹²⁷ Haupt (n 91) at 236.

¹²⁸ Haupt (n 91) at 234-235.

¹²⁹ Du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (n 10) at 22; Du Plessis 'Clinical Legal Education: Interviewing Skills' (n 2) at 140; MA (Riette) du Plessis 'Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values' (2015) 48 *De Jure* 312 at 312.

¹³⁰ Stephan van der Merwe 'Too Simple for National Credit Act Matters: Reconsidering the Scope of Magistrates' Courts Rule 5(2) (B)' (2019) 136 *South African Law Journal* 397; Stephan van der Merwe 'Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadus?' (2019) 30 *Stellenbosch Law Review* 77; Mubangizi and McQuoid-Mason (n 9) at 57, 62.

¹³¹ Nicolson (n 26) at 98.

exposed to societal access to justice needs which instil in the students a desire for some level of pro-bono work in their future practice. The second way in which this function is served is that when students engage in community legal education,¹³² proffer counsel, referral or assistance in preparation of client documentation under the supervision of clinic staff, they always end up offering some form of assistance to indigent persons. This is regardless of the fact that the client was allocated to them as part of their CLE course load. In a country with a transformative constitution, CLE occupies an even more meaningful place because of the social justice focus with which transformative constitutionalism imbues legal education.

2.4 CLE AND TRANSFORMATIVE CONSTITUTIONALISM

Transformative constitutionalism is ‘a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.’¹³³

Transformative constitutionalism conveys significant implications for legal education. Proponents of transformative constitutionalism regard legal education as a tool for the attainment of the transformative goals because it prepares lawyers to use the law to attain social justice goals.¹³⁴ Law teachers bear the responsibility of transmitting social justice values to law students. They have the task of reminding students that the goal of legal practice extends beyond mere personal enrichment to the improvement of society.¹³⁵ It no longer suffices to limit the law curriculum to transmission of legal principles and analytical argument, but these must be complemented with an engagement with constitutional values that should permeate the practice of law.¹³⁶

Legal education is considered transformative when the content of legal education, the teaching methodology and the subjects of this education critically engage the goals of

¹³² David Mcquoid-Mason ‘Street Law as a Clinical Program: The South African Experience with Particular Reference to the University of Kwazulu-Natal’ (2008) 17 *Griffith Law Review* 27.

¹³³ Karl E Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 at 150.

¹³⁴ Radley Henrico (n 12) at 821, 825.

¹³⁵ Elmarie Fourie ‘Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping Our Legal Order’ (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 2.

¹³⁶ Pius Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351 at 356.

transformative constitutionalism.¹³⁷ Transformative legal education reflects the use of law as a tool for achieving equality and social reform. It entails the application of syllabi that integrate established areas of law with the new fields of law, constitutional principles and values.¹³⁸

Teaching methodology in transformative legal education demands a radical shift from presenting the law as if from a pulpit as incontestable norms, a moving away from the ‘culture of authority’ that stifles proactivity and innovation in a generation that should be propelling transformation in the community.¹³⁹ It is a move towards more inclusive teaching; a call to promote a critical sense in students and transmit the pluralist nature of law. This quality is consistent with the constructivist approach of experiential learning that transforms students from passive learners to collaborators and constructors of knowledge.¹⁴⁰ It provokes students to enquire into various other ways of approaching legal issues and to actively develop their understanding of the reasoning behind law and legal principles in the variety of contexts that they can be applied.¹⁴¹

It may also be the case that legal education and unequal access to justice can become obstacles to transformative constitutionalism.¹⁴² On one hand, legal education becomes a barrier to transformative constitutionalism when it fails to address constitutional values and goals.¹⁴³ Unequal access to justice on the other hand, implies that law and legal representation is only available to those who can afford it thus reflecting a society fraught with socio-economic disparities. Such imbalance conflicts with the aims and ideals of transformative constitutionalism.¹⁴⁴

Considering the description of transformative constitutionalism provided in the foregoing discussion, it is noteworthy that CLE bears elements of legal education that could be rendered transformative. McQuoid-Mason presents a number of these elements when he summarises the advantages of CLE as follows: CLE takes students out of theory; exposes them to the reality of

¹³⁷ Geo Quinot ‘Transformative Legal Education’ (2012) 129 *South African Law Journal* 411 at 412.

¹³⁸ Quinot (n 137) at 414.

¹³⁹ Quinot (n 137) at 417.

¹⁴⁰ Kaufman (n 20) at 1217.

¹⁴¹ Quinot (n 137) at 418.

¹⁴² Langa (n 136) at 355.

¹⁴³ The other two obstacles he identifies are legal culture and responsibility for transformation and reconciliation.

¹⁴⁴ Langa (n 93) at 355.

legal practice; requires them to exercise judgment; teaches professional responsibility; encourages social consciousness; allows reflective practice and improves teaching quality.¹⁴⁵

With these elements in mind, recent empirical research on CLE's role in the transformative constitutional paradigm is instructive on the direction clinics could take.¹⁴⁶ The study consisted of a survey conducted at South African law faculties to examine whether CLE was reflective of the new constitutional order through clinic engagement in systemic law reform, community representation and teaching law students how to think strategically about legal problems encountered in society.¹⁴⁷ These are consistent with transformative legal education, which is legal education that serves a greater purpose of achieving social justice.¹⁴⁸ A few clinics were found to engage in law reform work such as impact litigation; legislative, media or policy advocacy; community education and advocacy. However, these clinics did not actively involve students in this work. The reasons for exclusion of students were the perennial challenges emerging from the tensions between the academic and access to justice goals of CLE exemplified by the quick student turnover and the limitations resulting from absence of student practice rules.¹⁴⁹

Among proposals made from the study under reference towards harmonising CLE with transformative legal education was to incorporate law reform into the present objectives of clinics. This is based on the new constitutional dispensation that inspires the transcendence of formal parameters of legal education to holistic frameworks that consider the societal context in which the law is applied.¹⁵⁰ The researchers posit further that aligning CLE to transformative legal education will contribute to resolving perennial challenges experienced by clinics regarding financial sustainability, integration of clinic staff with law school faculty and developing a clinical programme which is integrated in the LLB curriculum.¹⁵¹

The history of South Africa is pivotal in demonstrating the role and involvement of clinics in social justice work. The 1996 transformative Constitution prescribed access to justice

¹⁴⁵ McQuoid-Mason (n 97) at 204.

¹⁴⁶ Maisel, Mahomed and Jain (n 126) at 437.

¹⁴⁷ Maisel, Mahomed and Jain (n 126) at 434.

¹⁴⁸ Radley Henrico (n 12) at 825.

¹⁴⁹ Maisel (n 83) at 415.

¹⁵⁰ Maisel, Mahomed and Jain (n 126) at 444.

¹⁵¹ Maisel, Mahomed and Jain (n 126) at 449.

guarantees. It guaranteed legal representation in criminal matters thereby resulting in an access to justice gap for civil matters. This propelled clinics to actively engage in serving indigent clients with civil matters. The transformative nature of the Constitution can be understood to present clinics with the challenge of re-examining their focus and rethinking their rationale for existence beyond assisting with civil matters. While retaining their ability to provide a practical methodology for the teaching of law, the potential of clinics for transformative legal education is beyond compare. This is because clinics have the unparalleled capacity to expose students to the society's legal needs and to the need for a legal profession that is alive to society's access to justice needs.

From the foregoing, it is arguable that harmonising CLE with transformative legal education conflates the divergent opinions by CLE scholars on the social justice role of CLE. The contention that it is the duty of the legal profession to assist indigent members of the community¹⁵² finds its place in transformative legal education because CLE is applied in the training of law students in the duties of their future profession. Members of the legal profession, either as members of the bench or of the bar, are custodians of the Constitution and its social justice guarantees. These guarantees include those on access to justice for all in society. Direct links between law clinic work and the legal profession can be drawn when clinics 'are able to screen and formulate "*pro bono* briefs" to practitioners' or partner with the private bar who pledge to offer certain *pro bono* services to clinic clients.¹⁵³

Transformative legal education also addresses the position that the role of law schools is simply that of teaching¹⁵⁴ and preparing competent future legal practitioners. This is because transformative legal education promotes education that rises above rote-learning and aspires to confer a practical and value-laden education that ultimately ensures that lawyers are alive to the access to justice needs of the society.¹⁵⁵

CLE as transformative legal education also complements arguments by scholars at the opposite end of the spectrum, who consider social justice a duty of law schools; a duty

¹⁵² Giddings and Lyman (n 6) at 306.

¹⁵³ Dave Holness 'Improving Access to Justice through Compulsory Student Work at University Law Clinics' (2013) 16 *Potchefstroom Electronic Law Journal* 327 at 339; De Klerk (n 79) at 946.

¹⁵⁴ Du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (n 56) at 21; Mahomed (n 1) at 65.

¹⁵⁵ Quinot (n 137) at 418.

emanating from the supposition that their education is funded by taxpayers.¹⁵⁶ This argument about the law schools' social justice duty does not conflict with transformative legal education because transformative education embraces the Constitutions' principle of social justice and accords it a primary place in the training of future members of the legal profession. Additionally, the goals of transformative legal education blend well with the indirect social justice mission of CLE, which seeks to expose students to the access to justice gaps in the community even before they join the legal profession.¹⁵⁷ This meets the indirect social justice mission of encouraging law students to aspire towards legal practices that are open to providing services to indigent persons.

The centre position, occupied by scholars who claim that education or social justice goals of CLE are not mutually exclusive but are merely a question of focus,¹⁵⁸ likewise finds a home in transformative legal education. This is by the very fact that a social justice mission is always incorporated into the pedagogical process even if this mission may not occupy pride of place at all times.

2.5 DISTILLING FRAMEWORKS FOR ENHANCING ACCESS TO JUSTICE

With the preceding background of CLE in South Africa, this section explores various approaches applicable in the development of a framework for examining the access to justice role of CLE in a transformative constitutional context. The framework is useful in the analysis of how the current legal framework enhances access to justice through CLE. It is also helpful in determining the institutional factors that undermine and resist the promotion of access to justice through CLE. The resulting framework therefore provides a perspective through which the access to justice role of CLE in Kenya can be reviewed.

It is acknowledged in the discussion below that the study of the access to justice role of clinics has previously been conducted in various settings. These include interviews and surveys carried out in a bid to develop best practice in clinics, studies carried out to measure the impact

¹⁵⁶ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *' (n 60) at 14.

¹⁵⁷ Adcock (n 28) at 574.

¹⁵⁸ Nicolson (n 26) at 98.

of clinics and even research on governments and the extent to which they fulfil their responsibility of providing access to justice. Thus, approaches to the evaluation of access to justice and CLE projects have been developed based on selected standards of best practice as well as an examination of other relevant factors from existing studies examined below. These factors range from skills and values identified from the perspective of students to similar information supplied from reports on the various activities conducted by clinics.¹⁵⁹ It has also been considered important to examine the functions or even number of services the clinic had been able to offer thus far, as well as the number of students involved in the clinic since its inception. Other factors that have been considered valuable are the structure of the clinic and how long it had been in operation.

There are certain CLE practices that have been found effective in the global experience. These have been documented as best practices or standards for CLE. They have been labelled as such after rigorous research and study. The best practices are nuanced depending on the needs of the regions where they have been developed such as Australia and the United States.¹⁶⁰ Other standards have emerged in different regions and contexts without being labelled as best practice. They relate to CLE course design, supervision, reflective learning, assessment and infrastructure. These practices aim at achieving the twin missions of CLE and therefore have a role to play in the enhancement of access to justice. A study of the contribution of CLE in any jurisdiction would draw some benefit from the approach of examining the clinic's compliance with these best practices to the extent that they enhance access to justice.

Another approach in examining the access to justice contribution can be identified from that taken by Kenya's Judiciary, which premises its existence upon the provision of access to justice.¹⁶¹ The Judiciary evaluates its access to justice contribution by documenting the ways in which it has promoted access to justice through interventions strategically aimed at removing procedural and substantive barriers that hinder access to the courts. These barriers include long distances between courts and the communities, procedural technicalities, lack of representation,

¹⁵⁹ 'South African University Law Clinics Association (SAULCA)' (n 118).

¹⁶⁰ Adrian Evans and others *Best Practices Australian Clinical Legal Education* (2012); Roy Stuckey and others *Best Practices for Legal Education: A Vision and a Roadmap* (2007).

¹⁶¹ The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice 2012-2013* (2013) at 12.

inadequate information on court procedure and even impartial or unfair decisions.¹⁶² Other barriers include resource constraints, corruption and discord between departments of the justice system.¹⁶³ The Judiciary's contribution to access to justice includes the generation of progressive jurisprudence, expansion of courts and court staff as well as efforts in enhancing cooperation between the departments of the justice system.¹⁶⁴ The Judiciary has made additional efforts to enhance access to justice through the introduction of performance management systems whose indicators include the rate at which cases are concluded and backlog is reduced.¹⁶⁵ Other contributions are the decentralisation of courts, the establishment of new courts, the introduction of mobile courts and court circuits in order to make the courts as accessible as possible.¹⁶⁶ The courts use the number of cases concluded or resolved as one of the indicators of their contribution to access to justice.¹⁶⁷ The increase in the number of cases filed in court is also interpreted as a gauge of increased public confidence in the court system.¹⁶⁸

Certain clinics have demonstrated their access to justice contribution by the mere fact that they have been able to remain in existence.¹⁶⁹ Approaches taken by studies that have measured the change brought about by clinics have been through conducting surveys of former CLE student participants and some of the employers of these students. The surveys examined various dimensions of change brought about by the clinics. They examined the changes in students' commitment to social values by obtaining their views on what skills and values they gained through CLE.¹⁷⁰

They also examined the changes experienced by the community. This was carried out by examining the number of people who made use of the services offered by the clinics, the numbers of outreach programmes conducted, the variety of legal issues dealt with, the number of

¹⁶² The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice* 2013-2014 (2014) at 34.

¹⁶³ *State of the Judiciary and the Administration of Justice* 2012-2013 (n 161) at 11.

¹⁶⁴ *State of the Judiciary and the Administration of Justice* 2012-2013 (n 161) at 11.

¹⁶⁵ The Judiciary Republic of Kenya *State of the Judiciary and the Administration of Justice* 2014-2015 (2015) at 46.

¹⁶⁶ *State of the Judiciary and the Administration of Justice* 2012-2013 (n 161) at 33.

¹⁶⁷ The Judiciary Republic of Kenya (n 165) at 27-45; The Judiciary of the Republic of Kenya (n 162) at 18-23; *State of the Judiciary and the Administration of Justice* 2012-2013 (n 161) at 13-15.

¹⁶⁸ *State of the Judiciary and the Administration of Justice* 2012-2013 (n 161) at 14.

¹⁶⁹ Leah Wortham 'Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve On How to Do So Effectively' (2006) 12 *Clinical Law Review* 615 at 615.

¹⁷⁰ Ernest Ojukwu, Odinakaonye Lagi and Sam Erugo *Impact Assessment of Clinical Legal Education in Nigeria* (2013) at 16.

cases concluded, the number of detainees released, the numbers of topics covered in outreach programmes and their impact.¹⁷¹ Examples of such impact include the decline of child labour or other similar practices in the community, better working conditions for manual labourers as well as improved relationships between communities and the police.¹⁷²

It is argued that CLE's mission of promoting access to justice is a mission that is evasive of measurement. This is because when clinics interact with indigent clients, they are being trained to look beyond the basic desire to 'win' the case. They are being trained to explain the law, assist the clients understand the legal system, provide representation and ultimately have a positive impact on the lives of the clients.¹⁷³

Further, it must be recognised that not all matters require legal representation in court or before a dispute resolution tribunal. Indeed, there are situations in which advocacy in the form of letter writing or negotiation on behalf of a client will suffice.¹⁷⁴ The majority of the clients expect to be listened to and to be understood.

From the foregoing, this study takes cognisance of the fact that existing indicators applied in the measurement of national compliance with international standards for access to justice do not appear useful in a study of CLE. This is because State obligations differ from the clinic aims and modes of operation and therefore the indicators suggested by international bodies are inapplicable.

Since only some of the factors identified above are relevant to a study of CLE and these are not mindful of a transformative constitutional context, it is deemed necessary to develop a framework for investigating the factors that either resist or enhance a clinic's contribution to access to justice.

The preceding discussion about the CLE experience in South Africa is illustrative of the factors that facilitated CLE's influence on access to justice in that country and could be useful in development of the required framework. The first of these was the prevailing unmet access to justice need to which the law schools responded. The society suffered a great economic

¹⁷¹ Ojukwu, Lagi and Erugo (n 170) at 40.

¹⁷² Ojukwu, Lagi and Erugo (n 170) at 41.

¹⁷³ Jane H Aiken and Stephen Wizner 'Measuring Justice' [2013] *Wisconsin Law Review* 79 at 80.

¹⁷⁴ Aiken and Wizner (n 173) at 81.

imbalance, with the country having a sharp distinction between the rich and the poor.¹⁷⁵ Although the government had a legal aid scheme in place, this scheme proved inadequate because its working hours were not inclusive of persons who could not absent themselves from their jobs during these hours. The government scheme also concentrated very predominantly on criminal cases and to a limited extent on certain civil cases, thereby excluding indigent persons who had civil cases. Thus, a legal aid gap was created and this is what universities attempted to fill.

The second factor is that South Africa's laws provided clinics with a legislative framework of operation that enabled them to delineate their role and mission and ensured continuity of their work. These were in the form of the 1996 Constitution, the Legal Aid Act and the Attorneys Act (now Legal Practise Act).

The Legal Aid Act of 1969 set up the national legal aid scheme.¹⁷⁶ It was silent on university clinics, but its inadequacy provided room for the establishment, operation and flourishing of university clinics. The clinics also provided legal representation during the country's apartheid history preceding the 1996 adoption of the democratic Constitution. This Constitution espoused access to justice guarantees that enlarged the scope of persons entitled to legal representation. With the State taking ownership of its access to justice responsibilities through the Constitution and the Legal Aid Act of 2014,¹⁷⁷ law clinics have been compelled to re-examine the extent of their access to justice mission, role and focus.

The legal profession in South Africa has been supportive of clinics in very distinct ways. These include the amendment of the Attorneys Act to allow candidate attorneys to carry out community service under a contract of service in accredited clinics and the funding of legal practitioners running clinics through the Attorneys Fidelity Fund (currently known as the Legal Practitioners Fidelity Fund) thus ensuring continuity of clinic work.

The bill of rights together with the generous provisions of the Constitution on *locus standi* facilitated the engagement of South African clinics in public interest litigation.¹⁷⁸ The sustained appreciation of the role of university law clinics in the post-constitution dispensation is

¹⁷⁵ World Bank *Gini Index* <<https://data.worldbank.org/indicator/SI.POV.GINI>>.

¹⁷⁶ Act No. 22 of 1969 (n 95).

¹⁷⁷ Legal Aid Act, No 39 of 2014.

¹⁷⁸ Mubangizi and McQuoid-Mason (n 9) at 56.

also demonstrated in the Legal Practise Act that was passed in 2014 to align the legal profession with constitutional imperatives. This Act recognises university law clinics and provides guidelines for the provision of services by these clinics.¹⁷⁹

Besides the legislative framework, certain institutional factors fostered the clinics' access to justice role. There was passionate leadership which drove the process and which organised international conferences to spread the clinic idea. This brought together legal practitioners from within and outside of South Africa and enhanced the exchange of experiences with other countries. Since CLE in South Africa is a teaching methodology, clinics' access to justice role is perpetuated because CLE is rooted in the university curriculum and students are supervised and awarded credits for it. Additionally, the clinics in South Africa formed an association known as AULAI (presently referred to as SAULCA) and benefit from emerging synergies.

2.5.1 Access to justice lessons from clinics in South Africa

CLE's social justice objectives combined with its practical approach are qualities which endear it to transformative legal education. This section, therefore, advances useful lessons for interrogating the access to justice role of CLE in Kenya. It is drawn largely from the South African clinical experience described in the preceding discussions. It is also based on the scholarly arguments on the appropriateness of CLE as a vehicle for transformative legal education.

2.5.2 Legislation

Drawing from the history of South Africa's clinics, the legislative framework influencing a clinic's access to justice work typically consists of the Constitution and specific legislation governing CLE, legal representation of clients and access to justice. Whereas universities remain independent and at liberty to define the mission and focus of their law clinics, prevailing legislation plays an important role in mapping universities' access to justice engagements.

As discussed below, the prevailing legislative framework clarifies the access to justice role of clinics when it directly delineates the categories of work clinics can engage in. This

¹⁷⁹ Act No 28 of 2014 (n 115).

delineation also takes place by default, when legislations are specific on the kinds of cases in which the government will intervene. The latter scenario grants clinics the opportunity to serve in the neglected spaces; the communities or thematic areas that have been omitted from the government's areas of focus.

2.5.3 Transformative Constitution

Constitutions, whether written or unwritten, form the normative framework upon which nations are governed.¹⁸⁰ They usually determine the power relations as well as the legal and institutional framework for government. Transformative constitutions have the alteration of society as their core objective.¹⁸¹ They extend beyond establishing governments by aspiring towards social, political, economic and cultural change.

Transformative constitutional paradigms are particularly meaningful for both legal education and access to justice. The Constitution is a tool for the attainment of social justice through the bill of rights, which may have express provisions on the right of access to justice. Societal transformation, which is its overall objective, is a dynamic project that is realised through legal education that actively engages with the constitutional values, institutions and structures.¹⁸²

The supporting legislation, developed to give meaning to the constitutional provisions touching on legal education and access to justice, lay the foundation for social justice projects and are pertinent in examining the kinds of access to justice work that is open to clinics.¹⁸³

Since there are jurisdictions where CLE is still actively utilised as a tool to promote access to justice,¹⁸⁴ a situational analysis of the existing access to justice need in the country is often necessary. This analysis provides guidance in demarcating the role and mission of a clinic under study. In the absence of scientific access to justice indexes,¹⁸⁵ it is still possible to get insights into the access to justice need by examining how much access the general populace has

¹⁸⁰ Kiwinda Mbondenyei and Osogo Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) at 7.

¹⁸¹ Langa (n 136) at 351.

¹⁸² Quinot (n 137) at 415.

¹⁸³ Holness 'The Constitutional Justification for Free Legal Services in Civil Matters in South Africa' (n 121) at 2.

¹⁸⁴ Abate, Birhanu and Alemayehu (n 73) at 3.

¹⁸⁵ See for example Global Initiative for Access to Justice *Access to Justice Index* (2016).

to legal services. This could be through an analysis of the ratio between lawyers and the total population, the pattern of distribution of lawyers in the country as well as an assessment of the percentage of the population that can actually afford legal services. These considerations could be made bearing in mind the level of equality in distribution of national resources and the resulting socio-economic balance in the country. It is highly probable that clinics in countries that rely on university clinics for their access to justice needs would place greater emphasis on their social justice mission.¹⁸⁶

2.5.4 Legal education

Transformative constitutions task lawyers with a critical role in access to justice and in the realisation of constitutional ideals. As such, legal education policies and structures should be sufficiently aligned towards the accomplishment of the expectations placed on lawyers to work towards societal change.¹⁸⁷ In the absence of such alignment, it is unlikely that transformative constitutionalism and access to justice will be attained.

In many jurisdictions, the establishment, structure and functions of universities is guided by a legal framework made up of legislation and subsidiary legislation.¹⁸⁸ Among other issues, these legislations articulate the objectives of legal education as well as the range of methodologies that are applicable in the programmes offered. The role of CLE as a subject, ‘an area of scholarly inquiry’ and methodology¹⁸⁹ is likely to be addressed in this context. There are jurisdictions where legislations go ahead to address how CLE fits into the overall law curriculum,¹⁹⁰ to determine what objectives CLE seeks to achieve as well as to set national standards for CLE.¹⁹¹

¹⁸⁶ Bamgbose (n 72) at 379, 381.

¹⁸⁷ Greenbaum (n 89) at 488, 490.

¹⁸⁸ Greenbaum (n 89) at 487.

¹⁸⁹ Haupt (n 91) at 231.

¹⁹⁰ See National Universities Commission and Council for Legal Education *Guidelines and Conditions for the Establishment of Faculties of Law in Nigeria* (2009). These state that ‘any proposal to commence law program must contain a detailed curriculum which shall include teaching delivery method with emphasis on introducing clinical legal education.’

¹⁹¹ National Universities Commission *Benchmark Minimum Academic Standards for Undergraduate Programmes for Nigerian Universities* (2014).

2.5.5 National legal aid schemes

Legislations on legal aid and access to justice make provision for the establishment, operation and funding of legal aid and access to justice institutions. An example of such legislation is South Africa's Legal Aid Act which establishes the country's national legal aid scheme.¹⁹² Legislations governing national legal aid schemes outline the criteria applicable in identifying cases that are eligible for legal aid. Such criteria provide a basis for universities to develop their own criteria and areas of focus that assist them in carving out a different niche for themselves. This is because a restrictive legal aid scheme would give more room for access to justice work by clinics. This was the case in South Africa when the 1996 Constitution's provisions on the right to legal representation resulted in the expansion of the scope of persons eligible for legal aid in criminal matters.¹⁹³ This largely neglected indigent persons with civil matters, occasioning a niche for law clinics to occupy and serve. Independent proposals to incorporate students as service providers in national legal aid schemes further present access to justice roles for clinics.¹⁹⁴

2.5.6 The Legal profession

The provision of legal services is usually regulated through Acts of Parliament. South Africa's Legal Practice Act provides for matters concerning the enrolment of legal practitioners as well as their professional conduct.¹⁹⁵ It lays down the norms and standards of legal practice. This legislation is applicable to clinic work because legal practitioners supervising students in law clinics require legal practice qualifications in order to carry out client representation. This participation of academic staff in legal representation demonstrates a social justice contribution made by universities. It thereby fosters CLE's alignment with transformative constitutionalism.

Additionally, law clinics are an initiation of law students into and a preparation for the tasks carried out by the legal profession. The legal profession is instrumental in complementing this preparation through supervision, training, providing internship opportunities and even

¹⁹² Act No 39 of 2014 (n 177).

¹⁹³ Holness 'The Constitutional Justification for Free Legal Services in Civil Matters in South Africa' (n 121) at 16.

¹⁹⁴ Hennie (n 96) at 67.

¹⁹⁵ Act No 28 of 2014 (n 115) at Preamble.

financially supporting law clinics.¹⁹⁶ Thus, their linkage with law schools and clinics is invaluable. Although it is not always the case that provision is made for clinics in legislation, it is arguable that the extent of recognition of clinic work by the legal profession would determine whether the clinics are also reflected in the law society's legislation. That clinic work is recognised and actually provided for in legislation, as was the case in South Africa,¹⁹⁷ is indeed laudable as it entrenches clinic's access to justice work in the legal system.

2.6 INSTITUTIONAL CAPACITY AND CLINIC STRUCTURES

University clinics are established and organised within the overall structure of the university's faculty or school of law, as the case may be. The clinics have their own management and operational set-up under the auspices of the general university governance structures. Clinic work can either be specialised or general,¹⁹⁸ with clinics either running as extracurricular entities or mainstreamed within the law curriculum.¹⁹⁹

2.6.1 Clinic structure

The South African experience is exemplar of a clinic movement that has been established and sustained under the mantle of passionate leadership.²⁰⁰ Stable clinic leadership stands out as an important factor in the perpetuation of a clinic's access to justice work. The clear sense of ownership and drive propels the attainment of clinic goals.

There are varieties of clinic management structures and organisational set-ups. Clinics would be student led and run or have hired management and administrative staff.²⁰¹ The frequent turnover of students through the university academic years exposes the student-run clinics to constant change, which is tempered by the presence of clinic staff. The level of involvement of academic staff in clinic work is not fixed since clinic models vary, with each model offering distinct advantages.

¹⁹⁶ Act No 28 of 2014 (n 115) at Chapter 3, Chapter 6.

¹⁹⁷ Act No 28 of 2014 (n 115).

¹⁹⁸ Willem de Klerk and Shaheda Mahomed 'Specialisation at a University Law Clinic: The Wits Experience' [2006] *De Jure* 306 at 310.

¹⁹⁹ Mahomed (n 1) at 205.

²⁰⁰ Maisel (n 83) at 381.

²⁰¹ Nicolson (n 26) at 110.

In order to determine the model or structure of a clinic, it is useful to examine the responses to a number of queries. These are as follows: What the role of students in the law clinic is, what the role of university staff is in the clinic; who carries out the day-to-day operations of the clinic; who carries out the management of the clinic; whether the clinic has a physical premise and where this is located; whether the objectives are purely access to justice or academic or both; whether the clinic is recognised or has some form of legal registration and whether law clinic staff form part of the university teaching faculty.

It is also meaningful to appreciate the place clinic occupies in the overall running of the university as well as the relationship between the management body of the clinic and that of the university. Since clinics exist within the university context, clinics rely on the university for a portion of their resources such as academic staff and funding, while complementing this with donor and other funding.²⁰² Decisions made at university management level eventually trickle down to the clinics and if these are not in alignment with clinic work then they can pose obstacles to the achievement of the clinic's objectives. It goes without saying that a university management that understands and appreciates the clinics' role is far more likely to support it than one which does not.

2.6.2 A focus on access to justice work

Law clinics aspire to achieve pedagogical and social justice objectives.²⁰³ The social justice objectives can in turn be direct or indirect. These objectives are considered direct when they entail an active involvement in providing services to indigent communities.²⁰⁴ The indirect social justice objective is the impact that service provision has on law students and the influence this has on their choice to incorporate *pro bono* or public interest work in their future careers.²⁰⁵

Since most clinics in the continent have a social justice orientation,²⁰⁶ any attempt to enhance access to justice through clinics would need to examine the sorts of projects undertaken by clinics with a clear access to justice goal as well as the areas of law that the clinics focus

²⁰² Maisel (n 83) at 389; 'South African University Law Clinics Association (SAULCA)' (n 118).

²⁰³ Giddings (n 85) at 14.

²⁰⁴ Bloch (n 10) at 133.

²⁰⁵ Aiken and Wizner (n 7) at 1010.

²⁰⁶ Mcquoid-Mason, Ojukwu and Wachira (n 67) at 23.

on.²⁰⁷ Information on the source of clients, the numbers of clients, communities or groups assisted in a month; as well as how long the clinic has been in existence can all contribute to determining the level of activity the clinic has with live clients. This information presents a picture of the extent of the clinic's engagement with the indigent community, the levels of access to justice work conducted and the kind of assistance and interventions offered by the clinics.²⁰⁸

Although the indirect social justice objective is more difficult to assess, insights on this can be gleaned from perspectives of the students on the influence they feel their clinic encounters offer to their career choices.²⁰⁹

2.6.3 Law school curriculum

While 'legal aid clinics' is a term used to refer to clinics centred on the access to justice role, 'law clinics' or university-based clinics' have tended to focus on the training on skills and values.²¹⁰ The latter are more frequently embedded in the university curriculum and are even assessed.²¹¹ Scholars have posited that integration of clinics into the legal education project is what actually makes CLE a teaching methodology that 'uses the practice of law as a context to teach.'²¹² These clinical courses are offered either as mandatory²¹³ or elective experiential learning courses, which are assessed like all other courses in the curriculum.

With the advent of transformative constitutionalism, the expectation is that law schools will also include in their curriculum courses whose content captures the bill of rights, national governance structures, transformative constitutional goals and values.²¹⁴ Additionally, it is expected that the alignment of CLE with transformative constitutionalism will yield law school

²⁰⁷ F Haupt and SH Mahomed 'Some Thoughts on Assessment Methods Used in Clinical Legal Education Programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic' [2008] *De Jure* 273 at 280.

²⁰⁸ Ojukwu, Lagi and Erugo (n 170) at 16.

²⁰⁹ Sandefur and Selbin (n 29) at 101.

²¹⁰ Mcquoid-Mason, Ojukwu and Wachira (n 67) at 27.

²¹¹ Du Plessis 'Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values' (n 129) at 313.

²¹² Haupt (n 91) at 231.

²¹³ Holness 'Improving Access to Justice through Compulsory Student Work at University Law Clinics' (n 153) at 329.

²¹⁴ Greenbaum (n 89) at 489.

curricula that attempt to harmonise the social justice and pedagogical aims of CLE through practical community engagement.

2.6.4 Partnerships and networks

Institutional linkages with other clinics and like-minded institutions offer the advantages of synergies and even economies of scale.²¹⁵ This is demonstrated by South African clinics that drew advantage from their synergies under AULAI. AULAI managed grant funding for clinics and now as SAULCA, having absorbed the AULAI Trust, remains as the association which serves the common interests of these clinics.²¹⁶ Additionally, the international conferences brought together like-minded institutions from South Africa and beyond to exchange ideas and forge ahead in their legal aid agenda.²¹⁷ Such collaborations brought these clinics together in establishing communities of expertise and support. Thus, an appreciation of a clinic's active networks is invaluable since these offer support and foster the attainment of clinic goals.

2.7 CONCLUSION

By review of scholarly arguments, this chapter addresses the first research question regarding the role of CLE in the enhancement of access to justice. It highlights the access to justice role played by universities, which ordinarily set themselves apart as research and teaching institutions. CLE as a teaching methodology uses clinics and live clients as a practical preparation of law students for their future legal careers. These clinics bear the double mission of serving the unmet legal needs of the communities around them while enabling law students to acquire practical legal skills.

Moreover, clinics in countries with an enormous unmet legal need have tended to emphasise the role of clinics in alleviating access to justice deficits. With the strengthening of national legal aid schemes, some of these clinics have reoriented themselves to their academic focus. Nevertheless, the access to justice focus is undergoing some reform by universities that have

²¹⁵ Hennie (n 96) at 61.

²¹⁶ Du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (n 10) at 28; 'South African University Law Clinics Association (SAULCA)' (n 118).

²¹⁷ Steenhuisen (n 107) at 264; Haupt (n 91) at 230.

developed a renewed appreciation of the role of CLE in addressing access to justice in society. This is supplemented by arguments bestowing on universities and law schools the access to justice role as a way of drawing from their wealth of knowledge to contribute to the needs of the underprivileged in society.

Analysis of scholarship on the organisation, development and role of the legal aid clinics in the enhancement of access to justice in South Africa reveals South Africa's deeply entrenched law clinic movement. Literature on the history and development of university law clinics in South Africa is an indication of the access to justice potential of university law clinics. Established from the 1970s, South Africa's clinics proffered counsel to disenfranchised persons during the apartheid regime. The clinics remained vibrant in the post-constitutional era by taking up civil cases. These were access to justice gaps occasioned by the constitutional guarantees on access to justice for criminal cases to the general neglect of indigent persons with civil cases.

With the advent of transformative constitutions, certain scholars now consider CLE a panacea for transformative constitutionalism. This is on the condition that CLE is aligned to a transformative education paradigm that consists of the realignment of the subject and methods of teaching in law schools with the social justice and societal transformation aims of transformative constitutions. Since transformative legal education seeks the greater purpose of achieving social justice, aligning CLE to the transformative legal education paradigm promises to mainstream CLE in the legal education endeavour. The extent to which this alignment will resolve the sustainability challenges confronting many university law clinics remains underexplored. Transformative legal education is not an isolated concept, but a project that has already commenced in the African continent. It examines transformative constitutionalism and investigates what this phenomenon heralds for access to justice, CLE and legal education.

The present chapter likewise addresses the second research question regarding the access to justice lessons offered by scholarship on the initial CLE experience in South Africa. It elicits frameworks for enhancing access to justice through CLE. The framework for enhancing access to justice through CLE in a transformative constitutional context is proposed on the basis of decades of clinic experience in South Africa. The proposal consists of a robust legal framework made up of a transformative constitution, legislation governing legal education, legal aid scheme and the legal profession. It also entails the assessment of a clinic's organisational structure, its

place in the law school curriculum, the extent of its social justice work and the institutional partnerships the clinic maintains. This framework makes an original contribution to knowledge because literature drawing lessons from South Africa's clinic experience does not address transformative constitutionalism and the resulting supporting legislation. It also fails to address aspects of clinic capacity and structure in the combination that has been collated in this chapter. The chapter thereby contributes to addressing the research problem when it provides a structure with which to approach the study of law clinics in Kenya's transformative constitutional context.

While the arguments in this chapter are drawn from studies on CLE in different jurisdictions across the world, the chapter presents a framework through which CLE is studied in a country with a nascent transformative constitutional setting. This perspective refines both access to justice and CLE objectives and presents CLE in a novel paradigm that sets the work apart from traditional studies of this discipline. The chapter thereby develops and presents the framework for the study of CLE and access to justice in Kenya that is applied in the chapters that follow.

CHAPTER 3: LEGISLATIVE FRAMEWORK FOR ACCESS TO JUSTICE AND CLE IN KENYA

3.1 INTRODUCTION

Chapter three addresses the third research question on the extent to which the current legal framework for CLE in Kenya fosters equal access to justice. The concept of equal access to justice implies that all persons in society can make use of the legal system regardless of their economic position.¹ Reality in many societies is that only the wealthy can afford legal representation or even good quality legal representation. Persons who cannot afford lawyers or the filing fees required to bring their disputes before the court system do not seek redress and therefore remain unheard because of barriers resulting from their economic position. Resolving this disparity in accessing justice is a priority for transformative constitutionalism.²

This chapter is an examination of the legislative setting in which access to justice and CLE operate in Kenya. It entails an analysis of the legal provisions in Kenya's legislations and how they either nurture or resist access to justice through clinical programmes hosted by legal education providers.

Scholars have explored the role of jurists in transformative constitutionalism from varying perspectives. Researchers have conducted extensive inquiries into the work of judges in Kenya's transformative context.³ Whereas there is literature on legal education and the legal profession in the pre-2010 setting,⁴ the access to justice work by lawyers and law students in the

¹ Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 355.

² Langa (n 1) at 352.

³ Willy Mutunga 'Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution' 2017 *Lameck Goma Annual Lecture* (2017); Willy Mutunga 'Human Rights States and Societies: A Reflection From Kenya' (2015) 2 *The Transnational Human Rights Review* 63; Willy Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014); John Dudley Ochiel Odhiambo *Transformation of Judicial Review Under the 2010 Constitution* (Unpublished LLM Thesis, University of Nairobi 2016); The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice Report 2017-2018* (2019); The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice 2016-2017* (2017); The Judiciary Republic of Kenya *State of the Judiciary and the Administration of Justice 2014-2015* (2015); The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice 2013-2014* (2014); The Judiciary of the Republic of Kenya *State of the Judiciary and the Administration of Justice 2012-2013* (2013).

⁴ Yash Pal Ghai 'The Legal Profession: Themes and Issues' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014); Paul Mwangi *The Black Bar: Corruption and*

present transformative legal framework remains under-explored. This chapter mends the latter gap with a specific focus on legislative provisions. It thereby addresses the legislative aspects of the overall research problem.

The examination of the legal framework for access to justice and CLE in Kenya after the 2010 Constitution contributes to knowledge by elucidating the implications of this transformative legislative framework on access to justice and legal education. The overview of Kenya's access to justice and legal education setting prior to the 2010 Constitution is important in discerning the place of access to justice and CLE in Kenya's current legislative framework. With a focus on access to justice and the legal profession, the following section sets the stage for the Constitution 2010 and provides insight into the clamour for constitutional change. The section provides a brief history of access to justice and the legal profession to lend perspective to the exigencies of the new constitutional dispensation and the expectations this dispensation establishes with reference to access to justice.

3.1.1 Access to justice and clinics in Kenya before 2010

Kenya's access to justice status in the pre-independence period all through to 2010 can be summarised as dire. Encouragingly, the state of access to justice from the perspective of access to lawyers and legal representation has seen significant improvement over the decades. During the colonial regime in Kenya, the legal profession was composed of Asians and members of the white settler community, an arrangement that was consistent with the colour bar system that was in operation at the time.⁵ These lawyers were concentrated in Nairobi and provided services to the members of their respective communities, leaving Africans and persons living in the rest of the country outside the scope of legal representation.⁶ The profession did not have any African members. Both the regime and the legal profession strived to maintain this discriminative arrangement because they perceived that African lawyers would use their training to engage in politics thereby interfering with the *status quo* in which the lawyers facilitated the economic

Political Intrigue within Kenya's Legal Fraternity (2001); Yash P Ghai 'Law and Lawyers in Kenya and Tanzania: Some Political Economy' in Yash Pal Ghai and JCN Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (1981).

⁵ Mwangi (n 4) at 21; GGS Munoru 'The Development of the Kenya Legal System, Legal Education and Legal Profession' (1973) 9 *East African Law Journal* 1 at 1.

⁶ Mwangi (n 4) at 16.

interests of the regime.⁷ It was only until 1951 that the first Kenyan African Advocate was admitted to the bar at Lincoln's Inn in England and subsequently allowed by the Law Society of Kenya to practice in Kenya after he completed the period of residential training recommended by the Society.⁸

Prevailing legislation such as the Native Tribunals Ordinance of 1930 ensured that lawyers did not represent Africans in the matters within its jurisdiction. In cases where the law permitted representation, there was a dearth of lawyers who were ready to take on African clients. The Africans who needed representation had to instruct sympathetic Asian lawyers or mobilise sufficient resources to instruct lawyers from abroad due to the unavailability of African lawyers.⁹ Britain was most popular since Kenya has a similar legal system to Britain, from where the colonial government had transplanted it. This was the case in the trial of Jomo Kenyatta, who would later become the country's first president, in *Jomo Kenyatta and five others v Republic*.¹⁰ The police had arrested them for various actions aimed at the struggle for independence, actions which the colonial government treated as treasonous.

With the pressure to maintain the *status quo* in their own interest, the colonial systems were hostile to African lawyers and placed obstacles to their admission to the bar.¹¹ Such obstacles included unwarranted protracted periods of residential training. In view of these circumstances, the indigenous Kenyans who sought legal education had to secure the financial means to leave the country for studies in England and elsewhere abroad.¹² The situation began to change in 1960 when Lord Denning steered a study on legal education for students from Africa.¹³ Convinced that Kenya needed to have African members of the bar by independence, the

⁷ Ghai 'Law and Lawyers in Kenya and Tanzania: Some Political Economy' (n 4) at 148, 149; Munoru (n 5) at 7.

⁸ Mwangi (n 4) at 22.

⁹ Mwangi (n 4) at 16.

¹⁰ *Jomo Kenyatta and 5 Others v Regina [1954] eKLR*; Mwangi (n 4) at 8.

¹¹ Ghai 'Law and Lawyers in Kenya and Tanzania: Some Political Economy' (n 4) at 149; Mwangi (n 4) at 21, 59.

¹² John A Harrington and Ambreena Manji 'Mind with Mind and Spirit with Spirit: Lord Denning and African Legal Education' (2003) 30 *Journal of Law and Society* 376 at 380.

¹³ JB Ojwang and DR Salter 'Legal Education in Kenya' (1989) 33 *Journal of African Law* 78 at 78; Munoru (n 5) at 7.

committee made recommendations for the establishment of a law faculty at University of East Africa in Dar es Salaam, Tanzania and for a law school in Nairobi, Kenya.¹⁴

The University College of Dar es Salaam was established in 1961.¹⁵ Thus, Kenyans and Africans from other countries could enrol at the law faculty there. The law school at Dar es Salaam attracted experienced scholars from around the world who formed its faculty. These lecturers engaged their students in debate and in various ways transmitted their brilliance, knowledge, passion and vision of rule of law to these students.¹⁶ It was from there that renowned Kenyan lawyers, scholars and rights activists such as Dr. Willy Mutunga, Gibson Kamau Kuria, Lee Gacuiga Muthoga and their ilk emerged.

By 1963 when Kenya gained her independence, the need for indigenous lawyers in the country was compelling. It was only in 1970 that the Faculty of Law at the University of Nairobi, the first law school in Kenya, was established.¹⁷ The link between the training and quality of lawyers was perceptible as early as the 1970s when the University of Nairobi law school, that was established to offer local training for African lawyers, encountered teething troubles. University of Nairobi struggled to match the distinguished faculty at Dar es Salaam. Although there remained a core group of committed academics,¹⁸ the lecturers at Nairobi were largely inexperienced, inadequately trained and those who simultaneously ran their legal practices had minimal time to dedicate to teaching.¹⁹ Faculty faced multiple dilemmas, occasioned by their own experience of colonial realities of the country and the awareness that political views could lead to their downfall.²⁰ There was their own legal training, which presented legal education as a preparation for private practice against a legal education system surrounded by expatriates and vestiges of colonialism bent on preserving the colonial training system as well as books prepared

¹⁴ Harrington and Manji (n 12) at 379; James CN Paul 'Legal Education in English Speaking Africa' (1962) 15 *Journal of Legal Education* 189 at 192.

¹⁵ Munoru (n 5) at 7.

¹⁶ Mwangi (n 4) at 46.

¹⁷ G. Kamau 'Current Problems of Legal Education in Kenya' (1979) 9 *Journal of Eastern African Research and Development* 33 at 43; Munoru (n 5) at 8.

¹⁸ Ojwang and Salter (n 13) at 87.

¹⁹ Mwangi (n 4) at 93.

²⁰ Mwangi (n 4) at 45; Ojwang and Salter (n 13) at 85.

for a foreign country whose needs differed from Kenya's rapidly changing economic and political set-up.²¹

These systemic issues seemingly trickled down to the law students and may have contributed to the decadence of the legal profession that was prevalent by 1984.²² It seemed that the new entrants to the legal profession contributed to the lowered standards of court practice because of their inadequate training and their inordinate focus on acquiring wealth. Given the sacrifice they and their families had made to support them through university, their focus on generating and preserving wealth was understandable. What was inexcusable was that, in several instances, the lawyers amassed this wealth at the expense of clients amidst sharp practice and lack of professionalism. It was also apparent that some of these lawyers were reluctant and ill prepared to get involved in national legal issues, constitutionalism and human rights struggle that was taking place in the country.²³ That notwithstanding, there remained a vibrant group of lawyers who confronted the autocratic and dictatorial tendencies of the African government that had taken over after independence.²⁴

Unfortunately, part of the legal profession perpetuated the regime's despotic practices and participated in the subversion of constitutionalism when Chief Justices, Attorneys General, Directors of Public Prosecution and judges allowed themselves to be unduly controlled by the Executive arm of government and lost their independence.²⁵ For instance, the Chief Justice stated in 1988 that the constitutional fundamental rights and freedoms were unenforceable because the Chief Justice had not made the rules for doing so.²⁶ This absence of rules, arising from a blatant omission to make them, became the pattern in which the courts disposed of constitutional petitions.

²¹ Kamau (n 17) at 45.

²² Mwangi (n 4) at 93; Kamau (n 17) at 34, 46.

²³ Robert Machatha Kibugi 'Training Lawyers for the Sub-Saharan African Market: What Role for Academics? Perspectives from Kenya' (2009) 43 *Law Teacher* 37 at 39; Mwangi (n 4) at 96, 97; JB Ojwang and DR Salter 'Legal Profession in Kenya' (1990) 34 *Journal of African Law* 9 at 26.

²⁴ Mwangi (n 4) at 92.

²⁵ Waikwa Wanyoike 'The Director of Public Prosecutions and the Constitution: Inspiration, Challenges and Opportunities' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 173.

²⁶ Mwangi (n 4) at 107.

Indeed, the Judiciary underwent its fair share of intimidation and threats. Only persons who held pro-government views were eligible for positions in the Judiciary and they held these offices without security of tenure.²⁷ Nevertheless, there were a few members of the bench who were impartial and did not yield to influence by the Executive. The latter were quickly rooted out through termination of their contracts, variation of retirement age, sustained pressure to resign and other underhand tactics.²⁸

With lawyers graduating from University of Nairobi and others coming back from Dar es Salaam and abroad, there was a gradual increase in numbers of African lawyers in the country. Some of these established their own practices while others took up government positions which were previously occupied by expatriates who had returned to their countries. These lawyers then became involved in challenging the regime and its impunity. The objections from the African lawyers led to multiple attacks on the profession.²⁹ Outspoken lawyers were arrested sometimes on trumped up criminal charges, arbitrarily tortured and detained. Thus, the infamous line from part 2, act IV, scene 2 of William Shakespeare's Henry VI 'the first thing we do, let us kill all the lawyers' was being implemented in earnest. Sympathisers of the *status quo* who preferred not to engage in political activities infiltrated the Law Society. Members of the profession who spoke out against autocratic rule became targets for government retribution and this intimidated those who were not as bold. In this very specific way therefore, lawyers contributed to agitating for rule of law in a country in which fundamental rights and freedoms could neither be enjoyed nor protected.

At a national level, communities that did not seem to be aligned to the regime suffered through recurring 'tribal clashes' instigated to 'remove' them from parts of the country where they were not desired. These clashes were experienced in six out of eight provinces in the country.³⁰ The dalliance between the Judiciary and autocratic Executive arm of government alienated Kenyan citizens from their government, and the affected communities could not expect

²⁷ Pheroze Nowrojee 'The Legal Profession 1963-2013: All This Can Happen Again-Soon' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 40.

²⁸ Nowrojee (n 27) at 41-42.

²⁹ Mwangi (n 4) at 92.

³⁰ AM Akiwumi *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya* (1999) at 23-26.

justice from the courts. The acrimonious relationship between the bench and the bar also posed a barrier to the just resolution of disputes and ultimately to access to justice.³¹

A significant stage in challenging the regime was the clamour for the repeal of section 2A of the Constitution, which made the country a single-party State. National resistance of despotic governance attracted international support that emboldened the struggle towards the restoration of a multi-party democracy in 1991 through the repeal of section 2A of the 1969 Constitution—a struggle that was commonly referred to as ‘the second liberation.’³² This was one among a series of momentous reforms through which Kenya moved towards her long and winding journey in constitution making.

A poignant demonstration of the extent of discord in the nation over a decade later is the civil unrest which erupted after the announcement of results of the December 2007 general election. The 2007-2008 post-election violence was the outpouring of pent-up tensions that had built up over the years between tribes from opposite political camps and those allied to them. These tensions manifested in violent clashes, death of innocent civilians, destruction of property and internal displacement of persons.³³ The differences spread beyond political questions to the distribution of national resources along ethnic and political lines.

The promulgation of the Constitution in August 2010 manifested a new beginning in the country, one that was heralded by turbulent political developments from the colonial times up till the 2007-2008 post-election violence and its aftermath. Kenyans from all walks of life across the republic gave their views to representatives of the Constitution of Kenya Review Commission and these shaped the development of the autochthonous Constitution. This constitution-making process involved members of the legal profession drawn from the academy, legal practice, civil society and government.³⁴ Members of other interested organisations also participated in the process in various capacities.

³¹ Mutunga ‘The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship’ (n 3) at 60.

³² Luis Franceschi and PLO Lumumba *The Constitution of Kenya 2010: A Commentary* (2019) at 42; Friedrich Ebert Stiftung *Institutionalizing Political Parties in Kenya* (2010) at v.

³³ Phillip Waki *Report of the Commission of Inquiry into Post Election Violence* (2008) at 236.

³⁴ Franceschi and Lumumba (n 32) at 43; Kibugi (n 23) at 39.

Since the Constitution is the supreme law of the land,³⁵ the transitional provisions of the Constitution provided for the review of all legislation to bring them into alignment with the new order.³⁶ This served as a catalyst for the amendment, repeal and promulgation of new legislation including those governing legal education and the legal profession.

One of the hallmarks of the implementation of the 2010 Constitution was a purge in the Judiciary, which followed from the vetting of all members of the Judiciary to guarantee the competence and integrity of persons left serving at the bench. The Judges and Magistrates Vetting board as established by the Judges and Magistrates Vetting Act, directed the vetting process.³⁷ This legislation laid down the basis upon which the suitability of judicial officers would be determined. Among the factors they considered were whether the officer met the constitutional criteria; their competence and diligence as demonstrated by their prior judicial pronouncements; existence of pending or concluded criminal cases against them as well as pending complaints or information received from any person or body.³⁸ In order to safeguard the rights of the judicial officers being vetted, the process was conducted in camera and with proper regard to the principles of natural justice.³⁹

The Judiciary set the transformational bar very high in a bid to break away from its damaging past. Consequently, the officers who were cleared to continue serving needed to have been persons of integrity in their professional and personal life⁴⁰ and must also have demonstrated a commitment to community service and to improving access to the justice system.⁴¹ The judges and magistrates who were found unsuitable to serve and therefore not cleared for future service had to leave for reasons such as inconsistency, authoritarianism on the bench, failure to show impartiality, condoning the torture of suspects, ignoring court orders, accepting gifts from litigants, lack of professionalism and honesty and being a stumbling block in the fight against corruption.⁴² Other judicial officers had their service discontinued because of

³⁵ 'Constitution of Kenya, 2010' art 2.

³⁶ Constitution of Kenya, 2010 (n 35) Sixth Schedule art 7.

³⁷ Vetting of Judges and Magistrates Act, No. 2 of 2012 s 6(1).

³⁸ Act No. 2 of 2012 (n 37) s 18(1).

³⁹ Act No. 2 of 2012 (n 37) s 19.

⁴⁰ Act No. 2 of 2012 (n 37) s 18(2)(c).

⁴¹ Act No. 2 of 2012 (n 37) s 18(2)(h).

⁴² Judges and Magistrates Vetting Board *Judges and Magistrates Vetting Board_1st Determination* (2012).

delays in the hearing of court cases and in the delivery of judgments⁴³ as well as the failure to adapt judgments to requirements of the 2010 Constitution.⁴⁴

Given the foregoing account of the development of legal education in Kenya and that the first law school was only established in the country in 1970, there is no record of clinic activity preceding the university. Although students participated in demonstrations during the clamour for constitutional amendments and during national outcries such as political assassinations and political meetings, they were not directly involved in clinical access to justice work.

Direct involvement of students in access to justice matters in Kenya is traceable to a Legal Advice Centre in Nairobi's *Shauri Moyo* estate which was established by the University of Nairobi and the Law Society of Kenya in 1973.⁴⁵ It provided legal advice and representation throughout 1980s then morphed into Kituo Cha Sheria, a renowned legal aid institution. There are records demonstrating that students from the University of Nairobi currently participate in *ad hoc* clinic work outside of the teaching programme.⁴⁶ The activities are organised and managed by a student-led team in conjunction with legal aid clinics offered by civil society organisations.⁴⁷ It is probable that law clinic activity continued to take place during the period between 1970 and 1994 when the school of law at Moi University was established.

The establishment of Moi University School of Law in 1994 saw the introduction of a legal education system which broke away from the lecture model to the clinic model that was its niche. The Faculty of Law at Moi University, set up with the transformation of society in mind,⁴⁸ premised its curriculum on the promotion of social justice. The university works towards this goal through a clinical pedagogy as well as the Moi University Legal Aid Clinic.⁴⁹ The clinic has

⁴³ Judges and Magistrates Vetting Board *Judges and Magistrates Vetting Board_2nd Determination* (2012).

⁴⁴ Judges and Magistrates Vetting Board *Judges and Magistrates Vetting Board_3rd Determination* (2012).

⁴⁵ Caroline Amondi 'Legal Aid in Kenya: Building a Fort for Wanjiku' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 205.

⁴⁶ David Mcquoid-Mason, Ernest Ojukwu and George Mukundi Wachira 'Clinical Legal Education in Africa: Legal Education and Community Service' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 29.

⁴⁷ Yohana Ouma and Esther Chege 'Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide' (2016) 23 *International Journal of Clinical Legal Education* 107 at 126
<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/download/567/982>>.

⁴⁸ TO Ojienda and M Oduor 'Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya' (2002) 2 *International Journal of Clinical Legal Education* 49 at 53
<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/view/123/122>>.

⁴⁹ Mcquoid-Mason, Ojukwu and Wachira (n 46) at 29.

been the medium for interaction with indigent members of the community and for the provision of legal assistance to those who needed it.⁵⁰ Despite the fact that several law schools have since been established in the country and are at various levels of accreditation,⁵¹ their clinic work remains largely undocumented or inaccessible to the public.

Although existing clinics were spurred on by initiatives from the various universities, the social justice goal of the 2010 Constitution and its supporting legislation presents a fresh impetus for the operation of university law clinics. This is because universities are the training ground for the members of the legal profession whose task is to implement the transformative framework of the 2010 Constitution. The university law clinics are engaged in access to justice in the country, a function which is either enhanced or restricted by the prevailing legislative framework.

The legislative framework for CLE and access to justice in Kenya can be gleaned from the Constitution and six different Acts of Parliament. These are the Universities Act,⁵² Legal Aid Act,⁵³ Legal Education Act,⁵⁴ Law Society of Kenya Act,⁵⁵ Kenya School of Law Act⁵⁶ and the Advocates Act.⁵⁷ These are discussed below.

3.2 CONSTITUTION OF KENYA

Kenya, which gained her independence in 1963, promulgated a home-grown Constitution in 2010. It replaced the Constitution of 1964. The 2010 Constitution provides the normative framework for governance and resource allocation in the country. Kenya's Constitution is 'transformative' because of the ways in which it endeavours to address historical injustices. These comprise injustices arising out of the long history of impunity, autocratic governance, lack of constitutionalism, electoral disputes, inequalities in distribution of national resources, tribal

⁵⁰ Ojienda and Oduor (n 48) at 57.

