KITUO CHA SHERIA
LEGAL ADVICE CENTRE
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As we celebrate the inaugural edition of the Legal Empowerment Journal, it is with immense gratitude and humility that we extend our heartfelt appreciation to all those who have contributed to its realization. This momentous endeavour would not have been possible without the dedication, expertise, and unwavering support of numerous individuals and organizations who have generously shared their time, insights, and wisdom.

First and foremost, we extend our deepest gratitude to the authors whose invaluable contributions have enriched the pages of this journal. Your commitment to advancing legal empowerment and access to justice is evident in the thought-provoking articles and perspectives that you have shared. Your willingness to share your knowledge and experiences from across the world has enriched the discourse on legal empowerment and inspired readers around the globe.

We would also like to extend our sincere appreciation to the peer reviewers who have served as the backbone of our technical board. Your rigorous evaluation and insightful feedback have ensured the quality and integrity of the articles published in this journal. Your dedication to upholding scholarly standards and promoting excellence in legal empowerment research is truly commendable.

Additionally, we express our gratitude to the members of the advisory board who have provided guidance, expertise, and strategic direction throughout the editorial process. Your invaluable insights and support have been instrumental in shaping the vision and scope of this journal. Your commitment to promoting access to justice and empowering marginalized communities is an inspiration to us all.

At Kituo, we firmly believe that access to justice is not just a legal principle, but a fundamental human right that is essential for the realization of a just and equitable society. The Legal Empowerment Journal serves as a platform for amplifying the voices of those who are marginalized and underserved, and for advocating for systemic change that addresses the root causes of injustice and inequality.

Last but not least, we extend special gratitude to the team involved in coordination of the development and review of this publication: Dr. Annette Mbogoh, Tobias Mwadime, Felix Kipkoech, James Adala and Glory Kairi of Kituo.

In closing, we would like to express our sincere gratitude to everyone who has contributed to the success of this inaugural edition. Your support and dedication have been instrumental in bringing this vision to life, and we are truly grateful for your partnership. As we embark on this journey together, let us continue to work tirelessly towards a world where justice is accessible to all.

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Decolonising Academia and Knowledge creation: An introduction to the Legal Empowerment Journal

Dr. Annette Mbogoh[1]

It has been a long and winding road to the publication and launch of the inaugural issue of the Legal Empowerment Journal (hereinafter "the LEJ"). Nonetheless, we are proud to have surmounted the hurdles and barriers along the way thereby reaching the finish line.

The idea of developing and publishing the Journal was inspired by the urgent need to amplify the impact and voices of grassroots justice actors who work tirelessly to enhance access to justice for the most vulnerable communities across the world. These frontline defenders use innovative legal empowerment strategies to bring about transformative change within the justice ecosystem. However, these impactful stories and lessons learnt are rarely shared by legal empowerment practitioners on their own terms. As a result, the stories from the field are rarely recorded for posterity, sharing and learning. For a while now, frontline defenders and practitioners have been mostly viewed as data sources as opposed to producers of knowledge. Their rich experiences are appropriated under the guise of research; analysed and crafted into narratives coloured by prejudices and biases of "intellectuals" mostly without any form of attribution.

It is against this backdrop that the LEJ was conceptualized. The Journal seeks to address this power imbalance in knowledge building and generation. It provides a platform for legal empowerment practitioners (and academics) to reflect, theorise and document their innovations, strategies, lessons and impact at individual and collective levels. The long-term vision of the journal is to decolonize academia and reclaim knowledge creation and sharing for all and sundry. Decolonizing academia involves transforming the entire exercise of knowledge creation and exchange, so it becomes more equal. In other words, pluralising knowledge whilst bringing marginalized knowledge into the centre.2

As you will therefore note, the Legal Empowerment Journal is primarily practitioner-led; documenting voices from the field and by the field. The Advisory and Technical Boards comprised a diverse mix of seasoned legal empowerment practitioners and academics from across the globe. Additionally, the nomenclature of this compilation of authored works as "a journal" was in fact one of the ways that we recognize the plurality of knowledge generation. Through its name, Legal Empowerment Journal, reclaims the process of knowledge creation, generation, and theorising into the hands of people. As such, the journal adopts broad and flexible rules for authors who submit writing pieces by accepting different forms and styles of writing. Authors are allowed to submit opinion pieces, articles, papers, book reviews and short stories. In the inaugural issue, the submissions were only short of being multilingual. Future publications will be more inclusive and source for submissions in diverse languages.

As its theme suggests, the inaugural issue focuses on the concept of legal empowerment and connects theory to practice. The Journal also aligns to the concept and ideology of legal empowerment. The shared understanding of legal empowerment is that it involves equipping people, particularly the marginalized and vulnerable, with the knowledge and resources to understand, use and shape laws that impact on their lived realities. Legal empowerment is anchored on the power of the law to bring transformative change for the benefit of the people. It is the process of placing the

1 DPhilLaw, Master in Law, SEARCWL-UZ and LLB, UoN, Outgoing Executive Director, Kituo cha Sheria – Legal Advice Centre and Editor, Legal Empowerment Journal. The author acknowledges the contribution of Oluwatosin Adegun in the writing of this piece.

2 Bhargabi D et al (2024) Introduction: Decolonising Academia in Sage Journals Volume 32 Issue 1-2

power of the law into the hands of ordinary people. Legal empowerment is intrinsically linked to international and regional human rights frameworks. For instance, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reaffirm that everyone is equal before the law. Consequently, access to justice becomes an important pre-requisite to achieving democracy, rule of law and sustainable development. Further various declarations, principles and values have been adopted that emphasise on legal empowerment, legal aid and customary and informal justice systems and mechanisms. The role of grassroots practitioners is essential in empowering communities to access justice. Hence, the cycle of legal empowerment becomes critical in achieving justice for all.

From the contributions in this issue, we note that legal empowerment is an effective tool to enhance state accountability, inclusivity and good governance. It enables communities equipped with knowledge to challenge status quo, assert for their rights and make decision-making processes and institutions work better for them. As a result, ordinary citizens can effectively and meaningfully engage with state institutions enhancing service delivery, justice, public trust and democratic governance.

The inaugural issue attracted submissions drawn from East, West and Southern Africa including the Global North. The authored works are the original written pieces of the writers addressing theoretical and conceptual concerns related to the theme. The submissions have been clustered in line with forms and style of writing. In part A, we begin with the articles that focus on legal empowerment, community paralegals and their practice. All the contributions are succinctly captured hereunder.

James Gondi begins by walking us through the history of legal empowerment in Kenya. The introduction of legal empowerment was associated with Kituo Cha Sheria- Legal Advice Centre which was established in 1973 as the first legal aid centre in Kenya. The Centre worked with students from the Kenya School of Law and the University of Nairobi to provide legal aid to poor communities living in informal settlements seeking justice in mainly labour, housing and succession cases. Gondi details that other non-governmental organizations later joined in the legal empowerment struggle including the Kenya Human Rights Commission, Federation of Women Lawyers (FIDA Kenya) and the Legal Resources Foundation (LRF). The article identifies varied mechanisms developed in aiding access to justice including legal outreach programmes and legal aid. Gondi proceeds to highlight the strategies of legal empowerment in Kenya which include community legal clinics, paralegal training, public legal education, legal aid, advocacy for legal and policy reforms and alternative legal resolution. Specific case studies of legal empowerment in Kenya include the Huduma Legal Aid Clinics, Katiba Institute, Justice Centres, the Mombasa Legal Aid Centre, Amnesty International and Kituo Cha Sheria.

The article notes that paralegals have been pivotal in bridging the gaps between the formal and the informal justice system. However, there exist challenges in the areas of funding and operationalisation. Despite good constitutional and legislative framework on access to justice which includes Articles 48 and 50(g) of the Kenyan Constitution of 2010, and the Legal Aid Act of 2016, Gondi asserts that inadequate resources, overlapping of functions and lack of implementation among other factors still pose serious challenges. He recommends operationalizing the spirit and functions of the Kenyan Legal Aid Act, strengthening the paralegal movement, the adoption of Alternative Justice Systems, raising awareness and justice sector reform among others. Finally, Gondi urges that consultation and cooperation between those who have worked on legal

empowerment for decades and the government is crucial to achieve effective legal empowerment in Kenya.

Thereafter, Abdul Tejan-Cole deep dives into contemporary challenges on state recognition of paralegalism in Africa. He interrogates state recognition of community-based paralegals and what it actually means to paralegal practice in Africa. Tejan-Cole reaffirms that community paralegals, also known as frontline defenders, play a critical role in bridging the justice gap. As the title of the article suggests, he analyses the challenges of balancing legitimacy and autonomy of community paralegals. He begins by providing a historical background of paralegals in Africa; dividing history into four eras namely, pre-colonial, colonial, mid-20th century and post-independence. In the pre-colonial period, paralegals were known as 'law speakers' or 'griots' and assumed important roles as custodians of customary law and traditions. During the colonial period, the western legal and court systems were introduced and the need to address the conflict between traditional values and the western legal system gave rise to community-based paralegals who translated legal concepts into accessible terms for the communities and bridged the gaps between the traditional legal system and the centralised justice system. The mid-20th century is the period most African countries gained independence, and the period witnessed paralegals becoming indispensable in rural communities providing basic legal information and bridging gap for those lacking access to qualified lawyers. Post-independence period witnessed the expansion of paralegal services in Africa, where government and CSOs recognised their importance and initiate programmes to train and empower paralegals.

The article notes the lack of a uniform legal definition of 'paralegals' resulting in African countries adopting diverse definitions for what constitutes 'paralegals'. Tejan-Cole draws on examples like section 1 of the Sierra Leone Legal Aid Act of 2012, section 24 of Nigeria's Legal Aid Act of 2011, and Section 2 of the Zambian Legal Aid Act of 2021. The author identifies two categories of paralegals: the conventional or formal paralegals and the community-based paralegals (CBPs). The conventional or formal paralegals work within the structured legal system in law firms, courts, and other requisite organisations under the supervision of lawyers. These are formally recognised in laws of some African countries like the Ugandan Advocates (Legal Aid to Indigent Persons) Regulations of 2007. The CBPs on the other hand, operate directly within communities serving as volunteers, they offer legal empowerment and justice services within their communities with their unique training and grassroots approach. The difference between conventional or formal paralegals and CBPs lies in their role and primary focus on community service rather than lawyerly assistance, as well as the level and nature of their training. Tejan-Cole posits that CBPs play pivotal roles which include aiding access to justice especially for the poor, marginalised and the vulnerable, legal literacy, job creation and economic development.

Despite this binary classification of paralegals, Tejan-Cole attributes the lack of a uniform definition to the inconsistencies in the scope of practice for paralegals across different countries and organisations, difficulty for paralegals to operate effectively, the possibility of causing confusion for communities seeking legal assistance and the challenges in establishing training and minimum qualifications requirements.

On State recognition, the article argues that State recognition of CBPs has its advantages including that it bestows legitimacy, thereby facilitating access to comprehensive training, essential resources and creates avenues for development; protects against harassment and intimidation, thereby empowering CBPs to serve communities within formal legal settings. There are however potential

challenges of State recognition which include government oversight and control that often than not may lead to bureaucratic red tape and administrative encumbrances which could impede the flexibility and innovation that characterise CBPs. Also, government recognition may incur higher costs for both paralegals and communities, especially that it has the potential to exclude some groups from the benefits of formal recognition.

Tejan-Cole makes an important observation especially for legal empowerment practitioners. He urges that when advocating for State recognition, a supportive, inclusive, and flexible approach of recognition should be advocated, which is achieved by guaranteeing that CBPs receive the requisite support, resources, and training while at the same time preserving their autonomous and effectiveness in providing legal assistance that is customised to the needs of specific communities. Using the examples from Kenya, Zambia, Tanzania, Nigeria and Sierra Leone, the article establishes that there are legislative provisions that regulate paralegals, and that the appropriate approach in striking a balance between legitimacy and autonomy is self-regulation by the CBPs and the communities with some form of limited State oversight. He however does not describe the scope of limited State oversight and how it would be manifested. Thus, standard regulation, access to funding, collaboration, standardised training, complaint mechanism among others are recommended to achieve efficient paralegal services in Africa. The article also recommends that the social, cultural, and legal context of each country's needs be considered in developing an effective strategy for effective paralegal services especially at the community level. Finally, the author posits that there is need for collaboration among countries in Africa and beyond to develop a guiding framework for paralegals that reflects diverse contexts and needs of African countries.

Still focusing on paralegal services, Stanley Ibe problematizes the longstanding struggle between lawyers and paralegals in Africa. On mainstreaming paralegal services for the marginalized, the title of his article poses compelling question: Might lawyers take a lead? He begins by pointing out that 84% of poor people in Africa live in rural areas where access to justice institutions is limited, and the number of the population needing legal services far outweighs the number of lawyers. Ibe argues that paralegals are thus essential in bridging this gap. Paralegals have often bridged the information gap for millions of poor people who would otherwise be left behind. They provide legal empowerment and advice services. They also help poor and disempowered people navigate the often-difficult terrain of public service delivery. In the field of criminal justice, paralegals connect arrested persons with their families and lawyers. They also help identify detainees entitled to bail and advise them about accessing and processing bail, including connecting with sureties where necessary. They may also take steps – together with other like-minded individuals and groups to challenge systemic societal problems such as marginalization of poor and disempowered individuals.

However, the article notes that there exists conflict between lawyers and paralegals as lawyers have raised the concern that paralegals impersonate lawyers and abuse their services. The article therefore posits that one way of addressing this challenge is through recognition and regulation backed by information dissemination. According to Ibe, in states without legal recognition and regulation for paralegals, lawyers and bar associations must play an active role in formulating appropriate laws and standards. The bar associations can later work with paralegals/paralegal organizations to disseminate this information to communities so they can understand the contours and limits of paralegal services. Paralegals and paralegal organizations also have a role in designing appropriate disciplinary mechanisms for members who do not comply with set standards.

Ibe recommends separate systems – for lawyers, law clinics and paralegals – so long as they

connect with one another and prioritize solving the problems of the poor and powerless in the communities. Lawyers and bar associations should do more to advance the cause of paralegals by engaging with paralegals on topics such as regulation, information sharing and exchange, mutual learning and understanding, data gathering and exchange, outreach, and communications. They should also consider providing pro bono services in support of paralegals handling cases, and one way to begin the process of engagement is to place paralegals on the agenda of annual bar conferences for state, sub-regional and regional bar associations. Legal empowerment of the poor should be prioritised, and there should be collaboration between paralegals, lawyers, and other stakeholders in the legal ecosystem.

Thereafter, the contributions focus on specific access to justice areas i.e. empowerment and integration of refugees and private prosecutions as a tool to enhance access to criminal justice. To begin with, Gordon Ogutu addresses the impact of legal and policy restrictions on refugees in Kenya. His argument is founded on the 1951 UN Refugee Convention, its Protocol of 1967, the 1969 OAU Convention on Refugees and Kenya's Refugee Act of 2021. Ogutu analyses the extent of legal protection for refugees provided in the repealed Refugee Act 2006. He notes that the repealed Act was inadequate because of the encampment provisions that confined refugees to designated areas. These camps were farther from urban areas where refugees could easily engage in socio-economic activities and thereby integrate more effectively in their country of asylum. The article noted that the location of the refugee camps in Kenya is a testament of Kenya's intentions to keep refugees away from the general population and in a position where they can only be passive recipients of humanitarian aid.

Ogutu argues that refugee management in Kenya prioritised security concerns over adequate protection and integration of refugees. He proceeds to highlight the developments provided in the Refugee Act 2021 which may potentially expand socio-economic opportunities for refugees hosted in Kenya. Ogutu argues that the 2021 Act recognizes the benefits of socio-economic integration of refugees for the country and host communities for the growth and development of the host communities and the country. That notwithstanding, he feared that the Refugee Act of 2021 was still highly influenced by the perception of refugees as a security concern. It contained provisions that would make it possible for government agencies to violate the rights of refugees and asylum seekers contrary to the 1951 Refugee Convention. For example, section 4 (d) of the Refugee Act of 2021 states that the government would not recognize refugees deemed to threaten national security. At the same time, section 29 (2) of the Act also authorised the denial of entry to a refugee or asylum seeker for security reasons. Further, section 19 (1) permitted the Cabinet Secretary for Interior and Coordination of National Government to expel any refugee from Kenya on national security and public order, which is against the principle of non-refoulement as enshrined in the 1951 Refugee Convention.

In addition, the Refugee Act of 2021 does not guarantee the right to work and freedom of movement to the refugees for the purpose of promoting their socio-economic rights and participation in the local and national economies. Instead, it focuses on clarifying the roles of various institutions involved in refugee affairs and is vague on how the country will work towards the realisation of durable solutions. As such, the Refugee Act of 2021 relates to the national government's view that refugee policy should carefully manage humanitarian concerns with security concerns. On integration, the 2021 Act does not highlight any strategies to promote peaceful coexistence and cohesion between refugees and hosts communities besides a mention in section 34(2) of the need to promote awareness amongst host communities on refugees.

Ogutu therefore recommends that any policy developed to promote inclusion and social cohesion amongst refugees and host communities must address the present needs of refugees and the historical marginalisation and exclusion of the host communities in the Northern corridor in Kenya. Refugees, host communities, and civil society groups advocating for the protection of refugee rights also have a role in challenging the restrictions and realizing legal empowerment.

Still on Kenya, Calvin Odull discusses the place of private prosecution in enhancing access to justice. Odull notes that the primary prosecutorial power lies in the Office of the Director of Public Prosecution (ODPP) pursuant to article 157 of the Kenyan Constitution of 2010, and the Office of the Director of Public Prosecutions Act of 2013. Any prosecution commenced by a person not an agent of the government amounts to private prosecution. Private prosecution should be hailed as a constitutional safeguard against impartiality and indolence on the part of the prosecutor as held in the case of Kimani -vs- Kahara. The right to private prosecution can be harnessed to serve as an accountability mechanism over State's discretion and monopoly to prosecute criminal cases in Kenya. Though there is no express provision for private prosecution in the Kenyan Constitution, it is implied in articles 22, 157(6) and 258. Odull identifies factors that have inhibited the use of private prosecution in Kenya which include the lack of resources, lack of awareness and a weak legal framework without clear procedures. The article recommends civil society organisations should play pivotal roles in providing resources and raising awareness for effective use of private prosecution in Kenya.

In Part B of the Journal, we focus on case studies, reflection pieces and short success stories from practitioners. We begin with a success story from Mozambique on the power of legal empowerment. Morgan Hargrave and Eduardo Malo share a case study from Mozambique on how legal empowerment was critical in the realization of the right to healthcare. They begin by providing a context on the health care system in Mozambique and the difficulties in the actualization of the right to health. They attribute this situation to lack of information, poor enforcement and power dynamics, poor health facilities, incidents of violations of privacy in health care facilities and corruption. They point out the successes they have achieved in promoting the realization of the right to health through the platform of Village Health Committees (VHCs). These VHCs have been involved in systems change advocacy and seeking remedies for individual cases. VHCs comprise members who join for varied reasons including to learn about public health and local institutions, build their skills and confidence in engaging with others and assist others while improving essential services for their community. Those who have effectively worked with VHCs are defensors who lead quarterly participatory health facility assessments and then analyse the root causes of problems alongside facility staff and patients, agree on strategy and commit to actions within certain timelines. Other roles of defensors in VHCs include enhancing community empowerment, building and sustaining buy-in from public health authorities, and ensuring both VHCs and the duty bearers in the health system develop their ability to understand and work with each other. Hargrave and Malo point out that VHCs are still self-funded, and to maximize their potential in bringing positive change, there is need for more training, oversight, engagement, and strategic alignment with the Ministry of Health. Consequently, they recommend that the Ministry of Health needs to invest in VHCs at the level that matches their significant impact, and VHCs should have more influence on policymaking at higher level.

The next impact story is on opportunities for legal empowerment in climate action. Evans Muswahili Ladema begins by highlighting the impact of climate change on human rights especially the right to food security, right to health, employment and cultural identity. He points out that article 42 of the Kenyan Constitution 2010 guarantees the right to healthy environment for present and

future generations. Article 69 of the Constitution outlines the obligations of the State in respect of the environment and the measures the State shall undertake in protecting and conserving the environment. Article 69 (2) of the Constitution obligates every person to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In enforcing environmental rights, article 70 (1) of the Constitution provides that one may apply to court for redress if the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed, or threatened. This gives every Kenyan access to a court of law to seek redress in environmental matter. Muswahili points out the pivotal role of paralegals in achieving environmental justice using the examples of how paralegals used advocacy and community mobilization to stop environmental violations in County Government of Vihiga. The article then identifies the need to train and fund paralegals in order for them to enhance their environmental justice work. Muswahili recommends opening of global spaces and platforms for grassroots justice actors to participate and contribute to the global climate change discourse. He draws from his own experience engaging in several COPs to share best practices and challenges facing community paralegals in Kenya and Africa as a whole.

Antony Njenga writes on the role of community paralegals in broadening pathways for justice. He defines a community paralegal as a person who the community knows and recognizes for dedication to and participation in community affairs; a mobilizer, a trusted adviser, and a mediator. Besides the well-known role of assisting in access to justice for arrested persons at police stations and walking accused persons to court, a very important but least visible role of a community paralegal is that of the community resource person in literally all matters involving his/her community.

Njenga asserts that community paralegals play a very important role in raising community awareness of rights through civic education and offer impromptu lectures in Chief meetings (barazas), community policing (Nyumba Kumi) meetings and neighbourhood associations. They play a very pivotal role in raising awareness and compliance with the Constitution and laws. The article noted how COVID-19 caused the digitization of public and private services in Kenya, and that digitization has resulted in exclusion and marginalization of some communities who do not have resources to aid access to technology. The article emphasised the importance of community paralegals as they are familiar with the communities they operate and have all requisite information about ongoings in their communities.

Finally, Part B ends with a piece from Serah Okumu on linking theory to practice from the perspective of an in-house counsel within the public sector. According to Okumu, theory and practice are inter-dependent, and the applicability of a particular law must bridge the gap between theory and practice at every given moment for there to be effective discharge of legal roles. The article notes that an in-house counsel's advantage over other C-suite members lies in his or her ability to link theory to practice in aspects beyond the general duties and responsibilities assigned. An in-house counsel ought to have the ability to review in detail the theoretical genesis of various legislative provisions, which provides an opportunity to understand its rationale and ultimately aids in enhanced service delivery to the organisation. Thus, the secret to the success of in-house counsels lies in his or her ability to delve into the essence of the theory behind the laws in which the legal provisions he/she applies emanate. Due to the nature of the retainer of the in-house counsel, he/she has the benefit of time to appreciate and understand the theory behind the practice by constantly interacting with different operational departments of the organisation. Okumu's piece omits the opportunities presented by in-house counsel working in legal empowerment organizations. These in-house counsel can play a critical role in challenging exclusionary norms

and practices within traditional legal practice that tend to discredit the work of community-based paralegals.

We sincerely appreciate the members of the Advisory and Technical Boards who took time to share feedback and review the contributions in this inaugural issue. Further, we are grateful to all the contributors and authors who submitted their written works for publication. Through this inaugural issue of the Legal Empowerment Journal, we believe that the collective experiences and practical experiences documented will foster learning, sharing and transformative change within our communities. More importantly, that we are closer to fulfilling the vision of the Journal of decolonising academia and knowledge creation in favour of the marginalized.

PART A

A history of legal empowerment in Kenya – Evolution and Way forward

James Gondi *

Introduction

This article draws upon research undertaken by Kituo Cha Sheria, (the Legal Empowerment Centre) that has been operating since the 1970s on the history and way forward for legal empowerment in the Kenyan context, drawing upon a literature review, focus group discussions with the founders, paralegals working in the field across the country and key informant interviews. It will outline some of the work Kituo has undertaken, the experience of its paralegals and through the last fifty years and place this in the broader Kenyan context to suggest ways to move forward with legal empowerment for indigent peoples in Kenya.

[1]Historical context.

Kituo Cha Sheria was formed in 1973 in the wake of independence from the colonial state in 1963 and the beginning of the opening up of the legal profession away from its colonial white-only membership with the entry of its first cadre of Kenyan lawyers. Prior to this, the Kenyan state had inherited a colonial system that placed an emphasis on legal exclusion of the African population, a system that even after independence continued to discriminate against native professionals in the legal system compounded by the fact that the ' colonial laws were neither repealed nor amended to consider the rights of natives…in addition illiteracy and lack of knowledge on the laws put many Kenyans at a disadvantage,' [2] a situation that arguably persists today. As argued by Moy, pre-independence regulations excluded Africans from the legal system and were fearful of the influence of indigenous lawyers and therefore created a dual structure that meant that the Law Society of Kenya lawyers did not interact with ordinary Kenyans, who were dealt with through Baraza's and it was only after independence that the first indigenous lawyers began to join the LSK. [3]

Kituo was formed by a group of lawyers only two years after the formation of the faculty of law at the University of Nairobi, who sought to provide legal aid and empowerment to indigent peoples, an aim that has remained central to its work up to date. According to the founders these early days where characterized by a spirit of volunteerism and community service from lawyers who would later in life become leading figures in the legal profession in Kenya such as former Chief Justice Willy Mutunga. As Mbogoh states, in 1960 a committee was established on legal education in Africa whose recommendations created the legal education programs for African students and in 1973 from the university of Nairobi the first legal aid organization Kituo Cha Mashauri renamed to Kituo Cha Sheria.[4]

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* James Gondi is an Advocate of the High Court of Kenya and an expert in research and technical assistance in governance, conflict analysis, constitutionalism, rule of law, and development work at the management level.

1 Moy, H.. (2018). Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism. 10.1017/9781316671801.005.

2 Mbogoh A (2021) Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

3 Marcos A Access to Justice and the Right to legal aid: A comparative analysis of Kenya and the United Kingdom (England and Wales) P30

4 LRF (2020) The State of Legal Aid in Nairobi County in 2020 Available at https://www.lrf-kenya.or.ke/wp-content/uploads/2021/07/State-of-Legal-Aid-Booklet.pdf

The founders of Kituo were lawyers working with well-known large white law firms at the time and sought to give back to society. This meant that these lawyers were financially stable and did not rely on the provision of legal aid as a means of income, this financial question would later become a challenge for paralegals working in the community as many are not sponsored. The lawyers worked in various locations in town including community centers every evening where they would provide services to walk ins. This grew as they sought to recruit students from the Kenya School of Law (KSL) and University of Nairobi (UON) law school to accompany them and provide legal aid to the community. Scholars have noted the important contribution of this early work for which Kituo 'deserve much credit for initiating and developing legal aid projects in Kenya as early as the 1970s.'[5] Kituo is credited with being the first legal aid center in Kenya.

They were at times able to provide transport or stipends to assist the students in their work. These young legal professionals provided advice, draft pleadings and directed helpless litigants.[6] These lawyers would also process pro bono cases in their offices with several very active and conscientious lawyers- a practice which is not as common today due to a variety of factors to be discussed later in the paper. The founders note that even in the early days it was a contentious decision to join the organization as better financial remuneration could be obtained elsewhere with the same legal skills. They contend that this still remains a problem.

