

WHAT ENSURES EFFECTIVE STATE-FUNDED LEGAL AID SYSTEM?

(A guide for the reform of the current state-funded Legal Aid System in Jamaica)

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ABSTRACT

Justice transcends the boundaries of a single legal system.² It is more than a sector, even more than a power; it is a virtue.³ The rule of law, a phrase frequently used, but little explained or understood guarantees that no one is above the law, which should be accessible to all. The right to access to justice, conceived as both a means and an end to justice, is one of the most important human rights. Access to legal assistance affects an individual's fundamental right to fair trial, a right which should be afforded even to the poor and vulnerable and be respected, supported and enforced. Effective legal aid has undoubtedly been deemed one of the most important aspects of access to justice. Without access to the means of enforcing one's legal rights, those rights are meaningless. The recent economic downturn on world markets exacerbates the problem of state-financed legal aid, especially in developing countries or countries in economic transition. Public officials, rule of law and development advocates are therefore propelled to implement new strategies to ensure that despite the economic challenge, this very important rule of law guarantee is not sacrificed.

This paper primarily explores the novel issue of what actually drives or ensures effective state-funded legal aid system. The writer embarks on a comparative, historical, theoretical and qualitative study; the main methodology of research being desk-review. The researcher however utilises some qualitative research methods to supplement same. He also proffers arguments as to why there are several common law jurisdictions, such as Jamaica, Uganda, New Zealand, Canada, Australia and the United Kingdom, whose legal aid systems comprise more or less, the same components that are deemed 'necessary' for effectiveness, yet some are effective and others not. Through the cross-jurisdictional comparisons, the hypothesis is tested and proven that, it is accepted that the fundamental right to fair trial is affected by access to justice, facilitated not only by an accessible legal aid system, but by an effective one that is based on the quality aid provided and the resulting client satisfaction. However, *while the components of a state-funded legal aid system are an indicator of its effectiveness, it is the treatment and/or interplay of these 'necessary' components that really ensures or drives its effectiveness.*

A central reasoning is that the extent to which legality is valued, facilitated and guaranteed by the treatment of the necessary components is a determinant of whether the said components work to make legal aid systems effective. The greater the level or value of predictability and accountability that the treatment of the seven (7) components in the legal aid system allows, is the greater the level of legality and effectiveness. In treating with the components, there is a clear underpinning tri-dimensional conceptual appreciation of the norms, capacities and interests and their interconnectedness, tension and compromise. The point is made that effectiveness of law, being a cognitive institution, requires that the legal aid system is sustainable and demand-oriented, being targeted at the needs of the most needy "rights-holders" and constantly being monitored and evaluated, albeit avoiding bureaucracy. The service should be comparable to paid legal services and be aimed at client-satisfaction or high clients' approval. Where possible, it should facilitate diversion from litigation to alternative dispute resolution, to save the strain on public funds.

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² Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, Theoretical Inquiries in Law, Vol.10:693 (July 2009), at 710.

³ Alexandre Cordahi, *A note on Civil Society Organisations and the Justice Sector in Jordan, Amman*, (2013), p.2.

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CHAPTER 1

INTRODUCTION

Access to justice is a germane component of the rule of law. Likewise, the right to access to justice is one of the most important human rights. These human rights are rendered meaningless if they are not respected, supported and enforced. In endorsing the view expressed by the Danish Institute for Human Rights, access to justice can be conceived as both a means and an end to justice. It is a means as it concerns the efficient method of enabling users of justice system to benefit from the end product of justice. Likewise, it can be conceived as an end, in the protection of an individual's right to justice through ease of access when the need arises. Access to legal assistance affects an individual's fundamental right to fair trial, a right which should be afforded even to those who are impecunious or unable to pay for such legal assistance and / or representation.⁴

Effective legal aid has undoubtedly been deemed the most important aspect of access to justice. In the researcher's opinion, the financing of an effective legal aid program is a more rampant issue in developing countries such as Jamaica, than in developed countries. The recent economic downturn on world markets and its repercussive negative effects on such fragile economies, exacerbate the problem of state-financed legal aid. With capital resource being scarce, Justice Reform Units and Rule of Law and Development Advisors are being forced to implement new strategies to ensure that, despite this economic challenge, this very important rule of law guarantee, that is, the right to effective state-funded legal aid is not sacrificed.

There are many articles and researches on the broad topic of access to justice and legal aid, which are and have been undertaken successfully. However, most view legal aid in the form of legal assistance or aid to states provided by donor agencies or other international organisations. Likewise, other pre-existing research or articles concentrate on, either: (i) what are the types of legal aid or assistance provided to and by the states; or (ii) what are the features of a good legal aid system, regardless of how "good" is defined. Other leading literatures focus on illustrating the importance of legal aid as a human right to access to justice and in securing the ultimate right to fair trial.

⁴ Danish Institute for Human Rights, 'A Human Right to Legal Aid' (Denmark 2010), p. 164.

While the findings and recommendations of such orthodox research will prove useful in this thesis, it is not those issues that are of central concern to this researcher. This paper, instead, will primarily explore the novel issue of what actually drives or ensures an effective state-funded legal aid system. The research also seeks to provide some explanation as to why there are several common law jurisdictions, such as Jamaica, Uganda, New Zealand, Australia, Canada and the United Kingdom, whose legal aid systems comprise more or less the same components that are deemed ‘necessary’ for effectiveness, yet some are effective and others not. Differently put, what ensures that the ‘necessary’ components of an effective state-funded legal aid system, work? Or, what discernible element, process or variable, ensures that the deemed ‘necessary’ components work- to ensure effective state-funded legal aid system?

Jamaica, a former British colony, is now an independent English-Speaking Commonwealth Caribbean state, in the West Indies. It is characterised as having a common law legal system. The current Ministry of Justice of Jamaica, Senator Mark Golding, is in the process of reforming the current state-funded legal aid system, as it has long been deemed ineffective, by the major stakeholders, such as, duty-bearers, rights-holders and users of the service. The current legal aid program is unorganised, incoherent, underfunded and insufficient. There is a need to ensure that scarce public funds used to finance Jamaica’s current legal aid system are utilized efficiently and allocated to give the best needed coverage. This reality was even recently recognised by the current Executive Director of the Legal Aid Council in Jamaica, Hugh Faulkner.⁵

This paper embarks on a comparative, historical, theoretical and qualitative study of what really ensures effective state-funded legal aid systems in common law jurisdictions, such as Jamaica. The main methodology for this research is a **desk-review**. It involves stocktaking and the use of available or pre-existing written and electronic materials such as scholarly articles, reports, statistics and surveys done by other reputable researchers. Here, the writer will cite examples from cross-continental jurisdictions with a similar common law legal system to that of Jamaica. The countries selected include Uganda, Australia, New Zealand, Canada and the United

⁵ See articles: (i) Jamaica Gleaner, ‘Time to re-examine legal aid’, August 17, 2012. Article available at <[<http://jamaica-gleaner.com/latest/article.php?id=39319\(19/12/12\)>](http://jamaica-gleaner.com/latest/article.php?id=39319(19/12/12))>; (ii) Jamaica Observer, ‘Legal Aid Council to increase fees paid to lawyers’, August 20, 2012, available at : < [<http://www.jamaicaobserver.com/news/Legal-Aid-Council-to-increase-fees-paid-to-lawyers-#ixzz2FV1n3a9L\(19/12/12\)>](http://www.jamaicaobserver.com/news/Legal-Aid-Council-to-increase-fees-paid-to-lawyers-#ixzz2FV1n3a9L(19/12/12))>; and (iii) Jamaica Gleaner, ‘Legal Aid Council a decade of advocacy’, December 28, 2011. Article available at : <[<http://jamaica-gleaner.com/gleaner/20111228/news/news6.html\(19/12/12\)>](http://jamaica-gleaner.com/gleaner/20111228/news/news6.html(19/12/12))>.

Kingdom, all of which state-funded legal aid systems, have the same components, which have been deemed to be ‘necessary’, for effectiveness.

The legal aid systems in these countries will be compared historically, and carefully examined under the two headings in the hypothesis, that is: (1) the presence and **role of the components of legal aid system** that are deemed ‘necessary’; and (2) **discernible variable**, element or process that really drives effectiveness or **ensures that the ‘necessary’ components actually work**. By this method, the hypothesis is tested and a determination made as to what really drives or ensures effectiveness of common law state-funded legal aid systems. For comparison also, the East-Asian experience will be briefly examined to see if their legal aid systems function without the presence of the deemed “necessary components”. The findings will guide the determination as to whether the said “necessary components” are, at all, needed for effectiveness.

To **mitigate the possible limitations** in the use of primarily desk-review methodology in this research, and to ensure that the data and information are accurate and reliable, the researcher has corroborated sources on relevant findings. It is also clear that there is a gap in pre-existing surveys and assessments conducted concerning Jamaica’s legal aid system and its effectiveness. I have also utilised qualitative survey methods, which include small case studies and interviews conducted in Jamaica to supplement the desk-review findings from the chosen cross-continental jurisdictions, on what really drives “effectiveness”.

This research is also premised on the **hypothesis** that state-funded legal aid systems are necessary in securing other fundamental human rights, such as the right to fair trial and access to justice. It is further hypothesized that securing these fundamental rights is facilitated not only by an **accessible** legal aid system, but an “**effective**” one that is based on the **quality** aid provided and the resulting **client satisfaction**.⁶ Likewise, a relevant hypothesis is that, some components are deemed necessary for an effective legal aid system, but different **treatment** of the same **necessary components**, yields different results. Hence, it will explore the writer’s hypothesis that, **it is accepted that the fundamental right to fair trial is affected by access to justice, facilitated not only by an accessible legal aid system, but by an effective one that is based on**

⁶ See ‘*Legal Aid Western Australia: Annual Report 2007/08*’, pp. 14. It recommended similar essential performance indicators for “effectiveness”, partly grounding the hypothesis. This report is available at <[<http://www.legalaid.wa.gov.au/LegalAidServices/Documents/AnnualReport07-08.pdf\(19/12/12\)>](http://www.legalaid.wa.gov.au/LegalAidServices/Documents/AnnualReport07-08.pdf(19/12/12))>.

the quality aid provided and the resulting client satisfaction. However, *while the components of a state-funded legal aid system are an indicator of its effectiveness, it is the treatment and/or interplay of these ‘necessary’ components that really ensures or drives its effectiveness.*

Chapter 1 is an **Introduction**, in which the writer explains why the topic was selected, its importance, relevance and novelty and also gives a succinct history of Jamaica’s legal system. He will also justify the chosen methodology, notwithstanding the limitations. In chapter 2, the researcher gives a succinct **Background** of Jamaica and **justification** for this research. It includes a **situational analysis** of the problems of poverty, access to justice for poor and non-inclusiveness of the marginalised in governance. Chapter 3 however, examines the **Law on the Books** in Jamaica, which basically explored the national and international legal framework for the operation of legal aid in Jamaica. The researcher examines the international standards, particularly those set by the United Nations in relation to the provision of an effective legal aid system or the services of free legal assistance to citizens by the State. The writer will then examine the national legal framework, that is, Jamaica’s Constitutional and legislative compliance with these international standards - the law on the books, looking also on those that are ratified and domesticated in fulfilment of the nation’s international obligations.

Chapter 4, a succinct review of the **Law in Action**, provides a deeper analysis or assessment of the execution or application of the existing legal aid laws to the Jamaican reality. The chapter will begin with a theoretical overview of rule of law, law effectiveness, justice and legality. The assertion is made that, the extent to which **legality** is valued, facilitated and guaranteed by the treatment of the necessary components is a determinant of whether the said components work to make legal aid systems effective. The greater the level or value of **predictability and accountability** that the treatment of the components in the legal aid system allows, is the greater the level of legality it ensures, and its effectiveness. Further in chapter 4, the writer will particularly explore the type(s) of legal aid programs in Jamaica. In doing so, he will also examine the extent of domestication of international obligations, through looking at how the current legal aid system works, who operates and monitors it and what are its strengths and weaknesses. In essence, the question that will be answered is: Is the current legal aid system in Jamaica effective? It is followed by Jamaica-specific recommendations. The said

recommendations are supplemented in chapter 6, with general and trans-continental applicable recommendations.

In Chapter 5, the researcher **tests the hypothesis**, primarily through desk-review and supplements findings with some qualitative methodological approaches, such as, interviews. The chapter ends with a highlight of the **findings of the research**, which comparatively and historically learns from the approaches to legal aid systems in different common law jurisdictions from different continents. The proceeding chapter, chapter 6 is therefore, a comprehensive discussion of **recommendations based on findings**. Such recommendations are in response to the results of hypothesis that was tested. They are universally applicable and are a good guide for developers and national reformers who are interested in projects that concern improving access to justice – primarily, by way of establishing or reforming legal aid system – to make it work or effective. The recommendations reflect a balance of pragmatic approaches and strong theoretical rule of law and development principles. From extensive research and analysis, Mr. Gayle recommends **seven (7) components of effective legal aid systems**, which he deems necessary. This chapter further explores what is quintessential though for effectiveness, that is, the **treatment** of the said components, which involves the quality of the administrative and monitoring institutions, processes and approaches. Lastly, the writer **concludes** in chapter 7 and outlines the **implication of the research** and findings, to law and development.

CHAPTER 2

BACKGROUND AND JUSTIFICATION

Situational analysis of Problems: Poverty, Inadequate Access to Justice for Poor and Non-Inclusiveness in Governance

Jamaica is a small Caribbean island and a developing state. She is located in the West Indies and gained her independence from Britain in 1962. Jamaica is a constitutional parliamentary democracy. She has a population of approximately 2.7 million people and is a multi-racial country, with its official language being English, although many natives speak Jamaican Patois

and are predominantly Christians. Although classified as an upper middle income country, Jamaica is currently one of the most highly indebted countries in the world. It is plagued with slow national economic growth, persistent trade and fiscal deficits, high unemployment, underemployment, inequalities, corruption and 16.5 % of population lives below poverty line (but 22.5% rural). There is limited fiscal space in the national budget, which affects all public services, particularly impacting on the poor and vulnerable. There are significant delays due to a backlog at all levels of the justice system and a need for governance reforms in addressing key developmental challenges.