⁵¹ Council of Legal Education (CLE) *Status of Licensed Legal Education Providers* (2019).

⁵² The Universities Act, No. 42 of 2012.

⁵³ Legal Aid Act, No. 6 of 2016.

⁵⁴ Legal Education Act, No. 27 of 2012.

⁵⁵ Law Society of Kenya Act, No. 21 of 2014.

⁵⁶ Kenya School of Law Act, No. 26 of 2012.

⁵⁷ Advocates Act, Chapter 16 Laws of Kenya.

clashes, loss of lives, displacement of communities, land disputes and misappropriation of public funds.⁵⁸

The 2010 Constitution was inspired by the need to articulate and address disparities and exclusions experienced by the people of Kenya and to emphasise the need for change towards a more just society in which every person can thrive without fear or favour. It was an exemplar of the use of law and legal institutions to create inclusive spaces for marginalised actors including women, minorities and the economically disadvantaged to ensure these groups enjoy the proverbial slice of the pie and to remove barriers across which certain kinds of actors cannot move.⁵⁹ These aspirations are the fruit of years of protracted struggle in an era whose constitutionalism and rule of law stood out more by breach than by compliance.⁶⁰

The Constitution of Kenya 2010 recognises the need for just governance and is respectful and nurturing of human rights, equality, freedom, democracy, social justice and the rule of law.⁶¹ It endeavours to articulate the power structures and to identify the principles of governance. The robust bill of rights encompasses civil and political rights as well as socio-economic rights.⁶² The Constitution provides for devolved government that entails a shift from a centralist to a federal system of government.⁶³ At the core of these provisions is the spirit of renewal and societal transformation.

A significant feature of the Constitution is the values and principles that permeate it. It specifically postulates the national values and principles of governance.⁶⁴ These are patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁶⁵ Every level of implementation of the constitutional provisions must espouse these values and principles. Chapter six specifically

⁵⁸ Yash Pal Ghai 'The Attorneys-General: Upholders or Destroyers of Constitutionalism?' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 164.

⁵⁹ Constitution of Kenya, 2010 (n 35) art 52-57.

⁶⁰ Franceschi and Lumumba (n 32) at 10.

⁶¹ Constitution of Kenya, 2010 (n 35) at Preamble.

⁶² Constitution of Kenya, 2010 (n 35) Chapter 4.

⁶³ Constitution of Kenya, 2010 (n 35) Chapter 11.

⁶⁴ Constitution of Kenya, 2010 (n 35) art 10.

⁶⁵ Constitution of Kenya, 2010 (n 35) art 10(2).

requires leaders and State officers to be persons of integrity. The 2010 Constitution establishes offices and institutional frameworks that perpetuate its core values. It enunciates the principles and framework of public finance,⁶⁶ the values and principles of public service⁶⁷ and establishes commissions and independent offices.⁶⁸ This being the supreme legislation of the land, all other legislation is legitimate to the extent of their consistency with the Constitution.

The courts have consistently described the Constitution of Kenya 2010 as ‘transformative.’⁶⁹ This is because it aims at attaining reform and social change through governance that is based on values of human rights, equality, freedom, democracy, social justice and the rule of law.⁷⁰ Indeed, the courts of Kenya have recognised it as a transformative Constitution, similar to that of South Africa.⁷¹ The Constitution is applauded as a transformative charter which aims at instituting social change and reform.⁷²

Apart from commitment to constitutional values such as integrity and impartiality,⁷³ the Judiciary bears the responsibility for interpretation of the 2010 Constitution to realise social justice.⁷⁴ The bar likewise plays a complementary role in the quality and standards of arguments raised before the courts. Given the court’s role in legislative interpretation, the Judiciary has a critical role in realising societal transformation through the Constitution.⁷⁵ In this regard, the Court of Appeal in *Judicial Service Commission v Mbalu Mutava and another* recognised that the transformative nature of the Constitution presents a challenge of interpretation, ‘giving life

⁶⁶ Constitution of Kenya, 2010 (n 35) Chapter 12.

⁶⁷ Constitution of Kenya, 2010 (n 35) Chapter 13.

⁶⁸ Constitution of Kenya, 2010 (n 35) Chapter 15.

⁶⁹ *George Bala v Attorney General* [2017] eKLR para 57; *Judicial Service Commission v Mbalu Mutava and Another* [2015] eKLR 1 para 11; *Speaker of the Senate and Another v Attorney-General and 4 Others* [2013] eKLR para 51.

⁷⁰ Constitution of Kenya, 2010 (n 35) Preamble; *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno and Another* [2017] eKLR 1 para 117; *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries and 4 Others Ex Parte Council of County Governors and Another* [2017] eKLR para 86; *Isaac Ngugi v Nairobi Hospital and 3 others* [2013] eKLR 1 para 25.

⁷¹ *Speaker of the Senate and Another v Attorney-General and 4 Others* [2013] eKLR (n 69); *George Bala v Attorney General* [2017] eKLR (n 69); *Judicial Service Commission v Mbalu Mutava and Another* [2015] eKLR (n 69).

⁷² *Peter Solomon Gichira v Independent Electoral and Boundaries Commission and Another* [2017] eKLR para 38; *Communications Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others* [2014] eKLR 1 para 377.

⁷³ Mutunga ‘Human Rights States and Societies: A Reflection From Kenya’ (n 3) at 81.

⁷⁴ Mutunga ‘The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship’ (n 3) at 67.

⁷⁵ *Communications Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others* [2014] eKLR (n 72).

and substance’ to constitutional values and principles in a dynamic society.⁷⁶ This challenge falls squarely on the shoulders of the Judiciary.

Thankfully, the Judiciary of Kenya has taken up this challenge of interpretation with the alacrity it deserves. In *Isaac Ngugi v Nairobi Hospital and 3 others*, the court noted that the intention to have a transformative Constitution could be read from the history of Kenya and the events preceding the promulgation of the Constitution.⁷⁷ In appreciating the transformative nature of the Constitution, the High Court in *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno*⁷⁸ emphasised that the Constitution is premised upon national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability.⁷⁹ These values distinguish it from the retired Constitution and guide its interpretation and application.⁸⁰ The Constitution aspires to transform these values into reality.⁸¹

Additionally, the Judiciary has endeavoured to fast track cases and reduce backlog of cases pending before the courts.⁸² These efforts have seemed greatly beneficial for the disposal of cases, especially criminal appeal matters.

A strong indication that the Judiciary of Kenya is committed to constitutional values and principles is the Supreme Court’s decision nullifying Kenya’s 2017 general elections. In the celebrated case Presidential Election Petition 1 of 2017 *Raila Amolo Odinga and another v IEBC and 4 others*, two of the presidential candidates were dissatisfied with the results of the elections on the grounds that the election process did not comply with the Constitution and electoral laws.⁸³ The Supreme Court indeed found that the election had fallen short of constitutional principles and electoral laws. The court therefore nullified the results of the presidential elections and called for a repeat election. This ground-breaking decision pitted the Executive against the

⁷⁶ *Judicial Service Commission v Mbalu Mutava and Another* [2015] eKLR (n 69).

⁷⁷ *Isaac Ngugi v Nairobi Hospital and 3 others* [2013] eKLR (n 70).

⁷⁸ *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno and Another* [2017] eKLR (n 70).

⁷⁹ Constitution of Kenya, 2010 (n 35) art 10.

⁸⁰ *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries and 4 Others Ex Parte Council of County Governors and Another* [2017] eKLR (n 70).

⁸¹ *Peter Solomon Gichira v Independent Electoral and Boundaries Commission and Another* [2017] eKLR (n 72).

⁸² *State of the Judiciary and the Administration of Justice Report 2017-2018* (n 3) at 18-59; Mutunga ‘The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship’ (n 3) at 71.

⁸³ *Raila Amolo Odinga and Another v IEBC and 4 Others* [2017] eKLR.

Judiciary⁸⁴ and was a stark demonstration of judicial independence, a rebirth from the enduring political dalliance that persisted between the two institutions thirty years ago.

3.2.1 Implications of the 2010 Constitution for access to justice and CLE in Kenya

The promulgation of the Constitution of Kenya 2010 led to the overhaul of Kenya's legislation, a process which sought to align them with constitutional standards. The Constitution provides that the fundamental duty of the State and every State organ is to 'observe, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.'⁸⁵ One of the rights provided for in the bill of rights is that the State shall ensure access to justice for all at a reasonable fee.⁸⁶ This is understood to include the right to have every person's disputes arbitrated by independent and impartial tribunals and the right to have legal representation in these tribunals. The article 48 provision for access to justice for all persons is wider than access to courts and legal representation in the event of a dispute. It extends to access to information and awareness of the law, rights and duties.⁸⁷

Access to justice is a right which is provided for both in international and Kenyan national law. The right of access to justice in international legal instruments is located in the Universal Declaration of Human Rights (UDHR) at article 17 which provides for equality before the law and article 10 which provides for the right to fair trial as well as the International Covenant on Civil and Political Rights (ICCPR) at article 2 which prohibits discrimination of any kind, including financial status and article 14 which provides for the right to fair trial. Although the general rules of international law form part of the laws of Kenya,⁸⁸ the Constitution expressly incorporates the access to justice rights from the UDHR and ICCPR in its provisions relating to access to justice, rights of arrested persons,⁸⁹ right to a fair hearing⁹⁰ and rights of persons held in custody.⁹¹ The right to a fair hearing is expressed to include having an advocate

⁸⁴ Lucianna Thuo *Compendium of 2017 Election Petitions* in Robert Allamano Ongudi and others (eds), (2019) at 13.

⁸⁵ Constitution of Kenya, 2010 (n 35) art 21(1).

⁸⁶ Constitution of Kenya, 2010 (n 35) art 48.

⁸⁷ *State of the Judiciary and the Administration of Justice* 2016-2017 (n 3) at 211.

⁸⁸ Constitution of Kenya, 2010 (n 35) art 2(5).

⁸⁹ Constitution of Kenya, 2010 (n 35) art 49.

⁹⁰ Constitution of Kenya, 2010 (n 35) art 50.

⁹¹ Constitution of Kenya, 2010 (n 35) art 51.

assigned to an accused person at State expense if substantial injustice would otherwise result.⁹² These provisions are geared towards a society in which laws do not subject the poor to injustice or which inadvertently exclude the poor from the justice systems.⁹³

Lawyers are critical agents in the enjoyment of access to justice and in the implementation of the transformative Constitution in its entirety. This is because lawyers are the primary readers of the law. Additionally, it is lawyers who provide legal representation to clients before courts and tribunals. The Judiciary, which is the principal arbitrator of disputes and interpreter of the law, is also made up of members of the legal profession. Presently, the majority of the independent offices established by the Constitution require persons with legal qualifications and training.

The legal profession is held accountable for the constitutional promises in several respects.⁹⁴ The Constitution of Kenya 2010 creates duties for lawyers in their various capacities. The majority of the positions in the Judiciary, commissions and independent offices require persons with legal training and knowledge. It behoves the members of the legal profession to be prepared to live and implement the change that is at the core of the Constitution.⁹⁵

The use of law as the vehicle for social change in transformative constitutionalism is consistent with the arguments that the legal profession is responsible for promoting access to justice in society.⁹⁶ Key drivers of transformative constitutionalism are lawyers and judges. These legal professionals must therefore have an appreciation for the new role that law is expected to play.⁹⁷ Relatedly, the quality of lawyers depends on the quality of legal education they undertake.⁹⁸ Thus, they ought to develop legal reasoning, method and analysis that is in

⁹² Constitution of Kenya, 2010 (n 35) art 50(h).

⁹³ Steve Akoth Ouma 'Justice without Lawyers: Juridical Structures and Practices of Law in Korogocho Slums' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 255.

⁹⁴ Nowrojee (n 27) at 53-55.

⁹⁵ Ghai 'The Legal Profession: Themes and Issues' (n 4) at 4-8.

⁹⁶ Eric Kibet and Charles Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 340 at 366; Jeremy Sarkin 'Promoting Access to Justice in South Africa: Should the Legal Profession Have a Voluntary or Mandatory Role in Providing Legal Services to the Poor' (2002) 18 *South African Journal on Human Rights* 630 at 630.

⁹⁷ Kibet and Fombad (n 96) at 353.

⁹⁸ Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' (n 3) at 71.

harmony with the transformative nature of the Constitution.⁹⁹ Upcoming lawyers ought to be oriented towards a constitutional order whose values have shifted significantly from those of the independence Constitution.

It is noteworthy that the Judiciary was among the first institutions in the justice system to experience the transformative impact of the 2010 Constitution. Those judges and magistrates who sought to continue in office after the promulgation of the 2010 Constitution consented to undergo a vetting process which assessed their suitability to continue in service. At the end of the process, the judicial officers who underwent the screening process and who were found unsuitable to hold office under the new constitutional dispensation had to leave. Nevertheless, critics recognised flaws in the vetting process, which they attributed to lawyers. They expressed concerns about the apparent silence of members of the legal profession who failed to raise complaints of corruption against judicial officers, largely because of their own complicity in and desire to perpetuate these malpractices in the interest of their firms.¹⁰⁰ Accordingly, any meaningful implementation of constitutional values requires the collaboration of all members of the justice system.

The present research considers CLE as the most appropriate pedagogical and social justice tool in a transformative constitutional context such as Kenya's. This position is in harmony with recommendations for the improvement of legal education through the increased use of legal clinics instead of teaching using case law only.¹⁰¹ As discussed in the previous chapter, South Africa is exemplar of constitutional impact on legal education.¹⁰² That CLE is proposed as an appropriate tool for attaining the goal of transformative legal education is therefore compelling. This is because CLE exposes students to societal inequalities by giving them the opportunity to interact with indigent communities. This offers them first-hand lessons in the realities of the prevailing socio-economic disparities in the country. They experience the

⁹⁹ Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 156.

¹⁰⁰ Ahmednasir Abdullahi 'Vetting of Judges: Successes and Failures' *Nation Newspaper* (19 January 2013) <<https://www.nation.co.ke/oped/opinion/Vetting-of-judges-Successes-and-failures-/440808-1669782-uwa2w1z/index.html>> accessed 29 May 2018.

¹⁰¹ Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' (n 3) at 72.

¹⁰² Peggy Maisel, Shaheda Mahomed and Meetali Jain 'Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present and Future' (2015) 60 *New York Law School Law Review* 433 at 433.

law in context and are confronted with questions about community experiences of law as well as the strengths and weaknesses of the legal system.

With the participation of law students in reflective practice and seminars geared towards critical engagement with the law, CLE holds the promise of according transcendental meaning to what may otherwise be considered a mundane career. This is because engagement with CLE offers the possibility of enthusing some students to seek public interest careers in future. Through CLE, students provide gratuitous assistance to communities through conducting research, drafting and other relevant support towards advocates who represent indigent clients. A further reason is that CLE supports a critical engagement with constitutional values. It promises greater meaning and purpose beyond financial gain. Additionally, activities that fall well within the competence of university law clinics such as research, debate and civic education as well as partnerships between law schools, legal practitioners, civil society organisations and justice sector actors remain unexplored opportunities through which the legal profession can participate in the implementation of the 2010 Constitution.¹⁰³

3.3 LEGAL AID ACT

The Legal Aid Act addresses the access to justice needs of indigent persons. The objective of this legislation is to facilitate access to justice, social justice and to establish the national legal aid scheme known as the National Legal Aid Service (NALEAS). The Legal Aid Act was passed to give effect to articles 19(2), 48, 50(2) (g) and (h) of the bill of rights of Constitution of Kenya 2010.¹⁰⁴ These provisions articulate the purpose of recognising and protecting human rights and fundamental freedoms as ‘to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.’¹⁰⁵ This is based on the constitutional guarantee that all persons have the right of access to justice.¹⁰⁶ Thus, any fees required should be reasonable and not impede access to justice. In addition, the Constitution

¹⁰³ Patricia Kameri-Mbote ‘Legal Education and Lawyers’ in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 138.

¹⁰⁴ Act No. 6 of 2016 (n 53).

¹⁰⁵ Constitution of Kenya, 2010 (n 35) art 19(2).

¹⁰⁶ Constitution of Kenya, 2010 (n 35) art 48.

guarantees every person the right to fair hearing.¹⁰⁷ Accused persons have the right to select and be represented by an advocate and to be informed of this right promptly.¹⁰⁸ Accused persons have the right to have an advocate assigned to them by the State, at the expense of the State if substantial injustice would otherwise result and to be informed of this right promptly.¹⁰⁹ The Legal Aid Act thereby sets forth the involvement of the State in access to justice and legal aid.

The Supreme Court Petition *Republic v Karisa Chengo and 2 others* addressed the question about the exercise of the constitutional right to representation.¹¹⁰ It raised two issues that were critical for the administration of justice in a country with such an enormous backlog of court cases as Kenya had. The first was whether judges of specialised courts established under Article 162(2) of the Constitution had jurisdiction to hear criminal appeal cases. The second issue was on how to apply the right to representation in Kenya.

The petition was an appeal by the State from the Court of Appeal decision in which the Court of Appeal held that specialised courts did not have jurisdiction to hear matters in courts outside their specialisation. This question arose when the Chief Justice Dr. Willy Mutung'a (as he then was) empanelled judges from the Environment and Land Court and the Employment and Labour Relations Courts to sit with judges of the High Court during Judicial Service Week. The Judicial Service Week was an initiative to hear and dispense with the backlog of criminal appeals pending before the High Court.

The petition also sought to set aside the Court of Appeal decision that an accused person would only be entitled to legal representation at the expense of the State if substantial injustice would result. In their case the court had held that the right to legal representation at State expense under the 2010 Constitution is a right which is to be progressively realised and that their right to legal representation was not violated because they had actively participated in their trial and had suffered no substantial injustice.¹¹¹

The Supreme Court found that the right to fair trial in this case entailed a bench of High Court judges and not judges of specialised courts, regardless of the good intention to accord the

¹⁰⁷ Constitution of Kenya, 2010 (n 35) art 50.

¹⁰⁸ Constitution of Kenya, 2010 (n 35) art 50(2)(g).

¹⁰⁹ Constitution of Kenya, 2010 (n 35) art 50(2)(h).

¹¹⁰ *Republic v Karisa Chengo and 2 Others* [2017] eKLR.

¹¹¹ *Republic v Karisa Chengo and 2 Others* [2017] eKLR (n 110).

respondent's appeals a timeous process of trial. On the second issue the Court found that the right to legal representation under article 50(2) (h) of the Constitution 2010 is not progressively realised and does not depend on any future legislative steps.¹¹²

Discussing the right to representation, the Supreme Court drew a distinction between the right to representation *per se* and the right to representation at State expense. The court clarified that the right to representation does not always have to be at the expense of the State. In determining whether substantial injustice will be suffered in criminal proceedings, the Supreme Court stated that courts should consider the provisions of the Legal Aid Act as well as other factors including the seriousness of the offence, the severity of the sentence, whether the accused is a minor, their ability to pay for their own legal representation, the literacy of the accused and the complexity of the charge against them. The court acknowledged that the specific guarantee of legal representation in Article 50(2) (h) was at the time in the process of implementation through Legal Aid Act No. 6 of 2016.¹¹³

The ratio of advocates to the Kenyan population was a paltry one advocate to 3500 persons by 2016 when the Legal Aid Act was enacted.¹¹⁴ Nevertheless, an increase in universities offering law programmes in the succeeding years promised a corresponding increase in the number of advocates in the country. Despite this increase in law programmes, the capacity and competence of law graduates appears to have declined. The Taskforce on Legal Sector Reforms attributed this decline to a waning in quality and standards of legal training and apprenticeship.¹¹⁵ Presently, the country has over 17000 advocates serving a population of 47.6 million people.¹¹⁶ Unfortunately, the cost of legal representation renders legal services accessible only to persons of certain economic status. Law students in Kenya have therefore attempted to address the unmet legal need by maintaining *ad hoc* community education engagements and

¹¹² *Republic v Karisa Chengo and 2 Others* [2017] eKLR (n 110).

¹¹³ *Republic v Karisa Chengo and 2 Others* [2017] eKLR (n 110).

¹¹⁴ Fred Ojiambo *Report of the Taskforce on Legal Sector Reforms* (2017) at 9; Compare with David Mcquoid-Mason 'Challenges When Drafting Legal Aid Legislation to Ensure Access to Justice in African and Other Developing Countries with Small Numbers of Lawyers: Overcoming Obstacles to Including the Use of Non-Lawyers to Assist Persons in Conflict with the Law' (2018) 18 *African Human Rights Law Journal* 486 at 488.

¹¹⁵ Ojiambo (n 114) at 29.

¹¹⁶ Kenya National Bureau of Statistics *2019 Kenya Population and Housing Census Volume 1: Population by County and Sub-County* vol I (2019) at 5; 'Law Society of Kenya' <<https://lsk.or.ke/about-lsk/>> accessed 1 July 2020.

conducting legal aid work with indigent prisoners.¹¹⁷ Public benefit and faith-based organisations have likewise been engaged in a substantive amount of legal aid work.¹¹⁸

The Legal Aid Act, while making provision for legal aid and for its funding, defines legal aid to include ‘legal advice; representation; assistance in out-of-court settlements, drafting or service of legal documents or alternative dispute resolution; spreading awareness of legal information; law reform and advocacy work on behalf of communities.’¹¹⁹ With the exception of advice and representation, the definition of legal aid corresponds to the types of activities commonly carried out by university law clinics in their respective communities.

The Legal Aid Act is the only legislation in Kenya that makes any reference to legal aid clinics. It demonstrates an intention to accredit law schools for the provision of legal aid. The Act defines clinics as ‘a clinic accredited by the service or offered by an accredited legal aid provider.’¹²⁰ A legal aid provider under the Act is an advocate working under the Law Society of Kenya’s *pro bono* scheme or a civil service legal aid provider, a paralegal, a firm of advocates, a public benefit or faith-based organisation, universities or other institutions operating clinics and government agencies accredited under the Act.¹²¹

This engagement of university students in legal aid activities is not a novel idea. The United Nations Principles and Guidelines on Access to Legal Aid actually count on the law students in supplementing legal aid services.¹²² What is distinctive is that Kenya brings them under the ambit of the national legal aid scheme and accredits them as legal aid providers as it does with advocates, public benefit organisations and paralegals.

The Legal Aid Act places all providers including public benefit organisations and university law clinics under the coordination of the National Legal Aid Service (NALEAS). Only accredited persons and institutions can carry out legal aid under the national legal aid scheme.¹²³ This legislation provides for the accreditation of law clinics, which are for the first time being brought under some form of regulation.

¹¹⁷ *State of the Judiciary and the Administration of Justice* 2016-2017 (n 3) at 204, 211.

¹¹⁸ Amondi (n 45) at 205.

¹¹⁹ Legal Aid Act, No. 6 of 2016 (n 53) s 2.

¹²⁰ Legal Aid Act, No. 6 of 2016 (n 53) s 2.

¹²¹ Act No. 6 of 2016 (n 53) s 2.

¹²² United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems guideline 16.

¹²³ Act No. 6 of 2016 (n 53) s 56.

The Act establishes the NALEAS, which is entrusted with several functions notable of which are to promote public interest litigation,¹²⁴ to establish and administer a national legal aid scheme¹²⁵ and to develop and issue guidelines and standards for legal aid by non-governmental agencies.¹²⁶ Functions of the NALEAS also include assigning legal aid providers to persons granted legal aid under the Act.¹²⁷ Its legal aid function extends to promoting and supervising the establishment and working of legal aid services in universities, colleges and other institutions.¹²⁸

One among the functions of the NALEAS is specifically in relation to paralegals. The NALEAS is mandated to develop programmes for legal aid education and the training and certification of paralegals, in consultation with the Council of Legal Education.¹²⁹ The Legal Aid Act recognises the role of paralegals in legal aid work and defines them in the context of their access to justice tasks. It defines a paralegal as ‘a person employed by the Service or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education.’¹³⁰

A twelve-member board governs the National Legal Aid Service. The board is a statutory body made up of members from the profession and academia. These include one person nominated by the Law Society of Kenya¹³¹ and one person nominated by the Council of Legal Education from among universities with an operational legal aid clinic.¹³² Among other functions, the board is responsible for accrediting and entering into cooperation agreements with legal aid providers.

The NALEAS sets out to provide legal aid services at State expenditure to all who qualify for legal aid. The services are in civil, criminal, children, constitutional and public

¹²⁴ Act No. 6 of 2016 (n 53) s 7(1)(e).

¹²⁵ Act No. 6 of 2016 (n 53) s 7(1)(a).

¹²⁶ Act No. 6 of 2016 (n 53) s 7(1)(g).

¹²⁷ Act No. 6 of 2016 (n 53) s 7(1)(m).

¹²⁸ Act No. 6 of 2016 (n 53) s 7(1)(i).

¹²⁹ Act No. 6 of 2016 (n 53) s 7(1)(f).

¹³⁰ Act No. 6 of 2016 (n 53) s 2.

¹³¹ Act No. 6 of 2016 (n 53) s 9(g).

¹³² Act No. 6 of 2016 (n 53) s 9(l).

interest matters as well as other matters that may be approved by the board.¹³³ It provides the criteria for determining persons who are eligible for legal aid.¹³⁴

The NALEAS is guided by several principles in the exercise of its powers and functions. Although they reiterate the principles espoused in the Constitution, these principles are expressed in the Legal Aid Act as follows: the national values and principles of governance set out in Article 10 of the Constitution;¹³⁵ the values and principles of the public service set out in Article 232 of the Constitution;¹³⁶ the principles of impartiality, gender equality and gender equity;¹³⁷ the principles of inclusiveness, non-discrimination and¹³⁸ protection of marginalised groups;¹³⁹ the rules of natural justice;¹⁴⁰ and the provisions of any treaty or convention ratified by Kenya, in relation to the provision of legal aid.¹⁴¹ This restatement emphasises the intention the NALEAS has towards adhering to the stated principles.

The Act establishes a legal aid fund managed by the Board.¹⁴² The legal aid fund is sourced from financial allocation made by Parliament. The fund also receives gifts, grants, donations, loans, endowments and funding from other legal sources.

The rules under the Legal Aid Act are still being generated so the adequacy of this legislation remains untested. As such, the continued absence of affordable access to justice channels may compel indigent persons to explore extra-legal and at times, illegal ways of resolving their disputes.¹⁴³

3.4 LEGAL EDUCATION ACT

Law is offered as a first degree in Kenya so students join the course directly after completion of high school. Preparation for legal practice entails four years of undergraduate studies at

¹³³ Act No. 6 of 2016 (n 53) s 35.

¹³⁴ Act No. 6 of 2016 (n 53) s 36.

¹³⁵ Act No. 6 of 2016 (n 53) s 4(a).

¹³⁶ Act No. 6 of 2016 (n 53) s 4(b).

¹³⁷ Act No. 6 of 2016 (n 53) s 4(c).

¹³⁸ Act No. 6 of 2016 (n 53) s 4(d).

¹³⁹ Act No. 6 of 2016 (n 53) s 4(e).

¹⁴⁰ Act No. 6 of 2016 (n 53) s 4(f).

¹⁴¹ Act No. 6 of 2016 (n 53) s 4(g).

¹⁴² Act No. 6 of 2016 (n 53) s 29.

¹⁴³ Ouma (n 93) at 238-239.

university. This is followed by two years of training at the Kenya School of Law, which includes pupillage with an Advocate who has over five years of legal practice experience. Candidates who pass the bar examination then petition the Chief Justice for admission to the bar. After admission, advocates elect to join existing practices or establish their own practice.

The Legal Education Act has the twin objectives of promoting and maintaining the highest possible standards in legal education as well as providing a system to guarantee the quality of education and legal education providers.¹⁴⁴ The Act establishes the Council of Legal Education to set and enforce standards of legal education in the country together with the standards for regulation, supervision, accreditation and licensing of legal education providers.¹⁴⁵ These include standards of the curricula and mode of instruction, harmonisation, accreditation, licensing, monitoring and evaluation of legal education programmes and providers.¹⁴⁶ In implementing the objectives of the Act, the Council of Legal Education anticipates co-operation, consultation or collaboration with the Commission for University Education and other education regulators, the Law Society of Kenya and government departments or agencies with related functions.¹⁴⁷

The accreditation role of Council of Legal Education was clarified by the High Court in the Constitutional Petition *Moi University v Council of Legal Education and another*.¹⁴⁸ In the petition, Moi University School of Law sought to challenge the closure plan that Council of Legal Education had issued because of the school's failure to comply with accreditation standards set by Council. Moi University identified several steps it had taken to comply with accreditation standards such as its programme for infrastructural development, which Council failed to consider while coming to its decision. The University also argued that Council was unfair since it had altered its parameters in the subsequent audits and inspections. These actions cumulatively denied the students their constitutional right to education.

The Commission for University Education, as interested party, indicated to the court that accreditation is a statutory responsibility of the Commission and it was *ultra vires* for Council to

¹⁴⁴ Act No. 27 of 2012 (n 54) s 3.

¹⁴⁵ Act No. 27 of 2012 (n 54) s 8(1).

¹⁴⁶ Act No. 27 of 2012 (n 54) s 8(2).

¹⁴⁷ Act No. 27 of 2012 (n 54) s 13.

¹⁴⁸ *Moi University v Council of Legal Education and Another* [2016] eKLR 1.

usurp it via its 2009 Accreditation Regulations, which was subsidiary legislation. Council's role was to oversee, set standards and make recommendations to the government. They had no power to shut down an institution without authority from the Commission. The Commission further argued that Council was improperly constituted and could therefore not make valid decisions such as the one they were purporting to make. The thrust of Council's argument was that while the Commission was concerned with overall university education, Council was concerned specifically with matters of legal education.

Although the constitutional arguments on the right to education failed, the court abided by the wording of the respective statutes that while Council's role is to set standards, the Commission's role was accreditation. Terming them unnecessary 'turf wars', the judge frowned upon the conflict between the two institutions and advised them to exercise their powers 'in a manner compatible with the principle of service to the people of Kenya and for their well-being and benefit.'¹⁴⁹ The court found that since the Legal Education Act preceded the Universities Act, it could not have been in contemplation in the provisions of section 8 of the Legal Education Act that refers to its superiority in case of a conflict with 'written law for the time being in force.' Since section 31 of the Interpretation and General Provisions Act provides that 'no subsidiary legislation ought to be inconsistent with an Act of Parliament,' the court noted the accreditation regulations¹⁵⁰ were subsidiary to statutory provisions. The court therefore drew upon its powers to read in the phrase 'as per the standards set' into 'the institution is not accredited by the Council' in regulation 16(1)(d) of the regulations. Thus, the Court paraphrased the regulation as 'the institution is not accredited as per the standards set by the Council.'

The court found that Council had no power to accredit institutions, which is the role of the Commission. Council has a technical, advisory role in setting, regulating and overseeing standards of legal education in the country. The court therefore declared that the Council of Legal Education has no jurisdiction to accredit or withdraw accreditation of universities in Kenya. It found that Council had violated the constitutional principles of fair administrative action and quashed the report recommending the closure of Moi University. Additionally, the court made a declaration that Council was illegally constituted since it failed to comply with

¹⁴⁹ *Moi University v Council of Legal Education and Another* [2016] eKLR (n 148).

¹⁵⁰ Legal Education Act (Accreditation and Quality Assurance) Regulations Legal Notice No.15 of 2016.

statute. The court suspended the declaration for a period of 60 days to facilitate the proper reconstitution of Council and avoid the adverse effects of such a declaration on otherwise sound decisions that Council had previously made.

Legal education is defined in the regulations under the Act as

‘any qualification in law obtained after a training course or programme for the award of a certificate, diploma, post-graduate diploma, degree, or post-graduate degree or any other course or programme that the Council may declare to be legal education in accordance with these regulations.’¹⁵¹

This definition places all courses from certificate level within the purview of the Legal Education Act and Council of Legal Education.

Legal education in Kenya is split into a theory-based undergraduate degree followed by a practice-based bar school experience.¹⁵² Presently, an apparent dichotomy in approaches to legal education and consequently, to the legal profession is emerging. While academics view legal education as a liberal education on the nature and purposes of law in society,¹⁵³ practitioners perceive it as a trade and therefore legal education as preparation for a business or a craft.¹⁵⁴ This disparity in approaches is likely to be perpetuated in the aspects of CLE that they find compelling and in the overall contribution that their proponents make to the legal education process.

Given that the members of the legal profession are midwives of the transformative Constitution, several questions about current regulation of legal education in Kenya become pertinent. These are questions about whether the training of legal practitioners integrates transformative principles, whether there is any emphasis on social justice, whether legal education considers realities of the society outside of the Constitutional Law class and what place constitutional principles and values occupy in the lives and work of legal practitioners.

¹⁵¹ Regulations Legal Notice No.15 of 2016 (n 150) r 2.

¹⁵² Ojwang and Salter (n 13) at 88; AM Akiwumi *Report of the Task Force on the Status and Management of the Kenya School of Law* (1994) at 20, 45.

¹⁵³ Lynette Osiemo and Anton Kok ‘Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education’ (2020) 64 *Journal of African Law* 173 at 175; Kameri-Mbote (n 103) at 138.

¹⁵⁴ Apollo Mboya ‘The Bar: Challenges and Opportunities’ in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 243.

Other important questions are how chapter 6 of the Constitution on leadership and integrity is inculcated in law students and how the legal education framework assists students to develop a professional identity as well as to work towards a purposeful career that is consistent with the attainment of justice by society.¹⁵⁵ These questions are considered in both chapters three and four.

The Legal Education Act specifies the core courses that providers are required to offer at certificate, diploma, degree and professional level.¹⁵⁶ However, institutions remain at liberty to offer further courses as they may determine. The core courses at certificate, diploma and degree level constitute theoretical courses inclusive of Constitutional Law. Courses at the professional postgraduate diploma level take a more practical approach than at the degree level. Although they do not include Constitutional Law, there is a course in Trial Advocacy that is supposed to include a ‘clinical programme.’ The other core courses are Civil Litigation, Criminal Litigation, Probate and Administration, Legal Writing and Drafting, Trial Advocacy, Professional Ethics, Legal Practice Management, Conveyancing, Commercial Transactions and Pupillage. Should a law programme offer only the core courses stipulated under the Act, given the centrality of integrity in the legal profession especially under the transformative constitutional framework, it is presumed that the constitutional values and principles are transmitted during the course in Constitutional Law. Otherwise, it is apparent that national values and principles have no place in the legal education system.

Whereas the accreditation and quality assurance regulations under the Legal Education Act do not mention CLE, they make provision for experiential learning. Experiential learning is defined in the Act as ‘relevant skills, knowledge or competencies that have been obtained through work experience, informal training and life experiences.’¹⁵⁷ The understanding is that work experience exceeding ten years, informal training and life experiences confer skills, knowledge or competencies that are acknowledged by Council of Legal Education and can be assigned academic credit contributing to the award of a diploma or certificate qualification. This understanding of experiential learning excludes courses in law school taught through live client

¹⁵⁵ Elmarie Fourie ‘Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping Our Legal Order’ (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 3.

¹⁵⁶ Act No. 27 of 2012 (n 54) Second Schedule.

¹⁵⁷ Regulations Legal Notice No.15 of 2016 (n 150) r 2, r 8.

processes or through ‘learning by doing,’ which is the traditional understanding of experiential courses in law schools.¹⁵⁸ Nevertheless, Council of Legal Education contemplates the possibility of law schools engaging clinical pedagogy as one of diverse modes of course delivery. This is evident from the inspection criteria and guidelines for legal education programmes that Council developed as part of its standard-setting mandate.¹⁵⁹ These have a matrix on the curriculum and modes of delivery which provides scores for a school’s niche area, innovative modes of delivery, periodic update or modernisation of programmes, the use of tutorials and seminars as well as whether the institution has a legal clinic or conducts clinical studies.

It is at law school that lawyers are introduced to ‘legal culture’ what is defined as deeply rooted approaches to law, legal argument and politics in which lawyers are socialised.¹⁶⁰ It is the ideal place where responsibility for societal transformation and reconciliation is instilled. Surprisingly, legal education has been pointed out as one of the challenges of transformative constitutionalism.¹⁶¹ This position is in harmony with arguments for versions of ‘transformative legal education’ such as those that call for incorporation of humanity-*Ubuntu*.¹⁶² Transformative legal education is articulated as a three-point theoretical framework consisting of the content of legal education, how students learn and the ‘impact of digitisation’ on the learning process.¹⁶³ This research takes the approach that legal education plays a role in either strengthening or weakening transformative constitutionalism. Admittedly, sitting judges who were the fruit of ‘traditional and formal’ legal education, have been instrumental in judicial activism and path-breaking decisions consistent with transformative constitutionalism such as that nullifying the results of the 2017 presidential elections.¹⁶⁴

Research suggests that legal education and training could pose an obstacle to transformative constitutionalism in Kenya if legal education fails to keep pace with the

¹⁵⁸ Adrian Evans and others *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) at 41.

¹⁵⁹ Council for Legal Education *Inspection Criteria and Guidelines for Legal Education Programmes*.

¹⁶⁰ Klare (n 99) at 167.

¹⁶¹ Langa (n 1) at 355.

¹⁶² Radley Henrico ‘Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu’ (2016) 13 *US-China Law Review* 817 at 838.

¹⁶³ Geo Quinot ‘Transformative Legal Education’ (2012) 129 *South African Law Journal* 411 at 412.

¹⁶⁴ *Raila Amolo Odinga and Another v IEBC and 4 Others* [2017] eKLR (n 83).

Constitution's transformative goals.¹⁶⁵ Several scholars have made recommendations on how transformative constitutions can influence legal education and pedagogy. They put together a potential goal for legal education in proposing that 'a well-rounded graduate should display a commitment to constitutional values and principles and have the ability to apply these values and principles when entering the profession.'¹⁶⁶ Legal education should remind law students that law serves a purpose bigger than financial enrichment, which is the improvement of society.¹⁶⁷ Legal education serves a greater purpose of achieving social justice.¹⁶⁸ Additionally, the law curriculum should inculcate a critical sense.¹⁶⁹ It is important to recognise the transformative power of law and teach students to critically engage with the constitutional values instead of merely drawing legal conclusions from principles that cannot be questioned.¹⁷⁰ Thus, law teachers need to rise above 'black letter law' if law is to achieve social justice.¹⁷¹ These recommendations entail a shift in mind-sets and a change from rote-learning to more practical and critical teaching and learning methods.

A commendable effort is being made to reform the legal sector and align it with constitutional goals and aspirations. This is demonstrated by the establishment of the Taskforce on Legal Sector Reforms that had as part of its mandate to review the suitability and quality of legal education and professional training curriculum.¹⁷² The taskforce was also required to review the legal and institutional framework for regulation of legal education providers.¹⁷³ The review included a re-examination of the Legal Education Act and its systems for the promotion of quality legal education.¹⁷⁴

The stringent application of the Commission for University Education standards requiring all teaching staff to be PhD holders is problematic for law schools. This is because one of the challenges of legal education in Kenya is the shortage of postgraduate programmes and holders

¹⁶⁵ Freda Mugambi Githiru *Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya* (Unpublished Phd Thesis, University of Pretoria 2015) at 194.

¹⁶⁶ Fourie (n 155) at 3.

¹⁶⁷ Fourie (n 155) at 2.

¹⁶⁸ Radley Henrico (n 162) at 825.

¹⁶⁹ Githiru (n 165) at 198.

¹⁷⁰ Langa (n 1) at 355-356.

¹⁷¹ Radley Henrico (n 162) at 825.

¹⁷² Ojiambo (n 114) at 14.

¹⁷³ Ojiambo (n 114) at 15.

¹⁷⁴ Act No. 27 of 2012 (n 54) s 3.

of these qualifications in local universities.¹⁷⁵ Consequently, many legal education providers have insufficient numbers of teaching staff with the PhD level qualifications. They therefore fall short of stipulations laid down by the Commission for University Education.¹⁷⁶ The Taskforce on Legal Sector Reforms is apprehensive that strict enforcement of the Commission for University Education requirements for teaching staff could pose a potential hindrance to the gains made so far in ensuring access to legal education.¹⁷⁷

One interesting recommendation that this taskforce made was to have legal education providers conduct pre-university assessment of potential law students.¹⁷⁸ The focus of this was not only academic suitability but also strong personal values such as honesty and integrity. High moral and ethical standards would be valuable prior to their entry into and preparation for the legal profession because it places a premium on strong personal values. This innovative attempt to address the attitudes and character traits required of lawyers begs the question about the place of the Constitution's chapter six requirements of integrity, for legal practitioners. Since it is admitted that the legal profession needs persons who have a commitment to become moral and ethical persons,¹⁷⁹ it may be helpful to have a formal pronouncement requiring the legal profession to commit to the constitutional stipulations on integrity.

Presently, contemporary legal education is still criticised as a training towards self-enrichment and disengagement from poverty and appears far removed from the authentic needs of society.¹⁸⁰

3.5 UNIVERSITIES ACT

Law clinics in Kenya are typically hosted in law schools that are part of universities which are regulated by the Universities Act. The Universities Act provides for the establishment, accreditation, government and management of Universities in Kenya.¹⁸¹ It identifies universities

¹⁷⁵ Kameri-Mbote (n 103) at 132, 136.

¹⁷⁶ Commission for University Education *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* (2014).

¹⁷⁷ Ojiambo (n 114) at 54.

¹⁷⁸ Ojiambo (n 114) at 52.

¹⁷⁹ Ojiambo (n 114) at 52.

¹⁸⁰ Ouma (n 93) at 234.

¹⁸¹ Act No. 42 of 2012 (n 52) Objects.

as being either private or public. The difference between public and private universities is that public universities are established and maintained using public funds while private universities do not use public funds.¹⁸²

This legislation sets out manifold objectives of university education as follows: to advance knowledge through teaching, scholarly research and scientific investigation; to promote learning in the student body and society generally; to promote cultural and social life of society; to support and contribute to the realisation of national economic and social development; to promote the highest standards in, and quality of, teaching and research as well as the education, training and retraining higher level professional, technical and management personnel. Other objectives are to disseminate the outcomes of the research conducted by the university to the general community; to facilitate life-long learning through provision of adult and continuing education; to foster a capacity for independent critical thinking among its students; to promote gender balance and equal opportunity among students and employees as well as to promote equalisation for persons with disabilities, minorities and other marginalised groups.¹⁸³ In summary, universities seek to advance knowledge through teaching and research.

It is apparent that CLE's service objective is not captured in the mandate of universities as provided for in legislation. CLE with its twin service and learning objectives falls within the teaching objective of the university. In spite of this position, the majority of the universities in the country value clinic work and carry out access to justice projects to varying degrees. Considering the scholarly view that the social justice vis-a-vis academic orientation of clinics is a matter of emphasis and not exclusive or alternative goals,¹⁸⁴ it is still possible for Kenyan clinics to attain their social justice objective. The social justice function of CLE continues to be served when students are faced with real life issues from the clients and encounter societal access to justice needs. It is anticipated that these experiences infuse in the students an aspiration towards *pro bono* work in their future career. Social justice is also served when students offering some

¹⁸² Act No. 42 of 2012 (n 52) s 2.

¹⁸³ Act No. 42 of 2012 (n 52) s 3.

¹⁸⁴ Donald Nicolson "Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (2016) 23 *International Journal of Clinical Legal Education* 87 at 98
<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/download/532/922>>.

form of assistance to indigent persons through knowledge sharing, assisting in filling forms or making referrals to relevant institutions for support.

Although Kenyan legislation does not stipulate or propose teaching methodologies, there are countries in the continent that have legislated CLE as part of legal education reforms. Along this vein, experience from Nigeria is that the National Universities Commission in conjunction with the Council of Legal Education requires newly established law faculties to include teaching delivery methods that emphasise CLE.¹⁸⁵ This is specified in the Guidelines and Conditions for the Establishment of Faculties of Law in Nigeria that were passed in October 2009. The practice in Kenya is that law schools seeking accreditation are required to focus their law programmes on certain niche areas. This requirement has been provided for in subsidiary legislation.¹⁸⁶ The fields of focus are usually in alignment with the university's core mission, explaining why schools such as Moi University have a focus on clinical method of training in both law and medical schools.¹⁸⁷

In order to meet its objectives, the Universities Act establishes the Commission for University Education whose role is to regulate and accredit university programmes.¹⁸⁸ The Commission for University Education is also responsible for promoting the quality of research, innovation and university education in general.¹⁸⁹ Amendments to the Universities Act have clarified that the provisions of the Universities Act on approval and accreditation of programmes are superior to all other legislation dealing with these matters.¹⁹⁰ This provision is an attempt to clarify roles of overlapping accreditation bodies, which occurs with the approval of courses whose professional bodies also have an accreditation role such as those for lawyers¹⁹¹ and engineers. This amendment accords the Commission for University Education primacy over professional bodies such as Council of Legal Education, which had previously competed with the Commission for University Education in the accreditation function.

¹⁸⁵ Festus Okechukwu Ukwueze and Beatrice Obianuju Obuka 'Challenges and Strategies for Sustainable Clinical Legal Education in Nigeria' (2020) 54 *The Law Teacher* 385 at 388.

¹⁸⁶ Regulations Legal Notice No.15 of 2016 (n 150) r 4(3)(a).

¹⁸⁷ Kameri-Mbote (n 103) at 131.

¹⁸⁸ Act No. 42 of 2012 (n 52) s 5.

¹⁸⁹ Act No. 42 of 2012 (n 52) s 5.

¹⁹⁰ The Universities (Amendment) Act, No. 48 of 2016 s 5A(1).

¹⁹¹ Kameri-Mbote (n 103) at 128.

This legislation establishes the universities fund to receive allocations from Parliament, donations, income from investments, endowments, grants and gifts. It is to be spent on funding public universities and providing loans and grants to private universities.¹⁹²

The Universities Act establishes the Kenya Universities and Colleges Central Placement Service.¹⁹³ This is a student placement body that directs the distribution of government-sponsored students into both public and private universities. Consequently, both public and private institutions receive public funding and the argument that universities owe a moral duty to taxpayers who fund their education as a rationale for their engagement in legal aid therefore applies to both categories of institutions.¹⁹⁴

The Universities Act streamlines the government and management structures for both public and private universities.¹⁹⁵ Universities' efforts to align themselves with the Constitution are evident from the stipulation on discharging university functions and powers under the guidance of the national values and principles of governance provided therein.¹⁹⁶ For instance, one of the qualifications for appointment as Vice Chancellor or as a member of the Commission for University Education is integrity in accordance with chapter six of the Constitution.¹⁹⁷

3.6 THE KENYA SCHOOL OF LAW ACT

The Kenya School of Law (KSL) provides professional legal training for law graduates to prepare them for admission to the bar.¹⁹⁸ Since this is the practical stage of legal education, the Kenya School of Law recognises participation in moot courts, clinics and other practical outputs as part of the course of study.¹⁹⁹

Persons undertaking the Advocates Training Programme at the Kenya School of Law are required to serve pupillage. This is a six-month tutelage under the supervision of an advocate who has over five years' practice experience. Although pupillage is conducted in law firms, the

¹⁹² Act No. 42 of 2012 (n 52) s 53.

¹⁹³ Act No. 42 of 2012 (n 52) s 55.

¹⁹⁴ Donald Nicolson 'Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World' (2015) 22 *International Journal of the Legal Profession* 51 at 56.

¹⁹⁵ Act No. 42 of 2012 (n 52) s 34-43.

¹⁹⁶ Act No. 42 of 2012 (n 52) s 3(2); Constitution of Kenya, 2010 (n 35) art 10.

¹⁹⁷ Act No. 42 of 2012 (n 52) s 7(2), 38(4).

¹⁹⁸ Act No. 26 of 2012 (n 56) s 4(1), 4(2)(a).

¹⁹⁹ Act No. 26 of 2012 (n 56) s 19(3)(b).

Kenya School of Law manages it. In order to encourage firms to take on pupils, the Taskforce for Legal Sector Reforms has recommended that advocates should be considered for tax rebates for taking pupils and for providing legal aid.²⁰⁰ This suggestion to incentivise legal aid and training comes after the observation that there is a decline in public service and *pro bono* work by lawyers in Kenya.²⁰¹ Considering this decline in *pro bono* work, young lawyers invariably have reduced chances of learning public service at law firms if this was not inculcated in them while at law school.

The Kenya School of Law administers pre-bar exams to applicants as well as bar exams at the completion of the student's candidature. It is only those who pass the bar that are admitted to the roll of advocates. Whereas students are enrolled into Kenya School of Law with pass grades from their undergraduate studies, the performance at the bar exam is rather dismal.²⁰² This poor performance curtails their entry into the profession. If the increase in numbers of lawyers in any way represents a higher population to lawyer ratio, then it would be worthwhile to explore the establishment of other bar schools as foreseen in the Act. This measure may ensure that as many graduates as possible enter bar school and increase the prospects of admission to the bar.

Without a valid practicing certificate, a law degree holder lacks capacity to represent clients. A student who has failed the bar, however, may be engaged in other tasks that could facilitate access to justice such as jobs in civil society, research and community legal education. They may find room as legal assistants at in-house legal offices as well. It is unfortunate that the traditional law firm setting does not have a place for such candidates since they are neither pupils nor 'holding over' awaiting admission to the bar. Some sympathetic firms retain them as interns, legal assistants or researchers until they qualify as advocates.

It is noteworthy that all law students who want to take the bar exam must register at the Kenya School of Law which is based in Nairobi. Being the commercial hub of the country, Nairobi has remained the nucleus of legal practice since the pre-independence days. The concentration of the bar school and high-end law practices in the country's capital results in the majority of lawyers remaining and practicing in the city. The minority who have family,

²⁰⁰ Ojiambo (n 114) at 65.

²⁰¹ Ojiambo (n 114) at 11.

²⁰² Council of Legal Education (CLE) *Performance in the November 2018 Bar Examination Series General Notice No. 15 of 2019* (2019).

property, health or other compelling reasons return to practice in their respective counties after admission to the bar. This skewed distribution of lawyers impacts the population's access to lawyers and becomes an obstacle for access to justice in the neglected parts of the country. These 'non-lucrative' areas have become the forte of paralegals and the civil society organisations under which they work.²⁰³ The latter organisations have attempted to fill the gap created when lawyers concentrate their practices in the more urbanised parts of the country.

3.7 ADVOCATES ACT

The Advocates Act provides for the law on advocates in Kenya. It governs the qualifications and the right to practice as an advocate in the country.²⁰⁴ The Advocates Act provides for professional and educational qualifications for admission to the bar.²⁰⁵ It makes provision for the rank of Senior Counsel²⁰⁶ and stipulates the order of precedence in the legal profession.²⁰⁷ The Act deals with the matters related to issuance of practicing certificates,²⁰⁸ unqualified persons and offences by advocates.²⁰⁹ It provides for remuneration of advocates²¹⁰ and establishes a complaints commission.²¹¹ It also makes provision for discipline of advocates.²¹² This legislation offers a glimpse into the socialisation of lawyers in Kenya as well as their level of congruence with the constitutional values and aspirations.

Since legal representation is so closely guarded by the profession, advocates solely shoulder the task of ensuring access to legal representation. Their legislation also regulates the costs of legal services. Unfortunately, scholars are not optimistic about the legal professions' commitment to access to justice.²¹³ Moreover, their high legal costs prevent the public from

²⁰³ Jedidhah Wakonyo Waruhiu and John Justice Odhiambo Otieno 'Access to Justice: The Paralegal Approach' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 190.

²⁰⁴ Chapter 16 Laws of Kenya (n 57) s 9-11.

²⁰⁵ Chapter 16 Laws of Kenya (n 57) s 12-16.

²⁰⁶ Chapter 16 Laws of Kenya (n 57) s 17-19.

²⁰⁷ Chapter 16 Laws of Kenya (n 57) s 20.

²⁰⁸ Chapter 16 Laws of Kenya (n 57) s 21-30.

²⁰⁹ Chapter 16 Laws of Kenya (n 57) s 31-41.

²¹⁰ Chapter 16 Laws of Kenya (n 57) s 44-52.

²¹¹ Chapter 16 Laws of Kenya (n 57) s 53-54.

²¹² Chapter 16 Laws of Kenya (n 57) s 55-80.

²¹³ Ghai 'The Legal Profession: Themes and Issues' (n 4) at 31; Kibugi (n 23) at 39.

enjoying legal representation thereby presenting a barrier to access to justice.²¹⁴ Given the scale of the Advocates Remuneration Order, only the relatively wealthy can afford a lawyer.²¹⁵ Presently, the Advocates Act through its Continuous Professional Development Rules recognises *pro bono* work for the award of Continuous Professional Development points. This *pro bono* work ought to have been conducted under the Society's Legal Awareness Week Programme and the points awarded are at the Society's discretion. The current trend is that the points do not usually exceed 20 per cent of the maximum points required per year. Although the Act is silent on who is responsible for legal aid, the Taskforce on Legal Sector Reform made recommendations for incentives to encourage advocates to provide legal aid. These are incentives such as award of Continuous Professional Development points, a condition for the renewal of practicing certificates for the following year of practice or for appointment as Senior Counsel.²¹⁶ Meanwhile, practitioners remain hopeful that small and medium size law-firms still have room for access to justice work.²¹⁷ The grim picture is thereby painted of a Society whose *pro bono* service must be incentivised and attached to some personal benefit to the advocates in the form of certificates, professional development points, honours and similar items.

One of the ways in which advocates can address access to justice gaps is through sharing their legal knowledge with members of the public. This is because ignorance of the people has always been a barrier to access to justice.²¹⁸ Invariably, advocates share their knowledge when they participate in preparing law graduates for legal practice. They do this whenever they take on pupils who undertake their period of practical learning with them called 'pupillage.' During this training, law graduates assist in research, drafting, attending to clients and accompanying advocates to court sessions where they take notes. The law firms transmit to them knowledge, skills, and values central to the firm's areas of practice.

It is noteworthy that the Advocates Act dedicates its longest part to disciplinary matters. Coincidentally, reports on ethics, discipline and integrity in the legal profession,²¹⁹ point to a

²¹⁴ Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' (n 3) at 70, 74.

²¹⁵ Patricia Kameri-Mbote and Migai Akech *Kenya Justice Sector and the Rule of Law* (2011) at 156.

²¹⁶ Ojiambo (n 114) at 118.

²¹⁷ Mboya (n 154) at 244.

²¹⁸ Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' (n 3) at 70.

²¹⁹ George Kegoro, Anita Nyanjong and Janet Milongo 'Professional Integrity and Disciplining of Advocates: Room for Improvement' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional*

lamentable reluctance of the profession to conform legal practice to constitutional standards.²²⁰ In response to perennial shortfalls of ethics and professionalism in legal practitioners, there are recommendations that legal practitioners need to emphasise the values of ‘integrity, honesty, honour, independence, service and competence’ in their practice.²²¹ Professional integrity and discipline in the profession also stand in need of improvement because it is opaque to the public and appears unduly protective of the profession.²²²

There is room to develop perspectives of the profession beyond it being a mechanism for enrichment. The Judiciary has taken steps to reform and bring itself to some level of conformity with the constitutional values and principles as demonstrated by the vetting process and the transformative jurisprudence emerging from the courts. Since the bench and bar are handmaidens of the Constitution, it behoves members of the bar to rise to the occasion in ways that will convince society of their desire to live by the hard-earned fruits of the struggle for a new Constitution. These must be in overt ways such as a reflection of constitutional values in the statutes guiding the profession. These could entail a commitment to social justice manifested in non-remunerated ways that demonstrate a commitment to access to justice such as *pro bono* service, public legal education, financial support towards university clinics etcetera.

The Advocates Act provides that the rank and dignity of ‘Senior Counsel’ is conferred upon a person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya.²²³ While contribution to the development of the legal profession through scholarly writings and presentations is an outstanding criterion for conferment under the rules,²²⁴ public service is not. It is conceivable to have the profession explore the feasibility of including social justice achievements among criteria for eligibility for such accolades. Presently, the absence of access to justice provisions in the Advocates Act perpetuate a disjuncture between the legal profession and constitutional social justice and access to justice ends.

Order in Kenya (2014) at 116; PLO Lumumba ‘The Legal Profession and Crisis of Ethics’ in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 86.

²²⁰ Mutunga ‘The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship’ (n 3) at 62.

²²¹ Lumumba (n 219) at 98.

²²² Kegoro, Nyanjong and Milongo (n 219) at 118-120.

²²³ Chapter 16 Laws of Kenya (n 57) s 17(1).

²²⁴ The Advocates (Senior Counsel Conferment and Privileges) Rules 2011 r 11.

3.8 LAW SOCIETY OF KENYA ACT

The Law Society Act governs the affairs of the legal profession in Kenya.²²⁵ It makes provision for the establishment,²²⁶ membership,²²⁷ governance,²²⁸ secretariat²²⁹ and meetings²³⁰ of the Law Society of Kenya.