The push for legal empowerment went hand in hand with the fight for democracy. As noted by Storgaard when addressing the justice gap this is a question of rights, particularly for indigent peoples which can bring legal empowerment and democratic freedoms to overlap. As he states this question,

"About whether some lack access to justice… is meeting the need for access to justice merely a question of improving the delivery structure by for instance enhancing legal aid facilities or is it first of all necessary to increase the democratic capacity and incite participation in the public by for instance empowering the general ability to understand and defend one's own legal rights"[7]

This is certainly in line with the evolution of state support for legal aid in Kenya which received a boost as the reform agenda including the passage of the new constitution and judicial reform were accompanied by advances in legal empowerment programs. The Asian Development Bank speaking on best practices notes that 'legal empowerment is most effective when…civil society organizations work in cooperation with government agencies and officials in public private partnership'[8]

The legal fraternity in Kenya had remained outside of politics through independence and the rule of Kenyatta and the early years of the reign of President Moi despite widespread human rights abuses in part to avoid being labelled as disloyal to the government, but this changed in the wake of the crackdown on democratic freedoms following the failed 1982 coup. As these measures

5 Storgaard (2002) Access to justice research on the way to a broader perspective OÑATI SOCIO-LEGAL SERIES, FORTHCOMING: ACCESS TO JUSTICE FROM A MULTI-DISCIPLINARY AND SOCIO-LEGAL PERSPECTIVE: BARRIERS AND FACILITATORS IN EUROPEAN CONTEXTS
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1352

6 Asian Development Bank (2009) Good practices guide for incorporating legal empowerment into development programs Available at https://www.advicenow.org.uk/sites/default/files/uploads/2013/04/asian-development-bank-good-practice-guide-2009-306.pdf

7 Moy, H.. (2018). Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism. 10.1017/9781316671801.005.

8 Mbogoh A (2021) Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

came into place,

"a pattern of open solidarity began to emerge among activist lawyers and sympathetic LSK members. Members of the legal profession began founding or allying with various human rights organizations. Their efforts ultimately fed into a broader popular movement for democracy. Without formal political organizations to counterbalance the Moi Regime, the resulting web of non-state actors served as some of the few opposition voices during the 1980s – and they drew heavily on legal tactics to achieve their aims"[9]

As argued by Mbogoh, legal aid through paralegalism was formed in community-based structures and informal spaces because of the control and lack of space provided at the formal level by repressive regimes that did not allow for freedoms. Thus paralegalism empowered communities in restricted regimes to articulate their interests and has a focus on human rights ethos in these circumstances. Many NGOs came up in the 1990s though the provision of legal aid and empowerment that paid significant roles in the fight for democracy in Kenya including Kenya Human Rights Commission (KHRC), Legal Resources Foundation (LRF), the Centre for Legal Education and Aid Networks (CLEAN), the Widows and Orphans Welfare Society of Kenya (WOWEK), the Education Centre for Women in Democracy (ECWD) and CRADLE (the Children's Foundation). Key lessons learned during this time by Kituo include:

- Legal aid does not operate in a vacuum, the political and economic context is important and can influence success
- The involvement of students and volunteers is key to engaging in legal aid and maintain the community spirit that characterized the early years
- It is necessary to recognize and engage with a broader set of skills than merely legal aid including advocacy, lobbying, use of the media and others to achieve success
- The methodology of delivery and content of legal education is important. These must be done in a manner that is suitable for the audience such as adult learning and contextually relevant to the challenges that are being faced by the recipient.

Bearing in mind the situation in Kenya, this created the socially and politically conscious lawyer who played a key role in democratic and human rights-based reform in the country to date. It is important to note that:

- prominent lawyers would play a significant role in the push for multi-party democracy and reform;
- that the current structure of Kenyan civil society engaged in democratic reforms has a large number of lawyers;
- that key movements such as the repeal of Section 2A of the Constitution thereby making Kenya a multiparty state and the passage of the new Constitution in 2010 are legalistic in nature;
- Judicial reform has been key in upholding democratic provisions and protecting human

9 LRF (2020) The State of Legal Aid in Nairobi County in 2020 Available at https://www.lrf-kenya.or.ke/wp-content/uploads/2021/07/State-of-Legal-Aid-Booklet.pdf

rights as the organ is no longer seen as a tool of the executive and has been used for various Public Interest Litigation cases including most recently opposition to proposed changes under the Building Bridges Initiative (BBI) that were deemed unconstitutional.

Thus, this legal aid was provided in a political and social environment of repression of human and civil rights where the rights of the people, especially the indigent ones were repressed – this in combination with work in the community setting led to collaborations with civil society some of whom were also providing legal aid and support at the community level. The legal aid movement thus became intertwined with the struggle for democracy at points in its history. Data from focus group discussions highlights that Kituo came together with the Public Law Institute and International Commission of Jurists and others when their interests aligned to play a key role in fighting for the rights of the disadvantaged. In the 1990's this group of CSOs more broadly focusing on access to justice grew encompassing some of the most prominent ones in the country such as International Federation of Women Lawyers (FIDA), Public Law Institute (PLI), the Law Society of Kenya, International Commission of Jurists-Kenya section(ICJ-K), Children Legal Action Network, Christian Legal Education And Research, the Independent Medico-Legal Unit, Legal Resources Foundation, Coalition on Violence Against Women, Center for Human Rights and Awareness, The Cradle Foundation, Catholic Justice and Peace Commission and Muslims for Human Rights[10].

Scholars have noted that in Kenya as the judiciary was not viewed as impartial or independent in previous regimes paralegal interventions were used to resolve disputes in much the same way as 'mob (in)justice, traditional dispute resolution mechanisms, demonstrations, mass action' showing the relevance of this approach in the fight for democracy[11] Indeed following the space granted during the start of the multiparty era, Kituo actively participated in civic education and outreach programs for voting rights, launching an extensive information campaign, issuing booklets, posters, and video- and audiocassettes that played on matatus.[12]

However, it is key to note that Kituo recognized the overlap with human rights but remained focused on legal aid. As per an organizational study on Kituo the early days were mostly used to deal with indigent persons,

"These groups (the marginalised) were vulnerable to several rights violations ranging from exorbitant increase in house rent by landlords, evictions from their slum dwelling place to poor conditions of work in their workplaces. Majority of these people worked as domestic workers in the upmarket residential areas or cheap manual labourers in the industrial market. Many times (sic) their salaries were withheld for no apparent reason, received dismissals on no notice, and lost their residential places to private developers who in most cases grabbed public land where their shanties stood."[13]

Another sign of the expansion of the work of Kituo in the 80s and 90s was the recruitment

10 Amondi Caroline (2014) Legal Aid in Kenya Building a Fort for Wanjiku in Jill Ghai and Yash Ghai eds (2014) The legal profession and the new constitutional order in Kenya pp 201-220 KAS Available at https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038

11 J.W Waruhiu and JJ Otieno (2014) Access to Justice – The paralegal approach pp185-200 in Jill Ghai and Yash Ghai eds (2014) The legal profession and the new constitutional order in Kenya pp 201-220 KAS Available at https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038

12 Moy, H.. (2018). Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism. 10.1017/9781316671801.005.

13 Ripoca Project (2010) Organizational Study Kituo Cha Sheria Available at https://www.jus.uio.no/smr/english/research/projects/ripoca/workshop-april-2010/Kenya_Org_study_Kituo_cha_Sharia.pdf

of staff without legal traditions to handle other tasks and from the founders meeting to apply non-legal knowledge to their community-based legal aid programs. A specialist on participatory methodology and adult learning in the development sector joined the team partly in response to concerns that students were concerned that the teaching was not relevant to their work and had too much of an exam-focused approach. Rather they wanted to know what was relevant to them, their context and how to apply this knowledge. The purpose of this approach was to determine the best way for legal education including awareness on legal and human rights – and for this to be delivered in a participatory method.

Kituo was already active in the informal settlements at this point for example in Korogocho teaching citizens about their rights and having law students brought by Kituo carry out this process. Following this education on rights was given in the context of empowerment of citizens to achieve these rights. A booklet entitled Haki Yetu was published and became so well known that the police would let those who carried the booklet free if they were arrested or detained. This built on earlier knowledge when a booklet produced by Kituo was met with skepticism in Korogocho as questions arose about its utility, this booklet would not help them and they requested a smaller sized booklet that could easily be carried in their wallet. These were so successful they were printed in multiple languages. This formed the foundation of what would later become the outreach program. It was at this stage that Kituo began shifting from simply a legal aid organization to more of a human rights organization.

A story provided by the founders demonstrated the intersection of legal rights and advocacy in the case of Toi market. The market has been used by informal traders to sell their wares but was on a piece of land that they did not own – however the absentee landlord went to court and sought to evict the traders. On a purely legal basis they had no legal grounds to protect themselves and indeed lost the case in court and eviction was ordered. Kituo however was concerned with the issue of livelihoods that would be affected by the closing of the market. Kituo chose to highlight the issue in the press showing the impact of the rights of the one versus the many holding that although the eviction was correct in law it was not correct from a human rights perspective. As narrated by one of the local community organisers at the time,

"What happened [at Toi] at that time: we were taken to court. So, we lost the case, but what happened: we had hired two 25-seater matatus, and people were waiting for us in the market, for news – so we just turned the story, and we went back to the market saying that we won. But we had actually lost the case. Meanwhile, there was an adjacent market which was constructed to host the Toi market traders, so that these people could be comfortable getting their land. So, when the chief was still allocating [the new market], we went back to [Toi] market – singing, dancing – and we reconstructed the [Toi] stalls, and we have been there ever since. Toi market has been there ever since. So those were the early days – we just ignored [them], we couldn't prove we had a right because they just said this is private property; it was very clear this is private land."[14]

Effectively this was won through advocacy and public opinion despite the loss of the court case. At the time of writing the market remains in place. It is key to note that government programs that have come into place with the advent of reforms are shaped by the existing paralegal and legal aid system put in place by civil society particularly Kituo since the 1970s, indeed civil society has advocated for and worked to create the current legal aid structure. In order to appreciate this, it is important to look at the work of paralegals and the challenges impacting access to justice.

14 Joseph Muturi (2016) Muungano Available at https://www.muungano.net/historytranscripts/joseph-muturi

Legal empowerment

Before we explore legal empowerment, it is important to understand the challenges faced by the justice sector in Kenya:

The justice system in Kenya faces several challenges that affect its ability to deliver justice efficiently and effectively. Some of these challenges include:

- Delays in the resolution of cases: The backlog of cases in the courts is a major challenge in Kenya's justice system. Some cases take years to be resolved, leading to frustration among litigants and undermining public confidence in the justice system.

- Limited access to justice: Many Kenyans, particularly the poor and marginalized, have limited access to justice due to factors such as poverty, lack of legal knowledge, and limited availability of legal aid services. This has resulted in a justice system that is inaccessible to many.

- Corruption: Corruption remains a major challenge in Kenya's justice system. This includes judicial corruption, where some judicial officers have been accused of taking bribes to influence the outcome of cases, as well as administrative corruption, where court officials demand bribes to expedite cases.

- Insufficient resources: The justice system in Kenya is under-resourced, with courts lacking the necessary infrastructure, technology, and personnel to handle the volume of cases effectively.

- Limited use of alternative dispute resolution mechanisms: Alternative dispute resolution mechanisms such as mediation and arbitration are not widely used in Kenya, limiting the options available to litigants and contributing to the backlog of cases in the courts.

- Limited public trust and confidence: Public trust and confidence in the justice system in Kenya is low, with many people viewing it as corrupt, slow, and ineffective.

The lack of access to justice for the poor and marginalized in Kenya has significant social, economic, and political impacts. Here are some of the key impacts:

- Endemic Violation of human rights: The poor and marginalized in Kenya are often unable to access the justice system to protect their human rights. This can result in violations of rights such as the right to a fair trial, freedom from discrimination, and the right to life and security of person;

- Entrenchment of poverty: The poor and marginalized in Kenya are often unable to access legal services or enforce their legal rights, leading to a cycle of poverty. For example, without access to legal services, poor individuals may be unable to obtain title to land or obtain compensation for labor, making it difficult for them to improve their economic circumstances;

- Endless Impunity: The lack of access to justice can create a culture of impunity, where those who commit crimes or violate rights are able to do so without consequence. This can erode public trust in the justice system and the rule of law.

- Perpetual Marginalization: Limited access to justice can further marginalize already

marginalized populations, such as women, persons with disabilities, and ethnic and religious minorities. This can perpetuate social inequalities and exclusion;

- Propagation of Conflict: The lack of access to justice can contribute to conflicts between individuals and communities, as disputes are often left unresolved. This can lead to increased tensions and even violence.

Efforts to increase access to justice for the poor and marginalized in Kenya are essential to addressing these impacts and promoting human rights, social inclusion, and economic development.

Legal empowerment programs are initiatives that aim to empower individuals and communities, particularly the poor and marginalized, by increasing their access to justice and legal services. These programs seek to address the barriers that prevent individuals and communities from accessing justice, such as lack of legal knowledge, discrimination, and socio-economic marginalization. Legal empowerment programs aim to promote legal awareness, education, and capacity-building, as well as provide legal aid and support to those in need.

Legal empowerment programs can take many forms, including community legal clinics, paralegal training, public legal education campaigns, and advocacy for legal and policy reforms. These programs can be led by non-governmental organizations, community-based organizations, or government agencies. The ultimate goal of legal empowerment programs is to enable individuals and communities to exercise their legal rights, access legal services, and participate in the decision-making processes that affect their lives.

Legal empowerment programs recognize that access to justice is not only a matter of formal legal processes but also involves addressing the social, economic, and political factors that create inequality and marginalization. These programs seek to build the capacity of individuals and communities to identify legal issues, advocate for their rights, and engage in social and political processes that affect their lives. Legal empowerment programs are based on the belief that empowering individuals and communities to exercise their legal rights is a key factor in promoting social and economic justice and building more inclusive societies.

Legal empowerment programs in Kenya are supported by a range of legal frameworks and policies. These include:

- The Constitution of Kenya, 2010: The Constitution of Kenya recognizes the right of all persons to access justice and promotes the protection of human rights. It also provides for the establishment of legal aid and alternative dispute-resolution mechanisms to increase access to justice for all. There is also a provision for alternative justice in section 159 of the Constitution;

- The Legal Aid Act, 2016: This Act provides for the establishment of legal aid service providers to offer legal aid services to indigent persons who cannot afford legal representation;

- The National Legal Aid Policy, 2016: The National Legal Aid Policy provides a framework for the provision of legal aid services in Kenya. It seeks to ensure that legal aid services are accessible, affordable, and effective for all;

- The Community Land Act, 2016: This Act provides for the recognition and protection of community land rights in Kenya. It also establishes mechanisms for resolving land disputes

through alternative dispute resolution mechanisms;

- The Access to Information Act, 2016: This Act promotes the right to access information held by public entities. It provides for the establishment of an independent commission to oversee the implementation of the Act;

- The Children Act, 2001: The Children Act provides for the protection of children's rights in Kenya. It also establishes mechanisms for resolving disputes involving children through alternative dispute resolution mechanisms;

- The Legal Education Act, 2012: This Act provides for the establishment of the Council of Legal Education to oversee legal education in Kenya. It seeks to ensure that lawyers and other legal professionals are properly trained and qualified to provide legal services.

These legal frameworks and policies provide a supportive environment for legal empowerment programs in Kenya. They promote access to justice, protect human rights, and establish mechanisms for resolving legal disputes through alternative dispute resolution mechanisms.

Kenya has a range of legal empowerment programs aimed at increasing access to justice for the poor and marginalized. Some of the different types of legal empowerment programs in Kenya include:

- Community Legal Clinics: These are community-based organizations that offer legal advice and assistance to individuals who cannot afford the services of a lawyer. These clinics are often staffed by volunteer lawyers, law students, or paralegals;

- Paralegal Training: Paralegals are trained to provide legal advice, assistance, and representation to individuals who cannot afford a lawyer. Paralegal training programs in Kenya provide training on basic legal principles, legal research and writing, and advocacy skills;

- Public Legal Education: Public legal education programs aim to educate individuals and communities about their legal rights and responsibilities. These programs provide information on legal processes, court procedures, and available legal services;

- Legal Aid: Legal aid programs provide free or low-cost legal services to individuals who cannot afford a lawyer. These programs may include legal representation, mediation, and other forms of legal assistance;

- Advocacy for Legal and Policy Reforms: Legal empowerment programs in Kenya often advocate for legal and policy reforms that can increase access to justice and promote human rights. These programs may involve lobbying, media campaigns, and other forms of advocacy to raise awareness about legal issues and promote legal and policy change;

- Alternative Dispute Resolution: Alternative dispute resolution programs provide alternative methods for resolving legal disputes, such as mediation or arbitration. These programs can be more accessible and cost-effective than traditional court processes.

The legal system of Kenya is complicated and consists of both formal and informal justice systems. Courts, tribunals, and other legal entities created by legislation make up the formal justice system. Regardless of how sensitive or urgent a case is, the conventional justice system has a reputation

for being too expensive and taking too long to resolve them. The informal judicial system, on the other hand, comprises of religious courts, community-based dispute resolution procedures, and customary courts[15]. These are viewed as being economical, effective, and dependent on mediation and mutual consent to settle conflicts in the communities[16]. Despite the existence of the formal and the informal justice systems, systems, marginalized and poor communities frequently often lack timely access to either. This might be explained by the justice systems' systemic accessibility and availability challenges, including the inherent occasions of giving unfair - either by process or by substance- outcomes.

In a 2017 perception survey on justice satisfaction carried out by Hill 63% of respondents were found to have legal problems in the last four years and 81% have taken active steps to resolve these problems, and of these dispute resolution providers were considered most helpful. [17] UNODC undertook a survey in select community centers that asked about whether paralegals and lawyers participation in Alternative Justice processes which found that lawyers were rejected because they were associated with increased costs and complicated procedures but this was in contrast to paralegals whose presence in local communities made them acceptable, spoke local languages and wont 'tell lies' like lawyers, thus enabling them to provide assistance consistent with Article 49 of the Constitution which allows a person to be represented by any person whose assistance is necessary[18]. This has also been evident to people living with HIV and AIDS, who even reported abuse from their partners upon disclosure of their HIV status[19]. They were reported to be intimidated by the formal justice network, and would often choose to escalate their matters to the village elders.

As a result, legal empowerment programs are now essential in Kenya in order to close the gap between the formal and informal judicial systems and offer legal aid to underprivileged and marginalized groups. Legal empowerment programs help marginalized groups receive legal assistance and understand their legal rights[20]. These initiatives support the development of community-based paralegal services, legal education, and community members' capacity for accessing justice[21].

The Alternative Justice System (AJS) has been the subject of government policy as a recognition of these informal networks and the benefits of legal aid. UNODC holds that AJS serves to reduce the burden on courts and strengthen the connections between formal and informal systems, it *'aims to ensure social inclusion, and is generally more affordable, participatory and more expeditious than court processes.'* [22] UNODC further notes that, there is a,

- Shortage of lawyers in the country, especially outside urban areas;

15 UN Women, UNICEF & UNDP. (n.d.) A study of informal Justice systems: Access to justice and human rights. Available at <https://www.undp.org/sites/g/files/zskgke326/files/publications/Informal-Justice-Systems-Summary.pdf>

16 ibid

17 Hill (2017) Justice needs and satisfaction in Kenya in 2017: Legal problems in Daily Life Available at https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf

18 Judiciary of Kenya (2020) Alternative Justice Systems Baseline Policy Available at https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

19 ibid

20 Anuradha Joshi, Legal Empowerment and Social Accountability: Complementary Strategies Toward Rights-based Development in Health?, World Development, Volume 99, 2017, Pages 160-172, ISSN 0305-750X, https://doi.org/10.1016/j.worlddev.2017.07.008. (https://www.sciencedirect.com/science/article/pii/S0305750X17302425)

21 ibid

22 UNODC (2023) **Partners welcome move to mainstream alternative justice systems in Kenya** https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html

- People sometimes prefer to resolve issues through the informal justice system, where legal professionals do not typically participate;
- Lack of legal empowerment and awareness among citizens, especially amongst vulnerable and marginalized segments of the population. For instance, people often do not know where to find legal assistance;
- Inadequate funding for the legal aid sector. [23]

Programs for legal empowerment are designed to strengthen marginalized and underprivileged groups' access to justice and a myriad of legal services. Legal empowerment programs have grown in importance in Kenya as a result of the poor and marginalized populations' restricted access to justice and the many legal obstacles that prohibit them from doing so. The Kenyan government has implemented a number of initiatives laws and policies aimed at improving the people's' access to justice[24]. However, these laws and policies have yet to be visibly effective in meeting the legal solutions for the underprivileged and disadvantaged groups, interviews with paralegals across the country found that land disputes were a key issue.

Legal empowerment programs have been successful in promoting access to justice for the poor and marginalized communities in Kenya. This has been anchored by Article 48 of the Constitution of Kenya 2010, which mandates the state to ensure access to justice for all Kenyans at a reasonable fee. For instance, community paralegals have been instrumental in providing legal services to communities that cannot afford the high costs of legal representation. These paralegals provide legal advice, mediate disputes, and represent clients in legal proceedings. The National Legal Aid Service exists to steward legal aid facilitation in Kenya[25].

Moreover, legal empowerment programs have played a crucial role in enhancing legal literacy among marginalized communities. Through legal education, communities have been empowered to understand their legal rights and obligations, which have enhanced their ability to seek justice. Legal empowerment programs have also facilitated access to justice by providing alternative dispute resolution mechanisms, which are more accessible and cost-effective than the formal justice system.

Legal empowerment programs aim to help individuals and communities understand and use the law to improve their lives. Kenya has several legal empowerment programs that have made significant impacts on the lives of individuals and communities. Some case studies of legal empowerment programs in Kenya include:

The Huduma Legal Aid Clinics: The Huduma Legal Aid Clinics offer free legal aid services to marginalized communities in Kenya. The program has been instrumental in helping individuals and communities access justice and protect their rights. In one case, the program helped a woman secure custody of her children after she had been unfairly denied access to them by her estranged husband.

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23 UNODC (2016) Global Study on Legal Aid Country Profiles Available at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf

24 Kalla, K. & Cohen, J. (2007). Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS–related Legal Services. Law and Health Initiative: OSI's Public Health Program. Open Society Initiative for East Africa. Available at <https://kelinkenya.org/wp-content/uploads/2010/10/Ensuring-justice-for-the-Vunlerable.pdf>

25 Muiru, A., Mburu, B., Wanjau, B., and Otieno, J. et al., (2021). Developing Alternative Pathways to Enhance Access to Justice through Incentivized Pro Bono and Legal Aid Services in Kenya. Strathmore Law Clinic. ELJ, Vol 1, 2021. ISSN 2789-3421

The Katiba Institute: The Katiba Institute is a non-profit organization that works to promote constitutionalism and the rule of law in Kenya. The institute has been involved in several high-profile cases, including the 2017 presidential election petition. The institute has also been instrumental in promoting public participation in governance through its civic education programs.

The Justice Centres: these are a network of legal aid clinics that provide free legal services to poor and marginalized communities in Kenya. The centers have been successful in helping individuals and communities access justice, particularly in cases involving land disputes, domestic violence, and child custody. These include Community Justice Centres in Nairobi, Mombasa, Kitui, Kisumu, Turkana, Taita Taveta, Vihiga, Uasin Gishu and Kisii Counties; as well as prison justice centres across prisons in Kenya[26].

The Mombasa Legal Aid Center: provides free legal aid services to vulnerable groups in Mombasa and the surrounding areas. The center has been instrumental in helping women and girls access justice in cases of sexual and gender-based violence. The center has also been involved in advocating for the rights of prisoners in Kenya.

Amnesty International: in October 2022, Amnesty International-Kenya, in conjunction with the Justice Centres across the country and the Paralegal Society of Kenya, undertook legal aid clinics upon the premise of lack of legal knowledge among Kenyans – hence limited access to justice. This initiative targeted 1,000 Kenyans from different parts of the country on a legal empowerment drive as well as to decongest the incarceration facilities[27].

The Kituo Cha Sheria: Kituo Cha Sheria is a non-profit organization that provides legal aid services to marginalized communities in Kenya. The organization has been involved in several high-profile cases, including the 2010 constitutional referendum to include the incarcerated in voting[28]. The organization also runs legal education and awareness programs to help individuals and communities understand their rights and the law[29].

[30]Access to Justice

Access to Justice is a basic principle in the rule of law and allows for citizens to have their voices heard and exercise their rights, according to the United Nations this should be impartial and non-discriminatory and one of the major challenges to this is accessing legal advice and representation.[31] To this end UNODC has developed the United Nations Principles and Guidelines on Access to legal aid which emphasizes that Legal Aid is an essential element of a criminal justice system.[32]

Access to Justice in Kenya is governed by various international conventions and instruments, the Constitution of 2010 and the Legal Aid Act of 2016. As per the Open Government Partnership this is not restricted to lawyers and courts but extends to individuals and communities being able

26 Kituo cha Sheria – Official website: https://kituochasheria.or.ke/#

27 Teyie, S. (2022) Amnesty to give free legal aid to Kenyans on Huduma day. The Star Newspaper. Available at <https://www.the-star.co.ke/news/2022-10-06-amnesty-to-give-free-legal-aid-to-kenyans-on-huduma-day/>

28 Constitutional Petition 1 of 2010. Available at <http://kenyalaw.org/caselaw/cases/view/67992/>

29 Kituo cha Sheria – Official website: https://kituochasheria.or.ke/about/

30 United Nations Access to Justice Available at https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

31 UNODC (2013) United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

32 OGP (2019)Access to Justice Justice Policy Series Part 1 Available at https://www.opengovpartnership.org/wp-content/uploads/2019/09/Justice-Policy-Series-Access-to-Justice.pdf

to access legal aid and be able to move through this system – access to justice then is a component of the rule of law.[33]

Pursuant to Article 2 (5) and 2 (6) of the Constitution of Kenya 2010, treaties and conventions and general rules of international law form part of Kenyan laws. As per the International Commission of Jurists Kenya key among these are:

Legal instrument	Access to Justice
The Constitution of Kenya, 2010	Mandates States to ensure access to justice for all persons and if any fee is required, to make it reasonable and not impede access to justice
The Legal Aid Act, 2016	Facilitates the provision of affordable, accessible, sustainable, credible, and accountable legal aid services to indigent persons in Kenya
Persons Deprived of Liberty Act	Provides for the right to visits by human rights officers of duly recognized institutions for the purposes of inspecting and assessing the conditions under which such persons are held and further accords legal aid and legal assistance to aliens in prisons where consular assistance is not available
The Universal Declaration of Human Rights	Sets out in general terms, as a common standard of achievement for all peoples and all nations that everyone charged with a penal offence should be granted all the guarantees necessary for his defense5 including legal representation and legal aid.
The International Covenant on Civil and Political Rights	Mandates States to ensure that accused persons have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing, and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.
The Convention on the Rights of the Child	Mandates State parties to ensure that the child is informed promptly and directly of the charges against him or her, and, if appropriate, through his or her guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense. States are required to ensure that legal aid is provided to children in all criminal cases unless special circumstances would dictate otherwise.
African Charter on Human and Peoples' Rights 1981 (ACHPR)	The Charter contains principles and guidelines on the right to fair trial and legal assistance in Africa. The charter makes it an obligation of state parties in ensuring that an accused person has the right to be presumed innocent until proven guilty by a competent court or tribunal and the right to defense, including the right to be defended by counsel of his choice

33 ICJ (2018) ICJ Kenya paralegal Report 2017-2018 Available at https://icj-kenya.org/news/sdm_downloads/icj-kenya-paralegal-report/

The African Charter on the Rights and Welfare of the child (ACRWC) 1989	The rights under this convention have been reproduced in the children's Act of 2001. This Act led to the establishment of Children's court to handle children's cases

The Constitution of Kenya under Article 48 states that, *'The State shall ensure access to Justice for all persons and, if any fee is required it shall be reasonable and not impede access to justice'*[34] Getanda argues that this taken in combination with Article 49 and 50 of the Constitution on Rights of Arrested persons and Fair Hearing place further emphasis on the concept of justice for all.[35] Article 50 (g) (h) states that 'Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'

This is a step forward from the now repealed Constitution that contained provisions removing the right to legal representation at public expense. This was shown in the case of David Njoroge Macharia v Republic where the charge was robbery with violence. It held that substantial injustice could occur in non-capital offence cases for the indigent accused. When determining whether an accused would suffer substantial injustice without state-funded legal representation, the court considered the following factors:

a) The severity of the charge

b) Complexities of the case

c) The capacity of the accused person to defend themselves

d) The public interest which requires the accused to have court-appointed counsel due to the nature of the offence[36]

Under the new Constitution of 2010 the appellant argued that his right to legal representation at state expense was violated and that Kenya had failed in its duties under international conventions and treaties such as the ICCPR. The court however found that under the old Constitution international law was required to be incorporated into national law and this could not be upheld and that the trial had taken place under the old constitution where the right to free legal representation was not guaranteed. [37] The judgement reads in part,

"Kenya is traditionally a dualist system; thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary…. in so far as the appellant before this Court is concerned, his trial took place under the old Constitution, and he would not have been entitled to free legal representation during the first trial. [38]

Kituo was part of the Paralegal Support Network (PASUNE) who sought to share experiences

34 Constitution of Kenya 2010

35 Getanda **Access to Legal Aid in Criminal Justice System in Kenya: Challenges and Solutions**

36 Wangui R (2021) A CRITICAL ANALYSIS OF THE RIGHT TO COUNSEL AS A MEANS TO A FAIR TRIAL FOR THE UNREPRESENTED ACCUSED IN KENYA Available at https://su-plus.strathmore.edu/server/api/core/bitstreams/6d314412-7e2d-4209-9455-ca43a59f501f/content

37 RF (2020) The State of Legal Aid in Nairobi County in 2020 Available at https://www.lrf-kenya.or.ke/wp-content/uploads/2021/07/State-of-Legal-Aid-Booklet.pdf

38 **Criminal Appeal 497 of 2007** available at http://kenyalaw.org/caselaw/cases/view/74661/

and collaborate, they grew from the various grassroots organisations, provided harmonized legal training materials which were shared with the Kenya School of Law for design of a diploma for paralegals and were involved in advocacy around the Legal Aid Bill.[39] Kituo working together with other members of civil society played a role in the formation of the National Legal Aid and Awareness Program (NALEAP) under the Government Justice Law and Governance Program (GJLOS) to create citizen awareness on legal aid and develop a legal aid delivery scheme for the indigent and vulnerable in society. Pilots carried out were done in conjunction with civil society and Kituo for example aided in the training of prisoners on law to build capacity for self-representation a program that continues today, and NALEAP worked on the draft of the Legal Aid Bill of 2013 that would become the Legal Aid Act of 2016.[40] NALEAP also pushed for a system to recognize and accredit paralegals.