The Jamaica National Development Plan, *Vision 2030*, clearly states the achievement of a safe, cohesive and just society as being among the key strategic goals to propel the country towards developed country status by 2030. Goal 2: National Outcome 6 (ii) of the long-term strategic plan for development, through *Vision 2030 Jamaica*, specifically envisioned effective governance through reformation of the justice sector. Legal aid system and access to justice are definitely key components in the reformation of any justice sector. All development efforts and interventions are therefore, mobilized around this vision. There is recognition of the need for governance and justice reform de-linking crime and politics at the national, local and community level with increased participation by civil society in policy making. A major public sector transformation reform and local governance reform are underway to improve efficiency and effectiveness of public services.⁷

The current legal aid system, which is state funded, has been deemed ineffective, inadequate and underfunded, a fact conceded even by the current Executive Director of the Legal Aid Council, Mr. Hugh Faulkner. The legal aid services are almost non-existent for civil matters,

⁷ (i) According to 2009, *National Report of Jamaica for the United Nations Economic and Social Council (ECOSOC) Annual Ministerial Review*; (ii) UNDP Report, “*Jamaica’s Progress Towards the Millennium Development Goals*” at: <[<http://www.jm.undp.org/millennium-development-goals/ja-progress-toward-the-mdgs\(09/04/2013\)>](http://www.jm.undp.org/millennium-development-goals/ja-progress-toward-the-mdgs(09/04/2013))>; (iii) UNFPA Caribbean: Country Profile Jamaica at: <[http://caribbean.unfpa.org/public/cache/offonce/Home/Countries/Jamaica;jsessionid=48F8DD522190E3C52FD8916DA7F20E67.jahia01\(09/04/13\);and](http://caribbean.unfpa.org/public/cache/offonce/Home/Countries/Jamaica;jsessionid=48F8DD522190E3C52FD8916DA7F20E67.jahia01(09/04/13);and)> (iv) Transparency International CPI, at<[<http://www.transparency.org/country#JAM\(09/04/2013\)>](http://www.transparency.org/country#JAM(09/04/2013))>. The poverty rate in Jamaica stands at 16.5%. However the rate is greater in rural areas, where 22.5% lives below the poverty line. Inequality has also risen, heightening vulnerabilities of the most-at-risk populations, including women and young people. Closely linked to poverty is the unemployment rate, where 14.8% of women are unemployed in comparison to 8.6% of men. It has the fourth largest debt to gross domestic product (GDP) ratio in the world. However, the continuing high number of reported extra judicial killings of civilians and the low prosecution rate demonstrate the need to prioritize the protection of citizens' rights. According to Transparency International Corruption Perception Index, which ranked Jamaica 83 of 176 (scoring 38 /100 - with score of 1 meaning public sector is perceived as highly corrupt), corruption continues to be a significant problem for the public sector, with low levels of public trust and a crisis of confidence in state institutions.

a regime which is yet to be developed, except for a few divorce and property cases. Legal aid is also lacking in coverage and quality in criminal cases, especially regarding representation at the appellate level, a fact the UK-based Privy Council and local and international NGOs and Human Rights groups constantly highlight, as a grave concern.⁸ Public funds, which are primarily used to fund the current legal aid system, through paying empanelled private Attorneys-at-Law to do legal aid work, are scarce and Jamaica needs external development assistance to realize this important human rights obligation.

In further illustrating and confirming the problem, gaps and therefore, relevance of this research, reliance is made on a recent international assessment of the current state of affairs in Jamaica, grouped with Latin America and the Caribbean. The most recent World Justice Project Rule of Law Index, 2012-2013⁹, which is a quantitative evaluation that uses rule of law indicators, ranked Jamaica 62nd and 73rd respectively, of the 97 countries surveyed, with scores of 0.51 and 0.42 of a total 1.0, respectively, under factors 7 and 8 : civil and criminal justice. In the index, a score of 1 is the highest, with 0 being the lowest. The said factors, 7 and 8 were used to examine delivery of Justice (formerly access to justice) in Jamaica, a key component of the rule of law. For example, factor 7.1, specifically asked questions and used indicators which addressed the extent to which Jamaicans can access affordable civil justice, being, legal advice and representation and also access and afford the civil courts. Factor 8.7, for example, examined the extent of due process, and other factors examined the extent to which the criminal and civil sectors are free from discrimination.

Although the judicial system was found to be independent and relatively free of corruption, it indicated a great need for improvement in access to the courts, criminal and civil justice via legal advice and representation, especially for the poor. The judicial system was also seen as slow and ineffective. Furthermore, an examination of the statistics provided in the said

⁸ See articles: (i) Jamaica Gleaner, 'Time to re-examine legal aid', August 17, 2012. Article available at <[<http://jamaica-gleaner.com/latest/article.php?id=39319\(19/12/12\)>](http://jamaica-gleaner.com/latest/article.php?id=39319(19/12/12))>; (ii) Jamaica Observer, 'Legal Aid Council to increase fees paid to lawyers', August 20, 2012, available at : < [<http://www.jamaicaobserver.com/news/Legal-Aid-Council-to-increase-fees-paid-to-lawyers-#ixzz2FV1n3a9L\(19/12/12\)>](http://www.jamaicaobserver.com/news/Legal-Aid-Council-to-increase-fees-paid-to-lawyers-#ixzz2FV1n3a9L(19/12/12))>; and (iii) Jamaica Gleaner, 'Legal Aid Council a decade of advocacy', December 28, 2011. Article available at : <[<http://jamaica-gleaner.com/gleaner/20111228/news/news6.html\(19/12/12\)>](http://jamaica-gleaner.com/gleaner/20111228/news/news6.html(19/12/12))>.

⁹ The World Justice Project Rule of Law Index, 2012-13, Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce and Christine S. Pratt, pages 46, 102, 187, 215 and documented scores and ranking of Jamaica, as a part of the Latin America and Caribbean. This Index can be found at: <[<http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf\(15/07/13\)>](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf(15/07/13))>.

Index also indicates the need to improve access to justice in Jamaica, by way of an effective and accessible state-funded legal aid system. This should assist the nation in being better ranked on international indices such as the said World Justice Project Rule of Law Index.

The **benefits of an improved legal aid system cannot be overstated**. It allows developing countries such as Jamaica to satisfy their international obligations, as members of the United Nations (UN). The UN requires primarily, that states ensure the availability of sufficient funding, institutions and resources for legal services to be afforded to the poor and disadvantaged citizens. At the “grass-root” level, the right to access to justice is one of the most important human rights; rights that are rendered meaningless if not respected, supported and enforced. We conceive access to justice, as both a “means and an end to justice” and an effective legal aid system has been deemed one of the most important aspects of access to justice and the Rule of law. Access to justice through legal aid affects a citizen’s right to fair trial, a fundamental right that should not be denied even to the impecunious or poorest of the poor. An improved and effective legal aid system will, inter alia, provide the poor with legal assistance, advice and representation, practically free of cost, to resolve their disputes formally by litigation and through alternative dispute resolutions (ADR).

The existing quality of legal aid in Jamaica is also not desirable in light of the international standards and Jamaica’s obligation for the enforcement of certain basic human rights, such as the right to fair trial, access to justice and legal aid, especially for citizens who are unable to afford the services of an Attorney-at-Law. In briefly outlining the applicable International Legal Framework, some of the main documents, standards and guidelines for legal aid systems are: (i) *Universal Declaration of Human Rights (UDHR)*; (ii) *International Convention on Civil and Political Rights*, Article 14; (iii) *American Convention on Human Rights*; and (iv) *United Nations Basic Principles on the Role of Lawyers (UN BPRL)*, 1990, Principles 1-7. These documents provide the right to non-discriminatory, high quality and accessible legal aid, especially for individuals who lack sufficient means to pay for such legal service. This is primarily the state’s responsibility.¹⁰

Access to justice, specifically through, **an improved legal aid system**, has the potential to impact and change the lives of the poor and marginalized by giving them a voice in the justice

¹⁰ UNODC Criminal Justice Assessment Toolkit (UN New York, 2006), ‘Access to Justice: ‘Legal Defence and Legal Aid’. Available at < [10](http://www.unodc.org/documents/justice-and-prison_reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf(19/12/12)>.”</p></div><div data-bbox=)

sector and in governance. Studies have shown¹¹, through the work of non-governmental organizations providing legal aid services, that legal advice, representation and advocacy can hold governments accountable to meeting the needs of the poor and disenfranchised. Creating or improving a legal aid system that is more broad scale in scope and impact than one legal aid NGO, is envisaged to even have a greater impact on facilitating not only access to justice for the poor, but also to encourage and support their active participation in governance.

The high public costs of under-funding and having an inadequate legal aid system are also cogent reason to embark on this study. Research¹² from other jurisdictions shows that cuts may save money in the very short term, but increase costs in the long term. While the government saves by not paying for legal representation, cases in which the parties lack legal representation are more likely to go to trial, which is extremely costly to the public. Unresolved legal issues, particularly family law issues, result in expensive social problems, such as poor health, increased reliance on social assistance and programs, unemployment, domestic violence and relationship breakdown.¹³ Likewise, an underfunded legal aid system results in more litigants representing themselves in court, and self-represented litigants cost the justice system more than litigants with counsel. In other words, **investment in legal aid results in significant financial savings in other areas of the justice system.** An investment in legal aid is an investment in our communities — and legal aid cuts are a shortsighted hazard to our health, our relationships, our social fabric, and our economy.¹⁴

Another justification for embarking on this study, among others, is to be in an informed position to recommend to the Government of Jamaica, (through the Ministry of Justice, specifically, the Attorney General’s Chambers, who, pursuant to section 79(1) is constitutionally mandated as the principal legal advisor to the Government), what should be emphasized when reforming the legal aid system in Jamaica. The focus of the advice will be: (i) In the reform,

¹¹ Dan Manning, *Legal Empowerment: Practitioners’ Perspective* ed. Stephen Golub (series ed. Thomas McInerney), International Development Law Organization (IDLO), “Legal and Governance Reform : Lessons Learned No. 21, 2010”, at p. 137.

¹² Legal Services Society, “Legal Problems facing Everyday people in BC,” <[www.lss.bc.ca\(22/07/2013\)](http://www.lss.bc.ca(22/07/2013))>; and McEwon, Carol. 2009. *Civil Legal Needs Research Report*. Law Foundation of British Columbia.<[www.lawfoundationbc.org/itoolkit.asp?pg=CIVIL_LEGAL_NEEDS\(22/07/2013\)](http://www.lawfoundationbc.org/itoolkit.asp?pg=CIVIL_LEGAL_NEEDS(22/07/2013))>.

¹³ Alison Brewin and Kasari Govender, *Rights-based Legal Aid: Rebuilding BC’s Broken System*, Canadian Centre for Policy Alternatives (November 9, 2010), BC Office, Vancouver. Available at: <[http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf\(22/07/2013\)](http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf(22/07/2013))>, at p. 5.

¹⁴ *Id* at p. 19 and 21.

should the emphasis be in ensuring that the right kind of legal aid system is selected for Jamaica, that is, whichever system is chosen should comprise the components deemed ‘necessary’ by the researcher, for success or effectiveness; or (ii) should the focus of the reform be to ensure the presence of ‘**the discernible variable, process or element**’ that makes these ‘necessary’ components work?

CHAPTER 3

LAW ON THE BOOKS

EXAMINATION OF THE LEGAL FRAMEWORK FOR LEGAL AID IN JAMAICA

NATIONAL LEGAL FRAMEWORK

Constitutional and Legislative Framework

Albeit, not specifically guaranteed in the *Constitution of Jamaica*, the provision of legal aid is a right that is enforceable, pursuant to explicit provisions for it, in national legislation. The *Legal Aid Act* of Jamaica stipulates the provision of legal aid services to the needy. It is however, “criminal legal services-centric”. The Act came in operation on the 1st May 2000, albeit the schedule of offences was amended thereafter. The Act provides for the establishment and operation of a co-ordinated legal aid system in Jamaica, to establish a legal aid council to administer legal aid and to provide for matters connected therewith or incidental thereto.

Part II of the said *Legal Aid Act* makes provisions for the legal aid council, inclusive of its establishment, functions, resources and reporting responsibilities. Part III however, provides for legal aid in criminal proceedings. Part IV, entitled legal aid in civil proceedings, provides for, *inter alia*, the application for legal aid, assessment of means, cost in legal aid matters and fees payable to Attorneys-at-Law.¹⁵ Unfortunately, Part IV, as indicated in the *Act* by an asterisk (*),

¹⁵ The *Legal Aid Act*, Jamaica can be found at:
<[<http://moj.gov.jm/ites/default/files/laws/Legal%20Act.pdf\(30/06/13\)>](http://moj.gov.jm/ites/default/files/laws/Legal%20Act.pdf(30/06/13))>.

is not yet in force. Notwithstanding recognition that the operation of a state-funded legal aid system is restrained by lack of public funds, it is crucial that this civil regime becomes operative also, even if its application and implementation take place in phases, determined by the needs of the poor, which are ascertained by way of a needs assessment.

In looking more closely at the legal aid council, arguably, it is the institutional hub of the legal aid system, which, to a great extent plays an administrative, oversight and strategic developmental role in that sector. Its effectiveness determines a great deal how effective legal aid is in Jamaica. Section 3 of the *Legal Aid Act* of Jamaica provides for the establishment of a legal aid council to administer legal aid, in accordance with the said *Act*. The legal aid council is empowered to, *inter alia*: (i) establish and operate legal aid clinics; (ii) review policy and laws about legal aid; (iii) receive and administer funds; (iv) decide on eligibility for legal aid; and (v) establish panels for attorneys. The composition of the board of directors of the council is also stipulated by the *Act* and the members should be appointed by specific personnel in the socio-justice sector. The board should include the Chief Justice, Minister of Justice, or their nominees and representatives from the Jamaica Bar Association, the Advocate Association of Jamaica, General Legal Council, Independent Jamaica Council for Human Rights, the Jamaica Constabulary Force and Jamaica Council of Churches. The selected persons who are entrusted by the statute to appoint the board of directors are varied and represent the main stakeholders in the sector. The Secretariat of the legal aid council is responsible for the daily administration of business of the council and is headed by the Executive Director of the Legal Aid Council.

INTERNATIONAL LEGAL FRAMEWORK

Jamaica is a party to the main international conventions, covenants, and declarations, such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, and has, to some extent, incorporated the principles within its domestic laws, regarding access to justice and the provision of legal aid. Law “without teeth”, that is, in words alone, not being implemented, is a contempt of the justice system and the essence of the rule of law. Equality and fairness in any jurisdiction are dependent on the level of equality of access to the justice system. The benefits of an improved legal aid system can therefore, not be overstated. It allows

developing countries such as Jamaica to satisfy their international obligations, as members of the United Nations (UN).

The UN requires primarily, that states ensure the availability of sufficient funding, institutions and resources for legal services to be afforded to the poor and disadvantaged citizens. At the “grass-root” level, the right to access to justice is one of the most important human rights; rights that are rendered meaningless if not respected, supported and enforced. We conceive access to justice, as both a “means and an end to justice” and an effective legal aid system has been deemed one of the most important aspects of access to justice and the rule of law. Access to justice through legal aid affects a citizen’s right to fair trial, a fundamental right that should not be denied even to the impecunious or poorest of the poor. An improved and effective legal aid system will, *inter alia*, provide the poor with legal assistance, advice and representation, practically free of cost, to resolve their disputes formally by litigation and through alternative dispute resolutions (ADR).

