



CYRUS R. VANCE CENTER  
FOR INTERNATIONAL JUSTICE



# SUMMARY SURVEY REPORT

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A REPORT OF THE BASELINE SURVEY FOR ESTABLISHMENT OF A  
CLEARING HOUSE IN KENYA

| NOVEMBER 2022

## Executive Summary

In Kenya, lack of representation has become commonplace in legal disputes as 'a majority of Kenya's population cannot afford to retain the services of a lawyer.'<sup>1</sup> This means that most citizens turn to legal aid services to bridge this gap. Although lawyers in private practice offer free legal services<sup>2</sup>, Civil Society Organizations (CSOs) are the primary stakeholders bridging the access to justice gap through legal aid services.<sup>3</sup> Some of these organizations include the Federation of Women Lawyers (FIDA), CRADLE, and the International Commission of Jurists in Kenya, Kituo Cha Sheria, Kenya Human Rights Commission, and KELIN Kenya, among others.

It is important to note that a substantial majority of the existing avenues for free legal services have been donor funded projects such as the PLEAD Programme<sup>4</sup>, Mediation programmes<sup>5</sup>, Legal Aid Awareness week<sup>6</sup> and the Judiciary Pauper Briefs Scheme<sup>7</sup>. In addition, some programs are also centred on development projects such as the Base Titanium Project, which sensitized residents on their respective community rights.

The National Legal Aid Service (NLAS)<sup>8</sup> is mandated to establish and administer a national legal aid scheme that is affordable, accessible, and sustainable. It has been argued that its mandate is broad and involves many functions, such as the provision of grants and the development of educational programs and research, which have led to limited geographical and functional impact.<sup>9</sup> According to the International Commission of Jurists-Kenya CBA report 2022, legal aid services have important financial, economic, and social benefits, yet in comparison to the global best practices, the said services remain underfunded.<sup>10</sup>

It would be crucial to create a dedicated, comprehensive, long-term entity devoted to promoting and supporting the pro bono legal services among stakeholders in the country. A pro bono

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1. Pro Bono Institute and Latham Watkins, Pro Bono practices and opportunities in Kenya, 2019. Available here <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya-2.pdf>

2. Gazette Notice 370 of 2016, Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services outlines that pro bono services shall be offered by qualified advocates across all courts.

3. Latham & Watkins LLP, A survey of pro bono practices and opportunities in 84 jurisdictions, 2016, 368-369. Available here: <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/A-Survey-of-Pro-Bono-Practices-and-Opportunities>

<sup>4</sup> Project funded by EU and United Nations working in collaboration with Government of Kenya, Law Society of Kenya and Amkeni Wakenya. [https://www.eeas.europa.eu/delegations/kenya/plead-verdict-newsletter-issue-no-5-2020\\_en](https://www.eeas.europa.eu/delegations/kenya/plead-verdict-newsletter-issue-no-5-2020_en)

<sup>5</sup> Project funded by DANIDA

<sup>6</sup> Funded by and internal Legal Aid Fund. The Awareness Week is done annually by the Law Society of Kenya and its respective regional branches.

<sup>7</sup> See note 2. In specific, capital offence cases and children in conflict with the law will be given priority and advocates would be paid an all-inclusive fee of Kes 30,000.

<sup>8</sup> Legal Aid Act No 6 of 2016. Functions of NLAS include ensuring the national legal aid scheme is affordable, accessible, sustainable, credible and accountable.

<sup>9</sup> Rethinking The National Legal Aid Service By: Onyango Aaron Okoth. Available here: <https://journalofcmsd.net/wp-content/uploads/2021/08/Rethinking-The-National-Legal-Aid-Service-.pdf>;

<sup>10</sup> A Cost Benefit Analysis of Legal Aid in Kenya 2022 by ICJ Kenya. Available here: <https://icj-kenya.org/wp-content/uploads/2022/05/A-Cost-Benefit-Analysis-of-Legal-Aid-in-Kenya.pdf>

clearinghouse meets this need by serving as an intermediary between a person/civil society organization seeking legal services and a firm/lawyer willing to provide the respective service.