The Legal Aid Bill of 2016 defines an accredited paralegal as a person accredited by the service to provide paralegal services under the supervision of an advocate or an accredited legal aid provider.[41]The Legal Aid Bill was passed in 2016 and this was to give effect to Article 19 (2) 48 and 50(2) (g) of the Constitution and provides a legal and institutional framework under which legal aid shall be provided, establishes the National Legal Aid Service (NLAS) and makes provisions for who qualifies for legal aid. [42] Moy in her fieldwork identified the problem of formal recognition as hampering the work of paralegals,

"Nearly every paralegal and community leader we interviewed identified the lack of formal recognition as one of the most serious challenges facing paralegals. Paralegals frequently referred to instances when authorities rebuffed them for lack of legitimacy. Meanwhile, community leaders wanted a clearer sense of what defines a paralegal, the type of training required, and what paralegals are authorized to do and not do…. Interviewees speculated that a system of accreditation might further clarify matters by standardizing training for paralegals, at a time when the length, recurrence, and quality of paralegal training varies widely across the country.[43]

Salient features of the Legal Aid Act include:

- Granting authority to provide legal advice;
- Establishing the Legal Aid fund;
- Adopting a wider definition of legal aid;
- The National Legal Aid Service is mandated to develop programs for legal aid education;
- Civil society representation in governance.[44]

It is important to note observations made by scholars prior to the Legal Aid Bill that pointed to a number of these challenges that the Legal Aid Act and subsequent policy has sought to

39 Mbogoh A (2021) Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

40 LRF (2020) The State of Legal Aid in Nairobi County in 2020 Available at https://www.lrf-kenya.or.ke/wp-content/uploads/2021/07/State-of-Legal-Aid-Booklet.pdf

41 The Legal Aid Act 2016 Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%20 2016

42 Ibid

43 Moy, H.. (2018). Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism. 10.1017/9781316671801.005.

44 ibid

address. The Danish Institute of Human Rights in 2011 noted that:

- The level and regulation and coordination of legal aid services generally remains low and the country has not yet adopted and implemented a national legal aid policy or bill;
- Kenyan state bodies directly involved in the provision of legal aid though usually only through projects of limited scope that draw upon the expertise of other legal aid providers;
- Lawyers are viewed as expensive and complicated and are not accessible in rural or urban slum areas;
- The LSK has pro bono services but these are not widespread and urban focused.[45]

The report further states that alternative systems of justice are often resorted to and paralegal systems have replaced formal justice systems,

"It is fair to say that legal aid relies extensively on private initiatives, such as the services offered by the legal profession, NGOs and paralegals. In terms of funding, Kenya places itself closest to the charitable model, as most legal aid schemes do not require self-payment by litigants and an insurance system is not in place… uses the following models: Pro bono legal aid services offered by private lawyers; judicare (state brief) referrals to private lawyers; justice centres, which use lawyers, jurists and/or paralegals to provide a range of legal aid services; paralegal advice offices; independent university law clinics; and (arguably) a cooperation agreement, where a national legal aid body (or more correctly put in the case of Kenya, a state legal aid initiative) contracts specialists to provide legal aid in a particular area of law."[46]

Bidali notes that prior to the passage of the Constitution access to justice in Kenya faced challenges such as:

'Prohibitive court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing by the providers of the service, lack of financial independence, lack of effective remedies, backlog of cases that delays justice, lack of awareness on ADR and traditional dispute resolution mechanisms."[47]

While the enactment of progressive laws is certainly a positive step there have been challenges in operationalization. Mbogoh argues that paralegals have thrived in informal settings and although they now receive recognition from the state – this recognition is governed by the state and creates, 'a formalized space shrouded by specific rules and regulation in training, accreditation and practice. The power to formulate over-regulation and ensure compliance to these new regulations is conferred on state agencies. [48] Bearing in mind the history of the work undertaken by Kituo through legal aid has often brought it into conflict with authorities this remains a concern. Writing in 2021 the Legal Resource Foundation notes that while the presence of the National Legal Aid Service (NLAS) is positive it is hampered in its operations by:

- Inadequate human and financial resources and is highly reliant on donor funding. There

45 The Danish Institute of Human Rights (2011) Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation between various actors Available at https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/legal_aid_east_africa_dec_2011_dihr_study_final.pdf

46 ibid

47 Flora Bidali. (2021). Evolution of Legal Aid in Kenya. *Egerton Law Journal*, *1*(1-192), 1–13. Retrieved from https://eu-journal.egerton.ac.ke/index.php/elj/article/view/43

48 Mbogoh A (2021) Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

are also no clear provisions for the service in the national budget;

- NLAS in 2021 was operating with what was considered a skeleton staff to cover the entire country with a lack of coordinating mechanisms and qualified advocates even in the capital city Nairobi;

- NLAS lacks the capacity to undertake monitoring, supervision, and coordination[49]

Mbogoh argues that these challenges above among others have meant that in effect the NLAS has not been effective and indeed that the passage of the Legal Aid Act may have hampered the informal rules of the sector which allowed it to grow and become important in the community. The impact of these rules has not only not been felt on the ground, but the presence of these rules creates a lack of clarity on where and how they apply. On the question of the training of paralegals for example,

"The Legal Aid Act and its appurtenant rules do not have transitional provisions providing directions on how to deal with already existing legal empowerment programs other than the legal aid pilot projects. Therefore, it is unclear what happens to the community paralegal organization and coordination and uncertain organically grew since Kenya's independence.[50]"

Onyango takes this further stating that while the attempts at harmonization of state policies on legal aid are laudable there are problems with the structure of the legal aid service stating that there are,

- Too many functions and duties;

- Supplication of roles performed by existing parties - certifying legal professionals - CLE, function with KSL, LSK;

- Accreditation of legal professionals - some NGOs have their own course which have worked;

- Provision of legal aid services - NGOs do this, Ombudsman does this, ODPP, KNCHR.

And finally,

Non-governmental institutions have also established a niche for themselves in the provision of legal assistance with two of the better-known organisations in the field being Kituo Cha Sheria and FIDA. These organisations have been widely involved in public interest litigation and are arguably more attractive prospects for indigent persons as opposed to government entities.[51]

Moy undertook a study across six of eight provinces to determine factors that influenced effectiveness of paralegals and legal aid in the field – a large variance in the types of cases handles was found and it was clear that skills beyond basic legal knowledge such as mediation, mobilization, advocacy, engagement with authorities and management of emotionally tense situations.[52] These

49 https://www.lrf-kenya.or.ke/wp-content/uploads/2021/07/State-of-Legal-Aid-Booklet.pdf

50 Mbogoh A (2021) Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

51 Okoth O.A (2021) Rethinking the National Legal Aid Service in Journal of cmsd Vol 7 (1) Available at https://journalof-cmsd.net/wp-content/uploads/2021/08/Rethinking-The-National-Legal-Aid-Service-.pdf

52 Moy, H.. (2018). Kenya's Community-Based Paralegals: A Tradition of Grassroots Legal Activism.

further demonstrate not only the key position that CSOs hold but the task for government to cooperate with them for better legal empowerment. The Baseline policy on AJS in 2020 found that there were several challenges faced by the National Legal Aid System including:

- Poor composition of staff;
- Vacancies on the board;
- Lack of an independent budget;
- Staff concentration in Nairobi for a national body;
- Reliance on donor funding;
- Poor records of legal aid service providers;
- Lack of comprehensive and reliable data.[53]

Conclusion and the way forward

The path to legal empowerment as illustrated here through the example of Kituo Cha Sheria its most prominent civil society advocate has undergone a similar path to the development of democratic freedoms. While there have certainly been advances in law and policy and through advocacy and cooperation with civil society these advances have largely built upon the lessons and experience in the field there remains a significant challenge in access to justice.

The challenge lies in operationalizing the spirit and functions of the legal aid act, in strengthening the paralegal movement, the use of Alternative Justice Systems, raising awareness, justice sector reform and many other wide ranging broad initiatives. Consultation and cooperation with those who have worked on legal empowerment for decades with the government is crucial, that is civil society and indigent peoples who lack access to justice.

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Balancing Legitimacy and Autonomy: State Recognition of Community-Based Paralegals in Africa

Abdul Tejan-Cole*

Abstract

This paper explores the prospective implications of state recognition of community-based paralegals in Africa, acknowledging their pivotal role in advancing access to justice within the region. Despite their significant contributions, the absence of formal recognition and regulation hampers the efficacy of paralegals. The paper critically examines the potential benefits and drawbacks associated with recognizing community-based paralegals by African governments.

The benefits of recognition are multifold. Formal recognition would endow paralegals with heightened legitimacy and credibility within justice systems. It would foster improved access to comprehensive training, essential resources, and professional development opportunities. Recognition could also reduce the harassment and intimidation of paralegals, empowering them to serve their communities more effectively within centralized legal settings.

Conversely, recognition presents potential risks. Government oversight and control could lead to bureaucratic red tape and administrative encumbrances, stifling flexibility and innovation in paralegal work and shrinking the civic space for community-based paralegals. Additionally, recognition might incur increased costs for both paralegals and their communities, potentially excluding certain groups from its benefits.

This article delves into the intricate dynamics of state recognition of community-based paralegals in African contexts, exploring the challenges and opportunities associated with integrating their roles within the legal system. It examines diverse approaches taken by African countries in regulating paralegal activities, highlighting factors that influence the degree of recognition and autonomy granted to these essential actors in the pursuit of justice.

I contend that the decision regarding the recognition of community-based paralegals demands careful consideration and a contextual approach, acknowledging the unique needs of each country. A case-by-case evaluation is necessary to determine the feasibility and impact of recognition in specific African contexts. Moreover, I advocate for a supportive, inclusive, and flexible approach in any recognition process, ensuring that paralegals receive the necessary support while preserving their autonomy and efficacy in providing legal assistance.

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Introduction

Situated at the intersection of access to justice, legal professionalism, and the community-based justice sector, the role of paralegals in Africa has gained increasing prominence in recent years. Paralegals, also known as legal aid providers or community paralegals, provide legal services to marginalized and underserved communities, often without formal legal training. Their contributions to legal empowerment —which involves building the legal capacities of communities through awareness creation, human rights monitoring, community education, and dispute resolution[54] — are widely recognized, particularly in contexts where access to traditional legal services is limited or prohibitively expensive.

Despite their significant contributions, paralegals face challenges in gaining full recognition and legitimacy within the centralized justice system. This tension between legitimacy and autonomy reflects the complex interplay between the state's role in regulating legal professions and the grassroots efforts of community-based paralegals to provide accessible and affordable legal services.

Historical Context and Evolution of Community-based Paralegal Roles in Africa

The historical context of paralegalism in Africa traces its roots to pre-colonial times, where revered individuals, known as "law speakers" or "griots," assumed pivotal roles as custodians of customary law and traditions.[55] Beyond their legal advice, they embodied multifaceted responsibilities as historians, cultural custodians, and keepers of ancestral knowledge, shaping the holistic nature of justice within the intricate fabric of African traditions.

The advent of colonial rule marked a seismic shift, introducing alien Western legal systems and courts within the centralized justice systems.[56] Despite these developments, the clash between traditional values and imposed structures left communities grappling with legal systems that often failed to resonate with their unique contexts.[57] In response to this, community-based paralegals emerged as indispensable intermediaries, translating legal concepts into accessible terms for communities and bridging the gap between deeply rooted traditional legal systems and nascent centralized justice system legal structures. They emerged as pragmatic responses to the exigent need for legal assistance, particularly in rural areas with limited access to qualified lawyers.

The mid-20th century witnessed the attainment of independence by African nations, accompanied by a surge in demand for legal professionals. Paralegal programs and institutions proliferated, recognizing their pivotal role in broadening access to justice. This phase witnessed paralegals becoming indispensable in rural areas and part of the urban areas where poor communities faced human rights violations and were unable to access legal services, providing basic legal information and bridging gaps for those lacking access to qualified lawyers.[58]The post-independence era saw a renewed emphasis on legal empowerment, with paralegal services expanding across Africa. Governments and civil society actors recognized the invaluable role of paralegals and initiated programs to train and empower these individuals. This concerted effort aimed to enhance the

54 Unlike legal aid, which is centred around the knowledge and direction of an advocate, legal empowerment focuses on community knowledge and agency, with paralegals playing an accompanying and facilitating role.

55 Bettye Kearse, "Griots and Griottes | Keepers of Unwritten History," https://www.bettyekearse.com/griots-and-griottes-keepers-of-unwritten-history/ (accessed [11 December 2023).

56 Mbogoh, A. (2021). Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016. Egerton Law Journal, Vol. 1, pp. 161-179. ISSN 2789-3421.

57 Commission on Legal Empowerment of the Poor, UN Development Programme, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment*, vol. 1 (New York: United Nations, 2008), 1.

58 See Mbogoh ([2021] Egerton Law Journal, Vol. 1, pp. 161-179).

scope of paralegal services and elevate their status as vital contributors to the evolving legal landscape. Training programs enabled paralegals to navigate a broader spectrum of legal services, including representation in courts in the centralized justice systems, empowering them to address intricate legal needs with increased efficacy.

After independence, many African countries relied on paralegals to provide legal services, with some formally recognizing them. Paralegals played a pivotal role in ensuring competence in delivering legal services through recognition and structured training programs. The historical evolution of paralegal roles in Africa epitomizes a dynamic interplay between traditional legal systems, colonial influences, and post-independence developments. Legal empowerment programs, enshrined in constitutional frameworks and supported by diverse legal instruments, underscore the resilience and adaptability of legal roles in addressing evolving societal needs, marking paralegals as pioneers in pursuing and promoting justice.

Navigating the Complexities: Analyzing the Diverse Definitions of Paralegals in Africa

The dearth of a consolidated definition for 'paralegals' in Africa poses a significant challenge hindering the development of cohesive regulatory frameworks. The absence of a common understanding emphasizes the crucial need for a standardized definition of paralegals, their qualifications, and their functions. Having a standardized definition is foundational for ensuring effective regulation and proper training within the legal sphere.

In Africa, paralegalism is a fundamental facet, assuming a pivotal role in assisting individuals in exercising their rights and facilitating access to justice, particularly within marginalized communities. While globally recognized as a crucial legal service, paralegalism is commonly defined as the provision of legal assistance by individuals without formal legal qualifications yet possessing training in legal principles and procedures. These practitioners are often denominated as "community-based paralegals" (CBPs), barefoot lawyers, or "paralegals without borders" (PLWBs), signifying their distinctive operational domains in rural or underserved areas where access to justice is acutely limited.

Traditionally, a paralegal has been defined as "(A) person who has been trained and holds authority to provide a specified number of legal services. A paralegal is not a lawyer but is usually on their way to becoming one."[59] However, this definition is unsatisfactory because while some paralegals do go on to become lawyers, many find their work fulfilling and choose to remain in the paralegal field.

In African countries with a history of paralegalism, paralegals have often undergone specialized training to carry out legal aid functions, which could lead to accreditation depending on the jurisdiction and the legal and procedural framework in place. Definitions differ, but they often share the community-based nature of their work. Various countries have defined paralegals, adding complexity to the understanding of their roles. For example, the Sierra Leone Legal Aid Act of 2012 defines an "accredited paralegal" as a person employed by the Board, a government department, an accredited civil society organization, or a non-governmental organization and who has completed a training course in the relevant field of study at the Judicial and Legal Training

59 Black's Law Dictionary. Black's Law Dictionary Free Online Legal Dictionary. 2nd ed; 1910. (accessed 11 December 2023). Available from: https://thelawdictionary.org. see also Wirya, A., Larasati, A., Gruskin, S., & Ferguson, L. (2020). Expanding the role of paralegals: supporting realization of the right to health for vulnerable communities. BMC International Health and Human Rights, 20(1), 8. https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-020-00226-y

Institute or an educational institution approved by the Board."[60]

In Nigeria, Paralegals are described in Section 24 of the Act as "any person [who] although not admitted to the practice of law in Nigeria, performs substantially legal tasks under the direction and supervision of a legal practitioner."[61]

According to the Kenyan Legal Aid Act of 2016, a "paralegal" means a person employed by the Service[62] or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education.[63] An "accredited paralegal" means a person accredited by the service to provide paralegal services under the supervision of an advocate or an accredited legal aid provider.[64]

In Tanzania, a paralegal is a non-lawyer with at least a secondary education or without a secondary education but has served as a paralegal for more than two years[65] and receives legal training to deliver legal assistance at the grassroots level of the community.[66]

In Zambia, section 2 of the Legal Aid Act 2021 states that a "paralegal" means a person registered as a paralegal under section 19." A paralegal shall not be registered by the Director if that paralegal does not hold qualifications determined by the Board and accredited and recognized by the Zambia Qualifications Authority or certified by the Authority.[67]

Contrastingly, under the Legal Practice Act of 2014, South Africa lacks a specific definition for paralegals yet emphasizes the need for statutory recognition. [68] The Paralegal Manual of 2016 defines a paralegal as a person with basic legal knowledge, conflict resolution skills, motivation, commitment, attitude, and skills to assist people and communities. It emphasizes that paralegals

60 Legal Aid Act 2012 (Sierra Leone), s. 1. Available from: http://www.sierra-leone.org/Laws/2012-06.pdf: http://www.sierra-leone.org/Laws/2012-06.pdf

61 Nigeria, Legal Aid Act 2011, s. 24. Available at: https://grassrootsjusticenetwork.org/wp-content/uploads/2012/08/Nigeria-Legal-Aid-Act-2011.pdf: https://grassrootsjusticenetwork.org/wp-content/uploads/2012/08/Nigeria-Legal-Aid-Act-2011.pdf (accessed 11 December 2023).

62 The service being the National Legal Aid Service.

63 Kenya, Legal Aid Act 2016 (No. 6 of 2016), s. 2. Available at: http://kenyalaw.org:8181/exist/rest//db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/L/Legal%20Aid%20Act%20-%20No.%206%20of%202016/docs/LegalAidAct6of2016.pdf (accessed on)

64 Ibid.

65 Tanzania, Legal Aid Act 2016, s. 19(1) and (3). Available at: https://www.parliament.go.tz/polis/uploads/bills/1478780478-A%20BILL%20-%20THE%20LEGAL%20AID%20ACT%20AFTER%20KB%2001.11.2016%20_FOR%20PRINTING_.PRINT.pdf: (accessed 11 December 2023).

66 Mauya Felister, "Improving Access to Justice in Tanzania: The Role of Paralegals," Zanzibar Year Book of Law, Volume 2, 2012, page page 407 citing Ishengoma Angela K., Report on the Legal Reform Process for the Recognition of Paralegals in Tanzania, Dar es Salaam: Friedrich Ebert Stiftung, 2011, page 2.

67 Zambia, Legal Aid Act 2021 (Act 1 of 2021), s. 19. Available at: https://zambialii.org/akn/zm/act/2021/1/eng@2021-03-24#part_III__subpart_nn_3__sec_19 (accessed 11 December 2023).

68 South Africa, Legal Practice Act 2014 (No. 28 of 2014). Available at: https://www.gov.za/documents/legal-practice-act: https://www.gov.za/documents/legal-practice-act The Bill has made reference to *para-legal practitioner*" means any person registered and enrolled to render legal services in terms of section 13 of this Act. The Paralegal Manual 2016 states that a "paralegal is a person, who has basic knowledge of the law and its procedures, knows about conflict resolution procedures and has the necessary motivation, commitment, attitude and skills to help people and communities with their legal, human rights, administrative, constitutional and developmental problems, while at the same time empowering them to tackle these matters on their own in future."
It further notes that "Paralegals use their knowledge and experience to help people with legal and other problems. A paralegal may investigate and refer matters to attorneys or relevant bodies for them to deal with. They can become educators on the law and rights for people in their communities. They can play a leading and supportive role in campaigns for improving community living standard sand general community development. Paralegals are not just mini-lawyers. Obviously, they cannot assist people in court and other tribunals until they acquire the relevant qualification and accreditation. But more than this, their role is to look at a variety of methods, other than using the courts, to achieve long-term, sustainable solutions to peoples' problems. Using the courts can bring quick relief which is important in many cases, but this is not always the case."

are not merely mini lawyers but serve a broader role in community development. [69]

Malawi's Paralegal Advisory Services Institute (PASI) views paralegals as providing "first" legal aid, analogous to paramedics or barefoot doctors.[70] The Paralegal Society of Kenya)defines a paralegal as "a community-based person who is not a lawyer, but who has basic legal knowledge and skills on a voluntary basis and outside or in addition to their normal vocation."[71] Kenya's Paralegal Society of Kenya defines a paralegal as "a community-based individual who is not a lawyer but who has basic legal knowledge and skills. Paralegals are, therefore, development workers and community members who educate people about the law or offer basic legal services."[72]

According to Dr Mbogoh, a "paralegal is viewed as a community-based person that provides basic legal services alongside other vocational roles. Paralegalism is viewed as a skill or vocation as opposed to a profession."[73] Dereymaeker notes that, in most African jurisdictions, "paralegals" or "community-based paralegals" are individuals without law degrees but possess skills and knowledge to provide legal aid under the supervision of a legal practitioner. [74]

This diversity in definitions underscores the multifaceted nature of paralegal roles in Africa and highlights the critical need for a cohesive and standardized understanding of paralegals in Africa. The absence of a standardized definition leads to inconsistencies in the scope of practice for paralegals across different countries and organizations. This variability can make it difficult for paralegals to operate effectively and confuse communities seeking legal assistance. Without a clear definition of what constitutes a paralegal, it becomes challenging to establish training and qualification requirements. This can lead to disparities in the level of expertise among paralegals and hinder efforts to ensure quality legal services.

Collaboration at regional and continental levels is essential to develop a guiding framework for paralegals that reflects the diverse contexts and needs of African countries. If this is done, African nations can harness the full potential of paralegals to expand access to justice, promote legal empowerment, and strengthen the rule of law across the continent.

The terminology surrounding community-based paralegals is not a mere linguistic matter but is deeply embedded in the political and socio-legal landscape in which grassroots advocates operate.

69 https://paralegaladvice.org.za/wp-content/uploads/2016/05/PLM-2015-Complete-Book-for-Print.pdf page 605.

70 Soy, A. (2018). Kenya's Community-Based Paralegals. In V. Maru & V. Gauri (Eds.), Community Paralegals and the Pursuit of Justice (pp. 165-209). Cambridge University Press. Available from: https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/: https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/ (accessed on December 11). Further, in a conversation. Dr Mbogoh refers to them as frontline defenders or first responders.

71 Quoted in Mbogoh, A. (2021). Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016. Egerton Law Journal, Vol. 1, 161-179. ISSN 2789-3421.

72 Paralegal Support Network (PASUNE). (2005). Handbook for Paralegals (4th ed.). Kenya: PASUNE. Available from: https://grassrootsjusticenetwork.org/resources/the-paralegals-handbook-pasune/ (accessed 11 December 2023).

73 See Mbogoh, A ([2021] Egerton Law Journal, Vol. 1, pp. 161-179).

74 Dereymaeker, G. (2016, July). Formalising the role of paralegals in Africa: A review of legislative and policy developments. Dullah Omar Institute. Available at: https://dullahomarinstitute.org.za/acjr/resource-centre/formalising-the-role-of-paralegals-in-africa-a-review-of-legislative-and-policy-developments (accessed 11 December 2023). According to Gwenaelle Dereymaeker, "In most African jurisdictions "paralegals", also called "community-based paralegals" or "community paralegals", are usually understood to be individuals who do not have a law degree but have skills and knowledge of the law that allow them to provide some form of legal aid and assistance to those in need, in particular members of a community they are part of or know well, and typically under the supervision of a legal practitioner. See also Open Society Justice Initiative (2010) Community-based Paralegals: A Practitioner's Guide. p. 16 and Danish Institute for Human Rights & East Africa Law Society. (2011). Access to Justice and Legal Aid in East Africa. DIHR research report, p. 18; Maru, V. (2006). Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide. Yale Journal of International Law, 31(2), 427-479.

The term "paralegal" suggests a subordinate role, implying that community-based paralegals are lesser counterparts to lawyers. This label carries connotations of informality and limited expertise, potentially undermining the credibility of their work and perpetuating the notion that community-based paralegals are merely paraprofessionals.

The designation of community-based paralegals as "paralegals" may unintentionally reinforce existing power dynamics and hierarchies within the legal system. It implies a connection to the formal legal profession that may not accurately represent the grassroots nature of their work or the depth of their community-based knowledge. The imposition of external labels can also inadvertently marginalize local understandings of justice and dispute resolution, overlooking the culturally specific terms that communities may have for individuals who fulfil similar roles.