However, notwithstanding the law on the books, the existing quality of legal aid in Jamaica is not desirable in light of the international standards and Jamaica’s obligation for the enforcement of certain basic human rights, such as the right to fair trial, access to justice and legal aid, especially for citizens who are unable to afford the services of an Attorney-at-Law. In briefly outlining the applicable **International Legal Framework**, some of the **main documents, standards and guidelines for legal aid systems are:** (i) *Universal Declaration of Human Rights*; (ii) *International Convention on Civil and Political Rights*, Article 14; (iii) *American Convention on Human Rights*; and (iv) *United Nations Basic Principles on the Role of Lawyers*, 1990, Principles 1-7. These documents provide the right to non-discriminatory, high quality and accessible legal aid, especially for individuals who lack sufficient means to pay for such legal service. This is primarily the state’s responsibility.¹⁶

In enumerating some of these guarantees, in relation to **access to lawyers and legal services**, the said *United Nations Basic Principles on the Role of Lawyers 1990*, outlines relevant standards. **Although these international standards are classified as non- treaty, as they are not ratified by states, they have been adopted by the United Nations’ General Assembly. They therefore bear significant political weight, internationally and regionally and provide**

¹⁶ UNODC Criminal Justice Assessment Toolkit (UN New York, 2006), ‘Access to Justice: ‘Legal Defence and Legal Aid’. Available at < [14](http://www.unodc.org/documents/justice-and-prison_reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf(19/12/12)>.”</p></div><div data-bbox=)

essential guarantees for administration of justice and fair process. The said *United Nations Basic Principles on the Role of Lawyers 1990* provide, *inter alia*, that:

“

1. **All persons are entitled to call upon the assistance of a lawyer** of their choice to protect and establish their rights **and to defend them in all stages of criminal proceedings;**
2. **Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination** based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status;
3. **Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.** Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources;
4. **Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers;**
5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;
6. **Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services; and**
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, **shall have prompt access to a lawyer**, and in any case not later than forty-eight hours from the time of arrest or detention. ”
(Emphasis mine)

Further, the United Nations Committee on Economic, Social and Cultural Rights has outlined that state parties have a duty to equally fulfill the economic, social and cultural rights of men and women, which includes establishing, “appropriate venues for redress such as courts and tribunals

or administrative mechanisms that are *accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women*¹⁷[*emphasis mine*]. Justice, facilitated by legal representation before the courts or tribunals should therefore not be limited to or only accessible to those who can afford it. Such is the foundation of an effective system of legal aid, which serves to counter that painful inequality.

Access to Justice, specifically, the right to legal aid is an important human right. In the premises, it is hoped that the *Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica*, which was recently amended in 2011 - when next reviewed, will include the right to legal aid. This protection from the supreme source of law in Jamaica can only strengthen this guarantee, which has already been provided for in the *Legal Aid Act* and Regulations thereto.

CHAPTER 4

LAW IN ACTION

Theoretical Foundation

The Rule of Law

Like the United Nations, the author views the **rule of law**, as, *inter alia*, a **principle of governance applicable to all, as no one is above the law, before which, we are all equal**¹⁸. Despite the rule of law being universally applicable and quintessential, not much is known of its details. This irony is pragmatically illustrated by Rule of Law and International Development Expert, co-founder of the International Development Law Organization (IDLO), Professor William (Bill) Loris, when he noted that, “*When a country is living under the rule of law, few think or talk about the rule of law. When a country lives without the rule of law, people think and*

¹⁷ UN CESCR, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16, 34th Sess., Annex, Agenda Item 5, UN Doc. E/C.12/2005/4, 2005, at para. 21.

¹⁸ The United Nations Secretary-General defines the rule of law as “*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*” Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004).

talk about rule of law all the time."¹⁹ However, in expounding on what the rule of law means, a characterization with which I concur, the authors of the report of the World Justice Project Rule of Law Index 2012-2013, essentially, posit that the rule of law comprises elements of: (i) states accountability for / and presence of clear and publicized laws; (ii) accessible, fair and effective process of law; and (iii) timely justice by competent and independent tribunal. They also recognized the importance of examining the law in action, in order to do a true evaluation or assessment of the effectiveness of law or systems within the legal sector, in a given jurisdiction. The report noted, "*In order to evaluate the rule of law in a given country, it is necessary to look not only at the laws as written (de jure), but also at how they are actually implemented in practice and experienced by those who are subject to them (de facto)*"²⁰.

Instructive also, is a profound and extensive description of what the rule of law means or entails, by Tom Bingham, Britain's former Senior Law Lord. In his award winning book, "The Rule of Law"²¹, Lord Bingham echoes Professor William Loris' sentiments in noting that, the 'rule of law' is **a phrase much used, but little explained**. As he further explained, the rule of law is not an arid legal doctrine, but the **foundation of a fair and just society, a guarantee of responsible government and an important contributor to economic growth**. Lord Bingham further examines the historical origins of the rule of law and proposes **eight (8) principles** that capture its essence, as understood in western democracies, which he also sees as the best means, to date, for securing peace and co-operation. To expound on Bingham's proposition, the writer is of the view that the eight principles, highlighted below, should also facilitate sustained economic development and growth in a democratic society, such as Jamaica.

In Lord Bingham's view²², with which the writer agrees, the **rule of law** guarantees that: (i) The law must be accessible, and so far as possible, intelligible, clear and predictable²³; (ii) Questions of legal rights and liability should ordinarily be resolved by applying the law, rather than exercising discretion²⁴; (iii) The law of the land should apply equally to all, save to

¹⁹ *Innovating Justice Forum*, William (Bill) Loris, see his views on the rule of law, expressed as his personal motto at : <[http://www.innovatingjustice.com/network/?memberID=15350\(17/07/2013\)](http://www.innovatingjustice.com/network/?memberID=15350(17/07/2013))>.

²⁰ *World Justice Project Rule of Law Index, 2012-13*, Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce, and Christine S. Pratt, p.186, available at: <[http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf\(15/07/2013\)](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf(15/07/2013))>.

²¹ Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

²² Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

²³ *Id* at p. 37.

²⁴ *Id* at p. 48

the extent that objective differences justify differentiation²⁵; (iv) Public officials must exercise powers fairly, in good faith, reasonably, and within limits of powers²⁶; (v) The law must afford adequate protection of fundamental human rights²⁷; (vi) Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes, which the parties themselves are unable to resolve²⁸ (example through legal aid system); (vii) The adjudicative procedures that are provided by the state should be fair²⁹ (enabling for example, fair trial); and (viii) The rule of law in the international legal order requires compliance by state with its obligations in international as in national law. This assures that reliance is based on law as opposed to arbitrary power in international relations. As Lord Bingham further notes, it means that settlement by states is reached by law not of force. Likewise, rule of law in the international legal order requires that, law can and should be used, instrumentally, for the co-operative international furtherance of social aims, in a manner to preserve and promote the value of freedom and human dignity for individuals.³⁰

The meaning and value of legality

In his book “Legality”³¹, Scott J. Shapiro shed some light on the meaning of legality and its value, and the rule of law. For him, the rule of law is served only when those who engage in legal interpretation are faithful to the views of rule of law that the legal system presupposes and embodies. In explaining the value of legality, Shapiro explains that it is two-fold in that it enables members of the community to predict official activities and hence to plan their lives effectively. Furthermore, the rule of law constrains behavior and thereby, protects citizens from arbitrary and discriminatory actions by officials.³² The rationales for the great value of legality as explained in chapter 14 by Shapiro are: (i) plans are capable of promoting **predictability and accountability**. It prevents worries about natural justice in deliberation and evaluation by

²⁵ *Id* at p. 55

²⁶ *Id* at p. 60

²⁷ *Id* at p. 66

²⁸ *Id* at p. 85

²⁹ *Id* at p. 90

³⁰ *Id* at p. 110-111.

³¹ Scott J. Shapiro, *Legality*, Belknap Press of Harvard University Press, USA, London, England, 2011.
Chapter 14: “The value of legality”, p. 388-400.

³² *Id* at p. 395.

officials, as much reliance is placed on the existence of a plan or policy; and (ii) legal systems have to balance, on the one hand, the needs for **guidance, predictability and constraints** versus benefits of **flexibility, spontaneity and discretion**, on the other. As he also profoundly enunciated, the legal systems must heed the rule of law, but also have views about how the rule of law itself is best heeded.³³ Adding to the body of classical jurisprudence, Shapiro sees legal systems as best understood, to be highly complex and sophisticated tools for creating and applying plans.

Thus, in applying the classical jurisprudential reasoning from Shapiro's "Legality", the **treatment of the components of a legal aid system is an important determinant** of the level of legality or effectiveness of such system. There is obvious need for **checks and balances** on the necessary components and the systems by way of design. Particularly, the necessary components of a legal aid system will work or be effective, depending on the **extent of their valued legality**, that is, the extent to which the components facilitate, incorporate and **ensure predictability and accountability**. Those principles are indeed central principles of the rule of law and development.

Effect of legal aid assistance on good governance, justice, legality and effectiveness of law

Without access to the means of enforcing one's legal rights, those rights are meaningless. Legal advice, representation and advocacy can hold governments accountable to meeting the needs of the poor and disenfranchised.³⁴ When the poor are enlightened about their rights, they are empowered and begin demanding performance from authority. The demand drives performance and accountability. This reasoning is in keeping with viewing **law as a cognitive institution** and the need for legality. That is, the extent to which a law that exists on the books is effective, being law in action. Legality is viewed as largely a function of the demand for law. Internal processes of law development should be encouraged and a self-sustained demand for legal innovation and change should come from locals.

³³ *Id* at p. 398.

³⁴ Legal Empowerment: Practitioners' Perspective, (ed.) Stephen Golub, (series ed.) Thomas McInerney, IDLO, Legal and Governance Reform: Lessons Learned. No 2/ 2010, p. 137. Article written by Dan Manning, entitled : "Supporting Stability and Justice: A Case study of NGO legal services in post-conflict Bosnia-Herzegovina".

Legal transplants, being social acts, represent instances of mediated actions and raise questions of justice. ‘When the framework of a legal transplant undermines legality as a dialogic exercise in which all have the right to participate on an equal footing, **justice is called into question.**’³⁵ In fact, as Rule of Law and Justice Reform Advisor, Professor Alexandre Cordahi profoundly posits, ‘**justice is more than a sector, even more than a power. Justice is a virtue.**’³⁶ Studies³⁷ have shown that legal transplants may only work if they are adapted by locals or if the population was already familiar with the basic principles of the transplanted laws. The studies also show that the effectiveness of a law is more determined by the way in which the law was received or created, rather than the type of legal system present. This conforms to Michele Graziadei’s view that **justice transcends the boundaries of a single legal system.**³⁸ Effective **law in action** is evident where the ‘**transplant effect**’ is non-existent or is minimal. As explained by Katharina Pistor et al., the “transplant effect” is the “mismatch” of the transplanted foreign legal order / law on pre-existed local condition/ legal order or norms.³⁹

Accordingly, legal aid systems must strive to be highly reflective, responsive and driven by the demands of the claim-holders or the poor and marginalised. The type of system or components of legal aid employed in a jurisdiction must be country-context specific and not a mere transplant from another jurisdiction, in which the legal aid program has seemingly worked. In fact, such is the approach being recommended by international donor organizations and rule of law experts, who are involved in developmental work. As inevitable as it may now appear in retrospect, it is such a pity this lesson and approach took years of trial and error, countless loss of lives, and wastage of public and private funds - to be learnt.

³⁵ See quote at p. 695. For further discussion see : Michele Graziadei’s *Legal Transplants and the Frontiers of Legal Knowledge*, *Theoretical Inquiries in Law*, Vol.10:693 (July 2009). For Graziadei, legal transplants as social acts performed by individuals, call for a study of the "micro" level of engagement with legal change by individuals. The notion of mediated action is used to explore this dimension and is an action that is performed by individuals making use of features of the environment as tools to interact in a specific setting.

³⁶ Alexandre Cordahi, *A note on Civil Society Organisations and the Justice Sector in Jordan*, Amman, (2013), p.2.

³⁷ Daniel Berkowitz, Katharina Pistor and Jean- Francois Richard, *The Transplant Effect*, (2003) 51 *American Journal of Comparative Law*, pages 163 – 203.

³⁸ *Id.*, see Graziadei, at p.710.

³⁹ *Id.* at pp. 163 – 203.

Operation of Legal Aid System in Jamaica and Identifying Gaps

Institutional Structure – Legal Aid Council, Clinics and Duty Counsel System

Jamaica has a number of human rights and institutional structures. However, they are to some extent, underfunded and are therefore, too often, forced to assume their responsibilities with inadequate assistance from the state. There is generally, insufficient focus on systematic or holistic institutional reform. Instead, too much effort is spend on single case intervention. Nevertheless, the legal aid system is one key institutional structure that is primarily state funded.

Legal Aid Council in Action

As previously discussed, the Legal Aid Council is provided for in the *Legal Aid Act*. It is in reality, operational as a statutory entity under the Ministry of Justice. The Council's mandate is to administer an efficient and coordinated legal aid system in Jamaica. In practice, it is involved in administering a legal aid scheme which provides legal aid for citizens. Currently criminal legal aid matters are handled primarily through the Duty Counsel System or Court Assignment, which are entitlements. In compliance with the *Act* that established it, the Council also acts in its advisory capacity, in its revision of the provisions and Regulations of the *Legal Aid Act*. Consequently, where applicable and necessary, from time to time, the Council makes recommendations to the Minister of Justice. The legal aid council also organizes and establishes legal aid clinics and creates the necessary standards, procedures and regulatory framework.