The fourteen objects and functions of the Society can for the purposes of this discussion be categorised into two. The first category entails assisting the government in the administration of justice and legal practice; maintaining standards of legal practitioners; improving standards of learning and competence for the provision of legal services; enhancing the professions' standards of ethical conduct and professional practice; promoting high standards of legal education for the profession and their service providers; assisting members in matters of welfare and practice conditions; transforming the profession through cohesiveness, accountability, efficiency and independence; promoting equal opportunities for members and developing adequate training programmes for members.²³¹

Objects and functions in the second category are to uphold the Constitution, advance the rule of law and administration of justice; protect and assist the public in matters relating to the law; promote restructuring of the profession in alignment with constitutional values, objects, spirit and principles; promote client and public interest by providing fair, efficient, and transparent procedures for resolving complaints against practitioners.²³²

The first category is inward looking and contends specifically with legal practice and the second deals with matters that directly affect members of the public.²³³ While the first category is important, this second category is of interest because of its direct link to access to justice for the indigent. The latter can be conflated with the Society's guiding principles of advancing

²²⁵ Act No. 21 of 2014 (n 55).

²²⁶ Act No. 21 of 2014 (n 55) s 3-6.

²²⁷ Act No. 21 of 2014 (n 55) s 7-14.

²²⁸ Act No. 21 of 2014 (n 55) s 15-25.

²²⁹ Act No. 21 of 2014 (n 55) s 2-29.

²³⁰ Act No. 21 of 2014 (n 55) s 30-37.

²³¹ Act No. 21 of 2014 (n 55) s 4(a), (e), (f), (g), (h), (j), (k), (m).

²³² Act No. 21 of 2014 (n 55) s 4(b), (d), (i), (l).

²³³ Act No. 21 of 2014 (n 55) s 4(a)-(o).

constitutionalism, facilitating access to justice, protecting the public interest and maintaining integrity.²³⁴

Whereas one of the principles governing the Society is the facilitation of access to justice, the legislation fails to address the Society's commitments relating to legal aid. Additionally, paralegals are defined as those offering support services to a legal practice.²³⁵ This definition is centred on law firms yet there are records indicating that persons referred to as paralegals have been instrumental in community education, advocacy and civil society work in the rural areas where few lawyers practice.²³⁶

The provisions of the Law Society of Kenya Act do not reflect the scholarly position that the legal profession has a legal and moral duty to assist those who cannot afford legal services.²³⁷ Neither does it indicate that access to justice is the role of the State and the legal profession, to which function clinics could anchor their contribution.²³⁸ Consequently, the absence of such a duty on the legal profession places an even lesser obligation on clinics and the academy in general to address access to justice needs in the country. It is therefore the case that clinics that focus on access to justice do so because the State and members of the bar have failed to take up their responsibility.²³⁹ The law schools contribute to these needs through research, teaching, public education and various forms of public service.²⁴⁰ It is ironical that law schools may be training lawyers to contribute to meeting society's access to justice needs upon attaining the necessary qualifications, yet this is a function which their Society does not require of them.

The Law Society of Kenya Act has recognised the importance of facilitating the work of advocates based in counties outside Nairobi.²⁴¹ The division of the Law Society of Kenya into eight different branches spread across the country is a step in encouraging the spread of advocates to places where they may previously have perceived that their Society is inactive or

²³⁴ Act No. 21 of 2014 (n 55) s 6(a)-(d).

²³⁵ Act No. 21 of 2014 (n 55) s 2.

²³⁶ Waruhiu and Otieno (n 203) at 189-191.

²³⁷ Sarkin (n 96) at 631.

²³⁸ Jane H Aiken and Stephen Wizner 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997 at 997.

²³⁹ R Wilson 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 *Penn State International Law Review* 421 at 430.

²⁴⁰ Debora L Rhode *Access to Justice* (2004) at 192.

²⁴¹ Act No. 21 of 2014 (n 55) s 34.

under-established in. That Law Society of Kenya branches were established in these counties ensures the decentralisation of legal practice from the Nairobi head office. Meanwhile, the ratio of lawyers to the general population as shown in chapter 3.3 as well as the poor distribution of lawyers in the counties remains inadequate. Their high concentration in large towns and cities serves to exclude access to lawyers for people living outside these regions.²⁴²

Transformative constitutionalism obliges lawyers to carry out professional work which is inspired by the goal of social transformation.²⁴³ The Law Society has capacity for this task given the historical role that the Society played in the clamour for political change through advocacy, constitution making, representing persons in court, calling for government accountability and joining matters before court as interested parties.²⁴⁴ It is acknowledged that the Society has continued to fulfil some of these roles by joining matters before court as *amicus curiae* and issuing statements on matters of public interest. It is likewise acknowledged that lawyers have been actively promoting social justice when they take up *pro bono* briefs, work in civil society, and enter into partnerships with law schools to assist with clinic work. It is important to reflect on the adequacy of these measures and to determine whether they meet the constitutional threshold for access to justice. Researchers have repeatedly found the Law Society's true concerns on access to justice for the indigent as feeble and rather discouraging.²⁴⁵ There is an ostensible disparity between the formal commitment to legal aid and what the Law Society practices. The legislative provisions indicate that there definitely remains great room for improvement of the commitment of lawyers in Kenya to social justice.

3.9 OVERVIEW OF LEGISLATIVE FRAMEWORK

Kenya has several legislations that make provision for access to justice and legal education. These form the legal framework underpinning the present inquiry. It follows from the preceding analysis that when read together, the legal education and access to justice legislations present a relatively strong framework that in certain instances is also fragmented, conflicted and marred by

²⁴² Waruhiu and Otieno (n 203) at 190; Ojwang and Salter (n 23) at 24.

²⁴³ Klare (n 99) at 151.

²⁴⁴ Mutunga 'The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship' (n 3) at 61.

²⁴⁵ Osiemo and Kok (n 153) at 174; Ghai 'The Legal Profession: Themes and Issues' (n 4) at 9; Ojwang and Salter (n 23) at 26.

gaps. These weaknesses serve to undermine a framework that is anchored in deep constitutional roots.

3.9.1 Strengths

The Constitution of Kenya is a transformative framework that has a robust bill of rights. It expressly provides for access to justice in both civil and criminal matters. The Laws of Kenya are construed in conformity with the Constitution²⁴⁶ thus the country has developed new legislation and amended or repealed existing ones to bring them to alignment with the Constitution. Additionally, the courts have endeavoured to interpret the Constitution in a transformative manner, giving meaning to the bill of rights.

Through its Judiciary Transformation Framework and the Judiciary blueprint titled ‘Sustaining Judiciary Transformation,’²⁴⁷ the Judiciary has systematically taken steps towards enhancing access to justice. These measures include bringing the courts to the people through concerted efforts such as constructing new courts and rehabilitating existing ones, employing more judges and magistrates, reducing the backlog of cases and making the courts a more amenable institution to the people of Kenya through entrenchment of policies to promote integrity.²⁴⁸

The establishment of a national legal aid scheme pursuant to the Legal Aid Act is a direct way in which the State has taken up its responsibility for assuring access to justice for all. This is a role that has continually been played by civil society with support from development partners in a bid to fill the lacuna left by the government.²⁴⁹ The Legal Aid Act was passed specifically to implement the constitutional provisions on access to justice.²⁵⁰ This is the only legislation that acknowledges the role that clinics play towards promoting access to justice for the indigent members of society.²⁵¹ It goes further to provide for accreditation of university legal aid clinics and their incorporation into the legal aid scheme. The accredited clinics anticipate some funding

²⁴⁶ Constitution of Kenya, 2010 (n 35) Sixth Schedule r 7.

²⁴⁷ *State of the Judiciary and the Administration of Justice Report 2017-2018* (n 3) at 18.

²⁴⁸ *State of the Judiciary and the Administration of Justice Report 2017-2018* (n 3) at 4-6, 14.

²⁴⁹ Amondi (n 45) at 206.

²⁵⁰ Act No. 6 of 2016 (n 53) Objects.

²⁵¹ Act No. 6 of 2016 (n 53) s 2.

from the legal aid fund established under this legislation. Such resources are likely to be a welcome boost to the operation of law clinics and their activities.

The Kenya School of Law Act refers to clinics in the context of acknowledging the contribution that their practical work makes to the learning process. Clinics, moot courts and other practical outputs are provided for in this legislation as a prerequisite for examination in any course of study at the school.²⁵² It is thus aligned to the pedagogical function of CLE.

The Taskforce on Legal Sector reforms is cognisant of the importance of integrity and personal values in the legal profession. It has therefore made recommendations to have these emphasised as early as the selection stage for undergraduate programmes.²⁵³ Meanwhile, the Legal Education Act includes Constitutional Law as one of the core courses for the study of law at certificate, diploma and degree level.²⁵⁴ Persons who undertake legal education at these levels are presumed to have learnt the constitutional values and principles as well as its transformative role.

The Law Society Act expressly enunciates the advancement of constitutionalism, facilitation of access to justice, protection of public interest and maintaining public integrity as its grounding principles. These principles display an intention to have the profession work in harmony with constitutional principles and values. Additionally, the Act has endeavoured to enhance the distribution of lawyers in all counties by introducing branches of the Society outside of Nairobi.²⁵⁵ This has the effect of decentralising Law Society activities and promoting access to lawyers in these counties.

The Universities Act requires universities to be governed in accordance with values and principles set out in the Constitution.²⁵⁶ It lays down the compliance with the integrity requirements of chapter six of the Constitution as part of the qualifications for Vice Chancellors and members of the Commission for University Education.²⁵⁷ In these specific ways, this legislation endeavours to align itself to constitutional values.

²⁵² Act No. 26 of 2012 (n 56) s 19(3).

²⁵³ Ojiambo (n 114) at 52.

²⁵⁴ Act No. 27 of 2012 (n 54) Second Schedule.

²⁵⁵ Act No. 21 of 2014 (n 55) s 24.

²⁵⁶ Constitution of Kenya, 2010 (n 35) art 3(2).

²⁵⁷ Constitution of Kenya, 2010 (n 35) art 7(2), 38(4).

3.9.2 Weaknesses

The legal framework is fragmented, has gaps, conflicts and overlaps which hinder its efficacy for enhancing access to justice through CLE.

3.9.2.1 Fragmentation

The legal provisions on access to justice and legal education are found in a multiplicity of legislations. This presents a fragmented legal framework which deals with varied aspects of legal education and access to justice and which establishes different funds and regulatory bodies. The Constitution of Kenya guarantees the right to access to justice and this guarantee is implemented by the Legal Aid Act, the Advocates Act and the Law Society of Kenya Act. The Universities Act, the Legal Education Act, the Kenya School of Law Act and the Advocates Act govern legal education. The Legal Aid Act establishes the National Legal Aid Service and the Legal Aid Fund. The Universities Act establishes the Commission for University Education and the Universities Fund.

This multiplicity brings with it the risk of duplication of roles and stipulations of institutions. It calls for an array of resources to keep them operational. There is also the risk of conflict between the various institutions. Exemplar of this conflict is the divergence between the accreditation roles of Council of Legal Education as established by the Legal Education Act and the Commission for University Education as established by the Universities Act, when it comes to law programmes offered in universities. This became the subject of litigation in *Moi University v Council of Legal Education* in which Judge Odunga termed the conflict as ‘unnecessary turf wars’ between institutions that are supposed to be at the service of the people of Kenya.²⁵⁸

²⁵⁸ *Moi University v Council of Legal Education and Another* [2016] eKLR (n 148).

3.9.2.2 Conflicts and overlaps

The overlap between the accreditation roles of Council of Legal Education and the Commission for University Education is not a recent phenomenon.²⁵⁹ Indeed, the Legal Education Act envisages cooperation between the bodies regulating education and legal practice. While cooperation has flourished between Council of Legal Education and the Law Society of Kenya, with the Law Society of Kenya being represented in the Council of Legal Education, this has not been the case between the Commission for University Education and Council of Legal Education. A further development in this matter is the 2016 amendment of the Universities Act vesting powers of accrediting both institutions and programmes, including the accreditation of law programmes as erstwhile provided for in section 8 of the Legal Education Act, in the Commission for University Education. The Universities Act was thereby amended to grant the Commission for University Education exclusive power in approval or accreditation of academic programmes offered by universities. Previously, the Commission for University Education was responsible for institutional accreditation, leaving room for professions and their bodies such as Council of Legal Education to accredit programmes. This amendment renders Council of legal Education's accreditation role illegal.²⁶⁰ The Council is relegated from an accrediting body to a consulting entity to which the Commission for University Education could delegate authority or consult for a specified function. Given that the Commission for University Education and its mother legislation do not appear cognisant of the access to justice role of CLE, this conflict potentially de-links access to justice and legal education as well as CLE as appreciated by the Kenya School of Law Act.

There is an apparent inconsistency between the objectives of universities as envisaged in the Universities Act and the expectations placed upon universities under the Legal Aid Act. The Universities Act establishes the objectives of universities as teaching and research institutions. The Legal Aid Act focuses on the clinics established in universities and is interested in their access to justice function that is not provided for in the Universities Act. Additionally, the extent of the supervisory role of the National Legal Aid Service over university law clinics is

²⁵⁹ Kameri-Mbote (n 103) at 128.

²⁶⁰ Act No. 42 of 2012 (n 52) s 5A.

potentially in conflict with university autonomy and the guidelines governing the operation of the clinics. The discrepancies that may emerge between the two expectations feed into the perennial conflict between the pedagogical and social justice aims of university law clinics.²⁶¹

There is a palpable disconnect between the legislations governing legal aid and legal practice, and between those governing legal education and legal aid. The legal profession is responsible for midwifing the Constitution. Thus, lawyers in practice are expected to embody the constitutional principles and be the forerunners of enhancing access to justice. Constitutional values, access to justice and legal aid matters are conspicuously absent from the Advocates Act that governs the individual legal practitioners and their firms. It is acknowledged that the Law Society Act, which governs the collective profession, makes mention of constitutional values and the facilitation of access to justice in general. Indeed, the Society has been active in public interest matters in the country. Additionally, legislation governing legal education is silent on legal aid, a concept within access to justice, yet this becomes an expectation when the law students eventually join the profession. Their training fails to reflect an aspect of an enormous expectation they shoulder both as individuals and as a Society. Thus, the stage and place where law students would be expected to cultivate their social justice outlook other than during their formative years at law school is open for speculation.

The disjuncture between legal aid and legal practice legislations is noticeable in how the role of paralegals is envisaged. While both the Legal Aid Act and the Law Society Act define paralegals, there is a nuance of a difference between the two definitions. The Law Society Act defines them only in support of a legal practice.²⁶² The Legal Aid Act offers them a wider definition with a view to highlighting their access to justice role.²⁶³

3.9.2.3 The gaps

Through the enactment of the Constitution and the Legal Aid Act, the State guarantees access to justice for all and undertakes to address the legal needs of the indigent. These laws also hold the

²⁶¹ MA (Riette) du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 12 at 19; Shelley AM Gavigan 'Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35 *Osgoode Hall Law Journal* 443 at 443.

²⁶² Act No. 21 of 2014 (n 55) s 2.

²⁶³ Act No. 6 of 2016 (n 53) s 2.

legal profession accountable for the constitutional promises in several respects. However, the country's approximately 17000 lawyers are expected to serve a population of 47.6 million people.²⁶⁴ The cost of legal representation remains high thus rendering legal service accessible only to the wealthy, except for those who are assisted by legal aid entities.

Constitution of Kenya 2010 creates duties for lawyers in the Judiciary, in commissions, in transmitting the spirit of the law, in the transitional provisions and in the implementation of new legislation. Lawyers are being trained in a constitutional order whose values have shifted significantly from those of the retired Constitution. This shift is not apparent from the courses on offer in the legal education institutions. Law clinics are recognised as legal aid providers by the national legal aid scheme, yet neither legal aid nor social justice feature in the regulation of legal professionals or in the core courses offered at university.

The transformative constitutional order and its social justice leaning are not apparent in the training of members of the legal profession. Constitutional values are not reflected in legislation governing the legal profession who are the custodians of the Constitution. Although the assumption is made that these are covered in the Constitutional Law class, its sufficiency in inculcating these values is debatable.

Law teachers present a neglected frontier in this transformative constitutional order. The legal educators' role is critical for awakening their student's sense of responsibility for transformation and the pursuit of social justice.²⁶⁵ As the ground has shifted, the ploughs must be adjusted too. Guidelines issued pursuant to the Universities Act address legal educators from the perspective of their academic qualification and raise the minimum standards for teaching at degree level from masters to PhD qualification.²⁶⁶ The Legal Education Act goes beyond the minimum qualifications for teaching staff and requires legal education providers to develop staff development policies, incorporating research, publication and pedagogy training. The latter legislation promotes the development of professional and academic skills of staff. It distributes the workload of fulltime staff as 60 per cent teaching, 30 per cent research and 10 per cent professional services. This distribution accords significantly greater weight to tasks carried out

²⁶⁴ Kenya National Bureau of Statistics (n 116) at 5; 'Law Society of Kenya' (n 116).

²⁶⁵ Radley Henrico (n 162) at 838.

²⁶⁶ Commission for University Education (n 176).

by staff in teaching oriented clinics than those in purely social justice clinics. It signifies a gap in recognising the engagement of academic staff in social justice clinics.

Both the Universities Act and the Legal Education Act treat academic staff as a homogenous entity. Thus, even clinical staff must strive towards these qualifications despite their engagement in practice-related tasks connected to clinics. Clinical work is therefore sidelined and not accorded due regard but is treated as an appendage to academic staff who will ultimately be torn between teaching, research, publication and other administrative duties. Although clinic work is stipulated as one of the conditions for eligibility for examinations at the Kenya School of Law, none of the legislation considers clinic work as material for the appointment or promotion of staff. The minimal percentages set for staff development budgets likewise reflect the priority placed in this endeavour. University staff will not be motivated to carry out clinic work if it is inconsequential to the legislation, their work-load and promotion criteria. Staff development is an area where resources can and should be placed if legal education is to cease to be an obstacle to the goals of transformative constitutionalism.

The Universities Act addresses teaching and research as the only objectives of university education. No direct reference is made to any sort of service to society as part of university objectives. When clinics are examined in this light, it is only their teaching function that seems recognised and therefore likely to receive support from university management. Their access to justice role, which is a great service to society and which furthers constitutional objectives, remains unappreciated by this legislation.

Indeed, efforts have been made to reform and improve legal education in Kenya. Nevertheless, CLE has been omitted in the reform of legal education. The 2005 Ministerial Taskforce made forthright recommendations for the redesign of legal education in the country.²⁶⁷ The majority of these recommendations have been progressively implemented. The Taskforce on Legal Sector Reforms made further recommendations in 2017.²⁶⁸ However, the recommendations did not address matters related to the development of law clinics and CLE.

²⁶⁷ Muigai Prof Githu *Report of the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya* (2005) at 19-28.

²⁶⁸ Ojiambo (n 114) at 119-145.

Although experiential learning is provided for in the Legal Education Act, there is a restricted approach to the meaning and purpose of experiential learning. The Legal Education Act provides for and recognises experiential learning yet it fails to consider the pedagogical aspects of experiential learning. Experiential learning is considered only in terms of previous work or training that is recognised for entry into a law programme. Further, clinics and experiential learning as traditionally conceived are not foreseen as important to legal education.

The Advocates Act does not yet have provisions on the role of advocates in access to justice. It is also silent on the commitment to constitutional values by legal practitioners. However, the Act legislates the rewarding of members who participate in *pro bono* work under the Law Society of Kenya's Legal Awareness Week Programme. These members gain Continuous Professional Development points that contribute towards their practice certificate for the following year. The Society determines the points to award for this specific sort of *pro bono* work.

The Law Society Act does not envision paralegal work outside the scope of legal practice. Nevertheless, paralegals have been a boon to access to justice and community education programmes in parts of the country where lawyers have not penetrated. As such, the Law Society's definition of paralegals needs to be broadened and made more inclusive of the paralegal's social justice role.

3.10 ROLE OF LAW IN ACCESS TO JUSTICE AND CLE

The colonial, postcolonial and present Kenyan society exemplifies the dynamic use of law in society and more specifically to either enhance or undermine access to justice. This experience conforms to arguments by scholars examining the function of law in society as 'the tool and not the driving force.'²⁶⁹ They admit that although the content may be different, law serves the same function in a democracy as it does in an autocracy or a dictatorship.²⁷⁰

The Kenyan society experienced the introduction of formal law through the transplanting of the English legal system into Kenya and its communities. These communities were hitherto

²⁶⁹ Charles E Clark 'The Function of Law in a Democratic Society' (1942) 9 *University of Chicago Law Review* 393 at 393.

²⁷⁰ Clark (n 269) at 400.

governed by community norms that sought to establish social order through customary laws. These norms differed from community to community and were dispensed by councils, chiefs or kings as the case may be.²⁷¹

In the colonial era, law was used as an instrument to disenfranchise local communities and to empower the dominant colonial authorities. Some of the laws that were enacted segregated and prevented Africans from accessing courts and lawyers thereby excluding them from the formal justice system. These laws also criminalised poverty. Exemplar is the 1925 Vagrancy (Amendment) Ordinance restricted movement of Africans, especially if they did not have a registered address. That had the effect of keeping Africans away from areas designated for white people thus helping to maintain colonial dominance. It established and perpetuated boundaries based on race.

The legal profession was also transplanted into the country to implement the colonial legal system. Members of the expatriate community dominated the legal profession with the intention of serving their interests and that of the colonial government. Laws, regulations and practices that systematically locked out Africans from the profession enforced this dominance. This use of law to exclude Africans from the legal profession was fuelled by the fear that allowing Africans into the profession would interfere with the regime and its political economy.²⁷² The regime was apprehensive that the indigenous lawyers would challenge the legitimacy of the colonial regime and their actions, and would apply their knowledge to spearhead the struggle for independence.

The colonial government bequeathed the nation a Constitution that steered it into the independence period. Soon after independence, the political elite amended this law multiple times thereby removing checks and balances as well as systems of ensuring accountability. These changes were aimed at concentrating political power in the hands of a few.²⁷³ Instead of independent governance, the Kenyan people were subjected to autocratic despotic rule supported by legal norms which scholars termed ‘Constitutions without constitutionalism.’²⁷⁴ The

²⁷¹ Jürg Helbling, Walter Kälin and Prosper Nobirabo ‘Access to Justice, Impunity and Legal Pluralism in Kenya’ (2015) 47 *Journal of Legal Pluralism and Unofficial Law* 347 at 267.

²⁷² Ghai ‘Law and Lawyers in Kenya and Tanzania: Some Political Economy’ (n 4) at 155.

²⁷³ Franceschi and Lumumba (n 32) at 32.

²⁷⁴ Franceschi and Lumumba (n 32) at 32.

government applied similar formal legal norms to oppress the people and achieve dictatorship rule. Thus, in the post-colonial era, law was systemically applied to legitimise impunity and State plunder. The boundaries that law established this time round were based on economic, political and ethnic lines. These boundaries undermined access to formal justice institutions and access to justice generally.²⁷⁵

The making of the 2010 Constitution in many ways fulfils the Hans Kelsen's argument of the *Grundnorm*, the norm at the apex of the legal order. He explains this as the superior norm at the top of the hierarchy that determine the creation of statutes and individual norms such as court decisions.²⁷⁶ This *Grundnorm* formed the backbone for the enactment of further legislation. The discourse of making a new Constitution was carried out within existing laws. It entailed an initial exercise of collating views from members of the public, which were incorporated into the drafts of the Constitution that were subsequently subjected to national referendum.²⁷⁷ Thus, the people of Kenya developed a *Grundnorm* to replace the repressive regimes of the colonial and post-colonial orders.²⁷⁸ It is noteworthy that in the Kelsenian sense, replacement of the *Grundnorm* is carried out by way of revolution which entails the removal of one legal order and its substitution with a totally different legal order.²⁷⁹ The process of establishing the 2010 constitutional order can still be considered a revolution albeit a non-violent one, achieving the same goal of bringing about a totally new legal order.

The 2010 constitutional dispensation heralds a radical change in the way law is employed. The Constitution is utilised to provoke transformation in society. Law is applied as an instrument for inclusion and empowerment. Legislative frameworks are aligned to the *Grundnorm* to facilitate enjoyment of rights enshrined in the Constitution. Law is used to enforce values and principles intended to apply equally to all persons. These values and principles guide the interpretation and enforcement of legislations by the courts. Law articulates and is used to enforce rights such as access to justice for all.

²⁷⁵ Helbling, Kälin and Nobirabo (n 271) at 350.

²⁷⁶ Hans Kelsen 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44 at 62.

²⁷⁷ Franceschi and Lumumba (n 32) at 49.

²⁷⁸ J. Rachuonyo 'Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case' (2018) 20 *Law and Politics in Africa, Asia and Latin America* 416 at 417, 426.

²⁷⁹ Rachuonyo (n 278) at 417.

Law provides for the establishment and operation of bodies that strive to meet statutory objectives and carry out duties as established by law such as the Commission for University Education and Council of Legal Education. Similarly, it provides for the creation of entities such as the Legal Aid Fund. Law allocates powers to these bodies to enable them to conduct their duties of accreditation or standard-setting. Law ensures disputes, even those between the regulators and the regulated, are resolved. Unfortunately, tensions emerge when there is an overlap or conflict in the functions of these institutions.²⁸⁰

The overarching legislation governing universities, the Universities Act, emphasises the teaching and research goal of universities. To this extent, it recognises the pedagogical role of CLE. The overarching legal aid legislation on the other hand, the Legal Aid Act, focuses on the social justice function of clinics. Through this split focus on disparate missions of CLE, the Kenyan legislative framework manifests and perpetuates the universal tension between the social justice and pedagogical aims of clinics.

Additionally, the legislative framework proposes to provide clarity through defining terms such as legal education, paralegals and clinics as used in the legislations. Nevertheless, tensions arise from nuances of differences in definitions of critical terms such as ‘paralegals,’ usage of the term ‘clinical’ and ‘experiential learning.’ These legislations thereby fail to provide the clarity they sought to achieve. These legislative weaknesses lower the efficacy of access to justice and its facilitation through university clinics.

There is a regulatory vacuum when it comes to CLE. The various legislations either grapple with clinics and their legal aid role or with clinics and their pedagogical role. Unlike in jurisdictions such as Nigeria, the law in Kenya is silent on CLE as a methodology or pedagogy. This legislative vacuum could have either of two effects. Since clinics have been in existence since 1973, their scanty existence in legislation could facilitate spontaneity, innovation and creativity in CLE because of the freedom that this provides. It could also have the opposite effect of stunting CLE especially if resource allocation is prioritised based on functions of universities as set out in legislation. Since law determines the discourse within which growth is possible,

²⁸⁰ *Moi University v Council of Legal Education and Another* [2016] eKLR (n 148).

these tensions and conflicts undermine access to justice and may become an enabler of extra-legal or even illegal measures by communities that cannot access justice through legal means.²⁸¹

3.11 CONCLUSION

Kenya's political history and the activism of the legal profession in this history sets the stage for the promulgation and implementation of the Constitution of Kenya 2010. The development of an indigenous legal profession was a slow and painstaking process that endured opposition from the colonial system. A law school was ultimately established in the country to stem the need for Kenyans to leave the country in pursuit of a law degree. This school in turn grappled with the challenges of training lawyers in a transitional country using curricula and material prepared for a different national context.

The shift from a colour bar colonial system to independent governance did not result in immediate relief for the people of Kenya. They continued to labour under despotic regimes whose rule was inconsistent with constitutional principles and whose impunity hampered the enjoyment of rights. Although judicial institutions had been established, the Judiciary was far from independent and failed to provide redress. The Judiciary's lack of independence compelled members of the profession to raise their voices against despotism and impunity that oppressed the people of Kenya. They also participated in the clamour for constitutional reform and eventual making of a new Constitution.

Unlike the retired Constitution, the 2010 Constitution goes beyond establishing three arms of government and providing for a narrowly interpreted bill of rights. The term transformative is endearing to the 2010 Constitution because it exceeds the establishment of governance structures by calling for social justice and reform guided by the national values and principles of governance. It creates a federal government system, articulates a robust bill of rights and addresses the controversial questions of electoral system, land, environment and public finance. The Constitution enunciates the principles and values that are required for leadership and public service and establishes certain independent bodies.

²⁸¹ Helbling, Kālin and Nobirabo (n 271) at 348.

This chapter envisaged a robust legislative framework supporting access to justice and legal education. It sought to address the third research question on the extent to which the current legal framework for CLE in Kenya fosters equal access to justice. The contribution it makes is that it provides a strong constitutional structure for access to justice in criminal and civil matters. However, when examined as a whole, the current legislative framework for CLE and access to justice is fragmented and fraught with duplication, gaps and inconsistencies that unless resolved may actually hinder the realisation of the Constitution's transformative goals.

Whereas the bench has been actively pursuing transformation right from their vetting to the emerging jurisprudence and judiciary transformation strategies, the bar appears to have been left behind in this endeavour. The legislation governing the bar does not inspire social justice and transformative values and principles in the legal profession. The legal education framework fails to mirror training in the social justice ethos of a legal profession called to operate in a transformative context. One clear example is the absence of access to justice responsibilities placed upon advocates. Consequently, these are not reflected in the content and methodology of core legal education courses. The revamping of the legal educator's function to match up to the transformative spirit is likewise neglected.

Admittedly, the Law Society and universities have endeavoured to ground themselves in constitutional principles. The Society has gone on to promote access to lawyers by decentralising their offices and activities.

There is a clear yet untested mechanism for access to justice in the national legal aid scheme. This defines, includes and potentially supports university law clinics. However, regulation governing universities aims at teaching and research thereby excluding the access to justice functions carried out by both staff and students in law clinics. Bodies governing university education and legal education entrench the estrangement of the social justice and pedagogical role of clinics. The practice legislation defines experiential learning and paralegal work only in relation to legal practice thereby excluding clinics and their social justice elements. Additionally, the disharmony between statutory bodies such as the Commission for University Education and Council of Legal Education is likely to result in further relegation of clinics, considering that Council has a greater appreciation for clinics than the Commission. In defining the role of the university as teaching and research institutions, the latter institution fails to

recognise the access to justice and service role of clinics. Meanwhile, legal aid legislations define clinic and paralegals in favour of access to justice work.

The current legal framework for access to justice is cognisant of university law clinics to the extent that clinics are recognised as legal aid providers. There is no legal framework for CLE even in the reform agenda of the Taskforces and thus CLE is abandoned to the autonomy and academic freedom of universities. They therefore apply and implement CLE as they find necessary. This is what the Kenya School of Law and universities such as Moi University have done.

Kenya's legislation presents the role of clinics in a dramatically binary fashion, recognising them either as social justice tools or as pedagogical tools. Whereas the overarching social justice goals and constitutional values and principles have made great strides towards access to justice, these have partially been reflected in legislations governing access to justice, legal education and the legal profession respectively. The legal framework demonstrates the pedagogical aspects of a CLE system that is at its very nascent stages, if the legislations governing legal education and the legal profession are used as an indicator. The social justice aspects of CLE are more clearly recognised as indicated by the provisions of the legislation on access to justice. As a whole, the social justice aspects of CLE are repressed by the imbalance and regulatory tensions that clinics endure at present. These, in turn, may frustrate their access to justice role.

CHAPTER 4: INSTITUTIONAL FRAMEWORKS FOR CLE IN KENYAN LAW SCHOOLS

4.1 INTRODUCTION

Chapter four delves into the institutional frameworks for CLE in the country, interrogating the ways in which CLE is operationalised in the national context and how legislative provisions impact clinical practice. This flows from the previous chapter, which examined the legal framework in which clinics and CLE operate in Kenya. The chapter consists of two parts. The first part is a discussion of the experience of CLE in Kenya as drawn from the engagements and interactions with stakeholders in university law clinics. The focus is on the prevailing models or designs of clinics and the programmes they conduct towards promoting access to justice. The second part investigates the setbacks that clinics encounter in their quest to mitigate unmet legal need in society.

Since law schools have adopted clinic models that are appropriate for their respective universities, the study examined all clinics in a bid to gain an in-depth view of the state of CLE in the country. It sought the shared experiences and characteristics as well as those that distinguished the different clinics. The first part therefore examines themes emerging from the grounded theory study of Kenyan clinics when addressing the institutional framework aspects of the third research question ‘how does the legal and institutional framework enhance access to justice through CLE in Kenya?’

In terms of CLE experiences, the law curriculum, students, academic staff and the place of clinics in the university structure emerge as critical elements of CLE in Kenyan universities. Interviews and focus group discussions yield another set of multiple intersecting and overlapping aspects of the clinics. These influence the role of clinics in mitigating the unmet legal need and promoting access to justice in the country. They are the clinics’ history, mission, structure, focus on access to justice work, clients, leadership, resources, sustainability, partnerships and networks.

The second part of the chapter reflects on the legislative and institutional factors and the extent to which these present a challenge to clinic activities. It examines practices of law clinics in Kenya and investigates the obstacles that university law clinics confront in their quest for access to justice. This second part addresses the fourth research question ‘what institutional

factors undermine the promotion of access to justice through CLE in Kenya?’ It likewise addresses some legal framework aspects of the third research question.

Chapter four makes an original contribution to knowledge by presenting the state of the art with respect to clinical practice in law schools in Kenya. Further, it builds up on literature by filling the research lacunae on the access to justice work conducted by university law clinics in the country. It interrogates the factors that undermine the use of CLE in promoting access to justice in Kenya therefore providing a basis for recommendations for the improvement of CLE and clinical practice.

The report withholds the identity of individuals and clinics in conformity with ethics permissions regarding participant anonymity.¹ In the instances where the participants granted these permissions, the researcher has withheld their identities for uniformity in the report. In both parts of the chapter, the clinic staff, students and collaborating institutions lend their voices to the themes and personal experiences that together make up the big picture of the status of CLE in the country.

PART 1

4.2 CLINIC HISTORY

The previous chapter examined the country’s access to justice history and the setting in which universities established their law schools since all Kenyan clinics operate under the aegis of universities.² It outlined the development of universities and noted that the country’s oldest universities are public universities while private universities are a more recent phenomenon. This is because the historical setting in which clinics develop usually has a bearing on the kinds of clinics that are set up, their mission as well as the nature of clinical work they undertake.³ These factors ultimately influence the sorts of challenges the clinics encounter.

¹ University of the Witwatersrand Human Research Ethics Committee (Non-medical) Ethics Clearance Certificate Protocol Number H18/10/17’ (2019).

² Strathmore University Law School *Exploring Opportunities for University Law Clinics in Kenya*’ (2019).

³ MA du Plessis ‘University Law Clinics Meeting Particular Student and Community Needs-A South African Perspective’ (2008) 17 *Griffith Law Review* 121 at 135.

The past decade witnessed a wave of establishment of law schools in private and some public universities in Kenya. Presently, 16 universities offer degree programmes in law.⁴ These are Riara University, Africa Nazarene University, University of Nairobi (in its Nairobi, Kisumu and Mombasa campuses), Kabarak University, Egerton University, Strathmore University, Kenyatta University, Jomo Kenyatta University of Agriculture and Technology, Catholic University of Eastern Africa, Mount Kenya University, Daystar University, Kisii University, Moi University, Umma University, University of Embu and Chuka University. More than half of the law schools are in Nairobi while the rest are in other counties. Of these, the researcher invited all 11 law schools that have some form of clinic activity to participate in the study and 10 participated as a result.

The law schools and their clinics boast rather short histories. A public university established what is now the oldest clinic in 1994. This is except the one that a different public university set up in 1973 and which thereafter morphed into an independent public benefit organisation.⁵ After the 1973 and 1994 clinics, records point to steady clinic activity taking place in 1999.⁶

More than 60 per cent of the universities listed above established their law programmes in the last decade. Thus, the majority of the clinics in the newer law schools are predominantly young, nascent clinics. These have been in existence for less than six years, are still in their developmental stages.⁷ Thus, it is apparent that clinics have not been in operation long enough for a clinical tradition to take root in these universities.

It is noteworthy that the universities are nurturing clinics in a practice environment that is devoid of a legal aid culture. This is because legal aid has been the preserve of paralegals and very few lawyers based in public benefit organisations that are largely donor funded.⁸ As explained in the preceding chapter, the history of the legal profession in Kenya is a profession

⁴ Council of Legal Education (CLE) *Status of Licensed Legal Education Providers* (2019).

⁵ Caroline Amondi 'Legal Aid in Kenya: Building a Fort for Wanjiku' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 205.

⁶ On file with author Protocol Number H18/10/17 'Interview 5' *Combined Transcripts* (2019) at 127.

⁷ On file with author Protocol Number H18/10/17 'Interview 1' *Combined Transcripts* (2019) at 5; On file with author Protocol Number H18/10/17 'Interview 2' *Combined Transcripts* (2019) at 19.

⁸ Amondi (n 5) at 205-206.

that has been sharply criticised for its focus on the business aspect of legal practice to the detriment of developing a *pro bono* culture.⁹

Universities established the majority of the clinics during the post 2010 era of transformative constitutionalism in the country. The hallmarks of the constitutional social justice agenda ‘access to justice and the fair administration of justice’ speak directly to the legal profession and to legal educators who train lawyers for their mission. A clinician aptly captures these hallmarks in her dreams for legal education when she says:

‘So, we just want to play our part in terms of access to justice. It is also a good way for the students to learn, even just learning how to process cases. ... most importantly, we want to expose the children, the students, to know that law is not just about making money. And even if you are making money, you are dealing with actual people. And so, we want them to give them a human face when they are still students. That is the only way... when they are out there, making money in big law firms, they can be able to volunteer to do one or two cases on *pro bono* basis. If you do not introduce this to them when they are still young, and students, it will be very hard to be able to sell this concept to them when they are already mature advocates. So, they need this conviction early on in life.’¹⁰

Evidently, law clinics are at an opportune time in the nation’s history to align their mission with the social justice agenda of the 2010 Constitution.

4.3 CLINIC STRUCTURE

Chapter one’s discussion of the meaning of CLE presented the diversity of approaches to CLE. Literature therein describes the ideal CLE model as consisting of learning through providing legal services to indigent clients under close supervision by a practicing lawyer.¹¹ That notwithstanding, the literature still considers practical learning models that do not contain all three elements as forms of experiential learning.¹²

⁹ Yash Pal Ghai ‘The Legal Profession: Themes and Issues’ in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 31.

¹⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 9.

¹¹ Adrian Evans and others *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) at 42.

¹² Evans and others (n 11) at 41.

Clinics in Kenya fall into two broad categories. These are curriculum-based and extra-curricular clinics. Curriculum-based clinics, as the name suggests, are clinics embedded in the law curriculum, which the universities offer either as elective or mandatory courses. The majority of these are credit bearing and constitute part of the requirements for the award of the undergraduate law degree.

Extra-curricular clinics are programmes engaging law students in a variety of legal aid and community education projects outside of their course hours. Although these activities confer opportunities for practical learning, they are voluntary and do not attract credits.

4.3.1 Clinic distribution

The distribution of clinics in the 10 law schools that were studied is presented in Figure 1. It is indicative of the variety of clinical programmes as well as the level of study at which they are offered in the respective institutions. While all schools offer the Judicial Attachment course, Clinical Externship is offered in five schools. The diagram also shows that the Public Interest Clinic, clinic club, Department for Legal Clinics and Externship, the walk-in clinic and student practice organisation are each offered in a different school, with a second school in the process of setting up a walk-in clinic. Additionally, student associations at eight schools offer legal aid clinics.

Figure 1: Distribution of Clinics in Kenya

Law School	Judicial Attachment Course	Clinical Externship Course	Public Interest Clinic Course	Department for Legal Clinics and Externship Courses	Walk-in Clinic	Clinic Club	Student Practice Organisation	Legal Aid by Student Associations
1	Year 2	Year 3	-	-	Under development	-	-	-
2	Year 2	Year 3	-	-	-	-	Year 1 to Year 4	-
3	Year 2	Year 3	Year 4	-	Year 1 to Year 4	Year 1 to Year 4	-	Year 1 to Year 4
4	Year 2	Year 4	-	-	-	-	-	Year 1 to Year 4
5	Year 2	-	-	-	-	-	-	Year 1 to Year 4
6	Year 2	-	-	-	-	-	-	Year 1 to Year 4
7	Year 2	-	-	Year 4	-	-	-	Year 1 to Year 4
8	Year 2	Year 3	-	-	-	-	-	Year 1 to Year 4
9	Year 3	-	-	-	-	-	-	Year 1 to Year 4
10	Year 3	-	-	-	-	-	-	Year 1 to Year 4

4.3.2 Curriculum-based clinics

Curriculum-based clinics are courses with a practical component. The curriculum treats these as clinical or experiential courses that are credit bearing. These courses find anchor in the curriculum of law schools whose niche or areas of specialisation are public service and experiential learning respectively. This is because they are in alignment with their university's areas of focus. Curriculum-based clinics take the form of the Public Interest Clinic course, Clinical Externship courses and a school department for Legal Clinics and Externship.

4.3.2.1 Public Interest Clinic Course

The Public Interest Clinic aims at preparing law students for public interest law and practice using both theoretical and practical methodology.¹³ Counting on knowledge gained from previous theoretical courses offered in law school, lack of access to legal services by indigent persons in both urban and rural communities inform the content of the Public Interest Clinic.

The fourth-year students who register for this elective course work at designing interventions for social justice issues in the community.¹⁴ The first part of the course entails lectures and seminar discussions on public interest litigation, access to justice, legal aid, public awareness campaigns and related matters.¹⁵ This introduction propels the students into the practical aspects of the course in which they develop an advocacy project that they implement during the semester when the course is offered. The students conduct the logistical preparations, mobilise resources and execute a legal awareness and aid clinic towards their advocacy project.¹⁶ Thus, this course is training in project management as well. The Public Interest Clinic builds linkages with the university's walk-in clinic because it accords students the possibility of referring clients to the walk-in clinic for further intervention.¹⁷

¹³ On file with author Protocol Number H18/10/17 'Interview 3' *Combined Transcripts* (2019) at 1.

¹⁴ On file with author Protocol Number H18/10/17 'Interview 3B' *Combined Transcripts* (2019) at 79.

¹⁵ On file with author Protocol Number H18/10/17 'Interview 3' *Public Interest Clinic Course Outline* (2019) at 4-8.

¹⁶ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' *Combined Transcripts* (2019) at 100.

¹⁷ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 80.

4.3.2.2 Clinical Externship Course

The Clinical Externship is a programme that exists in 5 of the 10 law schools that were studied. It takes the form of attachment programmes to law-related institutions. The course is either elective or mandatory for third year students in the several universities that offer it.¹⁸ Although the course titles may vary in the different universities, the course instructor takes the role of a coordinator who ensures that students go out and get practical experience from law firms, public benefit organisations and other institutions. There are proposals to develop additional clinical courses to augment the Clinical Externship course in one university where Clinical Externship is the only clinical course on offer besides Judicial Attachment.¹⁹

4.3.2.3 Department for Legal Clinics and Externship

One of the law schools has a department dedicated to Legal Clinics and Externship. The department administers a course that entails students writing papers on legal aspects of current events in the country as well as on critiques of Bills pending before parliament.²⁰ A student aptly described the course as follows:

‘But sometimes some lecturers try to fine-tune the research paper in a way that you have a semblance of a real clinical legal education. But normally it is just a research paper based on a legal problem. You research on it and write a legal opinion, or something latest that has happened in Parliament, a Bill, things like that.’²¹

Contrary to what the title suggests, the department operates as a secretariat and collection point for student research papers. The course instructor eventually grades the research papers as part of the student assessment process.

4.3.3 Extra-curricular clinics

As the title implies, extra-curricular clinics operate outside of the law curriculum. They exist in all universities irrespective of the university’s niche area of focus. Students organise and

¹⁸ On file with author Protocol Number H18/10/17 ‘Interview 7’ *Combined Transcripts* (2019) at 165.

¹⁹ On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 165.

²⁰ On file with author Protocol Number H18/10/17 ‘Interview 6’ *Combined Transcripts* (2019) at 140.

²¹ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 140-141.

participate extensively in voluntary legal aid clinics whose principal emphasis is access to justice. These student-led and run clinics are generally voluntary activities that do not bear credits. Extra-curricular clinics take the form of a semi-autonomous walk-in clinic, a university walk-in clinic, a clinic club, a student practice organisation and student associations.

4.3.3.1 Semi-autonomous walk-in clinic

The walk-in clinic is a work-in-progress by one law school that is in the process of establishing an entity that is semi-autonomous from the university structure. Although the structures of this new clinic are still in development,²² it has a member of academic staff as patron.

The proponents of the semi-autonomous clinic, an uncommon entity in the country, justify it by reasons of operational efficiency. The clinic patron is of the following view:

‘Because of bureaucracy, money does not flow that easily within the public university. If we are to establish a law clinic, an effective law clinic where we get outside external partners, and they put their money into our project and things do not move because money is taking long to be processed, I think we would be getting into a lot of accountability problems.’²³

The clinic presents the role of students as attending to clients from the initial point of screening. They then take notes, prepare the clients’ court documents and assist them to complete any necessary forms. The model is still in its infancy as it awaits approval from the university authorities.²⁴

While awaiting these approvals, the students participate in externships in different governmental and public benefit institutions where they can proffer their knowledge. The clinic patron explains thus:

‘The children offices, we have so many children offices scattered all over the country so a person who is a law student and trained on children rights and these other legal issues becomes a resource in such an office in resolving disputes....’²⁵

²² On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 6.

²³ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5-6.

²⁴ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5.

²⁵ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 4.

Interestingly, academic staff who are qualified advocates have already expressed their willingness to take up cases for court representation.²⁶

4.3.3.2 University walk-in clinic

Only one law school has an operational client walk-in clinic. This clinic is set at a different campus from the law school, albeit within the same city. It is a department within the law school and is therefore not an autonomous entity.²⁷ The clinic coordinator is a law lecturer who is a qualified advocate who oversees its activities and reports to the dean of the school while administrative staff manage the operations of the clinic.²⁸

Students from the law school have the option of volunteering at the clinic as an extracurricular activity. Although the role of these students is a voluntary one, they scarcely accomplish it ostensibly because of the relatively long distance between the law school and the clinic.²⁹

Clients receive legal advice on the issues they present to the clinic coordinator. The walk-in clinic is not specialised so it is open to receiving clients with legal issues from all aspects of law.³⁰ If there are clients with matters that the clinic cannot handle, the clinic refers them to other more suitable organisations.

The clinic has a lot of space that the university has allocated for its use. It is observable that this space appears underutilised and that the clinic is not yet operating at full capacity. The clinic attributes this position to financial difficulties experienced by the university that have subsequently clipped the capacity of the clinic.³¹

4.3.3.3 Clinic Club

The university operating the walk-in clinic also has a students' club referred to as the 'clinic club.' The clinic club is a student led and run entity that organises legal aid activities such as *ad*

²⁶ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 8.

²⁷ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 82.

²⁸ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 82.

²⁹ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 55; On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 81, 84.

³⁰ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 86.

³¹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 86.

hoc visits to remand centres and legal awareness clinics in communities experiencing systemic access to justice issues.³² The clinic club, like other clubs and associations for students in the university, charges an annual nominal subscription fee to all its members.

The chairperson is a student leader whose role is to assist the students in making decisions such as determining which remand centres to visit.³³ The club chairperson also puts together the teams of students for various projects. A member of the teaching staff takes the role of club patron whose responsibility is to oversee clinic activities and facilitate necessary permissions for club activities held outside the university precincts. To organise its activities, the clinic depends largely on funding from the school or from the club members' subscription fee when the school funding is lacking.

The clinic club serves the community's legal awareness needs in matters such as explaining and interpreting the law and legal processes. As put by a student leader:

'Some people don't know what the law is about. I heard you asking whether people cannot access the Constitution, some can access but they need interpretation of the law because sometimes the legal language is very complex. It is too complicated for the local person so they need interpretation. Sometimes those Acts are too long, they cannot read, maybe they just need an interpretation of it...'³⁴

In conducting its activities, the clinic does not specialise in any aspect of law as a way of remaining accessible to the needs of all persons. In explaining the general nature of clinic work, the student leader gives the following example:

'So, [...if...] our theme today is about killings and something like that and people come to you with land problems and now you just cannot send them away, so it's up to the public.'³⁵

³² On file with author Protocol Number H18/10/17 'Interview 3A' *Combined Transcripts* (2019) at 72.

³³ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 72.

³⁴ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 73.

³⁵ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 75-76.

The clinic club also endeavours to collaborate with other organisations that offer legal aid. The student leader underscores the clubs' collaboration with the Law Society as:

‘...you know the Law Society of Kenya organises a Legal Awareness Week every year for a whole week in October/November thereabout. So, we are supposed to participate in this. It is optional, by the way, so the school decides whether ... to take part in the LSK legal aid clinic. It is a week that is dedicated to offering legal aid services. It is usually done in every high court in Kenya, so it's usually all over Kenya, so as a school [XYZ] we've always participated in the legal aid week....’³⁶

4.3.3.4 Student Practice Organisation

One of the private universities runs a student practice organisation. A student practice organisation is a student-led and run entity which students refer to as such because they feel the term ‘club’ does not represent the level of commitment that legal aid work entails.³⁷ The student organisation aims at student-centred legal awareness programmes up to the level of strategic litigation. A member of faculty serves as the clinic director whose role is to supervise the student legal awareness programmes.

The programmes focus on three thematic areas; human rights, entrepreneurship and criminal justice.³⁸ A steering committee elected from clinic members with leadership experience oversees the management of these units.³⁹ This committee meets regularly with the leaders and assistant heads of the thematic units. The coordinators of the clinic units report monthly to the clinic president and steering committee.⁴⁰ They have even developed a procedure handbook that outlines the organisation's internal control systems.⁴¹

The steering committee preserves the continuity of clinic activities by spearheading an annual student recruitment as well as a regular assessment of the performance of clinic

³⁶ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 71.

³⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ *Combined Transcripts* (2019) at 27.

³⁸ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 16.

³⁹ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 20.

⁴⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25.

⁴¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 26.

members.⁴² Thus, the organisation only retains students who demonstrate commitment to clinic projects.⁴³

The student practice organisation collaborates with like-minded partners in executing its projects. In this regard, one student leader shares as follows:

‘Indeed, our projects are normally collaborations with partners. So, we have collaborated with community-based organisations ..., because they are on the ground they are able to tell us what conversations are happening. ... and then from there we are able to design and implement certain legal awareness programmes which we think are necessary to react to those particular issues and then through the collaboration we both implement, both the community-based organisations and us, implement the programmes.’⁴⁴

The clinic conducts its advocacy through blogs and online projects.⁴⁵ The students also run online campaigns on topical issues such as sexual offences.⁴⁶ This use of digital technologies has expanded the reach of clinic tremendously.

The clinic has also developed manuals that students utilise in running community education programmes for indigent youth from the informal settlement neighbouring the university.⁴⁷ Training of community youth leaders serves as a ‘training of trainers’ because these youth transfer the ideas they receive from the training to other persons within their community and community-based organisation.

4.3.3.5 Student Associations in public universities

Public universities boast a vibrant array of student organisations. The respective universities register their student associations and their constitutions as such.⁴⁸ Student associations and organisations in public university law schools predominantly perform clinic work.⁴⁹ One example is the Student Association for Legal Aid and Research (SALAR) that has since

⁴² On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 24.

⁴³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 35.

⁴⁴ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 17-18.

⁴⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 27.

⁴⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 34.

⁴⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 33.

⁴⁸ On file with author Protocol Number H18/10/17 ‘Interview 6A’ *Combined Transcripts* (2019) at 151.

⁴⁹ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 138.

inception hosted a client walk-in clinic.⁵⁰ Unfortunately, the walk-in clinic is no longer in operation due to, among other reasons, lack of space.

Established in 1999, SALAR is the host entity for an extracurricular clinic.⁵¹ It has an academic staff member as patron. The students operate and manage SALAR's activities. They elect from among themselves student officials who run the club in the positions of Chairperson, Vice-Chair, Secretary General, Treasurer and Organising Secretary.⁵² The association conducts legal aid clinics, community outreach projects and research for publication in journals.⁵³ In partnership with legal aid programmes run by public benefit organisations, SALAR engages in community outreach projects and mentoring of students in schools in low-income settlements.⁵⁴ The association has memoranda of understanding with two public benefit organisations that facilitate teams of students to assist with the organisations' legal aid programmes. A student leader describes these partnerships as follows:

'That entails giving.... The members in need of legal aid come with their problems to either of the two organisations. Our partnership with the two organisations... they call us when they have such events. So, we send a number of students, either four or five, depending on the capacity need that the partners require. They assist in giving the legal aid which mainly ranges from Labour Law... specific aspects of Criminal Law and a little of Succession and Refugee.'⁵⁵

The other public universities have similar students' associations that mirror this elaborate leadership structure.⁵⁶ These associations engage in community legal education projects and do not attract course credits. Additionally, the student associations do not limit the scope of legal matters they deal with to avoid excluding the clients they serve.⁵⁷ Whenever a client needs further interventions beyond advice, the students refer them to the appropriate institutions. To

⁵⁰ On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 128.

⁵¹ On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 131.

⁵² On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 127.

⁵³ On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 126.

⁵⁴ On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 129, 131.

⁵⁵ On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 129.

⁵⁶ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 139.

⁵⁷ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 143.

preserve institutional memory, these students endeavour to record and document their clinic activities.⁵⁸

4.4 CLINICS AND THE LAW CURRICULUM

The law curriculum serves as the blueprint for the content and methodology of legal education offered at university. It provides a framework that guides the teaching and learning process. Whereas scholars qualify clinical programmes as strong when they are rooted in the curriculum as mandatory courses, their success is determined by an effective assessment programme that identifies clear outcomes, skills and values.⁵⁹

By incorporating and allocating the areas of emphasis between serving indigent persons in community and teaching students, the curriculum design presides as an umpire in the perennial tension between service and learning dimensions of CLE.⁶⁰ It is therefore the case that the curriculum lends support to the service mission of CLE because it contributes to raising the standards of legal work carried out in the clinic.

From the foregoing, it is optimal to approach any attempts at using clinics for transformative legal education from the level of the curriculum. Thus, evaluating the transformative elements of the training of lawyers in Kenya entails an interrogation of the content of the curriculum, the first of the three-pronged framework for transformative legal education. This framework revolves around the content of legal education, teaching methodology of law and the use of technological advancements in teaching.⁶¹

Kenyan law schools offer a variety of courses, both theoretical and practical. The theory courses offered in the foundational years at university imbue students with knowledge that they then apply to practical courses in succeeding years.⁶² Accordingly, procedure courses such as Civil and Criminal Procedure facilitate the fruitful participation of students in the Externship and

⁵⁸ On file with author Protocol Number H18/10/17 'Interview 6A' (n 48) at 148.

⁵⁹ MA du Plessis 'Clinical Legal Education: Planning a Curriculum That Can Be Assessed' (2011) 36 *Journal for Juridical Science* 25 at 26, 38.

⁶⁰ MA du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (2008) 33 *Journal for Juridical Science* 1 at 1, 10, 16.

⁶¹ Geo Quinot 'Transformative Legal Education' (2012) 129 *South African Law Journal* 411 at 411.

⁶² On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 4; On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 137.

Attachment Programmes.⁶³ Such practical courses presented as part of the clinical programmes are Judicial Attachment, Clinical Externship, Public Interest Clinic and Legal Clinic and Externship projects.

Both legislation and university policy on the institution's niche area of focus guide the content of the law curriculum in any university. The Legal Education Act provides the list of core courses that universities must offer at degree level.⁶⁴ These are Legal Research, Law of Torts, Law of Contract, Legal Systems and Methods, Criminal Law, Family Law and Succession, Law of Evidence, Commercial Law (including Sale of Goods, Hire Purchase and Agency), Law of Business Associations (including Insolvency), Administrative Law, Constitutional Law, Jurisprudence, Equity and the Law of Trusts, Property Law, Public International Law and Labour Law. Resultantly, all law schools offer these as mandatory courses in their curriculum. It is noteworthy that these mandatory courses are all theory courses, some of which could employ clinical methodology with some ingenuity by teaching staff.

One of the conditions that a new law school must fulfil to meet the threshold for accreditation is that the law curriculum must have a unique niche of focus.⁶⁵ The school's niche is usually in alignment with the wider university's niche area. Such focus could be a field of specialisation such as commercial law or training for public service. A niche could also be a pedagogical approach such as clinical training.⁶⁶ The respective institutions would thereafter supplement the courses with additional courses that serve to advance their niche area. Consequently, students who enrol in institutions whose niche is in public service are more disposed to acquire a superior social justice training compared to those enrolled in institutions whose curriculum is commercially oriented. This requirement of giving prominence to a niche area presents the risk of an overload of courses in the curriculum.⁶⁷ This would be the case where an institution attempts to provide a wider variety of courses to meet competing interests such as

⁶³ On file with author Protocol Number H18/10/17 'Interview 4' *Combined Transcripts* (2019) at 121.

⁶⁴ Legal Education Act, No. 27 of 2012 Second Schedule.

⁶⁵ Legal Education Act (Accreditation and Quality Assurance) Regulations Legal Notice No.15 of 2016 Third Schedule r 14 (c).

⁶⁶ Patricia Kameri-Mbote 'Legal Education and Lawyers' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 131.

⁶⁷ Kameri-Mbote (n 66) at 130.

attempting to incorporate emerging areas of law, legal aspects of national and international interest as well as courses that are perceived to be relevant for new generations of lawyers.