Recognizing the politics embedded in the nomenclature of community-based paralegals necessitates a more inclusive and contextually sensitive approach to community-based legal empowerment. Questioning the implications of these labels prompts a dialogue on how best to represent the unique and invaluable contributions of community-based paralegals within the complex fabric of justice systems at the grassroots level. Embracing terminology that accurately reflects their contributions and capabilities is an essential step in empowering community-based paralegals and ensuring that their vital work receives the recognition it deserves.

Types of Paralegals in Africa: Formal and Community-Based

Paralegals in Africa manifest in two overarching categories delineated by distinct operational domains: 'Conventional or Formal Paralegals' and 'Community-Based Paralegals' (CBPs).

4.1 Conventional or Formal Paralegals

Conventional or Formal Paralegals integrate into the formal legal infrastructure, operating within established legal entities such as courts, law firms, and legal institutions.[75] Their roles are intricately linked to procedural mechanisms within the formal justice system, contributing to legal processes. Typically situated in law firms, corporations, or legal aid offices, these paralegals work in structured environments, often under lawyer supervision, predominantly in urban areas. The law formally recognizes these paralegals in most African countries.

In Uganda, the Advocates (Legal Aid to Indigent Persons) Regulations, 2007, acknowledges paralegals as individuals with legal qualifications, albeit not at a degree level recognized by the Law Council.[76] This illustrates a formal acknowledgement of paralegals within the legal aid framework.

The South African School of Paralegal Studies defines paralegals or legal assistants as individuals capable of working in a legal environment and possessing a sound basic knowledge of legal principles relevant to their field. While not qualified to represent communities, they undertake crucial legal tasks and administrative duties. In practice, these paralegals alleviate attorneys'

75 Botero, J.C. (2013). The Three Faces of Justice: Legal Traditions, Legal Transplants and Customary Justice in a Multicultural World (thesis). Georgetown University.

76 Uganda, The Advocates (Legal Aid to Indigent Persons) Regulations, 2007. Available at: https://old.ulii.org/ug/legislation/statutory-instrument/2007/12#:~:text=No%20person%2C%20organisation%20or%20institution,to%20be%20met%20before%20registration (accessed on 11 December 2023). Section 4 states that paralegal "means a person who holds a qualification in law, other than a degree in law, recognized by the Law Council.

workloads by handling routine legal tasks and research.[77]

4.2 Community-Based Paralegals (CBPs)

The term "community-based paralegals" encompasses diverse interpretations and functions. These paralegals, also known as CBPs, constitute a vital subset operating directly within communities, often serving as volunteers. Dr. Oby Nwankwo, Executive Director of the Civil Resource Development and Documentation Centre (CIRDDOC), characterizes a community-based paralegal as an individual trained to undertake substantial legal work akin to that of a lawyer, excluding court representation and litigation.[78] Community paralegals contribute to the community by offering immediate access to justice.

They act as intermediaries between community members and the formal legal apparatus, addressing local legal needs. Unlike their conventional counterparts, CBPs engage proactively with grassroots issues, earning titles such as legal empowerment advocates, grassroots legal advocates, barefoot lawyers, community mobilisers, health advocates, or environmental coordinators. [79]

Community-based paralegals differ significantly from conventional paralegals. While conventional paralegals primarily assist lawyers, CBPs work directly with communities. Trained in basic law, mediation, organization, education, and advocacy, they play a dynamic frontline role, engaging the centralized and traditional institutions.[80] The distinction lies in their role and primary focus on community service rather than lawyerly assistance, as well as the level and nature of their training. [81]

The 2012 Kampala Declaration on community-based paralegals defines them as individuals using legal knowledge, mediation, organizing, education, and advocacy to help people seek concrete solutions to instances of injustice.[82] Community-based paralegals often address disputes among people, grievances against state institutions, and conflicts with private firms, acting as frontline agents for justice at the grassroots level. [83]

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77 South African School of Paralegal Studies. (n.d.). [website]. Retrieved December 11, 2023, from https://paralegalstudies.co.za/. The South African School of Paralegal Studies defines Paralegals or Legal Assistants are people who are able to work in a legal environment. Paralegals have a sound basic knowledge of the legal principles relevant to the field in which they are working and as a result are able to work independently to perform legal tasks. Although not qualified to represent clients, Paralegals perform various important legal tasks and other administrative duties in the office. In an attorney's practice, for example, the Paralegal relieves the workload of the attorney by performing much of the routine legal work or research.

78 Namati. (2019). Nigeria Community Paralegals: Recognition & Financing. Namati Nigeria Research Brief. Available at: https://grassrootsjusticenetwork.org/wp-content/uploads/2019/03/Nigeria-Community-Paralegal-Research-Brief-Final.pdf (accessed 11 December 2023).

79 Namati. (n.d.). Community Paralegals. Available at: https://namati.org/what-we-do/grassroots-legal-empowerment/paralegals/. Accessed 11 December 2023.

80 HiiL. (2022, March 22). Community Justice Services. HiiL Policy Brief. Available at: https://dashboard.hiil.org/wp-content/uploads/2022/06/HiiL-Policy-Brief-2022-01_Community-Justice-Services.pdf (accessed 11 December 2023).

81 See Namati. (n.d.). Community Paralegals. "Community paralegals are different from conventional paralegals—their primary role is not to assist lawyers, but rather to work directly with the communities they serve. They are trained in basic law and in skills like mediation, organizing, education, and advocacy. They form a dynamic, creative frontline that can engage formal and traditional institutions alike. But just as primary health workers are connected to doctors and hospitals, community paralegals should be connected to lawyers and the possibility of litigation or high-level advocacy if frontline methods fail.

82 "Kampala Declaration on Community Paralegals", Kampala, Uganda, 26 July 2012. Available at: www.namati.org/news/newsfeed/kampala-declaration/ (accessed 11 December 2023). See also Public Lab. (2020, October 16). The concept of community paralegals. [online] Available at: https://publiclab.org/notes/liz/10-16-2020/the-concept-of-community-paralegals (Accessed 11 December 2023).

83 Maru & Gauri (eds.) (2018).

While the term "community-based paralegal" is used broadly, a nuanced distinction arises from those with formal training, utilizing an array of tools, both legal and non-legal, to provide justice services. These paralegals live in or possess deep knowledge of the community, receiving technical support and supervision from a lawyer. [84]

Community-based paralegals offer a distinctive contribution to legal empowerment and justice services within their communities with their unique training and grassroots approach. When we refer to the term paralegal in this article, we refer to this type of paralegal, who commonly receives specialized training in providing legal aid at the community level and "works directly with people affected by injustice" through a grassroots approach primarily based on legal empowerment.[85]

The Integral Role of Community-Based Paralegals

Access to justice, a fundamental human right crucial for protecting the poor and marginalized, is significantly facilitated by the pivotal role played by community-based paralegals in Africa. These vocations address multifaceted challenges such as poverty, illiteracy, bureaucratic legal systems, and delays in justice administration, providing diverse and impactful benefits to the communities they serve.[86]

Community-based paralegals extend essential legal services to individuals who would otherwise be unable to afford them.[87] Resolving disputes out of court significantly reduces the number of cases brought to formal legal proceedings. This not only eases the burden on the centralized justice system but also ensures a more accessible avenue for justice for those in underserved communities.[88] Paralegals enhance the quality of justice by providing accurate legal information and advice to communities. Their expertise contributes to informed decision-making and the resolution of legal matters, ensuring that individuals clearly understand their rights and available options. This empowerment through knowledge is a cornerstone of their contribution to the justice system.[89]

They play a pivotal role in job creation and contribute to the development of the economy. Their involvement in legal processes stimulates economic growth and empowerment.[90] They indirectly

84 Grassroots Justice Network & Open Society Justice Initiative. (2014). Community-Based Paralegals: A Practitioner's Guide. Available at: https://www.justiceinitiative.org/publications/community-based-paralegals-practitioners-guide: https://www.justiceinitiative.org/publications/community-based-paralegals-practitioners-guide.

85 iProbono (2023, May). Institutionalisation of Nepal's Community-Based Paralegals. iProbono. Available at: https://iprobono.com/articles/institutionalisation-of-nepals-community-based-paralegals/ (accessed 11 December 2023).

86 Grassroots Justice Network & Open Society Justice Initiative. (2014). Community-Based Paralegals: A Practitioner's Guide. Available at: https://www.justiceinitiative.org/publications/community-based-paralegals-practitioners-guide: https://www.justiceinitiative.org/publications/community-based-paralegals-practitioners-guide; New Tactics. (2018). What are community paralegals and why are they important for protecting human rights? Available at: https://dullahomarinstitute.org.za/acjr/news/paralegals-need-formal-recognition-in-africa; Grassroots Justice Network. (2006). How to Develop a Community Paralegal Program. Available at: https://grassrootsjusticenetwork.org/ and International Bar Association. (2015). Paralegals as Agents of Change: Promoting Access to Justice in Africa. Available at: https://dullahomarinstitute.org.za/acjr/news/paralegals-need-formal-recognition-in-africa.

87 Grassroots Justice Network. (2006). How to Develop a Community Paralegal Program. Available at: https://grassrootsjusticenetwork.org/ (accessed 11 December 2023).

88 Wojkowska, E. (2004). Doing Justice: How informal justice systems can contribute. UNDP and Ubink, J. (2011). Customary justice: perspectives on legal empowerment, legal and governance reform: Lessons learned. International Development Law Organisation.

89 Nanima, R., & Durojaye, E. (2022, March 12). A research report on the legal recognition of paralegals in Africa: Lessons, challenges and good practices. ResearchGate. doi:10.13140/RG.2.2.22351.97449.

90 Manuel, M. & Manuel, C. (2021). People-centred justice for all: A route to scaling up access to justice advice and assistance in low-income countries. ODI. Available at: https://odi.org/en/publications/people-centred-justice-for-all/: https://odi.org/en/pub-

contribute to the overall stability and prosperity of their communities by cultivating an environment where legal issues are resolved efficiently.[91]

Educating individuals about their legal rights and possible course of action is a fundamental role of community-based paralegals. They act as crucial intermediaries to ensure marginalized groups can access legal representation. This legal literacy within communities is empowering, enabling individuals to navigate the complexities of the legal system with confidence.[92]

The impact of community-based paralegals in African legal systems is evident in their roles as catalysts for community development, contributors to policy changes, and champions of fundamental human rights.[93] Their activities extend beyond individual cases, addressing systemic issues and fostering positive change within communities.

Community-based paralegals are increasingly integrated into the legal aid framework, assuming roles encompassing representation, assistance, advice, education, and participation in alternative dispute resolution mechanisms. However, this incorporation into a narrow legal aid framework often conflicts with the intended and inherent role of community-based paralegals. Rather than constraining these practitioners within the limits of traditional legal aid, aid frameworks should be expanded to embrace legal empowerment principles. This would allow community-based paralegals to effectively fulfil their role in building the legal capacities of communities and promoting community knowledge and agency.

Operating within both the centralized and community-based justice systems, they serve as crucial conduits, bridging the gap between local communities and the broader legal apparatus. They can straddle plural legal systems, engaging centralized and traditional institutions based on the needs of a given case.[94] Their ability to navigate and understand the intricacies of diverse legal frameworks positions them as versatile agents of change within their communities.[95]

Their efforts are diverse. Some provide holistic services, while others focus on specific issues like gender, climate, land, or prisoners' rights.[96] They operate within various organizational structures, including NGOs, community-based organizations, and membership associations. These varied approaches ensure a tailored response to the unique legal needs of different communities. They use their knowledge and experience to empower communities, address systematic problems,

lications/people-centred-justice-for-all/ (accessed 11 December 2023).

91 Dancer, H. (2018). Power and Rights in the Community: Paralegals as Leaders in Women's Legal Empowerment in Tanzania. Feminist Legal Studies, 26(1), 47–64. doi:10.1007/s10691-018-9371-6; Maru, V., & Gauri, V. (2018). Paralegals in Comparative Perspective: What Have We Learned across These Six Countries? In V. Maru & V. Gauri (Eds.), Community Paralegals and the Pursuit of Justice (pp. 1-42). Cambridge: Cambridge University Press. doi:10.1017/9781316671801.001, Schönteich, M. (2012). A powerful tool of justice: Paralegals and the provision of affordable and accessible legal services. Crime & Delinquency, 42(1), 21-27 and Wirya, A., Larasati, A., Gruskin, S., et al. (2020). Expanding the role of paralegals: supporting realization of the right to health for vulnerable communities. BMC International Health and Human Rights, 20(1), 8. doi:10.1186/s12914-020-00226-y.

92 United Nations Office on Drugs and Crime. (2013, June). United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (accessed 11 December 2023).

93 HiiL, (2012). Towards basic justice care for everyone: Challenges and promising approaches.

94 Kampala Declaration. https://namati.org/kampala-declaration/ (accessed 11 December 2023).

95 Maru, V. (2009). Access to Justice and Legal Empowerment: A Review of World Bank Practice. Justice and Development Working Paper Series, no. 9. © World Bank, Washington, DC. Available at: http://hdl.handle.net/10986/18102. License: CC BY 3.0 IGO.

96 International Development Law Organisation. (2019). Navigating complex pathways to justice: Women and customary and informal justice systems. Available at: https://www.idlo.int/sites/default/files/pdfs/publications/idlo-issue-brief-women-cij-final-web.pdf and UN Women, UNICEF & UNDP. (2017). Informal Justice Systems: Charting a course for human-rights based engagement - A summary. Available at: https://www.undp.org/sites/g/files/zskgke326/files/publications/Informal-Justice-Systems-Summary.pdf (accessed 11 December 2023).

and foster long-term self-sufficiency. Training programs, both centralized and community-based systems, equip them with the skills necessary to fulfil their roles effectively.

They use various strategies to advance justice, including public education, advising communities on legal processes, mediating disputes, organizing collective action, advocacy, fact-finding, investigations, and monitoring.[97] This multifaceted approach allows them to address a broad spectrum of legal issues and contribute meaningfully to justice and development.

Their role is instrumental in fostering access to justice, empowering communities, and addressing systemic legal challenges. Their diverse functions, combined with a deep understanding of local dynamics, position them as essential actors in pursuing legal empowerment and societal development.[98] The success of community-based paralegals relies on their adaptability, continuous refinement of methodologies, and collaboration with stakeholders to ensure sustained positive impact within African legal systems.

State Formalization and Recognition of Community-Based Paralegals in Africa: A Crucial Nexus for Legal Empowerment

In the ever-evolving landscape of legal systems across Africa, the concept of state recognition and recognition of community-based paralegals stands as a pivotal frontier, embodying the quest for enhanced access to justice and legal empowerment. State recognition and recognition of community-based paralegals entail acknowledging and incorporating their roles and functions within the legal framework by state authorities.[99] It represents a deliberate and structured effort to integrate community-based paralegals into the broader legal system, endowing them with a formal status that recognizes their contributions, validates their expertise, and establishes a regulatory framework for their practice.[100]

Community-based paralegals, often operating in marginalized communities, play a vital role in bridging the justice gap, offering essential legal services where access to qualified lawyers is limited.[101] State recognition and recognition seek to amplify the impact of paralegals by providing them with an official standing. This formal acknowledgement enhances their legitimacy and credibility and signifies a commitment to leveraging their expertise as instrumental components in the broader pursuit of justice.[102]

The recognition of community-based paralegals by state authorities carries a spectrum of implications that warrant careful consideration. On the one hand, it promises to bestow heightened legitimacy upon community-based paralegals, elevating their status within legal frameworks.

97 Hague Institute for Innovation of Law (HiiL). (2022, March 22). Community Justice Services. [Policy Brief]. Available at: https://dashboard.hiil.org/wp-content/uploads/2022/06/HiiL-Policy-Brief-2022-01_Community-Justice-Services.pdf (accessed 11 December 2023).

98 Harper, E. (2021). The enduring utility of customary justice in fragile and post-conflict states: why development actors need to stop searching for magic bullets and solve the political economy and human rights challenges associated with justice programming. Journal of Legal Pluralism and Unofficial Law, 53(3), 342-355.

99 Recognition need not be by legislation. However, this type of recognition may be very limited in scope.

100 Dereymaeker, G. (2016, July). Formalising the role of paralegals in Africa: A review of legislative and policy developments. Dullah Omar Institute. Available at: https://dullahomarinstitute.org.za/acjr/resource-centre/formalising-the-role-of-paralegals-in-africa-a-review-of-legislative-and-policy-developments (accessed 11 December 2023).

101 Schönteich, M. (2012). A powerful tool of justice: Paralegals and the provision of affordable and accessible legal services. South African Crime Quarterly, 42, 21-27.

102 Jaichand, V. (2004). Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law. SUR - International Journal on Human Rights, 1(1), 127-142.

This, in turn, facilitates access to comprehensive training, essential resources, and avenues for development. Moreover, formal recognition protects against harassment and intimidation, empowering community-based paralegals to serve communities within formal legal settings more effectively.

Conversely, the prospect of recognition introduces potential risks. Government oversight and control may accompany formal recognition, potentially leading to bureaucratic red tape and administrative encumbrances. This could impede the flexibility and innovation that characterizes community-based paralegal services. Additionally, recognition may incur higher costs for both paralegals and their communities, potentially excluding certain groups from the benefits of formal recognition.

It is essential to advocate for a supportive, inclusive, and flexible approach when navigating the terrain of state recognition and recognition of community-based paralegals. This is achieved by guaranteeing that community-based paralegals receive the requisite support, resources, and training, while simultaneously preserving their autonomy and effectiveness in providing legal assistance that is customized to the customs and requirements of their specific communities. The enduring success of this transformative initiative is contingent upon the ability to maintain the grassroots, community-centric essence of community-based paralegal work while also achieving recognition.

Recognition and Regulation in Select African Countries

Recognition and regulation of community-based paralegals exhibit significant variation across African countries, each crafting its approach to meet specific contextual needs. In the aftermath of colonial rule, many African nations recognized the invaluable contributions of community-based paralegals in expanding access to justice and upholding the rule of law. Several countries took decisive steps through legislative reform to formalize the role of community-based paralegals, integrating them into the legal ecosystem and providing them with the necessary support and recognition.

7.1 Kenya

Before the enactment of the Legal Aid Act in 2016, paralegals in Kenya faced formidable challenges due to the absence of formal recognition.[103] The Advocates Act, which prohibited individuals not admitted as advocates of the High Court of Kenya from providing legal advice and representation, resulted in paralegals encountering skepticism, dismissals, and accusations of unauthorized legal practice.

Local leaders sought clarity on the identity, training requirements, and authorized roles of paralegals. The lack of formal recognition hampered paralegals' effectiveness, impeding their ability to access courts, support communities in dispute resolution, monitor court proceedings, and administer cases. Legal empowerment organizations undertook sustained advocacy efforts to address these challenges.

The Legal Aid Act of 2016 was enacted in response to advocacy efforts, marking a significant milestone in Kenya's formal recognition and regulation of paralegals. The Act acknowledges paralegals as legal aid providers, granted they operate under the supervision of an advocate or an

103 Mbogoh, A. (2021). Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016. Egerton Law Journal, 1(2), 161-179. ISSN 2789-3421.

accredited legal aid provider.[104]

The Legal Aid Act defines legal aid broadly, encompassing legal empowerment activities undertaken by community paralegals. These activities include raising legal awareness, alternative dispute resolution, and community-driven advocacy initiatives. Accredited paralegals, as defined by the Act, are authorized to provide legal advice and assistance, a role traditionally reserved for advocates. This expands the scope of services paralegals can offer. The Act establishes the Legal Aid Fund, providing a financial mechanism for accredited paralegals to access funding to provide legal aid. This prohibits paralegals from soliciting or accepting payments from eligible communities.

The National Legal Aid Service, as mandated by the Act, is required to develop programs for legal aid, education, and the training and certification of paralegals. This provision aims to ensure standardized training and certification processes. While the formal recognition of paralegals under the Legal Aid Act is a positive development, it comes with trade-offs. Over-regulation, heavy state involvement, and potential reinvention of paralegalism are challenges that must be navigated. The Act interacts with existing legal empowerment programs, raising questions about the coexistence and coordination of these initiatives.

Kenya's 2010 Constitution guarantees access to justice for all, potentially constituting constitutional recognition of paralegals. Article 48 provides that "the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."[105]

The Legal Aid Act of 2016 represents a significant step toward formally recognizing and regulating paralegals in Kenya. While addressing key challenges, the Act necessitates a delicate balance between regulatory frameworks and preserving the essential role of paralegals in facilitating access to justice.

7.2 Zambia

In Zambia, the recognition and regulation of paralegals are structured within a comprehensive three-tiered framework, highlighting the country's commitment to standardization, training, and qualification.[106]

Paralegals in Zambia are systematically organized into three distinct categories—Level 3, Level 2, and Level 1 paralegals. These levels correspond to varying degrees of specialization, with qualification requirements tailored to each tier. Implementing this tiered system signifies a nuanced

104 Amondi, C. (2014). Legal Aid in Kenya: Building a Fort for Wanjiku. In Y. P. Ghai & J. Cottrell-Ghai (Eds.), The Legal Profession and the New Constitutional Order in Kenya (pp. 201-220). Nairobi: Strathmore University Press. Available at: https://www.kas.de/. ISBN: 978-9966-054-07-4 and Feeley, M. (2006). Transnational movements, human rights and democracy: legal mobilization strategies and majoritarian constraints in Kenya, 1982-2002. University of California, San Diego. ProQuest ID: umi-ucsd-1289. Merritt ID: ark:/20775/bb2116874n. Available at: https://escholarship.org/uc/item/4sm3f7x9 (accessed 11 December 2023).

105 Constitution of Kenya. [Online]. Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010. (Accessed 11 December 2023).

106 Training, Formalization, Recognition & Financing of Paralegalism in Kenya and Zambia, *A Comparative Study*, INTERIM REPORT July 2023. See also Policy Monitoring and Research Center. (2021, November 5). PMRC Analysis of the National Legal Aid Policy of 2018. [PDF Document]. Available at: https://pmrczambia.com/wp-content/uploads/2021/11/National-Legal-Aid-Policy-Analysis.pdf (accessed 11 December 2023).

approach to paralegal roles and responsibilities based on specialization levels. In a pivotal development, the Technical Education, Vocation, and Entrepreneurship Training Authority (TEVETA) officially sanctioned a comprehensive three-level training scheme. This initiative is crucial for establishing clear training standards, qualifications, and mandates for paralegals operating within the country.

The formulation of the National Legal Aid Policy represents a significant stride in regulating paralegals. This policy not only recognizes the distinct roles of paralegals but also establishes clear standards for their training, qualifications, and mandates. The National Legal Aid Policy plays a pivotal role in shaping the legal landscape and providing a structured framework for the practice of paralegals.

TEVETA's approval extends beyond mere endorsement, encompassing the development of essential documents. Training charts, syllabi, and job profiles for paralegals at all three levels have been officially approved, ensuring a standardized and comprehensive approach to paralegal training.

The enactment of the National Legal Aid Act in 2021 signifies a legislative milestone in explicitly recognizing the role of paralegals. Sections 2, 18, and 19 of the Act explicitly mention paralegals, solidifying their status within the legal framework and providing a legal basis for their practice. Article 18 (2) (d) of the Zambian Constitution emphasizes the importance of legal aid. It stipulates that individuals charged with a criminal offence are entitled to legal aid, reinforcing the idea that legal representation is a fundamental right. This constitutional provision underlines the commitment to ensuring access to justice through legal aid mechanisms.

TEVETA, in collaboration with relevant stakeholders, has developed reference paralegal training manuals for all three levels. These materials serve as invaluable resources for training providers, ensuring consistency, and enhancing the quality of paralegal education across Zambia. In Zambia, the legal recognition of paralegals is intricately linked to training, standardization, and qualification. The multifaceted approach, involving legislative acts, constitutional provisions, and official training schemes, reflects Zambia's commitment to fostering a robust community-based paralegal vocation and ensuring access to justice for all.

7.3 Tanzania

Tanzania has established a robust legal aid framework, recognizing the diverse roles played by legal aid providers, including NGOs, paralegals, and advocates. The legislative acts and coordinated efforts contribute to enhancing access to justice for indigents across the country. The provision of legal aid is governed by the Ministry of Constitutional and Legal Affairs, with oversight facilitated through the Registrar for Legal Aid Provision. The regulatory landscape is delineated by the Legal Aid Act of 2017 for Tanzania Mainland and the Zanzibar Legal Aid Act (Act No. 13 of 2018), outlining conditions for extending legal aid services to indigents.

The Legal Aid Act of 2017 specifies the qualifications for legal aid providers under Section 10. To qualify, an institution must be registered under relevant laws, with legal aid provision listed as one of its fundamental functions. Qualifications include maintaining a permanent office with office facilities and personnel, including advocates, lawyers, and paralegals. The

Act emphasizes the necessity of affiliation with another legal aid provider having an advocate if the office lacks one.

Complementing governmental efforts, NGOs and Civil Society Organizations play a crucial role in extending legal aid services. After legal developments in 2019, organizations not registered under the NGO Act were required to register and shift their status to NGOs to continue offering legal aid services. The coordination of these entities falls under the Tanzania Network of Legal Aid Providers (TANLAP), emphasizing a mission to ensure access to justice.

Paralegals, defined as non-lawyers with at least a secondary education or two years of experience as a paralegal, receive legal training to provide grassroots-level legal assistance. Paralegals are not permitted to practice law or charge fees for their services but contribute significantly to legal literacy, dispute mediation, and connecting individuals with justice systems. The Ministry of Constitutional and Legal Affairs officially recognizes paralegals, issuing certificates upon completion of training. Paralegals contribute to legal literacy, mediation, guiding individuals through legal procedures, and advising conflicting parties. Advocates offer legal advice, draft documents, and represent communities in court.

The Tanganyika Law Society (TLS) serves as the Bar Association for Tanzania Mainland, ensuring access to justice. TLS, governed by the Tanganyika Law Society Act, compensates members assigned to provide legal aid services, covering transport fees. In Zanzibar, the Zanzibar Law Society, a non-profit organization registered under the Societies Act, provides legal aid services with 500 active advocates.

7.4 Nigeria

In Nigeria, the recognition and regulation of paralegals find their basis in the Legal Aid Act of 2011. The Act acknowledges paralegals in Section 24, defining them as individuals who, while not admitted to the practice of law in Nigeria, engage in significant legal tasks under the direction and supervision of a legal practitioner. This recognition primarily aligns with the prevalent role of paralegals in civil matters within the country.[107]

Section 17 of the Act empowers the Legal Aid Council to grant licenses to individuals who have completed a prescribed course in paralegal services, enabling them to provide such services in appropriate situations. However, the Act lacks specificity regarding the content of this prescribed course, and it does not make accreditation mandatory for paralegals to operate.

Despite the recognition afforded by the Act, it does not impose an obligation on the state to provide legal aid to indigent accused individuals, even though the right to counsel of choice is acknowledged in the Nigerian Constitution. The Legal Aid Act establishes a Legal Aid Council responsible for providing legal aid, advice, and access to justice in criminal defence, civil matters, and community legal services. However, many provisions of the Act are yet to be implemented.

The Act defines legal aid broadly, encompassing legal assistance, representation in court, and additional aid, without specifying the providers of the latter. The Legal Aid Council is mandated to maintain a register of legal practitioners willing to provide representation under the legal aid

107 Namati. (2019, March). Nigeria Community Paralegals: Recognition & Financing. [PDF document]. Available at: https://grassrootsjusticenetwork.org/wp-content/uploads/2019/03/Nigeria-Community-Paralegal-Research-Brief-Final.pdf (accessed 11 December 2023).

scheme. Moreover, the Act establishes a Legal Aid General Fund to finance legal aid for indigent persons, with payments to private practitioners determined by the Legal Aid Council.