In practice, the Council is administered by a board, which comprises, a chairman and at least thirteen (13) to a maximum of fifteen (15) members. The Board members include: Chief Justice, the Director of Public Prosecutions, the Solicitor General, the Permanent Secretary of the Ministry of Justice, or their nominees. The Board also includes representative of the Jamaican Bar Association, the Advocate Association of Jamaica, the Council of Legal Education, the General Legal Council, a member of the Jamaica Independent Council for Human Rights, a member of the Jamaica Constabulary Force and the Jamaica Council of Churches. These representative are however, selected by the Minister from a panel of three (3) that were nominated by these bodies, Directors of both Legal Aid Clinics and the Norman Manley Law

School. The daily operation of the Council is supervised by the Executive Director and four (4) staff members.⁴⁰

Legal Aid: Criminal Justice Regime – Duty Counsel System

The *Legal Aid Act* guarantees access to justice for all Jamaicans, especially the poor, marginalised and impecunious. It provides a system for appropriate legal representation for almost all criminal offences, except offences under the *Money Laundering Act*, offences under the *Dangerous Drugs Act* for manufacturing, importing, exporting, taking preparatory steps to export, selling or otherwise dealing in any dangerous drug and being in possession and/or in excess of the specified amounts; and also any offences not punishable with imprisonment. Further, under the criminal regime, legal representation is given from the time the detainee is taken to the police station, until the trial and on appeal before the local based Court of Appeal. All individuals detained or charged with one of the included offences can be granted legal aid under the duty counsel scheme. The court or any other person so authorised by the legal aid council, is responsible to decide who qualifies by determining if the detainee is in need of financial assistance to obtain legal representation. The decision is not discretionary, but mainly taken after a means test is applied. The *Legal Aid Act* speaks to this test.⁴¹

The Council maintains a panel of attorneys to carry out legal aid duties in fulfilment of its mandate. These are attorneys who have indicated their willingness to offer their services to persons who are in need of legal aid. These attorneys are drawn from across the island and operate in all courts. They include Queen’s Counsel, established senior attorneys, as well as junior attorneys, in both private and public bar. By way of statistics, as at September 30, 2012, approximately three hundred and seventy-nine (379) attorneys are enlisted, including almost ninety (90) Senior Counsel. Mr. Hugh Faulkner, Executive Director of the Legal Aid Council, in interview on the 7th June 2013, noted that the number has now reached approximately 420

⁴⁰ Ministry of Justice, Jamaica - Annual Report 2008-09, to be found at : [http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf\(17/07/2013\)>](http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf(17/07/2013)>), Strategy 4 : Access to Justice : pp. 25-27.

⁴¹ See brochures: “The Legal Aid Act – The Legal Aid Council”, February 2005; and “Legal Aid in Criminal Matters: At the Court”, Legal Aid Council, 2 Oxford Road, Kingston 5, NCB Towers, North Tower, Justice Education Unit, June 2004.

private lawyers.⁴² This expansive cadre of Attorneys-at-Law provides duty counsel services and also accepts legal aid court assignments. It also receives and administers the financial resources of the Council, consistent with the provisions of the *Financial Administration and Audit Act* and the *Public Bodies Management and Accountability Act*. Similarly, the Council, in accordance with the *Legal Aid Act*, establishes and maintains a tariff of fees to be paid to attorneys for services rendered. The fees paid for these services vary depending on the seniority of the Counsel, the offence and the court before which the accused is tried. They therefore range from the allotment for duty counsel services to a maximum fee for senior Counsel for capital murder trials. Of positive note also, is the fact that, fees are reviewed occasionally, in a consultative manner, which starts with the Council consulting with the Jamaican Bar Association and Advocates Association of Jamaica. The Minister however, has the final say on the recommendations emerging from the said consultations.⁴³

Currently, legal aid is provided officially, for only criminal matters, with two programs being operated. Upon arrest and being taken to the police station, the police are required and generally, ask detainee if he or she has an attorney. If no, the detainee gets to select “Duty Counsel” from list of empanel legal aid attorneys, to represent the detainee. Duty Counsel is a lawyer who has agreed to provide legal aid assistance to persons arrested and detained. A Duty Counsel is paid by the government. He or she is usually an Attorney-at-Law in private legal practice, who donates a portion of his/her time to providing legal aid assistance – he/she is not always an Attorney from the Legal Aid Department. If charged and the case goes to court, the Duty Counsel is paid to represent detainee at first court appearance.⁴⁴

Further, under the duty counsel scheme, the legal aid council provides the service of an attorney-at-law to a person being held at a police station, lockup, correctional institution or any other place where he/she is being held or detained before a court appearance. Counsel gives legal advice to that person who is detained or accused of an offence; attends an identification parade, if one is being held; be present at the taking of a cautioned statement, if one is to be taken, or at a questioning by the police, whether questioning will be recorded by the police or not; makes

⁴² Source : Interview conducted by Mr. Nigel Gayle, with the Executive Director of the Legal Aid Council, Mr. Hugh Faulkner, at the Legal Aid Council’s Office, located at 72 Harbour Street, Kingston, on the 7th June 2013.

⁴³ The Ministry of Justice, Jamaica Website – Legal Aid Council, found at : <[http://moj.gov.jm/legal-aid-council\(16/07/2013\)>](http://moj.gov.jm/legal-aid-council(16/07/2013)>).

⁴⁴ Jamaican for Justice website: < [http://jamaicansforjustice.org/know-your-rights/legal-rights-and-responsibilities/detention-arrest-bail/\(16/07/2013\)>](http://jamaicansforjustice.org/know-your-rights/legal-rights-and-responsibilities/detention-arrest-bail/(16/07/2013)>).

representation for bail at the lockup; and represents the individual as Counsel on his/her first appearance in court. When an application for legal aid is made and granted by the appropriate authority, the legal aid council provides Counsel to conduct the defence on behalf of the accused. Legal aid is provided for matters in the criminal courts, viz, Resident Magistrate's Courts, Circuit Courts, Gun Courts and the Court of Appeal.

Additionally, the said Ministry of Justice's Annual report highlighted that persons who visited or called the Council received legal advice, and follow-up meetings were arranged. On other occasions, clients were given direction as to how to proceed. Other forms of legal aid assistance that were provided included: Making of Writ of *Habeus Corpus* Applications, Lock-up Visits and other related assignments. The Council also made improvements in its effort to increase public awareness regarding the legal aid programs offered. This was done mainly through visits to the Police Stations to educate the police as to how to effectively administer the duty counsel system. An examination of the Ministry of Justice's Annual Report, Jamaica 2008-09⁴⁵, reflects a vast improvement in the number of criminal cases handled by legal aid in 2008/2009 when compared to previous years, that is, since 2004/2005.⁴⁶ As the report noted:

A total of six hundred and seventy-one (671) Duty Counsel Cases were handled during 2008/09. This represents an increase of forty-seven point five percent (47.5%) in the number of Duty Counsel Cases handled in 2008/09 compared to the previous year. Work in this area has been steadily increasing over the past four (4) years. Since 2004/05, there was a ninety-seven percent (97%) increase in the number of Duty Counsel Cases handled by the Legal Aid Council. During the period under review, a total of one thousand three hundred and forty-nine (1,349) persons who could not afford legal representation, were provided with Legal Aid assistance.⁴⁷ This represents an increase of approximately 30% when compared to one thousand and forty-one (1,041) cases handled in 2007/08. Increased activity was also recorded in the Resident Magistrate's Courts (33%), the Gun Court (37%), the Circuit Courts (14%) and the Court of Appeal (21%). Between 2004/05 and 2007/08, the greatest increase in the number of Legal Aid cases handled related to the Resident Magistrate's Courts (66%). Legal Aid cases related to the Gun Court and the Circuit Courts also increased over the period by 38% and 95% respectively. There was a decrease in Legal Aid cases for the Court of Appeal by 3%.⁴⁸

⁴⁵ Ministry of Justice, Jamaica, Annual Report 2008-09, to be found at : <[http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf\(17/07/2013\)>](http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf(17/07/2013)>), Strategy 4 : Access to Justice : pp. 25-27.

⁴⁶ <[http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf\(17/07/13\)>](http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf(17/07/13)>)

⁴⁷ **Data unavailable as to what percentage the 1,349 represents of the total number of persons who sought legal assistance.** There is a need for data gathering and analysis in this regard.

⁴⁸ Ministry of Justice, Jamaica, Annual Report 2008-09, to be found at : <[http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf\(17/07/2013\)>](http://www.moj.gov.jm/sites/default/files/pdf/Final%20MoJ%20Annual%20Report%202008-09.pdf(17/07/2013)>), Strategy 4 : Access to Justice : pp. 25-27.

Legal Aid Cases handled	2004/05	2005/06	2006/07	2007/08	2008/09	% Increase since 2004/05
RM Courts	347	381	419	434	577	66%
Circuit Courts	243	292	251	233	266	9%
Gun Courts	196	240	440	341	466	38%
Appeal Court	41	41	27	33	40	(-3%)
Sub-total Legal Aid Cases	827	954	1,137	1,041	1,349	63%
Duty Counsel Cases	341	373	419	455	671	97%
Grand Total	1,168	1,327	1,556	1,496	2,020	73%

Table of Legal Aid Cases handled up to 2009 was extracted from page 26, Table C from the 2008-2009 Ministry of Justice Annual Report.

Financing the Legal Aid System - Payments to Legal Aid Lawyers

Financing the legal aid system is very expensive. Basically the Government pays private attorneys to represent legal aid clients. As the Executive Director of Legal Aid Council, Mr. Faulkner explained in an interview with the researcher, on June 7, 2013, the Legal Aid Council routinely sends yearly budget to be included in the Ministry of Justice's annual budget. The allotments however, are heavily dependent on the portion of the national budget being allocated by the Ministry of Finance to the Justice Ministry. For illustrative purposes however, as reported in the Ministry of Justice's Annual Report 2008-09, the legal aid council disbursed a total of Thirty-six Million Eight Hundred and Thirty-six Thousand Five Hundred Dollars (\$36,386,500) as payment to attorneys for service rendered under the scheme for the period 2008-2009.

Legal Aid Clinics and their inadequate civil legal aid services

The Kingston Legal Aid Clinic Limited (KLAC) a limited liability company under the laws of Jamaica, was established in 1971 by a group of concerned Attorneys. The aim is "To provide high quality legal service to persons who because of poverty are in danger of having their legal rights infringed". The Clinic provides subsidized professional legal services to persons who are

faced with criminal cases or civil disputes that are in danger of having their civil rights infringed or their claims unheeded because of their inability to pay. Over the years more and more persons who do not fall in the above category in order to stretch their dollar, seek the assistance of the Clinic. The KLAC provides high quality legal services to persons across the length and breadth of Jamaica. Two mobile clinics are operated; one in Mandeville Manchester on Wednesdays and the other in May Pen on Thursdays twice per month. The Mandeville clinic operates out of the RADA Building and the May Pen clinic operates out of the May Pen court house.

On an average, about 900 persons are seen at the May Pen clinic, 1500 at the Mandeville clinic and in excess of 12,000 at the office at 131 Tower Street annually. Approximately half of these clients seek only advice on a variety of problems, such as, legal, social, economic, and on occasions, even medical. On its inception, consultation was free, however faced with rising costs, clients are now being asked to pay a small consultation fee. The types of matters undertaken by the clinics include: In the **Civil division** (albeit not widespread) divorce, deed poll, making wills, division of property, drafting letter, declaration of spouseship, appointment of legal guardian, declaration of paternity, probate and letters of administration, transfer of property, lost title applications, carious declarations/affidavits/agreements. Agreement for sale, declaration of identity, application to note death, application to note marriage, caveat, custody, miscellaneous Supreme Court applications, and matters related to employment, landlord and tenant. In the **Criminal Regime:** Various matters in the R.M and Supreme Court. This is in addition to the Duty Counsel system. The KLAC is governed by a Board of Directors and has its' offices at 131 Tower Street in downtown Kingston. The service provided by the clinic is not free; clients are assessed and fees are charged based on each client's ability to pay. The clinic receives a small annual subvention from the Ministry of Justice, without which, the clinic would be totally dependent on the fees received from clients for the remainder of its operation costs.⁴⁹

⁴⁹ Ministry of Justice Jamaica website – Legal Aid clinic, available at: <[http://moj.gov.jm/legal-aid-clinic\(17/07/2013\)>](http://moj.gov.jm/legal-aid-clinic(17/07/2013)>).

Examination of the extent of compliance, identification of gaps and evaluation of effectiveness of legal aid system in Jamaica; and Recommendations for reform of the Jamaican Legal Aid system

To a great extent, Jamaica's legal aid system can be deemed to be in compliance with international obligation for the provision of legal aid in **criminal matters**. The legal framework is adequate and the institutions in place are also sufficient. The **civil regime**, provided for in the *Legal Aid Act*, needs to become operative, notwithstanding that some civil matters are being dealt with in the state's legal aid clinics and privately, by the Norman Manley Law School Legal Aid clinic. While it is recognised that the provision of criminal legal aid services might be more urgent since for example, upon detention, its absence has the grave effect of depriving a citizen's fundamental right to liberty and fair trial, so too, the absence of assistance for the poor and vulnerable in civil matters, can have devastating impact on the lives of citizens. Family matters and enforcement of property rights are two such essential needs. The ultimate guarantee of this right to legal aid in both criminal and civil matters would however be met, if and when provided for in the supreme law of the land, the *Constitution*.

The Recent **World Justice Project Rule of Law Index**, 2012-2013, ranked Jamaica 62nd and 73rd respectively, of the 97 countries surveyed, with scores of 0.51 and 0.42 of a total 1.0, respectively, under factors 7 and 8 : civil and criminal justice. In the index, a score of 1 is the highest, with 0 being the lowest. The said factors, 7 and 8 were used to examine delivery of Justice (formerly access to justice) in Jamaica, a key component of the rule of law. Although the judicial system was found to be independent and relatively free of corruption, it indicated a great **need for improvement in access to the courts and criminal and civil justice via legal advice and representation**, especially for the poor. The **court system** was also found to be **slow**.

The current legal aid system, which is state funded, has been deemed ineffective, inadequate and underfunded, a fact conceded even by the current Executive Director of the Legal Aid Council, Mr. Hugh Faulkner.⁵⁰ The legal aid services are woefully lacking for civil matters, except for a few divorce and property rights cases. The current coverage and quality of the legal aid services for criminal cases, especially regarding representation at the appellate level, is also poor. In fact, as already noted, the UK-based Privy Council, Jamaica's final appellate court,

⁵⁰ Source: Interview with Mr. Hugh Faulkner, Executive Director, Legal Aid Council, June 7, 2013 at Legal Aid Council, Harbour Street, Kingston.

recently noted this as a grave concern in the Carlos Hamilton and Jason Lewis appeal. The Privy Council opined that: "*it remains commonplace in the case of criminal appeals coming before the Privy Council from jurisdictions in the Caribbean for periods of years rather than days to elapse before the application is made...Legal aid is not generally available at that stage and on the rare occasions when it is available, the facilities provided are very limited. Almost all the prisoners have to resort to pro bono assistance which is not easily found*"⁵¹.

There is a need for a **hierarchical system of oversight monitoring and evaluation** of the legal aid system as a whole and to harness **participation and feedback from legal aid clients. Public education and awareness campaign** is still in need of improvement. The image of the legal aid system also needs to be strengthened, as there is a deterrent stigma in the country that free service is not quality service. Likewise, **accessibility of the legal aid services is also lacking**, by way of their location in proximity to needy communities island-wise and in terms of discriminatory and intimidating policies, practises and personnel. There are great **capacity building** needs, for both **personnel and institutions**. The establishment of more legal aid clinics across the island, with some being devoted to civil matters would be a welcomed change.