There is a noteworthy attempt in law school curricula to ensure that students have a practical experience of both the bar and bench before completing the degree programme. To this end, the curricula in Kenyan law schools offer at least one clinical course in the entire programme consisting of attachment to legal institutions.⁶⁸ It is generally the case that the curriculum provides for a student externship at the courts and another at law offices as a way of exposing students to practical aspects of the law.

The law school's niche area notwithstanding, all institutions offer externships that serve to expose students to the society's engagement with law. The institutions attempt to offer some degree of exposure to social justice matters while maintaining course offerings that perpetuate the university's niche area. Endeavours to strike this balance often lower the chances of universities incorporating multiple clinical courses in the curriculum in the interest of having a manageable number of courses on offer.

The courses offered at law school are reflective of the transformative provisions of the Constitution 2010.⁶⁹ The evidence for this is in the linkages between the 2010 Constitution and the content and method of courses offered in the law schools. Course units such as Administrative Law and Human Rights Law incorporate access to justice as an area of focus.⁷⁰ The classes on Constitutional Law canvass both constitutional principles and values.

Clinical courses in the law curriculum express an underlying and indirect social justice mission.⁷¹ The courses offer law students a glimpse of law in society and of indigent persons in conflict with the law. In this way, the clinic experience also serves as an indicator of the inadequacy of case law and the limits of case method of teaching that is prevalent in the teaching of theory courses in law schools. A student expresses her interaction with unmet legal need and the inadequacy of case method of teaching thus:

⁶⁸ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 3; On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 57; On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 100.

⁶⁹ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 137.

⁷⁰ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 15.

⁷¹ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 108.

‘Once you go outside you encounter real problems, challenges that people face. So, you get an exposure.... So, now I am in a better position to assist someone with legal aid than someone who has never attended legal aid because now I have that first-hand exposure to know the real problem that people face. Because now in school we read about cases, and now these cases do not tell us about the background story what these people really went through, they only report maybe the facts, just a summary of the facts, maybe the judgement and that is not enough for you to know what real problems there are.’⁷²

After completing their second year of study, all law students undertake the Judicial Attachment Programme, commonly referred to as ‘clinicals.’⁷³ Law schools categorise the Judicial Attachment Programme as part of the curriculum-based clinical training.⁷⁴ This programme entails several weeks of attachment at a court under the supervision of magistrates and other judicial officers. There, the students experience court processes in both civil and criminal cases from the perspective of the bench. Judicial Attachment accords students their first formal exposure to the workings of the national justice system.⁷⁵ It confers upon students the opportunity of a first-hand experience at the application of law in the court system.⁷⁶ Therefore, when interrogating the extent to which the law curriculum forms the blueprint for the training of members of the legal profession as midwives of transformative constitutions, it is conceded that legal education indeed considers the realities of the Kenyan society outside of the Constitutional Law class. This is the case when students confront the practicalities of the dispensation of justice from the perspective of both the bench and the bar. In this instance, the students learn by engaging with law in practice and not as taught to them authoritatively as by ‘a sage standing on a stage’ in the expression used by the transformative legal education proponent Quinot.⁷⁷

Law schools present externships as curriculum-based practical learning courses. Some universities avail these courses on an optional basis at public or government institutions where they run for the duration of one semester.⁷⁸ When offered as optional courses, such externships

⁷² On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 76.

⁷³ Commission for University Education *Credit Accumulation and Transfer System: Bachelor of Laws* (2013) at 47; JB Ojwang and DR Salter ‘Legal Education in Kenya’ (1989) 33 *Journal of African Law* 78 at 84.

⁷⁴ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 79.

⁷⁵ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 115.

⁷⁶ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 15.

⁷⁷ Quinot (n 61) at 417.

⁷⁸ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 114-115.

have not been popular with students although the few students who participate consistently report an extremely rewarding experience. A course instructor explains the negative attitude towards optional externships as being founded on a lack of awareness about the category of students targeted by the programme as well as discouragement about the extra expenditure incurred in the daily commute to and from the externship offices:

‘The irony is that students don’t first voluntarily take up the course but then those who choose to do it express that they’ve learned so much when they were doing the unit. ...there is one particular group that when I asked why they did not sign up, said that they thought the programme was for specific students. When we put up the notice, it was very clear that any student could sign up. So, they assumed only a few people would be chosen so they don’t even bother to write their names...because they are not paid a stipend so they feel that “I spend all this money on travel and then I’m not paid anything so I’d rather do the ordinary courses rather than spend extra money” but they don’t factor in the kind of experience that they get; which for me, is absolutely necessary.’⁷⁹

The Public Interest Clinic is a course dedicated to social justice matters which one law school offers in the fourth year as an elective unit.⁸⁰ It specifically serves the students who are in their final year of law school and who have an interest in legal aid.⁸¹ The course therefore attracts students who perceive law as a tool for social justice.

Public Interest Clinic sensitises students on the role of law in society and offers them the means to address systemic issues in the community.⁸² The following excerpts from students’ own comments demonstrate their interest in applying the law to attain social justice:

‘I1: And the reason why I chose to do Public Interest Clinic was basically access to justice.’⁸³

‘I1: So, in fourth year, I got to do Public Interest Clinic and I chose that because there’s really need to create awareness on issues that perhaps the larger society is afraid of talking about. Just to deal with it... So, knowing how committed I was, you know, to legal aid clinics since first year [of

⁷⁹ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 115, 119-121.

⁸⁰ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 57; On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 79.

⁸¹ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 63-64.

⁸² On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 67.

⁸³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 94.

law school], then that gave me at least an upper hand to try and even do more with the knowledge I gained.’⁸⁴

‘I1: So that made me appreciate the essence of having such legal aid clinics because [...] at least it brings the less privileged, you know, people to be on the same level playing field with the others who can be able to easily access advocates and easily solve their issues in courts.’⁸⁵

‘I2: Personally, I come from a society that is fragmented in terms of social justice. And that gave me the drive to pursue law.’⁸⁶

The Public Interest Clinic course addresses current social justice issues in the country. It equips students to develop strategic clinical interventions and advocacy plans for specific issues identified by the students.⁸⁷ Thereafter, the students have the option of engaging with the selected issues by creating awareness, supporting public interest litigation and making proposals for law reform.⁸⁸ Different students describe their responsibility for some of their interventions as follows:

‘I1: And (um), we did it [at place ABC], so that's the area, you know, which has prevalent cases of extrajudicial killings and interacting with the audience gave us, you know, a podium to learn and just feel the way they do feel because it's painful to them and we have to learn and we have to come up with solutions that will be able to help them, that will be able to stop this.’⁸⁹

‘I2: It was quite an experience because you just have to (like) do all the planning from day one to the execution date. ...Of course, we executed our plan on a weekday. ...So, the main issue was we had low attendance. So, we worried—what will we do? We have some few guests, but the public, the main issue was mobility, when then the public is not there. So, we took up the matter, we did not just give up and all that. So, we went on the street with T-shirts ..., with our programme inscribed on the T-shirts, so we could actually speak to each person.... We just needed their views

⁸⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 95.

⁸⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 97.

⁸⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 102.

⁸⁷ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 58.

⁸⁸ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 59.

⁸⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 96.

and how they understand this aspect of public participation. So, our main issue (like) is to create awareness for these persons with disabilities.’⁹⁰

‘I3: So, when the public is denied this information, then we get the script from an aspect of legal aid. But personally, I have had an amazing experience as the way my colleagues have explained, because we were on the ground and we get those emotions and those feelings about how people understand the law and how they perceive the law.’⁹¹

Students undertaking the Public Interest Clinic course also have the possibility of understudying a public interest litigation case and assisting in the preparation of pleadings in the case. However, the course runs for one semester only so the students must monitor and complete the interventions that they propose within that semester. As a result, the students regard the option of mounting public interest litigation as too arduous because they would have to complete it within one semester and it would require the assistance of practicing advocates.⁹² This limitation of capacity and time renders community education the most popular project among students. In these community education projects, the students identify a legal issue, design an appropriate intervention, mobilise the relevant communities and stakeholder partnerships, locate a venue, procure the necessary licenses and ensure everything that is required for the success of the project is in place.⁹³ At the end of the course, the students engage in reflective practice and write a research paper that forms the basis of their assessment in the course.⁹⁴

The Legal Clinic and Externship projects are fourth year research projects that the department of Legal Clinic and Externship coordinates.⁹⁵ This is a course in which the instructor assigns to students research topics from current issues of public interest in the country, including Bills pending before parliament. The students conduct research and draft legal opinions on the assigned topics, which they submit to the course instructor for assessment. The course is essentially a research class whose practical element is the preparation of legal opinions on current issues and events in the country.

⁹⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 100-101.

⁹¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 105.

⁹² On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 61.

⁹³ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 59.

⁹⁴ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 60.

⁹⁵ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 140-141.

While all the universities offer practical courses such as Judicial Attachment and Clinical Externships, which find anchor in the law curriculum, not all clinical courses are curricular and only some are credit based.⁹⁶ With successive curricular reviews, universities have an increased impetus to convert practical courses from extra-curricular to curriculum-based courses and to attach credits to such courses.⁹⁷ One of the universities even proposes to pool clinic work, student participation in moots and the Student Law Review into an ‘Experiential Learning’ course with a view to awarding credits for these intensive and time-consuming learning activities.⁹⁸ The proposal is to have this Experiential Learning course encompass the practical extra-curricular activities and to integrate them into the curriculum. Nevertheless, the expediencies of assessing and crediting the proposed variety of clinic work in the curriculum remain to be determined.⁹⁹

It is noteworthy that this use of the term ‘experiential learning’ by law schools in the country is dissimilar to the provisions of the Legal Education Act which define experiential learning as ‘relevant skills, knowledge or competencies that have been obtained through work experience, informal training and life experiences.’¹⁰⁰ The definition in the Legal Education Act, which makes references to life experiences outside of law school, is a departure from established clinical practice in which only practical law courses offered in the curriculum are classified as experiential. While the Legal Education Act recognises experiences outside of the legal education setting for the purposes of accrediting it, the Experiential Learning course admits practical experiences acquired during the legal education process. The latter use of this term aligns with its universal application in the CLE tradition. Clinical tradition uses the term experiential learning to refer to law school courses in which students learn by doing, and it includes CLE, role-plays, mooting, simulation and placements.¹⁰¹ In this way, it is evident that experiential courses in the country appear to be developing in harmony with international practice, despite variances that legislation has introduced.

⁹⁶ Strathmore University Law School (n 2) at 5.

⁹⁷ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 14; On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 165.

⁹⁸ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 14.

⁹⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

¹⁰⁰ Regulations Legal Notice No.15 of 2016 (n 65) s 2.

¹⁰¹ Evans and others (n 11) at 41.

CLE literature from jurisdictions where CLE has taken deep root proposes to have CLE integrated into the entire law curriculum as a way of exploring its full potential.¹⁰² This suggests a shift from offering CLE as isolated courses. Contrary to this proposition that is gaining momentum in CLE circles, it is apparent from the foregoing discussion that Kenya is still grappling with the idea of incorporating CLE in the curriculum in the first place.

4.5 THE STUDENTS

School curricula that integrate CLE accord students the possibility of active learning while serving the indigent in the community. Although their research does not address students in purely social justice clinics, clinical scholars uphold the centrality of students in the CLE process while emphasising the need to have them at the forefront when working with clients.¹⁰³ This position renders students and not clients the focus of CLE programmes. This learner-centred approach makes learning through clinics more constructivist,¹⁰⁴ a factor that endears it to transformative legal education which presents learning as an active and subjective process.¹⁰⁵

In Kenya, the average proportion of university students engaged in clinics is only eight to ten per cent of the student population in the law school.¹⁰⁶ These students are spread over the four years of university, with the students in the junior years having the opportunity to learn from those in the senior years.¹⁰⁷ Such a distribution enables the students to work in teams and be capable of handling matters of various levels of complexity.

It is patent that the students select clinical courses because they find their social justice objective appealing. These students participate in clinic work and legal awareness projects on their own volition.¹⁰⁸ The following excerpts demonstrate how students sacrifice their time for

¹⁰² Shaheda Hasim Mahomed *Critical Evaluation of the Practical Legal Studies Programme at the University of the Witwatersrand* (Unpublished Phd Thesis, University of the Witwatersrand 2013) at 204.

¹⁰³ Du Plessis 'Clinical Legal Education: Planning a Curriculum That Can Be Assessed' (n 59) at 31.

¹⁰⁴ Neil Gold 'Clinic Is the Basis for a Complete Legal Education: Quality Assurance, Learning Outcomes and the Clinical Method' (2015) 22 *International Journal of Clinical Legal Education* 84 at 110 <<http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/406/793>>.

¹⁰⁵ Quinot (n 61) at 419.

¹⁰⁶ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 35; On file with author Protocol Number H18/10/17 'Interview 5' (n 6) at 128.

¹⁰⁷ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 139.

¹⁰⁸ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 94.

clinic activities and in turn, find fulfilment in using their knowledge to help people who cannot afford legal services:

‘...because at the end of the day the people are not being paid. Some people are like “I like working for the clinic, let me just miss this one class, right?” [laughter] yeah... and even sacrifice for meetings in the evening going on till eight-something....’¹⁰⁹

‘I think the thing was mining and the law, so we studied about mining, we read books. We do everything we can to understand so that we are in a position to offer legal assistance to those people because you know, as lawyers and law students, people do not understand that we don’t know everything. So, we just need to study because you can’t tell them “I don’t know” when they come for legal assistance.’¹¹⁰

‘Number one, I think it was an avenue of giving back to the community. In fact, we called it corporate social responsibility. It was fulfilling to actually leave school, go out there, and come back knowing that you’ve assisted one or two persons. And it also served as an avenue for applying what you’ve learned in class to the outside practice.’¹¹¹

Likewise, another student shares how the prospect of enhancing access to justice attracts students to the Public Interest Clinic and other clinical courses:

‘So, in fourth year, I got to do Public Interest Clinic and I chose that because there’s really need to create awareness on issues that perhaps the larger society is afraid of talking about just to deal with it head-on without feeling compromised or anything of the sort. ...But we chose the legal aid way because it is ideal, it is engaging, it is interactive, it just basically raises and answers questions at the same time. So, knowing how committed I was, you know, to legal aid clinics since first year, then that gave me at least an upper hand to try and even do more with the knowledge I gained. So, it is basically the only way you will get to interact directly with, you know, with the victims of injustices and with people who feel like, you know, perhaps going the litigation way or the court way may not really speed up this process of solving issues.’¹¹²

¹⁰⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 26.

¹¹⁰ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 74.

¹¹¹ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 133.

¹¹² On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 95.

The injustices that they or their families have encountered impelled some of the students to study law and eventually to participate in clinic work.¹¹³ One of the student leaders vividly narrates the experience of personal injustice acting as a spur to his engaging in legal aid as follows:

‘I was orphaned ... while I was in primary school. I did not know anything about the law, except the extent that I have to be a disciplined boy and I have to follow school rules. So, when that happens, I am left with ...a step-mother for that matter who is helpless because the family with poor cultural understanding comes in to take over the situation materially. So, they inherit on our behalf. They inherit what we should have owned. And it is followed by neglect and little fights here and there... So, by the time I get to Form One, I think about it and I think I could help someone as a lawyer as opposed to as a doctor because then I would think I could do one of the two professions... I always thought that if someone with legal knowledge had stopped by and given advice...back then maybe that squandering of our inheritance would not have happened. And then perhaps myself and my siblings would be in school comfortably and would have finished school comfortably. So, it has a personal attachment, ... for that reason.’¹¹⁴

There are other students whose attraction to clinic is the impact of the projects and activities that other clinic participants have carried out. Students witness their colleagues leading the operations of outreach projects and eventually feel drawn to this example of leadership.¹¹⁵ Examples of these are community education programmes on the rights of arrested persons in which regard a student leader made the following observation about growing the clinic membership:

‘So, we’re trying to devise ways of having impact with as little resources as possible and the little impact that we are having is really attracting people to the clinic.’¹¹⁶

Students from clinics based in private institutions generate an abundance of creative ideas about the possibilities of projects that they could run. Some examples are the ‘Innocence Project’ that aims at assisting persons who believe the courts have convicted them wrongfully, as well as

¹¹³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 102.

¹¹⁴ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 161-162.

¹¹⁵ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 118.

¹¹⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 30.

the use of technology to set up websites and blogs for legal awareness.¹¹⁷ A student leader depicts their use of technology in legal awareness below:

‘So, recently we have been trying to get up a website and some blogs for the clinic but we were unable to get the website up on time but we have started on the blogs. So, each individual unit has blogs and writers from the units post content there.’¹¹⁸

This sort of creativity is somewhat constrained in public universities, conceivably because of the limited resources available for clinics and for student extracurricular activities generally.

Nevertheless, the experience at the NALEAS is that students emerging from one of the public universities have superior training and are well prepared for legal aid work.¹¹⁹ These students, in turn, are very appreciative of their experience at the NALEAS.¹²⁰ This experience largely entailed assisting in training clients to carry out self-representation. During their attachment, these students would also assist with drafting client documents.¹²¹

An examination of the courses offered at this public university reveals that students from this institution have the advantage of multiple clinical opportunities. The law school has a clinic club run by students, a walk-in clinic operated by staff and a closely supervised clinical course in the curriculum. If the evaluation by the NALEAS is anything to go by, such multiple combination of clinical course offerings appear effective in preparing students for public service.

Overall, the clinic experience impacts students in multiple ways. This impact includes the students acquiring sustained commitment to access to justice as demonstrated by some aspects of the career decisions that students take.¹²² Relatedly, a clinic participant announced his professional plans as follows:

‘I think I have decided personally, when I get time, that I’ll be offering my services free of charge to the needy citizens. ... I think I want to acknowledge the fact that, despite there being an increase in the number of lawyers in Kenya, there is still a deficit of legal services to people who

¹¹⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 42.

¹¹⁸ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 39.

¹¹⁹ On file with author Protocol Number H18/10/17 ‘Interview 8’ *Combined Transcripts* (2019) at 177.

¹²⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 97.

¹²¹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 164.

¹²² On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 134.

cannot, ideally, get the funds to pay for formal legal services. As lawyers, I feel that we need to dedicate a few hours here and there and help one or two persons.’¹²³

Such sustained commitment to access to justice is evidence of the indirect social justice mission of clinics. This is because it goes beyond the direct mission of assuaging unmet legal need extending into the indirect mission of CLE that is to influence participation of lawyers in social justice matters even in their future careers.

4.6 ACADEMIC STAFF

Members of academic staff are a significant component of CLE. Their role according to CLE literature is dependent on the focus of a clinic and its incorporation as an accredited course in the law curriculum.¹²⁴ Therein, academic staff provide leadership at all three levels of CLE pedagogy, these being ‘the clinical experience, tutorials and classroom instruction.’¹²⁵

Unlike South Africa and other jurisdictions,¹²⁶ Kenya does not distinguish between clinical staff and academic staff. As instructors of clinical courses, academic staff in Kenya teach the theoretical aspects of the courses and guide the students into the practical aspects of the courses which they supervise and examine.¹²⁷ They are therefore core to curriculum-based clinical programmes.¹²⁸ Academic staff also coordinate both curriculum-based and extra-curricular clinical externships. In this way, they ensure students go out and get practical experience.¹²⁹ Their specific responsibilities vary depending on the nature and structure of the clinic.

Academic staff take on clinic roles as may be necessary and these are often secondary to their teaching duties. The staff play an oversight role in the extracurricular entities.¹³⁰ Academic

¹²³ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 135.

¹²⁴ MA (Riette) du Plessis ‘Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values’ (2015) 48 *De Jure* 312 at 316.

¹²⁵ MA du Plessis ‘Clinical Legal Education Models: Recommended Assessment Regimes’ (2015) 18 *Potchefstroom Electronic Law Journal* 2778 at 2793.

¹²⁶ Mahomed (n 102) at 3.

¹²⁷ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 58.

¹²⁸ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 118.

¹²⁹ On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 166.

¹³⁰ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 117.

staff fulfil the role of patrons in extracurricular clinics.¹³¹ Besides, they stand in as patrons in student clubs and associations.¹³² In this capacity, academic staff provide moral support and liaison with university management.¹³³ They assist clinics gain institutional support when they represent the clinic at school and university management level, a function which students appreciate as one student leader does below:

‘Yes, the [Clinic name] has a patron. When I left office, the patron was one Ms. [XYZ] She was so supportive. We are presuming that, before we came into office, there had been patrons who had been as supportive.’¹³⁴

Academic staff shoulder the responsibility of liaison between the university administration and students and between students, public benefit organisations and potential partners.¹³⁵ Staff also provide representation in critical fora such as those formulating the school budget.¹³⁶ As two students share below, they are invaluable in getting information to the university management:

‘We also have a patron for purposes of facilitating our relations with the administration. Because when we have a lecturer, [a] member of staff being a patron, things go faster and get to the dean easily, stakeholders can see a legitimate letter from the school and help you.’¹³⁷

‘I was just going to add that [Clinic Director] fights for us when we need anything, especially when it comes to funding. Usually her and [lecturer X].’¹³⁸

They also liaise with external advocates for support during the ‘Legal Aid Weeks’ that are held on campus.¹³⁹ Over and above these tasks, emergent clinics propose to engage teaching staff in court matters to provide legal representation for cases that the clinic takes up. The

¹³¹ On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 166.

¹³² On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 114; On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 156.

¹³³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 27-28.

¹³⁴ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 156.

¹³⁵ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 130.

¹³⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 29.

¹³⁷ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 139.

¹³⁸ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

¹³⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 33.

director of one such clinic shares her optimism about staff participation in legal representation as:

‘We are going to partner with law firms and advocates, practicing advocates, and also most of our lecturers are practicing advocates and they are good. We have approached them and they are going to be part of us. We can request lecturers; each can take one or two cases. So, ... people to present these matters to court are there. Yes, even within our campus.’¹⁴⁰

Only one university has a client walk-in clinic. The walk-in clinic differs from other clinics to the extent that it is an initiative steered by academic staff.¹⁴¹ In contrast to other clinics that are led and run by students, the walk-in clinic is operated and managed by administrative and academic staff.¹⁴² A member of academic staff manages the clinic in their capacity as clinic coordinator.¹⁴³ Coordinating the walk-in clinic is considered part of the teaching load and the school bears this in mind when distributing the teaching load.¹⁴⁴ In this way, staff in the walk-in clinic have time allocated in their schedule for clinic work. Unfortunately, this is not the case for all universities since the majority of the clinic directors carry these out as volunteer roles beside their teaching allocation.¹⁴⁵

The teaching staff offer themselves to teach social justice courses out of personal interest.¹⁴⁶ Although the courses are quite labour-intensive, the staff view this work as their own *pro bono* service. A member of staff explains this as:

‘But it’s also the kind of course no one volunteers to teach. ..., it is not everyone’s cup of tea. You can bet it will always be a healthy mix of administrative decision and voluntarism. But I find it exciting because for me- it is a way for nurturing lawyers beyond pay checks: lawyers who are sensitive to why we even have law in the first place. ... It is my way of doing legal aid, by multiplying the number of minds who can critically identify social justice issues and critically, on

¹⁴⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 8.

¹⁴¹ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 78.

¹⁴² On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 55.

¹⁴³ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 78, 81-82.

¹⁴⁴ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 10; On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 82.

¹⁴⁵ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 23.

¹⁴⁶ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 64.

their own motions, come up with solutions I may not dream up myself. There's some satisfaction that comes with that.'¹⁴⁷

Similarly, staff engaging in overseeing extra-curricular clinic work do so out of personal interest. Clinic is a passion that these members of staff carry over to their professional work from their undergraduate experience of participating in university clinics.¹⁴⁸ As shared below, they are therefore inclined towards social justice projects and have the desire to inculcate this disposition in their students:

'Yes, it is an administrative duty that was allocated by the university, but my selection came out of my own passion I had demonstrated because I had already written a concept and a proposal on my own volition and presented it to the university with the intention of setting up a law clinic.'¹⁴⁹

'...since this has been something I've been meaning to do and participated in before then for me it ended up on my docket.'¹⁵⁰

Their conviction about social justice projects is evident when academic staff sometimes draw from their personal resources to supplement clinic activity. In this regard, a lecturer shares as follows:

'And then the other thing is that students want to do it and then there is no funding. Now, they want to visit the prisons so the university will be quick in providing transport but then there are so many other things you need like lunch or stationery. So, sometimes as patron, you need to support them. So, you actually pay from your own money so that they are able to do some of those events...'¹⁵¹

As stated below, some of these staff felt drawn to clinic work from their previous work experience:

'So, when I joined the bar, I was lucky to be mentored along the way by people who were also very much invested in legal aid.'¹⁵²

¹⁴⁷ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 64-65.

¹⁴⁸ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 10; On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 118.

¹⁴⁹ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 10.

¹⁵⁰ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 119.

¹⁵¹ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 123-124.

¹⁵² On file with author Protocol Number H18/10/17, 'Interview 3' (n 13) at 66.

Just like the students, clinic staff have had past experiences of the ignorance of the law and procedures which propels their social justice inclination.

4.7 THE PLACE OF CLINICS IN THE UNIVERSITY STRUCTURE

Cognisant of the perennial tension between the teaching and service goals of clinics, clinical scholars acknowledge that the focus of clinics in university education is usually consistent with both teaching and service goals of universities in jurisdictions that integrate CLE in their curriculum.¹⁵³ However, it is not always the case that university objectives incorporate the element of service to society.

Kenya's Universities Act provides for the university objectives and governance structures of public universities.¹⁵⁴ The objective of university education as presented in this legislation can be summarised as teaching and research.¹⁵⁵ Since universities and law schools channel their development towards specific niche areas, the university's niche areas have tended to guide the clinics' area of focus within the wider goals of the university. The disposition towards specific areas of law is evident from the extracts of conversations with clinic participants below:

'We will have a section where we will ... have that but generally we will do human rights, generally, yes. But, we can have... a section where we can have ... these specific issues on ...technology because we are a university of technology. So, there we can do beyond maybe legal aid. We can do maybe a bit of research and collaborate with institutions of same conviction.'¹⁵⁶

'Yeah so, the entrepreneurship unit, I think, was historically the most dormant one. There wasn't much to be done because it is not as attractive as human rights but this year we've tried finding different things to do. So, we have splintered it into more sub units: Small to micro-business, Intellectual Property and Oil and Gas. Oil and Gas had intended to partner with the extractives centre here at [university X]'¹⁵⁷

¹⁵³ Du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (n 60) at 2, 17.

¹⁵⁴ The Universities Act No. 42 of 2012 s 3, 34-43.

¹⁵⁵ Act No. 42 of 2012 (n 154) s 3(1).

¹⁵⁶ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 7.

¹⁵⁷ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 36.

‘For me what I would add to what my colleagues have said is, maybe, if you can have a look at the different curricula from the various universities. And see why other universities thrive in terms of their students are more given to legal aid than other institutions. It could be in the curriculum of those universities that make one... I was noticing a trend that students from this particular university are more legal aid-oriented.’¹⁵⁸

As a result, the place of clinics in the university setting defies uniformity, with some clinics being curriculum-based and others extra-curricular. The country presently does not have clinics that operate as independent entities.

All the clinics operate as an integral part of their university and the majority end up encountering institutional bureaucracy in decision-making and allocation of resources. This conversation between student leaders below alludes to the prevailing bureaucracy:

‘SM2: No, actually it is our own [website]. Our own initiative.

SM4: Yeah, because like [Department X] have made it hard for us to do anything. ...we approached them and [they] told us “oh you want a website? You are going to have to wait in line and you guys will wait like a year and something before you can get a website.”¹⁵⁹

In a bid to relieve its projects of similar university bureaucracy, a nascent clinic in one of the public universities is in the throes of creating a semi-autonomous entity within the university.¹⁶⁰

Regardless of their place in the university set-up, the clinics receive moral support from the law school management which often has a clear appreciation of the teaching and social justice role that clinics play. The students and academic staff from both public and private universities echo the existence of this support in different ways:

‘We have total support from the school.’¹⁶¹

‘There are some [clients] who would be referred by the administration, and more specifically the Dean’s office, to the club.’¹⁶²

¹⁵⁸ On file with author Protocol Number H18/10/17 ‘Interview 8’ (n 119) at 177.

¹⁵⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 39.

¹⁶⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5.

¹⁶¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 40.

‘In this country, I can speak mostly for public universities because I have experience with, with two public universities. ... the students are very committed, but they [clinics] have failed to pick and to be effective because of bureaucracy and lack of support by the university management.... No, not at the level of law school, you have to be very clear. Not at the level of the law school. It is at the level, at the high echelons. The DVCs, the VCs level. That is where the problem is.... So, the university, the top echelons do not see the social justice part of it. They do not see the need. Yes. They do not identify with that need. Those are the correct words, they don’t identify with those needs.’¹⁶³

More established clinics maintain that even with such institutional support, obtaining resources from the university for clinic work is an endeavour that demands planning and resilience.¹⁶⁴

4.8 CLINIC MISSION

The mission of a clinic is central to its existence because it determines the purpose for which a clinic is set up and remains in operation. The mission statement of the clinic reflects the mission of the clinic and it forms the basis of evaluating whether a clinic is serving the purpose for which it was set up.¹⁶⁵

Literature provides the two missions of CLE as teaching and social justice.¹⁶⁶ The social justice mission can either be direct or indirect, with the former entailing assistance to indigent communities and the latter being engagements that instil in students the inclination to participate in social justice projects in their professional future.¹⁶⁷ Student participants manifest the direct social justice goal of clinics in statements such as:

‘I believe even if you are able to help only one person...resolve that dispute properly... that is enough.’¹⁶⁸

¹⁶² On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 132.

¹⁶³ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 11-12.

¹⁶⁴ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 68.

¹⁶⁵ Du Plessis ‘Clinical Legal Education: Planning a Curriculum That Can Be Assessed’ (n 59) at 27.

¹⁶⁶ Mahomed (n 102) at 44.

¹⁶⁷ Donald Nicolson “Our Roots Began in (South) Africa”: Modelling Law Clinics to Maximise Social Justice Ends’ (2016) 23 *International Journal of Clinical Legal Education* 87, at 92

<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/download/532/922>>.

¹⁶⁸ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 9.

The clinical experience varies across law schools in Kenya. What remains common is their mission to alleviate injustice.¹⁶⁹ This social justice mission does not conflict with the clinic's pedagogical role. This is because CLE advances learning beyond theory in the classroom, offering the acquisition of lawyering skills such as public speaking and addressing clients.¹⁷⁰ Therefore, although the only operational walk-in clinic is located outside the law school, the university that hosts it does so because it deems clinic a valuable student learning experience.¹⁷¹ The clinic coordinator likewise expresses the primary objective of the clinic as the 'advancement of learning' and the secondary one as 'promoting social justice: giving back to community through an expression of corporate social responsibility.'¹⁷² The dual mission of CLE as teaching and access to justice is prominent in the minds of clinic patrons. A clinic patron expresses these as:

'I think the main objective of the legal clinic is to facilitate access to justice while promoting the *pro bono* culture in terms of the students. So, it is a way for both to benefit: facilitating access to justice to underserved communities and promotion of *pro bono* culture to the students.'¹⁷³

Through the clinic, the students gain insight into society's legal needs and situations that members of the public encounter. Such work entails exposure to society's realities outside of their sanitised environment, the 'bubble' that is law school. They also experience the rewarding sense of clinic work, which often entails immersion into the communities outside the law school, and an appreciation of the immense knowledge they have gained from law school. A student clinician participated in a 'stop rape culture' project in a low-income settlement as a way of sensitising youth on rape and consent issues. His reaction to the contrast between law school and community life summarised the encounter quite aptly:

'...it was very shocking to see ... different realities within Nairobi: we are in a parallel universe.'¹⁷⁴

¹⁶⁹ Strathmore University Law School (n 2) at 5.

¹⁷⁰ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 50.

¹⁷¹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 78.

¹⁷² On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 84.

¹⁷³ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 18.

The teaching mission of CLE incorporates training in law, aspects of leadership, people and organisational management.¹⁷⁵ The students gain these skills through engaging in practical tasks connected with running the clinic. They reinforce their knowledge of law and legal principles when they revise the relevant thematic areas before going out to teach in community education projects.¹⁷⁶ Many students are attracted by this pedagogical value of CLE.¹⁷⁷ They consider CLE a learning experience of the law as it really is in practice.¹⁷⁸ Students consider CLE as an experience of the reality of legal practice, a lesson in the difference between the law as it is and the law as it ought to be.¹⁷⁹ These practical sessions complement the theoretical knowledge they have acquired from class.

Additionally, clinic work in promoting access to justice is in alignment with some students' passion for using law to achieve social justice.¹⁸⁰ It introduces students to noble reasons for legal practice beyond financial enrichment, with students entering into legal aid work in the hope that they will pursue these matters even in their future profession.¹⁸¹ CLE also provides certain aspects of exposure to the variety of legal themes and careers even if not directly related to assisting clients. Examples are the students who discover topics, ideas and possibilities for their final year dissertation or research paper from their clinical experience.¹⁸²

In a nutshell, whereas the clinics prioritise their mission to mitigate unmet legal need, the clinic tasks offer students extensive practical learning experience. In this way, the clinics succeed in ultimately fulfilling their twin service and learning missions.

¹⁷⁴ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 48-49.

¹⁷⁵ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 21; On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 51-52.

¹⁷⁶ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 73.

¹⁷⁷ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 63.

¹⁷⁸ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 76.

¹⁷⁹ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 101-102.

¹⁸⁰ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 52.

¹⁸¹ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 9.

¹⁸² On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 48.

4.9 FOCUS ON ACCESS TO JUSTICE WORK

Proponents of CLE and its integration in the law curriculum argue that clinics should recognise unmet legal need but remain clear of their focus on the training of students.¹⁸³ Thus, although clinics work towards alleviating unmet legal need, CLE programmes view this as a by-product and not the goal of the university programmes, even if it is these that inspired the establishment of the clinics.

The desire to contribute to reducing the unmet legal need in communities around the universities motivated university law clinics that were in operation in Kenya before 2010.¹⁸⁴ This was in some cases complemented by the need to comply with legislative requirements compelling universities to identify their niche areas and develop projects that propel their agendas. There is a sense in which these law schools now align themselves with the Constitution's transformative framework. This is because the Constitution of 2010 provides an even greater impetus for direct involvement of universities in access to justice regardless of their niche.¹⁸⁵ Even more than before, law clinics play a critical role because they imbue some social justice focus to students engaged in clinical work thereby aligning the universities with the goals of the country's transformative Constitution.

Even with the engagement of university law clinics in legal aid work, there are abundant manifestations of access to justice gaps in the country. These point to the country's huge unmet legal need. When sharing the roots of her interest in legal aid, a law lecturer aptly depicted the access to justice scenario in Kenya as follows:

‘...and then I joined the bench at some point. ...when you are seated up there writing rulings and judgements and taking proceedings, especially in the subordinate courts where I served, you meet injustice at individual level. But then with time, you realise it is systemic. It stares at you every day. It is about the little processes that go wrong. It is about the lack of agency in a majority of the

¹⁸³ Du Plessis ‘Clinical Legal Education: Planning a Curriculum That Can Be Assessed’ (n 59) at 31.

¹⁸⁴ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 117.

¹⁸⁵ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 116.

population just suffering through the system because they do not even have the basic information to help themselves through a very antagonistic system.’¹⁸⁶

Clinics encounter multiple incidences where indigent persons lack knowledge of the law and are thereby excluded from the legal system, legal services and justice institutions. Even with a good Constitution and bill of rights, people remain ignorant and unable to claim their rights in the absence of civic education.¹⁸⁷ Many are ignorant about court processes and about how systems work.¹⁸⁸ A student reminisced how this lack of information propels injustice:

‘Because at the moment when we were speaking at [place XYZ], I got that sense of bitterness and how these people don't know about those basic rights.’¹⁸⁹

Furthermore, there are unwarranted delays in the criminal justice system coupled by an overflow of petty offenders in the custodial system who cannot afford their bail or fines that is indicative of a justice system skewed against the poor.¹⁹⁰ A student recalled the manifestation of certain legislations that appear prejudiced against poor people who cannot afford fines or bail as follows:

‘And I remember, many of the people who were arrested for [being] drunk and disorderly. When I used to go to the lower courts, because we were attached to the high court, the judge ... at the high court used to tell us “we don't put those people into jail, because these are poor people who are arrested going singing on the way home about their cows,”’¹⁹¹

There is the problem of people who seem under-represented or even unrepresented in court, often because they cannot afford the cost of legal representation as provided for in the Advocates Remuneration Order of the Advocates Act. Then there are the claims that could benefit from alternative dispute resolution but remain stuck in the court system thereby increasing the backlog of cases. Another student expresses this situation as:

¹⁸⁶ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 66.

¹⁸⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 110.

¹⁸⁸ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 145.

¹⁸⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 106, 140.

¹⁹⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 94.

¹⁹¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 109.

‘...they would have lost these cases for lack of representation. But where it happens that there is representation, then it goes right. ... There would be small claims that should not make it to court. Claims that should end at ADR.... They end up in court and create a backlog.’¹⁹²

The correlation between poverty and lack of access to justice also becomes palpable when many people remain ignorant of information that is easily available online because they either cannot afford to access the internet or they lack the technical skills and knowledge to do so.¹⁹³ This ignorance of the law becomes a barrier to their accessing justice and justice institutions.

The students begin to appreciate the extent of access to justice problems when they encounter people seeking legal services, an explanation of the law or of their rights. They encounter cases that smirch of corruption, negligence and the resulting injustice. There are the inefficiencies in the criminal trials, delays in court processes and accused persons who are in custody longer than is necessary, situations which the students observe as:

‘...cases take too long to be adjudicated upon, some files go missing in the courts....So, this basically struck a debate on what is really happening in the judiciary and ... in the remand centres as well. Even in prisons where you find people getting convicted as a result of getting fixed and as a result of the magistrates and judges being compromised. So, the advocates we were with took up those cases to make a follow up of them and find out exactly where the rot was.’¹⁹⁴

Additionally, there is a perception that legal practitioners have a role to play in enhancing access to justice, even through public education and sharing of knowledge, which they have failed to carry out. A student articulated this sentiment as follows:

‘The general public does not understand not only the legalese of the Constitution, but the general information at large. And it is from that moment ...we get us a fractured society that moves in a different direction. So many cases which are of interest to me like gender-based violence, sexual offences and all others, is because the society is being cut out of that conversation. This conversation is only maintained by advocates and practitioners. So, when we get to such a level it is not, I will be forgiven to say, that the public does not really know their rights. It is because this

¹⁹² On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 160.

¹⁹³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 112-113.

¹⁹⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 93, 103.

Constitution and these rights are only being spoken by the elites. That is what I mean.... lawyers, practitioners, have let the general public down in that aspect.¹⁹⁵

Students confront societal unmet legal need when on attachment in institutions that conduct legal aid.¹⁹⁶ They share their legal knowledge even as they continue to gather exposure on legal issues in society.

The role of students in walk-in clinics is to receive clients, interview them, research their cases, counsel the clients and perform most of the tasks short of legal representation.¹⁹⁷ The majority do not screen their clients although plans are underway to conduct screening of clients in one of the clinics to safeguard the focus on indigent persons.¹⁹⁸ The intention there is to examine both their financial means as well as their vulnerability as persons, since vulnerability could sometimes outweigh financial means in extraneous circumstances as with the case of children who are victims of their caregivers.¹⁹⁹

Law clinics conduct research as a critical part of clinic work.²⁰⁰ This research is in support of legal aid work by alternative justice institutions such as chiefs' offices and children offices which host students from clinics for attachment programmes. They also carry out research in preparation of manuals which support the clinic's own community education projects.²⁰¹

Since students have no capacity to represent clients, the scope of clinic work is limited to advocacy and promoting legal awareness.²⁰² They organise public programmes on themes that are relevant to the underserved community on rights of arrested persons and similar issues.²⁰³ During such programmes, clinics invite other members of the criminal justice system such as the police to collaborate in their projects and engage with the community as well.²⁰⁴ These programmes give insights to law students about the lived realities of the community around them

¹⁹⁵ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 104.

¹⁹⁶ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 4.

¹⁹⁷ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 8.

¹⁹⁸ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 6.

¹⁹⁹ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 7.

²⁰⁰ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 4, 8.

²⁰¹ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 30.

²⁰² On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 16.

²⁰³ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 16.

²⁰⁴ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 31.

as well as their engagement with the law.²⁰⁵ Clinic programmes are therefore as dynamic as community issues since they are grounded on the community's legal needs.

Clinics also engage with schools and operate various high school programmes. These are *ad hoc* programmes that entail teaching in public high schools located near the university.²⁰⁶ Topics of interest include sexual offences that have become prevalent in the country and the age of criminal liability.

Several students' associations make visits to prisons. They make use of these visits to teach the incarcerated persons about the legal processes, which assist in preparing unrepresented accused persons for self-representation during their trials.²⁰⁷

The key activity run by clinics within the university campuses are the 'Legal Aid Weeks'.²⁰⁸ This entails engaging faculty and volunteer advocates over two to three consecutive days to supervise students in proffering legal advice and training to the members of the campus community who express interest in the sessions.

4.10 THE CLIENTS

Indigent clients and their unmet legal needs present law schools with the possibility of adopting 'live client models' in their CLE programmes. In fact, the overwhelming needs of indigent clients seeking assistance at university clinics and necessitating a balance between these and student learning needs, informs mainstream CLE literature.²⁰⁹

The university clinics in Kenya focus on the legal needs of the indigent communities and persons residing around the campus precincts. They often rely on the local administration and public benefit organisations to mobilise these people to participate in the programmes organised by the clinics.²¹⁰ Resulting from constraints in resourcing, clinic work centres on the communities that live in the university precincts, to the neglect of those who are far from law

²⁰⁵ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 16-18.

²⁰⁶ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 32.

²⁰⁷ On file with author Protocol Number H18/10/17 'Interview 6A' (n 48) at 149.

²⁰⁸ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 32.

²⁰⁹ Mahomed (n 102) at 61; Du Plessis 'Closing the Gap between the Needs of Students and the Community They Serve' (n 60) at 11; Shelley AM Gavigan 'Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35 *Osgoode Hall Law Journal* 443, at 447.

²¹⁰ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 124; On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 138.

schools. This emphasis raises the risk of clinics concentrating on the same group of persons in every project. Aware of this danger and given that the surrounding community is the same, clinics endeavour to diversify their clientele through targeting dissimilar cadres of people. Says a clinic participant regarding these efforts:

‘...we try to make the persons who are attending as diverse as possible-not the same person being trained about a million times, it’s different people.’²¹¹

To extend their client base, the clinics arrange for visits to prisons and informal settlements close to the university.²¹² Additionally, the students attend to persons seeking assistance from the legal aid institutions that host the students for attachment.²¹³ Only one university is set up to receive walk-in clients whose numbers range from one to ten per month.²¹⁴

On their part, indigent clients feel frustrated to receive legal information and training yet their real need is legal representation. A clinic patron shares his sentiments on client statistics and dispositions thus:

‘The numbers are not that high.... I also think the reason is that we do not offer concrete solutions. ... when we go to prisons they will tell us, “how different are you from those who have just been coming to talk to us. Is it not that you are just interested to see us? ... A number of you have been coming here, like now, I have been presenting my case for twenty years in prison, my appeal has never been heard. ... What are you going to help us with?”’²¹⁵

Nevertheless, a student observes that even without legal representation, contact with clinics offers an initial step in resolving client matters:

‘We also give them contacts of organisations or institutions that can help them better. So, for instance if it is a woman on domestic violence, we give them FIDA’s contact because at FIDA they will get the help they need. They can get legal counsel, they can get psychological

²¹¹ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 19.

²¹² On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 16; On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 84; On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 149.

²¹³ On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 165.

²¹⁴ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 85.

²¹⁵ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 85.

counselling, things like that. Sometimes, legal problems do not always have legal solutions. There might be a different way to cure it. So, if it is an administrative action matter, we link them with the Ombudsman.’²¹⁶

It is often the case that clients who present themselves at clinics experience multiple problems, some legal but the majority intricately rooted in poverty. This reality is vividly captured in the following reflections of a South African clinician:

‘Clients at law clinics are generally poor, uneducated and marginalised from mainstream society. They tend to present to the clinic lawyer a rather large package of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract. Formulating the mandate is only half the battle won, as the enforcement of clients’ rights pose particular difficulties, especially in South Africa where many of our clients live in communities where the rule of law commands little respect.’²¹⁷

A Kenyan clinic director echoes a similar experience below when he expresses one of the challenges in his work:

‘Another one is where clients who come and for sure you can see this is not a legal problem, it’s a social problem and they don’t want to listen when you tell them what we do. This is an issue which can be resolved out of court or without necessarily looking at the law. And I think, maybe that is now bringing in some issues of mediation. But they are not ready and willing.’²¹⁸

For those clients who leave satisfied, it is usually because they simply needed a listening ear particularly in circumstances where no further intervention is possible.

‘...where a matter has been substantively concluded, but the client is not satisfied. ... and there is nothing you can do with that and you can explain to the client that their matter has been looked over by the court and for sure, from where I am seated, this matter has been resolved conclusively. But again, ... they do not want to agree because essentially, they can come to you with letters from various organisations which offer legal aid, but if you look at ...the issues we are raising are one and the same. So, I think for them, they are looking for somebody who can listen to them,

²¹⁶ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 143.

²¹⁷ Willem de Klerk ‘Unity in Adversity: Reflections on the Clinical Movement in South Africa’ (2007) 12 *International Journal of Clinical Legal Education* 95, at 97.

²¹⁸ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 87.

someone who can agree with their point and say “yes you are right.” Then from there, even if you agree with them whether they are right or wrong there is nothing you can do.’²¹⁹

All the clinics have few clients so they constantly try to ensure that they have people to work with. It is paradoxical that the country has enormous access to justice needs yet the student clinics suffer a deficiency of clients.

4.11 LEADERSHIP

There is an array of capacity for leadership in clinics globally. CLE scholarship discusses staff and students providing leadership in university clinics.²²⁰ There are reports of clinicians nurturing the leadership of CLE into a movement and clinic leaders from different countries uniting to build a membership alliance that fosters clinical conferences, training of trainers, the exchange of materials, ideas and even resources.²²¹

In Kenya, leadership in clinics is at two levels, namely student leadership and staff oversight. The students provide leadership in all the extra-curricular clinics except the walk-in clinic.²²² Teaching staff largely serve as course instructors, clinic directors²²³ and patrons of student associations. The curriculum lays out the responsibilities of staff as instructors of clinical courses, unlike that of patrons and directors that are extracurricular roles which depend on their availability and personal initiative.

The management and operations of clinics are closely linked with the vibrancy of their leadership. The experience of one extra-curricular clinic illustrates this importance of leadership in the development and stability of clinics. Over a two-year period, this clinic transitioned from an entity with a dormant patron and a large student membership to an entity with an active patron and a lean curated student membership. A student leader described their experience of this adjustment as follows:

²¹⁹ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 87.

²²⁰ Nicolson “Our Roots Began in (South) Africa”: Modelling Law Clinics to Maximise Social Justice Ends’ (n 167) at 112.

²²¹ Peggy Maisel ‘Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn From South Africa’ (2006) 30 *Fordham International Law Journal* 374 at 381, 413.

²²² On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 21; On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 27.

²²³ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 13.

‘When you were around, we were one hundred and seventy-something members and we would have meetings and like ten people would show up and the ten people would all be first years and, you know, first years are eager and just want to know everything that is going on. So, we had to have systems and like he said we cannot take on so many people lest the clinic suffers, and we do not have enough work to keep all of them busy, then they drag on everyone and there’s a small leadership of which the roles are not well established.’²²⁴

This clinic’s story validates the nexus between clinic leadership and how active or dormant a clinic can be.

Clinic participants are of the view that when their student leaders are clear on their roles, the students become more responsible and can carry out their tasks independently.²²⁵ These student leaders strive to gain clarity on their roles largely through peer mentoring. Given the annual turnover of student cohorts in the university, aspiring student leaders tend to learn from those in their senior years. Furthermore, capacity-building opportunities for clinic members through technical training has helped both student leaders and clinic members prepare manuals and equipped them academically for their roles as trainers of trainers.²²⁶

Clinic leadership is confined to individual universities, with each university clinic working towards its own goals and developing independently. The clinic leaders do not interact with clinic leaders from other universities except when third party institutions present this opportunity. There is a noticeable absence of national or even inter-university networks and collaborations among clinics in the country. Thus, if there are any gains from benchmarking with institutions in other jurisdictions, these are enjoyed by the individual universities that pursue them.

Clinic leaders from Kenyan universities came together in a roundtable discussion organised pursuant to this study, under the auspices of the Global Alliance for Justice Education (GAJE).²²⁷ One of the matters discussed was the potential for national leadership and collaboration among clinics in the country. The roundtable explored the viability of synergy among clinics in Kenya. It envisioned the development of a standard framework for CLE as well

²²⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 35-36.

²²⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 36.

²²⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 36-37.

²²⁷ Strathmore University Law School (n 2).

as inter-university frameworks to enhance sustainability and succession planning in clinics.²²⁸ The discussants foresaw that such national collaboration would entail selecting leadership or a steering committee, a process that inferred some degree of personal or institutional commitment among entities that had not otherwise interacted with each other. Acknowledging failed past attempts at synergies, the clinicians underscored that building rapport had to be a forerunner to any form of future collaboration.²²⁹ The clinics therefore suspended the proposed collaboration, leaving universities to continue operating in isolation as they had always done.

4.12 RESOURCES

Fruitful clinic engagements often require a variety of resources such as physical space, furniture, stationary, file storage facilities, communication equipment, security, personnel and transportation in the case of mobile clinics. Clinical researchers rate the in-house live-client clinic as the most resource-intensive form of CLE,²³⁰ since its needs are akin to those of running a legal practice at the university. This renders resourcing the first trial that some universities confront when considering clinical courses²³¹ and when offering these courses.²³² It comes as no surprise therefore that Kenyan clinics based in both public and private universities endure shortfalls in the resources they need for their work.²³³

Clinical work conducted in curriculum-based courses often experience a greater assurance of receiving university funding because the universities treat the clinics as taught courses which they then manage as part of the core business of the university. For instance, the curriculum-based attachment courses receive allocation from university funding to ensure faculty supervisors can visit all the institutions where students have placements.²³⁴

²²⁸ Strathmore University Law School (n 2) at 10.

²²⁹ Strathmore University Law School (n 2) at 11.

²³⁰ Evans and others (n 11) at 63, 201.

²³¹ *African Law Deans' Forum Report* (2012) at 7.

²³² Mizanie Abate, Alebachew Birhanu and Mihret Alemayehu 'Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities' (2017) 11 *Mizan Law Review* 1 at 11; Dave Holness 'Improving Access to Justice through Compulsory Student Work at University Law Clinics' (2013) 16 *Potchefstroom Electronic Law Journal* 327 at 335.

²³³ Strathmore University Law School (n 2) at 9.

²³⁴ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 68.

Law clinics that operate as extra-curricular activities, unlike curriculum-based clinics, do not have similar guarantee of university resourcing. As the following quotation suggests, these clinics generally depend on the benevolence of universities for resources:

‘Well that is hopefully the next phase of the clinic. Well, I’m happy to say that the school has promised us space, physical space.’²³⁵

Exceptionally, there are universities that have been able to place their resources generously at the disposal of their extracurricular clinics. Excerpts from the remarks of a clinic director about the operations of their clinic reveal the variety of ways in which the public university offers support to its extra-curricular clinic as:

‘The legal aid clinic is not on the curriculum because it is not mandatory for the students to come to the clinic.... Precisely, yes. Because the workload, for instance, for a lecturer is three units. As a coordinator, you will have a workload of two units...Yes, they have given us space.’²³⁶

Since universities often have limited resources, such support is not a coincidence but an indicator of a high level of appreciation for the mission of clinic and a connection between the clinics’ activities and the overall university goals or niche area of specialisation.

The student-led extracurricular clinics such as student associations and clubs that run legal aid projects usually charge participants a nominal annual membership fee.²³⁷ As will be discussed later on in the chapter, in 4.17.12, it is often the case that this fee forms the only source of financing for the association.²³⁸ The students therefore seek out partner institutions to supplement resourcing for clinic projects as illustrated in the excerpt from a student leader below:

‘This is why students would have to be asked to register by paying fees so that these fees fund the society.... So, you would realise that in the end it is about students and even when we would have legal aid activities, we would have to ask students to contribute such an amount of money for the success of that venture. Except where we had partners like the [XYZ Advocates firm]. It is headed

²³⁵ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 17.

²³⁶ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 81-82, 86.

²³⁷ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 132.

²³⁸ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25.

by one of our lecturers. That firm would take care of everything done logistically and even financially.’²³⁹

Although private universities would seem better resourced, the situation of clinics in these universities is similar because clinics also rely on annual membership fees to finance their projects. Since this is often insufficient, the students lack adequate resources that are necessary for the optimal operation of the clinic.²⁴⁰ These students have resorted to generating funding proposals and seeking institutional partnerships that can mind the resource gaps.²⁴¹ Consequently, proposal writing has become a core part of clinic work arising from the need to be on the constant look out for resources.²⁴²

Cognisant of the scarcity of resources to run the clinics, the students strive to spread out available finances and utilise it well. They even combine several projects as a way of avoiding any form of wastage.²⁴³

4.13 SUSTAINABILITY

After establishing a clinic, it takes considerable stamina to keep it operational. Researchers identify several factors that are critical for the establishment and sustainability of clinical programmes. They classify these as external and internal factors with the former being those occasioned by circumstances outside of the university setting and the latter being those caused by situations within the university.²⁴⁴ External factors include the differing political and economic environments, government policies on education and practice as well as attitudes of the legal profession all of which impact clinic operations in aspects such as availability of resources, project choices as well as continuity of clinic activity.²⁴⁵ Internal factors affecting clinic

²³⁹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 157-158.

²⁴⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25, 39.

²⁴¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25, 46.

²⁴² On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 32.

²⁴³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 37.

²⁴⁴ Jeffrey Michael Giddings *Influential Factors in the Sustainability of Clinical Legal Education Programs* (Unpublished Phd Thesis, Griffith Law School 2010) at 109, 125, 130.

²⁴⁵ Jeff Giddings *Promoting Justice Through Clinical Legal Education* (2013) at 115-119.

sustainability include commitment by both the university and the law school to clinical method, the clinic's response to resource constraints as well as commitment of students and staff.²⁴⁶

The clinics in Kenya are young, with the walk-in clinic having been set up in 2014²⁴⁷ and the student practice organisation in 2015. The older ones were established in 1994 and 1999 respectively. These present a broad range of sustainability scenarios.

The first scenario is the experience of curricular clinics whose operations have been more secure because they are rooted in the school curriculum. As a result, the clinics received funding from university resources and are only subject to the regular curriculum review processes. Course leaders explain this stability as follows:

'We also have infused in the curriculum right from second year, I think, all the way to fourth year, what we call the clinical approach. So that at the end of every academic year beginning second year, the students have to undertake a segment of externship or internship.'²⁴⁸

The second scenario is that of the walk-in clinic. Although the clinic is operational and has no problems of space, the staff perceive the clinic's operations as sub-optimal.²⁴⁹ This is also observable from the low levels of student and client participation as well as the underutilised space in the clinic. The staff attribute the sub-optimal operations to poor student participation and the university's inability to resource the clinic. They describe their situation as follows:

'...this is for the students because it is their facility but now it seems they run the legal aid club outside the legal aid clinic.'²⁵⁰

'Yes, they have given us space. ...But funds for day to day running of the clinic is limited. And I think maybe it is because of the, it's not like they have refused to give us funds, I think the university generally has financial issues.'²⁵¹

²⁴⁶ Giddings *Influential Factors in the Sustainability of Clinical Legal Education Programs* (n 244) at 135-148.

²⁴⁷ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 82.

²⁴⁸ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 57.

²⁴⁹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 83.

²⁵⁰ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 83.

²⁵¹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 87.

The third and toughest experience is that of extracurricular clinics. This category suffers the greatest exposure to sustainability risks. They lack a steady and secure position in the university or its curriculum and the student leadership is in constant flux. A clinic patron shares her experience with an extracurricular clinic below:

‘With [student association X] the challenge depends on the student leadership at the time because it’s student led. So, you can have a committee that is very vibrant and during their term in office [the association] is really vibrant and the activities are always there. Students are participating and after they are gone, ... since they are only there for one year or two years, then you have a new set of leadership. It all changes and suddenly [the association] goes down and I feel even for myself as the patron, I need to keep asking the chair or the officials “can you come and participate in this event, what are you doing, have you come up with a work plan?”’²⁵²

With one such extracurricular clinic having suffered seasons of dormancy the students saw the value of an internal clinic management and accountability plan. They implemented such a plan to develop a sense of continuity for the clinic and to ensure the clinic is sustainable.²⁵³ They considered the continuity of membership as a factor contributing to the sustainability of the clinic. Thus, the clinics make a concerted effort to have a membership spread across all years of law school.²⁵⁴ A group of students describe their experience of being part of a failing clinic as follows:

‘SM4: But you left. This was 2015, right? ...But the president in 2016 was leading it, they were crawling they were trying, then the year she left it died like nobody’s business.