Notably, the Act recognizes paralegals and authorizes the Legal Aid Council to issue licenses to those who have undergone a prescribed course in paralegal services. However, the absence of specific details about the course and the non-mandatory nature of accreditation for paralegals raises concerns.

Furthermore, the Act empowers the Legal Aid Council to adopt regulations for the involvement of paralegal aid provision, but these regulations are yet to be adopted. Civil Society Organizations (CSOs) have engaged in advocacy efforts to enhance the recognition of paralegals and establish a Paralegal Training Institute for standardized quality training. Despite the existing two-year National Innovative Diploma course in Paralegal Studies, it caters more to corporate paralegals. It may not adequately address the needs of community paralegals, particularly those operating in rural communities.

7.5 Sierra Leone

Sierra Leone made significant strides in recognizing and regulating the role of paralegals within its legal aid framework through the enactment of the Legal Aid Act (6 of 2012).[108] This legislation, a result of extensive advocacy efforts by Civil Society Organizations (CSOs) and non-governmental organizations (NGOs), provides a comprehensive legal aid structure and explicitly acknowledges the crucial role of paralegals.[109]

The Legal Aid Act 2012 broadly defines legal aid as 'the provision of legal advice, assistance, or representation to indigent persons.' This definition includes legal advice and assistance, "means providing information in both criminal and civil cases about the relevant law and legal processes, assisting with alternative dispute resolution, advising on legal issues, assisting with the drafting of documents other than instruments prohibited under section 24 of the Legal Practitioners Act, 2000, referring matters to legal practitioners and doing other things that do not constitute legal representation."110

Notably, the Act introduces the term "accredited paralegal," which is defined as an individual employed by the Legal Aid Board, a government department, an accredited civil society organization, or an NGO. Accredited paralegals must have completed a training course in the relevant field of study at the Judicial and Legal Training Institute or an educational institution approved by the Board. This requirement ensures that paralegals receive standardized and quality training, enhancing their effectiveness.

108 Manuel, M., & Manuel, C. (2021). People-centred justice for all – A route to scaling up access to justice advice and assistance in low-income countries. ODI Report. London: ODI. [Online]. Available at: www.odi.org/en/people-centred-justice-for-all] (www.odi.org/en/people-centred-justice-for-all) (Accessed 11 December 2023).

109 Dale, P. (2009). Delivering justice to Sierra Leone's poor: An analysis of the work of Timap for justice. Justice for the Poor Research Report; No. 1. © World Bank, Washington, DC. http://hdl.handle.net/10986/30532 License: CC BY 3.0 IGO. https://openknowledge.worldbank.org/entities/publication/d5bcb88d-4d48-52f1-9df8-cd83f256b736 and Dereymaeker, G. (2016, July). Formalising the role of paralegals in Africa: A review of legislative and policy developments. Dullah Omar Institute. Available at: https://dullahomarinstitute.org.za/acjr/resource-centre/formalising-the-role-of-paralegals-in-africa-a-review-of-legislative-and-policy-developments (accessed 11 December 2023).

110 Sierra Leone. Legal Aid Act 2012, s. 1. [Online]. Available at: https://grassrootsjusticenetwork.org/wp-content/uploads/gravity_forms/6-c66e454f338b98d157a2f7f3cb7dc3a1/2012/10/SL-Legal-Aid-Act-2012.pdf.

The Act explicitly lists paralegals as legal aid providers alongside legal practitioners, civil society and non-governmental organizations, and university law clinics. However, paralegals are restricted to providing legal advice and assistance and are not authorized to offer legal representation in court.[111]

To oversee the legal aid system, the Act establishes a Legal Aid Board chaired by a judge appointed by the President. The Board is tasked with accrediting legal aid providers, including paralegals, entering into cooperation agreements, determining eligible cases, and setting income thresholds for qualifying as an "indigent person."

Notably, the Act mandates the Legal Aid Board to appoint at least one paralegal to each Chiefdom. This provision aims to provide advice, legal assistance, and legal education to the Paramount Chief and the Chiefdom's inhabitants, emphasizing the role of paralegals in promoting Alternative Dispute Resolution (ADR) and mediating between formal and traditional justice systems.

While the legislation represents a significant step forward, challenges remain in its implementation. The requirement for a considerable number of trained paralegals poses a hurdle, and the Act lacks specific guidelines on determining the "interest of justice." Additionally, the composition of the Legal Aid Board, predominantly from the legal profession, raises concerns about a potential focus on legal representation to the detriment of other forms of legal aid.

The Act incorporates oversight mechanisms, requiring legal aid providers to maintain records, report to the Legal Aid Board regularly, and subject legal practitioners to disciplinary action for unprofessional conduct. Criminal offences are established for individuals and organizations providing legal aid without accreditation or a cooperation agreement with the Board.

Current Challenges Faced by Community-Based Paralegals Without Formal Recognition - Impacts on Efficacy

The challenges community-based paralegals face in Africa due to the lack of formal recognition have profound implications for their efficacy. These challenges are multifaceted and encompass limitations in access to resources and funding, legal ambiguity and lack of recognition, as well as issues related to accountability and professional regulation.

The absence of formal recognition hampers community-based paralegals' ability to secure crucial resources and funding. They struggle to conduct training programs, acquire essential equipment, and establish functional offices without financial support. This lack of resources directly impacts the quality and reach of their legal services, hindering their capacity to serve marginalized communities effectively.[112]

The legal ambiguity surrounding community-based paralegals' roles and responsibilities presents a significant hurdle. Without formal recognition, community-based paralegals may face challenges in defining the scope of their work, leading to uncertainty about their authority in providing legal advice and engaging in alternative dispute resolution. This ambiguity affects their interactions with the legal system and impedes collaboration with the police, lawyers, and their communities, amongst others.

111 Maru, V. (2006). Between Law and Society: Paralegals and Provision of Justice Services in Sierra Leone and Worldwide. The Yale Journal of International Law, 31(2), 427-476.

112 International Development Law Organization (IDLO). (2021). Navigating complex pathways to justice: Community paralegals and customary and informal justice. [Guide]. Available at: https://www.idlo.int/sites/default/files/handout_paralegals_and_cij_for_final.pdf: (Accessed 11 December 2023).

The absence of formal recognition means that community-based paralegals operate without a structured system of accountability and regulation. This lack of oversight raises concerns about the quality of their services and adherence to ethical standards. The potential for unchecked practices can undermine the credibility of community-based paralegals, eroding trust in their ability to provide competent and ethical legal assistance.

The lack of formal recognition places community-based paralegals at risk of being accused of illegally engaging in their work, exposing them to legal consequences such as prosecution, fines, or imprisonment. This jeopardizes their vocational standing and creates a barrier to confidently navigating legal boundaries and providing effective legal assistance to communities.

The denial of formal recognition denies community-based paralegals access to structured training programs, inhibiting their development. This restriction hampers their ability to stay informed about evolving legal landscapes, diminishing their capacity to provide high-quality services to communities and limiting their potential contribution to the legal field.

The informal status of community-based paralegals creates barriers to employment opportunities, as many employers prefer individuals recognized by regulatory bodies. This limitation impedes community-based paralegals' ability to secure stable positions, hindering their meaningful contribution and potentially losing valuable talent.

The challenges faced by community-based paralegals in Africa due to the lack of formal recognition have far-reaching implications for their efficacy and contribution to the legal system. Addressing these challenges through formalizing their roles and functions within the legal framework is crucial for unlocking their untapped potential and ensuring access to justice for marginalized communities.

Prospective Benefits of State Recognition and Regulation

Community-based paralegals play a pivotal role in enhancing access to justice, particularly in marginalized communities on the continent. Positioned as first responders in their communities, they can bridge the gap between the public and the formal legal system, enhancing access to justice and fostering the independence of lawyers. Formal state recognition is a cornerstone for paralegals, conferring on them increased legitimacy and credibility within the legal framework. The acknowledgement by state authorities affirms their role as indispensable contributors to the justice system, fostering public trust in their capacity to provide valuable legal assistance. This status is crucial not only for the paralegals but also for those who rely on their services.[113]

State recognition opens doors to comprehensive training programs and essential resources, addressing a longstanding challenge community-based paralegals face. It also offers a pathway for collaboration with justice sector actors, which enhances the efficacy of paralegals and institutionalizes and mainstreams their services. Structured training ensures that community-based paralegals are well-versed in legal principles and procedures, enhancing their competence. Access to legal databases and research tools becomes a reality, empowering them to stay abreast of legal changes and provide informed advice to their communities. Formal state recognition facilitates networking and collaboration opportunities for community-based paralegals. Integration into

113 Dereymaeker, G. (2016, July). Formalising the role of paralegals in Africa: A review of legislative and policy developments. Dullah Omar Institute. Available at: https://dullahomarinstitute.org.za/acjr/resource-centre/formalising-the-role-of-paralegals-in-africa-a-review-of-legislative-and-policy-developments (accessed 11 December 2023).

formal legal structures allows them to collaborate with legal professionals, participate in legal networks, and contribute meaningfully to the broader legal community. This interconnectedness enhances the overall efficiency and impact of the legal aid services provided by community-based paralegals.

Recognition by the state translates into enhanced development opportunities for community-based paralegals. Beyond initial training, they gain access to specialized programs, workshops, and skill-building initiatives. This continual investment in their growth enriches their capabilities and contributes to the overall development of community-based paralegals within the legal landscape.

The formal recognition of community-based paralegals establishes a protective shield against harassment and intimidation. State acknowledgement of their role creates a framework within which they can operate without fear of undue interference. This protection is essential for community-based paralegals to carry out their duties effectively and without external pressures that might compromise their ability to serve the interests of their communities.

State recognition empowers community-based paralegals to navigate formal legal settings with greater efficacy. Recognition enables them to represent communities in court proceedings, file necessary documents, and advocate for their communities within the established legal framework. This expands the scope of services community-based paralegals can provide and ensures their communities have adequate and effective representation.

Community-based paralegals emerge as vital components in consolidating democracy across Africa. Their ability to translate legal principles into tangible benefits within communities contributes significantly to the effective functioning of justice and social security systems. Operating fluidly between modern legal systems and traditional practices, community-based paralegals bridge gaps and ensure access to legal services for diverse populations.

Community-based paralegals employ diverse modes of dispute resolution within communities, including education, mediation, organization, advocacy, monitoring, and, with legal assistance, litigation. Their voluntary or minimally compensated services focus on practical remedies, enhancing access to justice for the economically disadvantaged.

The prospective advantages of state recognition and regulation are not limited to individual paralegals; they also contribute to the general improvement of the legal profession and access to justice in the African context. Recognition guarantees that paralegals can fulfill their essential role as indispensable intermediaries between legal systems and their communities by confronting critical challenges and establishing a structured framework for their operation.

The Potential Drawbacks of State Recognition

The recognition of paralegals, through state recognition and regulation, is a complex process laden with potential risks and benefits. The prospect of recognition introduces the spectre of heightened government oversight and control. While regulatory mechanisms aim to ensure accountability, the delicate balance between maintaining the integrity of legal aid services and avoiding undue interference in the paralegal vocation becomes paramount. Striking this balance requires meticulous delineation of regulatory boundaries.

Recognition brings with it the risk of bureaucratic red tape and administrative burdens and possibly control. This may inadvertently hamper the efficiency of community-based paralegals, shifting their focus from direct legal aid provision to navigating complex regulatory requirements. These stumbling blocks may be put in their way to control them, especially on issues that are not favourable to the government. There is a need for a judicious approach is warranted to streamline processes and ensure that the work of community-based paralegals are not stifled.

A potential drawback of recognition lies in the reduced flexibility that community-based paralegals may experience. Flexibility is key to their work. They operate in diverse communities with varying cultural contexts, legal needs, and access to resources. Flexibility allows them to tailor their approaches and services to the specific needs of their communities, ensuring that their work is relevant and effective. Very often, as first responders to new legal issues and challenges that arise in their communities, flexibility enables them to adapt quickly to these emerging issues and provide timely and effective support. They require flexibility if they are going to successfully help bridge the between the customary and Western systems, especially since they have very limited resources. They need to be resourceful, adaptable and maintain crucial relationships. The structured nature of State regulatory frameworks may impede the adaptability required to address diverse legal challenges effectively.

A significant risk is that State recognition and regulation of community-based paralegals may entail increased costs for them and their communities.[114] Compliance with regulatory standards, accreditation, and ongoing training may be costly. This cost will have to be passed down to the communities, particularly economically marginalized ones. This may exclude many of the poorer communities and further marginalize them. The added costs may also mean that some community-based paralegals may not be able to gain official recognition. This exclusion, often rooted in geographic or socioeconomic factors, risks perpetuating existing inequalities in society, especially with regard to access to legal aid.

The Middle Ground - Self-Regulation and Limited State Oversight

The recognition of community-based paralegals through state recognition and regulation is a nuanced process with inherent risks. There is a need to strike a balance between the inherent risk that State regulation poses and the positive impacts of informality that foster innovation, inclusivity, and effective legal aid provision.

A possible middle ground could be self-regulation by the community-based paralegals and the communities and some form of limited state oversight. Many vocations regulate themselves. Community-based paralegals have a deep understanding of their communities and the legal needs of their clients. They are, therefore, well-positioned to develop self-regulatory standards that are appropriate and effective for their work. Self-regulation can be more responsive to the changing needs of communities and the legal system. It can also be more flexible and adaptable than state regulation. It can help to build trust and confidence among community-based paralegals, their clients, and the wider community. It can also foster a sense of ownership

114 Manuel, M., & Manuel, C. (2023). '"Small is beautiful but scale is necessary": front-line justice services in lower-income countries with the potential to scale-up'. ODI Policy Brief. London: ODI. Available at: https://odi.org/en/about/our-work/takingpeople-centred-justice-to-scale-investing-in-what-works-to-deliversdg-163-in-lower-income-countries/ (accessed 11 December 2023).

and responsibility among community-based paralegals for upholding ethical standards.

However, there are some limitations. Some countries have well-established community-based paralegal associations with the capacity to develop and enforce self-regulatory standards. However, in other countries, community-based paralegal associations are weak or non-existent. Additionally, the capacity of individual community-based paralegals to self-regulate varies depending on their level of training, experience, and access to resources.

A collaborative approach is envisaged in a model combining self-regulation and limited state oversight. Community-based paralegals can develop and enforce self-regulatory standards. At the same time, the state can ensure that these standards are met and that community-based paralegals comply with the law. For example, the state could develop a national framework for community-based paralegal self-regulation, setting minimum standards and providing guidance on implementing them. The state could establish a complaint mechanism allowing clients and others to report community-based paralegals who do not meet the required standards. It could conduct periodic audits of community-based paralegal associations to ensure they comply with their self-regulatory obligations.

As we navigate the complexities of formalizing community-based paralegals, the proposition of self-regulation with limited state oversight emerges not as a panacea but as a pragmatic middle ground. In acknowledging the strengths of community-based paralegals and the nuances of varied contexts, this approach opens avenues for a regulatory landscape that is both effective and respectful, embodying the spirit of collaboration in the pursuit of equitable access to justice in Africa.

Conclusion - Balancing Formal Recognition with Grassroots Realities

Paralegalism in Africa has emerged as an indispensable pillar of the legal ecosystem, playing a pivotal role in bridging the chasm of access to justice and empowering marginalized communities. While the formal recognition of community-based paralegals remains a subject of ongoing discourse, the intricate dynamics surrounding their role underscore the need for a nuanced approach that strikes a delicate balance between legitimacy and autonomy.

As African nations continue to grapple with the intractable challenges of access to justice, the invaluable contributions of paralegals cannot be overstated. Their unique ability to navigate the centralized and community-based justice systems and their deep-rooted understanding of community dynamics make them indispensable partners in pursuing legal empowerment. Recognizing their expertise and fostering their seamless integration into the centralized legal system will undoubtedly enhance the delivery of justice and promote the rule of law across the continent.

Striking the balance between legitimacy and autonomy for community-based paralegals requires a nuanced approach that recognizes their unique role in promoting access to justice while ensuring their independence and ability to respond to the specific needs of their communities. There is a need to develop a national framework, which could include a registration process, training standards, and a code of conduct that acknowledges the valuable contributions of community-based paralegals and provides a mechanism for their recognition. This framework. Collaboration and partnerships between community-based paralegal associations, the legal profession, and government agencies to foster mutual understanding and support should also be encouraged. This

could involve joint training programs, shared resource platforms, and regular consultations.

Part of the framework may also include developing and implementing a transparent and accessible complaints mechanism to address concerns about community-based paralegals' conduct or adherence to standards. This mechanism should involve independent oversight and ensure fair and timely resolution of complaints.

Community-based paralegals should form associations or strengthen existing associations. For this to happen, more funding, training, and technical support must be needed. This will enable them to effectively self-regulate, advocate for their members, and build capacity to participate in policy discussions. They must be encouraged to engage in continuous learning and development opportunities to enhance their skills, knowledge, and expertise. This could involve workshops, seminars, and mentorship programmes.

There is a need to respect the autonomy of community-based paralegals to operate independently and in accordance with their community's norms and values. Excessive state regulation, control or interference that could undermine their credibility and effectiveness should be avoided. Funding is key to autonomy. A sustainable funding mechanism should be developed to support community-based paralegal activities and ensure their long-term viability. This could involve government grants, donor funding, and community-based fundraising initiatives. There is a need to continuously monitor and evaluate the effectiveness of regulatory measures and make adjustments as needed. This will ensure that the regulatory framework remains responsive to the evolving needs of community-based paralegals and their communities.

The evolution of paralegalism in Africa epitomizes resilience, innovation, and grassroots mobilization. By embracing the transformative potential of paralegalism, African nations can strike a balance between legitimacy and autonomy for community-based paralegals, enabling them to continue their invaluable work in promoting access to justice and fostering a more just and equitable society. Community-based paralegals embody the indomitable spirit of justice, their transformative contributions serving as a beacon of hope for millions. The decision on recognition must consider the unique contexts of individual African countries, acknowledging legal landscapes, cultural nuances, and specific needs. A comprehensive and adaptable approach to community-based paralegal recognition is pivotal for the continued enhancement of access to justice across diverse communities.

The unwavering belief in the power of law to transform lives and the indomitable spirit of justice are exemplified by community-based paralegals. Their contributions, which are unquestionably transformative yet frequently disregarded, serve as a source of hope for millions who yearn for a world in which justice is not merely an abstract concept but a tangible reality that is within their reach. The recognition of community-based paralegals necessitates meticulous deliberation within the distinctive contexts of individual African countries.

In order to ascertain the feasibility and impact of recognition, it is necessary to conduct a case-by-case assessment of the legal landscape, cultural nuances, and specific requirements of each jurisdiction. This method recognizes the diversity that is inherent in the African legal environment and guarantees that any recognition process is contextually appropriate and responsive. Recognizing paralegals is a fundamental step toward a more equitable and inclusive legal system as Africa continues to negotiate the intricacies of its legal system. To guarantee the ongoing improvement of access to justice for diverse communities, it is imperative to implement a comprehensive and adaptable community-based paralegal recognition strategy.

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Mainstreaming Paralegal Services for Africa's Poor & Powerless:

Might Lawyers Take a Lead?

Stanley Ibe*

Introduction

Sub-Saharan Africa is home to 47.8% of the global poor population.[115] Of the 22 countries with more than 50% of their population in the poverty zone, the region holds 19[116] including the poorest four.[117] Interestingly, 84% of poor people in Africa live in rural areas where access to justice institutions is severely limited. This raises the question: how does the majority poor people in rural areas access justice in Africa? Who makes that connection possible – if ever?

Almost every time access to justice[118] is mentioned, there is a tendency to assume that only lawyers, judges, law enforcement and corrections personnel act in that space. In this universe of professionals, lawyers have a place of prominence because they often serve as intermediaries between clients and the justice institutions. This reality makes it imperative to ask: what proportion of our population does legal practitioners represent and what does that mean for access to justice?

FACT - lawyer to population ratio is quite low in most places on the continent.[119] Nigeria averages 1:1,598; Rwanda - 1:9720; Uganda - 1:2,429; Ghana - 1:15,989; Zambia - 1:20,789; and Malawi - 1:26,698. These ratios demonstrate the futility in relying exclusively on lawyers to help people navigate their way through the path of justice. So, what other options exist? Do we need lawyers at every point in the process? Does working with paralegals help or hinder the process? This article provides some answers to these questions. Ahead of that, I briefly highlight the sorts of problems people in rural areas confront.

Navigating the universe of rural-connected problems

The average person in a rural community in Africa confronts simple problems – disputes relating to land, chieftaincy, custody, customs and tradition, access to government institutions etc. They also deal with more serious problems such as high crimes, murder, armed robbery, sexual and gender-based violence, etc. Both simple and complex problems potentially require the services of a lawyer, but a lawyer does not have to be the first responder to these problems partly because

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115 See *Global Multidimensional Poverty Index: Unstacking Global Poverty – Data for High Impact Action* (UNDP & OPHI 2023), p. 6 <https://www.undp.org/sites/g/files/zskgke326/files/2023-07/2023mpireportenpdf.pdf> (accessed 23 November 2023).

116 Angola, Benin, Burundi, Central Africa Republic, Chad, Democratic Republic of Congo, Ethiopia, Guinea, Guinea Bissau, Liberia, Madagascar, Mali, Mauritania, Mozambique, Niger, Senegal, Sierra Leone, Sudan, Tanzania, and Uganda. Global Multidimensional Poverty Index (n. 1), p. 6.

117 Burundi (75.1% in 2016/17), Central Africa Republic (80.4% in 2018), Chad (84.2% in 2019) and Niger (91% in 2012)

118 In this context, access to justice means the "ability of any individual to seek redress and receive remedy over a perceived wrong either through formal or informal justice systems." See Ebenezer Durojaye, Gladys Mirugi-Mukundi & Oluwafunmilola Adeniyi, "Legal empowerment as a tool for engendering access to justice in South Africa." International Journal of Discrimination and the Law, Vol. 20, Iss. 4, Dec. 2022. Pp. 224-244 quoting the UNDP. <https://journals.sagepub.com/doi/epub/10.1177/1358229120969602> (accessed 27 November 2023).

119 The data that follow come from worldometer.com (for country population) and the website of African Centre of Excellence on Access to Justice https://accesstojustice.africa/laws-policies-on-paralegals-in-africa/ accessed 27 November 2023 (for average number of lawyers).

they can be handled by other people and more importantly, there are not enough lawyers to go round. Indeed, some of these problems could be addressed by the rural poor directly if they have the appropriate information. For example, women in communities with limited or no access to maternal health facilities often rely on traditional birth attendants to have their babies. Providing basic information about accessing birth certificates from the appropriate government office could help address future problems around the actual age of those children.

Paralegals have often bridged the information gap for millions of poor people who would otherwise be left behind. They provide legal empowerment and advice services. They also help poor and disempowered people navigate the often-difficult terrain of public service delivery. In the field of criminal justice, paralegals connect arrested persons with their families and lawyers. They also help identify detainees entitled to bail and advise them about accessing and processing bail, including connecting with sureties where necessary. They may also take steps – together with other like-minded individuals and groups – to challenge and ultimately upend systemic societal problems such as marginalization of poor and disempowered individuals.

In countries like Malawi and Sierra Leone,[120] networks of paralegals have worked across districts providing appropriate legal information to arrested persons; assisting chiefs dispense justice according to law; and helping detainees in prison find suitable responses to the cases against them – including by connecting them to lawyers.

Paralegals are often connected to the communities they serve. Many come from those communities, understand the local contexts, and earn the trust of the people. Organizations such as Paralegal Advisory Service Institute (PASI) (Malawi)[121] and TIMAP for Justice (Sierra Leone)[122] have led the effort to train and deploy paralegals to provide these services. They continue to inspire similar efforts across the continent.

As explained above, paralegals provide a range of services to clients. In doing so, they contribute to solving problems for the poor and often forgotten. One might therefore wonder how and why solving problems for people who cannot help themselves might predispose paralegals to clashes with lawyers. I will reflect on this point in the next section.

The lawyer/paralegal conundrum

Despite the advances highlighted in section 2, paralegals confront formidable opposition from lawyers and bar associations in the work that they do around the continent. Lawyers and bar associations allege that some paralegals impersonate lawyers and therefore potentially become the

120 Sierra Leone has a lawyer to population ratio of 1:9,768. This is based on a lawyer population of 900 and general population of 8,791,092.

121 Paralegal Advisory Service (PAS) commenced operations in May 2000 as an initiative of Penal Reform International connecting four Malawian NGOs with the Malawi Prisons Service. It evolved into an autonomous entity (PASI) training and deploying paralegals to prisons, courts, prisons, and communities in 2007. For more see Open Society Justice Initiative, *Where there is no Lawyer: The Paralegal Advisory Service Institute – Malawi* (Open Society Foundations 2010) <https://www.unodc.org/documents/congress/background-information/NGO/Open_society_foundation/Malawi_PASI_OVERVIEW_CJ_PILOT_April_2010.pdf> (accessed 25 November 2023).

122 TIMAP for Justice began as an independent paralegal organization in 2004 with the objective of brining justice and conflict resolution services to poor and marginalized communities in Sierra Leone. It works with the formal and informal justice systems. For more, see Dale P (2009) *Delivering Justice to Sierra Leone's Poor: An Analysis of the work of TIMAP for Justice*. Justice for the Poor Research Report No. 1 <https://openknowledge.worldbank.org/entities/publication/d5bcb88d-4d48-52f1-9df8-cd83f256b736> (accessed 25 November 2023).

competition and/or damage their professional reputation before clients – actual and potential. This allegation has merit.

In communities without lawyers (or with few lawyers), there is a tendency for community members to perceive anyone who appears to solve a seeming legal problem as a "lawyer" and there are occasions where unscrupulous individuals parade themselves as lawyers. This tag is not restricted to paralegals. Court clerks, teachers and even students with access to the language, culture or etiquette of lawyers could exploit it to mislead the public. Nonetheless, paralegals – where they exist - tend to get the most attention partly because they have "legal" embedded in their professional title. Addressing this problem will therefore get the lawyer/paralegal relationship to a place better than it is now.

One way of addressing the problem is through recognition and regulation backed by information dissemination. Legal recognition of paralegals imposes obligations on them to work according to set standards and regulation means that they will be held to those standards. Both ideas require the input of lawyers and bar associations to succeed. For states without legal recognition and regulation for paralegals, lawyers and bar associations must play an active role in formulating appropriate laws and standards and then working with paralegals/paralegal organizations to disseminate this information to communities so they can understand the contours and limits of paralegal services. Paralegals and paralegal organizations also have a role in designing appropriate disciplinary mechanisms for members who do not comply with set standards. Applying appropriate sanctions sends the signal that paralegals do not condone inappropriate conduct and therefore increases the trust quotient they have with the wider community. States must also provide direct support to paralegals to expand the services they provide particularly for the rural poor.

Given this background, lawyers and bar associations do not have the luxury of walking away from or pretending that paralegals do not exist. Paralegals exist. They provide an essential service and they deserve respect and support for their work. Lawyers do not have to see paralegals as competitors. They are partners and team members. To get to this point, lawyers must work with paralegals/paralegal organizations to, for instance, stem the tide of malpractice that is sometimes a sticky point. In addition to helping sanitize the system, collaboration could also potentially get more jobs to the lawyers because paralegals will have greater incentive to connect clients who require the services of lawyers to lawyers. In return, lawyers will hopefully become more comfortable letting paralegals do what they can do well. It is important that malpractice is not the exclusive preserve of paralegals. Lawyers are sometimes involved in malpractice. The difference is that bar associations often have disciplinary committees to which victims of malpractice by lawyers can report. These disciplinary committees are often well known to the public. Regrettably, paralegal associations may not be at the point where they have structured and publicly recognized disciplinary mechanisms.