Notwithstanding scarcity of public funds used to finance the current legal aid system, any **level of stability, independence or autonomy by the legal aid council over budgetary allocation** to the legal aid system is recommended, to strengthen predictability in the system. Although the legal aid council's efforts to date are to be commended, **greater coverage and easier access to duty counsel service** are needed. The recommended weekend duty counsel service, being available at selected police stations is encouraged. **Fees paid** to attorneys for duty counsel service are in need of **review and should be constantly updated**, in keeping with the economic context, in a **consultative process**.

Additionally, the presumption of innocence requires that the **list of offences** (under the *Legal Aid Act* and *Regulations* thereto), which are **exempted from representation by legal aid**, under the duty counsel system or otherwise, be shortened or removed. Further, the trend of **under-utilizing or not applying the findings of relevant research, studies, proposed reforms and initiatives, should be avoided**.

⁵¹ Barbara Gayle, "Legal aid lacking for Caribbean Prisoners Appeal", The Jamaica Gleaner, August 17, 2012, available at : <[http://jamaica-gleaner.com/gleaner/20120817/news/news2.html\(18/07/2013\)>](http://jamaica-gleaner.com/gleaner/20120817/news/news2.html(18/07/2013)>); and RJR News Local, "Legal Aid Council to consider Privy Council recommendations", August 18, 2012, at: <[http://rjrnewsonline.com/local/legal-aid-council-to-consider-privy-council-recommendations\(18/07/2013\)>](http://rjrnewsonline.com/local/legal-aid-council-to-consider-privy-council-recommendations(18/07/2013)>)

The prevalence of **pretrial-detention** or unjustifiable prolonged detention before charging or releasing suspects is unacceptable or leaves much to be desired. Overcrowding in prisons and police holding cells arguably, could be likened to inhumane living conditions for the detainees. A categorization of inmates in accordance with the type of crime being committed could help in this regard. More efforts should also be made to provide programs geared at **rehabilitation and restorative justice, to divert many offenders from the prison system and to prevent recidivism**. The current Minister of Justice, Senator Honorable Mark Golding has already committed himself toward this cause, which is commendable. A great step would also be infrastructural reform. By this, the Government should fulfill promises of building proper detention facilities for the holding of detainees, to be more in compliant with international human rights standards. The Government can tackle these problems, as recommended by the Jamaicans for Justice, an approach with which I concur, by improving administrative practices, enforcing professional behavior and increasing resources, especially in regard to duty Counsel and legal aid.

For legal aid services to be effective, with the **quality being comparable to paid legal services**, the legal aid attorneys need to be accompanied with **technical and scientific support**, from for example, **DNA experts** and data analysts to assist in mainly criminal cases. A **Forensic Unit** could be set up to facilitate this high standard of service.

With a **fairly good legislative framework**, it could be said that Jamaica suffers from **implementation deficit** for its legal aid system. It has insufficient budgetary support, which affects the payment of lawyers who render legal services, mainly in criminal matters. It is also not diverse, being criminal-centric. There is a need for an updated **island-wide assessment** of legal service needs of potential users. The legal aid services should then be created or altered to fit the highlighted criminal and civil needs or demands of the poor, for the system to be effective. A **“grass-root”, “bottom-up” approach to reform** is recommended, in keeping with theory that effectiveness of law is driven by the demands of the citizens. There is **urgent need to develop the civil regime in the legal aid system in Jamaica**. Plans could be put in place to set up a **holistic rights-based, demand-driven legal aid program**, where a **cadre of legal aid lawyers** is trained that devote themselves solely or mainly to providing this kind of service.

It is also recommended that **legal aid services be afforded continuing legal professional development credits, to Lawyers**, under the *Legal Professional (Continuing*

Legal Professional Development (CLPD)) Regulation, February 1, 2013. This could assist in the availability of attorneys, free of cost, to broaden the coverage of legal aid and to “jump-start” the civil legal regime. Interestingly also, a **national civil legal aid tariff or tax** could be introduced, mainly to finance civil legal aid services. This is likely to ensure sustainability for a comprehensive legal aid system, while generating a sense of national ownership, political will and demand for efficiency. It should also encourage public use of the services.

Likewise, to secure **sustainable economic development and growth**, through embracing, promoting and adhering to the rule of law, the Jamaican Government could consider establishing a **Rule of Law, Sustainability and Development Unit (ROLSDU)**, in the Attorney General’s Chambers of the Ministry of Justice; the **hub of rule of law promotion in the nation**. The unit could, *inter alia*, coordinate major development plans, project and programs, among key ministries, departments and institutions, to ensure their alignment with adhering to and promoting principles of the rule of law and the growth they facilitate. It would act as a resource center for rule of law and development research and data (gathering and analysis), and to spearhead national needs assessment to guide justice sector reforms and create a culture of inclusivity and participation of all, in governance. ROLSDU could also lobby donor and Diaspora financial support and ensure that development plans/projects are not duplicitous; but aimed at achieving the goals, objectives and outcomes in the National Development Plan, *Vision 2030 Jamaica*.

Although not without flaws, the current legal aid system in Jamaica has semblance of a developed world system, in spite of budgetary constraints. We wait to see if the recent loan arrangement with the International Monetary Fund⁵² will trigger investment in the island and fast-track development and rule of law projects, particularly geared towards improving access to justice. The legal aid criminal regime is to a reasonable extent, effective, but the civil regime, which is not officially operational, leaves much to be desired and is insufficient. Both are lacking in coverage and diversity and are in need of systems of checks and balances. There is minimal monitoring and evaluation for performance, likewise, low predictability and arguable, not enough accountability. It is hoped that legal aid will be recognized as an essential human right or at least, be deemed a crucial public service, like health care and education, in Jamaica.

⁵² Financial arrangement with, viz, the World Bank, EU and Bilateral partners could be a more rewarding option.

CHAPTER 5

TESTING HYPOTHESIS AND FINDINGS

The hypothesis is tested primarily through desk-review and supplemented with findings from research conducted in Jamaica via the qualitative methods of interview and case study. The legal aid systems and approaches from **cross-continental jurisdictions** with a similar common law legal system to that of Jamaica are insightful. The countries studied included Jamaica, Uganda, Australia, New Zealand, Canada and the United Kingdom, all of which are mainly state-funded legal aid systems, which comprised some components that have been deemed to be ‘necessary’ for effectiveness. The legal aid systems in these countries are compared historically and carefully examined under the two headings of the hypothesis: (1) the **presence and role of the components of legal aid system** that are deemed ‘necessary’; and (2) the **discernible variable, element or process** that really drives effectiveness or **ensures that the ‘necessary’ components actually work**. With this approach, a determination is made as to what really drives or ensures effectiveness of common law state-funded legal aid systems. The experiences of other countries, such as the East Asian experience and the United States are highlighted by way of further comparison, with intent to further confirm the thesis statement.

The central issues considered as hypotheses are:

- (1) Is it the mere existence of the ‘necessary’ components, in common law jurisdictions that ensures or drives an effective state-funded legal aid system, and what are those characteristics? or
- (2) Is it the treatment and / or interplay among these ‘necessary’ components that: –
 - (a) ensures or drives effectiveness; or (b) explains why the same ‘necessary’ components work in some common law jurisdictions, but not in others? There are also some **sub-issues explored**, which include: Is it the: - (i) interplay between the necessary components, such as their **treatment**, which ensures or drives whether a legal aid system is effective? (ii) Does the treatment that guarantees effectiveness include, either: (a) the level of **adaptation to needs**; (b) **perception of potential users**; or (c) desire and **demand** of the citizens for it to work? (iii) Likewise, do **institutions** play a vital role? The considerations include: (a) approach and capacity of the existing legal aid institutions

and their efficiency; and (b) the quality of the monitoring machinery in place - particularly, how they prioritise or balance these necessary components, to ensure **legality** - which determines whether the legal aid system is effective?

FINDINGS FROM EXPERIENCED INTERNATIONAL ORGANIZATIONS

There are literatures on the types of legal aid and their importance as a human right. Similarly, there are writings on the characteristics of a good legal aid system. There are some agreed components which appear to be necessary for an effective legal aid system. However, there are some other **discernible** processes, variables or considerations that determine whether the components work and whether the legal aid systems work. The treatment of these components, such as, how they are managed, prioritised or balanced is also crucial. The monitoring institutions to ensure effectiveness are also essential. Likewise, mechanisms of financing and delivery and understanding the interactions between the components, explain legal aid's effectiveness and whether it works. The current literatures that have been reviewed have a gap, in that, they do not contend with those latter issues, the novel areas of this Thesis.

The **WJP Rule of Law Index** is an innovative quantitative assessment tool designed to offer a comprehensive picture of the extent to which countries adhere to the rule of law, not in theory, but in practice. The WJP Rule of Law Index presents a comprehensive set of indicators on the rule of law from the perspective of the ordinary person. It examines practical situations in which a rule of law deficit may affect the daily lives of ordinary people. The World Justice Project Rule of Law Index provides new data on the following nine dimensions of the rule of law: limited government powers; absence of corruption; order and security; fundamental rights; open government; effective regulatory enforcement; *access to civil justice; effective criminal justice; and informal justice.*

This Index measures in 2011, **access to justice** by means of three factors: (a) Factor 7: Access to Civil Justice; (b) Factor 8: Effective Criminal Justice; and (c) Factor 9: Informal Justice. These factors measure whether ordinary people can peacefully and effectively resolve their grievances in accordance with generally accepted social norms, rather than resorting to violence or self-help. **Access to civil justice** requires that the system be affordable, effective, impartial, and culturally competent. Effective criminal justice systems are capable of

investigating and adjudicating criminal offences impartially and effectively, while ensuring that the rights of suspects and victims are protected. Impartiality includes absence of arbitrary or irrational distinctions based on social or economic status, and other forms of bias, as well as decisions that are free of improper influence by public officials or private interests.⁵³ The approach of the authors guides us in the **importance of monitoring and evaluation, data gathering and quality institutions** being put in place to execute same. The **use of indicators** is also recommended to gain an understanding of degree of effectiveness, of any legal aid system.

The **United Nations Office on Drugs and Crime (UNODC) Toolkits** serve as reference points for the applicable international framework and standards. They provide guidance also on the relevant national legal sources and of general considerations for assessing and improving legal aid systems, as a part of access to justice. Likewise, they contain a checklist for examining effectiveness of legal aid. There are many different UNODC hand-outs or booklets relating to **Access to Justice**, such as: *Legal Defence and Legal Aid*, *The Courts and The Independence, Impartiality and Integrity of the Judiciary*. Of particular relevance however as to what makes legal aid systems work to create greater access to justice, is the finding that, **accessibility** includes general awareness of available remedies; availability and affordability of legal advice and representation; and absence of excessive or unreasonable fees, procedural hurdles, and other barriers to access to formal dispute resolution systems. Access to justice also requires fairness and enforcement.⁵⁴

Similarly, the *Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems – V-11-85805* and *UNDP’S Practice Notes 9/3/2004 – Access to Justice*⁵⁵ provide guidance on the issue in enunciating the major challenges with legal aid. It can reasonably be inferred therefore that, by guarding against the following challenges by employing strategies to counter them, legal aid systems in whichever jurisdiction, are likely to be effective. The three main challenges are **availability, affordability and adequacy**. In expounding on them, the United Nations guides that legal aid systems are likely to work, if (i) demand-oriented;

⁵³ The World Justice Project Rule of Law Index, 2012-13, Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce and Christine S. Pratt. This Index can be found at: <[http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf\(15/07/13\)>](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf(15/07/13)>).

⁵⁴ UNODC Criminal Justice Assessment Toolkit (UN New York, 2006), ‘Access to Justice: ‘Legal Defence and Legal Aid’. Available at <[http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf\(19/12/12\)>](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf(19/12/12)>).

⁵⁵ *Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems – V-11-85805*; and *UNDP’S Practice Notes 9/3/2004 – Access to Justice*, at p. 12-13.

(ii) expand access and quality; (iii) ensure sustainability, and (iv) implement monitoring and evaluation systems and institutions.

COMPARING RELEVANT FINDINGS ON COMMON LAW LEGAL AID SYSTEMS ACROSS CONTINENTS

NEW ZEALAND

The New Zealand Ministry of Justice has conducted major research on improving their legal aid system and has made several findings and recommendation as to what constitutes effective legal aid system. In their Public Discussion Paper, 2009⁵⁶, they noted that effective legal aid: (a) ensures right people can access services; (b) provide right mix of services; (c) provide high-quality legal aid service; (d) support an efficient and effective court system; and (e) manage taxpayer funds effectively. Further guidance gleaned from a study of the New Zealand legal aid system, which in the writer's opinion is a good one, includes: the resources are targeted to needs, are fair, transparent and channelled through a simple administrator. An effective legal aid system should also provide incentives for early resolution and discourage unnecessary delays and litigation. Quality assurance processes should be utilised by legal aid institutions. These institutions, for example, should set criteria, mechanism to ensure continuous improvement, feedbacks, loop, monitoring, auditing and complaint. Good legal aid should be provided with ease of access, although there is a great need to have tight eligibility criteria. In finality, New Zealand's success in providing legal aid services can easily be accredited to the presence of a good designed legal aid system, which provides disincentive to protracted court proceedings.

UNITED KINGDOM

Albert Utton⁵⁷ and the Ministry of Justice Proposals for Reform of Legal Aid in England and Wales⁵⁸ provide historical background of legal aid system in UK and guidance on the essentials

⁵⁶ 'Improving the Legal Aid System: A Public Discussion Paper- Legal Aid Review' (2009), Ministry of Justice New Zealand. At <[<http://www.justice.govt.nz/publications/global-publications\(19/12/12\)>](http://www.justice.govt.nz/publications/global-publications(19/12/12))>.

⁵⁷ Utton, Albert, 'The British Legal Aid System', 76 Yale L.J. 371 (1966 – 1967)

for effective legal aid in the 21st century. Of particular interest is the cogent principled approach taken in the United Kingdom that good **legal aid systems cut bureaucracy**, regulate demands more effectively, and encourage upfront preparation and the earliest possible resolution of cases. As observed from a study of their legal aid system, legal aid covers legal advice and representation. It is quite diverse. Like New Zealand and a common principle gleaned from the study is that criteria of scope of and eligibility of legal aid scheme, are also essential.

Moreover, in the said Proposal for Reform⁵⁹, it was clearly noted that, a good legal aid system is aimed at ensuring that legal aid is **targeted to those who need it most**, for the most serious cases in which legal advice or representation is justified. The United Kingdom provides example of a simplified justice system, which recognizes the interconnectedness between access to justice, legal aid and other aspects of the system. Thus, their approach is to reform in a comprehensive manner, leaving no loophole. Specifically, the reform, which, in my opinion, has brought about some success, facilitates a legal aid system that is **more responsive to public needs** and allows them to **resolve their issues out of court without recourse to public funds**. Simpler and more informal remedies, which encourage more efficient resolution of contested cases were used, where appropriate. The legal aid system accounts for consultation of legal aid remuneration and eligibility rules. Both New Zealand and the United Kingdom, deem the **reduction of bureaucracy** associated with the legal aid scheme as essential for good **governance and administration**. The United Kingdom has done this by bringing the administration of legal aid within an executive agency of the Ministry of Justice, abolishing the Legal Services Commission as a Non-Departmental Public Body.