SM2: In calendar year 2017, people stopped attending meetings.

SM3: There were no projects.

SM4: ... first the leadership had so many fourth years who were stressed with their dissertations, ...bad planning for the clinic. They didn’t even care, so ... [we] were in second year at the time, so picked them and we tried to push the two projects we were working on. So, priority was fixing our

²⁵² On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 120.

²⁵³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 44.

²⁵⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 29.

internal systems because it was a total mess, ...and we were not included in the budget for the school....²⁵⁵

Clinic members deliberately recruit from across the academic years in campus, except the final year students who are busy with their dissertations, as a way of boosting clinic sustainability. This spread of students across all years of law school promotes the judicious use of resources through the selective training of members who have time for clinic work and will continue to serve the clinic for longer than a year.²⁵⁶

4.14 PARTNERSHIPS AND NETWORKS

Mitigating unmet legal need is an enormous project whose resolution defies individual institutional efforts. This justifies the existence of a global clinical movement whose central component is access to justice.²⁵⁷

The kinship that exists between legal aid bodies in Kenya lends itself to informal symbiotic partnerships in which organisations provide funding, clients and logistics while students supply the workforce.²⁵⁸ The following comment by a clinic patron highlights this connection among legal aid providers:

‘Because legal aid is a culture and when they take this course one of the things they gain is networking with the people in the field who are interested in offering legal aid.’²⁵⁹

Resultantly, clinics explore partnerships and networks to augment their minuscule capabilities.

Clinics in public and private universities demonstrate a strong dependency on partnerships. The clinics actively search for partners because they supplement the clinic’s resources.²⁶⁰ These partnerships become more critical when the interventions require court

²⁵⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 29.

²⁵⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 43.

²⁵⁷ Cosmos Nike Nwedu ‘Towards Clinical Sustainability from Evolution to Revolution: A Study of Sustainable Factors for Law Clinics’ (2019) 6 *Asian Journal of Legal Education* 43 at 51; Frank S Bloch ‘Access to Justice and the Global Clinical Movement’ (2008) 28 *Washington University Journal of Law and Policy* 111 at 117.

²⁵⁸ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 154.

²⁵⁹ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 67.

²⁶⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25.

processes.²⁶¹ Thus, institutional partnerships provide clinics with the missing link that is client representation in court.²⁶²

Partner institutions also benefit from collaborations with clinics. Public benefit organisations have a relationship with university clinics in which the organisations invite clinics to their legal aid events as a way of supplementing the manpower needs of the event.²⁶³ On their part, the public benefit organisations assist with supervision of students who are on attachment programmes at their institutions.²⁶⁴

The clinics, in turn, encounter new clients through joint projects with the organisations they partner with on such *ad hoc* projects.²⁶⁵ Additionally, collaborations with community-based organisations enable entry into communities, prisons and other institutions in which these organisations already operate.²⁶⁶ They assist with an assortment of resources ranging from seeking and booking venues, mobilising communities of clients to managing event logistics.²⁶⁷ There are clinics where partners mobilise clients and provide space while students are tasked with providing the technical legal support.²⁶⁸

Law schools have also worked out partnerships with government institutions to get students attached to these institutions for one semester. As the lecturers attest in the following excerpts, the schools endeavour to facilitate the development of linkages that matter:

‘We also send them to government offices like the chiefs camp, the police stations, all these places where dispute resolution happens, where the people who man those offices or the people in charge of those offices are not lawyers. So, they go there and take their legal expertise and help the chiefs resolve these disputes...The children offices, we have so many children offices scattered all over the country, so a person who is a law student and trained on children rights and these other legal issues becomes a resource in such an office... in resolving disputes....’²⁶⁹

²⁶¹ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 132.

²⁶² On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 8.

²⁶³ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 129.

²⁶⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 114.

²⁶⁵ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 84.

²⁶⁶ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 17.

²⁶⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 45.

²⁶⁸ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 18.

²⁶⁹ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 3-4.

‘So that, at the end of every academic year beginning second year, the students have to undertake a segment of externship or internship. ..., so, for second year they do it with the courts, that’s the judicial attachment; for third year they take externship anywhere else other than the courts, so this being ministries, corporations....’²⁷⁰

Student leaders also pull their weight in seeking opportunities for partnerships. A student leader explains his role thus:

‘So being president is first of all, relationship management with external partners. Trying to get opportunities for reaching out to potential partners and explaining to them what the clinic is all about, right, that’s the basic stuff.’²⁷¹

The Law Society of Kenya organises an annual Legal Awareness week which is quite popular with university law clinics.²⁷² For instance, the walk-in clinic enters into collaborations with LSK and the NALEAS. It does this even though the clinic does not have partnerships with other institutions largely because of the work that forging partnerships requires from it.²⁷³ There are universities that have strategically aligned their legal aid work to the partnerships with the LSK Legal Awareness Week and the Judiciary’s Judicial Service Week.²⁷⁴ All the clinics are optimistic that the NALEAS will soon launch operations of its funding and accreditation roles. This is in the hope that collaboration with the NALEAS will radically enhance clinic work.²⁷⁵

Statistically, clinics have an average of one active partnership per clinic. This is usually an informal collaboration that is run on a project-by-project basis.²⁷⁶ The partnerships that clinics enter into are *ad hoc* and not usually governed by formal agreements or even memoranda of understanding.²⁷⁷ Since the clinics are not legal persons, the agreements would have to be concluded between the university and the partner organisation, an arrangement that could work

²⁷⁰ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 57.

²⁷¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 26.

²⁷² On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 92; On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 158.

²⁷³ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 56; On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 86.

²⁷⁴ On file with author Protocol Number H18/10/17 ‘Interview 7’ (n 18) at 165.

²⁷⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

²⁷⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 45.

²⁷⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 41.

well in the absence of the bureaucracy within the educational institutions. Nevertheless, with the growing requirement by donor organisations for partnerships with institutions in the global south, clinics envisage a rising potential for meaningful and more formalised partnerships.²⁷⁸

Since clinics in Kenyan universities are all at varying stages of development and have a variety of clinical experiences, they stand to gain from the benefits of inter-university collaboration. It is therefore regrettable that the clinics operate independently of each other. The clinics do not interact or network with each other, refer clients to each other or even synergise for purposes of pooling resources. The university clinics have therefore developed in silos.

4.15 THE NATIONAL LEGAL AID SERVICE (NALEAS)

For several years, national legal aid schemes have been utilised in South Africa to provide legal aid pursuant to constitutional provisions on access to justice. South Africa has explored a variety of mechanisms such as *pro bono* counsel, private counsel compensated by the state, candidate attorneys funded by the state and based in rural law firms, justice centres offering legal aid funded by the state, private law firms, university law clinics, paralegal offices and legal insurance schemes, all with differing results.²⁷⁹

The NALEAS is Kenya's national legal aid scheme established pursuant to the provisions of the Legal Aid Act. It forms the country's institutional framework for providing access to justice among indigent persons in the country.²⁸⁰ The structures of the NALEAS give effect to the access to justice provisions of the bill of rights of the Constitution of Kenya by addressing the access to justice needs of indigent persons. It employs the mechanism of legal aid providers that consist of an advocate working under the Law Society of Kenya's *pro bono* scheme or a civil service legal aid provider, a paralegal, a firm of advocates, a public benefit or faith-based

²⁷⁸ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 116, 123; Daniel Bonilla 'Legal Clinics in the Global North and South: Between Equality and Subordination - An Essay' (2013) 16 *Yale Human Rights and Development Law Journal* 1 at 9, 25.

²⁷⁹ David McQuoid-Mason 'South African Legal Aid in Noncriminal Cases', *Making Legal Aid a Reality* (2009) at 20.

²⁸⁰ 'Legal Aid Act, No. 6 of 2016' s 3.

organisation, universities or other institutions operating clinics and government agencies accredited under the Act.²⁸¹

Some of these mechanisms can benefit from lessons drawn by South African clinicians beginning with the caution that legal aid schemes are often unsuccessful in situations where the public is uninformed of their rights and how they can seek redress.²⁸² As if affirming the choice of paralegals as legal aid providers, these clinicians underscore the invaluable role of paralegals as the first point of contact for many people who have no access to legal aid and who link the community with institutions that can provide further assistance.²⁸³ Relevant for Kenya's reliance on advocates from the Law Society's *pro bono* scheme, these scholars aver that while *pro bono* schemes are cheap, the quality of service tends to be lower than that of paying clients.²⁸⁴ Since the rules under the Kenya's Legal Aid Act are not yet published, little is known about the operationalisation of the various mechanisms for legal aid under the Act.

Nevertheless, the NALEAS has and continues to undertake several projects with university law clinics. This work that the NALEAS carries out with university law clinics demonstrates an appreciation for the capacity that these clinics have for legal aid and access to justice. The NALEAS fostered this appreciation during pilot projects with university law clinics that commenced in 2009 and ran for three years.²⁸⁵ These pilot projects preceded and informed the development of the National Legal Aid Policy and subsequent promulgation of the Legal Aid Act. It is these projects that ascertained the viability of delivering legal aid services in Kenya through university law clinics.

The NALEAS therefore values partnerships and the synergies that emerge from collaborations with universities.²⁸⁶ This collaboration is beneficial for all parties involved because the NALEAS gets to fulfil its mandate while students benefit from the practical learning opportunity. Presently, the NALEAS hosts university students on attachment and internship in its current provisional legal aid programmes. It established the programmes as 'a mixed delivery

²⁸¹ Act No. 6 of 2016 (n 280) 2.

²⁸² David J McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham International Law Journal* 111 at 115.

²⁸³ McQuoid-Mason (n 279) at 27.

²⁸⁴ McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (n 282) at 117.

²⁸⁵ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 168.

²⁸⁶ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 169.

model' that entails training clients for self-representation in court.²⁸⁷ The students participate in drafting pleadings under the supervision of advocates based at the NALEAS.²⁸⁸ They also assist in screening clients and conducting mediation sessions. The students participate in open days, community legal aid days as well as in monitoring self-representation in court cases that the NALEAS is assisting in. In a laudable bid to promote access to justice for all, the NALEAS has county offices that enhance the spread of their services nationwide.

When considering university law clinics as a mechanism for providing legal aid, the NALEAS perceives the supervision role it has over clinics in the national scheme as a quality assurance measure.²⁸⁹ The accreditation of clinics that will operate under the national legal aid scheme doubles up as a tool for quality control as it will provide certain standards of service for the clinics.²⁹⁰ This is justified by the argument that the vulnerability of clients does not render them deserving of poor quality service.²⁹¹ Unfortunately, accreditation is optional so unaccredited clinics operating outside the scope of the NALEAS could still expose their clients to the risk of receiving substandard services. As the present study has revealed, the question of quality control lingers especially in the case of most clinics in the country that are extracurricular and therefore do not benefit from some level of quality assurance accorded by close supervision and the law school curriculum.

An observation by officers at the NALEAS that is also linked to university curricula and the training of students is that the level of legal aid preparedness varies from institution to institution, with one specific public university consistently generating students who demonstrate superior aptitude for legal aid tasks.²⁹² Accordingly, data from this study reveals that the same university has a Public Interest Clinic course in which enthusiastic lecturers train law students specifically on theory and practice of social justice work. Additionally, the same university has both an active walk-in clinic and a clinic club. This observation supported by research data suggests a link between curriculum-based training for legal aid and the disposition of students as well as the quality of service they render. Conversely, the lack of preparedness for legal aid work

²⁸⁷ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 179-180.

²⁸⁸ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 170.

²⁸⁹ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 174.

²⁹⁰ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 173.

²⁹¹ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 174.

²⁹² On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 177.

in students from the other universities alludes to gaps in the training of law students for legal aid and social justice work.²⁹³

Another interesting observation from the NALEAS is that students who have worked with the Service tend to remain in contact with the institution and eventually join the pool of *pro bono* advocates upon admission to the bar.²⁹⁴ The Service has had students who nurtured their interest for legal aid work at the NALEAS and thereafter inculcated it in their legal practice. Some of these later joined the *pro bono* scheme at the NALEAS after becoming advocates. This phenomenon validates the nexus between the access to justice work conducted by students and the inspiration to engage in social justice projects that this involvement inculcates in their careers. This connection lends credence to the secondary social justice argument for clinic work which literature decries as having mere anecdotal support.²⁹⁵

4.16 THE LAW SOCIETY OF KENYA (LSK)

Members of the legal profession in various jurisdictions in Africa have taken active measures towards alleviating unmet legal need. The measures include providing financial support to firms specialising in legal aid²⁹⁶ and even establishing a fund to subsidise the funding of accredited clinics,²⁹⁷ thereby cushioning them from financial embarrassment. Jurisdictions that have recognised law clinics as a form of legal practice²⁹⁸ enable clinics to take up legal representation of clients in their own name, relieving them from having to instruct external counsel to offer voluntary assistance. Allowing such recognised clinics to engage candidate legal practitioners²⁹⁹ has the effect of expanding training opportunities for lawyers thereby multiplying the numbers of qualified professionals offering legal services. A more common direct measure applied by members of the legal profession in other countries is offering their *pro bono* services on

²⁹³ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 178.

²⁹⁴ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 170.

²⁹⁵ Nicolson "'Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (n 167) at 94.

²⁹⁶ Mcquoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (n 282) at 128.

²⁹⁷ Legal Practice Act, No 28 of 2014 s 53.

²⁹⁸ Act No 28 of 2014 (n 297) s34(5)(c), 34(6)(b).

²⁹⁹ Act No 28 of 2014 (n 297) s 34(8)(b)(iv).

volunteer basis in instances where their statute does not provide for mandatory³⁰⁰ provision of *pro bono* services for the indigent. Contrasted to these, the measures carried out by the Law Society of Kenya appear feeble in response to the unmet legal need in the country.

The Law Society of Kenya (LSK) is the bar association to which all the advocates in Kenya belong. They get to join LSK upon successfully completing the Advocates' Training Programme, signing the roll of advocates and gaining admission to the bar when they enter legal practice as Advocates of the High Court of Kenya. All advocates are members of the LSK, which facilitates the issuance of practice certificates to those who are in active practice.

The LSK consists of the council, the membership and the secretariat. The secretariat provides technical support to the council and has a Public Interest and Advocacy Department.

The Public Interest and Advocacy Department assists clients who need advice on selecting legal counsel according to their areas of expertise. As the Society is the repository of all the information that advocates have shared on their areas of expertise, the Department has adequate material to provide reliable referrals.

Since advocates conduct the public interest litigation matters on behalf of the Society, the Public Interest and Advocacy Department conducts case management in the Society's public interest litigation matters and keeps the Society's membership updated on them.³⁰¹ The Department also maintains the Society's *pro bono* database, conducts legal aid programmes and organises the annual LSK Legal Awareness Weeks.

The *pro bono* database run by the Public Interest and Advocacy Department is a database of advocates who have volunteered to provide legal services to the indigent.³⁰² The Society refers indigent clients to the advocates listed in the *pro bono* database. It consists of approximately eight and a half per cent of the advocates in practice. Coincidentally, this percentage mirrors the percentage of university students engaged in clinic work at university level.

The Society has a financial means threshold that a client must meet before qualifying for *pro bono* services.³⁰³ For this reason, the Public Interest and Advocacy Department screens the

³⁰⁰ Abate, Birhanu and Alemayehu (n 232) at 10.

³⁰¹ On file with author Protocol Number H18/10/17 'Interview 9' *Combined Transcripts* (2019) at 180.

³⁰² On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 181.

³⁰³ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 182.

clients before referring them to *pro bono* advocates who are located closest to them.³⁰⁴ These advocates waive their legal fees and work on the cases free of charge.³⁰⁵

While the Society uses '*pro bono*' to refer to the waiver of professional fees only, *pro bono* matters tend to bring along hidden costs that are unforeseen by the firms taking them on. This happens especially when indigent clients cannot meet filing fees and disbursements related to their cases.³⁰⁶

Even though *pro bono* cases consume resources and the clients do not pay legal fees for them, the LSK still holds advocates accountable for the *pro bono* files they take up.³⁰⁷ These advocates carry out the required tasks without any incentive except the possibility of receiving the '*Pro Bono* Lawyer of the Year Award'.³⁰⁸

The heavy responsibility incurred coupled with the lack of returns might explain the reluctance on the part of advocates to enlist in the database as *pro bono* advocates.³⁰⁹ Presently, the Society is still studying arrangements for further incentives such as awarding of Continuing Professional Development (CPD) points that the Society requires all advocates to accumulate as a prerequisite for the renewal of their annual practice certificates.³¹⁰

Together with managing the *pro bono* database, the Public Interest and Advocacy Department carries out legal aid programmes. It collaborates with like-minded institutions and enters into partnerships with them to provide support in their diverse fields of expertise.³¹¹ Akin to a framework organisation, the Department invites interested members to these programmes to offer legal aid on behalf of the Society.³¹²

The Public Interest and Advocacy Department is the one responsible for organising the annual 'Legal Awareness Week' in various high court stations across the country. This is a full week in which lawyers volunteer their time and attend to members of the public who show up for

³⁰⁴ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 183.

³⁰⁵ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 181.

³⁰⁶ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 191.

³⁰⁷ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 190.

³⁰⁸ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 190.

³⁰⁹ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 190.

³¹⁰ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 189.

³¹¹ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 184.

³¹² On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 185.

the event.³¹³ Participating lawyers earn a CPD point as an incentive and reward for their participation.

LSK's engagement with students is most prominent during the Society's annual Legal Awareness Week during which the students have close interactions with advocates and have the opportunity to learn from them.³¹⁴ This is why the majority of the clinics consider the LSK as one of their collaborators. A course instructor had the following to say about their work with the Society:

'Some of the stakeholders we work with are the LSK and other non-state actors who are involved in the provision of legal aid or who support the provision of legal aid in some form or other.'³¹⁵

The clinics that engage with the Society explain their collaborations with the Law Society mainly in relation to the Society's annual Legal Awareness Weeks. Some excerpts describing these are as follows:

'I joined legal aid in first year, first semester. You know, the Law Society of Kenya organises a Legal Aid Week every year for a whole week in October-November thereabout. So, we are supposed to participate in this. It is optional, by the way. So, the school decides whether you want to take part in the LSK legal aid clinic. It is a week that is dedicated to offering legal aid services. It is usually done in every high court in Kenya, so it is usually all over Kenya...'³¹⁶

'To begin with, the LSK organised a legal aid week which was held at Milimani. We got to be part of it, bringing students from fourth years, third years, second years, then... and even first years to try and be part of the legal aid.'³¹⁷

'When we did it with the LSK during the annual LSK Legal Awareness Week for 2018, we had an arrangement where the Law Society would award us with the documents showing our participation....'³¹⁸

'The legal aid is done in partnership with LSK Week plus Judicial Service Week.'³¹⁹

³¹³ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 185.

³¹⁴ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 192.

³¹⁵ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 55.

³¹⁶ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 71.

³¹⁷ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 92.

³¹⁸ On file with author Protocol Number H18/10/17 'Interview 6A' (n 48) at 158.

The students also participate when members of the Society offer legal aid to persons in remand centres.³²⁰ They assist with fulfilling administrative tasks that promote the smooth running of the Legal Awareness Week.³²¹ The LSK in turn supports university law clinics that approach it, by reaching out and inviting the membership to the university legal aid clinics.³²²

LSK officials are cognisant of the service value that legal aid instils in students, a value which they carry with them into the profession.³²³ This begs the question why the Society has left the acquisition of these values to chance activities that are not a priority even for resourcing purposes. The under prioritisation is highlighted by the limited resources allocated for the Society's Legal Awareness Week which results in the students drawn from different universities volunteering their services purely for the learning experience and having to look after their own logistics.³²⁴

It is noteworthy that the Society has a Public Interest and Human Rights Committee, which has its own programmes that include proactively sourcing for partnerships that are beneficial to members of the public. These partnerships include developing and availing Information Communication and Education (ICE) materials that present legislation in simplified formats to members of the public.³²⁵

Furthermore, there is an emerging trend where firms are taking legal aid initiatives without the lawyers having enlisted in the LSK *pro bono* database.³²⁶ Such initiatives have an impact in inculcating a culture of legal aid in young lawyers, as shared by a lawyer below:

'I remember my first boss ever after joining the bar. We would spend Saturday's with him doing legal aid in the community. We would do our briefs during the week, all over the place. But during the weekends we would take our time for no pay and just go to the community, work with the community on some legal issue or other. Sometimes volunteering our legal services beyond

³¹⁹ On file with author Protocol Number H18/10/17 'Interview 7' (n 18) at 165.

³²⁰ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 193.

³²¹ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 194.

³²² On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 192.

³²³ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 195-196.

³²⁴ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 194.

³²⁵ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 186.

³²⁶ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 189.

Saturday now into court and into negotiations. And it hones you. When you're young, when you're just coming into the profession, it helps you.³²⁷

Unfortunately, statistics of these firms are unavailable.

PART 2

4.17 THE BARRIERS TO ACCESS TO JUSTICE THROUGH CLE

The historical evolution of law from a tool of suppression to a tool for social justice has been a turbulent one for the legal profession and law schools in Kenya.³²⁸ A law curriculum that is minimally engaged with social justice and the goals of transformative constitutionalism illustrates the disconnection between the content of legal education and the changing role of law in society. Although university law clinics have been involved in sporadic voluntary community services, they have barely been employed as pedagogical tools for imparting a disposition towards social justice to law students.

The benefits of CLE abound in literature to the extent of virtually raising CLE to the level of a panacea for legal education. The social justice mission of CLE immerses students in the legal needs of the clients they serve; a process that plunges them into the practical legal needs of the community and extends their learning into ethical and reflective practice.³²⁹ It generates benefits for the community enabling them to access some level of legal service that they would otherwise not afford. CLE has the potential of promoting a student-centred learning that fosters in the students a professional identity while transmitting a variety of skills and values such as responsibility, emotional skills and confidence.³³⁰ The students develop legal practice skills such

³²⁷ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 66.

³²⁸ Ghai (n 9); Paul Mwangi *The Black Bar: Corruption and Political Intrigue within Kenya's Legal Fraternity* (2001); Yash P Ghai 'Law and Lawyers in Kenya and Tanzania: Some Political Economy' in Yash Pal Ghai and JCN Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (1981); G. Kamau 'Current Problems of Legal Education in Kenya' (1979) 9 *Journal of Eastern African Research and Development* 33.

³²⁹ Donald Nicolson 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16 *Legal Ethics* 36 at 47-48.

³³⁰ Adrian Evans and others *Best Practices Australian Clinical Legal Education* (2012) at 5.

as interviewing clients, interpreting court pleadings, leading negotiations and taking notes.³³¹ Furthermore, scholars recognise the great potential CLE has for engaging in transformative constitutionalism such as in public interest litigation and systemic social justice issues.³³²

Critical reviews of CLE are alive to the questions about the quality of service offered to the clients given that the students and sometimes even their immediate supervisors have little or no experience in the matters they are dealing with.³³³ Additionally, if there is an increase in cases, the clinic could lose the delicate equilibrium between the focus on practical training of students³³⁴ and providing services to clients.³³⁵

Despite the documented benefits of CLE,³³⁶ the data from this study indicates that the universities in Kenya have not set up structures to optimise CLE as a pedagogical instrument for transmitting social justice training and values to students. They have merely implemented clinics as one of several extracurricular university activities.³³⁷ This indifference notwithstanding, clinics have flourished as agents of community legal awareness. However, the fact that clinics lack capacity to provide legal representation despite students' knowledge of law and legal principles has curtailed the capability and reach of clinics. The want of capacity to represent clients limits the clinics in respect of the types of interventions they can make. Their activities gravitate around community education projects and legal awareness programmes.³³⁸ Furthermore, the students encounter difficulties in accessing persons who could draw some benefit from their limited services.³³⁹

³³¹ Du Plessis 'Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values' (n 124) at 319.

³³² Peggy Maisel, Shaheda Mahomed and Meetal Jain 'Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present and Future' (2015) 60 *New York Law School Law Review* 433 at 460.

³³³ Jeffrey Michael Giddings 'Contemplating the Future of Clinical Legal Education' (2008) 17 *Griffith Law Review* 1 at 8.

³³⁴ Du Plessis 'Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values' (n 124) at 327.

³³⁵ Mahomed (n 102) at 61.

³³⁶ Giddings *Influential Factors in the Sustainability of Clinical Legal Education Programs* (n 244) at 49-58.

³³⁷ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 114.

³³⁸ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 75.

³³⁹ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 138.

On their part, law teachers grapple with heavy teaching loads that they stretch to enable them to serve as patrons and directors of law clinics.³⁴⁰ Their work with clinics does not arise from their contractual obligations but is the fruit of the passion and personal interest they have for clinical work.³⁴¹

The leadership of the clinic is organised to have the students in their senior years operating and managing the clinics.³⁴² Inevitably, the turnover in student leadership resulting from changes in student cohorts upsets the momentum of the clinic. Furthermore, while clinics in other jurisdictions enjoy the gains of forming associations, university clinics in Kenya have developed in silos.³⁴³ Their partnerships and collaborations with entities that provide legal aid are symbiotic yet *ad hoc*, feeble and unstructured.

Although university law clinics are in the list of legal aid providers in the national legal aid scheme,³⁴⁴ they are bereft of legal recognition in the university settings that host them. This contributes to their fragile existence. With their extracurricular status as clubs, student associations and practice organisations that fall outside the mainstream university structures and teaching objectives, clinics end up starving of resources. This in turn culminates into problems of sustainability.

Clinic work demands close and constant supervision, which the extracurricular clinics in Kenya lack. This is because of their dependence on few academics that have the interest and very little time to work with students.³⁴⁵ The lecturers often assist clinics in a voluntary capacity usually over and above their course load. Even when universities appoint them as clinic patrons, they end up allocating them large numbers of students that are counterproductive for clinical teaching. These large student numbers are not ideal for clinical courses³⁴⁶ although they may be cost effective for the university.

³⁴⁰ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 23.

³⁴¹ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 10.

³⁴² On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 27.

³⁴³ Strathmore University Law School (n 2) at 11.

³⁴⁴ Act No. 6 of 2016 (n 280) s 2.

³⁴⁵ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 125.

³⁴⁶ MA du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (2013) 38 *Journal for Juridical Science* 17 at 17.

There has been a protracted delay in operationalising the national legal aid scheme, which has prolonged the anticipation of the benefits it promises.³⁴⁷ The impending accreditation of clinics by the NALEAS has generated unnecessary expectation, speculation and even disillusionment among university clinics.

Meanwhile, clinics remain immersed in their social justice endeavours with indigent persons in communities around the university, prisons, schools and legal aid programmes. Unfortunately, they operate their programmes and activities without any form of monitoring, evaluation or studies on the impact of their interventions.³⁴⁸ This prevents them from gathering lessons so they end up generating strategies and proposals that are devoid of research, reflection and experience. Additionally, their failure to conduct impact studies of the interventions they make prevents them from generating empirical justification for their continued operations that could be beneficial for attracting new collaborators.

The endeavour to enhance access to justice through CLE is therefore one that is replete with obstacles that confront both access to justice and CLE. According to the data, these challenges affect clinics in all institutions regardless of whether they are categorised as public or private. The later classification only appears to impact the level of bureaucracy which is often lower in private universities, as they are generally smaller and younger institutions.

From the foregoing, it is possible to categorise the setbacks to enhancing access to justice through CLE in Kenya as arising from either external or internal circumstances. The external circumstances emanate from outside of the university environment while the internal circumstances are mainly from university and clinic operations. The setbacks emerging from external circumstances are historical factors, legislative weaknesses, delay in operationalisation of the national legal aid scheme and clinics' lack of representational capacity.

Those emerging from internal circumstances are law curricula that are minimally engaged with the goals of transformative constitutionalism, clinics that operate as extra-curricular activities, limits to the scope of work that students can conduct, difficulties in mobilising clients, limitations in engaging volunteer academic staff, inadequate supervision of students, high turnover of student leadership, inadequate resources, inappropriate placement of

³⁴⁷ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 172.

³⁴⁸ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 19.

clinics in the university structure, lack of clinic sustainability, the neglect of evaluation or impact studies of clinic activities as well as weak partnerships and networks.

4.17.1 Historical factors

Chapter three examined the history of clinics in the face of the development of the legal profession in Kenya. The chapter explained how the colonial and succeeding regimes stifled the development of the legal profession. The profession suffered attacks aimed at thwarting the growth of Kenyan legal practitioners because of the challenges they could pose to the despotic regime.³⁴⁹ Additionally, legal education in the country underwent similar repressive treatment that stunted its growth. This combination of factors yielded an inward-looking profession that was struggling for its own survival. Unfortunately, it seems that the lawyers' dynamism concentrated on the struggles that confronted the legal profession. With the tumultuous circumstances of its development, the legal profession did not cultivate a *pro bono* or legal aid culture.

Nevertheless, a few lawyers working alongside paralegals in civil society and public benefit organisations entrenched themselves in legal aid, community education, representation of indigent clients and public interest litigation.³⁵⁰ Erstwhile regulated and referred to as non-governmental organisations (NGOs), some of these public benefit organisations consisted of bodies established with the support of donor funding to spearhead opposition to despotic governance and to advocate for human rights and the rule of law.

The establishment of legal education institutions also suffered the brunt of repression by the pre-independence government which was opposed to the enrolment and training of indigenous Kenyans.³⁵¹ Even when eventually established, the first law school curriculum and staff struggled with the effects of legal transplant that often disregarded the needs of the local population in favour of the political and economic interests of the incumbent.³⁵² Unfortunately, some of the problems with legal education that were identified in the 1970s such as the dearth of

³⁴⁹ Mwangi (n 328) at 21, 26, 54, 59, 72, 92.

³⁵⁰ Jedidhah Wakonyo Waruhiu and John Justice Odhiambo Otieno 'Access to Justice: The Paralegal Approach' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 192.

³⁵¹ Ghai (n 328) at 152.

³⁵² Ghai (n 328) at 149; Kamau (n 328) at 45.

reading material and research addressing national needs are perpetuated to date.³⁵³ This historical development of legal education and the legal profession has not been favourable for the growth of clinics.

Interestingly, Kenya like South Africa established its first law clinic in the early 1970s. South Africa has since developed a robust CLE movement yet clinics in Kenya remain at their nascent stages of development.³⁵⁴ The variety of responses below is reflective of how young the clinics in Kenyan universities are:

‘Because it’s a young institution, it [Clinic] is yet to be inculcated into the culture of the university.’³⁵⁵

‘Yes, the law clinic is a new concept to us as a university. I was actually just appointed last year, given the formal appointment as the coordinator of the law clinic. So, we are in the process of setting it up.’³⁵⁶

‘The legal clinic was opened in two thousand and fourteen May or June thereabouts.’³⁵⁷

The following response was from one of the most established extra-curricular clinics:

‘The clinic was established in 1999.’³⁵⁸

Understandably, universities in South Africa have been in existence much longer than those in Kenya: Kenya had only one law school between 1970 and 1994, while South Africa boasted 21 law schools in the same period.³⁵⁹

While South Africa’s clinics developed within the university curriculum, Kenya’s clinics blossomed as extra-curricular clinics. The first and only law school in existence in the 1970s set up a clinic in collaboration with other entities and this clinic mutated into a public benefit

³⁵³ Patricia Kameri-Mbote *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses* (University of Nairobi 2013) at 25.

³⁵⁴ De Klerk (n 217) at 95-96.

³⁵⁵ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 22.

³⁵⁶ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5.

³⁵⁷ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 82.

³⁵⁸ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 129.

³⁵⁹ Willem de Klerk ‘University Law Clinics in South Africa’ (2005) 122 *South African Law Journal* 929 at 929, 931.

organisation.³⁶⁰ It was only until 1994 when Moi University was established as the second law school in the country and the first with a purely clinical focus.³⁶¹

The country's political history and yawning need for access to justice ought to have been a conducive environment for the growth and development of clinics which, unfortunately, was not the case. Legal aid work organically became the preserve of public benefit organisations that the State and the legal profession only engaged in with difficulty. Universities on their part, established clinics spontaneously as a way in which students could assist indigent members of the community outside of the law programme. With the advent of the 2010 Constitution, a profession that was nurtured at a time when law was a tool for suppression is now contending with law as a tool for social justice.

The history of the country, of the legal profession and of legal education did not nurture university law clinics, *pro bono* or a legal aid culture in lawyers. The social justice goals at the centre of the 2010 Constitution place the legal profession, legal education and law clinics at crossroads, thus requiring them to re-evaluate their missions and recognise the need to shift from their historical moulds.

4.17.2 Legislative weaknesses

As discussed in the previous chapter, the statutory provisions facilitating legal aid intersperse several legislations some of which establish corresponding institutions. Weaknesses are identifiable in legislation in instances where there are conflicting provisions such as when the Legal Aid Act recognises university clinics as key legal aid providers under the national legal aid scheme yet the legislation governing universities neither provides for nor facilitates this role. The latter legislation identifies the objectives of universities as teaching and research. Data on university practice reflects this conflict since the universities have active social justice clinics whose pedagogical role is dormant. As such, the mission of clinics that the Universities Act directly recognises is inactive, while the social justice role that the same legislation does not provide for is the one that is prolific and is the one that the Legal Aid Act provides for and

³⁶⁰ Amondi (n 5) at 205.

³⁶¹ TO Ojienda and M Oduor 'Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya' (2002) 2 *International Journal of Clinical Legal Education* 49 at 49
<<http://www.northumbria-journals.co.uk/index.php/ijcle/article/view/123/122>>.

promotes. The fragmented and conflicting legal framework for CLE and clinics as analysed extensively in chapter three does not augur well for seamless implementation.

The Legal Education Act, which is the legislation that governs legal education in the country, mandates the core courses that all law schools must offer. The mandatory courses lack a discernible appreciation of the Constitution's social justice orientation. These courses are largely the same as those offered in the previous dispensations thus transferring any social justice or clinical approaches to the academic freedom of the law schools. Whether by default or by design, it appears that the only change introduced by the 2010 Constitution is in the content of the Constitutional Law courses and aspects in which the constitutional provisions have influenced the rest of the property and commercial courses.

Another instance of legislative weakness that compromises access to justice is the administration of paralegal services. Paralegals have historically proffered their services in parts of the country that have few or no lawyers by offering legal services to indigent persons.³⁶² Unfortunately, paralegals likewise experience a dearth of legal and institutional structure; a situation that does little to facilitate their access to justice work. The perception by clinics that social justice is not sufficiently prioritised in legal education and in the justice system generally,³⁶³ finds some support in the consequences of the foregoing instances of legislative inadequacy.

Therefore, even when law schools offer moral support to their clinics the overall institutional bureaucracy renders this kind of moral support of clinics negligible because it is inconsequential in terms of resource allocation, planning, establishment and eventual sustainability of clinics.

4.17.3 Delay in operationalisation of the NALEAS

The only statutory recognition accorded to university clinics is in the Legal Aid Act of 2016 which lists university law clinics as legal aid providers in the national legal aid scheme, the NALEAS.

³⁶² Waruhiu and Otieno (n 350) at 190.

³⁶³ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 68.

Unfortunately, there has been a protracted delay in the development and adoption of the rules under which the NALEAS will operate. Since the promulgation of the legislation in 2016, the NALEAS has not developed frameworks for engagement with university clinics as legal aid providers.³⁶⁴ The delay in developing and adopting regulations under the Act has impeded the implementation of the national legal aid scheme.³⁶⁵ This is because these are the regulations that provide the structures that facilitate the engagements between the NALEAS and legal aid providers. Additionally, these regulations provide the basis for the NALEAS to obtain funding from the national treasury towards its legal aid services.³⁶⁶

With the delayed operationalisation of the Act, anticipation is building up around the NALEAS as a panacea for coordination of legal aid and for supporting university law clinics' resources. There are varying and even erroneous ideas about the role of the NALEAS circulating among university clinics. A student articulates one of these erroneous expectations related to rules for awarding academic credit to clinics, instead of the NALEAS accrediting clinics to join the national legal aid scheme, as:

‘Also, the national legal aid accreditation service, they were developing rules to give credit to some of these clinics that are operating....’³⁶⁷

Other less idealistic hopes are more aligned to the factual role of the NALEAS although these too allude to some level of unfamiliarity with the role and objectives of the NALEAS:

‘I have heard of the National Legal Aid Council or something. I think they need to do better. If they are able to do better, we will have more legal aid clinics, we will have more...we can even be able to find a way in which students are linked to suspects who don't have ... accused persons who do not have legal representation at all.’³⁶⁸

Clinics are eagerly awaiting accreditation under the national legal aid scheme in the hope that this will improve their prospects of operation. Such optimism is nurtured by the possibility

³⁶⁴ On file with author Protocol Number H18/10/17 ‘Interview 8’ (n 119) at 173.

³⁶⁵ On file with author Protocol Number H18/10/17 ‘Interview 8’ (n 119) at 171.

³⁶⁶ On file with author Protocol Number H18/10/17 ‘Interview 8’ (n 119) at 172.

³⁶⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

³⁶⁸ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 146.

of receiving affirmation and guidance, of having an institutional reference point, a source of supplementary funding and a constant flow of clients. These, in turn, generate possibilities of improved resourcing and consequently greater chances of sustainability. The optimism of obtaining some assistance from the NALEAS is palpable in the following comment by a student:

‘... as soon as they are developed we would be able to benefit from some form of support from the National Legal Aid Service.’³⁶⁹

Once the national legal aid scheme is fully operational, the NALEAS would be a unifying factor among the university clinics given the independent way in which clinics operate in the country. It would also be the first and only national body fostering, funding and setting standards for the operation of social justice clinics in the country.³⁷⁰

Presently, only two factors dampen the widespread optimism towards the activation of legal aid provision under the NALEAS legal aid programme: the lack of certainty about the content and operation of the scheme as well as the protracted delay in the commencement of its activities.³⁷¹

4.17.4 Lack of representational capacity

Neither clinics nor law students have capacity to represent clients in court,³⁷² so they can assist with everything else around a case save for representation in court. This lack of representational capacity compels clinics to limit their work to legal awareness and advocacy³⁷³ even when there are simple cases in which students can assist indigent clients under the supervision of advocates.³⁷⁴ The capacity to provide legal representation for clients has the potential of highly facilitating the access to justice role of clinics and making their impact more far-reaching.³⁷⁵

³⁶⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

³⁷⁰ On file with author Protocol Number H18/10/17 ‘Interview 8’ (n 119) at 173.

³⁷¹ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 146.

³⁷² On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 8.

³⁷³ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 16.

³⁷⁴ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 61.

³⁷⁵ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 132.

The walk-in clinic is dependent on assistance from practicing lawyers because the clinic lacks representational capacity.³⁷⁶ This dependence demonstrates the impotence of legal awareness without representation. Some clinics view the fact that only advocates have a representational capacity as a hindrance to their access to justice work. They have the impression that courts exhibit a leaning towards legal counsel in court and are intolerant with persons conducting self-representation or public benefit organisations that are not law-oriented.³⁷⁷

Clinic participants are of the view that clients in simple and straightforward cases end up proceeding unrepresented because the courts do not factor in students' role or knowledge in legal aid. These are court cases whose resolution the courts could encourage through alternative dispute resolution mechanisms led by clinics, thereby removing them from an already clogged court system. This is the case in jurisdictions such as the United States, in which law is offered as a second degree course, where clinics and students through their representational capacity have contributed to significant court decisions affecting indigent communities.³⁷⁸ Supporting this role of students, the 1972 decision in *Argersinger v. Hamlin* on the right of an indigent defendant in a criminal trial to the assistance of counsel, the American Supreme Court was of the view that:

‘Given the huge increase in law school enrolments over the past few years... I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.’³⁷⁹

A student leader expressed his displeasure with their incapacity to represent clients thus:

‘There would be small claims that should not make it to court. Claims that should end at ADR, which ADR can be facilitated by anyone, even a passer-by advice. They end up in court and create a backlog. But if the Supreme Court of Kenya or any other court decided that students can give advice, even at an ADR basis.... In America, the way they do it is that the judge asks “Any of the accused persons want a lawyer? There are students here who can give you advice.” Then such a case becomes... those who are willing are represented then and there. If it happened like that in

³⁷⁶ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 81.

³⁷⁷ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 159.

³⁷⁸ Katharina Pistor *The Code of Capital* (2019) at 25.

³⁷⁹ *Argersinger v Hamlin* (1972) (No 70-5015) 407 US 25.

Kenya, then it would be a better chance for persons who go to court underrepresented or unrepresented.³⁸⁰

Since the teaching staff recognise the huge unmet legal need in the country and are aware about jurisdictions that allow clinics to provide legal representation, they perceive this situation as a missed opportunity for Kenyan clinics. They too draw the comparison between clinics in jurisdictions that allow student representation and Kenya, which does not. In appreciating the value of student representation for access to justice, a clinic director predicts resistance from the legal profession on the question of student representation should clinics in Kenya propose this. She expresses her view as:

‘...so, for them [US clinics] the law student can actually represent the client in court, but for us it’s not the same. So, our law clinics are a bit limiting to that extent. So, we may never get to a point where law students will be representing clients because it’s a very political issue that LSK may not be willing to give to that. So, in that respect, how can we remodel the whole concept...’³⁸¹

A consequence of the lack of representational capacity by clinics is that the effectiveness of student projects becomes dependent on their cooperation with advocates and these interventions are therefore reliant on goodwill from the advocates.³⁸² Clinics rely on the generosity of *pro bono* advocates to facilitate their execution of projects such as a ‘criminal justice innocence project’ that entails legal representation.³⁸³ Advocates are likewise necessary for the establishment and running of a semi-autonomous client-representing clinic in the university.³⁸⁴

The students lack autonomy in access to justice matters that require legal representation and are dependent on representation and assistance from the bar.³⁸⁵ The bar unfortunately, has a low social justice profile and is not known to invest time and resources in this.³⁸⁶ Ultimately,

³⁸⁰ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 160-161.

³⁸¹ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 125.

³⁸² On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 60.

³⁸³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 42.

³⁸⁴ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 17.

³⁸⁵ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 69.

³⁸⁶ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 125.

representation at clinic level is left to the mercy of advocates yet these advocates do not have any corresponding obligation towards either clinics or *pro bono* service. Thus, there is a sense in which clinic staff feel that the legal profession could be more relenting in its representational stance. A clinic course instructor articulated this sentiment well when she said:

‘So, then their experience in the clinical course would be limited to drafting the background material, researching, observing the proceedings in court and not necessarily actually representing whichever parties would be represented in court. Now, this is a problem that has been there; I think not just for our law school. One of the things that will come out of the round table is LSK to consider its own role in enhancing access to justice by just, perhaps, allowing students to take on some of the more simple cases where parties may not be able to afford legal fees. Perhaps with the rider that such students must be supervised, of course, along that process.’³⁸⁷

CLE in Kenya, apart from being an extracurricular activity suffers the disadvantage of dependency on the benevolence of a separate institution that holds monopoly over legal representation. Consequently, the future collaboration between legal education institutions and the professional bar while not entrenched in law becomes inevitable.

4.17.5 Law curricula are minimally engaged with transformative constitutionalism

Of all professions, lawyers are best placed to be the custodians of transformative constitutionalism. Legal education as presently delivered through the current law school curricula falls short of the Constitution’s transformative goals. This situation conveys significant implications for access to justice because the curriculum fails to prepare lawyers to use the law to attain social justice goals.³⁸⁸ Additionally, the responsibility that law teachers bear of transmitting social justice values to students is underutilised. They restrict the task of enthusing students to work towards the improvement of society³⁸⁹ to theory classes. This reduces the law curriculum to the transmission of legal principles and analytical argument, without the practical

³⁸⁷ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 61.

³⁸⁸ Radley Henrico ‘Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu’ (2016) 13 *US-China Law Review* 817 at 821-825.

³⁸⁹ Elmarie Fourie ‘Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping Our Legal Order’ (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 2.

engagement with constitutional values that should infuse the practice of law.³⁹⁰ It is noteworthy that except for the theory courses on Constitutional Law and Professional Ethics, there is no distinct method of inculcating chapter six of the Constitution on leadership and integrity as well as other values in law students. The way legal education assists students to develop a professional identity and work towards a purposeful career is not distinct.³⁹¹ Thus, the law school fails to transmit transformative legal education to its full potential.

The legal education as currently transmitted appears to fall short of transformative standards because the subjects of legal education as set out in the Legal Education Act, the teaching methodology focused on theory and lectures as well as the content of this education do not yet critically engage the goals of transformative constitutionalism.³⁹² The core subjects remain the traditional courses on commerce, constitutional law, contract, property and legal research yet transformative constitutionalism is value-laden and has social justice objectives.

Additionally, there is a disconnect between university objectives and the use of clinics for extracurricular social justice projects. Statute expresses the objectives of universities as teaching and research, while clinics are extensively or even solely employed as a service to the community; a role that falls outside the scope of the stated university objectives. Paradoxically, the pedagogical role of clinics is highly underutilised yet this is the only aspect of clinics that is in accordance with the university's statutory objectives.

Although the teaching methodology in transformative legal education stresses a fundamental shift from presenting the law as if from a pulpit as incontestable norms, Kenya's continued use of the lecture method retains the 'culture of authority.' This represses proactivity and innovation in a generation that should be propelling transformation in the community.³⁹³ It is an impediment towards student's understanding of the reasoning behind law and legal principles in the variety of contexts where these apply.³⁹⁴

³⁹⁰ Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 356.

³⁹¹ Fourie (n 389) at 3.

³⁹² Quinot (n 61) at 412.

³⁹³ Quinot (n 61) at 417.

³⁹⁴ Quinot (n 61) at 418.

In alignment with the argument that legal education and unequal access to justice can become obstacles to transformative constitutionalism,³⁹⁵ the present set up of Kenya's legal education resists transformative constitutionalism in the instances when it fails to address national values and principles set out in the Constitution. These values and principles include equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised.³⁹⁶

The level of integration of access to justice needs in the law curriculum beyond externships and clinical courses is wanting. Stemming from its theoretical nature, legal education barely exposes students to the societal environment in which the law applies.³⁹⁷ The curriculum limits this exposure to attachment programmes at the courts and law offices, which it offers at the end of the second or third year of law school. As a result, students experience little or no immersion in legal matters concerning communities with unmet legal need.

Furthermore, the term 'clinical' as used in Kenyan law schools exhibits significant ambiguity. The law schools use the terms 'clinicals' and 'clinical courses' to refer to the entire gamut of courses that have some practical element. These include externships, the judicial attachment programmes, attachment at legal aid institutions as well as research projects on access to justice and law reform matters. The institutions do not draw any distinction between practical and clinical courses. Thus, even curricula that boast of clinical content may only offer a smaller percentage of this, if at all.

A shortfall of curriculum-based clinical courses is that these last only one semester so interventions must align with the duration of academic semesters. This limitation of time confines the courses to interventions such as awareness creation, which the students can complete within the duration of a semester. They thereby exclude public interest litigation, that is often protracted, and law reform projects whose timelines are beyond the school's control and which are linked to multiple factors that are independent of the university such as parliamentary

³⁹⁵ Langa (n 390) at 355.

³⁹⁶ Constitution of Kenya, 2010 art 10(2).

³⁹⁷ Maisel, Mahomed and Jain (n 332) at 444.

approvals and clogged court diaries that see cases take several years due to backlogs at the courts.³⁹⁸

Whereas it is ideal to blend the theory and practical aspects of courses, achieving this within the time allocated in the curriculum is often impossible.³⁹⁹ There usually are many courses that students must successfully complete before they become eligible for graduation. Thus, the risk of curriculum overload is a real one. Considering that learning by doing is usually possible where there is a lean curriculum, heavy course loads leave students with little time to avail themselves for practical sessions.⁴⁰⁰ Additionally, perspectives from teaching staff allude to the resulting abrupt shift from theory to practice as a potential cause of difficulty and failure of law students at professional examination level.⁴⁰¹

The large numbers of students in law schools in Kenya likewise hinder practical learning processes that are usually more favourable with small groups.⁴⁰² This creates a gap in the implementation of clinical sections of the law curriculum.⁴⁰³

It is also noteworthy that Kenya does not operate a uniform university calendar and each law curriculum emphasises the university's niche area. Additionally, the NALEAS has little or no engagement with universities on the nature and content of their curriculum and how their courses contribute to preparing students for legal aid work.⁴⁰⁴ Since universities have unique niche areas, not all of them train students on social justice aspects of law. The varying university curricula and calendars result in heterogeneously trained students seeking internship positions at the NALEAS during periods that are incongruent with the NALEAS operational cycles.⁴⁰⁵ Additionally, the duration of externship programmes is not consistent across universities although the NALEAS officials recommend a minimum of three months if the experience is to be of learning value.⁴⁰⁶ These discrepancies call for communication and coordination between universities and the NALEAS.

³⁹⁸ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 59.

³⁹⁹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 89.

⁴⁰⁰ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 88.

⁴⁰¹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 90.

⁴⁰² Du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (n 346) at 21.

⁴⁰³ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 142.

⁴⁰⁴ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 175.

⁴⁰⁵ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 176.

⁴⁰⁶ On file with author Protocol Number H18/10/17 'Interview 8' (n 119) at 175.

In the foregoing ways, the law curriculum fails to optimise clinics and CLE as a way of integrating transformative constitutionalism in the curriculum and as a way of imparting transformative legal education that immerses students in the societal legal needs. This engages them in a learning process that inculcates in them a disposition towards social justice even as they endeavour to meet the legal needs of indigent persons.

4.17.6 Clinics as extra-curricular activities

Kenyan clinics conduct the majority of clinic work in clubs and student organisations. The clinics are extracurricular in nature so they provide legal service to indigent persons outside of the law courses. The data on clinic structures reveals an evident leaning towards student-led clinics.⁴⁰⁷ The fact that clinics function outside of the law curriculum without assessment, award of credits, or a structured system of supervision renders their pedagogical mission dysfunctional. That these are purely social justice clinics perpetuates the divide between the twin goals of CLE, which are teaching and service.

It is noteworthy that the use of the term ‘experiential learning’ by clinic staff is dissimilar to that in the Legal Education Act where experiential learning is explained as ‘relevant skills, knowledge or competencies that have been obtained through work experience, informal training and life experiences.’⁴⁰⁸ On the contrary, clinic staff use the term experiential learning as it is applied in clinical tradition;⁴⁰⁹ a broad term that refers to knowledge gained through CLE, mootings, simulations and role-plays offered at law school. The application of this term in its traditional sense is notable in the excerpt from a clinic director’s description of their clinic below:

‘Ideally, the law clinic having really taken off mid-last year did not actually originally have a curriculum recognition, in that, students were not benefiting in the sense that the grades would not increase or decrease by their participation in the clinic. However, that situation has now changed in the revision of the curriculum in which the students who actively participate in clinical work all through their four years will be assigned a certain grade or credit which amounts to a unit known

⁴⁰⁷ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 8.

⁴⁰⁸ Regulations Legal Notice No.15 of 2016 (n 65) s 2.

⁴⁰⁹ Evans and others (n 11) at 41.

as Experiential Learning.... So, experiential learning has been... perhaps I should explain that the use of the word ‘Experiential Learning’ in our curriculum encompasses Moot Courts, Law Review and Law Clinics.’⁴¹⁰

The proposal to integrate these activities into the curriculum under one umbrella course called ‘Experiential Learning’ is a recognition of the pedagogical value that these extracurricular activities hold. It is an attempt to render the learning therein more systematic and to accord it some form of assessment and credit.

Also noteworthy is that the three terms ‘law clinics,’ ‘legal aid clinics’ and ‘university law clinics’ are not synonymous in CLE literature. While ‘legal aid clinics’ focus on legal aid work drawn from their access to justice work with indigent persons, ‘law clinics’ and ‘university law clinics’ encompass their educational and training value.⁴¹¹

From the foregoing discussions, it is evident that in Kenya, the term ‘clinical’ and ‘clinical courses’ is indiscriminately applied to all law courses that have a practical element. These include externships, the judicial attachment programmes, attachment at legal aid institutions, research projects on access to justice and law reform matters. The question therefore arises as to whether such activities can be categorised as CLE in the strict sense. This is because the law schools make no distinction between practical, clinical and experiential courses.

While there are similarities between CLE in Kenya and in other jurisdictions as presented in literature, the reality is that CLE in Kenya is still very underdeveloped. The majority of the activities referred to as CLE are extracurricular social justice projects that are bereft of a pedagogical component. As a result, CLE’s pedagogical function is so stunted that clinics are largely *ad hoc* community legal awareness ventures. The clinics are comparable to South Africa’s clinics of the 1970s which literature aptly describes as:

‘low budget voluntary student initiatives supported by some academics and a few private practitioners whose establishment was inspired by service to the poor members of society.’⁴¹²

⁴¹⁰ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 14.

⁴¹¹ De Klerk (n 359) at 930.

⁴¹² De Klerk (n 359) at 930.

4.17.7 Limited scope of access to justice work that clinics can conduct

The scope of work conducted by students in clinics narrows down to community education and participation in criminal justice matters. There is a dearth of clinic engagement in civil law matters, legislative reform or media advocacy. Moreover, the students largely conduct their clinic work in the geographical neighbourhood of the universities. This is because they lack the resources to reach communities or clients who are further afield. The students' incapacity to provide legal representation coupled with the inconveniences of engaging in projects whose timelines exceed university calendars occasion such limitations in the scope of clinic work.

There is a noticeable emphasis on criminal cases and legal aid work with accused persons to the exclusion of access to justice needs in civil matters such as family, land and succession causes that would require greater commitment in terms of funds, time and expertise. The quotations from interviews with five clinics below illustrate this partiality in selection of clinic activities:

‘...there are plans of having the innocence project kind of thing that we want to launch with the criminal justice unit where we could be reviewing case files.’⁴¹³

‘...so that week is usually dedicated to offering legal aid services to the public. There are different activities for different days from Monday to Friday... and so we go to prisons, we can go to remand centres.’⁴¹⁴

‘The clients walk in and sometimes we write to prisons. We write that we would like to offer legal aid to remandees or those in custody.’⁴¹⁵

‘So, we visited prisons and remand centres.’⁴¹⁶

‘We have partnered with the public institutions, in government, I mean, where students who are willing will go and serve for a period of three months...that is an entire semester, in either the Director of Public Prosecutions office or the Attorney General's office.’⁴¹⁷

⁴¹³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 42.

⁴¹⁴ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 72.

⁴¹⁵ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 84.

⁴¹⁶ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 93.

‘So, we went to [XYZ] Children Remand Home. There we found children accused of various offenses and others....’⁴¹⁸

Both the students and their patrons feel frustrated about the impotence of proffering legal advice in the clinic and with the communities they visit without further interventions that can conclusively resolve their clients’ legal issues.⁴¹⁹ A student echoed their exasperation as:

‘...there’s the clinic that we did, but what next?’⁴²⁰

In the case of prisons, the students are apprehensive about the prospect of reducing their work to merely teaching the law because some convicts do not stand a chance at appeal.⁴²¹ The clinics therefore struggle with selecting the right audience for legal aid in their work in prisons and ensuring that their work enables convicted persons who need advice to prepare for their appeal hearings.

Most clinics conduct community education as their main course of action because of their incapacity to offer client representation in court. Although only advocates have the preserve of legal representation, it is also the case that there are other interventions that clinics could engage in which do not require representation and yet the clinics do not venture into these. Such interventions include legislative reform, media or policy advocacy. Unfortunately, the students mainly use riots and public demonstrations to demand for justice in matters where they or their colleagues and their lecturers are involved.⁴²²

The community education projects provide ideal examples of the law as presented in the statutes and not the law as practiced. There are many instances where practice differs from the text book positions, for instance the nuances in the criminal justice process from the point of search and arrest. These practice differences underscore the significance of involving not just lawyers but other actors in the justice system in the community education process. This justifies why students use the community education initiatives to engage other participants in the justice

⁴¹⁷ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 115.

⁴¹⁸ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 149.

⁴¹⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 111.

⁴²⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 111.

⁴²¹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 149.

⁴²² On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 75.

system, such as police officers, to supplement their legal awareness projects. A clinic student leader reflects on a town hall session between community members and the police as follows:

‘So, through that project we were able to initiate a town hall session in [Informal settlement X] again with [Organisation X], with the police ...with the office of the DPP. So, we went down there ...to try and address some of the issues that they had raised during the training sessions because they said, “it’s fine for you to come and tell us about our rights but if the police also do not acknowledge it and ... in place then it really doesn’t mean anything.” So, we were able to do that which was very successful.’⁴²³

Clinics experience difficulties in raising funds for projects in outlying areas beyond the school neighbourhood. One of the consequences of this geographical limitation is that it confines the legal matters they deal with to themes that are predominant in areas they can afford to go to. For instance, even though there is a prevalence of legal issues affecting mining communities, the prospect of educating these communities on legal matters relevant to them is out of the question. This is due to the long distance between the mines and the university, which will require a budget for road transport, meals and overnight accommodation. A student leader had the following to say about a cancelled clinic trip to a mining community:

‘...there’s a time we were to go to Malindi but we went to Kilifi. But then we were not able to get funding from the school. So, ... we can’t fund from our own pockets. So, we put off the trip but we were supposed to go to Kilifi and I think the thing was mining and the law.’⁴²⁴

A further factor that thwarted clinic efforts was a directive from the Ministry of Education that affected programmes that the clinics had started with high school students. The 2018 directive from the Ministry of Education prohibits outsiders from visiting schools during the third school term. This is because the schools preserve the third term for preparation for national examinations. The Ministry therefore sought to curtail external interference from third parties as a way of curbing cheating and examination irregularities. This directive hampered the

⁴²³ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 32.