One caveat about legal recognition and regulation, experience around the continent suggests that paralegals are required to have minimum academic and/or professional qualifications under state laws recognizing them.[123] They may also come under the supervision of state institutions.[124] These

123 For example, the Tanzania Legal Aid Act of 2017 requires a secondary school certificate, diploma, or degree for different categories of paralegals. See African Centre of Excellence on Access to Justice, Laws & Policies on Paralegals in Africa <https://accesstojustice.africa/wp-content/uploads/2023/07/Tanzania.pdf> accessed 25 November 2023.

124 Section 23(4) of Nigeria's Legal Aid Act of 2011 empowers the Legal Aid Council of Nigeria to make regulations for the conduct of "paralegal aid provision." See African Centre of Excellence on Access to Justice (n. 9) <https://accesstojustice.africa/wp-content/uploads/2023/07/Nigeria.pdf> 25 November 2023.

requirements have the potential to stifle the work of paralegals. For example, where paralegals are mandated to obtain a diploma to be able to continue their work, there is a high chance that they would migrate to more financially rewarding professions and certainly away from the communities. Even when they are not disposed to financial gains, the reality is that many will not be able to afford the fees for additional qualification in view of the fact that most paralegals earn modest salaries. As useful as state-level supervision is, it could hinder the work of paralegals particularly in contexts where paralegals are representing clients who have complaints against the state and where state institutions are competing for the same clients or providing similar services as paralegals. Besides, some of the state institutions under consideration struggle with their primary assignment so it bears reviewing how they plan to cope with additional responsibilities.

What more can lawyers, and bar associations do?

In a prior article, I advocated for a "tiered system" of legal aid service providers with lawyers at the top and paralegals and law clinics beneath.[125] The main reason for this proposal is that there are few lawyers compared to the populations across Africa and not every problem requires the services of a lawyer at first sight. This model is akin to the system hospitals adopt in the provision of medical services – doctors at the rear with paramedics, nurses, and other support staff in the frontlines. With the benefit of two years of more reflection, I can say that we do not necessarily need a tiered system. We could have separate systems – for lawyers, law clinics and paralegals – so long as they connect with one another and prioritize solving the problems of the poor and powerless in our communities. To be clear, this proposal is not an indication of how important any of the professionals is. It reflects the fact that in many rural communities, clients are more likely to see a paralegal than a lawyer. In any event, the service of a paralegal is more likely to be free than the lawyers.

Lawyers and bar associations can do more to advance the cause of paralegals by engaging with paralegals on topics such as regulation, information sharing and exchange, mutual learning and, understanding, data gathering and exchange, outreach, and communications. They might also consider providing pro bono services in support of paralegals handling cases. One way to begin the process of engagement is to place paralegals on the agenda of annual bar conferences – for state, sub-regional and regional bar associations. For instance, the Pan African Lawyers Union (PALU) could include an agenda item on paralegals in its 2024 conference programme and invite leading paralegal organizations across the continent to a discussion with lawyers about issues of mutual concern. This meeting could provide a rare opportunity to do joint reflection in the same room and reach some agreements as to how to foster lawyer/paralegal relations in the interest of justice and the poor. Another option is for the African Centre of Excellence on Access to Justice[126] to convene a joint meeting with PALU or other bar associations where these discussions can begin and then trickle down to national bar associations and individual lawyers.

Lawyers must embrace these conversations in the interest of their profession, the communities,

125 See Ibe S, (2021)"Plugging the legal aid gap in Africa: Paralegals to the rescue?" ESR Review, Vol. 22, No. 2, 2021 <https://dullahomarinstitute.org.za/socio-economic-rights/esr-review-archives/archives/esr-review-volume-22-no-2-2021/plugging-the-legal-aid-gap-in-africa_paralegals-to-the-rescue.pdf> (accessed 25 November 2023).

126 A continental network of civil society organizations committed to promoting access to justice, human rights, rule of law and legal aid for the poor and marginalized. For more on the activities of the organization, please see <https://accesstojustice.africa/> (accessed 25 November 2023).

and the future disruptions that legal empowerment of the poor could trigger. In the next section of this piece, I briefly reflect on that.

How legal empowerment might disrupt the future of access to justice

Legal empowerment[127] strengthens the voices of the poor and enables them to use the law to advance their rights and interests.[128] It aims to get to the root of the disempowering practices and laws that keep people poor and powerless. The United Nations Commission on Legal Empowerment of the Poor was founded on the premise that providing a stake for everyone, especially poor people, in the equal protection of the law is the surest way to reducing poverty across the world.[129]

As far-fetched as it may sound now, it is possible to increasingly empower poor people to a point

127 Stephen Golub has the credit for coining the words "legal empowerment." In a 2003 piece, he described legal empowerment as "the use of legal services and related development activities to increase disadvantaged populations control over their lives." See Golub S *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for International Peace 2003) <https://carnegieendowment.org/2003/10/14/beyond-rule-of-law-orthodoxy-legal-empowerment-alternative-pub-1367> (accessed 27 November 2023).

128 *Legal empowerment of the poor and the eradication of poverty*. Report of the Secretary General of the United Nations to the 64th session of the UN General Assembly. Doc. A/64/133, July 2009, p. 3 <https://www.un.org/esa/socdev/documents/reports/Legal%20empowerment%20of%20the%20poor.pdf> (accessed 25 November 2023).

129 *Making the Law Work for Everyone* – Vol. II Working Group Reports (Commission on Legal Empowerment of the Poor & United Nations Development Programme 2008), p. iii <https://digitallibrary.un.org/record/633966> (accessed 25 November 2023).

where they know how to navigate state institutions, including the justice system with or without the support of lawyers. This may not necessarily threaten the business of lawyers, but it could change the relationship dynamics if lawyers are not plugged into the support chain. To paint a scenario, assume that the poor in rural communities now fully understand how to be on the side of the law in their routine transactions and engagements with other people and state institutions, the probability of running afoul of the law will reduce and with it, the actual need for a lawyer. However, if lawyers played a more proactive role, the poor would see them on the spectrum and connect at the appropriate time.

Conclusion

Paralegals or "barefoot lawyers"[130] have come a long way in Africa. Two important instruments - *Lilongwe Declaration on Accessing Legal Aid in Criminal Justice Systems in Africa*[131] and *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*[132] invite states to recognize the role of other service providers, including paralegals in the delivery of legal aid services. That is a recognition of the importance of the work they do.

Despite this and other strides in the field, paralegals confront significant pushbacks, particularly from the professionals most connected to their work – lawyers. The frosty relationship is needless because both parties are better off working together. Either can initiate the move to start doing things differently. The already existing cordial relationship between PALU and the African Centre of Excellence on Access to Justice provides an important opportunity to begin this process. As I hinted in this article, the benefit of collaborating outweighs any downsides. The real question at this point is: who will make the first move?

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130 UNODC uses this phrase to describe paralegals because they provide basic legal services. See Handbook on Improving Access to Legal Aid in Africa (New York: UNODC, 2011), p. 31 <https://www.unodc.org/pdf/criminal_justice/Handbook_on_improving_access_to_legal_aid_in_Africa.pdf> (accessed 26 November 2023).

131 2004. Article 7 acknowledges the paucity of lawyers and the necessity of incorporating non-lawyers, including paralegals in the delivery of legal aid services. See Lilongwe Declaration <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2004-lilongwe-declaration-en.pdf> (accessed 26 November 2023).

132 UN General Assembly Resolution 67/187 of 2013. Guideline 14 invites states to "recognize the role played by paralegals and similar service providers in providing legal aid where access to lawyers is limited." See <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> (accessed 26 November 2023).

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Between Integration and Separation: The Impact of Legal and Policy Restrictions on Refugees in Kenya

Gordon Ogutu*

Abstract

Since it gained independence in 1963, Kenya has hosted refugees and asylum seekers due to its geopolitical location in a relatively unstable region. According to data from the United Nations Refugee Agency (UNHCR), the number of refugees hosted in Kenya has risen from less than 15,000 in the 1960s to more than 700,000 presently[133]. The Government of Kenya has, on many occasions, complied with the obligations of the 1951 UN Refugee Convention and its Protocol of 1967, especially by opening its borders to those seeking international protection. However, over time, it has imposed a restrictive policy of encampment, requiring refugees to reside mainly in Kakuma and Dadaab refugee camps, which are in remote and marginalised North-Western and North-Eastern regions, respectively.

In 2015, the Government of Kenya, the UN Refugee Agency and the County Government of Turkana launched a new integrated settlement in Turkana-West as a new model for enhancing refugee socio-economic integration. This was further supported by the enactment of the Refugees Act of 2021, which provided for the inclusion of refugee issues in the local and national development plans, among others. In addition, Kenya launched the Marshal Plan for refugees in May 2023 to signify a new focus on self-reliance and development rather than aid dependency. Despite the adoption of new legal frameworks and forward-looking strategies and plans, refugees in Kenya still cannot access critical socio-economic rights such as freedom of movement and labour rights. They are also still confined to highly securitised camps.

This article critically analyses the impacts of the legal restrictions on the socioeconomic integration of refugees in Kakuma. It seeks to provide a better understanding of Kenya's contradictory refugee policies, which theoretically are designed to enhance refugee socio-economic integration while, on the other hand, perpetuate the long-standing separation and containment of refugees from the general population mainly due to perceived security concerns in practice. As indicated in the country's Comprehensive Refugee Response Framework (CRRF), Kenya's legal and policy frameworks are grounded in international law relating to refugees such as the Refugee Convention of 1951 and its 1967 Protocol, the 1969 OAU Convention on Refugees among others[134]. The country's Comprehensive Refugee Response Framework (CRRF) outlines several key objectives. These include enhancing protection space for refugees and supporting their socioeconomic needs. These objectives provide a context for the discussion on refugee integration in Kenya.

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133 Kenya: Refugees and Asylum Seekers, 2024, https://www.unhcr.org/ke/wp-content/uploads/sites/2/2024/06/Kenya-Statistics-Package_31-May-2024.pdf ()Accessed 5 July 2024)

134 Support for Host Community and Refugee Empowerment (SHARE): Kenya's Comprehensive Refugee Response Framework, 2020, https://refugee.go.ke/sites/default/files/downloads/Kenya-Comprehensive-Refugee-Response-Framework-CRRF.pdf (Accessed 5 July 2023).

Introduction

Effective integration of refugees into the host communities remains a major challenge in Kenya's long refugee response and management plans. Despite having hosted refugees since the 1960s, the Kenyan government has failed to provide safe and dignified asylum to the hundreds of thousands of people entering the country from the neighbouring states. On many occasions, the government has resorted to reactionary measures which contravene international laws and conventions, such as the closure of borders to prevent refugee movement, illegal detention of refugees and threats to close the two main camps of Kakuma and Dadaab refugee camps. In addition, due to the absence of proper integration frameworks, the refugees have continued to be confined in large and crowded camps away from the public sight and at the margins of society.

The inhuman and unfair treatment of refugees by the Kenyan government has, in effect, relegated refugee issues farther from the national development discourse despite the positive socio-economic contribution of the refugees in the hosting regions. Moreover, the impact of the encampment policy can be seen in the low proportion of Kenyans who have had direct contact with refugees. According to a 2018 study conducted by the International Rescue Committee (IRC) Kenya, only about 26 per cent of Kenyans have encountered refugees[135]. This low interaction can be attributed to the long-standing encampment policy, which has separated and restricted refugees to Kakuma and Dadaab refugee camps, and the overall negative perception of refugees across the country, which is worsened by media reports on refugees that relate to national security issues.

This article, therefore, argues that the negative perceptions of refugees and their association with security issues are not in any way connected to the real activities of individual refugees but are direct outcomes of the restrictive refugee policies designed and implemented by the Kenyan Government. Moreover, it demonstrates how the contradictory refugee policies in Kenya impede the efforts to provide quality international protection and derail the programs initiated to enhance greater refugee and host community integration.

Dawn of the first refugee law regime and the entrenchment of the encampment policy

Until 2006, the Government of Kenya had no law to manage refugee affairs. This legal gap was partly due to the transfer of such affairs to the U.N. Refugee Agency in 1992 after receiving overwhelming numbers of refugees in 1991, which had stretched the country's financial and human resources capacity. According to data, Kenya hosted around 30,000 refugees up to 1991, but the numbers drastically increased to approximately 300,000 in a span of one year. [136]

Moire (2009), however, opines that the Kenyan Government's stance on refugee issues was informed by the perception that having such legislation would restrict the government's response to the perceived security threats posed by refugees by imposing certain legal obligations on the government, such as protecting and respecting refugee rights. [137] In practice, refugees were expected to reside in designated camps- Dadaab and Kakuma- established in 1991 and 1992,

135 International Rescue Committee, 'Kenya: Citizens' Perceptions on Refugees.' International Rescue Committee, 2018. https://www.rescue.org/sites/default/files/document/2857/irckenya.pdf (Accessed 20 June 2023).

136 Laura Hammond, 'Somali Refugee Displacements in the near Region: Analysis and Recommendations' *UNHCR*, 2014. https://www.unhcr.org/events/campaigns/55152c699/somali-refugee-displacements-near-region-analysis-recommendations-paper.html (Accessed 10 July 2023).

137 Edward Mogire, 'Refugee Realities: Refugee Rights versus State Security in Kenya and Tanzania.' *Transformation* 26, no. 1, 2009, 15–29. https://doi.org/10.1177/0265378809102173 Accessed 1o July 2023).

respectively, except for those pursuing further education, which is not available in camps, those needing specialised healthcare not available in camps, those at high-security risk in the camps, and those undergoing resettlement process.[138]

The first refugee-specific legislation was thus enacted in 2006. Through the Refugees Act of 2006, the government committed to recognizing, protecting, and managing refugee affairs. [139] New offices and institutions were also created under this Act to oversee the implementation of the legislation. They included the Department of Refugee Affairs (D.R.A.) responsible for coordinating and administering refugee matters (section 6); a Commissioner for Refugee Affairs office which headed the D.R.A. and was responsible for formulating refugee-related policies and promoting durable solutions (section 7); the Refugee Affairs Committee charged with assisting the Commissioner in matters relating to the recognition of persons as refugees (section 8); and the Refugee Appeals Board to consider and decide appeals (section 9).

Interestingly, under the Refugees Act of 2006, the government set the maximum number of refugees allowed into the country and specified where they were expected to reside. Under Section 16a, the maximum number of refugees and asylum seekers in Kenya was not to exceed one hundred and fifty thousand (150,000), even though the 1951 Refugee Convention requires states not to limit the number of refugees they can admit. In addition, the 2006 Act stipulated that only the National Assembly could review the number upwards but within a limited period of 12 months. This requirement on numbers allowed into the country was, however, practically impossible as the number of refugees and asylum seekers in Kenya at the time the 2006 Act was operationalized exceeded half a million- Dadaab hosted at least 460,000 while Kakuma had more than 100,000.

Regarding the residence of refugees, under Section 12 of the 2006 Act, refugees were expected to reside in designated camps and were not allowed to leave without the permission of the Refugee Camp Officer (Section 14). This element was in keeping with the non-integration approach, which was the de facto policy restricting refugees' rights to work and move, but it was now enshrined in the law.

Despite the legal gaps which existed in the new 2006 Act, the legislation was lauded by activist and human rights organisations for transforming the international protection and management of refugee affairs in Kenya[140]. For the first time, the country had a legislation which exclusively addressed the refugee issues and set up institutions to oversee its implementation. However, it was argued that the Kenyan government showed little technical capacity and political will to implement it[141]. In addition, there needed to be more well-developed institutional and policy frameworks to implement the 2006 Act[142]. The security concerns of the state when the Act was first passed were

138 Human Rights Watch, 'Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala.' Human Rights Watch, 2002. https://www.hrw.org/reports/2002/kenyugan/kenyugan.pdf (Accessed 10 July 2023).

139 Office of the United Nations High Commissioner for Human Rights, 'Refugees Act No. 13 of 2006.' Office of the United Nations High Commissioner for Human Rights, 2016. https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/CallEndingImmigrationDetentionChildren/CSOs/RefugeeConsortium_of_Kenya_Annex1.pdf (Accessed 10 July 2023).

140 Crisis Group, 'Kenya: Al-Shabaab – Closer to Home. Crisis Group, 2014. https://www.files.ethz.ch/isn/184018/Kenya-Al-Shabaab.pdf (Accessed 10 July 2023).

141 Pavanello, Sara, Samir Elhawary, and Sara Pantuliano, 'Hidden and Exposed: Urban Refugees in Nairobi, Kenya.' Research Gate, 2010. https://www.researchgate.net/profile/Sara-Pantuliano/publication/242679166_Hidden_and_Exposed_Urban_Refugees_in_Nairobi_Kenya/links/560b130208ae4d86bb14b301/Hidden-and-Exposed-Urban-Refugees-in-Nairobi-Kenya.pdf (Accessed 11 July 2023).

142 Ken Oluoch, 'Reconciling Security Concerns and Refugee Protection.' Review of History and Political Science, 2017. https://doi.org/10.15640/rhps.v5n1a3 (Accessed 11 July 2023).

also evident in the provisions of the Act. These concerns increased the risks of such provisions being exploited by rogue police officers through wrongful detentions, prosecutions, and sometimes deportations of refugees and people seeking protection. [143]

In essence, the 2006 refugee legislation was significantly driven by security concerns and did not consider the potential impacts of the socio-economic integration of refugees with the host communities. It was formulated in response to real and perceived security challenges and aimed to control refugees rather than to provide a framework for addressing the long-term refugee crisis in the country by for instance expanding their labour and mobility rights. There was an inadequate commitment to durable solutions except for a small mention in section 7 on the functions of the Commissioner for Refugee Affairs, which included, among other things, to 'promote as far as possible durable solutions for refugees granted asylum in Kenya' (subsection 2e).

[144]New Paradigm in Refugee Management

Despite having enacted the 2006 refugee legislation that enshrined international protection and recognition for refugees, in practice, there was no significant change in how the Kenyan government viewed and dealt with refugee issues. The non-integration policy continued, as evident in the 2007 Kenya-Somalia border closure. Moreover, the government resisted plans to expand the Dadaab refugee camp in 2011 as such a move would suggest a state of durability for refugees[145]. In 2015, the Kenyan Government revived the intentions to close the Dadaab refugee camp, with the then Deputy President William Ruto urging the UNHCR to close the camp and send back all refugees to Somalia. [146] While addressing the 2015 World Humanitarian Summit in Turkey, Dr. Ruto also claimed that Kenya's humanitarian obligations had come at massive financial, environmental, and security costs; thus, the refugees needed to be repatriated to contribute to rebuilding their country[147].

The hard stance towards refugees continued despite the enactment of a new Citizenship and Immigration Act of 2011, which guaranteed qualified or professional refugees such as medics, engineers, lawyers, accountants, and I.T. experts- a right to a free class M work permit, the possibility of becoming Kenyan citizens, access to essential requirements such as refugee identity cards, and family reunification and education for students.

Therefore, it was clear that the Government of Kenya was not fully committed to respecting and promoting refugee rights and needs, for which it received constant criticism from human rights organisations and NGOs working on refugee reforms and rights.[148] In 2014 particularly, the

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143 Kiama Lucy, and Dennis Likule, 'Detention in Kenya: Risks for Refugees and Asylum Seekers.' Forced Migration Review, 2013, 2.

144 Rice Xan, 'Somali Refugee Settlement in Kenya Swells as Row Grows over Empty Camp.' The Guardian, August 11, 2011, sec. World news. https://www.theguardian.com/world/2011/aug/11/somali-refugees-kenya-camp-empty (Accessed 11 July 2023).

145 William Ruto is the current President of Kenya, having been elected in the August 2022 general elections.

146 Kaberia, Judie, 'DP Ruto Tells Global Leaders Meeting Dadaab Decision Final.' Capital News, May 23, 2016. https://www.capitalfm.co.ke/news/2016/05/dp-ruto-tells-global-leaders-meeting-dadaab-decision-final/ (Accessed 11 July 2023).

147 United Nations, 'UN Refugee Agency Cautions against Stigmatizing Refugees in Wake of Violence in Kenya.' UN News, December 20, 2012. https://news.un.org/en/story/2012/12/428852-un-refugee-agency-cautions-against-stigmatizing-refugees-wake-violence-kenya (Accessed 11 July 2023).

148 Balakian, Sophia, 'Money Is Your Government': Refugees, Mobility, and Unstable Documents in Kenya's Operation Usalama Watch.' African Studies Review 59, no. 2, 2016: 87–111. https://doi.org/10.1017/asr.2016.36 (Accessed 11 July 2023).

government of Kenya drew criticism following the security operation dubbed 'Operation Usalama (Security) Watch' where at least 4,000 people, mainly Somali refugees living in Nairobi's Eastleigh estate, were arrested and detained in Kasarani Stadium.[149]

The security operation was launched in April 2014 by the Government of Kenya following a wave of terrorist attacks which claimed the lives of Kenyans; thus, it was a measure through which the Government intended to address the rampant insecurity, especially in the capital city of Nairobi. However, the operation unfairly targeted about fifty thousand refugees who lived in the city and scapegoated them in its war against terrorism.

After numerous engagements with and criticisms from key stakeholders, such as the UNHCR and civil society groups, Kenya again enacted new legislation- the Refugee Act of 2021 partly due to the local and international pressure. The main difference with the 2006 Act was that the new Act of 2021 aimed to promote and expand socioeconomic rights and opportunities for refugees, which had initially been curtailed. It recognized the benefits of socioeconomic integration of refugees for the country and host communities, and there was a reference towards allowing them to engage in economic activities for the growth and development of the host communities and the country.[150] It particularly provided for access to necessary documentation that would ensure that qualified refugees, for example, are able to engage in gainful employment beyond the camps. By focusing on socio-economic integration, the Act aimed at enhancing self-reliance[151] amongst refugees and the host communities for the realisation of positive integration outcomes such as improved social cohesion and well-being[152].

In terms of new institutions and offices, the new Act under Sections 6 to 11 introduced some changes and clarified the roles of various institutions involved in refugee affairs. The Department of Refugee Affairs was renamed the Department of Refugee Services (D.R.S.), the Refugee Affairs Committee became the Refugee Advisory Committee, the Office of the Commissioner for Refugee Services was maintained, while the Refugee Appeals Board was replaced with the Refugee Status Appeals Committee. However, restructuring the offices and departments did not affect the functions performed; it only clarified the roles and responsibilities.

Section 28 of the Act bestowed upon refugees all the rights outlined in the 1951 Refugee Convention, its Protocol of 1967, the O.A.U. Convention and the laws of Kenya. Notably, the government committed to facilitate access to and issuance of the necessary documents at national and county levels to enable refugees to contribute to socio-economic development and access to rights and services such as identification documents and business registration certificates. These documents are essential for socio-economic integration since the inability of refugees to register and conduct business affects their economic independence, suppresses their innovative ideas, and perpetuates poverty by limiting their socio-economic freedoms[153].

149 Laws of Kenya, 'Kenya Refugee Act of 2021.' 2021. http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2010%20of%202021 (Accessed 11 July 2023).

150 According to the UNHCR Handbook for Self-reliance, it is defined as the social and economic ability of an individual, a household, or a community to meet essential needs (including protection, food, water, shelter, personal safety, health, and education) in a sustainable manner and with dignity (p.1).

151 International Rescue Committee, 'Kenya: IRC Welcomes President Kenyatta's Move to Sign the Refugee Bill into Law.' International Rescue Committee (IRC), 2021. https://www.rescue.org/press-release/kenya-irc-welcomes-president-kenyattas-move-sign-refugee-bill-law (Accessed 12 July 2023).

152 Jamal Arafat, 'Camps and Freedoms: Long-Term Refugee Situations in Africa.' 2003, 3.

153 International Finance Corporation, 'Kakuma as a Marketplace: A Consumer and Market Study of a Refugee Camp and Town in Northwest Kenya.' Washington, D.C.: World Bank Group, 2018. https://www.ifc.org/wps/wcm/connect/0f3e93fb-35dc-

By promoting socio-economic integration through enhanced access to documentation and opportunities, the 2021 Act was aimed at realising more socio-economic gains previously identified by the 2016 World Bank study, which showed that refugees contributed at least 3.4 percent to the overall economy of Kakuma and operated about 30 percent of businesses in Turkana County[154]. Section 34 (1 and 2) of the Act provides an opportunity for shared public services, spaces, and facilities between refugees and the host communities. The shared services approach aims to increase the interactions between the refugees and hosts to promote positive social cohesion between them. The Commissioner for Refugees is also required to raise awareness among the host communities and promote good relations with refugees.

The Act further calls for incorporating the refugee agenda into the national and county development plans. Section 35 states;

> The Commissioner shall liaise with the national and county governments to ensure that refugee matters are considered in initiating and formulating sustainable development and environmental plans.

Overall, the 2021 Refugee Act was a renewed effort by Kenya to reform its refugee regime and align it with global efforts such as the 2018 Global Compact on Refugees and the Comprehensive Refugee Response Framework meant to address protracted refugee situations. This effort was a result of local and international pressure to reform the refugee protection system. Therefore, the new Act was based on an approach to humanitarian responses geared towards promoting refugees' engagement in the nation's socioeconomic development instead of containing them in camps and limiting their freedom to move and seek economic opportunities. An example of the new approaches is the planned sensitization of the host communities on the plight of refugees to ensure friendly interactions between them and enhanced social cohesion.

This Act also incorporated global commitments and agreements such as the 2016 New York Declaration for Refugees and Migrants, the 2018 Global Compact for Refugees, and the UNHCR's Comprehensive Refugee Response Framework's (CRRF) three-fold objective of alleviating the impacts of refugee presence on the hosts, achieving self-reliance for refugees and improving humanitarian development. It is also supported by the 2017 Nairobi Comprehensive Plan of Action for Durable Solutions for Somali Refugees, which Kenya pledged to promote self-reliance and socioeconomic inclusion. Under Kenya's 2020 CRRF, the government mainly supports voluntary repatriation and commits to facilitating the transition of refugee camps into urban settlements to promote the socio-economic inclusion of refugees and host communities.[155]

While the 2021 Act pointed to a new and robust approach by Kenya to address refugee affairs, it was still highly influenced by the perception of refugees as a security concern. It contained provisions that would make it possible for government agencies to wrongfully and unjustly violate the rights of refugees and asylum seekers contrary to the 1951 Refugee Convention, such as Section 4 (d), which states that the government would not recognize refugees deemed to threaten national security. At the same time, Section 29 (2) also authorised the denial of entry to a refugee or

4a80-a955-6a7028d0f77f/20180427_Kakuma-as-a-Marketplace_v1.pdf?MOD=AJPERES&CVID=mc8eL2K (Accessed 12 July 2023).

154 Refugee Affairs Secretariat, 'Support for the Host Community and Refugee Empowerment (SHARE).' Government of Kenya, 2020. https://refugee.go.ke/wp-content/uploads/2021/03/Kenya-Comprehensive-Refugee-Response-Framework-CRRF.pdf (Accessed 13 July 2023).

155 Betts, Alexander, 'The Wealth of Refugees: How Displaced People Can Build Economies.' Oxford University Press, 2022.

asylum seeker for similar security reasons. Further, Section 19 (1) permitted the Cabinet Secretary for Interior and Coordination of National Government to expel any refugee from Kenya on national security and public order, which is against the principle of non-refoulement as enshrined in the 1951 Refugee Convention.