## **Pro Bono**

The International Bar Association defines pro bono as work or actions carried out for the public good<sup>11</sup>. The Pro Bono Declaration of the Americas (PBDA) outlines pro bono legal services as those provided without a fee, or expectation of a fee, principally to benefit poor or underprivileged persons or communities, or organizations that assist them. The service may include representation of persons, communities or organizations in matters of public interest who otherwise could not obtain effective representation.<sup>12</sup> The PBDA emphasizes pro bono as a responsibility that stems from the legal professionals' role and purpose in society. In South Africa, pro bono includes advice, opinion, or assistance in areas to be listed by the Council of the Society but is not limited to those services, and members can propose areas of professional services to be recognized. In Uganda, pro bono includes giving advice or providing representation to indigent persons, involvement in free community legal education, and offering free legal advice or representation to a charitable or community organization or its client.

Therefore, for this report, we define pro bono in Kenya as **legal services offered to benefit underprivileged persons or communities, or organizations that assist them without a fee or an expectation of a fee** by Kenya's first national clearing house (CH)-**The Pro Bono Institute of Kenya. (PBIK)**

## **What is the value of setting up the PBIK?**

By mainstreaming the provision of pro bono legal services in the Kenyan marketplace under a central administrative vehicle, **the Pro Bono Institute of Kenya (PBIK)** will leverage over 20 years' experience of *-The Vance Center for International Justice*, coupled with the localized support of its implementing institutions, *the Strathmore Legal Aid Clinic and Kenyatta Law School Clinic..* The Institute will support the increasing demand from CSOs and different legal stakeholders willing to devote their time and expertise to bridge the access to justice gap.

In addition, PBIK will devise mechanisms to identify the most pressing legal problems requiring pro bono solutions, all while identifying the most suitable legal professionals to resolve them. The Institute's mission includes the following:

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<sup>11</sup> IBA pro bono declaration. Available here: <https://www.ibanet.org/document?id=C4B06FD6-A807-44D4-A98A-C73B464589C6>

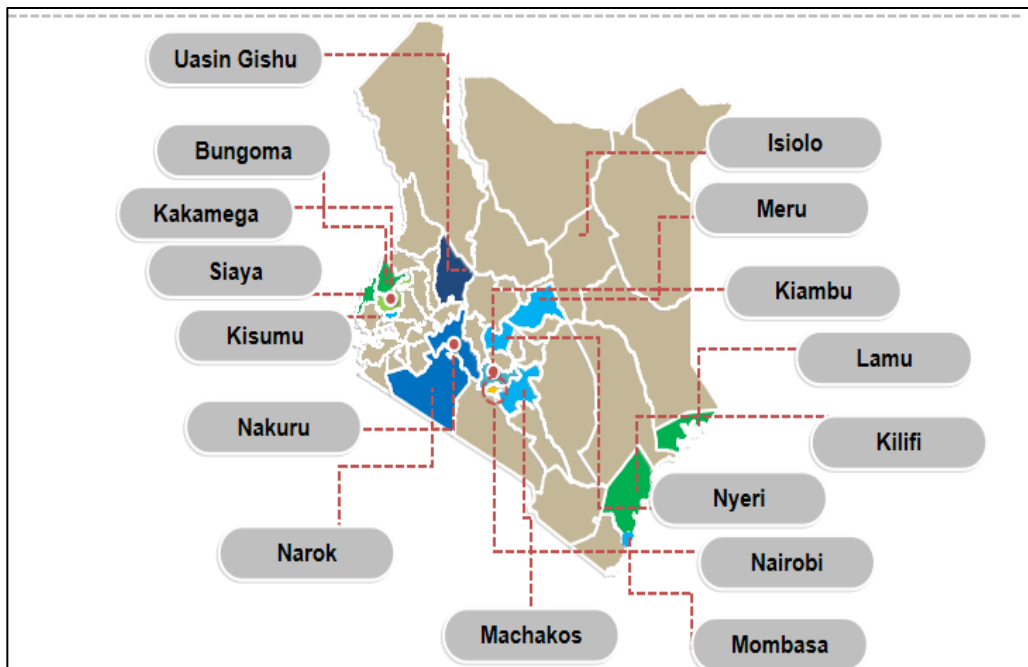
<sup>12</sup> The Pro Bono Declaration for the Americas(PBDA).Available here: <https://www.vancecenter.org/wp-content/uploads/2018/03/english.pdf/>