⁴²⁴ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 74.

programming of law clinic legal awareness activities that involved schools since the students could no longer conduct their programmes in the third term of the school year.⁴²⁵

Clinics attribute part of their limitations to lack of recognition and support from the legal profession. The clinics perceive that lawyers and the national legal system in general are unsympathetic towards them and so they do not facilitate legal aid work conducted by universities. A student leader opined as follows regarding the unappreciated role of students in access to justice:

‘So, if the legal system even the political arrangement of the country appreciates...especially the judiciary itself...if they appreciate the role of students or what it could be in legal aid activities, then it will work. But for as long as it is left only to the State Law offices and to NGOs, it does not work right.’⁴²⁶

Admittedly, there is a limit to the kinds of access to justice work that university students can carry out given their level of expertise, lack of experience and lack of representational capacity.

4.17.8 Mobilising clients

Clinics across the universities encounter difficulties in drawing a wide base of clients. This dearth of clients is paradoxical given the immense levels of ignorance about rights and the law that is manifested in many communities.⁴²⁷ There are instances when clinics have their own clients, albeit few. A clinic participant states as follows when expressing one of their challenges as the inability of clinics to mobilise clients for their programmes:

‘The other thing is that sometimes we are not able to pull the crowds.’⁴²⁸

One of the ways clinics have attempted to resolve this problem is to work in partnership with bodies who already have a client base. The collaboration benefits both parties because the

⁴²⁵ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 129.

⁴²⁶ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 164.

⁴²⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 111.

⁴²⁸ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 144.

clinic receives clients to work with while the partner institutions benefit from the additional workforce. A clinic director alludes to the clinics' lack of clients as follows:

'[NGO X] is a great mobilising agent, because it mobilises residents of [ABC] and we come in to give the technical and legal support.'⁴²⁹

Further difficulties emerge because the interventions that clinics offer do not include legal representation. This is one of the reasons why the clients seek out legal assistance in the first place.

Additionally, it is apparent that the clients are unable to trust students with their legal issues.⁴³⁰ Clinics perceive this as suspicion addressed not only to themselves but to the profession at large. Explaining the latter position, one student offers the following opinion:

'It is like Kenyans are sceptical about the legal community, I think. The moment you say lawyers, they think these are people who take money. Sometimes it was hard to pull crowds, it was just hard...we have few people actually showing up for the legal clinics. So, there is a level of scepticism around civilians and just how they relate to the law.'⁴³¹

Nevertheless, public scepticism about the limited scope and effectiveness of clinic interventions is apparent and prompted a clinic director to state as follows:

'I also think the reason is that we do not offer concrete solutions. It's like even when we go to prisons they will tell us, ... What solution are you going to give? ...What is this legal aid to us?'⁴³²

The interaction with live clients is a distinguishing factor for CLE.⁴³³ Therefore, the difficulty that clinics experience in attracting clients is a significant drawback to the implementation of CLE programmes in the universities. Clinic work is highly dependent on engagement with live clients, so their absence, lack of trust or scepticism is a hindrance to the promotion of access to justice through CLE in Kenya.

⁴²⁹ On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 18.

⁴³⁰ On file with author Protocol Number H18/10/17 'Focus Group Discussion 3' (n 16) at 101.

⁴³¹ On file with author Protocol Number H18/10/17 'Interview 6' (n 20) at 144.

⁴³² On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 85.

⁴³³ Evans and others (n 11) at 136.

4.17.9 Academic staff volunteers as a resource for clinics

Academic staff who are qualified advocates are a valuable resource for the supervision of clinics.⁴³⁴ Their legal qualification equips them to represent clients and relieve clinics of their need to source for advocates externally. However, academics who are available to run the walk-in clinic on a full-time basis and to supervise the students when they volunteer at the clinic are not easy to come by.⁴³⁵ This is because staff teaching loads do not encourage faculty to actualise the moral support they may have for clinics.⁴³⁶ That is why a faculty director is of the following view:

‘The other challenge would be perhaps faculty support. ...currently I am the only member of the law clinic...it is just that there’s not enough faculty support but I also understand that because ultimately good law clinics need permanent staff. Like persons who are just hired to permanently deal with the law clinic, that their main role is the law clinic in the law school.’⁴³⁷

As is the case for the majority of law schools, clinic work does not form part of the teaching load so clinics lack the benefit of having permanent academic staff running them.⁴³⁸ In the face of competing teaching and administrative duties, the clinic is a voluntary task that is not a priority for the university or school.

Even if a university was to consider clinic work as part of teaching allocation for its staff, the intensity and extent of clinic work even during university breaks is likely to make the clinic a less attractive option to regular law courses. The time-consuming and continuous nature of clinic work in a robust and active walk-in clinic implies that although a clinician will be very engaged even during the university breaks, they will have less time to generate publications compared to their colleagues. The academic calendar delineates the university teaching schedule for the latter so it rarely spills over to the university breaks and non-teaching periods.

The shortage of law teachers in Kenya exacerbates the problem for clinics because it lowers the chances of there being academic staff available for volunteer tasks. This shortage

⁴³⁴ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 20.

⁴³⁵ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 81.

⁴³⁶ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 22.

⁴³⁷ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 23.

⁴³⁸ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 23.

impacts the distribution of course loads and it leaves lecturers quite stretched and having to take up larger student numbers.⁴³⁹ While training or hiring teaching staff, universities implementing CLE will need to consider the small class sizes that facilitate such practical courses.

It is worthwhile to consider proposals that encourage the inclusion of clinic staff and the unique nature of their work into the academic environment which is often more doctrinal and has progress therein pegged only on such items as publications alone. Universities could make clinical courses more attractive for academic staff through incentives incorporating concessions and innovations, such as a variation in promotion requirements for clinicians,⁴⁴⁰ in recognition of the diversity of their role. Examples of such concessions here could include the recognition of caseloads and clinic supervision hours as well as the rationalisation of these with annual publication requirements.

4.17.10 Lack of close supervision

There is a strong link between the problem of lack of close supervision and the engagement of volunteer academic staff as supervisors for the clinics. The data in regard to the supervision of university clinics paints the picture of a learning process that is bereft of guidance and structure and whose pedagogical mission is a matter of chance.

There are few members of academic staff engaged in clinics and these also have a liaison role between students and management.⁴⁴¹ For example, the walk-in clinic has only one advocate attending to clients at the clinic and who would oversee and supervise all students who volunteer at the clinic. The clinic director expresses the problem with supervision as follows:

‘The legal aid clinic is not on the curriculum...it’s not mandatory for the students to come to the clinic. So, it is those who are willing and can volunteer. But the challenge is, we do not have staff who are present all the time who can address and guide the students...The day to day operations of the clinic is supposed to be carried out by a coordinator. We do have an organogram on the hierarchy of those who should be running the clinic but I think because of issues of finances it is not that well equipped as far as human resources is concerned. So essentially, we have a

⁴³⁹ Kameri-Mbote (n 66) at 137.

⁴⁴⁰ MA du Plessis and D Dass ‘Defining the Role of the University Law Clinician’ (2013) 130 *South African Law Journal* 390 at 404; De Klerk (n 217) at 104.

⁴⁴¹ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 20.

coordinator who should be sitting.... So currently we have a coordinator who is also a teaching member of staff.... Yes, it is also the coordinator who manages it....’⁴⁴²

With the shortage of law lecturers, supervising extracurricular clinic work is a problem because academic staff already feel overloaded with teaching. A clinic director shares her perspectives on the difficulty of clinic supervision as:

‘...and even legal advice has to be supervised and you’re dealing with staff who are already overburdened and don’t have an interest in providing any further support to the students. So, it becomes another issue that we need to consider....’⁴⁴³

The shortage of staff deprives both students and clients of the benefits of supervision by qualified staff. Students therefore do not participate in seminars and reflective practice that are presided upon by supervisors guided by clear learning outcomes. This may occasion errors on the part of students and subsequent losses on the part of clients should they make decisions based on erroneous information provided by students.

It is also the case that the partner institutions that host students for attachments and externships often share in the supervision responsibilities. In these cases, supervision and training end up in the hands of third-party institutions whose core business may differ from that of the university. Says a patron of a student association regarding the reality of shared supervision:

‘I am the patron of the association and other than working, a patron would collaborate also with NGOs that are within the area of [XYZ] who would then also provide some form of supervision and also funding for some of the activities. Other than that, there is a compulsory clinical attachment that is done at the end of the second year, where the students are attached to the law courts of their choice throughout the country. The magistrates would perform a supervisory role but then the lecturers or the faculty members visit every court ...and just assess and see whether the student is learning what they are supposed to learn and also get feedback from the court as to the performance of the students.’⁴⁴⁴

⁴⁴² On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 81-82.

⁴⁴³ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 125.

⁴⁴⁴ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 114-115.

Such supervision by third parties may not provide the effective learning that CLE anticipates to deliver unless the university goals, objectives and curriculum closely guide it.

4.17.11 High turnover of clinic leadership

Students elect leadership teams annually to manage and operate the clinics. Such student leadership suffers the disadvantage of annual turnover since students often select leaders from those in the senior years of university. Inevitably, these senior students graduate soon thereafter and leave both the institution and the clinic. As the excerpts below illustrate, the frequent change in clinic leadership is evident in the student-led clinics:

‘We have quite an elaborate structure. We have elections actually to elect the Chair, Vice-Chair, Secretary, PR. So, we have elections as per our constitution first of all to elect these officials.’⁴⁴⁵

‘...its leadership is replaced through elections, free and fair elections that come frequently.’⁴⁴⁶

‘But you left. This was 2015, right?...

But, the President in 2016 was leading it, they were crawling they were trying, then the year she left, it died, like nobody’s business.

In calendar year 2017, people stopped attending meetings...’⁴⁴⁷

‘Well I just became the Chairlady so I don’t have much...’⁴⁴⁸

‘So, in first year, first and second semester, it wasn’t that active as it would have been in second year. So, basically in my second year in campus, we did a lot of things. To begin with the LSK-organised legal aid week which was held at Milimani. We got to be part of it bringing students ... to try and be part of the legal aid.’⁴⁴⁹

⁴⁴⁵ On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 20) at 139.

⁴⁴⁶ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 151.

⁴⁴⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28-29.

⁴⁴⁸ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 71.

⁴⁴⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 92.

‘...since they are only there for one year or two years then you have a new set of leadership, it all changes.’⁴⁵⁰

‘I served in my fourth year as Secretary General, though previously I’d served as the Vice-Chair the previous year.’⁴⁵¹

This annual change affects the clinic, whose dynamism depends on the enthusiasm of the leadership, as it would an entity with a leadership that is constantly evolving. A clinic director who is witness to the variations in clinic leadership identifies and comments on this constant change as one more challenge for clinics as follows:

‘With [Clinic name] the challenge depends on the student leadership at the time because it’s student led so you can have a committee that is very vibrant and during their term in office. [Clinic name] is really vibrant and the activities are always there, students are participating After they are gone, and since they are only there for one year or two years, then you have a new set of leadership.... So, ... it depends on the student leadership and their personal interest in driving the activities at [Clinic name].’⁴⁵²

Leadership that is in such constant flux is bound to inconvenience the long-term implementation of strategies and project plans.

Furthermore, the clinic leadership has not reached a level where it transcends individual clinics and schools. The leadership offered by academic staff in the form of a patron, clinic director or coordinator is often that of oversight, supervision and liaison with university management. These are responsibilities that are allocated by university administration to staff who seem capable, interested or qualified to carry them out. Coincidentally, all staff who participated in the study have a history of legal aid or clinic engagement or a passion for access to justice and clinic work. They exercise their leadership role at the level of their respective institutions.

Clinics in Kenya do not have a facilitating body or the kind of passionate drivers that jurisdictions such as South Africa had. Additionally, the clinics do not organise national

⁴⁵⁰ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 120.

⁴⁵¹ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 126.

⁴⁵² On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 120.

conferences or workshops bringing clinicians together to exchange ideas, experiences, plans or even make joint applications for funding. The clinicians therefore end up in chance meetings at international gatherings such as the conferences organised by the Global Alliance for Justice Education (GAJE) and the International Journal for Legal Education (IJCLE) which only few get to attend at any given time.⁴⁵³

Although university clinics have very clear demarcations of operation, institutional deficiencies, the heterogeneous nature of the different clinics and the lack of ownership of the clinic project are a hindrance to collaborations between universities. The consequences of such disconnection are that clinics in Kenya have developed in silos and do not benefit from synergies that inter-university collaboration and partnerships could generate.

4.17.12 Inadequate resources

Clinics in Kenya are not an exemption to the perennial problem of inadequate resourcing that clinics worldwide experience.⁴⁵⁴ As a clinic director succinctly states:

‘Yes, we do have moral support but ideally when we need financial backing for certain projects, it’s hard to come by. Fundamentally, I think the biggest challenge is that.’⁴⁵⁵

Another clinic director’s response to the challenges encountered in clinic work is:

‘One of them is financial, the clinic is not financed by the university.’⁴⁵⁶

A student leader from a different university echoes these sentiments as:

‘We had a number of challenges and I think the first challenge would be financial challenges because the only funds we get from the members, the membership fees, is 200 shillings per semester.’⁴⁵⁷

⁴⁵³ Strathmore University Law School (n 2) at 3.

⁴⁵⁴ Strathmore University Law School (n 2) at 8; Festus Okechukwu Ukwueze and Beatrice Obianuju Obuka ‘Challenges and Strategies for Sustainable Clinical Legal Education in Nigeria’ (2020) 54 *The Law Teacher* 385 at 392.

⁴⁵⁵ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 22.

⁴⁵⁶ On file with author Protocol Number H18/10/17 ‘Interview 3B’ (n 14) at 86.

⁴⁵⁷ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 31.

Nevertheless, the scale of the under-resourcing is appalling. The majority of the universities do not have resources to furnish a walk-in clinic.⁴⁵⁸ Law campuses lack the space to host walk-in clinics.⁴⁵⁹ This is because the universities concentrate the available resources on its teaching goals, in relation to which they often consider clinics extraneous.⁴⁶⁰ They maximise the available resources into teaching using the most cost-effective methods,⁴⁶¹ which is usually the lecture method.

Clinics with their present status as extracurricular activities are not a priority in the allocation of resources in the university.⁴⁶² The hierarchy in resourcing is implicit in this lecturer's comment:

‘...we are all struggling for space and I mean when we say we need a particular room where students can attend to clients when not all lecturers have an office, that can cause a lot of issues... there are no sufficient lecture rooms. Again, that can cause an issue or maybe all lecturers are ... sharing office space and yet students have one room just for themselves...’⁴⁶³

Clinics being young, are not prominent in the institutional cultures and do not have access to resources, even in private universities. The students share their struggles for resources as follows:

‘And, for our activities, you’d find that the funds were not adequate, per se. We would receive small quantities of funds from the university. That is, if at all they gave us any.’⁴⁶⁴

‘SM3: They put us in the budget for next year and they told us next year we should repay them for the money they gave us this year as a show of good faith.

SM4: And the amount they’ve given us is already so little. They’ve given us 15-20% of what we originally asked for.’⁴⁶⁵

⁴⁵⁸ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 123.

⁴⁵⁹ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 122.

⁴⁶⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 12.

⁴⁶¹ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 12.

⁴⁶² On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 17.

⁴⁶³ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 122.

⁴⁶⁴ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 132.

⁴⁶⁵ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 29.

The lack of space and funding by clinics limits the variety and extent of the programmes they run.⁴⁶⁶ They make up for these shortfalls by establishing partnerships with entities that can provide funding, space or have capacity to mobilise clients in exchange for the technical legal support that is provided by the students.⁴⁶⁷ The resourcing problem creates a reliance on partner institutions for clients, funding and logistical support whenever the law students engage in legal aid work.

Obtaining funding for clinics and clinic-related projects remains problematic.⁴⁶⁸ For instance, there are student associations whose constitutions provide for funding from the university. However, the universities do not always provide funds and when they do, there is almost always a delay in releasing the funds.⁴⁶⁹ It is public universities that from time to time supplement the funding of their students' associations. Unfortunately, the level of bureaucracy in these institutions is often high resulting in delays in funding even if such funding is available.⁴⁷⁰ As a student leader remarks below, bureaucracies in large institutions such as public universities cause delays in the disbursement of existing funding:

‘...there would be no funding from the institution. The only way there would be funding for [association] is when there is some money for clubs and associations.... So, where that happens, we receive that kind of money with the bureaucracy in all public institutions in Kenya.’⁴⁷¹

Similarly, student clubs also experience difficulties in finding funding for their clinic initiatives.⁴⁷²

One of the consequences of inadequate funding of clinics is that the nature of interventions that clinics can make is limited.⁴⁷³ It is unfortunate that there are instances such as the ones depicted below when students feel the compulsion to restructure projects for want of resources:

⁴⁶⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 33.

⁴⁶⁷ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 18, 47.

⁴⁶⁸ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 68.

⁴⁶⁹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 151.

⁴⁷⁰ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 157.

⁴⁷¹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 157.

⁴⁷² On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 75.

⁴⁷³ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 68.

‘And also, ..., unfortunately, we decided due to our lack of funding... we decided not to go to [informal settlement X] constantly. So, we joined it with the project under human rights... where we bring the youth leaders here on campus every Saturday and we do the different trainings.’⁴⁷⁴

‘But then we were not able to get funding from the school. So, ... we can’t fund from our own pockets. So, we put off the trip but now we were supposed to go to Kilifi and I think the thing was mining and the law, so we studied about mining we read books, we do everything we can to understand...’⁴⁷⁵

There are students who have attempted to resolve the problem of inadequate resourcing by writing proposals in the attempt to obtain alternative funding from grants. This endeavour has been rather arduous.⁴⁷⁶ As indicated below, the task of obtaining funding through proposals written by students is yet to bear fruit:

‘For funding, we’ve been sending proposals to a few partners but most of the time it has not been successful.’⁴⁷⁷

As a last resort, the students rely on annual subscription fees paid by members of the club, association or student organisation. Such financing is nominal and is inadequate to operate the clinic. The students had the following to say about running the clinics using the student membership fees:

‘We had a number of challenges and I think the first challenge would be financial challenges, because the only funds we get from the members, the membership fees, is 200 shillings per semester....400 shillings per year. So, that would be how we used to raise funds.’⁴⁷⁸

‘This is why students would have to be asked to register by paying fees so that these fees fund the society.... It worked well in my year while I was Chair because we would even have an internal auditor who would report on the use of the money.... So, you would realise that in the end it is

⁴⁷⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 37.

⁴⁷⁵ On file with author Protocol Number H18/10/17 ‘Interview 3A’ (n 32) at 74.

⁴⁷⁶ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 46.

⁴⁷⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 46.

⁴⁷⁸ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 131-132.

about students, and even when we would have legal aid activities, we would have to ask students to contribute such an amount of money for the success of that venture.’⁴⁷⁹

‘I am the finance officer, ideally, we should be fully funded, but life is not ideal, students join and pay an annual membership fee of about 1,000 shillings. That helps us run some of our projects, developing budgets.’⁴⁸⁰

Protracted delays in providing clinics with the resources they need creates a sense of frustration that is palpable in the indictment of both the education and the legal system by a clinic director in the following sentiments:

‘The students dig into their own pockets to do it. Which also tells you that the education system and the justice system, separately and jointly, do not place much emphasis on... Let us stick with the education system first. They don’t place much emphasis on what I would call social responsibility, because if they did, these are the kinds of courses they would focus on in terms of resourcing.’⁴⁸¹

4.17.13 Sub-optimal placement of clinics in the university structure

With university law clinics operating in the form of student organisations, clubs or associations, the clinics occur as accessories to their respective law schools. The majority are not associated with the law curriculum and therefore the university management considers them as peripheral items in the management and operation of the university.⁴⁸²

While law schools support and appreciate the role that clinics play in legal education, there are universities whose management do not sufficiently support clinics. This is because they do not appreciate the role of clinics in the context of the overall goals of the university. It is impossible for clinics to thrive in a university that has not grappled with and integrated the value of clinics in the university’s mission. Echoing the experience of other clinics, this position may explain why emerging clinics are seeking autonomy from their universities.⁴⁸³

⁴⁷⁹ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 48) at 157-158.

⁴⁸⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 25.

⁴⁸¹ On file with author Protocol Number H18/10/17 ‘Interview 3’ (n 13) at 68.

⁴⁸² On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 11.

⁴⁸³ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5.

The search for autonomy through institutional approval of a clinic as a semi-autonomous entity within the university setting is a complex process. Nevertheless, it is an apt demonstration of dissatisfaction with the *status quo* and of a commitment to find a more appropriate place for clinics in the university structure. A lecturer working at establishing such a semi-autonomous clinic alludes to their dissatisfaction with the current place of clinics in the following comment:

‘...we are actually at the point where we are trying to see whether we can explore other methods of having to set up this semi-autonomous law clinic and also work with the university. Yes, a semi-autonomous independent clinic but within the main structures of the university..., the bureaucracy has become too much and time consuming and also, we are... afraid in terms of money flow. Because of bureaucracy, money does not flow that easily within the public university.’⁴⁸⁴

Interestingly, the clinics with a clear position in the university structure are those that take the form of clubs, associations or student organisations. This is apparent from descriptions of clinics such as the one made by a student below:

‘It is not legally registered as a society but it’s a recognised club in school in the [University Z].’⁴⁸⁵

There are students who are discontented with such positioning of clinics in the university. They are of the view that the categorisation of clinics as student clubs connotes a certain level of flippancy that is not consistent with the kinds of issues that clinics grapple with and the level of research and commitment that these tasks require. This is because the other student clubs are often engaged with activities that have no connection with the undergraduate degree in law. These are leisure activities such as practicing languages, drama, music, entertainment, debate and travel. Relatedly, a student leader articulates their view on such a placement of clinics as follows:

‘Hear the clinic as a club we cringe, we hate the term ‘club’ because ‘club’ does not connote seriousness, I think we are a student run organisation that cares about access to justice in Kenya....’⁴⁸⁶

⁴⁸⁴ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 5.

⁴⁸⁵ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 127.

Although they are under the authority and guidance of the law school, not every clinic has a clear structure and position within the university. Such ambiguity in the position of clinics is discernible from another lecturer's description of a clinic in the university structure which exudes some degree of uncertainty:

'I'd say it more or less can be taken as a department within the law school. It is not registered, it is not independent of the law school.'⁴⁸⁷

The unwarranted dichotomy between the service focus of clinics and the teaching objectives of the university perpetuates the ambiguity of clinics in the university structure. That the pedagogical role of clinics is unexplored places clinics even lower in the universities' estimation. Manifestly, university administrators underestimate the value of clinics and their role in skills training and social justice orientation of law students.⁴⁸⁸ Clinics are therefore under-prioritised in the planning and management of the university. Subsequently, they suffer multiple afflictions affecting their operations and resourcing.

Clinics wallow in the dire need of appropriate recognition by their own universities. Such recognition if accorded, would facilitate the appreciation of the twin role of CLE that is teaching and service, enhance clinic resourcing and optimise their pedagogical capacity.

4.17.14 No impact studies

Impact studies, monitoring and evaluation of projects are related terms that have different meanings. Institutions evaluate projects upon their conclusion to examine whether they have met the objectives that had been set and whether they meet the needs and expectations of those who participated in the project.⁴⁸⁹ Evaluation takes place at the end of the project while monitoring entails assessment during the course of the project. In the case of university clinics, participants would include the students, staff, clients, university management and even partner institutions

⁴⁸⁶ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 27.

⁴⁸⁷ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 82.

⁴⁸⁸ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 11.

⁴⁸⁹ Sarah Bowen and Patricia J Martens 'Theory and Methods: A Model for Collaborative Evaluation of University-Community Partnerships' (2006) 60 *Journal of Epidemiology and Community Health* 902 at 903.

who may be engaged in evaluating clinic activities at the end of an elective term or clinic programme.

Such monitoring and evaluation processes yield information which the clinics utilise to make decisions regarding their projects. The information is helpful in demonstrating accountability to stakeholders such as the clinic membership, clients, university management, resource providers or even donors in the case of grants.

Impact studies or assessments measure the impact of the interventions in either on-going or complete projects. Literature concedes that measurement of impact may require complex tools and some projects yield an impact after several years, a situation which does not discredit a study of the short-term impacts or the outcomes of the project.⁴⁹⁰ Examples of CLE outcomes that are assessable include collaborations, client care and the formal documents that the students draft.⁴⁹¹

There is an evident lapse in tracking of numbers of clients, community education projects and monitoring and evaluation of clinic activities. As a different clinic reports below, there are no studies on the impact, effectiveness and reach of work carried out by these clinics.

‘Well, we are currently doing our evaluation exercises. Being a young institution it’s hard to quite measure exactly the impact that we’ve had... Legal awareness is very hard to measure the impact. So, we are trying to increasingly develop measurement tools so as to figure out how much impact we are making and so as to probably be able to evaluate our performance. ...as for now, to be honest, it’s a pretty daunting task to try and figure that out.’⁴⁹²

Assessing the impact of a clinic in terms of numbers of clients served is difficult because in several instances, clinics do not have their own clients. The clients that students attend to during legal aid programmes hosted by public benefit organisations are usually the organisations’ clients for which students merely complement the staffing role. Relatedly, a student leader responded as follows regarding the numbers of clients they assisted:

⁴⁹⁰ Vincenza Scherrer *Measuring the Impact of Peacebuilding Interventions on Rule of Law and Security Institutions* (2012) at 12.

⁴⁹¹ Du Plessis ‘Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values’ (n 124) at 321.

⁴⁹² On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 19.

‘It would be quite difficult, but, for instance in one day, if I can give an estimation from a legal aid session at [public benefit organisation XYZ]. In a day, we would serve about 40 people. We used to go there on Tuesdays and on Thursdays.’⁴⁹³

Additionally, the clinics may sometimes retain participant registration sheets for their activities they but do not get to the point where they assess the overall reach of these activities. The student discussion below reveals this position:

‘SM3: We would have to look at the specific project. And then see what the attendance was here.

SM2: Yeah

SM3: Yeah because we had attendance sheets during the sessions so you could tell how many were there.’⁴⁹⁴

The absence of evaluation and monitoring of clinic activity is problematic when it comes to supplying the university and other stakeholders with evidence-based justifications for entrenching law clinics in the curriculum. This absence of information exposes the clinic to programming difficulties in future, as it cannot draw from the benefits of evaluation.

4.17.15 Weak networks and partnerships

Whereas the synergies emerging from strong networks and partnerships are desirable for clinics, the clinics do not enjoy these because they experience weaknesses at four different levels.

At the first level is a distinct lack of interaction among clinics in the various universities. The unfamiliarity with other clinics was palpable during the stakeholders’ roundtable in which the majority of the participants in this study met, many, for the first time. The roundtable created an ideal opportunity for clinicians to exchange experiences. The clinicians made presentations about their projects and it emerged that a client referral system among them does not exist despite the level of expertise that some clinics had built around the subject areas they frequently worked in.⁴⁹⁵ The participants were aware about previous attempts at networking initiatives

⁴⁹³ On file with author Protocol Number H18/10/17 ‘Interview 5’ (n 6) at 131.

⁴⁹⁴ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 32.

⁴⁹⁵ Strathmore University Law School (n 2) at 11.

between universities that had fumbled.⁴⁹⁶ Whereas the participants generally acknowledged the benefits of synergy and cooperation, they were conflicted about the establishment of a national network for clinics. The participants were very cautious and uncomfortable about engaging with institutions that they had not built a rapport with, some of whom they had never worked with before. As such, there was a generalised preference for informal interactions without defined leadership or structure.

The lack of a countrywide-partnership and networking does not preclude collaborations between universities that are ready to take the step and develop projects in complementarity with like-minded institutions. This is possible, given the researcher's observation during the roundtable that the resistance emerged more from participants from public universities than those from private universities, with the latter demonstrating a greater alacrity in taking steps towards collaboration. The researcher drew a link between this observation and the level of bureaucracy experienced in the different institutions as well as the level of authority granted to the respective clinic leaders in the public and private universities. Meanwhile, in this absence of interaction between university clinics, the clinics continue to develop in isolation.⁴⁹⁷

The foregoing discussion alludes to the second level of weakness in networks and partnerships, which is that clinics conduct all their efforts and activities individually. The country does not have an umbrella association such as the South Africa University Law Clinics Association (SAULCA), discussed in chapter 2.6.4, which offers the benefit of synergy when university clinics are sourcing for grants.

The clinic patrons and directors are cognisant of the benefits of forging partnerships and collaborations between their clinics and like-minded organisations. This is evident in the following statement in which a patron of a student association that conducts clinic work shares some of the benefits they draw from collaborations:

⁴⁹⁶ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 54.

⁴⁹⁷ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 53.

‘I am the patron of the association and other than working, a patron would collaborate also, with NGOs that are within the area of [X] who would then also provide some form of supervision and also funding for some of the activities. ...’⁴⁹⁸

Some clinics share the experience of weak partnerships, which are not binding on parties.⁴⁹⁹ There is such an over-dependence on partners that if the entity backs out, the clinic automatically suspends the project. This occurred in an instance when the partner who was providing access to clients, while students were providing the trainers and manuals, pulled out of the *ad hoc* partnership leaving the students without clients. The student leader described the incident as follows:

‘So, this is the unit that has partnered with [organisation XYX] so we train their paralegals. In March, we had a training session and we planned on having three more sessions throughout the year but we are so heavily reliant on [XYX] for us to execute on our projects and [XYX] were non-responsive. I don’t know what was going on with them, we have proper manuals ready for the training of the paralegals, now you see the paralegals are theirs....’⁵⁰⁰

At the third level, there are weak linkages between the education system and the justice system. There are clinics which lack the networks required to obtain leeway with potential partners and relevant government offices,⁵⁰¹ contributing to the lack of synergy between the access to justice actors such as non-state actors, state actors and training institutions. Some clinics have these networks but fail to optimise them. In relation to the latter, a course instructor shares her demoralising experience with seeking opportunities for students in partner institutions as follows:

‘There have been many challenges, one is the student interest. In fact, that really kind of brings my morale down because we work so hard and the staff work so hard to get these opportunities and then students do not show interest.... and when I have asked, people feel like these opportunities are so many. So, they lose interest because every time they would see up on the notice board [the

⁴⁹⁸ On file with author Protocol Number H18/10/17 ‘Interview 4’ (n 63) at 114.

⁴⁹⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 47.

⁵⁰⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 40.

⁵⁰¹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 42.

XYZ office] is looking for students... there is one particular group that when I asked why they didn't sign up...they thought the programme was for specific students.'⁵⁰²

At the fourth level, as a course instructor illustrates, weak linkages exist between the legal profession and universities:

'because there's all these non-state actors engaged in legal aid. There's now a state actor trying to police people in that area and then you have law schools whose primary interest is just to train. The extra mile of social justice is not really on their radar, so for them it ends at training. So, the question becomes how can we link the learning institutions, the education system, professional education for lawyers, to the justice system. And I think the big missing link is the bar. The bar should be more invested. I know they have *pro bono* legal aid counsel, some committee of the counsel. But they need to be more active. They need to be visible, they need to engage with the learning institutions, and they seriously need to consider allowing students some level of autonomy, especially concerning the urban poor accessing justice in criminal matters, in family feuds. The sorts of things that can be resolved by ADR. Of course, with the supervision of the bar, there has to be that rider.'⁵⁰³

The highlight of collaboration with the Law Society for all the clinics is the annual Legal Awareness Week and this is rather inadequate given the significant unmet legal need in the country.⁵⁰⁴ There is a lot to learn from collaborations in other jurisdictions that have taken the form of having the profession take an interest in the service and learning missions of CLE,⁵⁰⁵ entering into cooperation agreements for *pro bono* work with the profession,⁵⁰⁶ the profession developing a fidelity fund to support clinic resourcing⁵⁰⁷ as well as accrediting and formally recognising law clinics for legal practice and bar candidature.⁵⁰⁸

⁵⁰² On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 115, 119-120.

⁵⁰³ On file with author Protocol Number H18/10/17 'Interview 3' (n 13) at 69-70.

⁵⁰⁴ On file with author Protocol Number H18/10/17 'Interview 3A' (n 32) at 71.

⁵⁰⁵ Nwedu (n 257) at 51; David McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) at 164.

⁵⁰⁶ De Klerk (n 359) at 946.

⁵⁰⁷ Act No 28 of 2014 (n 297) s 53.

⁵⁰⁸ Act No 28 of 2014 (n 297) s 2.

4.17.16 Clinics are not sustainable

Universities establish clinics with the hope that they will grow and flourish. The interest, time, effort and personal financial resources that students and staff dedicate to clinic activity, even when these are voluntary and do not bear academic credit, displays their commitment to clinics.

This commitment notwithstanding, Kenyan law schools grapple with keeping clinics running and active despite the seasons of dormancy they suffer. A student accurately depicts this period of inactivity as:

‘Well it [clinic] was there but it was barely functional.’⁵⁰⁹

Additionally, students invoke internal factors such as the quality of clinic management and operations as well as the absence of functional internal systems as greater hurdles to their sustainability:

‘...so, priority was fixing our internal systems because it was a total mess. There were no job descriptions, holding people accountable, there was no proper guidance. I mean, all the controls we were talking about were not there before....’⁵¹⁰

Interestingly, clinics have not experienced overt forms of opposition from either within or outside their institutions in forms such as lawsuits or expulsion. Perhaps their noble service goal and relatively brief existence has yet to elicit critique in society.

The outlook of sustainability of clinics in Kenya appears dismal when examined from the lens of scholarship on influential factors of sustainable clinical education programmes.⁵¹¹ As discussed below, the clinics in Kenya score poorly in most of these sustainability factors save for the fact that the few students and staff who take on clinic work have high levels of commitment. The economic and social context in which the clinics operate does not augur well for CLE since the running of clinical programmes is a costly endeavour⁵¹² which occasions an additional financial burden on universities in a developing country whose universities have financial

⁵⁰⁹ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 28.

⁵¹⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 29.

⁵¹¹ Giddings *Influential Factors in the Sustainability of Clinical Legal Education Programs* (n 244) at 305-335.

⁵¹² De Klerk (n 359) at 949; Maria Szewczyk ‘Thoughts on the Reform of the Teaching of Law’ in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 18.

difficulties.⁵¹³ Unlike in other jurisdictions where clinics flourished as a response to tumultuous political periods, such a link is difficult to draw in the case of Kenya where legal education was commenced in the 1970s post-independence period and with great challenge.⁵¹⁴

The legislative framework for higher education,⁵¹⁵ legal education⁵¹⁶ and legal services⁵¹⁷ are reflective of the policies for education and legal practice. As discussed in chapter three, these legislations neither provide for nor oppose CLE. It is this ambivalence that curtails the flourishing of clinics because it conveys a lack of interest and political will to introduce the social justice agenda at law school, more so at a critical time when the country is implementing a value laden transformative Constitution. The 2016 legislation for legal aid is the first statutory recognition of the involvement of university law clinics in legal aid. It proposes to set standards for clinics and accredit them to join the national legal aid scheme. It also establishes a legal aid fund that, once operational, will supplement the resourcing of its legal aid providers. The fund will meet expenses incurred by legal aid providers thereby relieving them of the burden of bearing the costs of disbursements.⁵¹⁸ In these ways, the Legal Aid Act promises clinics some assistance that could contribute towards their sustainability.

As explained earlier in the chapter, the clinics in the different universities have developed independently. Unlike South Africa that has a robust clinic movement, the country does not have a clinic movement that could create momentum for the growth and sustainability of the clinics. This absence of a movement may have a correlation to the fact that, again unlike South Africa, Kenya has a deficiency of passionate clinicians who have convictions about CLE and who can spearhead the development of clinics in the country.

Furthermore, the low level of engagement between university law clinics and the legal professional body leaves a lot of room for expansion of the collaborations between clinics and the legal profession to foster the development of CLE in the country. As discussed earlier in the chapter, the weak networks and the partnership programmes in which clinics are involved also has a negative effect on their sustainability.

⁵¹³ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 87.

⁵¹⁴ Kamau (n 328) at 33.

⁵¹⁵ Act No. 42 of 2012 (n 154).

⁵¹⁶ Act No. 27 of 2012 (n 64).

⁵¹⁷ Advocates Act, Chapter 16 Laws of Kenya.

⁵¹⁸ Act No. 6 of 2016 (n 280) s 30.

It is probable that the relegation of clinics to extracurricular activities in the university signals a lack of commitment to clinical method by the universities. They do not prioritise clinics, as the previous discussion on inadequate resources for clinics demonstrates. As a result, the universities do not foster CLE or facilitate academic conditions for it. This is except for the varying levels of commitment to CLE and clinical pedagogy that universities, which have a clinical niche area of focus, demonstrate. The following comment illustrates the commitment that clinics experience from their universities:

‘the students are very committed, but they[clinics] have failed to pick and to be effective because of bureaucracy and lack of support by the university management. The main university management, you know, the higher echelons... they don’t see the value; because a law clinic does not bring economic value.’⁵¹⁹

Although the law schools are committed to the service value of clinics, their commitment to clinical method is yet to take deep root. The quotations below are evidence of the various levels of commitment that law schools offer, as well as the low levels of university commitment in contrast with the support from the law schools:

‘No, not at the level of law school; you have to be very clear, not at the level of the law school, it is at the level, at the high echelons. ... That is where the problem is.’⁵²⁰

‘Yes, we do have moral support but ideally when we need financial backing for certain projects....’⁵²¹

‘We have total support from the school.’⁵²²

It is understood from the preceding excerpts that while the schools are supportive, they do not yet demonstrate their commitment in more practical ways such as boosting clinic resources, training staff to supervise and practice in clinics as well as facilitating the application of clinics

⁵¹⁹ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 11.

⁵²⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 7) at 11.

⁵²¹ On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 7) at 22.

⁵²² On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 37) at 40.

for both learning and service. A similar appreciation for clinics does not seem to have escalated to higher levels of university management and those that deal with allocation of resources.

There is an entire gamut of circumstances around clinics as extracurricular activities that does not augur well for their sustainability. These are the under-resourcing, inadequate supervision, high turnover of leadership, few clients and limited scope of interventions. The fact that universities and law schools are not yet committed to clinical method compound the problem. Overall, the majority of the setbacks discussed in this second part of the chapter when experienced together, conspire against the sustainability of university law clinics in Kenya.

4.18 INTERROGATING THE INSTITUTIONAL FRAMEWORKS FOR CLE

The practical experience of university law clinics in Kenya provides a platform upon which to reflect on institutional frameworks for accessing justice through CLE in the country. The data analysis section in chapter 1.7.8 made reference to analysis of data from the interviews and focus group discussions. This commenced during data collection and continued during transcription when the researcher began identifying categories within the data and considering how the categories related to each other.⁵²³ The researcher sought common narratives to ensure that related categories were eventually classified together as themes. For instance, multiple participants made reference to the sorts of activities that their clinics organised. Some of these activities were curriculum-based, while others were not. Both students and staff were engaged in clinic tasks. Thus, all the activities were further classified under the four themes of students or staff, and as curricular or extracurricular. The themes were expanded or narrowed and renamed to sufficiently address the common categories within them. This coding was iterative and continued till no new themes could be extracted or filtered from the transcripts.⁵²⁴ In writing up this chapter, the quotes relevant to the first set of themes that illustrate the practice of enhancing access to justice through clinical legal education are presented in part one, while those from the

⁵²³ Kathy Charmaz 'Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies' in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (2005) at 517.

⁵²⁴ Linda Liska Belgrave and Kapriskie Seide 'Grounded Theory Methodology: Principles and Practices' in P Liamputtong (ed), *Handbook of Research Methods in Health Social Sciences* (2019) at 16.

second set of themes that illustrate the challenges encountered during this process are presented in part two.

The following commentary on the experiences of promoting access to justice through CLE in Kenya is pertinent when the themes drawn from the data analysis are considered and contextualised with literature under the four constructs that were generated in chapter two. These are robust clinic structures, a focus on access to justice work, incorporation into law school curricula as well as strong partnerships and networks.

4.18.1 Clinic structures

The distinct divide between curricular and extracurricular clinics has attendant consequences on clinic objectives, level of supervision, awarding of course credits and resource allocation. For instance, the generalised lack of clinic premises is notable. The clinics are itinerant and are not set-up for client interaction arguably because resources are inadequate. This situation may affirm participant apprehensions about university appreciation and commitment to clinics,⁵²⁵ given that classrooms are availed for other academic courses and methodologies yet clinics lack space.

The associations, clubs and student practice organisations engaged in legal aid operate within general processes, structures and requirements for the approval of university student entities as outlined by the respective institutions' policies and governance systems. However, by 2002 authors had alluded to the need for some level of autonomy because of the difficulties of having legal aid clinics operating within such university systems.⁵²⁶ Relatedly, one university is now establishing a semi-autonomous clinic as a way of circumventing institutional bureaucracy. This development is based on the peculiarities of the university systems that ought to guarantee recognition, acceptance, sustainability and some form of legitimacy. Their notable failure to do so becomes a focal point whose resolution is likely to accelerate the operation and momentum of clinics functioning under similar encumbrances.

It is observable that clinic structures in the country are not homogenous. This is because they are tailored to the needs and capabilities of each university and its niche area of focus. In the resulting array of arrangements, only one law school is sustaining a client walk-in clinic whose

⁵²⁵ On file with author Protocol Number H18/10/17 'Interview 1' (n 7) at 11-12.

⁵²⁶ Ojienda and Oduor (n 361) at 62.

distance from the law school renders it inconvenient to students. The existence of only one such clinic significantly falls short of what may be desirable to run a robust clinical education programme in the country. The engagement of less than 10 per cent of all students in clinics is likewise considerably lower than what may be needed to generate impactful cohorts of lawyers that are attuned to the Constitution's access to justice goals.

Nevertheless, the diverse structures offer various advantages and disadvantages. The Public Interest Clinic is a curriculum-based course offered as an elective. The class size is small and has the attention of the course instructor.⁵²⁷ It offers opportunities for providing feedback as well as some form of reflective sessions to students,⁵²⁸ which extracurricular clinics lack. It entails classroom instruction, tutorial and community sessions, as is recommended for clinical programmes.⁵²⁹ Students undergo assessment and are awarded credits for the course,⁵³⁰ which is also reflective of the learning that occurs in the clinic. It contributes towards student grades and the requirements for the completion of the law degree. For universities that offer legal aid clinics, the course is a potential source of client referrals for the legal aid or walk-in clinics.

The Clinical Externships share the advantages of the Public Interest clinic save for the drawback that they lack the classroom and tutorial components. Should these be offered outside the curriculum,⁵³¹ students do not gain credits for the course.

While the Department of Legal Clinics and Externships offers students the opportunity of researching and writing legal opinions on topical legal matters, the walk-in clinic promises the pedagogical and social justice advantages of a live client interaction. Being extracurricular, students are neither assessed nor do they earn any credits.

The clinic club, student practice organisation and student associations in public universities are engaged in diverse legal aid clinics and community educational programs that offer them social justice advantages. These are not curriculum-based so they do not contribute

⁵²⁷ Du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (n 346) at 19.

⁵²⁸ MA (Riëtte) du Plessis and Neels Swanepoel 'Reflective Journals as an Assessment Method in Clinical Legal Education' [2014] *De Jure* 283 at 289.

⁵²⁹ MA (Riëtte) du Plessis 'Designing an Appropriate and Assessable Curriculum for Clinical Legal Education' (2016) 1 *De Jure* 1 at 4.

⁵³⁰ Du Plessis 'Clinical Legal Education: Planning a Curriculum That Can Be Assessed' (n 59) at 48.

⁵³¹ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 119-120.

towards student assessment or credits. They remain interesting ‘incidental’⁵³² learning opportunities under the tutelage of university patrons, volunteer advocates and legal aid officers from partner institutions.

4.18.2 Focus on access to justice work

The clinics embody both the direct and indirect social justice objectives in their service to communities and *pro bono* influence on law students. However, they neither express any endeavours towards creating publicity for their work nor explore alternative avenues for finding audiences for their public education programmes such as radio programmes or talk shows. They maintain a marked preference for working alongside public benefit organisations that have established legal aid programmes and clientele.

This social justice focus appears misplaced given the statutory objectives of universities in the country that are set as teaching and research. This focus is a direct service to the community that is more in keeping with various other jurisdictions such as South Africa, which have three key three pillars identified as research, teaching and community engagement or service.⁵³³

Although the clinics do not discuss these, database searches reveal a steady trickle of publications about clinics in the country.⁵³⁴ While satisfying the research objectives of the university, these too bear a distinct focus on the social justice mission of the clinics when they examine their role in rendering legal aid and hopefully inculcate in the law students a public service ethic.

⁵³² FS Haupt ‘Some Aspects Regarding the Origin, Development and Present Position of the University of Pretoria Law Clinic’ (2006) 39 *De Jure* 229, at 234.

⁵³³ Du Plessis ‘Clinical Legal Education: Planning a Curriculum That Can Be Assessed’ (n 59) at 30.

⁵³⁴ Lynette Osiemo and Anton Kok ‘Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education’ (2020) 64 *Journal of African Law* 173; Arnold Nciko ‘Ignorance of the Law Is No Defence: Street Law as a Means to Reconcile This Maxim with the Rule of Law’ (2018) 3 *Strathmore Law Review* 25; Nciko (n 534) at 40; Yohana Ouma and Esther Chege ‘Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide’ (2016) 23 *International Journal of Clinical Legal Education* 107 <<http://www.northumbria-journals.co.uk/index.php/ijcle/article/download/567/982>>; David Mcquoid-Mason, Ernest Ojukwu and George Mukundi Wachira ‘Clinical Legal Education in Africa: Legal Education and Community Service’ in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011).

4.18.3 Incorporation into law school curricula

Each law school that was studied offers at least one curricular and one extracurricular clinical program. Overall, the extracurricular clinics presenting most of the live-client interaction constitute approximately 41 per cent of clinical legal education programs in the universities. The law schools offer them as regular semester-long courses that cut across the law curriculum. Whether or not one semester-long course is sufficient to transmit the objectives of CLE is arguable, as these must be balanced with core and other niche courses that are aligned to the university's niche area, in fulfilment of the obligations under the Legal Aid Act.

Whereas the Legal Education Act does not provide for clinical courses or methodologies as core, the criteria and standards developed from regulations made thereunder offer clinical methods as one among the modes of course delivery. There is conspicuously no central personality or institution driving clinical legal education, as is the case with South Africa⁵³⁵ and Nigeria⁵³⁶ respectively. A correlation is, however, drawn between the development of law curricula around university niche areas of study and their clinical programs. This link is evident from the data showing that the law schools that have a clinical niche embed clinical courses in their curricula. The one that has a public service niche also has a live client walk-in clinic. Resultantly, the present growth of clinics revolves around university goals and not constitutional impetus.

4.18.4 Partnerships and networks

Clinics acknowledge partnerships as a potential source of resources. Although such partnerships are an avenue for resolving needs relating to client representation, access to clients and working space, clinics appear to have unsatisfactorily taken up the challenge of seeking supplementary resources from donors.⁵³⁷ This would call for stronger and more direct engagement from staff as well as school leadership in the affairs of the clinics. Institutional accountability in partnerships and collaborations will require that clinics become consistent in monitoring and evaluating their

⁵³⁵ Maisel (n 221) 381.

⁵³⁶ National Universities Commission *Benchmark Minimum Academic Standards for Undergraduate Programmes for Nigerian Universities* (2014).

⁵³⁷ On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' (n 37) at 46.

clinic activities as well as in maintain institutional memory through regular reporting using standardised models.⁵³⁸

Leadership is problematic at both clinic and national level. Staff leadership at clinic level is beset with lack of clarity on staff engagement as it exceeds time and efforts expended in non-clinical courses and apparently, bears no direct benefits save for their altruism. The lacuna in national leadership remains in need of rapport, consensus building and a sense of ownership among clinic staff in the country. Unlike South Africa where clinics hire fulltime attorneys, Kenya's clinics depend on their academics that are qualified advocates for this function.⁵³⁹ This is reconcilable with the narratives of resource constraints as well as lack of a steady flow of clients.

The clinics reveal the resource-constrained nature of clinic operations that render them dependent on other institutions. According to the participants, clinic interactions with advocates appear limited to the Law Society Legal Awareness Week,⁵⁴⁰ clinic patrons or directors⁵⁴¹ and occasionally, some volunteer law firms⁵⁴² as well as advocates based in public benefit organisations.⁵⁴³ None of the clinics had fulltime advocates or employed any paralegals and neither did they express this possibility, which is the norm for jurisdictions with established clinics such as South Africa that also take on candidate attorneys on contracts of service.⁵⁴⁴ Their paralegals likewise play a prominent complementary role in access to justice,⁵⁴⁵ which is not the case of clinics in Kenya.

The Law Society of Kenya has a database of advocates who enlist to offer *pro bono* legal services to indigent persons.⁵⁴⁶ Even though these advocates are a paltry 8.5 per cent of advocates in legal practice, their commitment presents a prospect for partnership between like-

⁵³⁸ Bowen and Martens (n 489) at 903.

⁵³⁹ Du Plessis and Dass (n 440) at 393.

⁵⁴⁰ On file with author Protocol Number H18/10/17 'Interview 7' (n 18) at 165.

⁵⁴¹ On file with author Protocol Number H18/10/17 'Interview 3B' (n 14) at 81-82.

⁵⁴² On file with author Protocol Number H18/10/17 'Interview 6A' (n 48) at 157-158.

⁵⁴³ On file with author Protocol Number H18/10/17 'Interview 4' (n 63) at 114; On file with author Protocol Number H18/10/17 'Interview 2' (n 7) at 18.

⁵⁴⁴ Holness (n 232) at 334.

⁵⁴⁵ D Holness 'The Need for Recognition and Regulation of Paralegals: An Analysis of the Roles, Training, Remuneration and Impact of Community-Based Paralegals in South Africa' (2013) 38 *Journal for Juridical Science* 78 at 83.

⁵⁴⁶ On file with author Protocol Number H18/10/17 'Interview 9' (n 301) at 191.

minded entities such as clinics. This is yet another unexplored opportunity in which the clinics could assist with research and drafting of pleadings while the advocates focus on litigation aspects. Along this vein, the Society ought to explore the possibilities of establishing a fund that indigent clients could draw filing fees and other disbursements from. In this way, less established advocates would not be precluded from joining the *pro bono* scheme for lack of sufficient funding to bear disbursement costs attached to serving the indigent.

Clinics' dissatisfaction with the monopoly of legal representation that reposes with advocates is likewise palpable. This is rendered more acute by the lack of synergies between legal educators and practitioners in what would seem as a stark parallelism. The contentious prospect of seeking student representation capacity is a direction clinics could consider upon satisfactory resolution of their own challenges. This question of representation has also arisen in South Africa, where student practice rules were drawn up but have not yet been approved.⁵⁴⁷ Relatedly, arguments are made that student representation in the United States is more robust because law is offered as a second degree in that jurisdiction. Such arguments are debateable because the first degree is not in law and as such, the only difference between these students and those in other jurisdictions would not lie in their knowledge of the law but perhaps in age or maturity.

4.19 ADVANCING LITERATURE ON CLE IN KENYA

Clinical scholarship uses the terms 'clinics',⁵⁴⁸ 'law clinics',⁵⁴⁹ 'law school clinics',⁵⁵⁰ 'legal clinics',⁵⁵¹ 'university-based law clinics'⁵⁵² or 'legal aid clinics'⁵⁵³ to refer to CLE programmes

⁵⁴⁷ David Mcquoid-Mason 'Challenges When Drafting Legal Aid Legislation to Ensure Access to Justice in African and Other Developing Countries with Small Numbers of Lawyers: Overcoming Obstacles to Including the Use of Non-Lawyers to Assist Persons in Conflict with the Law' (2018) 18 *African Human Rights Law Journal* 486 at 498; D Mcquoid-Mason 'Whatever Happened to the Proposed South African Student Practice Rules?' (2008) 41 *De Jure* 580.

⁵⁴⁸ Margaret B Kwoka 'Intersecting Experiential Education and Social Justice Teaching' (2013) 6 *NorthEastern University Law Journal* 111 at 114.

⁵⁴⁹ Du Plessis 'University Law Clinics Meeting Particular Student and Community Needs-A South African Perspective' (n 3) at 126.

⁵⁵⁰ Richard J Wilson 'Legal Aid and Clinical Legal Education in Europe and the USA: Are They Compatible?' in Ole Hammerslev and Olaf Halvorsen Ronning (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (2018) at 264.

⁵⁵¹ Abate, Birhanu and Alemayehu (n 232) at 1.

hosted by law schools. The predominant term applied in Kenyan universities is ‘legal aid clinics’ or simply ‘legal aid.’ This terminology betrays the social justice leaning of the clinics. These take the form of clubs, student associations, student organisations and courses with practical elements.

The social justice orientation of Kenyan clinics is consistent with literature from multiple jurisdictions that this study reviews and finds indicative of the tendency towards social justice at the developmental stages of the clinics.⁵⁵⁴ It is apparent from these scholarly works that jurisdictions that have mature or developed clinics have eventually deemed it fit to expand their pedagogical orientation.⁵⁵⁵

Regardless of the ostensible dichotomy between the pedagogical and social justice missions of CLE, this study yields data aligned to the literature that considers these twin missions of CLE as inseparable orientations rather than as binaries. With most clinics being extracurricular, the struggle to balance the twin missions of CLE is identifiable in one of the few curricular clinics that exist. This is the Public Interest Clinic course, which is grappling with limitation of the scope of its social justice projects to only those which can be concluded within the teaching semester as defined by the university academic calendar. This compliance with the university calendar limits the interventions to legal awareness campaigns and excludes more engaging and impactful interventions such as assisting with public interest litigation and law reform matters.

Although the inception of the clinics did not flow from implementation of the 2010 Constitution, its transformative framework compels a new *raison d’etre* for clinics. This impetus is traceable to its progressive bill of rights and agenda for social change. Whereas the Constitution guarantees access to justice for all, some constitutional law scholars doubt whether

⁵⁵² Ukwueze and Obuka (n 454) at 388.

⁵⁵³ McQuoid-Mason, Ojukwu and Wachira (n 534) at 23, 27.

⁵⁵⁴ Abate, Birhanu and Alemayehu (n 232); Cynthia F Adcock ‘Curriculum Beyond Externships and Clinics: Integrating Access to Justice’ (2013) 62 *Journal of Legal Education* 566; Frank S Bloch and Mary Anne Noone ‘Legal Aid Origins of Clinical Legal Education’ in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011); Bloch (n 257) at 133; McQuoid-Mason, Ojukwu and Wachira (n 534); Jane H Aiken and Stephen Wizner ‘Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice’ (2004) 73 *Fordham Law Review* 997; Gavigan (n 209); McQuoid-Mason (n 505).

⁵⁵⁵ Wilson (n 550); Evans and others (n 11); MA du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2017); Leah Wortham and others (eds), *Learning From Practice* (2016); Nicolson ‘“Our Roots Began in (South) Africa”: Modelling Law Clinics to Maximise Social Justice Ends’ (n 167).

such a guarantee can be achieved from the nation's own resources.⁵⁵⁶ This incapacity could justify why the state has rallied university law clinics as legal aid providers thereby expanding its capability to fulfil the access to justice needs of the people.

The Legal Aid Act draws universities into an arena that public benefit organisations hitherto dominated because of despondency by the state and the legal profession. This statutory recognition of the access to justice role of university law clinics was ground-breaking in the country despite it having been foreseen and provided for in international guidelines on access to legal aid.⁵⁵⁷ The legislative novelty recognising clinics as legal service providers destabilises the legal and policy framework for both legal education and access to justice as these are still oblivious to CLE and its potential for delivering access to justice and transformative legal education.

The study commenced with a broad definition of CLE whose sole distinguishing factor was the social justice orientation of both extracurricular and curricular clinics. When juxtaposed with the variety of definitions of CLE emerging from jurisdictions where CLE has taken deep root, CLE practice in Kenya defies these definitions and does not fit squarely in any one of them. This situation is reflective of what the Kenyan legislative and university context allows and of the multiple barriers that prevail over CLE. Comparisons between three of various definitions of CLE and the data on CLE as practiced in the country are as follows:

When defined as experiential learning that places students in the position of lawyers attending to persons with legal needs,⁵⁵⁸ CLE's reference to 'experiential learning' presupposes the clinic as a course in the school curriculum. The course that most closely aligns with this definition is the Public Interest Clinic course because it is curriculum-based and closely supervised. Like all other clinics in the country, the Public Interest Clinic course places students in the position of 'community educators' and not lawyers given that they share their legal knowledge and barely attend to legal needs. Since the majority of clinics are extra-curricular, theirs may be more of *ad hoc* learning since it is neither structured nor systematic and often without close supervision.

⁵⁵⁶ Kiwinda Mbondenyei and Osogo Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) at 194.

⁵⁵⁷ Amondi (n 5) at 209.

⁵⁵⁸ Evans and others (n 11) at 41.