Another finding shared by all jurisdictions studies is that, funding is important. Consequently, where the possibility exists, the legal aid system should encourage, lobby for, or utilize alternative sources of funding, even if the main funds are provided by the Government. For example, the United Kingdom in their proposition for reform, suggested two **alternative sources of funding, as a means of supplementing the legal aid fund**. The approach for same was very insightful. The Government, sought public views on how to establish a scheme to consolidate the interest accruing on client accounts held by solicitors, to help offset some of the costs of legal aid. It also sets out proposals for a supplementary legal aid scheme, in which a

⁵⁸ Ministry of Justice Proposals for Reform of Legal Aid in England and Wales, Consultation Paper CP12/10, November 2010.

⁵⁹ *Id.* at p. 5-9.

proportion of a legally aided claimant's awards made in successful damage claims are collected and used to supplement the legal aid fund. What was also interesting is that the Government welcomed views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings. Their approach illustrated that they (the duty-bearers) valued impact assessment as integral to reform of legal aid system, as well as the views of the citizens (the rights-holders).

The Ministry of Justice, on the April 9, 2013, launched a consultation on proposals for further reform of the legal aid system in England and Wales. The reform, as proposed, will affect the civil and criminal regimes of the legal aid in the United Kingdom. The proposals were framed, as Jonathan Featonby explains⁶⁰, to tackle abuses of the legal aid system and to prevent “fat cat” lawyers from earning millions of pounds from the taxpayers. In essence, the stated aim was to reduce public funding for legal aid. It introduces a **residence test** which will require individuals to be in the UK at the time of the claim and to have been “lawfully resident” for at least 12 months. This has several implications for the users and providers of the system and access to same. For example, under the proposals, legal aid providers will only be paid if applications for judicial review are accepted at the permission stage. Being pessimistic about this proposal, Featonby further notes that the reform will result in providers taking on fewer cases despite their merits, in order to protect themselves from the additional financial risk they will be under. As clearly illustrated, he posits that, it will be harder for people to find and instruct legal representation unless they can afford it. He further declares that perhaps there is a hidden motive or mischief for the proposed changes, such as, fear by the state of its administrative decisions being challenged.

Whatever the reason or outcome of the reform, a lesson learned is that, impact assessment is critical before and after reforming any legal aid system. There is also need for constant **monitoring and evaluation** of effect on the final beneficiaries, providers and financiers. This UK reform and approach also highlight the importance of **tight budgetary management and a need to operate under principles of accountability and predictability.** It means that, despite opposition, **set criteria** should be in place **to determine eligibility**, especially because there is a

⁶⁰ Jonathan Featonby, Liberal Democrat Voice, Opinion: “*The Ministry of Justice’s latest reform to legal aid will cut access to justice not the deficit.*”(4th June 2013), at: <[http://www.libdemvoice.org/opinionthe-ministry-of-justices-latest-reforms-to-legal-aid-will-cut-access-to-justice-not-the-deficit-34776.html\(22/07/2013\)>](http://www.libdemvoice.org/opinionthe-ministry-of-justices-latest-reforms-to-legal-aid-will-cut-access-to-justice-not-the-deficit-34776.html(22/07/2013)>).

need to **channel public funds toward the demands and needs**, especially those of the **neediest of the “right-holders”**.

AUSTRALIA

The Australian approach to legal aid is similar to that of New Zealand and the United Kingdom, which reflects the presence of the necessary components, outlined in the proceedings chapter, as well as a great level of care as to their treatment. Such treatment includes, monitoring and evaluation, tight budgetary management and the provision of diverse legal aid services, which are suited to the needs of the users. Strong institutional support is also recommended for effectiveness and accountability. That continent also uses indicators, facilitated by data gathering and surveys, to assess and evaluate the performance of its legal aid, which is a welcomed approach, in line with the rule of law and the way it is currently being measured by WJP RoL international index. The *Western Australian Report 2007/08*⁶¹ provides guidance on the meaning of effectiveness of legal aid systems and possible performance indicators to assess effectiveness. It uses a five (5) point scale questionnaire, in its surveys to examine effectiveness. In line with the concept of effectiveness utilised in this Thesis, Australia considers the main effectiveness performance indicators as follows: (i) application approved for grant of aid as percentage of all application received; and (ii) percentage of client’s satisfaction. In the writer’s opinion, the Australian legal aid system is effective, due to the presence of the components and treatments of same, which ensure that it remains highly demand-oriented and rights/client-based.

CANADA (Bijuridical : a mixed common and civil law jurisdiction)

The Canadian Government recognises the importance of legal aid, as access to the means of enforcing one’s legal rights, if the rights are to carry any meaning⁶². Profoundly also, is the

⁶¹ Western Australia: Annual Report 2007/08’. Report is available at: [<http://www.legalaid.wa.gov.au/LegalAidServices/Documents/AnnualReport07-08.pdf\(19/12/12\)>](http://www.legalaid.wa.gov.au/LegalAidServices/Documents/AnnualReport07-08.pdf(19/12/12)), at p. 13-15; See also *Legal Aid Australia*, at : [<http://www.legalaid.vic.gov.au/825.htm\(19/12/12\)>](http://www.legalaid.vic.gov.au/825.htm(19/12/12)).

⁶² Alison Brewin and Kasari Govender, *Rights-based Legal Aid: Rebuilding BC’s Broken System*, Canadian Centre for Policy Alternatives (November 9, 2010), BC Office, Vancouver. Available at: [<http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf\(22/07/2013\)>](http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf(22/07/2013)). The report had empirical data gathered from the Canadian society and other jurisdictions, which justified the need to invest in state-funded legal aid. It found that: An underfunded legal aid system results in

recognition that such an investment transcends justice sector to benefits to society in general. With this assurance and political will, principles are garnered to assure accountability and predictability of the effective legal aid system. In studying the system specifically, it reflects that, an effective legal aid system should include a mix of legal aid clinics, private lawyers paid through a tariff system, and staff lawyers in community organizations. The use of data gathering is also essential to Canada's success along with the presence of the necessary components, approaches and processes.⁶³ Like the afore-studied countries, Canada embraces the components, but more so, the treatment and interplay among them, as illustrated below.

Lessons learned from Canadian report as to the components, processes and approaches to consider in the design and administration of effective legal aid systems:

It is important to have a clear structure and public policy behind the system of public legal services. The goal of which, should be to provide access to justice for the most vulnerable. Effective management of the system requires long-term solution and strategic planning, public commitment and willingness to take a rights-based approach to legal aid.⁶⁴ In fact, Roger Smith, director of the Scottish law reform organization JUSTICE, has developed a series of questions to help governments determine the most effective model of legal aid delivery⁶⁵: For example, governments are asked which legal duties they accept in relation to publicly funded legal services. In Canada for example, these legal duties seem to include the Charter of Rights and Freedoms, the rule of law, and both domestic and international human rights law.

Likewise, another question is asked as to the role of legal aid in funding “test cases”, which have the potential to change the law by challenging the constitutionality of legislations. Smith's questions also focus on the vulnerability and identities of those most in need of legal services. He further stated a point which has been noticed from a study of the jurisdictions in this

more litigants representing themselves in court, and self-represented litigants cost the justice system more than litigants with counsel. In other words, investment in legal aid results in significant financial savings in other areas of the justice system. An investment in legal aid is an investment in our communities — and legal aid cuts are a shortsighted hazard to our health, our relationships, our social fabric, and our economy, at p. 5,6,19 and 21.

⁶³ Alison Brewin and Kasari Govender, *Rights-based Legal Aid: Rebuilding BC's Broken System*, Canadian Centre for Policy Alternatives (November 9, 2010), BC Office, Vancouver.

⁶⁴ *Id* at p. 22 and 26.

⁶⁵ Smith, Roger. 2002. “Legal Aid: Models of Organisation.” Prepared for a conference of the European Forum on Access to Justice, Budapest. Available at:<[<www.justice.org.uk/images/pdfs/legalaid.pdf\(22/07/2013\)>](http://www.justice.org.uk/images/pdfs/legalaid.pdf(22/07/2013))>.

research, that legal services should be tailored to the needs of marginalized people. Smith ends with a solid recommendation to the effect that, good legal aid systems employ **partnerships** of the time, resources and intellect of members of the **bar, non-profit sector, unions and government**. He also suggests that the cost of running a clinic staffed by lawyers (higher than the cost of paying private lawyers a legal aid tariff) is **outweighed by the value of developing multi-disciplinary clinical services specializing in particular legal issues**.

Thus, in expounding on what is meant by **rights-based legal aid**, which was recommended for the Canadian legal aid system, Alison Brewin and Kasari Govender noted that this is a **mixed model of service delivery firmly rooted in the community and a rights-based approach**. This mixed model of delivery includes public legal services delivered through legal aid clinics, private lawyers paid through the tariff system, and staff lawyers in community organizations. Such model as they noted, can meet the diverse needs of a diverse population, foster co-operation with a range of professionals both in and outside the justice system, create accessible public legal services through storefront clinics and interdisciplinary community organizations, and free up resources for **test case litigation**.⁶⁶ It is therefore no surprised when, the Canadian Bar Association noted that, “the most effective approach to legal aid service delivery is one that is *comprehensive* or *holistic* in meeting the needs of clients (legal and non-legal) and is well *integrated* with other relevant social service delivery agencies”.⁶⁷ As noted, there may be instances where, it is smarter to build a new rights-based system, instead of trying to fix the damaged legal aid system; one that will ensure legal representation for low income people, improve the justice system, and reduce social and economic costs.

In supporting the **relevance of some components**, the Canadian experience illustrates the importance of providing **diverse services**, both criminal and civil, so that all citizens have the right to access the justice system with legal representation in any legal matter where human dignity is at stake. These services include civil matters such as: custody and access, spousal and child support, immigration and refugee matters, poverty law- debt and access to social assistance, and employment matters. **The need for legal aid to become a constitutional right is also reinforced**. “Pamphlet law”, which is the provision of merely legal information, is not enough.

⁶⁶ *Id*, See Alison Brewin and Kasari Govender, at p. 22-23.

⁶⁷ Buckley, Melina. 2010. *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*. Report for the Canadian Bar Association. June. Available at : <[www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf\(22/07/2013\)](http://www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf(22/07/2013))>; at p. 126.

A diverse range of services should be funded and include legal information, advice and representation.

A key ingredient in a healthy legal aid system is **independence from government**, to ensure government does not influence the administration of justice represented by legal aid. The council that administers legal aid should also be independent and accountable to the public. Canada for example, strives for its Legal Services Society to be independent and accountable to the public. Its mandate is to provide legal aid services “that enable people with low incomes to effectively address their issues within the justice system.” Its main funds are from the province, through the Ministry/ Attorney General. It acts as a central organization with public accountability through a board of directors to manage private lawyers working on a tariff system (paid per client, per file) where appropriate, clinics specializing in subject areas with capacity to identify public interest cases, and support for non-profits and charitable organizations to hire and maintain practicing lawyers on staff.⁶⁸

Another finding of note from a study of the Canadian legal aid system is that **pro-bono or donated legal services cannot truly replace public legal services such as legal aid**. It should therefore not be portrayed or misconceived as such. As found in the Canadian report, although the justice system too frequently relies on an assumption that an increase of pro-bono legal services offered by lawyers can fill the gap for “state-funded effective legal aid system”, there is no factual basis for such expectation.⁶⁹

UGANDA

The Danish International Development Agency (DANIDA)⁷⁰ took a comprehensive approach to dealing with the issue of inaccessibility to justice, especially for the poor and vulnerable in Uganda, Africa. Their approach is well documented in the Justice Law and Order Sector (JLOS) Program⁷¹. To tackle the problem with access to justice, the programs aimed at strengthening the legal aid, lowering the cost of administration of justice and inaccessible justice to the poor. This approach recognized the **correlation, inter-dependence and interconnectedness of the three variables or elements of the justice sector that can affect the effectiveness of equal access to**

⁶⁸ *Id.*, See Alison Brewin and Kasari Govender, at p.6 and 24.

⁶⁹ *Id.* at p. 9.

⁷⁰ DANIDA is the brand which the Ministry of Foreign Affairs of Denmark utilizes when providing humanitarian aid and development assistance to other countries, especially developing countries such as Uganda, Africa.

⁷¹ See details on the JLOS, Uganda <[<http://www.ulrc.go.ug/?p=159\(26/07/2013\)>](http://www.ulrc.go.ug/?p=159(26/07/2013))>.

justice. This component involves support to organization and human resource development to improve institutional efficiency and effectiveness as well as generation of efficiency gains to increase the resource envelope for operations. To improve and expound coverage of legal aid services, there was recognition of the **need to strengthen the legal framework under which legal aid system would operate.** Consequently, through DANIDA and the JLOS program, the *Advocates Act* was amended and enforcement capacity increased to ensure that all advocates provide pro-bono and legal aid services.

Further, in Uganda, through the assistance of DANIDA, the **geographical coverage** of legal aid clinics was increased with the use of a strengthened civil society organization (CSO). To provide **checks and balances and accountability,** the Uganda Law Council addressed and improved the regulatory framework for legal aid under the Legal Aid Basket Fund managed by DANIDA.⁷² A study of Uganda's legal aid system reinforces the point for a **solid legal framework upon which to ground this right and service.** Moreover, as gleaned from Uganda's approach, to ensure effective legal aid system, the mere presence of the necessary components is not enough. How to treat with them will be dependent on the local context and the other factors within the jurisdiction that may affect access to justice. It means that, to treat properly with the components will require understanding the interconnectedness between them and other elements in the justice sector, such as independence of the judiciary, corruption and institutional and regulatory capacity. Consequently, **institutions play a vital role in effectiveness.** These institutions will monitor effectiveness and also provide strategic planning and development of the system, to ensure that the components are constantly being fitted to suit the emerging needs of the poor. The other countries studied from other continents, were strong in terms of legal framework for this right to legal aid, hence their concentration, in terms of reform, based mainly on monitoring and evaluating the current system with the aim of ensuring their effectiveness and to avoid wastage of public funds. They were also concerned about the avoidance of implementation deficit.

⁷² Safer World Research Report, *Monitoring and evaluation arrangements for the Justice Law and Order Sector in Uganda: a case study*, Catherine Flew and Simon Rynn, (January 2009); available at <[http://www.saferworld.org.uk/downloads/pubdocs/UgandaCaseStudy.pdf\(26/07/2013\)](http://www.saferworld.org.uk/downloads/pubdocs/UgandaCaseStudy.pdf(26/07/2013))>.