- a. **To promote a formal and institutionalized pro bono culture** among all lawyers, law firms and corporations operating in Kenya and beyond.
- b. **To facilitate access for the provision of pro bono legal services** to CSOs that cannot access such services for economic reasons by brokering pro bono partnerships between key CSOs and the law firms in Kenya which will provide legal services on a pro bono basis.
- c. **To provide all pro bono actors with the tools required to optimize their pro bono activities.** For law firms and in – house counsel, PBIK will serve as an implementation partner for their respective, institutional pro bono programs. It will undertake rigorous screening processes on behalf of its members, i.e. vetting pro bono clients to ensure bona fide, winnable cases, earmarking potential strategic litigation matters. As an added benefit for members, PBIK will assist with evaluating pro bono performance and output on the work it allocates to its law firms and lawyer members, ensuring that they optimize their knowledge and expertise allocated.

### **Why partner with the PBIK?**

With expected administrative centralization to enhance service delivery, the Institute will have a *sui generis* nature rooted in the following:

- **Diversity of key stakeholders:** PBIK aims to foster high-level collaboration among law firms, in house counsel, lawyers, paralegals, government agencies and CSOs. The members will have an opportunity to refer or accept pro bono matters and benefit from peer referrals and advisory on cross-cutting areas of law e.g. Strategic/Public Interest Litigation.
- **Risk Management Control:** Pro bono practice is a bona fide area for many law firms across the world that requires firms to view pro bono not only as a platform for social responsibility, but also with a risk management lens. PBIK will ensure that law firms benefit from the brokerage services wherein quality pro bono matters are referred therefore bypassing the risks associated with taking on pro bono matters that are not properly screened or referred.
- **A pool of resource and knowledge:** PBIK will be enriched by the caliber and experience of its members who would benefit from professional development courses such as mentorships and specialized training. Moreover, PBIK will develop individualized plans for law firms in order to further institutionalize their respective pro bono practices by sharing manuals and best practices.
- **Devolution of pro bono services in Kenya:** The Institute will leverage its member's geographical presence to ensure access to justice is impactful and devolved to more than a third (16) of the counties across the country including *Nairobi, Mombasa, Kilifi, Meru, Isiolo, Narok, Kisumu, Bungoma, Lamu, Nakuru, Machakos, Siaya, Kiambu, Nyeri, Uasin Gishu Kakamega* (See map below)



### **The Need for a Baseline Survey**

In order to best understand the needs of the proposed stakeholders within the pro bono ecosystem in Kenya, the Vance Center, Strathmore University and Kenyatta University undertook a survey. The survey was conducted as a one-on-one sixty (60) minutes interview over a period of eight (8) weeks in September and October 2022. The survey targeted sixty-five (65) respondents located in Nairobi and other major cities/towns including Mombasa, Thika, Nakuru, and Eldoret among other towns. (42 respondents participated) It was divided into 12 sections namely: *Descriptive Data, Current State of Pro Bono Practice in Kenya, Law Firms as suppliers of legal aid, companies/in-house counsel as suppliers of legal aid, NGOs as clients, Individuals as Legal Aid Clients, Quality Control, Publicity, Work Allocation, Funding, Governance and Launch.*

The survey was based on the following hypotheses:

1. Access to justice programs available across Kenya are inadequate.
2. There is no clear distinction, understanding or practice between legal aid and pro bono in Kenya.
3. Pro bono services are necessary in both criminal justice and civil practice.
4. Whereas law firms are the ideal suppliers of pro bono service, In-house counsel are also interested in supplying the service through the CH.
5. Whereas NGOs and CSOs interact with diverse legal matters and are therefore the ideal clients, Individuals are underserved by the existing system and therefore willing clients for the CH.