Additionally, the Act does not guarantee the right to work and freedom of movement to the refugees to promote their socioeconomic rights and participation in the local and national economies. Instead, it focuses on clarifying the roles of various institutions involved in refugee affairs and is vague on how the country will work towards the realisation of durable solutions. As such, the 2021 Refugee Act relates to the central government's view that refugee policy 'should carefully manage humanitarian concerns with security concerns'[156]. In Dadaab, for example, the government focuses on repatriation and managing the security concerns linked to the Al-Shabaab terrorist group based in neighbouring Somalia.

In that sense, it is influenced by security concerns rather than paying attention to other refugee-hosting contexts like Turkana County, which is gradually moving towards socioeconomic integration under the Kalobeyei Integrated Socio-Economic Development Plan (KISEDP) that promotes integrated settlement. On integration, the Act does not highlight any strategies to promote good relations between refugees and hosts besides a small mention of the need to promote awareness of the host communities about refugees and related matters to promote 'peaceful co-existence with each other' (Section 34(2)).

Moreover, the anticipated benefits of the new legislation are yet to be felt or achieved as the government and other stakeholders are still engaging in discussions to develop other policies and frameworks that would support the implementation of the 2021 Act. Much will need to be done in terms of improving the relationship between the hosts and refugees because it is complex and shaped by different narratives, such as government exclusion. Additionally, the history of the host community as a marginalised and underserved region has primarily shaped these perceptions; thus, any policy developed to promote inclusion and social cohesion among the refugees and hosts must address not only the present needs of refugees but also the historical marginalisation and exclusion of the host communities in Turkana and North-Eastern parts of Kenya.

Refugees, host communities, and civil society groups advocating for the protection of refugee rights also have a role in challenging the restrictions and realizing legal empowerment. This push for reforms has been seen in court decisions to bar the government from forcing urban refugees back to Kakuma and from closing Dadaab and Kakuma refugee camps. [157] Therefore, using advocacy and challenging some of the restrictions in courts as a strategy to achieve more legal and policy reforms for refugees can ultimately transform the refugee policies in Kenya and compel the government and policymakers to consider formulating refugee-centred policies rather than security or politically motivated policies.

While there is an indication from the government to shift from the restrictive encampment policy to a more inclusive approach under the proposed *Shirika* Plan, the possibility of greater socio-economic inclusion of refugees might not be fully achieved if they are still subjected to the same

156 Kadida, Jillo, 'Appeal Court stops state from forcing urban refugees back to camps.' The Star, 2017. https://www.the-star.co.ke/news/2017-02-17-appeal-court-stops-state-from-forcing-urban-refugees-back-to-camps/ (Accessed 12 July 2023); Muthoni Kamau, 'Court bars State from closing Dadaab and Kakuma refugee camps.' The Standard, 2024. https://www.standardmedia.co.ke/national/article/2001492271/court-bars-state-from-closing-dadaab-and-kakuma-refugee-camps (Accessed 12 July 2023).

157 Formally the Marshal Plan for refugees, which is intended at transforming refugee camps into integrated settlements.

legal and policy restrictions in marginalised regions with low or little economic potential. [158] The Kalobeyei Integrated Settlement is a perfect example of the government's continued actions only aimed at exciting the already fatigued donors to continue supporting refugee operations in the country without achieving any meaningful and practical community interventions. Seven years since it was established in 2016, there has been no significant improvement in the lives of refugees living in Kalobeyei. The refugees are not able to find meaningful employment opportunities and are unable to sustainably earn a reasonable income from doing business in the settlement. In addition, refugees in Kenya are hosted in counties with low economic activity and agricultural potential. Thus, any strategy that still favours keeping refugees in the marginalised and deprived host communities in Northern Kenya or any other "designated areas" will only perpetuate poverty among them.

Conclusion

Kenya has been a sanctuary state for refugees displaced across the region, despite subjecting refugees and asylum seekers to strict legal restrictions which inhibit their pursuit of self-reliance. This approach has been enabled by the Government's stance towards refugees, which is aimed at complying with the requirements of international laws while making it hard for refugees to survive in the country in practice. The location of the refugee camps in the country is a testament of Kenya's intentions to keep refugees away from the general population and in a position where they can only be passive recipients of humanitarian aid. In addition, keeping refugees in far-flung marginalised border regions is in line with the government's security stance on refugees, which is aimed at preventing any potential harm to the general Kenyan population, especially in densely populated regions like towns and cities. Consequently, the exclusion has resulted in gross violation of refugees' fundamental rights by the state and its officers, material and economic deprivation, and loss of agency among refugees over their own future.

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The Place of Private Prosecution in Enhancing Access to Justice in the Kenyan Judicial System

Calvin Were Odull*

Introduction

The design of the criminal justice in Kenya breathes its life from the supreme law of the land i.e. the Constitution of Kenya 2010 ('the Constitution'). As such, the prosecutorial power in Kenya is vested in the Office of the Director of Public Prosecution (ODPP). However, there is a window that allows a private citizen to prosecute criminal cases in Kenya. The power to privately prosecute is not expressly provided for in the Constitution, making its implementation a mirage. Creating awareness and active participation in private prosecution may enhance criminal victims' access to justice.

Article 157 of the Constitution establishes the Office of the Director of the Public Prosecution ('the ODPP') which has a constitutional mandate to exercise state powers of prosecution. A glimpse into the powers of the ODPP includes but is not limited to taking over criminal proceedings instituted by another person or authority seized with prosecutorial powers. The stated power of the ODPP remotely implies the existence of private prosecution in Kenya.

Any prosecution commenced by a person not an agent of the government amounts to private prosecution. With the progressive nature of the Kenyan Judicial System, the place of private prosecution should be revisited and enhanced to promote access to justice and aid in strengthening the rule of law. The Constitution provides a constitutional and a public interest litigation in Articles 22 and 258, respectively, where any private citizen can institute court proceedings in apprehension of violation of the Constitution. Likewise, it can be argued that private prosecution is a mechanism which provides oversight and accountability where there is a reluctance to exercise the state's prosecutorial powers.

Private prosecution practice has gained little momentum in Kenya despite its provision. Implementing the Constitution should be a novel task for both government and its citizens. Such implementation should include the creation of joint awareness by criminal justice players in promoting private prosecution. Private prosecution should be hailed as a constitutional safeguard against impartiality and indolence on the part of the prosecutor, as was stated in the case of Kimani vs. Kahara.[159] The right to private prosecution can be harnessed to serve as an accountability mechanism over the state's discretion and monopoly to prosecute criminal cases in Kenya. Private prosecution should be taken seriously as it is the only alternative avenue in prosecuting criminal cases in Kenya.

In the current Constitutional regime, individuals or non-governmental organisations have not fully embraced Private Prosecution, not because the state is doing exemplary prosecutorial mandate but because of a lack of awareness. The bottlenecks affecting the actualization of active private prosecution are within reach. Through creating awareness and support of all players in both private and public sectors, private prosecution can be brought to life. This will ensure victims whose cases are gathering dust on police desks and prosecutors' offices without any just reasons can fully

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159 *Gouriet v Union of Post Office Workers [1973] All ER 94*

access justice and benefit from the rule of law. Obstacles that suppress private prosecution could be deliberately designed to promote monopoly and bureaucracy, which has recently been witnessed in the ODPP. This article addresses the place of private prosecution in the Kenyan legal framework and, importantly, its value in a democratic society like Kenya.

Legal Framework on Private Prosecution

As discussed earlier, the prosecutorial power is constitutionally vested in the ODPP. The constitutional provision establishing the ODPP was given effect by an Act of Parliament known as the Office of the Director of Public Prosecutions Act, 2013(the ODPP Act). The Act provides a legal framework including the functions of the ODPP. Section 5(b) of the ODPP Act expressly affirms the core function of the ODPP, which is to be the sole state prosecutor in criminal matters. However, the Constitution does not state that the office of ODPP shall initiate all criminal matters. The idea of private prosecution is acknowledged despite its scanty provision in the supreme law.

The legal framework guiding private prosecution is more practical than in theory. The idea sounds far-fetched, making it a challenge to be appreciated and practised among legal practitioners. The Constitution does not expressly provide it but rather vaguely. Article 157(6) of the Constitution provides for the powers bestowed on ODPP, including taking over and continuing with criminal cases instituted by another person or authority. Keen interpretation of this article suggests that there is another avenue for initiating criminal proceedings apart from the ODPP and the alternative avenue is private prosecution.

Section 28 of the ODPP Act expressly breathes life into the idea of private prosecution; it provides that "*notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.*" The ODPP Act crystallizes the foggy idea provided for in the Constitution regarding private prosecution. It is legally correct to state that private prosecution is a sanctioned by section 28 of the ODPP Act. The section provides leeway to any person, both natural and juridical. Having statutory backing, private prosecution should be an enhanced alternative avenue in realizing access to justice as espoused in Article 48 of the Constitution.

Jurisprudence and Rationale for Private Prosecution

Generally, the ODPP is the state-recognised prosecutorial agent seized with ultimate and undisputed control over all prosecutions. These prosecutorial powers can sometimes be abused to the detriment of the state. In *Gouriet vs. Union of Post Office Workers,* Lord Wilberforce said,

> *"Enforcement of the law means that any person who commits the relevant offence is prosecuted. So, it is the duty of the Director of Public Prosecutions or the Attorney General to take steps to enforce the law in this way. Failure to do so, without good cause, is a breach of their duty… The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earlier days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi)*

remains a valuable Constitutional safeguard against inertia or partiality on the part of authority."

The ODPP is an independent office as stipulated in the Constitution; however, the public has not outrightly perceived this independence. The Director of the Public Prosecution is a Presidential appointee, making the office somehow a political office with a consequence of control from the appointing authority. Biasness and partiality in the effecting of prosecutorial powers vested in the ODPP are glare occasionally.

In the famous case of *Gouriet v Union of Post Office Workers,* Lord Diplock gave a rationale on which private prosecution is based. In his judgement, he stated that –

> "*It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and bring criminals to justice and the creation of the office of Director of Public Prosecutions, the need for prosecutions undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law."*[160]

The above-stated rationale was equally appreciated and applied in our jurisdiction. The case of *Kimani v Kahara*[161] remains a *locus classicus* case in matters related to private prosecution. In the case, the Court mentioned with emphasis that in Kenya, the right of private prosecution is essential to counteract attempts by wealthy and influential people to stifle prosecutions when offences by them are alleged in reports to the police. The Court emphasized that private prosecution is a constitutional safeguard. Essentially, the right to private prosecution is seen as a safeguard against the inaction of prosecuting and investigating authorities, i.e., the ODPP and DCI, respectively.

Article 22 of the Constitution provides liberty to any person with a right to institute court proceedings in case of any denial, violation, infringement or threat to a right or fundamental freedom espoused in the Bill of Rights. The right to access to justice and fair hearing are among indispensable rights in the supreme law. To provide a potent ground to catalyze access to justice, private prosecution practice must be encouraged, especially in cases where criminal offences are perpetrated by state agencies like police officers.

Institutions seized with powers to aid Private Prosecutions

Like normal public prosecution, private prosecution does not operate in a vacuum. Private prosecutions are often instigated or carried out by the victim of the alleged offence or by a body with a direct interest in pursuing the case. Nevertheless, a declaration of rights, finding of

160 Kimani v Kahara[1983] eKLR

161 https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/497/49705.htm accessed on 2nd September 2023.

guilt, sentencing and enforcement of the sentences are carried out by other government bodies, including the Judiciary, the Kenya National Police and other government stakeholders.

The National Police Service

The National Police Service is a key stakeholder in public and private prosecution. In public prosecution, the national police are used in different stages, including investigation, arrests, arraignment and sentencing enforcement. The National Police plays a vital role in private prosecution. The service aids the Court in effecting arrests with or without warrants and effecting committal orders.

The Judiciary (Courts)

The Judiciary (the Court) is the sole arbiter in all prosecutions. This is the body that determines whether an accused in private prosecution is guilty or not. It is equally bestowed with powers to pass appropriate and proportionate sentences, i.e. sentence the accused person. As will be discussed in the procedure for initiating private prosecution, Courts play an important role in promoting private prosecution. They are seized by powers to either encourage or exterminate private prosecution. In the Kihara case, the Court affirmed that it has wide discretion on whether or not to grant permission to conduct a private prosecution. The courts majorly entertain almost three-quarters of the process involved in private prosecution. The crucial part of its function is to grant leave to private prosecutors on whether to proceed with prosecution or not.

Procedure in instituting Private Prosecution

Private prosecutions are often instigated or carried out by the victim of the alleged offence or by a body with a direct interest in pursuing the case.[162] In conducting private prosecution, the procedure known jurisprudence was enunciated by Justice Mumbi Ngugi as she was in the case of *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* (Aluochier case).[163] The Learned Judge had this to say:

> "*I believe that the law and judicial precedent with regard to the extent and circumstances under which a private person may institute criminal prosecutions against another as was in force under the former Constitution is still applicable today…"*

From this *ratio decidendi*, it follows that instituting private prosecution borrows heavily from the procedures adopted before the inception of the current Constitution.

The *locus classicus* precedents on the procedure must be followed when instituting private prosecution. In the famous case of *Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997* ("the Floriculture case"), Justice Kuloba provided conditions precedent to anyone instituting private prosecution. He stated that:

i. "…*For all these reasons, criminal proceedings at the instance of a private person shall be allowed*

162 *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others [2013] eKLR.*

163 *Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997*

to start or to be maintained to the end only where it is shown by the private prosecutor that …."He has firstly exhausted the public machinery of prosecution before embarking on it himself;

ii. *public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated;*

iii. *the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued;*

iv. unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice,

v. *that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralise the attempts of crooked people to stifle criminal justice"*

The Court in Aluochier case cited the case of Rufus *Riddlebarger vs. Brian John Robbson*[164] with approval that -

> *"a private prosecution can only be given legitimacy and allowed by the Court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The Court will therefore, require to be satisfied by the private prosecutor that the private proceedings are necessary because the Attorney General and his officers or the Police do not wish to act on the complaint and that they have declined to act or refused to take action, for culpable reasons."*

The statutory provision for steps to be taken when instituting private prosecution is under the Criminal Procedure Code, which provides procedures to be followed in criminal cases. Section 88 of the Criminal Procedure Code provides locus to initiate private prosecution by way of approval being granted by a Magistrate. This means private prosecution is always under the mercy of the Magistrate. In the Aluochier case, the Court stated that a party should approach the Magistrate's Court under the provisions of section 88 of the Criminal Procedure Code to permit them to carry out the prosecution. Private prosecution starts and stops with the Magistrate court.

Essentially, from the Criminal Procedure Code and the above-stated precedents, the procedure for initiating private prosecution commences by reporting the alleged offence to the law enforcement authorities and ODPP to investigate and prosecute the alleged offence respectively. If no action is taken, the complainant applies to the Magistrate Court seeking leave to prosecute the matter privately. The permission for granting leave to initiate private prosecution is discretionary and is not by right.

164 Rufus Riddlebarger vs. Brian John Robbson [1959] EA 841

Challenges Suppressing Uptake of Private Prosecution

There is insignificant uptake of private prosecution in our judicial system. Attributes to paltry uptakes are quite evident. One of them is the principle of equality of arms. The Constitution expressly provides for the state prosecutorial agency (ODPP). The government runs the agency and has an annual budgetary allocation. Public prosecution undertaken by the ODPP and Private Prosecution undertaken by private persons are incomparable in terms of available resources. The state allocates resources to ODPP annually, making the office fully equipped to handle its state prosecutorial mandate, unlike private prosecution, where the cost of private prosecution lies entirely with the individual. Legal services are quite expensive in Kenya; less than 50% of the populace can afford it. As per the report by the Independent Reporting Mechanism (IRM) released in 2020, generally, many Kenyans cannot afford the high cost of legal services.[165]

A scanty legal framework on private prosecution also contributes to the low uptake of private prosecution. As seen earlier, the supreme law only mentions private prosecution subtly. Until you dive into the ODPP Act of 2013 and peruse section 88 of the Criminal Procedure Code, it is hard to come across a legal framework establishing Private Prosecution. The only known procedures are those developed by court precedents such as Kahara, Floriculture and Aluochier cases.[166] It is true that private prosecution does not have a clear procedural framework in Kenya.

In normal times, opting for private prosecution is catapulted by reticence, slackness, and refusal by constitutionally and statutory mandated bodies to investigate and prosecute criminal acts. Considering the framing of the legal provision on private prosecution, the complainants have no escape route from the agencies, which hence frustrates their urge to partake in justice. Victims must return to get permission from the same agencies that first denied them access to justice. This is too much for private prosecutors if no measures are implemented to breakdown such bureaucracy.

Roles of Civil Society Organizations in Promoting Private Prosecution

Civil society organizations in Kenya have played and continue to play pivotal roles in enhancing access to justice since time immemorial. Keeping state agencies in check for excessive use of power and prompting them to execute their public mandate requires a robust civil society. Agencies mandated to investigate and prosecute can sometimes be compromised. The recent withdrawals of criminal charges against a clique of politicians and their cronies in the recent past by the ODPP, is just an example. Civil society organizations must take it upon themselves to promote and sensitize the populace on the consummation of private practice.

Cases of police brutality which have sprouted in the recent past can be tamed by private prosecution. Victims of police brutality suffer in silence since perpetrators of such brutalities are the ones gatekeeping the investigatory and prosecutorial agencies. Public bodies such as the Independent Oversight Authority (IPOA), Kenya National Commission of Human Rights (KNCHR), and the Commission on Administrative Justice (Office of the Ombudsman) have been vocal on the preservation of human rights; however, the fact that these offices are executive

165 https://www.opengovpartnership.org/members/kenya/commitments/KE0030/, "Implement legislation to increase access to justice (KE0030)" accessed on 15th September 2023.

166 Supra notes 4,6 & 7

appointees they are prone to compromise and political bias.

The Constitution of Kenya speaks volumes about protecting human rights and fundamental freedoms. Article 19 provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities, promote social justice and realize the potential of all human beings.

In the spirit of Article 19, civil society organizations must uphold the rule of law. One way of enhancing the rule of law is by creating awareness and providing resources to promote private prosecution. Political wind in Kenya is unpredictable, thus exposing poor Kenyans to police brutality since they cannot afford justice in their private capacity. Since bodies and agencies trusted to assist in curbing human rights violations more often dance to the tune of the appointing authority, civil society organizations must fill in this gap and assist in upholding the rule of law.

Conclusion

As stated in the introduction, private prosecution can be harnessed as a complementary tool to public prosecution. Having a legal backup, however scanty they seem, deliberating and rationalizing the idea will boost the already drooling rule of law. Civil society organizations are not under a government leash, and most of the time, they come in handy when the government turns to and sacrifices its people.

Private prosecution can be harnessed as an accountability mechanism over the state's discretion and monopoly to prosecute criminal cases in Kenya. Private prosecution should be taken seriously as it is the only alternative avenue in prosecuting criminal cases in Kenya when the master becomes a dictator.

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PART B

Collective Empowerment Requires Structure: A Legal Empowerment Case Study From Mozambique

Morgan Hargrave and Eduardo Malo*

Background

"We used to think that healthcare was a gift from God, but now we know that it is our right."

Amelia, after working with a defensor and Village Health Committee in Mozambique

Mozambicans have strong rights when it comes to health care, rights that are enshrined in the Constitution, policies in place at the Ministry of Health, and regional and international covenants. But a lack of information, poor enforcement, and power dynamics keep people from exercising those rights. Violations are persistent, with people being denied service, facilities lacking basics like water or privacy, and health workers demanding illicit payments. Namati's approach has been to seize on a solution that similarly existed on paper but not in reality: *Comitês da Saude, or* Village Health Committees (VHCs). These are bodies made up of community members who work together to hold health facilities to account, educate their neighbours about their rights, and help patients resolve violations.

When Namati began implementation in early 2013, though, there was not a single functioning VHC in our program catchment areas. Strong and active voluntary associations do not conjure themselves up out of nowhere. So Namati turned to *defensores de saude* – health advocates – to accompany and support VHCs. The *defensores* got VHCs up and running and have strengthened them through training and other capacity building ever since. Namati now has *defensores* in 75 health facilities across Maputo City and Inhambane, Zambézia, and Maputo Provinces; there are committees in each of those facilities, as well, with 20 to 25 members each. Those committees are winning remedies – 29,000 violations addressed so far, with an 81 percent resolution rate – while building relationships and awareness among health workers and community members.

One of the most pervasive impacts may be that VHCs have also proven to be powerful vehicles for individual and collective empowerment. *Defensores* ensure that VHCs have committed memberships that include people from vulnerable or marginalized populations, and they build members' capacity to address not just individual cases but also systemic barriers. As a result, VHCs are working to change policy and practice so that health services are available and delivered with quality and dignity. They are an example of what innovative community organizing and empowerment can look like.

Sustained collective action does not pop up overnight, nor does it happen without leadership and structure. The flourishing of VHCs in Mozambique has come with a host of lessons for what that leadership and structure can look like.

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Structures that generate collective empowerment

People join the VHC in their community for a variety of reasons. They want to learn about public health and local institutions, build their skills and confidence in engaging with others, and help others while improving essential services for their community. Many of them derive a great sense of responsibility and purpose from their role. As a VHC member they get to see – and, indeed, create – positive impact each day as they lead community education sessions and accompany justice seekers in seeking redress.

Laurinda, a young woman who had just recently joined the committee in Morrumbene, told us how quickly the VHC had made an impact on her. Within her first couple of days she had already been a part of helping a community member pursue a remedy for their case, and with a few months under her belt she could see just how much she had learned. That's important, because she had joined the VHC primarily because she saw it as a chance to gain new knowledge and skills. And now she sees an opportunity to help the VHC grow its connections with other young people.

> I am here because something motivated me to be here. It's a very beautiful experience. What motivated me is that I want to give more experience to another young person and invite more young people to be in this group so that they can study more and learn more about this project. This is very important. I learned a lot from this committee. I learned a lot from our defensora. Young people, if we work with this committee, we are going to learn a lot.
>
> - Laurinda Castro, member of the Village Health Committee in Morrumbene

Laurinda has illuminated some ways that VHCs provide a huge boost to the empowerment of individuals – be it their members or the justice seekers who interact with them – but they may be most exciting in how they generate collective empowerment. They build up the overall rights awareness, consciousness, and agency in a community, and at the same time they create a space for collective learning and action. They are a space to plug into for community-spirited people who want to do more. Community organizing is not about one big mass of people marching in the streets in spontaneous and cathartic expression; it is about structure that creates community and collaboration, structure that lasts for the long fights that come with pushing for justice. And that is what VHCs can be.

One place we see that is in how VHCs play a role in systemic change and advocacy. Beyond seeking remedies in individual cases, they also seek to affect policy and practice at health facilities. *Defensores* and VHCs lead quarterly participatory health facility assessments and then analyze the root causes of problems alongside facility staff and patients, agree on strategy, and commit to concrete actions and timelines.

But they can go even further. For example, when multiple patients complained about a lack of privacy when receiving their diagnosis or test results, VHCs were able to take up the overarching issue and get health facilities to change how they accommodate all patients. Direct testimony from community members along with years of case data from VHCs led to an official directive from provincial health officials commanding all health facilities to address privacy concerns. And because VHCs are ever present, they could make sure the directive was implemented. They could also work hand-in-hand with health facility staff to find creative solutions like proper scheduling

so patients aren't bunched together, erecting privacy screens, and encouraging staff to use unused rooms.

A similar story has emerged with an effort to ensure every facility has a functional bathroom for patients. The accompanying graphic shows just how quickly a coordinated advocacy effort built on grassroots casework can lead to results. In just a year and a half, facilities across an entire province greatly increased their ability to provide patients with an important provision.

Success in one province could then be taken to others, and the momentum they build can transfer to other issues, which led to even more systemic change in both policy and practice. VHCs have since tackled other systemic issues, pushing for similar efforts to end the practice of bribery.

Since VHCs are now seen as respected partners in the places where Namati works, they are increasingly involved in decision making at local and district level. In fact, standout members of VHCs are now coming together to form 'advocacy groups' to solidify this role and address patterns of violations at the district and provincial levels. These groups use grassroots grievance data and invite justice seekers from across multiple communities and facilities to share their stories directly, with the goal being to improve how care is provided across multiple health facilities. These groups have aims to one day form a national movement.

What it takes for committees to flourish

In the Mozambique experience, having a trained and dedicated *defensor* has been key to VHC success. You can hear it in how VHC members talk about the *defensores* who support the committees' work and development. Laurinda, the VHC member in Morrumbene, put it like this: "I am here to learn.

And I have learned a lot to teach the community thanks to our *defensora*, Eugenia."
But what does the support the *defensores* provide look like? To answer this question, we asked the *defensores* about the most important aspects of their jobs. Here some of their answers:

> The *defensor* must be humble and empathetic and must know how to put herself in the other's shoes, because most of the members come from very poor communities. Sometimes they don't even know how to read or write.
>
> This includes carrying out simulations of activities so that members develop communication skills and mastery of the contents and methodology of the educational sessions in the community and in the health facility.
>
> Our job is to create a welcoming and inclusive environment and provide development opportunities for each member, forming working groups composed of strong and weak members and giving all members the opportunity to lead all activities and decision-making.
>
> - Farida Jafar Taju, *Defensora de Saúde*, Inhambane Province
>
> The *defensor* must offer initial training on their role and create opportunities for the committee members themselves to lead the activities, invest in advocating for recognition of the role of the committee by the health facilities, publicize the results and impact of the health committees' actions in the community and health facility…
>
> - Geraldo Cremildo Guilundo, *Defensor da Saúde*, Inhambane Province
>
> The *defensor* must cultivate a sense of responsibility among the members and encourage a culture of accountability. That is, when a member is assigned responsibilities he has to give feedback to others on the activities carried out… share experiences and changes achieved by the committees from other areas of health, give feedback on the positive aspects and those that need improvement in a constructive way, without humiliating or denigrating the members… praising the members for the successes achieved by the group as well as the individual ones.
>
> - Carlota Carlos, *Defensora de Saúde*, Maputo Province
>
> The *defensor* must cultivate a spirit of leadership rather than deferring to authority, establish a relationship of trust and a healthy work environment, ensure the representation of the various groups in the creation of the committee, observe the terms of reference for the functioning of the health committees, and carry out continuous training on topics related to health and health rights…

- Alice Chambule, *Defensora de Saúde*, Maputo City

> The *defensor* must involve health authorities in the creation or revitalization of the committee, developing initiatives that encourage competitiveness among members as well as to motivate members, getting involved in the design of strategies and advocacy for the resolution of challenges that limit access to health services.

- Eny Quembo, *Defensora de Saúde*, Maputo City

Their responses highlight two sides of the *defensor's* role in particular. On one hand, it's all about maximizing empowerment. *Defensores* say that they must support VHC members to take ownership over the committee and ultimately over the outcomes of the health facility in their community. It's an impressive balance of leadership on the part of the *defensores*. And on the other hand, the *defensores* point out the importance of getting buy-in from public health authorities. As part of the health system, the VHCs have to be able to work with the other parts of the system in order to improve it. Both the VHCs and the power holders in the system need to develop their ability to understand and work with each other, and the *defensores* play a major role in making that happen.