JAMAICA

Jamaica's legal aid system appears to have some of the necessary components, such as a fairly good legal framework, but seems to be substantially lacking in implementation and the other discernible factors and processes, which include: institutional support, monitoring and a balanced treatment of the components to actually drive its effectiveness. For example, Jamaica's system is not holistic, diverse, accessible, rights-based or demand-driven enough. The provision of the services appears to be more motivated by budgetary support, rather than be designed to fit the needs of the rights-holders (poor), especially those most in need. It is too criminal-centric and the civil regime is almost non-existent. Its design and implementation do not facilitate to a great extent, accountability and predictability.

Take for example, the Jamaican case study of Mr. B:

Mr. B is a depressed 60 year old man who resides in rural Jamaica. He had to travel hundreds of miles to Kingston, the corporate area, to seek legal aid, as there is no such service available in his parish. A further disappointment for him when he reached Kingston was the reality that the legal aid system could not accommodate him in his multiple causes of action civil claims, as, among others, he had initiated the claim already on his own. He explained that he was forced to start the hand-written claim in ink, as he had not received favorable assistance from the heads of the legal aid clinics he had previously visited in Kingston. He was now in court and being faced with an application to strike out his claims for being statute-barred and not complying with the technicalities of the Supreme Court Civil Procedure Rules, among others. He was at a standstill, as he was homeless, unable to adequately legally represent himself against an Attorney on the opposite side, and was seeking compensation from his previous employer for years of dedicated service, which was terminated because of his unforeseen illness. His wife was also his dependant. He had to walk away, unassisted by legal aid, forcing him to represent himself in person, like a lawyer or be denied justice altogether (Case Study, 2012, Kingston Jamaica, documented by Nigel Gayle)

EAST ASIA AND CHINA

The East Asian example, when examined, in my opinion, does not reflect an anomaly, to the other cross-continental jurisdictions studied. The presence of the components was relevant and more so the treatment of same. It does not refute the thesis statement. In fact, former Justice Michael Kirby, in his writing, which outlined seven lessons of Bangkok and the legal aid in South-East Asia, reiterates the point that **funding is an endemic problem of legal aid bodies, wherever they exist.** For him, in the East Asia, an effective legal aid will have as a major

component, sustainable and reliable funding, state-based or non-state-based.⁷³ Despite the financial considerations, East Asia provides guidance that **over-generalization is harmful**. This lesson bolsters the need for demand-driven legal aid system, driven by country-context and an avoidance of transplants. Profoundly stated, Justice Kirby reminded the world that, talks about the rule of law would be hollow and perhaps construed as deceptive, if legal aid services were not available. He further noted that, when made available, if the services are not **affordable, and ensure effective access to independent, neutral and professional courts** – then there is no access to justice and rule of law. East Asia supports the relevance of the components, but as posited in the thesis statement, also guides against merely transplanting one model to another jurisdiction, without taking note of context, adaptability, institutional capacity, client-demand, and how these components will and ought to be treated to ensure effectiveness.

UNITED STATES OF AMERICA

The World Justice Project, Rule of Law Index 2011, found that low income Americans act very differently from higher income earners, with regards to accessing justice. Only a few use the court system (including small-claims courts), while many take no action to resolve their disputes. The differences in attorney's fees, availability of legal services, awareness of available remedies, disempowerment, different institutional settings, or differences related to the organization of the society- are few of the explanation given in the Report for this pattern. For example, in the United States, among the low income litigants, 81% did not seek legal assistance because they felt that they could not afford the lawyer's fees, compared to 48% of the high income litigants.⁷⁴ The American experience, serves to bolster the fact that, there is definitely a need for a legal aid system that is effective, to ensure access to justice for all, even the poor and indigents. It is also clear that, effective legal aid system should provide diverse services, which should not be limited to legal representation and advice, but should also include public education and legal empowerment of the poor. It also illustrates that mere components are not enough, as the unique client behavioral patterns, warrants a rights-based approach to treating with these components. The processes, approaches and institutions should also ensure legality.

⁷³ Kirby, Michael, 'Legal Aid in South-East Asia and China: Seven Lessons of Bangkok', Asia – Pacific Journal on Human Rights and the Law, 2000, Vol. 1, Issue 1, p. 89-96, 8 p.

⁷⁴ See the WJP RoL Index at:
<[http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf\(15/07/2013\)>](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf(15/07/2013)>)

In finality, as gleaned from Shapiro’s “Legality”, the treatment of the 7 components of legal aid system is important to determine the level of legality or effectiveness of such systems. It follows that there is a need for checks and balances on: (i) the necessary components of legal aid system; and (ii) on the monitoring and administrative machinery by way of design. Particularly, **the necessary components of a legal aid system will work or be effective, depending on the extent of their valued legality, that is, the extent to which the components facilitate, incorporate and ensure predictability and accountability. Those principles are indeed central principles of the rule of law.**⁷⁵

CHAPTER 6

RECOMMENDATIONS BASED ON FINDINGS

The following are recommendations garnered from an analysis of the findings or testing of the hypothesis, as to what ensures effective comprehensive state-funded legal aid program.

They are made for general application, where justice reform personnel, policy makers, rule of law and development advisors are aiming at ensuring that national legal aid legislative provisions become laws in action. Consequently, adherence to the principles outlined hereinafter, could facilitate affording citizens this fundamental right to fair trial, and greater participation in the justice sector and governance, facilitated by access to Justice – a key rule of law component. Implementers are however, cautioned that, the recommendations must not be merely transplanted or applied “blindly” in a given jurisdiction, that is, without testing their level of suitability to the local country context. Otherwise, there is the risk of the beneficiary legal aid system suffering from the “transplant effect”, thereby, being deprived of legality or effectiveness. In essence, the findings are meant to be a guide as to relevant areas of concern, components and necessary treatment – when establishing or reforming any legal aid system, viz, common law or civil law jurisdictions. After all, justice surpasses the boundaries of any individual legal system.

In support of the hypothesis, it is submitted that the seven (7) “necessary components” should be present, but more importantly, is their interplay or treatment. The recommendations are based on the findings concerning whether in fact, there are necessary

⁷⁵ Scott J. Shapiro, *Legality*, Belknap Press of Harvard University Press, USA, London, England, 2011. Chapter 14: “The value of legality”, p. 388-400.

components, especially, since despite their existence, why are they not always effective? The simple answer is, because it is their treatment that really matters or is the determinant/ driving force. Treatment takes into consideration the **institutional** role, capacity and effectiveness and **method of provision** of the legal aid service. It also captures the notion of the **tri-dimensional approach** to rule of law capacity development, technical assistance and co-operation ethics, so aptly explained by Professor Alexandre Cordahi. This concept appreciates that there is an inevitable tension between **norms, capacities and interests**. Each and all of these elements are the expressions of tensions and compromises⁷⁶, which need to be carefully understood and managed, in treating with the components in any legal aid system.

SEVEN (7) NECESSARY COMPONENTS

As stated earlier, the “necessary components” should be present, but what is more important, is how they are treated or interplay. From research, it is submitted that **seven (7) “necessary components”** for effectiveness of primarily state-funded legal aid systems are:

Funding – It requires budgetary stability, sustainability and cost-effectiveness. There should be a main source (such as public funds), but efforts should be made to diversify the source of funding, to include private or external public and private funding / international developmental aid. A Rule of Law, Development and Sustainability Unit may be established, to, *inter alia*, channel donor finances and assistance and to ensure the system’s autonomy and independence. It would also lobby from Parliament, at least a guaranteed budgetary amount, annually. The legal aid system should have in-built sustainability strategy. Some countries, such as Canada, have tried levying a national tariff specifically to finance civil legal aid;

Accessible –There should be ease of access. This component is three-fold, viz.: (a) Proximity - it should be available across all parts of the country, in both rural and urban areas and reachable to the poor and marginalised;(b) Non-discriminatory service; and
(c) Gender/vulnerable/marginalised/disabled-sensitive. The services should also be accommodating and comfortable, even for disabled and vulnerable groups;

⁷⁶ See Alexandre Cordahi, *Comparative law and ethics in Rule of Law assistance*, PROLaw Students’ Journal, Loyola University Chicago School of Law, Rome Italy (October 2011) - for further discussion of the tridimensional approach to technical assistance in rule of law.

Affordable - The legal aid services should be mainly free and/ or at most, affordable to the poor. It should be free for the poor that cannot afford and almost free for those with a little more means to pay. A system should be implemented with set eligibility criteria for determining means/ payment/contribution plan and the needy prospective clients. The eligibility criteria should be tight, with little or no room for discretion, which so easily facilitates corruption. For example, a simple test for financial eligibility could be the ability to retain counsel without suffering under financial hardship. Financial eligibility should cover everyone below the national poverty levels and anyone above those levels who is unable to acquire essential public legal services without impoverishing him or herself or family. A reasonable contribution to all or part of the cost of providing the services should be made, where possible⁷⁷;

Diverse services, range of services and providers – This component is two-fold. It involves: (i) diverse services; and (ii) diverse providers/ types of legal professionals. For **diverse services** - There should be the right mix of services. The services should be suited to local needs of poor and facilitated by a needs assessment survey. The diagnostic country assessment is essential as some of these services may not be applicable to particular jurisdictions altogether, or at time of implementation. Suitability to local context is paramount. Some recommended comprehensive services to be provided by legal aid include: (a) public education and outreach; (b) legal advice; (c) drafting legal and court documents; (d) Alternative dispute resolution (ADR); (e) General court representation /advocacy: litigation–Individual representation before court, tribunal and Dispute Resolution Foundation (mediation/Arbitration) and in Judicial Review matters. These services should be for both criminal and civil matters such as: torts, contracts, commercial, property, family, children, crimes, Administrative law, Human Rights; and (f)Systematic advocacy – testing and challenging “bad” laws- advocate change, to bring lasting impact for the poor, indigent, marginalised, disables and vulnerable.

The second part, diverse providers and legal personnel: The system should incorporate the knowledge, skills, expertise, and diversity of legal professionals from different ethnic groups and religions, from both private and public bar. The cadre of providers should be gender-neutral as far as practicable and representative of the socio-cultural background of the country. It should

⁷⁷ *Id*, see Buckley, Melina. 2010. *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*. at p. 119. This example was taken from Buckley’s notes on the scope of financial eligibility.

not be restricted to lawyers, but utilise paralegals, public advocates and other persons with special training in the provision of legal assistance to disadvantaged people. Other professionals such as psychologists, social-workers, forensic experts, data analysts, and medical doctors should be provided in labs and other related offices, to assist with the provision of a comprehensive victim-sensitive quality legal service. By way of example, these are some of the diverse kinds of providers observed in the countries studied: (i) pro-bono lawyers, (ii) state-funded legal aid-clinics (iii) University legal or law school clinics; (iv) Participation of Bar Associations; (v) CSOs such as NGOs involved in Human Rights protection or civil legal aid services; (vi) Public interest law firms; (vii) Public Defender (funded by state); (viii) state funded /referral to empanelled private lawyer; and (ix) Paralegal and other public advocates and their offices;

Quality service – High quality, through: (a) continuous training and capacity building of institutions of legal aid, leaders and personnel. This is guided by client-after-service questionnaires and performance surveys. These evaluations should be utilised to re-adjust performance and approaches to suit clients’ needs where there are gaps. Another source or means of verification of the quality of the services is through external appraisal of the system by external legal aid experts; (b) Qualification, accreditation and Professionalism of providers – comparative to paid legal service; and (c) Performance – comparable to paid private legal service. Means of verification include: survey of Judges, bar association and review of case files-handled by legal aid providers. There should also be public education campaign to highlight the quality service and to erase any negative deterrent stigma associated with legal aid service, such as the view that, “free service means poor quality service”;

Clients’ satisfaction – **The legal aid system should be demand-oriented and rights-based.** Clients’ demands before and after service, should to a great extent, guide how the services are rendered. This means that, despite the outcome of the case, for example, in litigation case, clients are likely to be satisfied that their needs and expectations were met and felt that the legal aid provider handed the case professionally by upholding the ethics of profession, respecting the client and did his or her best with reasonable care and standard. A comparison is likely to be made between the quality service provided with what could have been - “had the client used alternative legal source, such as retaining private attorney. The use of “pre and post-service

questionnaires” to solicit clients’ views should help with the gathering, analysis and evaluation of data. A combination of quantitative and qualitative methods of research could be used, such as: surveys, case studies, focus groups and post-service questionnaires; and

Comprehensive Legal Framework – Legal aid, an important human right, should be adopted in local laws, preferably as a constitutional guarantee or at least, be provided for in national statutes/ legislations. The laws and accompanying regulation and rules should clearly outline the right to legal aid for all, especially the poor “rights-holders”. The laws should also provide clear guidelines and parameters for “duty-bearers” of eligibility for and the operation and sustainability of the legal aid system. International principles, conventions and treaty standards may be used, cautiously, to guide the reform of *Legal Aid Acts*, to bring them in line with international standards. Caution is required as legal reforms are effective when endogenously demanded and made through consultation with all local stakeholders, including final beneficiaries. The legal framework should be comprehensive, yet limit discretion, which can easily cause corruption and bureaucracy.

Necessity of the Components

All of the functioning legal aid systems studied can be characterised as having the said seven components. It is also not feasible to study all the systems in the world, hence resorting to some level of generalization and deduction. Nevertheless, it can, with great certainty be posited that, systems without such components are less likely to perform well, unless backed up by external support or other socio-legal, economic and cultural factors. A rationale is that, the more a legal aid system is characterised by these components, is the greater the likelihood **of the level of adaptability to the needs, perception and political will of users and providers**, and thereby, its **legitimacy and legality**.

TREATMENT OF COMPONENTS

The requisite treatment of the seven components is guided by local context and needs, facilitated by conducting Needs Assessments. These assessments and monitoring techniques can employ desk-review or original island-wide survey methodologies. They should be participatory and

inclusive of all stakeholders and members of the justice sector and related government sectors of society, even the poor and marginalised. Applying a **tri-dimensional approach**, which takes into consideration the **norms, capacities and interests**⁷⁸, the appropriate treatment utilises a gender-sensitive, rights-based and victims-sensitive approach. It takes into consideration how the components are prioritized in the context of limited budget and time. Which of the components takes priority in case of budgetary and time shortage, is it all or none? Are some more essential than other? Effective legal aid requires that **priority is given to the level of adaptability of the components to the needs of the stakeholders, particularly, the “rights-holders”, who are the poor, marginalised and vulnerable**. The perception of potential users, desires and **demand of the citizens for the legal aid system to work**, will impact effectiveness. Likewise, **the perception and the political will of the providers of the service or the “duty-bearers” must be taken into account when treating with the components**.