This summary report offers a snapshot of the findings and insights used to design a suitable and sustainable model for the CH. The survey sought to gather insights on various aspects of Pro bono practice and the proposed clearing house with the aim to:

- ✚ Understand the current state of pro bono/legal aid practice in Kenya
- ✚ Identify existing gaps in practice that would be filled by the CH
- ✚ Identify preferred sectors in which the CH can provide legal aid/pro bono support
- ✚ Identify client needs and expectations of the CH
- ✚ Identify supplier needs and expectations of the CH
- ✚ Identify the proposed founding members of the CH
- ✚ Understand the capacity of suppliers to fund the CH
- ✚ Highlight a preferred governance structure and legal registration
- ✚ Identify a suitable case allocation process
- ✚ Identify key partnering institutions across the country
- ✚ Identify key activities for the CH within the 2year pilot phase

## **General Findings and Insights**

### **I. The State of Pro Bono Practice**

According to survey respondents, the pro bono ecosystem in Kenya remains underserved due to a lack of sufficient support from the government and inefficient structures. Whereas the respondents understood pro bono to mean legal services that are offered for free, the reality is that clients often paid for the service, albeit at a subsidized rate. It was also highlighted that the lack of distinction between the definition of legal aid and pro bono had occasioned a gap between individuals who need the service and the lawyers.

100% of the respondents were aware of pro bono legal services and organizations/firms that offer the services. Whereas all respondents were familiar with pro bono services, 90% of the respondents had knowledge of the existing legal framework for their provision in Kenya. In spite of awareness of pro bono practice, in law firms and CSOs, there are pertinent challenges when it comes to delivering on the promise of pro bono. Respondents identified the following challenges the Kenyan pro bono ecosystem faces:

- Knowledge gap and mismatched expectations between clients and pro bono advocates at corporate law firms.
- Extreme reliance on donor funding for CSOs working to bridge the access to justice gap.

It was a general perception that lawyers operated as “one-man” isolated units, which hindered impactful output on respective pro bono assignments. The following collaborative measures were suggested to improve service delivery:

- Collaboration of all stakeholders to ensure large-scale implementation of pro bono initiatives.
- Mapping out and registration of advocates in every county who can offer the service.

- Introduction of a bare-minimum hours policy for advocates.
- Law firms should develop pro bono policies.

**Solutions offered by the PBIK:** From the discussion above, the PBIK as a private entity is uniquely placed as a bridge to ensure service delivery in accordance to existing legislation. Moreover, the PBIK would be a complimentary vehicle that would partner with existing government and non-government actors.

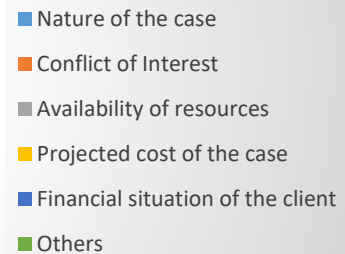
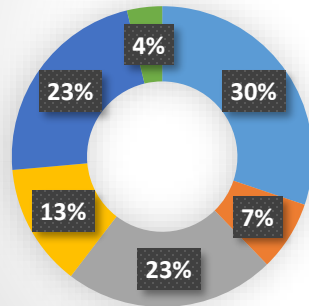
## **II. Law firms and in-house counsel as suppliers of pro bono legal services**