Defining CLE as a methodology that uses the practice of law as a context to teach professional skills and ethics⁵⁵⁹ prioritises and delineates the pedagogical mission of clinics. Again, the Public Interest Course fits this definition, save for the fact that it uses ‘community education’ and not the ‘practice of law’ as the context for teaching. This definition excludes the extracurricular clinics that comprise most university clinical programmes in the country. The students in such clinics indeed acquire some professional skills when they host legal awareness clinics, community education programmes or work at legal aid clinics run by public benefit organisations. These are skills such as public speaking, note-taking or client interviewing. They observe ethical dilemmas in host institutions in which they take up externships,⁵⁶⁰ although they do not usually conduct supervised reflective practice that would assist them to benefit from their experiences.

There are CLE contexts that discount community education or street law and skills courses such as legal research and writing from clinical courses.⁵⁶¹ If applied to Kenya, such a definition would exclude the Department for Legal Clinics and Externship because it is fundamentally a course in legal research and writing. Of the curriculum-based courses, only the Public Interest Clinic and Clinical Externship courses would meet the mark. Among the extracurricular clinics, only the semi-autonomous clinic and the walk-in clinic would qualify as CLE. The clinic club, student practice organisations and student associations in public universities would be ineligible since these are essentially community education programmes.

A definition presented for a ‘robust and effective clinic’ is an academic programme that entails experiential learning achieved through the provision of legal services to indigent clients by students that are under close supervision of a practicing lawyer.⁵⁶² Although none of the clinics complies with all the key elements of this definition, they display various combinations of the elements in the definition. The clinics in Kenya work with indigent persons in both curricular and extra-curricular settings. Academic clinical programmes in the country are rather few, with the majority being extracurricular. Furthermore, clinics do not have capacity to offer legal

⁵⁵⁹ Evans and others (n 11) at 74.

⁵⁶⁰ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 3’ (n 16) at 93, 103.

⁵⁶¹ Maisel (n 221) at 379.

⁵⁶² Wilson (n 550) at 265; R Wilson ‘Training for Justice: The Global Reach of Clinical Legal Education’ (2004) 22 *Penn State International Law Review* 421 at 423.

services so they carry out advocacy, client referrals and community education instead. While practicing lawyers sometimes supervise clinics, supervision is principally by academic staff who are not in active legal practice and is often not as close as may be desired. Consequently, champions of this definition of CLE may criticise the clinics as not being robust or effective.

Literature accords the social justice mission both a wide and a narrow sense. The wide sense is that of overcoming legal barriers to inequality⁵⁶³ while the narrow sense is that of accessing legal advice, dispute resolution institutions and legal information.⁵⁶⁴ The social justice mission in the practice of CLE often narrows down to the right of access to justice. This entails providing legal services to indigent persons, representing group or community interests and preventing disputes in society.⁵⁶⁵ The clinics in Kenya assist with the provision of legal services during their sporadic collaborations with the Law Society of Kenya or with public benefit organisations, but rarely on their own accord. They represent community interests and prevent disputes as may be possible through community education programmes.

The concept of access to justice goes beyond representation in court to awareness of laws by the public, ability to seek redress and enforce rights⁵⁶⁶ and affordable legal services for all. It therefore includes the availability of legal aid or access to mechanisms for resolving disputes.⁵⁶⁷

As anticipated, this research finds law clinics in the country primarily oriented towards the social justice mission. They gear the legal aid and legal awareness programmes that they engage with towards enhancing access to justice. Both the direct and indirect social justice mission as expounded on above are open to vast possibilities of interventions. Unfortunately, the prevailing legal and institutional circumstances render community legal awareness the leading viable aspect of clinical practices. It is evident that the clinics are operating well below their potential even on the direct social justice mission alone.

⁵⁶³ Radley Henrico (n 388) at 825; David Mcquoid-Mason 'Access to Justice in South Africa: Are There Enough Lawyers?' (2013) 3 *Oñati Socio-legal Series* 561 at 564.

⁵⁶⁴ Mcquoid-Mason 'Access to Justice in South Africa: Are There Enough Lawyers?' (n 563) at 565; DJ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Pre-1970 until 1990: Part I *' (2004) 29 *Journal for Juridical Science* 28 at 29.

⁵⁶⁵ Bloch (n 257) at 133.

⁵⁶⁶ Dorah Caroline Mafabi *Legal Aid: A Tenet of Access to Justice* (2014) 2 at 2.

⁵⁶⁷ Patricia Kimeri-Mbote and Migai Akech *Kenya Justice Sector and the Rule of Law* (2011) at 156-176.

The literature reviewed in this study draws linkages between scholarly works that are associated with the access to justice role of clinics. It also acknowledges seminal works on CLE from regions that have deeply ingrained the pedagogical mission of CLE. Unlike other jurisdictions that emphasise on either mission of CLE, Australian clinics operate both as learning environments and community service centres. As such, their experiences resonate with that of Kenyan clinics on questions such as operating sustainable social justice clinics.

Scholarly articles reviewed at the commencement of this study acknowledged the increase in universities in the East African region and this phenomenon's attendant drawbacks.⁵⁶⁸ The legal frameworks discussed in chapter three refine these drawbacks when they provide for higher qualifications for law teachers, who are already a scarce resource in the current setting.

Within the continent, only countries such as South Africa, Nigeria, Ethiopia, Uganda and Kenya have generated publicly available literature on the social justice experience of their clinics. These are also appreciative of the pedagogical value of clinics.⁵⁶⁹ Available reports on clinic activity in Kenya have been on aspects of clinics in individual universities.⁵⁷⁰ Previously, only the status of the law clinic at Moi University as at 2002 was available.⁵⁷¹ The present study complements these reports by detailing the variety of clinic set-ups in the country, the access to justice activities, processes and challenges. It yields data supporting the developments after 2002 in universities across the country. The positioning of clinics in the university structure hinders their operational independence, resourcing, decision-making and even capacity for client representation since clinics lack the legal standing to act in their own capacity. The only existing client walk-in clinic still experiences difficulties in engaging student volunteers arguably because of the physical distance between the law school and the clinic. One of several developments after the 2002 publication on Moi University is that university clinics now have supervisory staff, albeit one per clinic. The clinics are predominantly student operated, with clinic leaders being very clear and self-motivated on their roles.

⁵⁶⁸ Thomas F Geraghty and Emmanuel K Quansah 'African Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to A Neglected Means of Securing Human Rights and Legal Predictability' (2007) 5 *Loyola University Chicago International Law Review* 87 at 98.

⁵⁶⁹ Samuel O Manteaw 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' (2008) 39 *McGeorge Law Review* 903 at 950.

⁵⁷⁰ Nciko (n 534) at 40; Ouma and Chege (n 534) at 107.

⁵⁷¹ Ojienda and Oduor (n 361).

South Africa mitigated supervision and resource difficulties by joining the national association of clinics, entering into agreements with the local bar and hiring new law graduates to assist with supervision.⁵⁷² These options are not within the reach of clinics in Kenya. Legislation does not enable the use of clinics to host and train bar candidates. Additionally, the clinics in Kenya have not yet had any propulsion towards agreements with the bar as a collective, although individual clinics have approached private law firms and enjoy collaborations with them.

The prevailing legal framework has at its apex a transformative Constitution whose predominant values include social justice and equality. It becomes a beacon for legal education and the legal profession since they are the peak of constitutional education and practice. The supporting statutes engage with constitutional values to varying degrees.

The empirical aspect of this study addressed the institutional framework for access to justice through CLE in Kenya. An examination of documentation on South Africa's initial legal aid clinics that were purely oriented towards social justice preceded the data collection process. It consisted of scholarship on their organisation, development and status after the promulgation of South Africa's transformative Constitution. The review reflected on and drew lessons from literature on the South African clinical experience because of the similarities between the social justice orientation of the initial South African clinics and that of the present Kenyan clinics.

This review yielded frameworks for enhancing access to justice through CLE. The discussion on the place of access to justice in CLE rehashes the direct and indirect social justice mission of CLE.⁵⁷³ It reiterates the arguments supporting the access to justice role of clinics that results from lethargy by both the state and the legal profession in fulfilling their obligation in this regard;⁵⁷⁴ the access to justice role of both the state and the legal profession to which students

⁵⁷² MA (Riette) du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 12 at 28; De Klerk (n 359) at 946.

⁵⁷³ Nicolson "'Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (n 167) at 92.

⁵⁷⁴ Wilson (n 562) at 430; Jeremy Sarkin 'Promoting Access to Justice in South Africa: Should the Legal Profession Have a Voluntary or Mandatory Role in Providing Legal Services to the Poor' (2002) 18 *South African Journal on Human Rights* 630 at 631.

contribute;⁵⁷⁵ and more directly, the moral duty clinics have towards access to justice arising out of a sense of justice towards taxpayers that fund legal education.⁵⁷⁶

In making the case for the integration of university clinics into the law curriculum and wider legal education project, the study aligns itself with authors who argue that a focus on the education mission of CLE serves both CLE missions.⁵⁷⁷ They posit that giving prominence to the service mission will fail both goals of CLE. Data on the prevailing barriers to accessing justice through CLE provides support for alignment with the argument made by these authors.

The data indicates that the operation, management and staffing of clinics in the country takes the form of extracurricular student activities. They are external to the mainstream university system and are therefore under-prioritised when compared to direct teaching activities. The detachment of clinics from the curriculum directly and negatively impacts resources allocated to them by the university. The staffing of clinics merely for oversight and liaison with university management precludes close supervision of students. Their limited resourcing narrows the scope of their interventions besides contributing to their unsustainability.

The pedagogical value that clinics offer in aligning legal education with transformative constitutionalism and in the inculcation of transformative legal education buttresses the inclination this study takes towards curricular integration of clinics. This thesis supports CLE as a teaching methodology for transformative legal education because of CLE's capacity to immerse students into the society's legal needs. In this way, CLE addresses both unmet legal need and legal education, two factors which scholars have already delineated as potential barriers to transformative constitutionalism.⁵⁷⁸

Furthermore, such integration in the curriculum has the potential of mitigating the deficiency of a *pro bono* culture in the country, enabling law students to nurture social justice dispositions. It confers greater chances of clinics being on equal footing with other substantive law courses resulting in clinics occupying an agreeable place in the university structure,

⁵⁷⁵ Aiken and Wizner (n 554) at 997; Debora L Rhonde *Access to Justice* (2004) at 192.

⁵⁷⁶ Donald Nicolson 'Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World' (2015) 22 *International Journal of the Legal Profession* 51 at 56; DJ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Part 2: 1990 until the Present *' (2005) 30 *Journal for Juridical Science* 1 at 14.

⁵⁷⁷ Wilson (n 562) at 430.

⁵⁷⁸ Langa (n 390) at 355.

receiving equal funding allocation, adequate staffing ratios and some assurance of sustainability. This integration in the curriculum perpetuates the utilisation of CLE for pedagogy and greater public acceptance as an access to justice instrument by students. Consequently, proponents of the viewpoint that African universities have a special duty towards the poor in their communities⁵⁷⁹ stand vindicated by a sharpening of CLE's pedagogical mission.

The recognition that legal aid legislation accords to the social justice mission of clinics in harmony with the bill of rights justifies the strengthening of clinics. This fortification stands to gain from lessons from the South African experience, since both countries operate in a transformative constitutional context and have experience of an enormous access to justice need. Previous usage of aspects of the South African clinical movement as a model for the establishment of clinics in other jurisdictions such as Nigeria,⁵⁸⁰ the United Kingdom⁵⁸¹ and Poland⁵⁸² emboldens such comparison.⁵⁸³

The CLE landscape in Kenya pales in significance when juxtaposed with that of South Africa considering that all South African universities offer live client clinical courses⁵⁸⁴ while only one Kenyan university has a curriculum-based clinical course. This is an elective course, with the potential of being a live client clinical course but which at present conducts community legal awareness projects. A by-product of the pre-independence turmoil in both countries was an environment characterised by unequal access to justice as set out in chapter 2.3.1 and 3.1.1. Although the unmet legal need in society in both jurisdictions motivated students to lead and operate social justice clinics, the factors driving the growth of the clinics differ.

Similarly, the review of literature had anticipated that the commonalities between clinic operations in Kenya and Poland would lend the structure and experience of the Polish clinics a benchmarking value in this study. It emerges that the circumstances of clinics in the two countries are significantly at variance. As is the case with Kenya, the legal profession in Poland

⁵⁷⁹ Mcquoid-Mason 'Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa: Part 2: 1990 until the Present *' (n 576) at 14.

⁵⁸⁰ Mcquoid-Mason, Ojukwu and Wachira (n 534) at 24.

⁵⁸¹ Nicolson "'Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (n 167) at 90.

⁵⁸² Isabela Kraniscka 'Legal Education and Clinical Legal Education in Poland' (2008) 13 *International Journal of Clinical Legal Education* 47 at 53.

⁵⁸³ Maisel (n 221) at 377.

⁵⁸⁴ Maisel, Mahomed and Jain (n 332) at 434.

lacks a *pro bono* tradition, whereas the university clinics have a social justice orientation.⁵⁸⁵ Having found ample educational justification for the cost of clinical programmes, one university introduced CLE in Poland in 1997 as an educational method in legal studies.⁵⁸⁶ Thereafter, all the public and the majority of the private universities followed suit. Besides having succeeded in retaining their educational function as the reason for their existence, the clinics have made significant contribution to alleviating the country's huge unmet legal need.⁵⁸⁷ This educational function is one that the Kenyan clinics have not adequately engaged with.

Facilitating the social justice work of Poland's clinics has been the availability of financial support for the establishment of law clinics, their integration into the university structure, the establishment of the Legal Clinics Foundation⁵⁸⁸ and cooperation agreements with the Ombudsman of the Republic of Poland, law firms and legal corporations.⁵⁸⁹ The purpose of the Legal Clinics Foundation is to strengthen the clinical movement in the country by promoting clinical programmes, their standards and financing.⁵⁹⁰ None of these circumstances have worked in favour of Kenyan clinics. The clinics in Kenya endure persistent scarcity of resources. They are not well integrated into the university structure and do not have a central body to spearhead the clinical movement, standards or financing. These clinics have very few collaborative projects, the majority of which are *ad hoc*. Nevertheless, Poland too had their share of struggles such as convincing the national association of advocates and legal advisers of the non-competing nature of clinic work.⁵⁹¹ As was the case with South Africa, this was a battle the Polish clinics fought and won. The gains made by these countries in engaging with the lawyers' professional body makes it a worthwhile path for Kenya's clinics to consider.

The clinics in Kenya were developed to alleviate unmet legal need in the society. Personal or previous work experiences inspired social justice convictions in both students and

⁵⁸⁵ Eleonora Zielińska 'Clinical Education as a Nucleus for the Reform of Legal Education in Poland' in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 14.

⁵⁸⁶ Szweczyk (n 512) at 17-18.

⁵⁸⁷ Lukarz Bojarski 'The Aim of Legal Clinics' in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 27.

⁵⁸⁸ Kraniscka (n 582) at 51, 54.

⁵⁸⁹ Magdalena Olczyk 'The Aims and Principles of Cooperation between the Ombudsman and the Legal Clinics' in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 573.

⁵⁹⁰ Kraniscka (n 582) at 53.

⁵⁹¹ Kraniscka (n 582) at 51.

staff, drawing them to conduct clinic work with the indigent in society. Unlike the case of South Africa, the clinics and universities operated in isolation since the nation does not have a national association, clinic pioneers, substantial donor support, conferences or even support from the Law Society. Unlike South Africa's Law Society that even regulates clinics and recognises them as places for legal practice, the only legal recognition accorded to clinics in Kenya is as a legal aid provider under the Legal Aid Act. Nevertheless, this research considers the 2010 transformative Constitutions' access to justice guarantees and social justice orientation a spur that has the potential of inspiring the evolution of clinics and legal education in Kenya.

Having found no frameworks for the study of CLE in transformative constitutional contexts, this study distilled frameworks for enhancing access to justice through CLE from literature on South Africa's experience. The resulting framework gave prominence to the legislative and institutional factors which set the basis for the emerging themes in the grounded theory study. It identified the legislative factors as a transformative constitution and enabling legislation in support of its provisions regarding access to justice. The latter include legislation on legal aid, the legal profession and legal education. The legal framework guided the study of the Constitution of Kenya 2010, Kenya School of Law Act, Legal Education Act and Universities Act for the provisions which resist and those which enhance access to justice through CLE.

The institutional framework yielded material under the themes of unmet legal need in society, the structure and mission of clinics, the law school curriculum, partnerships and networks that are in alignment with clinic's social justice outcomes. The study examined further themes that the data analysis yielded. These were the history of clinics, role of academic staff, positioning of clinics in the university structure, clinic leadership, resources and sustainability.

The clinics exist in a variety of forms and structures, with titles that are unique to each university. They all have a social justice orientation that is open to the incidental learning that may accompany such practical projects. The participants have a strong desire to engage in community awareness, advocacy and tackling unmet legal need in society. This rationalises the extracurricular nature of the majority of these clinics.

Despite differences in terminology introduced by legislation, CLE terminology applied in practice such as 'experiential learning' is consistent with that applied in CLE globally. Courses

based in the curriculum and classified as clinical also include externships and attachments at courts and law offices since these are typically practical courses.

Considering that it is the law curriculum that accords clinic its pedagogical identity, it is noteworthy that only one clinic best fits into this category. Paradoxically, the timeframes imposed by the curriculum limit the scope of social justice interventions operated by this curricular clinic. This factor alone is an indicator of the extent of the social justice orientation of clinics in Kenya.

In highlighting the absence of clinical courses in Kenyan law schools, this study associates with the view that if the school curriculum does not integrate clinics then CLE is not being utilised as a teaching methodology.⁵⁹² Indeed, the courses and reference material offered in the law curriculum are largely what they were at the time of the transplant of legal education into the country. As such, the core subjects offered in the law curriculum appear still deeply rooted in the country's colonial heritage and skewed away from the justice needs of the indigent population. With clinics running parallel to the traditional law school curriculum, the legal profession is not rooted in a clinical tradition and is devoid of a *pro bono* culture.

Drawn to clinics by their social justice objective, the students operate the clinics and provide their day-to-day leadership. Past experiences of injustice as well as a desire for change in the society around them serve to motivate their clinic work. Consequently, there are students who resolve to pursue social justice work in their future professional practice.

The clinics spread their knowledge of law and how people can claim their rights. The students share the knowledge they have gathered from class with persons in custody, indigent communities around campus as well as clients of public benefit organisations. The most common collaborations among the clinics are with the Law Society of Kenya's Legal Awareness Week and the NALEAS. They partner with public benefit organisations that have clients, since the clinics do not have a client base of their own. Clinics do not have capacity to represent clients and this may explain why they fail to draw clients in the way that public benefit organisations do. Nevertheless, these community projects enable students to experience how law excludes poor

⁵⁹² Haupt (n 532) at 231.

people either in effect or through direct provisions such as those requiring legal fees beyond the reach of many.

This study illuminates the multiple barriers that stand in the way of university clinics as a vehicle for access to justice. These emanate from the legal and institutional framework whose provision for clinics ignores its pedagogical aspects and therefore falls short of CLE standards. It discusses the legal framework that recognises CLE's legal aid function but does not empower clinics for client representation thereby curtailing the scope of their interventions. The framework recognises experiential learning but not CLE as a means of achieving this. Furthermore, it recognises the teaching objective of universities but not their service role thereby excluding CLE as presently oriented.

The legal aid framework that recognises clinics is yet to become operational. Institutional frameworks exclude clinics from the curriculum with the attendant consequences emerging as under-prioritisation, under-resourcing, inadequate supervision and general lack of sustainability. The clinics lack stable leadership, synergies, firm networks, clients, monitoring, evaluation and national partnerships. Addressing these barriers holds the promise of sharpening the utility of clinics for promoting transformative legal education in the country. Although there is a new motivation by big law firms towards legal aid work and partnerships, this appears to be the reflection of an international trend and not the influence of a transformative Constitution.

4.20 CONCLUSION

This chapter paints a picture of the clinical experience of law schools in Kenya. It presents the historical context of the clinics, their place in the university curriculum and what their mission is. It demonstrates the variety of structures through which CLE in Kenya takes place.

The chapter sets out the role of the students and staff. It depicts the access to justice need in the country and the muted response of clients to interventions by university students. Although clinic activities are under-resourced, they assuage this deficiency by synergies from partnerships with like-minded institutions. The absence of inter-university networks among clinics implies that national leadership and growth in clinic activities is unexplored. University law clinics are an underutilised resource, in a country with widespread lack of access to justice yet few clients take advantage of this opportunity.

The chapter establishes a broader understanding of CLE than is envisioned in CLE literature. Clinics in Kenya are more active as extracurricular than curricular activities. Their emphasis lies on social justice and not the pedagogical mission of CLE. However, universities with a generous offering of clinical courses in the curriculum report some level of success in generating students who are adequately prepared for social justice work.

The chapter demonstrates that clinics in Kenya have developed in a context where they are responding to societal need, lack of state action, an active civil society and development partners and a reluctant legal profession. In the context of legal education that has been slow in developing, clinics have thrived due to personal interest and drive from students and clinic directors. It buttresses research on sustainability of clinics, challenges facing clinics that emphasise their access to justice mission as well as contributing to empirical studies on the influence of clinic work on student career choices.

Clinics have developed within the country's socio-economic and political context, in universities with diverse histories and curriculum. Relations vary between law schools and their clinics. The clinics have unique missions, structure, areas of focus and leadership. They seek resources, partnerships and networks in the endeavour to remain sustainable. The majority engage students and academic staff in serving indigent persons.

The growth of clinics in Kenya has been simultaneous with the development of universities. Public universities have had a longer history than private ones, which have now proliferated the legal education sphere. Contrary to the impression depicted by the literature review that there is no clinical work going on, data demonstrates that there is a lot of clinical work taking place in Kenya. Except for two public universities, the majority of the universities have nascent clinics. They embrace a rich variety of social justice projects.

Theory courses abound in university curricula in Kenya. The division of legal training between the undergraduate programme and a more practical vocational training at the Kenya School of Law fosters this intensity of theory at degree level. The universities are also grappling with balancing courses stipulated by law with the courses in the university's niche area of focus without overloading the students. The focus on mandatory courses and university niche areas leaves little room for social justice courses, unless these are the university's niche. The practical courses, considered as clinical ones, are few and far between. These take the form of attachment

programmes, which give students exposure to the courts and legal practice in general. Thus, some universities are attempting to convert these to credit bearing courses in the curriculum.

One outstanding feature of CLE in Kenya is its divergence from traditional clinic activity. Although it is possible to conduct clinic activity both within and outside the school curriculum, clinical and legal aid activities are thriving in student organisations. These are volunteer activities that focus on the direct social justice mission of CLE. The extracurricular activities are more creative and vibrant as only students who are interested participate in them.

Despite Kenya's robust bill of rights in the Constitution, people have little awareness about rights, legal procedures and processes. It appears that the law is helpful only to persons who can afford lawyers. Additionally, systemic issues in legal processes such as delay in court cases, backlog of cases at the courts and missing court files present obstacles to access to justice. Despite the access to justice need in the country, the clinics are not able to draw a wide client base on their own. The clinics therefore concentrate on the access to justice needs of the communities that neighbour the universities. They also rely on partner institutions, prisons and remand centres as well as administrative offices to mobilise clients. They are yet to become a well-known and reliable source of community legal education and assistance.

The students volunteer their services to the community. This interest springs from a desire to learn, to help people or even to make up for injustices they have witnessed or experienced before joining law school. Their participation in legal aid projects in the absence of course credits points to a purely social justice disposition.

Academic staff oversee clinic work in both curricular and extracurricular settings. They too align themselves to these tasks because of personal interest arising from previous engagements with clinics. They represent the clinics at university management level and coordinate externship programmes for the university.

Both students and staff share the elaborate leadership responsibilities in clinics. The students guarantee sustained clinic activity through spreading membership across the four years so that the annual turnover when the final year students graduate does not significantly affect the clinic.

The absence of inter-university or national collaborations limits the synergies that such networks could draw. Partnerships with public benefit organisations supplement their manpower

needs while students benefit from clients and supervision. Inter-university partnerships are non-existent although there are inklings of partnerships with universities and institutions in the global north.

The perennial problem of securing resources to run the clinics prevails in all the universities. Curriculum-based clinic programmes receive funding as courses, while extra-curricular ones occupy spaces as student associations, clubs and student practice organisations which depend largely on student donations and membership fees. Partnerships with public benefit organisations serve to ease the clinics' deficiency in funding. Resultantly, there is keen optimism for the operationalisation of the NALEAS so clinics can begin receiving funding from there.

Accreditation and operationalisation of the national legal aid scheme is dependent upon the passing of regulations under the Legal Aid Act. These regulations for its operation are still under development. Until they are ready, the NALEAS limits its work with students to hosting them for externships.

With a fuzzy national trajectory for social justice, clinics have applied the law as a tool for enhancing access to justice. In this endeavour they confront sustainability issues, shortage of resources, inadequate supervision, poor networks, inadequate leadership, lack of institutional support, student leader turnovers as well as inappropriate placement in legislation and within university structures. These multiple barriers prevent optimal application of clinics and CLE in enhancing access to justice.

CHAPTER 5: ENHANCING ACCESS TO JUSTICE IN KENYA THROUGH CLE

5.1 INTRODUCTION

The legal profession and the court system in Kenya developed in the pre-independence era during which they were utilised to serve the interests of the incumbent regime.¹ The vestiges of colonialism still plague these institutions on which access to justice depend, with certain elements standing out as fruits of legal transplant from the country's historical heritage.² Presently, law still serves to protect select categories of people as demonstrated by the manner in which huge populations are excluded from formal justice institutions by the cost of legal representation, which soars above the average income of ordinary citizens.³ With lawyers practicing mostly in the urban centres, there are areas of the country where the inhabitants do not have access to legal practitioners and the levels of ignorance and legal illiteracy are high.⁴

In this context and as part of its transformative framework, the 2010 Constitution of Kenya guarantees all persons the right of access to justice.⁵ This right is for the enjoyment of every person irrespective of his or her financial means. The Legal Aid Act facilitates the right of access to justice by establishing the National Legal Aid Service (NALEAS) to administer an affordable and accessible legal aid scheme.⁶ The NALEAS is set up to work through enlisting the services of legal aid providers. These legal aid providers are advocates operating under the *pro bono* scheme of the Law Society of Kenya, a paralegal, firms of advocates, public benefit and

¹ Yash P Ghai 'Law and Lawyers in Kenya and Tanzania: Some Political Economy' in Yash Pal Ghai and JCN Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (1981) at 146-149; See also Chapter 3.

² Yash Pal Ghai 'The Legal Profession: Themes and Issues' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 10; G. Kamau 'Current Problems of Legal Education in Kenya' (1979) 9 *Journal of Eastern African Research and Development* 33 at 34.

³ Steve Akoth Ouma 'Justice without Lawyers: Juridical Structures and Practices of Law in Korogocho Slums' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 224, 225, 237; Robert Machatha Kibugi 'Training Lawyers for the Sub-Saharan African Market: What Role for Academics? Perspectives from Kenya' (2009) 43 *Law Teacher* 37 at 40.

⁴ Jedidiah Wakonyo Waruhiu and John Justice Odhiambo Otieno 'Access to Justice: The Paralegal Approach' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 190.

⁵ Constitution of Kenya, 2010 art 48.

⁶ Legal Aid Act, No. 6 of 2016 s 5, 7(a).

faith-based organisations as well as accredited legal aid clinics run by universities and other institutions.⁷

These legal aid providers have all been engaged in some form of legal aid work prior to the promulgation of the Legal Aid Act. First, paralegals, public benefit and faith-based organisations have been the vanguards of access to justice in the country especially in localities where advocates do not practice.⁸ The history of legal aid in Kenya shows the public benefit organisations as surpassing the government's involvement in access to justice for the indigent.⁹ Secondly, the Law Society of Kenya through its Public Interest and Advocacy Department operates a *pro bono* database that consists of approximately 8.5 per cent of the members of the legal profession who through a formal commitment provide *pro bono* services to indigent members of the public through the Society.¹⁰ Additionally, some firms of advocates that have not formally enlisted in the Society's *pro bono* database also proffer free legal aid and assistance to clients of their choice.¹¹ Thirdly, the majority of the law schools in the country have clinics that run a variety of legal aid and community education programmes. Starting in 2009, the NALEAS ran pilot programmes in a few university clinics for three years as a way of testing the viability of engaging university law clinics in the national legal aid scheme.¹² The resulting positive evaluation justified the inclusion of these clinics in the Legal Aid Policy that was the forerunner of the Legal Aid Act.

The analysis of Kenya's legal framework for access to justice and CLE in chapter three together with the findings from interviews and focus group discussions with clinic students and staff in chapter four, indicate that university law clinics in Kenya function in the face of relative indifference by both legislation and university administration. At present, the university law clinics encounter multiple setbacks to both their operation and sustainability. The clinics operate extraneously to the university structure, are severely under-resourced and they fall short of international standards required of clinics in terms of student learning, supervision and

⁷ Act No. 6 of 2016 (n 6) s 2.

⁸ Waruhiu and Otieno (n 4) at 190.

⁹ Caroline Amondi 'Legal Aid in Kenya: Building a Fort for Wanjiku' in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 205-206.

¹⁰ On file with author Protocol Number H18/10/17 'Interview 9' *Combined Transcripts* (2019) at 181.

¹¹ On file with author Protocol Number H18/10/17 'Interview 8' *Combined Transcripts* (2019) at 188.

¹² On file with author Protocol Number H18/10/17 'Interview 8' (n 11) at 168.

assessment.¹³ Additionally, the clinics experience constraints in the sorts of interventions they can make towards addressing societal justice needs.¹⁴ Consequently, CLE as presently constituted narrowly optimises both its goals of promoting student learning and social justice.

In the face of a transformative constitutional order that highlights social justice and with a history such as the one Kenya's legal profession has had, it would be appropriate for any reforms to legal education to examine the society's access to justice needs. Presently, legal education legislation obliges universities and law schools to focus their curricula on their respective niche areas.¹⁵ These vary across institutions depending on whether their niche is in technology, public service, business or whatever else they conceive their niche to be.¹⁶ Such a focus on niche areas that neglects clinical methodology may suggest an inadequate engagement with the 2010 Constitution's transformative framework as well as with the training of lawyers who are prepared to address society's social justice needs generally and access to justice specifically. It is in this context that the present study promotes the alignment of CLE with transformative legal education as a way of filling this training gap.¹⁷

Despite the resilience they have demonstrated, fostering positive support towards the development of university law clinics holds the potential of advancing both legal education and the 2010 Constitution's social justice goal. The underlying argument here is that improving CLE optimises the quality of access to justice and the training of lawyers for legal practice in a transformative constitutional framework. Consequently, it is worthwhile to address the shortcomings experienced in the operation of university law clinics and in CLE as presently formulated in Kenyan universities with a view to making recommendations. Since Kenyan universities also attract students from neighbouring countries, the recommendations contribute

¹³ On file with author Protocol Number H18/10/17 'Interview 1' *Combined Transcripts* (2019) at 5, 11; On file with author Protocol Number H18/10/17 'Interview 2' *Combined Transcripts* (2019) at 23, 32; On file with author Protocol Number H18/10/17 'Interview 4' *Combined Transcripts* (2019) at 123.

¹⁴ On file with author Protocol Number H18/10/17 'Interview 6A' *Combined Transcripts* (2019) at 161.

¹⁵ Legal Education Act (Accreditation and Quality Assurance) Regulations Legal Notice No.15 of 2016 r 14(2)(c).

¹⁶ Patricia Kameri-Mbote 'Legal Education and Lawyers' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 131.

¹⁷ Peggy Maisel, Shaheda Mahomed and Meetali Jain 'Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present and Future' (2015) 60 *New York Law School Law Review* 433 at 439.

comprehensively to the national efforts in improving legal education and promoting access to justice in the region.

In addressing the fifth research question ‘What recommendations can be made in order to enhance access to justice in Kenya through CLE?’ chapter five explores ways in which overcoming setbacks to CLE will yield improvements in the training of law students and in turn enhance access to justice in Kenya. The chapter begins by distinguishing CLE in Kenya’s legal aid scheme as a form of the Law and Development reform strategy referred to as an ‘institutional bypass.’ It discusses the prospects of law reform that could address legislative indifference towards CLE as well as the ostensible disharmony between legislation on the legal profession and the Constitutions’ transformative framework. The chapter then proceeds to address the benefits Kenya could draw from converting clinics from extra-curricular activities to curriculum-based courses. It explains how the clinics would stand to benefit from aspects of international best practice on CLE for curriculum design and student supervision. The chapter explores the possibility of having students represent clients in small claims and endorses partnerships among university clinics, the legal profession and other like-minded institutions. It then proposes various ways of strengthening the mobilisation of the resources required to keep clinics operational and sustainable. Finally, the chapter calls for education of stakeholders on the role of the NALEAS as it works towards full functionality.

5.2 CLE FOR ACCESS TO JUSTICE AS A CASE OF INSTITUTIONAL BYPASS

Chapter 3.2.1 highlighted the role of lawyers in the promotion of access to justice. It drew a link between the quality of lawyers and the nature and content of their legal education and training. It also noted the capacity of CLE to imbue legal practitioners with a social justice outlook. Additionally, chapter 3.7 noted the enduring lack of commitment by lawyers to *pro bono* work and applied it as an indicator of the prevailing disconnect between the legal profession and constitutional social justice values and access to justice guarantees. Buttrussing this position is chapter 3.8 which underscored the absence of access to justice objectives in legislation governing the Law Society. References to literature therein describe the access to justice concerns of the profession as dismal. Relatedly, the discussion that follows below demonstrates how the establishment of the NALEAS as the vehicle for fulfilling the constitutional guarantees on access

to justice surpasses obligations of the legal profession in facilitating access to justice for the indigent. This use of university law clinics in the national legal aid scheme to fulfil a role that belongs to the legal profession is a phenomenon that appears consistent with the development reform concept of an institutional bypass.

The term ‘institutional bypass’ is a concept among Law and Development scholars that is used to explain a strategy employed in developing countries to overcome challenges encountered in reforming institutions that have a monopoly or quasi monopoly in providing services.¹⁸ Where the monopoly service provider, the dominant institution, is unwilling or incapable of providing certain services, the government establishes an equivalent institution to counter the inefficiencies of the monopoly service provider. These bypasses can either be intentional or spontaneous. While intentional bypasses can occur as deliberate processes of reform, spontaneous bypasses develop organically as a response to institutional failures.¹⁹

The argument put forward in this section is that in the Kenyan context, the engagement of university law clinics in the national legal aid scheme is a case of institutional bypass of the provision of access to justice for the indigent, which is part of the broader obligation of the State and the legal profession of providing access to justice for all persons. Although law firms are increasingly taking up *pro bono* operations, the scale and scope of their *pro bono* operations pales against their for-profit business.²⁰ Thus, despite the huge unmet legal need in Kenya, the legal profession appears to have deliberately underscored its business function to the detriment of the overall access to justice needs of society.²¹

In its attempt to address the needs of the indigent, the State through the NALEAS has sought the assistance of university students and volunteer lawyers while turning a blind eye to the wider legal professions’ neglect of this aspect of their professional obligation. Enlisting law students as legal aid providers in the NALEAS in the country’s current legislative set-up fulfils

¹⁸ Mariana Mota Prado and Michael J Trebilcock *Institutional Bypasses* (2018) at half title loc 268 ch 1.1 loc 295; Michael Trebilcock ‘Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies’ (2016) 66 *University of Toronto Law Journal* 330 at 349.

¹⁹ Mota Prado and Trebilcock (n 18) ch 1.6 loc 772.

²⁰ On file with author Protocol Number H18/10/17 ‘Interview 9’ (n 10) at 189.

²¹ Apollo Mboya ‘The Bar: Challenges and Opportunities’ in Yash P Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 243.

the six characteristics that define an institutional bypass. Considered here in two sets, the first three of the six characteristics are as follows:

‘It keeps the dominant institution in place; it creates an alternative institutional pathway through which to discharge functions performed by the dominant institution; it has at least one distinctive feature that aims at addressing perceived dysfunctionalities or limitations in the dominant institution.’²²

One of the guarantees of the Constitution of Kenya 2010 is that of access to justice for all persons.²³ Examined through the lens of the Hohfeldian jural correlatives, every right has a corresponding duty thus the State’s guarantee of this right obliges it to ensure that all persons enjoy the right.²⁴ Legal provisions on access to justice do not operate automatically, but must be implemented by institutions. The institution of the legal profession occupies a predominant place in the justice system because of the monopoly that advocates possess in the role of proffering legal advice and representation. Thus, the State is incapable of providing access to justice without the involvement and cooperation of the legal profession.

Justifications of the lawyer’s role in access to justice include the argument that lawyers have a moral responsibility towards citizens as taxpayers, because it is these taxpayers who meet the cost of legal education and it follows that society must derive some benefit from the taxes they have paid.²⁵ By virtue of legislation, lawyers in Kenya retain the monopoly of providing legal representation. Thus, under the Advocates Act it is a criminal offence for unqualified persons to represent clients.²⁶ The argument about the responsibility of lawyers in the justice system is bolstered by their monopoly of legal representation that they have continued to guard jealously.²⁷ Although the Law Society is the dominant institution whose responsibility it is to provide access to justice to all, the commitment to this responsibility remains elusive.

²² Mota Prado and Trebilcock (n 18) ch 2 loc 1018.

²³ Constitution of Kenya, 2010 (n 5) art 48.

²⁴ Wesley Newcomb Hohfeld ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16 at 30.

²⁵ Donald Nicolson ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16 *Legal Ethics* 36 at 39.

²⁶ Advocates Act, Chapter 16 Laws of Kenya s 31.

²⁷ Willy Mutunga ‘The 2010 Constitution of Kenya: Its Vision of a New Bench-Bar Relationship’ in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 70.

The expansion of legal practice in Kenya towards the trajectory of business models relegates access to justice concerns to medium sized law firms and sole practitioners, if at all.²⁸ While the Law Society is the dominant institution in legal representation and the provision of legal services, members of the Law Society generally provide legal advice and representation to persons who can access lawyers and who can afford their services. Granted, the Public Interest and Advocacy Department of the Law Society runs a voluntary *pro bono* database through which only approximately 8.5 per cent of the advocates engaged in legal practice have formally enlisted.²⁹ This still leaves behind an enormous underserved indigent community or persons with an unmet legal need.³⁰ That being the trend, persons who need and cannot afford or access legal representation must turn to legal aid institutions for recourse. It is this underserved community that is indicative of the malfunctions of the legal profession as the dominant institution, the limitation that the institutional bypass would seek to cure.

The NALEAS legal aid providers under the Legal Aid Act are advocates operating under the *pro bono* programme of the Law Society of Kenya or any other civil society organisation or public benefit organisation, a paralegal, a firm of advocates, a public benefit organisation or faith-based organisation, a university or other institution operating legal aid clinics, or a government agency accredited under the Act to provide legal aid.³¹ The NALEAS does not oblige lawyers to work as legal aid providers. Considered further, the fact that the NALEAS engages members of the Law Society who are already committed to the Society's own *pro bono* programme, places these advocates under a double encumbrance. It remains speculative whether the NALEAS role will attract takers given that even the Society is presently at pains to provide incentives for the few advocates working in its own *pro bono* programme.³²

Save for the university law clinics, the legal aid providers under the NALEAS are institutions whose purposes, operations and sustainability are in no way linked to their work with the NALEAS. It is therefore likely that the serious and unresolved setbacks afflicting clinics in Kenya will steer clinics towards dependency on the NALEAS for the recognition and support

²⁸ Mboya (n 21) at 243-244.

²⁹ On file with author Protocol Number H18/10/17 'Interview 9' (n 10) at 181.

³⁰ Waruhiu and Otieno (n 4) at 190.

³¹ Act No. 6 of 2016 (n 6) s 2.

³² On file with author Protocol Number H18/10/17 'Interview 9' (n 10) at 189-190.

they lack from their own universities. These setbacks endear university clinics to the NALEAS as the most available legal aid providers with which the NALEAS seeks to resolve the dominant institution's failure to address the access to justice need by indigent persons in the country.

The specific element that distinguishes NALEAS as a bypass is its enrolment of university clinics as legal aid providers under the present framework in which clinics largely operate as ectopic entities in the university structure and curriculum. The State establishes the NALEAS as an alternative institutional pathway, abandoning the very clear-cut option of reforming the legal profession with respect to access to justice for the indigent. This would entail convincing advocates to take certain quantities of mandatory *pro bono* work, the representation of whom they hold the monopoly, as a way of discharging the function of attending to indigent persons.

In the case of Kenya, the establishment of a national legal aid scheme in the form of the NALEAS is a plain demonstration of the State's capacity to address unmet legal need. The scheme also serves to stimulate a response, in both legal educators and practitioners, to social problems brought about by poverty and inequality.³³ The practice of creating a parallel institution in the form of an institutional bypass could draw legitimate criticism for what appears as duplication of resources and functions by countries that need them most. Law and Development scholars opine that such a strategy is justifiable because it avoids the resistance that may be provoked when reformers squarely challenge the *status quo* of an institution.³⁴ Tracing its roots to the country's British colonial heritage, Kenya's legal profession is an institution that is steeped in tradition. The self-regulating profession that has endured a tumultuous history³⁵ having grown and flourished in relative isolation, is likely to resist attempts at reform by 'outsiders.' Apart from general resistance to change occurring as the fruit of path dependence, there are cases where resistance in institutions that are subjected to reform arises from self-interested parties or rent seekers who profit from the *status quo* such as public servants who had erstwhile been

³³ Frank S Bloch and Mary Anne Noone 'Legal Aid Origins of Clinical Legal Education' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 163.

³⁴ Mota Prado and Trebilcock (n 18) ch 1.2 loc 359.

³⁵ Pheroze Nowrojee 'The Legal Profession 1963-2013: All This Can Happen Again-Soon' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (2014) at 34; JB Ojwang and DR Salter 'Legal Profession in Kenya' (1990) 34 *Journal of African Law* 9 at 26.

benefiting from bribes paid to them to expedite the delivery of services.³⁶ Considering both their business approach to practice³⁷ and the pessimism about their lack of commitment to access to justice,³⁸ self-interest risks keeping Kenya's legal profession from conceding to mandatory *pro bono* service yet they could apply their time to more economically rewarding tasks.

Furthermore, a bypass offers the advantage of serving as a pilot project which tests the outcomes of proposed reforms to an institution without interfering with the operations of the dominant institution.³⁹ In this way, in the event of adverse outcomes the State could easily withdraw the bypass without interference with the dominant institution.

Bypasses have the potential of being misused by corrupt or autocratic and self-interested governments as a conduit for circumventing valid and legitimate opposition to projects that are not in the best interests of the people.⁴⁰ With that possibility, the institutional bypass fits the bill of the proverbial double-edged sword that should be implemented with an abundance of caution.

The legislative setup of university clinics, the NALEAS, the Law Society of Kenya and the legal profession fulfil the remaining three of six characteristics that define an institutional bypass. These are as follows:

‘...it is separated from the dominant institution from a governance perspective; it has effects in the same jurisdiction as the dominant institution and it does not expressly contradict the requirements of the legal system within which it is operating.’⁴¹

University clinics, the NALEAS and the legal profession in Kenya are separate institutions even when considered from a governance perspective. The Universities Act regulates the establishment, accreditation, governance and management of universities in Kenya. Although it does not pronounce itself on matters related to service to the community, it presents education and training as one of the objectives of university education.⁴² Universities are governed in

³⁶ Mota Prado and Trebilcock (n 18) ch 1.2 loc 367.

³⁷ Mboya (n 21) at 243.

³⁸ Ghai (n 2) at 31; Kibugi (n 3) at 39.

³⁹ Mota Prado and Trebilcock (n 18) ch1.3 loc 442.

⁴⁰ Mota Prado and Trebilcock (n 18) ch1.5 loc 631.

⁴¹ Mota Prado and Trebilcock (n 18) ch 2 loc 1026.

⁴² The Universities Act, No. 42 of 2012 s 3.

accordance with their charters and statutes, subject to the provisions of the Universities Act.⁴³ The Legal Aid Act establishes the National Legal Aid Service and provides for its administration, management and funding. The Advocates Act is the law which makes provision for the right to practice as an advocate in Kenya, admission to the bar, the issuing of practice licenses, remuneration and discipline of advocates.⁴⁴ Advocates who sign the roll become members of the Law Society. The Law Society Act provides for the membership and governance of the Society comprising of the members of the legal profession.⁴⁵ Invariably, the institutions established by these legislations operate and are effective in the same jurisdiction, Kenya. As presented above, different statutes establish and govern the legal profession and the NALEAS and these are not in conflict with the requirements of Kenya's legal system in which they operate.

It is noteworthy that an institutional bypass is not a permanent strategy. Law and Development scholars acknowledge the institutional bypass as a mere spur to institutional change with the preferred strategy being the reform of malfunctioning institutions.⁴⁶ As discussions in this chapter make clear, both university students and indigent persons have a lot to gain from clinics and from collaboration with the NALEAS and like-minded institutions. Nevertheless, the meaningful attainment of access to justice for all as envisaged in the Constitution calls for more concerted support and commitment by both universities and the legal profession than is presently availed.

5.3 STRENGTHEN HARMONY BETWEEN THE CONSTITUTION AND LEGISLATION

Law and Development scholars use the term 'critical juncture' to refer to events which propel institutional change, situations which provoke a shift in trajectory and an uprooting of path dependence that are often identifiable only in hindsight.⁴⁷ Critical junctures are events that place institutions along the course of transformation.

⁴³ Act No. 42 of 2012 (n 42) s 34-43.

⁴⁴ Chapter 16 Laws of Kenya (n 26).

⁴⁵ Law Society of Kenya Act, No.21 of 2014.

⁴⁶ Mota Prado and Trebilcock (n 18) ch 1.2 loc 1762.

⁴⁷ Mota Prado and Trebilcock (n 18) ch 1.1 loc 335; Trebilcock (n 18) at 334.

Although the legal profession has retained its traditions and mode of operation for many years, it is not impermeable to change. The 2010 Constitution, being an autochthonous document with a transformative core, can be utilised as a ‘critical juncture’ in terms of reform of the legal profession towards social justice and access to justice for all. The reforms stand to offer legal education and the legal profession a greater alignment with the constitutional provisions and values.

Some jurisdictions have partially attributed the failure of their legal profession in meeting its obligation to provide access to justice to inadequacies of legal education.⁴⁸ A similar conclusion could be arrived at when considering whether the constitutional goals and values have sufficiently influenced purposes articulated for legal education in Kenya. Arguably, the critical juncture occasioned by a transformative constitution is suitable for renewed reflection on the theory and practice divide of university and vocational training. It calls for an interrogation of its merits in view of the values of transformative constitutionalism and the twin benefits of CLE. Indeed, scholars argue for the centrality of access to justice in both legal education and in the legal profession.⁴⁹ Such a juncture is expedient for interrogating the place of social justice and, more specifically, access to justice in legal education.

Undeniably, the legal profession in Kenya has had its fair share of struggles, of colonial and postcolonial baggage.⁵⁰ When examined as a legal transplant, the profession has eliminated some superficial elements that have long been inapplicable in the Kenyan context. An example here is the attempt to phase out robes and sisal wigs that are reminiscent of British lawyers. It would be helpful if the profession could then address itself to the needs and legal issues experienced by its immediate constituency.⁵¹

Acknowledging the legal profession’s difficult history and its influence on current legal practice is a practical step in striving towards reform. Another practical step would be to identify the impacts of this difficult history on the legal profession, by probing the shortcomings in the

⁴⁸ Roy Stuckey and others *Best Practices for Legal Education: A Vision and a Roadmap* (2007) at 18.

⁴⁹ Donald Nicolson ‘Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World’ (2015) 22 *International Journal of the Legal Profession* 51 at 52; Mutunga (n 27) at 71-72.

⁵⁰ Paul Mwangi *The Black Bar: Corruption and Political Intrigue within Kenya’s Legal Fraternity* (2001) at 21, 72; GGS Munoru ‘The Development of the Kenya Legal System, Legal Education and Legal Profession’ (1973) 9 *East African Law Journal* 1 at 1.

⁵¹ Kibugi (n 3) at 41-42; Ojwang and Salter (n 35) at 26.

legal profession emerging from the country's political history and examining ways of alleviating these. This process could steer some level of commitment to transformation and alignment with constitutional goals and values through legislative reform.

Whereas the institutional bypass of the access to justice function is palpable in Kenya, law reform is always the preferred alternative. This is because institutions such as the legal profession are creatures of the law. Similarly, law addresses questions on who ought to provide legal representation and at what cost. The monopoly of legal representation held by advocates is similarly a creature of law. This law, however, does not provide a way forward for the representation of persons who can partially afford the required fee. Such a gap could be a candidate for law reform; dismantling the monopoly held by lawyers and promoting access to the justice institutions that law has created.

While the Law Society Act mentions constitutional values and the facilitation of access to justice in general, it does not provide an obligation towards ensuring access to justice for all. Matters such as constitutional values, access to justice and legal aid should find a home in the Advocates Act which governs the individual legal practitioners and their firms. Both statutes could benefit from a deeper orientation towards the goals of transformative constitutionalism. Examples here include fortifying legal aid and *pro bono* work and making it mandatory, as well as expanding the criteria for Senior Counsel appointments to include tangible contributions to social justice.

There are several jurisdictions that are exemplar of how legislation has been employed to bolster some level of commitment to access to justice in the legal profession. These entail statutory provisions through which the legal profession provides financial support to clinics, as is the position in South Africa⁵² as well as the push by Nigeria's Council of Legal Education to have their universities embed CLE in the curriculum.⁵³ Admittedly, implementing similar systems without rationalisation is not necessarily a panacea to a commitment to justice by the legal profession. For instance, although Ethiopia has a mandatory *pro bono* services system for

⁵² Legal Practice Act, No 28 of 2014 s 57.

⁵³ Festus Okechukwu Ukwueze and Beatrice Obianuju Obuka 'Challenges and Strategies for Sustainable Clinical Legal Education in Nigeria' (2020) 54 *The Law Teacher* 385 at 388.

its lawyers, its implementation in rural areas where the people need it the most has been elusive.⁵⁴

Authors familiar with legal practice in Kenya vividly portray the structured reality of legal practice in the country. The top tier law firms are often huge and globalised and these render their services mainly to corporations while the lower tier ones commonly offer their legal services to individuals and small institutions.⁵⁵ This practice tendency notwithstanding, Kenya has the capacity to introduce a culture of legal aid by introducing a shift from the predominantly financial focus that is prevalent in legal practice. This would entail efforts such as rethinking the funding of legal education and the payment structures of lawyers especially those more directly engaged with public interest as one way of assisting them recoup the expenses incurred in acquiring the legal training.⁵⁶ Such actions may encourage more lawyers to engage in public interest practice by alleviating their realistic need for financial independence.

Apart from refining the Advocates Act and the Law Society Act, another important task for law reform would be to address discrepancies that emerge between apparently conflicting legislative expectations that only serve to advance the perennial tension between the pedagogical and social justice aims of university law clinics.⁵⁷ This is because while university clinics feature and are relied upon in access to justice legislation,⁵⁸ university legislation does not recognise CLE's active social justice function. The Universities Act establishes the objectives of universities as teaching and research institutions, thus offering a possibility of acknowledging the pedagogical value of the clinics. However, the Legal Aid Act is more interested in the university clinics' access to justice function, which the Universities Act does not provide for. It goes ahead to subject clinics to supervision by the NALEAS despite clinics largely operating as student clubs and associations in the different universities thereby presenting a potential conflict in the governance of clinics.

⁵⁴ Mizanie Abate, Alebachew Birhanu and Mihret Alemayehu 'Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities' (2017) 11 *Mizan Law Review* 1 at 10.

⁵⁵ Mboya (n 21) at 243-244.

⁵⁶ Katharina Pistor *The Code of Capital* (2019) at 228-229.

⁵⁷ Shelley AM Gavigan 'Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35 *Osgoode Hall Law Journal* 443 at 457.

⁵⁸ Act No. 6 of 2016 (n 6) s 2.

The resolution of these inconsistencies could lie in the clarification of the role that universities play in serving the community, over and above their teaching and research objectives. These objectives would then be in greater harmony with the utilisation of clinics for both curricular and extracurricular social justice projects. It would also grant greater legitimacy to the engagement of law clinics with the NALEAS.

There is a need for consistency in the explanation of terms such as clinics, experiential learning and paralegals across the different legislations preferably with a predisposition towards fostering access to justice. For instance, the Law Society Act offers a definition of paralegals that is skewed towards the support of a legal practice⁵⁹ and that is not in harmony with the definition in the Legal Aid Act because the latter underscores their access to justice role.⁶⁰ Additionally, the scope of the Legal Education Act's recognition of experiential learning is narrow and only limited to persons gaining recognition for work or training undertaken outside of a law programme. The definition in this Act ignores experiential learning that could occur within a law programme in the form of clinics, moots, simulations and other curricular methods as traditionally foreseen in CLE programmes.⁶¹ Regarding the explanation of CLE, it is conceded that there are multiple interpretations of CLE and there is no unanimity among clinicians on a common meaning to date.⁶² There is, however, some agreement that CLE is a form of experiential learning in which law students assume the role of lawyers.⁶³ Since these variations are not advantageous in any perceptible respect, legislations that incorporate definitions of experiential learning that are aligned to mainstream clinical practice would foster CLE that is in tandem with global standards and practice.

There is a notable absence of clinical work from legislation governing legal education save for a provision making clinic one of the conditions for eligibility for examinations at the Kenya School of Law's Advocates Training Programme for law graduates.⁶⁴ Additionally, the Commission for University Education does not recognise clinical practice among the options

⁵⁹ Act No.21 of 2014 (n 45) s 2.

⁶⁰ Legal Aid Act, No 39 of 2014 s 2.

⁶¹ Adrian Evans and others *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) at 41.

⁶² Evans and others (n 61) at 40.

⁶³ Evans and others (n 61) at 41.

⁶⁴ Kenya School of Law Act, No. 26 of 2012 s 19(3)(b).

considered for the appointment and promotion of academic staff. These options are research and publication, teaching and instruction, consulting, administration and community engagement or ‘other contributions’ in their order of weighting.⁶⁵ Given the pedagogical and service missions of law clinics, clinicians play a unique role as both legal practitioners and law teachers. Unfortunately, there is a likelihood of being sidelined by both the academy and the legal profession,⁶⁶ with the academy treating them as practitioners and practitioners treating them as teachers thereby leaving clinicians no benefits from either institution. Rendering of clinic practice consequential to the legislation, workload and promotion criteria of academics could therefore serve as a way of motivating staff to get involved in clinics. This would reduce the perception of clinical practice as an extra task that does not count towards teaching, research, publication and other administrative duties that contribute towards the ascent of the academic ladder.

5.4 MAINSTREAMING CLINICS IN THE LAW CURRICULUM

Universities give effect to the right to equality before the law when they establish and operate clinics as a way of providing services such as representation, legal advice and assistance, community legal education and law reform activities.⁶⁷ While it is sometimes the case that law school clinical programmes are housed in legal aid clinics or even in community legal centres,⁶⁸ the clinical programmes run within university curriculum in Kenya mainly take the form of externships and attachment programmes.⁶⁹ The direct interactions with indigent clients and communities normally occur as extracurricular clinics such as a club, student practice organisation, student associations and a walk-in clinic.⁷⁰

⁶⁵ Commission for University Education *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* (2014) at 4.

⁶⁶ MA du Plessis and D Dass ‘Defining the Role of the University Law Clinician’ (2013) 130 *South African Law Journal* 390 at 394.

⁶⁷ Bloch and Noone (n 33) at 153.

⁶⁸ Bloch and Noone (n 33) at 156.

⁶⁹ On file with author Protocol Number H18/10/17 ‘Interview 7’ *Combined Transcripts* (2019) at 165.

⁷⁰ On file with author Protocol Number H18/10/17 ‘Interview 1’ (n 13) at 6; On file with author Protocol Number H18/10/17 ‘Interview 2’ (n 13) at 14; On file with author Protocol Number H18/10/17 ‘Interview 6’ *Combined Transcripts* (2019) at 139.

With their current status as extracurricular volunteer activities, the clinics concentrate on their social justice mission by offering services to indigent members of the community.⁷¹ Deprived of the rigour of an academic programme, this community service is vulnerable to deficiency in quality. Presently, multiple setbacks such as limited funding, inadequate supervision, sustainability challenges and high turnover of clinic leadership encumber university law clinics.⁷² Additionally, the place of clinics in the mission and structure of the university is undefined, thereby contributing to the problems of resourcing and sustainability. Consequently, it is desirable to counter the existing barriers to using clinics as vehicles for promoting access to justice in ways that optimise CLE in the country.

This study proposes that overhauling clinics and embedding them into the university curriculum is a means to furthering transformative constitutionalism and directly enhancing access to justice. This suggestion is consistent with global CLE practices that aim at balancing the interest of both students and clients by straddling academic excellence and quality access to justice, thereby complementing academic theory and applied theory.⁷³ Since research on CLE endorses the integration of clinics into the core law school curriculum for the attainment of its pedagogical value,⁷⁴ such integration of legal aid clinics into the university curriculum would serve to optimise the two dimensions of CLE in Kenya.