Thus, in applying the classical jurisprudential reasoning from Shapiro’s “Legality”, the **treatment of the components of a legal aid system is an important determinant** of the level of legality or effectiveness of such system. There is obvious need for **checks and balances** on the necessary components and the systems by way of design. The extent to which **legality** is valued, facilitated and guaranteed by the treatment of the necessary components is a determinant of whether the said components work to make legal aid systems effective. The greater the level or value of **predictability and accountability** that the treatment of the components in the legal aid system allows, is the greater the level of legality it ensures, and its effectiveness. **Those principles are indeed central principles of the rule of law**. Additionally, the **approach and capacity of the existing legal aid institutions and their efficiency is a determinant**. This treatment component concerns the **quality of the institutional monitoring machinery**, particularly, how they prioritise, mix or balance the necessary components.

Considerations for institutions that treat with the components

The preliminary issues to grapple with are: What institutions are in place? What is the role of institutions in charge of operating the legal aid program? How effective are they in fulfilling their mandate? Who sets the mandate? Is the mandate guided by the demands of the poor, with a well-designed system of evaluation and client’s feedback? It is clear that the level of adaptability

⁷⁸ *Id.*, see discussion by Alexandre Cordahi

and suitability of the legal aid system to genuine needs of the poor by way of the type of services it provides and how they are provided – will affect its effectiveness. Effectiveness will also depend on the extent to which the system as designed and operated, is aimed at targeting the needs of those who need it most.

Role of Institutions: What institutions are in place?

The importance of the approach and role of institutions in this regard cannot be overstated. It is now trite law in the development world that institutions and their quality play a pivotal role in economic development. Expressed succinctly, Professor Dani Rodrik and IMF Advisor Arvind Subramanian, in their article, *The Primacy of Institutions (and what this does and does not mean)*⁷⁹, noted that, institutions play a central role in dealing with property rights and the rule of law. As they expounded, the rules of the game in a society, matter. These rules are defined by “prevailing explicit and implicit behavioral norms and their ability to create appropriate incentives for desirability economic behavior.”⁸⁰ The quality institutions that guarantee economic development and stability, as they argued, are not only those that create markets, but those that sustain their growth, through regulation, stabilization and legitimization.⁸¹

However, in this research, the **institutions of focus are the institutions that provide and are involved in the administration, planning, co-ordination, training, monitoring and evaluation of legal services for the poor.** These include specifically, legal aid institutions, such as: Legal Aid Council, Legal Aid Clinics and Rule of Law and Legal Reform Unit in the Ministry of Justice. These institutions should be equipped and their capacity built to operate with a great **level of transparency, rationality, accountability, and predictability, to ensure national development.** Bureaucracy should be kept as minimal as possible. These institutions somewhat, regulate and give the legal aid programs their legitimacy. They should also lobby for budgetary support for the provision of legal aid services and reform initiatives, as a part of the **sustainability strategy.**

The institutional and personal capacities and their functionalities, with respect to the level of monitoring, evaluation and **provision of oversight, are also crucial.** The legal aid services

⁷⁹ Dani Rodrik and Arvind Subramanian, ‘The Primacy of Institutions (and what this does and does not mean)’, Finance and Development (June 2003).

⁸⁰ *Id* at p. 31.

⁸¹ *Id* at p. 32

provided and logical frameworks, which are to be aligned with the National Development Plan, should be **continually re-evaluate and readjusted, as necessary, in response to genuine needs of the poor.** **Monitoring** involves ongoing data collection to provide indication of progress and achievement of objectives. It requires regulatory tracking of activities and outcomes. A systematic way of monitoring legal aid is to **monitor its service level, service coverage and service quality.** The benefits to be derived from monitoring are tremendous, they include: the legal aid council/ institutions being able to capture lessons, learn from past experiences and to improve both quality and coverage of service. It places the key institutions in a position of greater accountability to the communities they serve and to the financiers (public). The legal aid council should be an **independent** statutory body, directed by a board, which guarantees a **balanced representation of the interests of the community**, that is, the poor, vulnerable and marginalised, government and legal profession.⁸²

In treating with the components, **regulatory institutions are needed to ensure that resources are targeted to needs and demands and regulated effectively, fairly, transparently, and through a simple administrator.** These institutional approaches ensure that bureaucracy is eliminated or kept at a minimum. All the components should be designed in a way to **provide incentives for upfront preparation and early resolution of cases or disputes and to accordingly, discourage unnecessary delays and litigation. Quality assurance processes are quintessential.** They include setting criteria that are tight and providing mechanisms to ensure continuous improvement, feedbacks, monitoring, auditing and complaint. The institutions should strategically be created and equipped to facilitate these quality assurance processes. As a whole, there is a need for a good designed legal aid system, as poor design gives incentive for prolonged proceedings.

The method of providing legal aid services is an important part of treatment

The germane questions concern whether the legal aid services that are being provided, afforded through private attorneys (Government pay on ad hoc, per case basis) or Non-Governmental Organizations who are devoted to legal aid, public pro-bono attorneys or both? Each system has different implication for outreach and effectiveness, in changing the life of the poor. Dan Manning shared years of experience in the International Development Law Organization

⁸² *Supra*, See Melinda Buckley's explanation of Administration of legal aid, at p. 119.

(IDLO) Manual, *Legal Empowerment Practitioners' Perspective*. Profoundly he noted that, it is better to have institutions in place specializing in legal aid, as they are able to spot trends and gather evidence, to make sustained changes in systemic problems and challenge ineffective law. Mr. Manning, an expert involved in legal aid work across the world, explained and illustrated the rationale for such a system preference. For him, the **method for providing legal aid is important**, which led to his advocating for the use of legal aid NGO's rather than reliance on individual private lawyers to do legal aid work.

Dan further posited that **publicly funded legal aid systems using private lawyers cannot develop the knowledge-base or provide the range of services needed- which legal aid NGOs and public institutions can provide**. One of the enunciated necessary components is a legal aid system with diversified legal services. In my view, the ideal holistic legal aid system may be considered an extension of the legal aid case study in Bosnia-Herzegovina, which was highlighted by Mr. Manning, of an effective public NGO that was dedicated to civil legal aid services. In such a system, paralegals should also be utilised to offer some of the requisite services.⁸³ Their use can expand both access and quality of service.⁸⁴

Mr. Manning's findings are not alarming, as they are in keeping with the findings of a study that was done on the effectiveness of a legal transplantation. Katharina Pistor et al., reported that effectiveness of legal transplant is more determined **by the way in which the law was received or created, rather than the type of legal system present**. Thus, internal processes of law development should be encouraged and a self-sustained demand for legal innovation and change should be driven endogenously.⁸⁵ Applied in this context, the manner in which the legal service is provided is essential. It is **more effective where the legal aid service providers or "duty-bearers" are committed to making systemic changes to improve the lives of the poor and to give voice to the voiceless, marginalised and indigents**.

This level of commitment is more suitably fulfilled by a trained cadre of legal aid providers, who are solely or mainly devoted to rendering high quality legal aid and not be mere

⁸³ See Legal Empowerment: Practitioners' Perspective, (ed.) Stephen Golub, (series ed.) Thomas McInerney, IDLO, Legal and Governance Reform: Lessons Learned. No 2/ 2010, p.152. Article written by Dan Manning, entitled: "Supporting Stability and Justice: A Case study of NGO legal services in post-conflict Bosnia-Herzegovina".

⁸⁴ Paralegals or persons with special training in the provision of legal assistance can assist in rendering basic advice to disadvantaged groups. For example, they can be used to screen the nature of assistance required and help to refer clients to pro-bono lawyers. They can also help in the public education legal aid efforts.

⁸⁵ Daniel Berkowitz, Katharina Pistor and Jean- Francois Richard, *The Transplant Effect*, (2003) 51 American Journal of Comparative Law, pages 163 – 203.

private attorneys being paid from public funds on a case-by-case basis. The cadre of providers would be seen as public legal aid attorneys, who operate under a common mandate and vision and work collectively to improve the situation of governance and inadequate access to justice for the poor, in line with the country's national strategic plan. Inter-professional cooperation can result in a strengthened co-ordination among state and non-state funded legal aid providers.

CHAPTER 7

CONCLUSION AND IMPLICATION OF RESEARCH TO LAW AND DEVELOPMENT

Inadequate or no access to the means of enforcing one's legal rights would render those rights almost meaningless. An effective legal aid system, which provides, *inter alia*, legal advice, representation and advocacy can hold governments accountable to meeting the needs of the poor and disenfranchised.⁸⁶ When the poor are enlightened about their rights, they are empowered and begin demanding performance from authority. This demand drives performance and accountability. It is in keeping with viewing law as a cognitive institution and the need for legality. That is, the extent to which 'law on the books' is effective, being 'in action'.

Legality is viewed as largely a function of the demand for law. Internal processes of law development should be encouraged and a self-sustained demand for legal innovation and change should come from locals. Studies show that legal transplants may only work if they are adapted by locals or the population was already familiar with the basic principles of the transplanted laws. Likewise, as was illustrated using the concepts of 'legal transplants'⁸⁷ and 'transplant effect', effectiveness of law is more determined by the way in which the law was received or created, rather than the type of legal system present.⁸⁸ Consequently, the method of providing legal aid is important. So too, is the need for a cadre of trained legal aid service providers, rather

⁸⁶ Legal Empowerment: Practitioners' Perspective, (ed.) Stephen Golub, (series ed.) Thomas McInerney, IDLO, Legal and Governance Reform: Lessons Learned. No 2/ 2010, p. 137. Article written by Dan Manning, entitled: "Supporting Stability and Justice: A Case study of NGO legal services in post-conflict Bosnia-Herzegovina".

⁸⁷ *Supra*, Michele Graziadei's *Legal Transplants and the Frontiers of Legal Knowledge* (2009)

⁸⁸ Daniel Berkowitz, Katharina Pister and Jean- Francois Richard, *The Transplant Effect*, (2003) 51 American Journal of Comparative Law, pages 163 – 203.

than reliance on individual private lawyers to do legal aid work with public funds. As Dan Manning so aptly posited, publicly funded legal aid systems using private lawyers cannot develop the knowledge-base or provide the range of services needed, which legal aid NGOs and public institutions can provide.

In support of the hypothesis, it has been proven that although the “necessary components” should be present in legal aid systems, it is their treatment or the interplay among them that will ultimately determine the systems’ effectiveness. The extent to which the components value, facilitate and prioritise legality, by being highly predictable and accountable, will be a great determinant. To facilitate effectiveness, institutional capacities must be built and strong, “backed-up” by strong systems of checks and balances, monitoring and evaluation. An effective legal aid system is also one which by design and implementation, is available, accessible, diverse in terms of the providers and services rendered, affordable, high in quality, sustainable, adequately funded and demand-oriented - being suitable to satisfy the genuine needs of those who most need it. It should also be of comparatively high quality to paid service and result in great client’s satisfaction and be rights-based. It should be grounded on a comprehensive legal framework, preferable guaranteed in the constitution and / or legislations.

Without more, the novelty of this area of focus indicates its potential benefits to the legal and development communities. Particularly, the findings of this research will assist in understanding the nature and scope of access to justice, which is a major component of the rule of law. As already noted, one’s ability to access the formal and informal court mechanism or systems of dispute resolution, will greatly determine their right to access to justice and fair hearing. An effective legal aid system, particularly, those funded by the state, is important, not only to its users who are mainly individuals who are impecunious or unable to afford legal representations, but also, to those that actually provide the said required service. In the rule of law and development communities, these stakeholders are known as the ‘duty-bearers’ and ‘claim-holders’ of the legal aid right. Further, the effective functioning of a state-funded legal aid system will effect on the justice sector as a whole, and have repercussive effects on other non-legal sectors of society.

The ‘fruit’ of this research or findings and recommendations herein, should specifically guide local and international development organizations and donors who are interested in rule of law, democracy and governance projects, especially those geared towards improving access to

justice and legal aid programs. Particularly, this paper guides them on the areas of focus that matter, and, on what activities and outputs, funds are to be channelled – that is, on the components, treatment, elements, processes and institutions that drive effectiveness. Moreover, such a research, knowledge base and baseline, could also serve as a cause to ignite donors’ interest in financing the development of more legal aid projects.

At a time of economic recession where capital resources are scarce, governments, inclusive of developed countries, are forced to find innovative ways to prevent wastage and misallocation of public resources and funds. National legal aid is a necessity and one of the responsibilities of every government. While some aspects of state-funded legal aid programs can be delegated by the government, the ultimate responsibility to ensure that all citizens have access to justice through legal representations and advice remains non-delegable. In that context, the research adds to the scholarly understanding of what is the driving force of effective legal aid systems. Likewise, the answers provided as to what ensures that, even with the existence of what is deemed ‘necessary components’ of effective legal aid systems, it will actually work or produce the desired results, are useful to governments and policy makers.

It follows therefore that, the findings and recommendations can be used in advising the Jamaican Government or governments in general, as to, on what areas of legal aid reform to focus, and to accordingly, employ the most capital, technical and human resources. In that way, the scarce public resources are likely to be better allocated and managed and citizens can be assured better access to justice, legal aid assistance and in some cases, to the fundamental and universal right to a fair trial. Moreover, with this scholarly research and practical guide, Jamaica is more likely to comply with its international obligations when its state-funded legal aid system conforms more, to international standards, particularly, in respecting, for example, the *UDHR* and *UN BPRL*. Likewise, as a developing country, her image and ranking by the international community, indices, and Human Rights watchdog organisations, should be improved. Further, in drawing from Amartya Sen’s theoretical conception of “development as freedom”⁸⁹, a greater national image or outlook with respect to observing the rule of law, human rights and freedoms, has further socio-economic implications for national development and growth.

The upshot of the research, it is clear that one of the most effective approaches to the delivery of legal aid services is to ensure whichever system is chosen, is *holistic, rights-based,*

⁸⁹ Amartya Sen, *Development as Freedom* (1st ed. Oxford University Press, 1999), pp. 3-53.

gender-and-victim-sensitive, and demand-driven. It should meet the needs of the “rights-holders” or the poor, and at the same time, be well *integrated and coordinated* with other interconnected social service delivery institutions. The treatment of the seven proposed components of effective legal aid systems requires a tri-dimensional balance of the norms, capacities and interests, in terms of the method of service, legal aid processes and approach and quality of the administrative and regulatory legal aid institutions. The system’s legality or effectiveness warrants high levels of adaptability to stakeholders’ and beneficiaries’ needs, predictability, accountability and zero to minimal bureaucracy, without which, access to justice, an essential component of the rule of law is denied. With the importance of access to justice being illustrated, it would help to join the cause for the expressed inclusion of access to justice and the rule of law in the post-2015 development agenda of the United Nations.

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