Survey respondents from law firms and corporations generally expressed that although they were ready to provide their services, they lacked sufficient opportunities to do so. In specific, the channels of communication in the respective organizations were unknown or communication of pro bono needs and opportunities passed on short notice. Other key findings include:

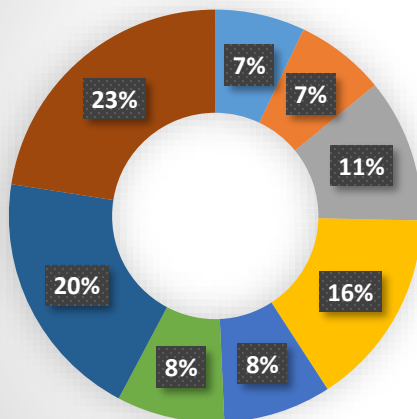
- 25% of firms had a developed and documented pro bono policy that was communicated to all employees.
- Most firms and in-house counsel did not keep a data base/record of pro bono matters.
- Firms that lacked an existing policy determined pro bono matters on a general case by case basis based on the availability of human resources, technical expertise and capacity.
- 100% of in-house counsel participated in pro bono matters in an advisory capacity and outside their standard working hours.
- 95% of the respondents supported the inclusion of in-house counsel in PBIK for purposes of industry expertise.
- 9.7% suggested that the CH should include a Swahili tag-line centered along justice **(HAKI)** and community **(JAMII)**

**Solutions offered by the PBIK:** By joining the PBIK, the members stand to benefit from case screening services and development of individualized plans to formalize their respective pro bono practices through manuals, policies and guidelines.

## Law Firm considerations when approving pro bono cases



## Areas of interest for law firms



The above findings offer several insights, including:

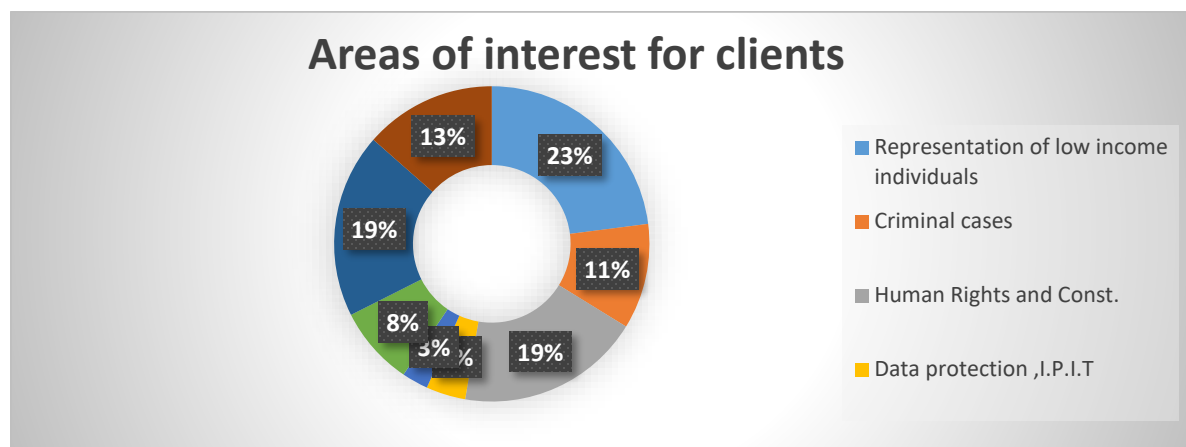
- In Kenya, pro bono legal practice is multi-dimensional and complex.** Law firms can best serve CSOs as pro bono clients by assisting them with what are seemingly complex and extenuating corporate transactions and legal proceedings. While CSOs are surely substantive experts in the various public interest fields they work on, these clients recognize that they often lack the resources or expertise to optimize their business models. This is where PBIK can make an impact: as members, the law firms in Kenya could offer pro bono legal services to CSO clients in general legal advisory, labor and employment issues, tax issues, litigation support etc.