Best practice standards highlight the significance of CLE within legal education generally.⁷⁵ Thus, a law curriculum and pedagogy that strengthens CLE would be remiss if it did not consider existing international clinical best practice since these already offer standards on pertinent aspects of the law curriculum. Good clinical practice exists from the United Kingdom, the United States and Australia, these being the fruit of research and documentation as best practice, that is applicable in creating a meaningful basis for the development of clinical

⁷¹ On file with author Protocol Number H18/10/17 'Interview 1' (n 13) at 9; On file with author Protocol Number H18/10/17 'Interview 2' (n 13) at 18; On file with author Protocol Number H18/10/17 'Interview 3B' *Combined Transcripts* (2019) at 84; Strathmore University Law School *Exploring Opportunities for University Law Clinics in Kenya* (2019) at 8-9.

⁷² Strathmore University Law School (n 71) at 6-7.

⁷³ Du Plessis and Dass (n 66) at 405; MA du Plessis 'Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training' (2007) 32 *Journal for Juridical Science* 44 at 47.

⁷⁴ MA du Plessis 'Clinical Legal Education Models: Recommended Assessment Regimes' (2015) 18 *Potchefstroom Electronic Law Journal* 2778 at 2781.

⁷⁵ Evans and others (n 61) at 230.

programmes elsewhere. These best practices offer standards on course goals, curriculum content, use of technology, mode of clinical instruction and course assessment among other items. Furthermore, there is a lot to gain from building on CLE research from around the continent given the likelihood of these countries offering more homogenous and relatable context. The latter would entail integrating applicable lessons on the development of clinical programmes from established clinical programmes in South Africa and other countries of the continent.⁷⁶

While the United States and Australian best practice are the fruit of extensive scholarly discussion and research, standards from the United Kingdom emerged largely by consensus among clinicians.⁷⁷ Since the United Kingdoms' standards focus only on live-client clinics set in a clinical programme with a strictly pedagogical aim, they are narrowly applicable to the present study. A selection of the United States' best practices for legal education are relatable to this study as they were developed with the general focus on legal education that has access to justice considerations whose components include best practice for experiential learning.⁷⁸ Aspects of Australian best practice are also pertinent because they were developed with a clinical programme bearing both service and pedagogical aims in mind.⁷⁹ Although there are aspects of divergence between the setting in Kenya and that of other jurisdictions, the United States' and Australian best practices have multiple commonalities that could be considered and adapted for this study as specified in the subsequent discussion.

5.4.1 Law curriculum and pedagogy

The transformative potential of legal aid clinics for both legal aid and CLE is well recognised.⁸⁰ It is therefore worthwhile to harness this potential towards implementing Kenya's 2010 Constitutional order which prioritises social justice and guarantees access to justice for all. Since the Constitution in and of itself does not prepare or train lawyers, it is desirable to develop law curricula that integrate clinical programmes whose methodologies incorporate a social justice

⁷⁶ MA du Plessis *Assessment Methods in Clinical Legal Education* (Unpublished Phd Thesis, University of the Witwatersrand 2014); Shaheda Hasim Mahomed *Critical Evaluation of the Practical Legal Studies Programme at the University of the Witwatersrand* (Unpublished Phd Thesis, University of the Witwatersrand 2013).

⁷⁷ Evans and others (n 61) at 230.

⁷⁸ Stuckey and others (n 48).

⁷⁹ Evans and others (n 61) at 46.

⁸⁰ Bloch and Noone (n 33) at 163.

mission. ‘Integrating clinic into the curriculum’ entails infusing the curriculum with clinical courses to complement the existing doctrinal courses that comprise most law school curricula.⁸¹ Clinical scholars argue for such integration as a means to sustaining clinical programmes in the university setting and as a way of guaranteeing the attainment of its pedagogical goals.⁸² Such a curriculum would therefore be deliberately advancing CLE as a means of engaging with transformative constitutionalism. Entrenching clinic in the curriculum and incorporating a broader scope of work such as law reform in the clinic agenda would further harmonise CLE with transformative legal education.⁸³

This integration of CLE would also bear in mind the recommended shift from isolated clinical courses, that may contribute to curriculum overload, towards mainstreaming CLE methodologies into the law curriculum in accordance with the respective university’s niche areas thereby assimilating staff, clinic operation costs and student practical learning needs in these courses.⁸⁴

In Kenya, as is the case with jurisdictions such as the United States,⁸⁵ many law schools focus on training lawyers for the business of legal practice leaving the legal needs of small businesses and indigent persons underserved.⁸⁶ Furthermore, the cost of legal services soars beyond the reach of many people.⁸⁷ Thus, this proposal to integrate CLE into the law curriculum in Kenya is informed by the country’s need for law students who are better trained for legal practice in recognition of the access to justice gaps in the country and as a means of preparing them to mitigate these gaps.⁸⁸ Such integration would aim at perpetuating a commitment to justice in future legal practitioners. It is plausible that such enrichment will imbue a commitment

⁸¹ Rachel Spencer and Matthew Atkinson ‘Towards a Pedagogy of the Integration of Clinical Legal Education within the Law Curriculum: Using De-Identified Clinic Files Within Tutorial Programs’ (2013) 25 *Australia Legal Education Review* 121 at 121.

⁸² MA du Plessis ‘Clinical Legal Education: Planning a Curriculum That Can Be Assessed’ (2011) 36 *Journal for Juridical Science* 25 at 27.

⁸³ Maisel, Mahomed and Jain (n 17) at 456.

⁸⁴ Mahomed (n 76) at 189, 192-194.

⁸⁵ Stuckey and others (n 48) at 19.

⁸⁶ Mutunga (n 27) at 70; Kibugi (n 3) at 40.

⁸⁷ Kibugi (n 3) at 40.

⁸⁸ Mutunga (n 27) at 72; Stuckey and others (n 48) at 18.

to social justice in students and will educate them on their professional role in providing access to justice in their future practice.⁸⁹

Mainstreaming CLE in the university law curriculum would move clinic to the centre of legal education thereby presenting a theory of change for the Law Society, in what some researchers allude to as the ‘clinic effect.’⁹⁰ This is because law schools will over the years graduate generations of lawyers who will ultimately populate the Law Society and imbue it with the social justice orientation they will have acquired from their clinical training.

In a bid to address the attendant setbacks encountered by clinics in the country, the integration of CLE into the law curriculum partially entails formulating and articulating course aims for clinical programmes, introducing the assessment of students in the clinical programmes, incorporating technological advancement in learning and ironing out institutional asymmetries. Since the clinics are presently extracurricular activities with a purely social justice orientation, aligning them to the learning process necessitates their incorporation into courses with such courses clearly providing for the use of clinical methodology. To ensure effective assessment, the courses need to have relevant and clearly identified outcomes, skills and values.⁹¹ A critical item when setting goals for the programme of instruction is the commitment to justice, which then grounds students in core attributes that are vital for effective and responsible lawyering.⁹² The expected outcome of such a goal is to engender members of a legal profession that embodies an unwavering commitment to justice in all their endeavours.

The goals articulated for the clinical programme should also embrace the capacity CLE has for imbuing students with personal integrity and values. Considering that students confront moral and ethical decisions during their interactions with clients, CLE offers a useful means of transmitting values and providing students with an avenue to adapt their moral character to that required in the legal profession.⁹³ This adaptation is more probable if qualified clinic supervisors

⁸⁹ Stuckey and others (n 48) at 19.

⁹⁰ Rebecca Sandefur and Jeffrey Selbin ‘The Clinic Effect’ (2009) 16 *Clinical Law Review* 57 at 59.

⁹¹ MA (Riëtte) du Plessis ‘Designing an Appropriate and Assessable Curriculum for Clinical Legal Education’ (2016) 1 *De Jure* 1 at 7.

⁹² Stuckey and others (n 48) at 62.

⁹³ Nicolson ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (n 25) at 46.

are available to guide the students through selected academic literature and in reflecting on their live-client experiences.⁹⁴

The course aims for clinical programmes ought to ensure that the clinics are responsive to the legal needs of the community.⁹⁵ Examples of such course aims are advocacy for changes in legal policy and law reform.⁹⁶ In this way, the clinical programme retains its twin aims of service and learning. Along the same vein, there is need to streamline the duration of clinical courses to accommodate meaningful student engagement in public interest litigation, law reform and alternative dispute resolution. This alignment addresses the present difficulties that universities experience with clinical courses whose durations limit the scope of student engagement to interludes of community awareness and education projects.⁹⁷

Advisable as a blend of clinical experience, classroom and tutorial components,⁹⁸ law schools will benefit from developing clinical course curricula which offer a fusion of both theory and practice. The gradual shift from the introductory theory sessions to the practical and reflective sessions present a guided learning curve that serves to ease the students into the practicalities of the legal profession.

With the advent of technology, learning has embraced digital methods from very basic levels. Thus, proponents of transformative legal education recommend the integration of technology in the learning process at university.⁹⁹ This is because the present generation of students have grown up in a digital age and are usually familiar with digital knowledge paradigms. By the time they get into law school, these students are likely to be more engaged by teaching approaches that sufficiently acknowledge the digital paradigm and embrace the learners at their varying degrees of technological skillsets.¹⁰⁰ Consequently, even with clinical pedagogies, it is desirable to embrace the variety of instruction, course delivery, student

⁹⁴ Nicolson 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (n 25) at 47.

⁹⁵ Stuckey and others (n 48) at 145.

⁹⁶ Evans and others (n 61) at 47.

⁹⁷ On file with author Protocol Number H18/10/17 'Interview 3' *Combined Transcripts* (2019) at 61.

⁹⁸ Du Plessis 'Designing an Appropriate and Assessable Curriculum for Clinical Legal Education' (n 91) at 5-7.

⁹⁹ Geo Quinot 'Transformative Legal Education' (2012) 129 *South African Law Journal* 411 at 430.

¹⁰⁰ Quinot (n 99) at 430.

participation and feedback methods that the use of technology offers.¹⁰¹ These would be incorporated into the mode of delivery and articulated in the curriculum as such.

One of the setbacks identified in the data from this research is that there are asymmetries between university calendars and externship programmes hosted by the NALEAS.¹⁰² Initiating and strengthening of inter-institutional communication is imperative in addressing this setback. The main task in addressing this issue would be for universities to synchronise the duration and frequency of their student externship calendars with student intake timelines shared by the NALEAS and its stakeholders. This process would streamline the availability of externship slots as well. This suggestion is rooted in the awareness that a similar system of inter-institutional communication has worked well with the Judicial Attachment Programme as coordinated by faculty representatives from all law schools and the Judiciary's Training Section.¹⁰³ Therefore, synchrony and communication are within reach.

The purpose of assessment is to examine the educational value of learning and to ascertain the level of student performance at the end of the learning period.¹⁰⁴ It therefore follows that upon integration into the law curriculum, clinical courses would be subject to assessment. It would be appropriate to grant credits for experiential courses that correspond to the time and effort that students expend in completing the workload in clinics and externships.¹⁰⁵ As clinical work is normally time consuming, the award of grades for the course could incentivise students who would otherwise spend their time in less intensive courses. As with other courses, the assessment would be based on predetermined standards and criteria that are known to the students.¹⁰⁶ Given the social justice interests furthered by these clinics, it would be appropriate to design and include an assessment of the social justice outcomes as well.¹⁰⁷

¹⁰¹ Stuckey and others (n 48) at 117.

¹⁰² On file with author Protocol Number H18/10/17 'Interview 8' (n 11) at 175-176.

¹⁰³ The researcher served as Judicial Attachment Coordinator at Strathmore University Law School in Nairobi from 2013-2018.

¹⁰⁴ Stuckey and others (n 48) at 191.

¹⁰⁵ Stuckey and others (n 48) at 127.

¹⁰⁶ MA du Plessis 'Clinical Legal Education: The Assessment of Student Collaboration and Group Work' (2014) 39 *Journal for Juridical Science* 67 at 81.

¹⁰⁷ Donald Nicolson "'Our Roots Began in (South) Africa": Modelling Law Clinics to Maximise Social Justice Ends' (2016) 23 *International Journal of Clinical Legal Education* 87 at 104
<<http://www.northumbriajournals.co.uk/index.php/ijcle/article/download/532/922>>.

When incorporated in the law curriculum, courses with clinical components would, like other substantive law courses, remain subject to regular appraisal when the school is evaluating the suitability and effectiveness of its programmes.¹⁰⁸ This appraisal process will confer Kenyan clinics with a level of quality assurance that they presently do not enjoy. Integrating CLE into the law curriculum thereby mitigates some of the challenges identified from both literature and data drawn from the clinics.

5.4.2 Supervision

Supervision entails the frequent and close review of the progress made by students and includes collaborating with supervisors at the institutions where students carry out their externships as well as ensuring that client interests are also served.¹⁰⁹ Clinical scholars portray supervision as the hallmark of CLE because effective supervision lends credence to the quality of student learning.¹¹⁰ Experience demonstrates that supervision by qualified clinic staff ensures that the goals and expectations of clinical programmes are met. Supervision is what has lent CLE its credibility both as an educative programme and as an effective service to community.¹¹¹

Clinical best practice warns that severing the link between supervision and clinic erases the credibility of the clinic as a pedagogical tool.¹¹² Unfortunately, Kenya has a deficiency of qualified law teachers and some of the qualified few end up teaching in several institutions or are concurrently engaged in legal practice.¹¹³ This shortage implies that the role of law clinic patron is just one of several duties assigned to law teachers. The academics who take up clinic tasks invariably do so because of their passion for clinic work,¹¹⁴ a passion which endures absence of institutional understanding and support, systemic bureaucracy and lack of resources to achieve clinic objectives.

¹⁰⁸ Stuckey and others (n 48) at 198.

¹⁰⁹ Evans and others (n 61) at 123.

¹¹⁰ Jeffrey Michael Giddings *Influential Factors in the Sustainability of Clinical Legal Education Programs* (Unpublished Phd Thesis, Griffith Law School 2010) at 62.

¹¹¹ MA (Riëtte) du Plessis 'Clinical Legal Education: Interviewing Skills' [2018] *De Jure* 140 at 148; David McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) at 166.

¹¹² Stuckey and others (n 48) at 148.

¹¹³ Kameri-Mbote (n 16) at 137.

¹¹⁴ On file with author Protocol Number H18/10/17 'Interview 1' (n 13) at 10; On file with author Protocol Number H18/10/17 'Interview 3' (n 97) at 65; On file with author Protocol Number H18/10/17 'Interview 4' (n 13) at 118.

Quality supervision is also dependent on student numbers. Acknowledging that large student numbers are counter-productive for practical courses, student numbers in clinical courses need to be rationalised to ensure adequate supervision and effective learning. Considering the current shortage of law teachers, scholars concede the difficulties in executing practical courses which require that numbers of students remain small.¹¹⁵ This supervision requirement also poses a challenge to the mainstreaming of CLE in existing courses that run with large student numbers. This situation may steer schools towards isolated clinical courses where student numbers are controllable by offering these as electives, specialised clinics¹¹⁶ or by promoting student collaboration and group work.¹¹⁷ Budgetary allocations permitting, clinics may also employ additional staff to assist with supervision.

Studies on establishment and sustainability of law clinics identify factors that are both external and internal to the operation of the clinics as being relevant for their sustainability. They identify factors external to clinics as those relating to the political, economic, historical or legislative environment, while internal factors are those under the control of the university and law schools such as curriculum, conviction about relevance of programmes, resource allocation etcetera.¹¹⁸ While Kenyan legislation is ambivalent to CLE, emerging data on certain institutional factors such as university bureaucracy in clinic resourcing and mere moral support by law school deans do not lend themselves to clinic sustainability.¹¹⁹ This situation calls for universities and law schools to gain greater understanding and appreciation for CLE in both its service and pedagogical role, thereby warranting it a place in the law school curriculum.

Incorporating clinics into the law curriculum potentially resolves the challenges of staffing and supervision because it transfers clinic work from volunteerism to formal allocation of course loads to academics. Furthermore, this addresses the problems emerging from the high

¹¹⁵ Du Plessis 'Clinical Legal Education: Interviewing Skills' (n 111) at 143; Kameri-Mbote (n 16) at 137.

¹¹⁶ MA du Plessis 'Clinical Legal Education: The Challenge of Large Student Numbers' (2013) 38 *Journal for Juridical Science* 17 at 18, 21, 24.

¹¹⁷ Du Plessis 'Clinical Legal Education: The Assessment of Student Collaboration and Group Work' (n 106) at 70-71.

¹¹⁸ Cosmos Nike Nwedu 'Towards Clinical Sustainability from Evolution to Revolution: A Study of Sustainable Factors for Law Clinics' (2019) 6 *Asian Journal of Legal Education* 43 at 47-54; Jeff Giddings *Promoting Justice Through Clinical Legal Education* (2013) at 115-119.

¹¹⁹ On file with author Protocol Number H18/10/17 'Interview 1' (n 13) at 5; On file with author Protocol Number H18/10/17 'Focus Group Discussion 2' *Combined Transcripts* (2019) at 40.

turnover in student leadership and promotes institutional memory in the office of the course instructor. In this way, resources for clinical courses are allocated in tandem with other courses in the curriculum thereby ensuring the availability of adequate facilities, equipment and staffing.¹²⁰ This likewise contributes towards eliminating sustainability problems arising from universities under-prioritising their law clinics in the allocation of resources.

It is desirable to have the academics that are implementing clinical methodologies undergo relevant forms of professional development. Professional development of clinical staff builds their capacity, boosts their effectiveness and raises the quality of supervision offered to the students.¹²¹ Such development could include regular training of other academic staff who have an interest in integrating clinics in their courses.¹²² Considering the intention of aligning CLE with transformative legal education, all law teachers are likely to benefit from developing new methods of teaching that encourage active learning as well as engagement of students with study material, the environment outside the classroom¹²³ and specifically with the realities of the pressing social justice needs in society.

5.5 EXPLORE STUDENT REPRESENTATION IN SMALL CLAIMS

A persistent hindrance to clinic work in Kenya is that law students lack representational capacity and are therefore limited in the forms of assistance they can offer in the clinics, even in very simple cases.¹²⁴ The students themselves propose the possibility of having students lead representation before small claims courts or in alternative methods of dispute resolution.¹²⁵ The development and approval of student practice rules presents an ideal solution to multiple setbacks which clinics encounter regarding lack of client confidence in clinics because of the narrow scope of services they offer as well as their limited focus on community education and legal awareness projects. Such a suggestion is audacious, given that a similar proposal leading to the development of student practice rules in South Africa was made in 1975 and has never seen

¹²⁰ Stuckey and others (n 48) at 151.

¹²¹ Evans and others (n 61) at 125.

¹²² Maisel, Mahomed and Jain (n 17) at 451.

¹²³ Quinot (n 99) at 422.

¹²⁴ On file with author Protocol Number H18/10/17 'Interview 2' (n 13) at 16.

¹²⁵ On file with author Protocol Number H18/10/17 'Interview 4' (n 13) at 125; The Small Claims Court Act, No 2 of 2016 s 12(3).

the light of day.¹²⁶ These failed even when bolstered with the possibilities of clinics taking out insurance covers for negligence and guaranteed student supervision by qualified teaching staff.

Since legal representation is a preserve of advocates that they have endeavoured to guard jealously,¹²⁷ opposition to any reforms touching on this role is inevitable. Clinical scholars report the consistent resistance by lawyers in the continent whenever the legislative proposal is made for engagement of paralegals and law students in various exceptional forms of legal representation, even in circumstances where lawyers are unavailable and where there is full compliance with fundamental human rights.¹²⁸

In anticipation of similar opposition to the proposal for student representation in small claims, resistance to student practice rules would in all likelihood lie in questions of the quality of legal services offered as well as the creation of competition for legal briefs. Student practice is justifiable by the argument that the issue of quality can adequately be resolved by having qualified teaching staff supervising the students. Furthermore, student practice would not bring about competition for legal briefs because the clinics would only accept matters from persons who meet the criteria set for indigence. These are claims that lawyers would generally find unattractive and which will therefore not compete with the profession's core business.

Student representation promises to carry clinic work beyond legal awareness, community education on human rights and criminal law matters. This is likely to expand the profile of clinic clients beyond criminal cases to a certain level of civil claims as well. Suffice it to say that the work clinics conduct with indigent communities offers them a good grasp of legal issues facing these indigent communities thus the clinics can utilise the 2010 Constitution's generous provisions on *locus standi* to bring public interest and related claims before the courts.

As is the case with legal malpractice, there is a probability that student malpractice in clinics could affect their colleagues, their university and even their clients,¹²⁹ depending on the types of cases and the quality of service they offer. It will therefore be crucial for universities to

¹²⁶ David McQuoid-Mason 'Challenges When Drafting Legal Aid Legislation to Ensure Access to Justice in African and Other Developing Countries with Small Numbers of Lawyers: Overcoming Obstacles to Including the Use of Non-Lawyers to Assist Persons in Conflict with the Law' (2018) 18 *African Human Rights Law Journal* 486 at 499; McQuoid-Mason (n 111) at 194.

¹²⁷ Mutunga (n 27) at 70.

¹²⁸ McQuoid-Mason (n 126) at 497, 499.

¹²⁹ Spencer and Atkinson (n 81) at 122.

provide some form of insurance for their in-house clinics and clinical courses covering clients, students and staff from the risk of losses that would emerge in the event of malpractice.¹³⁰

5.6 FOSTER SUSTAINED LINKAGES WITH LAW SOCIETY AND OTHER BODIES

CLE stands to benefit from the strengthening of the weak linkages that exist between the legal profession and universities, training institutions and state actors through partnerships, and collaboration. Members of the legal profession have a lot to offer CLE in terms of providing training in their areas of expertise, mentoring and supervising students during live client clinics as well as supplementing clinic resourcing.¹³¹ Indeed, the success of CLE is highly dependent upon cooperation with the members of the profession. This is because licensed advocates are the only persons who have capacity to provide client representation in court and lead public interest litigation even in matters emerging from clinics.¹³² Thus, it is in the interest of clinics to foster lasting engagements with the legal profession, public benefit organisations, civil society and other like-minded institutions that can lend them the necessary support.

Although vibrant clinic activity is dependent on the sustained backing of the legal profession, the legal profession in Kenya is yet to explore tangible ways of recognising and supporting legal education projects, more specifically CLE. Presently, assistance is often from individual law firms and not the profession as an institution.¹³³ Law firms have the capacity to support university law clinics in more structured ways such as providing expertise and resources for the access to justice projects that clinics run. They could provide financial support through modalities such as establishing a fund for clinics they accredit. The legal profession could be more invested in clinic work by recognising clinic work, facilitating the viability of law graduates undertaking their pupillage at clinics, remaining open to working with clinics in public interest causes among other initiatives. The Advocates Act explains ‘pupillage’ as the practical training for a prescribed duration in the business, practice and employment of an advocate, which

¹³⁰ Stuckey and others (n 48) at 143; Lukarz Bojarski ‘The Aim of Legal Clinics’ in Łomowski Dariusz (ed), *The Legal Clinic: The Idea, Organization, Methodology* (2005) at 92.

¹³¹ Mutunga (n 27) at 72.

¹³² Chapter 16, Laws of Kenya (n 26) s 31.

¹³³ On file with author Protocol Number H18/10/17 ‘Interview 6A’ (n 14) at 158.

is one of the requirements for admission of a law graduate as an advocate in Kenya.¹³⁴ Considering that the business, practice and employment of an advocate could be a corporate law firm, an in-house counsel office, a legal aid clinic, a public benefit organisation or similar entity, there is no reason why pupillage should be limited to law firms.

In addition, fostering linkages and networks among university law clinics around the country is likely to propel synergies which facilitate the development of all clinics and which enable clinics to collaborate, exchange knowledge and information, establish a client referral system, seek resources and opportunities jointly, organise joint clinics, conduct national capacity building initiatives and conferences, develop training materials as well as other similar initiatives that foster CLE in the country.¹³⁵

Considering that access to justice is a global movement that is open to justice educators in all their diversity, nascent clinics should not shy away from this movement. There is nothing to stop Kenyan clinics and clinicians from tapping into the global access to justice movement whose objectives include communication, information exchange, resource mobilisation and distribution, regional and international networking, as well as CLE training and capacity building.¹³⁶ The present independent operations by clinics militate against the gains that can result from partnerships and collaborations among and beyond university law clinics.

5.7 STRENGTHEN RESOURCE MOBILISATION

Universities adopting CLE invariably admit that setting up and operating live-client clinics requires more infrastructure, equipment and materials than the traditional lecture methods of teaching.¹³⁷ Offering effective clinical education ensuring close supervision and small class sizes¹³⁸ also demands large staff numbers, which makes a good clinical programme expensive. It

¹³⁴ Chapter 16 Laws of Kenya (n 26) s 13(1).

¹³⁵ Strathmore University Law School (n 71) at 10; Cosmos Nike Nwedu 'Taking Clinical Legal Education from Classrooms to Streets: A Practical Perspective to Solving Social Problems' (2018) 5 *Asian Journal of Legal Education* 137 at 150.

¹³⁶ Frank S Bloch 'Access to Justice and the Global Clinical Movement' (2008) 28 *Washington University Journal of Law and Policy* 111.

¹³⁷ Ukwueze and Obuka (n 53) at 392; Anbesie Fura Gurmesssa 'The Role of University-Based Legal Aid Centers in Ensuring Access to Justice in Ethiopia' (2018) 9 *Beijing Law Review* 357 at 374.

¹³⁸ Du Plessis 'Clinical Legal Education: Interviewing Skills' (n 111) at 143; Willem de Klerk 'University Law Clinics in South Africa' (2005) 122 *South African Law Journal* 929 at 949.

follows that sustainable resourcing of clinics is an endeavour that demands both institutional appreciation of CLE and goodwill to persuade the university to commit already scarce resources to such a costly venture.

The alignment of clinics with the university's overall objectives, which statutes in Kenya present as teaching and research,¹³⁹ may be of value in persuading university management about the value of CLE. With CLE integrated in the curriculum¹⁴⁰ and clinicians meeting promotion criteria for academic staff by generating research outputs such as notes from the field and publications,¹⁴¹ clinics may ultimately secure some funding from their own university budgets.

Having secured a stable resource base in the university, the clinics could seek supplementary funding from other sources to support their access to justice mission. Partnerships and collaborations with legal aid organisations, the NALEAS and the Law Society remain viable avenues for clinic resourcing in the form of expertise, client referrals and donations among various forms of cooperation. Despite the underlying dynamics of subordination, joint projects with clinics in the global north present opportunities for clinics from the global south to enter into collaborations with clinics that may be better resourced.¹⁴²

With clinics operating as vibrant legal service centres for indigent persons, the recognition of clinics for pupillage by the legal profession would create opportunities for law graduates to serve pupillage under the supervision of qualified clinic staff who are advocates. Since the intensity and goals of supervision for undergraduates differs from that of pupils,¹⁴³ this arrangement offers twin benefits because the law graduates would ease the workload of the clinic staff by assisting with the caseloads and student tutorials while obtaining an opportunity to undertake their own legal practice training.

The integration of clinics into the university curriculum is compatible with opening the clinics for volunteer services by other law students, paralegals and legal practitioners who would

¹³⁹ Act No. 42 of 2012 (n 42) s 3.

¹⁴⁰ JC Mubangizi and DJ McQuoid-Mason 'The Role of University Law Clinics in Public Interest Litigation, with Specific Reference to South Africa' (2013) 38 *Journal for Juridical Science* 47 at 62.

¹⁴¹ MA (Riette) du Plessis 'Forty-Five Years of Clinical Legal Education in South Africa' (2019) 25 *Fundamina* 12 at 24.

¹⁴² Daniel Bonilla 'Legal Clinics in the Global North and South: Between Equality and Subordination - An Essay' (2013) 16 *Yale Human Rights and Development Law Journal* 1 at 9.

¹⁴³ Du Plessis and Dass (n 66) at 404.

serve to boost the access to justice mission of the clinic by reducing the case-loads. As large student numbers are not problematic for social justice-oriented clinics,¹⁴⁴ accepting such voluntary service would be advantageous to the university clinics.

The dual mission of clinics opens them up to funding opportunities from either access to justice or education-oriented donors and grants. It is also the case that clinics which are organised into specialised units such as women and children units, employment units and human rights unit, experience higher chances of obtaining grants from funders working in these areas of specialisation.¹⁴⁵ The specialisations do not preclude the retention of general units for client inclusivity yet they offer pedagogical advantages for staff who focus on their areas of interest and skill while students are able to acquire specialised knowledge in their units of rotation.¹⁴⁶

5.8 STAKEHOLDER EDUCATION ON THE NATIONAL LEGAL AID SERVICE

The operationalisation of the National Legal Aid Service has been rather protracted despite the Legal Aid Act having been passed in 2016. This occasioned a delay in the release of the framework guiding the collaboration between the NALEAS and university law clinics and therefore the operation of the scheme remains speculative. This inordinate delay has elicited a lot of expectation on the impending role of the NALEAS, the dynamics of its engagement with universities and the levels of support that university law clinics can expect from the institution.¹⁴⁷ The data from university law clinics presents evidence of varying and even erroneous expectations that persist about the NALEAS, with some clinics holding it out as a panacea to the woes experienced by law clinics.¹⁴⁸

Even as the scheme is still under development, it is important for the NALEAS to curb such misinformation by educating stakeholders on its factual role, functions and operations. This

¹⁴⁴ Nicolson “‘Our Roots Began in (South) Africa’: Modelling Law Clinics to Maximise Social Justice Ends’ (n 107) at 135; Du Plessis ‘Clinical Legal Education: The Challenge of Large Student Numbers’ (n 116) at 21.

¹⁴⁵ Willem de Klerk and Shaheda Mahomed ‘Specialisation at a University Law Clinic: The Wits Experience’ [2006] *De Jure* 306 at 306-318.

¹⁴⁶ Du Plessis ‘Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training’ (n 73) at 59; De Klerk and Mahomed (n 145) at 313.

¹⁴⁷ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 119) at 28; On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 70) at 146.

¹⁴⁸ On file with author Protocol Number H18/10/17 ‘Focus Group Discussion 2’ (n 119) at 28; On file with author Protocol Number H18/10/17 ‘Interview 6’ (n 70) at 146.

would work towards managing stakeholder expectations to bring them to a more realistic level as well as in building a base of potential partners.

Some of the problems highlighted during the interaction between the clinics and NALEAS are the asymmetries in the time of the year when students are available for attachment at the NALEAS and the actual periods of availability of these slots, as well as the duration that universities avail students for attachment at the NALEAS and the optimum duration for this attachment as advised by the NALEAS.¹⁴⁹ Stakeholder education with the universities presents an ideal opportunity to communicate these and other similar challenges and negotiate acceptable solutions with the participation of all the concerned parties.

Since the NALEAS prescribes the accreditation of clinics as a tool to control the quality of services proffered to members of the public, the stakeholder education will serve to raise awareness among the universities about the impact that the accreditation standards will have on the operation and standards of the law clinics.¹⁵⁰ Additionally, such stakeholder engagement will serve to promote sustained interest, enhance institutional planning and preparation by the universities as well as herald dimensions of future collaboration for the NALEAS.

5.9 CONCLUSION

Justice institutions such as the legal profession and some legal education institutions were established during Kenya's pre-independence history. Although guided by legislation, access to these institutions excludes persons of low economic means and access to justice for all persons. The 2010 transformative constitutional order has introduced a social justice focus and operates as an instrument that drives the promotion of equality for all persons in society.

Research data indicates that university clinics have nevertheless operated with a social justice agenda and have organised themselves around access to justice projects in communities proximate to the universities. They have encountered multiple setbacks in this endeavour.

The argument is made that clinics presently fall short of their learning and service roles. Recognising and revamping these clinics holds potential for achieving the Constitution's social

¹⁴⁹ On file with author Protocol Number H18/10/17 'Interview 8' (n 11) at 175-176.

¹⁵⁰ On file with author Protocol Number H18/10/17 'Interview 8' (n 11) at 174.

justice goals through using CLE in training lawyers to develop a focus on social justice. It is proposed to revamp clinics by addressing the obstacles they encounter as identified from the research data. The process is one that seeks to align CLE with transformative legal education.

Recommendations generated from this study are drawn from consideration of the research data in light of literature on theory and practice of CLE across the globe and best practices developed therefrom. These proposals are to appreciate clinics as a case of institutional bypass, harmonise legislation and policy on legal education with constitutional goals, remove disparities between curricular and extra-curricular clinics by mainstreaming clinics in the law curriculum, to explore the viability of student representation in small claims without compromising quality of legal services, foster linkages between the Law Society of Kenya, law schools and other like-minded institutions and strengthen resource mobilisation as well as stakeholder education by the NALEAS.

The application of clinics in filling the access to justice gap alongside interested members of the legal profession and public benefit organisations fulfils all six characteristics of an institutional bypass. In this way, the clinics are examinable as a strategy to confront the legal profession's impotence in addressing access to justice needs by indigent members of society. This study therefore complements literature on institutional bypasses in developing countries and provides an exemplar of its application.

The proposal to optimise curriculum-based clinics addressed issues of funding, supervision, clinic sustainability and the place of clinics in the university structure. It prioritises the pedagogical aim of CLE simultaneously fortifying its service mission. The study argues that this process trains law students on the country's access to justice gaps and their professional role in that regard. The recommendations purpose to influence law school curricula by shifting clinics from volunteer activities to courses mainstreamed in the law school curriculum. It suggests that the course aims, methods, assessment and supervision be reflective of the theory and practice of addressing community legal needs in a technological age. This task incorporates the tenets of the theoretical framework of transformative legal education. It applies existing best practice standards on legal education and CLE.

The development of the 2010 Constitutional order provokes reflection on the degree of disharmony between its access to justice provisions and their implementation through legislation

governing the legal profession, access to justice and legal education. The legal profession is in many ways constrained by historical and traditional influences. Its commitment to justice, access to justice and *pro bono* service as determined from legislation and data is wanting. The research further identifies and discusses inconsistencies in the terms that are relevant for access to justice in legislation such as paralegals and experiential learning. The task identified here would be to strengthen the harmony between the Constitution and the policy and legislation for legal education.

Given the capacity that clinics have demonstrated for mitigating aspects of unmet legal need, the study considers the exploration of student representation in small claims courts upon resolution of the challenges bedevilling the clinics. It, however, foresees resistance from the profession and attempts to forestall this by justifying the proposal to develop student practice rules in assurances of quality service, a focus on the indigent and uptake of malpractice insurance cover.

Overcoming barriers to accessing justice through CLE entails building synergies with justice institutions, predominantly the legal profession and other university clinics. This is emphasised in light of findings that university clinics in Kenya have developed in silos, thus benefit minimally from linkages and collaborations.

Education of stakeholders by the NALEAS is underscored as a tool to manage rising expectations by clinics around the country that can be utilised to collaborate with universities to resolve existing asymmetries regarding durations and timings of student attachment at the NALEAS, as well as to communicate impending accreditation standards.

These recommendations promote the implementation of the 2010 Constitution and the Legal Aid Act and establish standards of good practice in the application of CLE, improve social justice training of lawyers and promote access to justice by indigent persons in Kenya.

CHAPTER 6: CONCLUSION AND SUGGESTIONS FOR FUTURE RESEARCH

6.1 CONCLUSION

This final chapter consolidates conclusions generated from the study and makes suggestions for further research. Interrogating the provision of access to justice through CLE in Kenya, the research elucidates approaches for enhancing access to justice that can inform legal education in jurisdictions operating in transformative constitutional contexts. The study makes an original contribution to knowledge by filling the unexplored gap on access to justice work conducted by law students in Kenyan universities as well as the factors that enhance and those that resist such work, thus presenting the current state of CLE practice in Kenya. Apart from presenting paradigms developed from the comparative aspects of South Africa's early clinics, the research advances literature on the global diversity of clinical education programmes in its approach of studying CLE from the social justice perspective. The study elicits the influence of the access to justice guarantees of the Constitution of Kenya 2010 on indigent persons, law students and lawyers, making the research findings relevant for curriculum development, policies on access to justice, legal education and legal practice as well as for law reform.

6.1.1 Addressing the research questions and methodology

This thesis has five chapters each of which tackles an aspect of the research. Chapter one provides a background to the study. It interrogates CLE and its twin pedagogical and social justice missions. The study narrows down and conceptualises the social justice mission of CLE as the right of access to justice. It conceives this right as a duty of the state and the legal profession. In the analysis of the social justice role of university law clinics, the study adopts a broad explanation of CLE that maintains the principal element of the interaction with indigent live clients as a defining factor.

The chapter contextualises the research when it explains the centrality of social justice in the Constitution of Kenya 2010 and juxtaposes this with legislation and the practice in university law clinics. It then reviews literature about the access to justice role of CLE and lays emphasis on South Africa's CLE experience because of similarities emerging from social contexts and

social justice orientation of clinics in the two countries. It likewise underscores CLE experiences in Australia and Poland because of the extent of their social justice focus and impact.

Besides recognising literature on the CLE experience in one university that was published in the pre-2010 Constitution period and a handful of other literature on select aspects of CLE in a few other universities, the review of literature delineates the research gap in literature on CLE in Kenya that is reflective of the 2010 Constitution's social justice orientation. Against this backdrop, chapter one presents the overall aim of the research as investigating how CLE can be utilised to enhance access to justice in Kenya's 2010 constitutional dispensation.

The study embarks on accomplishing five objectives, these being to conceptualise the role of CLE in the enhancement of access to justice, to draw lessons on access to justice from documentation on the initial CLE experience in South Africa, to appraise the prevailing legal and institutional framework for the enhancement of access to justice through CLE in Kenya, to analyse the institutional factors which hinder the contribution of CLE to access to justice in Kenya and to explore recommendations on how to enhance access to justice in Kenya through CLE.

Chapter one sets out the research methodology employed in the study. The review and analysis of literature charted the research gap and provided a basis for outlining the access to justice role of CLE. These addressed the first and second research questions and complemented the fieldwork responses to the third, fourth and fifth research questions. The Institutional Review Boards at University of the Witwatersrand¹ and at Strathmore University² provided ethical approval based on the interview schedule and focus group discussion guides prepared for the study. The National Commission for Science and Technology provided authorisation to conduct the research in the relevant counties in Kenya and issued a research license for this purpose.³

The methodology employed was appropriate because it facilitated methodological rigour since the knowledge from literature was complemented with up-to-date information on clinical

¹ University of the Witwatersrand Human Research Ethics Committee (Non-medical) Ethics Clearance Certificate Protocol Number H18/10/17 (2019).

² Strathmore University Institutional Ethics Review Committee Approval Letter SU-IERC0260/18 (2018).

³ National Commission for Science Technology and Innovation Research Permit No. NACOSTI/P/18/44934/25918 (2018).

practice from the diverse sources around the country.⁴ These are student leaders and clinical staff from 10 law schools, the National Legal Aid Service and the Law Society of Kenya. Given that the research sought to gain knowledge about the current state of clinical practice in Kenya, this was possible without empirical generalisation because the study engaged all universities that have operational law clinics.⁵

The study examined all the clinics in universities that had them, a process that was preceded by sharing participant information sheets and gaining informed consent of all participants after assuring their anonymity and privacy whenever it was possible to do so. The empirical section entailed conducting semi-structured interviews with academic staff engaged in clinical work as well as officials at the National Legal Aid Service and the Law Society of Kenya, which often partner with university law clinics. The focus group discussions with student leaders from law clinics from each institution under study complemented the perceptions of the staff and collaborating institutions. A grounded theory analysis of the data entailing coding of the emergent themes provided the appropriate tools for examining the process of enhancing access to justice through CLE.

Chapter one also frames the five research questions that are addressed in the study. It specifically addresses the first research question ‘what role does CLE play in the enhancement of access to justice?’ The chapter finds that because CLE has both pedagogical and social justice missions, CLE does contribute to enhancing access to justice particularly by indigent persons and communities in society. The extent and nature of access to justice interventions vary from jurisdiction to jurisdiction. The chapter also identifies a pattern in the establishment and growth of clinics, noting that these usually begin as purely social justice entities that subsequently refocus their emphasis towards their pedagogical function while preserving their social justice contributions to society.

The second chapter addresses the first research question articulated above as well as the second research question ‘what lessons does literature on the initial CLE experience in South Africa offer for access to justice?’ It does this by exploring the concept of CLE vis-à-vis access to justice and discussing literature on the place of access to justice in CLE and in legal education.

⁴ Michael Quinn Patton *Qualitative Research and Evaluation Methods* (2015) at 77.

⁵ Patton (n 4) at 46.

It then conceptualises access to justice, CLE and transformative constitutionalism and positions CLE as an appropriate channel for inculcating transformative legal education. The chapter analyses scholarship on the organisation and role of the initial legal aid clinics in enhancing access to justice in South Africa. Drawing from the extensive CLE experience in South Africa, it elicits appropriate frameworks for utilising the social justice aims of CLE. Chapter two eventually generates a framework for conducting this study of the access to justice role of CLE in Kenya, which consists of both legislation and institutional frameworks for university clinics.

The third chapter interrogates the legal framework aspects of the third research question ‘how does the current legal and institutional framework enhance access to justice through CLE in Kenya?’ It begins by drawing a nexus between the development of clinics in Kenya and the historical development of the legal profession as well as that of legal education. It then provides a synthesis of the role of the legal profession in a transformative constitutional context. By analysing the legal framework for CLE and access to justice in Kenya, chapter three identifies both strengths and weaknesses in the legal framework for CLE and access to justice. The chapter finally illustrates the role of law in enhancing access to justice and CLE.

The fourth chapter addresses matters relating to institutional frameworks as delineated in the third research question. It also addresses the fourth research question ‘what institutional factors undermine the promotion of access to justice through CLE in Kenya?’ Chapter four is a presentation of the findings of the empirical section of the research. It conveys new knowledge when it delves into the variety of clinic practices in Kenyan universities. The chapter examines their history, mission, positioning in the university curriculum, how the programmes are organised, administered, managed and sustained, their legal form, partner institutions, as well as types of legal assistance that the clinics offer. It thereafter deliberates on the challenges experienced in the CLE endeavour in Kenya and how these hinder the access to justice mission of clinics.

The fifth chapter addresses the fifth research question ‘what recommendations can be made in order to enhance access to justice in Kenya through CLE?’ by exploring ways in which overcoming setbacks to CLE will yield improvements in the training of law students and in turn enhance access to justice in the country. It discusses the factors that facilitate the contribution of

CLE to access to justice in the various clinical programmes in Kenya bearing in mind the research objectives, the local legislative and institutional context as well as best practice on CLE.

6.1.2 Debates engaged

As highlighted below, this study engages multiple arguments in the debates about the twin role of CLE, the duty of providing access to justice, the institutional bypass as a strategy for institutional reform, the role of law in access to justice as well as legal education in a transformative constitutional context.

The study aligns and develops original contribution to knowledge in its approach of studying legal education from the perspective of the access to justice training of lawyers. This focus on the social justice aspect of CLE in the country is novel and adds to the corpus of literature from around the world that largely focus on the pedagogical aspect of CLE. The comparative aspect also lends originality to it, as it seeks to draw lessons from literature on South Africa's original clinics that were purely social justice clinics.

In fortifying the link between legal education and access to justice, the study argues that legal education plays a role in preparing lawyers to address matters connected with access to justice, delivery of legal services and administration of justice. It supports the position that the twin roles of CLE are two sides of the same coin, a question of emphasis and not mutually exclusive goals.

Reflecting on the literature, legislation and empirical findings, the study considers CLE as the most appropriate pedagogical tool in a transformative context such as Kenya's. It takes the position that since clinics have developed in South Africa and other jurisdictions largely because of their social justice and not pedagogical role, the alignment of CLE with transformative constitutionalism will yield law school curricula that harmonise both social justice and pedagogical focus of CLE through practical community engagement. In certain instances, it demonstrates the tension between the social justice and pedagogical mission of CLE in Kenyan legislation and practice.

The appraisal of access to justice legislation in Kenya as well as that of the role of law in access to justice and CLE underscores the function of law and lawyers in a transformative constitutional context. The analysis of Kenya's legal framework for CLE and access to justice

yields the strengths of this framework. It also identifies multiple weaknesses such as fragmentation, gaps, overlaps and inconsistencies. It then examines how these weaknesses undermine the access to justice role of CLE. The research fills the unexplored gap of access to justice work by law students in the present constitutional framework, drawing implications of the transformative constitutional framework for access to justice and legal education.

The constitutional and legislative framework plays a critical role both in promoting and in some instances, in resisting access to justice in the jurisdiction. Considering that access to justice is the role of the state and the legal fraternity, the study highlights the legal professional's responsibility for promoting access to justice in society. This responsibility for access to justice is fortified by the implications that the 2010 Constitution has for the role of lawyers and the values they ought to uphold. Presently, the centralised location of the bar school as discussed in chapter 3.6 acts as a hindrance to training of lawyers and to access to justice by reinforcing the city of Nairobi as the hub of legal practice to the detriment of all other counties. This factor, among others, tempers the availability of lawyers and consequently of access to justice in the counties.

On transformative constitutionalism specifically, the study posits that transformative constitutionalism denotes a commitment to the transformation of all justice institutions towards constitutional values and principles. Whereas Kenya has a transformative Constitution, the legal education curricula as currently articulated is deficient for the social justice training of lawyers and therefore presents an obstacle to transformative constitutionalism. Additionally, legislations guiding justice institutions such as the Law Society of Kenya Act and Advocates Act are not in sufficient alignment with the social justice-centred Constitution.

The study employs the Law and Development concept of an institutional bypass in its explanation of the present use of law clinics to supplement the advocates' role in promoting access to justice for the indigent in a country where only advocates have representational capacity. It identifies the legal aid role of university law clinics provided by the Legal Aid Act as exemplar of this phenomenon. This institutional bypass suggests the need for reform of the access to justice function of the legal profession, which is presently skewed against their legal aid responsibilities towards the indigent members of society.

The thesis centres on the developments rooted in the Constitution of Kenya 2010 and the first ever legal aid legislation in Kenya, the Legal Aid Act of 2016. It incorporates experiences and voices of students and staff carrying out clinical work that are notably lacking in the modest clinical scholarship emanating from the region. These lend empirical support to the analysis of the extent of the utility of clinics for enhancing access to justice in the country. This study fills the gap in research and documentation on the current state of CLE in Kenya bearing in mind the principles and values of the 2010 Constitution as well as other related legislation in the country. While drawing implications of the Constitution 2010 for access to justice and CLE in Kenya, it presents the current state of knowledge on clinical practice in Kenyan law schools together with the factors that enhance and those that resist it. Countering knowledge hegemonies on the extent of CLE in Kenya, the research weighs in on the social justice role of clinics beyond lessons more frequently drawn from South Africa's original clinics that were purely social justice clinics.⁶

This study of CLE in a transformative constitutional setting draws out the influence of a constitution on the role of law clinics in South Africa and Kenya as well as for legal education, for law teachers and schools. Studying access to justice and legal education in Kenya from a transformative perspective ultimately builds on the understanding of these two aspects as potential obstacles of transformative constitutionalism.⁷ The proposal to incorporate CLE and its social justice aim into the curriculum is a move towards mainstreaming CLE in legal education in Kenya.

The research articulates a framework for enhancing justice through CLE in a transformative constitutional context consisting of a transformative constitution, legislation governing legal education, the legal aid scheme and the legal profession. It delineates an institutional structure consisting of a university clinic structure, a place in the curriculum, access to justice work and collaborating institutions. It thereby establishes this legal and institutional framework as a paradigm for studying CLE in a transformative constitutional context.

Harmonising CLE with transformative legal education also conflates the divergent opinions by CLE scholars on the social justice role of CLE. This is demonstrated by the

⁶ Eve Gray 'Access to Africa's Research: Publishing Development Research and Measuring Value' [2010] *African Journal of Information and Communication* 1 at 6.

⁷ Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 355.

transformative potential of the teaching of law in Kenyan universities when it provides law students with the practical exposure to the operation of law in society during the Judicial Attachment and Externship programmes which are common to all law schools. This is the case despite the empirical findings of the study indicating that CLE, in its narrow live-client clinic definition, has not yet taken deep root in Kenya.

6.1.3 Advancing literature

The review of literature categorised arguments on the social justice role of CLE in universities into three groups; the first group were those who argued that law students did not have such a duty, the second group were those who argued that the social justice role of CLE was not binary but merely a question of focus. The third group argued for a purely educational function. The thesis advances both pedagogical as well as social justice mission of clinic, including both the direct and indirect social justice mission of clinic.

The research advances literature that defines CLE by conforming to this definition with respect to real clients and departs from this with respect to clinics as extracurricular activities. It demonstrates that several of the problems encountered by clinics as discussed in literature persist to date.

In terms of methodological approach, the research made use of literature to trace the orientations of CLE programmes either as social justice or pedagogical. Each jurisdiction develops clinics for unique reasons and these reasons evolve as exemplified by South African clinics that shifted their focus from alleviating unmet legal need to a pedagogical tool. The research applied literature on CLE in South Africa to extract experiences of and justifications for clinics, for their comparative value.

The study also utilised literature to demonstrate the link between a country's political history and the development of clinics. These identify political and governance circumstances in both South Africa and Kenya that created a huge unmet legal need which prompted universities to intervene. It utilised literature to distil the factors that triggered the growth and development of clinics in the periods before and after the 1996 Constitution in South Africa. These periods were significant because by 1968, the Legal Aid Bureau focused on certain civil matters only and this focus shifted to criminal matters when the Legal Aid Board was established in 1969 and even

after the Constitution provided guarantees for legal representation in criminal matters. The Constitution had implications for clinics because it influenced the sorts of matters they could focus on, avoiding duplication of what the national legal aid scheme was already providing. The review was also utilised in examining the challenges that the clinics in South Africa grappled with and how they mitigated them.

The research fortifies the linkages between CLE and constitutionalism, between formal law and law in actual practice, between a constitution and its implementation, universities and societal good. It uses literature on CLE in South Africa to develop a model of the role of universities in access to justice as being first, a reaction to pressing societal needs followed by a result of legislative intervention. The research serves as a case study of how legal education can strengthen transformative constitutionalism, although the latter is not entirely dependent on the former. In this way, it advances literature on both transformative constitutionalism and transformative legal education.

Law and Development approaches weave into the study when it recognises attempts to attune the legal profession towards immediate national access to justice needs through the phenomenon of the institutional bypass. This entails employing the social justice mission of CLE in the national legal aid scheme as a way of fulfilling the constitutional guarantees of access to justice in situations where the state and the legal profession have been unable or unwilling to address legal needs of indigent persons. This supplements literature from other continents on examples and case studies of institutional bypasses.

The thesis also identifies aspects of the legal profession as an illustration of legal transplants. In analysing the role of law in access to justice and CLE, the chapters rehash the role of lawyers and legal education in society. This forms the basis for suggestions to re-prioritise clinic goals and objectives conferring prominence to pedagogy. In this way, the study employs clinical education at the law schools as the theory of change for the shifting of the Law Society's orientation towards social justice.

In contributing to the discipline of law, the research builds on global literature that has developed on pedagogical aspects of CLE from the United Kingdom, the United States, Australia as well as CLE literature on social justice from Poland, South Africa, Nigeria and Ethiopia. It draws commonalities among the difficulties experienced across jurisdictions when it makes

connections between problems experienced by CLE programmes in the country and those expressed in literature from other jurisdictions. While developed CLE programmes now emphasise on pedagogical aims, this research finds that live-client CLE programmes in Kenya still focus on the purely social justice mission. Nevertheless, the thesis adds knowledge on the diversity of CLE programmes in Africa, enriching literature on the global reach of CLE.

6.1.4 Forwarding policy and practice

The research builds on literature and leads to trajectories that can forward policy and practice on access to justice, legal education and legal practice. It bears impact, relevance and consequences that promote social justice in society. The study does this by interrogating access to justice practices that could enhance the implementation of the Constitution of Kenya 2010.

The thesis points to inadequacies of legal education and legal practice largely in the ways in which it ignores pro-poor law and in the extent to which the law protects only those who can afford legal representation. Delineating a gap in legislation about access to justice responsibility for lawyers, it points to the inadequacies of the Advocates Act in implementing the guarantees of the 2010 Constitution by its silence on their responsibilities arising from the access to justice provisions and social justice orientation of the Constitution. Notably, the legal education legalisation and practice do not engage the social justice potential of CLE in Kenya. This situation begs several interventions such as universities mainstreaming clinical methodologies in advancing their niche subject areas.

The study decries the delay in operationalisation of the National Legal Aid Service and regulations under the legal aid legislation that are critical for the implementation and attainment of constitutional guarantees on access to justice. Furthermore, it contributes to documentation of the practices implementing the social justice mission of CLE in Kenya in the 2010 constitutional dispensation, the state of CLE in Kenya, factors which undermine CLE in its access to justice and pedagogical missions and suggestions on how to mitigate the setbacks.

Through proposals to assuage the current setbacks in implementing CLE, the thesis establishes standards of good practice in the application of CLE by adapting applicable international research-based standards. The proposals seek to improve the social justice training of lawyers in Kenya by incorporating this mission in CLE courses in the law curriculum. It

thereby offers the practice of law in the country a transcendental meaning beyond legal transactions and financial enrichment. Lastly, the study promotes access to justice by indigent persons in Kenya by identifying current weaknesses in existing legislation governing access to justice and then making proposals for the aligning of these legislations towards the Constitution's social justice values.

6.2 EXTENDIBILITY: SUGGESTIONS FOR FUTURE RESEARCH

The research encountered several knowledge gaps on topics related to the delineated area of study. It therefore identifies and makes suggestions for further research into these areas.

The study interrogated the legislation connected with access to justice in Kenya and isolated various strengths and weaknesses therein. Among the weaknesses were the fragmentation and incongruence between legislative provisions *inter se* as well as between institutions created by these legislations. Since legislation flows from policy positions, the first suggestion for further research is an examination of the level of alignment between policy frameworks for legal services, university education, legal education, access to justice and the transformative values and principles of the 2010 Constitution of Kenya. This would be with a view of furthering greater harmony between these different policies and between the policies and the Constitution.

The research encountered literature underscoring the anecdotal evidence for the secondary social justice mission of clinics; that clinic work at university level propels students to incorporate some *pro bono* or public interest litigation in their future careers.⁸ While the research data already yielded elements of the veracity of this phenomenon in volunteer advocates working for the NALEAS and in a similar percentage of students and the Law Society's volunteer advocates in clinic and *pro bono* service respectively, a comprehensive inquiry of this perspective fell outside the scope of the research objectives. The second suggestion for further research is therefore a study focusing on the extent to which CLE achieves its secondary social justice goal. This would entail an empirical study of lawyers in professional practice whose CLE

⁸ Jeff Giddings and Jennifer Lyman 'The Global Clinical Movement' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) at 305; Rebecca Sandefur and Jeffrey Selbin 'The Clinic Effect' (2009) 16 *Clinical Law Review* 57 at 59.

experience propelled them to continue with *pro bono* service, legal aid or public interest litigation in their legal practices.

While it was feasible to gather insights into the participation of advocates in the volunteer programme operated by the Law Society's Public Interest and Advocacy Department, it became apparent that not all law firms and lawyers channel their *pro bono* services through their professional society. Engagements with clinics indicated that there are several firms and lawyers around the country engaged in offering various degrees of legal services on *pro bono* basis. As such, the third suggestion for further research is on the access to justice activities conducted by law firms and individual lawyers in their private capacity exclusive of those organised by the Law Society. This would offer a more accurate reflection of the extent to which members of the legal profession are conducting their access to justice responsibilities even in the absence of legislation mandating such tasks.

The fieldwork for this thesis yielded data elicited from students, university lecturers directing clinics and from organisations collaborating with the clinics. Although the voices of clinic clients were not pertinent for purposes of addressing the research objectives and questions as articulated for the present research, they are conspicuously absent in CLE research yet they are the beneficiaries of the subject under study. Consequently, the fourth suggestion for research is to establish the perspectives of clinic clients on access to justice work by university law clinics and clarify the basis of their resistance towards clinic activities. This is likely to fortify the findings and supplement the proposals for improvement of clinical programmes in the country.

One of the setbacks identified in the programmes organised by university law clinics in the country is the absence of monitoring and evaluation of projects run by university law clinics as well as the assessment of the access to justice impact that these clinics make. The contribution to knowledge that such a study would make earns it a place as the fifth suggestion for further research given that such impact studies do not appear to be a priority for majority of the institutions.

Finally, the sixth suggestion is research on clinical practice in universities with a view to developing best practice standards for CLE in Kenya. The present study demonstrates that CLE is still at its nascent stages in the country and its pedagogical mission is barely utilised. Nevertheless, the country's unique needs and context behove clinicians to generate their own

standards at some future time when CLE is utilised more extensively as a pedagogical tool for legal education. This would provide relatable benchmarks for new clinical programmes and avail standards for jurisdictions operating in similar contexts based on their particular experiences, needs and objectives.

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