- **The Kenyan market lacks some industry standards as a guide for law firms in pro bono practice.** A standard describing the parameters for financial considerations during pro bono client intake would greatly empower firms. PBIK will resolve this discrepancy by providing financial benchmarking with respect to prospective pro bono clients' financial resources. The benchmark will provide a fair, communally-understood requirements that CSO pro bono clients must meet in order to be considered for services. By adopting such a benchmark, law firms ensure that all mattered sourced from PBIK are bona fide pro bono clients and a good use of their resources.

### III. CSOs as clients of pro bono legal services

100% of CSO respondents had knowledge of where to find the service but deemed them inaccessible due to a perceived high cost of legal fees. Additionally, nearly half of the respondents were uncertain as to the firms that specialized in the respective areas of interest.



Other key findings included:

- Majority of the CSOs engaged paralegals for legal drafting and community mobilization activities however, they still required qualified advocates to take up brief and matters that were of a complex nature such as public interest litigation and general counsel representation in court.
- Smaller sized CSOs did not have sufficient case screening tools which led to decreased productivity of lawyers, time lost in case development and consequent delay in turnaround time.
- To promote accountability and institutionalization of pro bono schemes, monitoring and evaluation (M&E) measures were necessary.

- With regard to areas of interest for clients, the suppliers and clients are nearly matched in demand-supply for Legal Advisory services which would include drafting legal opinions and research memos. This is extremely encouraging as a first point of interaction for the stakeholders.

**Solutions offered by the PBIK:** By joining the PBIK, the CSO members equally stand to benefit from and development of individualized plans to formalize their respective pro bono practices through manuals, policies and guidelines. The uptake of the given practices would allow for acceleration of their societal impact.

## **CONCLUSION**

As evidenced above, there is good will and a responsive environment to develop a clearing house. With the establishment of the PBIK, it is crucial to ensure the governance structures are effective decision making instruments free from the encumbrance of institutional red tape. For this, most respondents recommended an Advisory Council comprising of 5-7 members that would serve on a rotational basis. In addition to this, the Advisory Council would only commission specialized Committees on a project basis.

The clearing house concept was lauded as a timely initiative that could be impactful when driven by **data-centric initiatives, member collaboration, and technology**. Moreover, the PBIK Team was tasked to spark a culture change by offering students of law a learning opportunity, inclusion of paralegals in its operations and prioritizing the devolution of PBIK services to all counties.

## **LIST OF RESPONDENTS**

### **A. Law Firms**

1. Anjarwalla & Khanna LLP
2. Ashitiva & Company Advocates
3. Bowmans
4. ENS Africa
5. Gikera & Vadgama Advocates
6. DLA Piper -IKM Advocates
7. J Oyombe and Company Advocates
8. Kaplan & Stratton
9. Kiingati Ndirangu & Associates
10. MMC Law
11. MN Legal
12. Muma & Kanjama Advocates
13. Oraro & Company Advocates
14. O&M Law LLP
15. RONN Law
16. Triple OK Law

### **B. Companies/In-House Counsel**

1. Equity Bank
2. Jamii Tele Communication
3. M-Kopa Solar
4. Microsoft
5. Synergetic Energy Partners

### **C. CSOs and Academic Institutions**

1. CLEAR Kenya
2. CREAW
3. Crime si Poa
4. FIDA Kenya
5. Hague Institute for Innovation of Law-HiiL
6. HIV/AIDS Tribunal
7. iLab Africa
8. Justice Defenders
9. Katiba Institute
10. Kituo Cha Sheria
11. Langata Legal Aid Centre
12. Lex Serve Trust
13. Refugee Consortium of Kenya
14. Africa Nazarene University Law School
15. Catholic University of Eastern Africa
16. Egerton University FOLLAP
17. Kenya Alliance for Advancement of Children (KACCR)
18. Law Society of Kenya Nairobi Branch
19. National Council on the Administration of Justice (NCAJ)
20. National Legal Aid Service
21. Wakili.sha

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