Frontiers for committees

A decade into the experience of VHCs supported by *defensores* in Mozambique, it has been an unequivocal success. The communities have seen health outcomes improve, they have won more influence in decision making on public health policy and practice, and Namati is on its way to creating a national movement of VHCs and community health advocates to influence systemic change at district, provincial and national levels. As a result, there are new frontiers and outstanding questions for what the future of healthcare will look like in Mozambique and other places that learn from this approach.

- How can the VHC movement continue to grow across Mozambique?

Boane, a district outside Maputo with a population of about 100,000 people, is home to an exemplary VHC. One of its leaders, Maria Luís, told us that her dream was that every community in the whole country has a committee like theirs. It is an ambitious dream, but there has also been remarkable growth over the last decade. In addition to direct support of VHCs in 75 health facilities, Namati has supported capacity building of VHCs across the country through training and mentoring of other civil society organizations, including 67 community-based organizations, in 10 of Mozambique's 11 provinces.

One major factor in VHCs reaching their full potential across the country is whether they can secure tangible resources and support from the state. Committee members not only work on a voluntary basis, but they also have to reach into their own pockets for transportation, cell phone credit, and other necessities. Additionally, VHCs could benefit from more training, oversight, engagement,

and strategic alignment with the Ministry of Health. Namati, the VHCs, community leaders, and some local health officials continue to advocate for the Ministry of Health to invest in VHCs at a level that matches their significant impact.

- VHCs can and should have more influence on policymaking at higher levels

The 'advocacy groups' made up of selected VHC members from nearby districts (mentioned above) are a primary strategy to achieve this. Advocacy groups composed of strong village health committee members and patients were first piloted in 2021 in six districts where we work across Inhambane (Zavala, Vilankulo, Maxixe, Jangamo) and Maputo (Lhamanculo, Matola). The next year, the initiative expanded to four additional sites (KaMavota and Marracuene Districts in Maputo; Inhambane City and Inharrime District in Inhambane Province). We convene the groups, train them further in human rights and advocacy, and help them get in front of decision-makers. Their objectives include:

- Give voice to patients, communities, and VHC members at the district, provincial, and national levels
- Recognize patterns of common challenges across communities and lead advocacy for their resolution
- Push for recognition of the key role of VHCs in promoting humanized health services and for greater investment in and support for committees

These groups show tremendous promise in bringing patient voice to the forefront and reducing the prevalence of common violations even at health facilities where we don't have health advocates posted.

Conclusion: Collective Empowerment Requires Structure

Any group of people can come together to build their collective power, but it will not happen without intention. Village Health Committees in Mozambique have shown the importance of having a space with leadership and structure that people can turn to when they need assistance or when they want to take collective action.

They are not alone in their pioneering efforts. In Sierra Leone, Namati supports Village Area Land Committees that bring together residents to protect land from underhanded investors and environmental degradation; and in Kenya, we help stand up Community Land Management Committees to lead the way in implementing communal ownership and management of land and natural resources.

These Namati teams and their partners are pioneering new ways to support local committees as engines of democracy and prosperity. Along the way they are learning what it takes to create spaces for deliberative decision-making that actually work, without being either captured or ignored by those in power.

Community governance is beautiful in theory and powerful when it works, and the journey to making it undeniable may be part of the evolution of democracy in the 21st century.

Opportunities for Climate Action in Last Mile Legal Aid

Evans Muswahili Ladema*

Understanding Legal Aid in the Context of Emerging Issues

I understand legal aid to be *the assistance of counsel and legal advocacy for people living in or at the borders of poverty in legal* matters that fall outside of the criminal domain. Many paralegals in Kenya have and continue to offer legal aid and alternative justice services in matters that are largely embedded in civil, political and economic, social and cultural rights. While this is good, it is worth noting that an unsustainable environment and its features like climate change, food and nutrition insecurity, water scarcity and communal strive among others, continue to undermine efforts and progress made in many areas where legal aid had previously attained several milestones.

For instance, the increasing severity of phenomena like climate change is not only negating gains made in enjoyment of human rights but is also compromising existing guarantees to those rights. For instance, a community that had been declared free from sexual and gender-based violence (SGBV), thanks to the deterrence caused by conviction of offenders; can easily slide back into SGBV when women and girls have to walk very long distances and late into the night to look for water during extended droughts or broken-down water supply services in city and municipal areas that have experienced massive flooding, landslides and other climate shocks.

Communities that had been certified to be free from child abuse also reverse very easily and quickly when a biting drought or devastating floods destroy food in the farms. Children from households in such areas get exposed to child trafficking, child sex trade and child labour to help supplement family incomes and livelihood sources. In the context of our food systems, increased severity of warming, floods, and drought reduces the quantity and quality of crop yields. Likewise, livestock is affected directly from heat stress and indirectly from reduced quality of their food and water supply. The sum total of these double-edged impacts is a sharp decrease in food production, thereby exposing subsistent communities to hunger and malnutrition. This means that children in such communities cannot grow to their full potential, and neither can adults be fully productive. While such peoples' rights may be very clearly spelt out in the constitution and existing subsidiary legislations, the people still sink deeper into misery and end up getting easily violated by the political and economic elite who exploit and deny them dignity, hope and a future.

For us in Kenya, the changing climate is making a big joke out of Article 43(1) (c) of the Constitution of Kenya (CoK). I say so because whereas we have been loud in our aspiration of having the right to be free from hunger, and to have adequate food of acceptable quality, we just can't feed ourselves in dignity; hence understandably, we collectively lack the spine to enact a right to food law that could operationalize Article 43 (1) (c) of the Constitution of Kenya.

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Guess what? Our national impotence regarding enactment of the right to food law is not only caused by our ailing economy but also by the unpredictability and worsening climatic conditions. Successive governments in Kenya are conveniently evading enactment of the right to food law by

citing challenges with budgets but there are a lot of opportunities for food systems transformation through our Nationally Determined Contributions (NDCs) to climate mitigation and adaptation.

According to World Bank data, a warmer climate could globally lead to at least 21 million additional deaths by 2050 from just five health risks: extreme heat, stunting, diarrhea, malaria, and dengue. In a case of "adding insult to injury", climate change exerts significant strains on health systems, simultaneously increasing demand for health services while also impairing the systems' ability to respond. This is not surprising for health systems like the Kenyan one that faces climate change vagaries when it is already bogged down with corruption, inefficiencies, under - resourcing and general mismanagement. Our well-intentioned aspiration on the right to the highest attainable standard of health may need serious thinking on moving towards building a climate resilient health system.

In Kenya today, the subject of housing is a 'pain point' and a 'pet subject' for some in equal measure. However, politics of housing aside, climate change is changing the way homes are built. It is influencing choice of construction techniques and materials. I guess it will sooner or later end up changing the entire thought process of how property is built. Today there are impacts to real estate markets, costs to purchase properties, and insurances. These changes negatively affect vulnerable groups. For instance, lower-income earners are more likely to have housing that can't withstand the impacts of climate change. They may not have access to proper settlements, and they're more likely to live within less resilient communities. Due to these harsh realities, the right to housing may need to be re-defined and re-purposed.

Prior to the Africa Climate Summit that was held in Nairobi in 2023, Kenya hurriedly amended her climate change law to capture the carbon markets opportunity. Without delving into the 'greenwashing' claims levelled against carbon credits, it is important to note that Kenya and Africa are still not well placed to participate meaningfully in these carbon markets. In terms of land tenure, unclear ownership rights and fragmented systems hinder the determination of carbon rights, impacting project development and raising concerns about potential land grabs. The absence of clear community ownership models and power imbalances lead to disenfranchisement and opposition to projects. Again, corruption compounds these issues - with weak enforcement allowing for fraudulent practices and diversion of benefits. The lack of transparency in decision-making adds complexity, hindering the successful implementation and integrity of African carbon markets. Bottom line is that our pursuit of climate justice through carbon credits may as well deliver more climate injustices!!!

Further ashore, as sea levels rise, fresh-water sources turn salty, the ocean acidifies, and storms of historic intensities rage, island nations become unlivable, and their peoples may be forced to emigrate. In exchange for acceptance by host countries, these peoples may very well lose their right to self-govern hence the right to self-determination. In fact, our hype on seeking jobs abroad for Kenyans may as well be a veiled expression of climate refugee status. The many Kenyans going to do all manner of jobs abroad face racism, inhumane treatment, and a host of unspeakable things.

Talking matters culture, by affecting the environment and natural resources of indigenous communities, climate change also threatens the cultural identities of people. As plants and animals used in traditional cuisines, practices or sacred ceremonies become less available, tribal culture and ways of life become greatly affected. People then get forced to abandon their culture – sadly dropping guard in observing the age-old adage that: "*Muwacha mila ni mtumwa*" – in loose translation to mean: He who abandons culture is a slave. Indeed, the freed slaves and the born free are all finding themselves in a new form of slavery occasioned by climate change.

In matters employment, the International Labour Organization avers that the increasing frequency and intensity of various environment-related hazards have already reduced labour productivity. Between 2000 and 2015, 23 million working-life years were lost annually at the global level as a result of such hazards. Climate change is decimating business and industry leaving many jobless people. It also reduces household incomes thereby reducing peoples' buying power. Consequently, industry suffers low sales and is forced to lay off workers. More interestingly, as we seek to de-carbonize, we discourage exploitation of fossil fuels. This leads to '*stranded' resources* and stranded economies that are unable to employ their citizens. Climate change has directly impacted the employment sector.

Constitutional and Legal Contexts

The right to life and the right to a clean environment are effectively mutually reinforcing. This is because environmental pollution threatens the very existence of life on earth for both the present and future generations. The right to life under article 26 of the Constitution of Kenya ("the CoK") will be threatened if the measures contemplated under article 69 of the CoK are not fulfilled. To reinforce this argument, one would look at instances where the right to life has been judicially applied by the Kenyan courts in the context of sustainable development. In *Peter K. Waweru versus Republic*, the court in adopting a liberal interpretation of the constitution on the right to life observed that the right to life is not just a matter of keeping the body and soul together since in this modern age the right could be threatened by many things including the environment.[167]

UN Sustainable Goal number 13 (Climate Action) calls for protection, restoration and promotion of sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss. It is directly linked to other 8 Sustainable Development Goals. The global targets and actions with regard to climate action have a 'home' in Kenya's Environmental Management and Coordination Act (EMCA) and also in our Nationally Determined Contributions (NDCs) to emission reductions.

The right to a clean and healthy environment is provided for in article 42 of the CoK and it includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures - particularly those contemplated in article 69 of the CoK and also to have obligations relating to the environment fulfilled under article 70 the CoK.

Article 69 of the CoK outlines the obligations of the State in respect of the environment and the measures the State shall undertake in protecting and conserving the environment. Article 69 (2) of the CoK obligates every person to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In enforcing environmental rights, article 70 (1) of the CoK provides that one may apply to court for redress if the right to a clean and healthy environment under article 42 of the CoK has been, is being or is likely to be denied, violated, infringed or threatened. This gives every Kenyan access to a court of law to seek redress in environmental matters.

The Access to Information Act of 2016 gives full effect to article 35 of the CoK. The Act not only avails vital information to the public so as to make informed decisions but also enhances transparency and accountability in government for acts and omissions that are harmful to the environment. On the other hand, values like public participation in environmental decisions result into consultations with those affected by a decision. Hence, Environmental Impact Assessments

167 High Court of Kenya at Nairobi, Misc. Civil Application No. 118 of 2004

(EIA), Environmental Audits (EA) and Environmental Monitoring continue to enable citizens to make informed decisions about environmental management.

Opportunities for Paralegals to Test the Constitution and Chart the Uncharted Waters

Avenues for offering last mile legal aid to communities that are disadvantaged are immense. I wish to demonstrate this using my two lived experiences while working as a paralegal in Vihiga County of western Kenya.

6. In the year 2017, the County Government of Vihiga also wanted to install a Muslim cemetery near 'Weliviri' water spring in Mbaya village of Mbihi sublocation. Through sustained advocacy, our team of community paralegals sensitized the public and engaged the county government with facts regarding the potential harmful environmental impacts of the cemetery in the community. Due to concerns of the human corpses contaminating the only natural water spring in the area, we specifically demanded an Environmental Impact Assessment (EIA) report that okayed the county decision. Since such a report was missing, we managed to stop the decision of having the cemetery on the land. This was a clear demonstration of how to build community power to deal with omissions and commissions of duty bearers which cause injustices to the citizens.

7. In the year 2021, the County Government of Vihiga was dumping solid wastes from markets at Ebusakami area near Luanda town in a private piece of land surrounded by households and families. The piece of land had deep and wide pits left after the owner had extensively excavated the land to obtain soil for brick making. At the height of the dumping by the county government, the community started having challenges of air pollution due to the stench from the decomposing matter. There was also a spike in malaria cases due to increased breeding of mosquitoes. Locals also reported scary wild animals coming to the dumpsite to scavenge for food. We teamed up as community paralegals, got support from InformAction organization, held community sensitization sessions and engaged the County Government of Vihiga on account of environmental and public health legislations. Due to our evidence – based advocacy, the County Government stopped dumping and even brought in lorry loads of soil to backfill the pits.

8. In the same year 2021, working with market traders from Majengo, Mbale and Chavakali markets, our team of paralegals successfully petitioned the Kenya National Roads Authority and the County government of Vihiga to cover the drainage trenches that were constructed between service lanes in Mbale and Chavakali markets along the Kisumu-Kakamega Highway. These trenches were causing accidents when people tripped and fell into them. To date, the trenches in Chavakali market have been covered but those in Mbale are yet. We consider this to be work in progress but we look back to it as an example of paralegals using the law to give agency to vulnerable people hence causing positive change to happen.

For us paralegals, matters like resumption of the *Shamba* system in management of gazetted forest land is an area we need to explore and weigh in for purposes of making communities aware of the negative environmental impacts of such 'juicy' policies.[168] While the government may find it a win –win scenario in regenerating forests using free labour from citizens growing food in the forest land, the absence of environmental impact assessments (EIAs) and longer-term environmental audits (EAs) of such schemes of convenience leaves a community paralegal as not only the first

168 *Shamba* system - The word *shamba* in Kiswahili means a farm. As the name suggests, under the shamba system, farmers grow both plantation trees and food crops on small plots, tending the trees and harvesting the crops until the trees become established.

line of defence but also the last honest arbiter should such matters require legal and administrative remedies.

The recent lifting of the ban on logging too is an area where community paralegals working with Community Forest Associations (CFAs) can help prevent the abuse of such a policy or executive directive by mobilizing and organizing CFAs to monitor the controlled logging and ensure that indigenous trees are not cut in the process.

Also, paralegals may help CFAs to demand and implement proper forest management plans that would ensure prompt replanting and re-growing of trees in areas affected by the alleged controlled logging.

By further considering the impugned lifting of the ban on Genetically Modified Organisms (GMOs) in food materials, paralegals can rise on account of article 43 (1) (c) of the CoK and punch holes in the assertion that GMOs could be a solution to the hunger problem in Kenya. It is an uncontested truth (from experts' perspective) that GMOs in the food sector actually worsens the hunger problem in the long run for those who do not own or control the technology.

When Kenya hosted the African Climate Summit, the grassroots people who are on the frontlines combating climate change and suffering casualties because of the ravages of climate change were not adequately represented. I remember I applied to participate, got accredited and was invited to pick my accreditation card in Nairobi. interestingly, upon reaching Nairobi, there was no badge for me and therefore I could not participate!!!

However, in November- December 2023, I was in Dubai for the 28th Conference of parties of the UNFCCC (COP28) with travel support generously provided by the Global Alliance for the Future of Food and her partners. What was shameful and incomprehensible was our own government's unwillingness to provide such grassroots people like myself with UNFCCC accreditation (that costs them nothing) yet as parties to the convention, they have a substantial number of slots - many of which go unused. A case in point is me. With full travel support from an International NGO, I requested UNFCCC accreditation from the designated office in the Ministry of Environment (PS office - Climate change) but I was taken in circles until a last-minute intervention by Kituo cha Sheria assisted me get a Blue Zone slot donated by a UK organization - thereby enabling me to participate in the conference meaningfully. This to me is an indication of cluelessness or basically the lack of intention in allowing grassroots actors to take charge of the challenges they face at community level and work for positive outcomes to be realized at national and international level. It would be good for states to acknowledge the importance of the grassroots actors who are on the frontlines of battling climate change and facilitate them to participate meaningfully in all discourses where decisions made affect such grassroots actors.

Conclusion

From my submissions above, it is clear that climate change has a negative impact on the realization of human rights across a wide spectrum; and that those working on human rights defence (like community paralegals) have new challenges to deal with. It is also emerging that we must sustain advocacy on matters climate action while ensuring that the proposed restorative interventions do not end up causing more or new forms of harm to the very people that we seek to protect. This careful balancing requires peoples' participation – especially those on the frontlines of battling climate change.

It is therefore my considered opinion that paralegals are essential actors in addressing the climate crisis. To do this well, paralegals need training on environmental rights, international climate instruments, negotiations and climate actions. Indeed, it is the paralegals' essential role that gives rise to the need for training, not the training that gives rise for their essential role!!!

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The Role of the Community Paralegal in Expanding the Doors of Justice

Antony Njenga*

Many centuries ago, somebody had it right when they coined the proverb: "Prevention is better than cure." Of course, we know that he was referring to disease, but we also know that lack of knowledge contributes to the misery that is disease, poverty, injustice, and the many social challenges that face the poor.

The year 2010 was a significant turning point for Kenya. After more than twenty years of struggle and drafting, a new constitution came to fruition. A new era of human rights emerged, bringing with it difficulties in recognizing and utilizing these rights as well as gaining access to the justice process.

With a public sector, law enforcement and judiciary that had previously only known almost totalitarian service delivery, many especially the poor in the urban slums and rural areas possessed little or no capacity to comprehend and navigate the path to enjoy the rights they had earned.

Devolution, public participation in public finance and all spheres of government, civilian oversight, political rights, and the many other responsibilities that the constitution of Kenya places on the hands of the citizen were and are, believe it or not, a knowledge burden still too foggy and muddy and best ignored if not avoided.

To help bridge this knowledge gap are volunteer community paralegals. Grassroots legal aid providers, the first responders in matters of access to justice at the community level, often mistaken as political activists because of the noise they make at times when injustices occur.

The community paralegal is a person who the community knows and recognizes for dedication to and participation in community affairs, a mobilizer, a trusted adviser and a mediator. Besides the well-known role of assisting in access to justice for arrested persons at police stations and walking accused persons to court, a very important but least visible role of a community paralegal is that of the community resource person in literally all matters involving his/her community. Be it a matter of mediating in a market conflict, dealing with school administrations and parents on fulfilling the right to "free and compulsory basic education," It is due to the almost octopus personality of the volunteer community paralegal that you will find them sitting in Community development committees, Community Policing Forums, Community Health Management Committees of the local health centre, the Board of management of public primary and secondary schools not to forget, the demand by the community that they hold an influential position in as many self-help groups and community based organisations as they may be members.

Their influence on the community is key to mobilization so they will mobilize and attend almost all the National and County governments' public participation fora and be the voice of the community. In many cases a good number of the community will only take seriously the call to attend a public participation forum if their community paralegal asked them to.

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The volunteer community paralegal has no working hours. All hours are working hours. One will be called upon to deal with a spousal dispute at 1.00 am on a Saturday morning.

Community paralegals play a very important role in raising community awareness of rights through civic education and offer impromptu lectures in Chiefs barazas, *Nyumba Kumi*[2] meetings and neighbourhood associations. They play a very pivotal role in raising awareness and compliance with the constitution and laws.

Ignorance of the criminal laws has seen many a poor people land in jail for arrests that should never have happened because they simply did not know that uttering threatening words in ignorance may land them in trouble if prosecuted. Community paralegals are working hard to educate communities, especially the youth, women, and the indigent to know, understand and use law to avoid getting themselves into jail.

The COVID pandemic brought sorrow and economic poverty to the world but along with it came a catalyst for the world to rapidly transit into the information age. And so, it was for Kenya. A government and citizenry that hitherto was averse to digitization found itself plunged into an accelerated phase of digitization to survive.

Suddenly, services that required a citizen to travel to county headquarters or to the capital city were available on one's mobile phone. Not by choice! Even if one could travel, government offices became a no-go zone. Enter, the eCitizen platform as the only way to access government services, pay for utilities. All County services, trade licenses etc. all done online, and for the courts, the virtual court.

Currency notes and coins money were not acceptable to pay for services in the public and private sectors. So much change in such a short time. An era of digital living had come in and along with it, another form of marginalization and exclusion due to digital illiteracy and lack of or scarcity of technology.

Again, the only person available to help advise the poor and the indigent honestly and for free was a volunteer community paralegal. Ill prepared. Yes! Like everyone else but the community had few if any options. At this time and now, paralegals used the little technology available to them to network and somehow provided and still provide the needed guidance to their community.

Volunteer Community paralegals are databases on two legs on matters about the communities where they live and serve, they have information on crime trends, corruption tendencies, poverty levels and needs. They are an invaluable resource to duty bearers in the public service and a reliable entry point for public benefit organisations. (PBOs) in their engagement with grassroot communities.

They are the community's access to information. They are the consultants on corruption matters and will often be consulted to interpret the law in community alternative dispute resolutions.

[2] **Nyumba Kumi** is a Swahili phrase that directly translates to "ten households." However, it doesn't necessarily mean a group of exactly ten households. Rather, it is an approach that focuses on individual households in an area collaborating to enhance safety, health, and the overall living conditions within their neighborhood.

Linking Theory to Practice: An In-house Counsel's Approach

Serah Esendi Okumu*

According to the Legal Information Institute[169], an in-house counsel is an attorney employed by a company to handle its in-house legal affairs.' The difference between an in-house and general counsel lies in its clientele. An in-house counsel is retained by one client, their employer, and is paid a monthly salary for rendering his services whilst a general counsel is retained by different clients and is paid per retainer per client for the specific service rendered. General counsel can serve different clientele at the same time while this is not possible with in-house counsel. Due to the nature of their work, most in-house counsel hardly litigate opting to retain general counsel to represent the organisation in litigation matters when the need arises.

The in-house counsel, especially one that does not litigate, remains a silent player in legal practice notably due to a lack of visibility in the corridors of justice and other legal circles. The evolution of the in-house counsel has grown over time to handle more than litigation matters expanding to other areas not limited to just rendering legal advisory services to their organisations. In-house counsels have become strategic business partners to their organisations, their service, however, remains peripheral, as their voices are often muzzled compared to those in practice due to their absence in active litigation. The best illustration of this is to think deeply of examples of general counsels vis-a' -vis their in-house counterparts regardless of which jurisdiction one operates in. You will note that it is easier to name several well-known general counsel than to highlight at least five top in-house counsel. This alone exhibits the prominence given to general counsel by virtue of their litigating prowess.

As stated above, when we think of linking theory to practice, we mainly view it from the angle of the general counsel, who has to constantly refer to theory to argue a matter before the courts. This article aims to present the in-house counsel's perspective in linking theory to practice through the viewpoint of the services rendered to the organisations that engage them. The important role of an In-house Counsel requires an in-depth understanding of the laws applicable to the operations of the organisation. This is necessary and fundamental in rendering proper legal advisory in the context of the dynamics of the business. It is through understanding the theoretical bases of law that an in-house counsel can offer professional services that are practical and reflective of the realities of the business/organization. By theoretical bases, I refer to the legal, moral, and philosophical rationales and explanations that society holds out as the reason for the enactment of a particular law. The in-house counsel must therefore infuse their understanding of the legal theory applicable to the various and diverse roles in which they serve with the experiential realities of the organisation to enable them practice by rendering the appropriate legal services.

How then does an in-house counsel link the theory of law to the dynamics of practice with a scope of duties and responsibilities that reach further than those in the general practice domain? To appreciate the above one would need to explore the aforementioned question by conceptualising the link between the two thus addressing the ever-evolving organizational challenges posed by the current corporate world. We start by recognising that an in-house counsel's advantage over

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169 Legal Information Institute Definition of In-house Counsel: https://www.law.cornell.edu/wex/in-house_counsel#:~:text=In%2Dhouse%20counsel%20is%20an,inside%20counsel%2C%20or%20corporate%20counsel.

other C-suite members lies in their ability to link theory to practice in aspects beyond the general duties and responsibilities assigned. An advantage that stems from the ability of an in-house counsel to review in detail the theoretical genesis of various legislative provisions. This provides an opportunity for the in-house counsel to understand why the legislative framework was put in place which ultimately aids in enhanced service delivery to the organisation.

Hon. Cs. Rebecca Miano started her legal career working in a law firm litigating before becoming an In-house Counsel at Kenya Electricity Generating Company (KenGen). She started as an Assistant Legal Officer before rising the ranks to eventually become the Director of Legal Affairs and the Company Secretary. Noting her in-depth understanding of the energy sector, she was appointed to act as the Managing Director of the Company after which she was confirmed as the substantive office holder in 2017. She was thus able to showcase her ability to apply theory to practice not only from the perspective of an in-house counsel but as an overall Chief Executive Officer required to have an overall appreciation of the operational requirements of the organisation and execute them with ease. Her legal background has been her anchor. Noting how effective she was heading the organisation, she was in September 2022 appointed as a Cabinet Secretary for the East African Community and Arid and Semi-arid Lands. Another new domain which she effectively performed before being given an even more tumultuous task of being the Cabinet Secretary in the Ministry of Investment, Trade, and Industry at a time when the country was going through economic difficulty. A position which she currently holds. It is my opinion that she has been able to successfully rise through the ranks and deliver on all her appointed roles based on her ability to continuously link theory to practice.

From a personal perspective, as I reflect on my earlier days as a litigation lawyer for a non-governmental legal aid organization, litigating the rights of refugees and other displaced persons was a normal assignment for me. I knew how to interpret and apply the law to the contexts and situations of the people I represented. I gained enormous and useful experience by doing repetitive litigious work to the extent that it became almost second nature to me. When I transitioned to become an In-house Counsel, I had to master the laws applicable to my current employment and serve as the legal advisor on all operational matters of the organisation. How wide was that scope of work? Extensive. This entailed a fusion of all types of laws that revealed the complexity of an organisation and the necessity to ensure compliance with all laws. In the first instance, I tried my best to read through the laws and comprehend them accurately and to give concise legal advice to the organization. However, I soon found this to be virtually impossible. This is because with time I learned that the essence of being a great Counsel is founded on understanding the legal theory behind every law to apply it accordingly. I soon learned that understanding the various provisions of the laws applicable to the organisation was fundamental in driving compliance and addressing challenges. I always found myself compelled to understand both the theory and praxis of law. Had I not immersed myself and awakened to the reality of the complexity between theory and practice of law, I would have found myself unable to execute my duties as an In-house Counsel. This is the primary reason why I had to understand the essence of the laws in the execution of my assigned duties and responsibilities.

From the above two illustrations, one can easily pick up the ease with which an In-house Counsel can easily transition from one sector to the other and not only perform but excel in the appointed tasks. The secret therein lies in their ability to delve into the essence of the theory behind the laws in which the legal provisions emanate. It is important to note that much time is spent in understanding the legislative background, and appreciating why the National Assembly sought to make certain provisions behind each law to achieve a general objective and thus, enable practice. Therefore, linking theory to practice is an in-house counsel's first and foremost assignment as

it forms the basis for the execution of all other duties and responsibilities: these range from the provision of legal advice, issuance of instructions on litigation matters and drafting of legal opinions. One advantage I must add, is that due to the nature of the retainer of the In-house Counsel, they have the benefit of time to appreciate and understand the theory behind the practice by constantly interacting with different operational departments of the organisation.

'There is a distinction, but no opposition, between theory and practice. Each to a certain extent supposes the other. Theory is dependent on practice; practice must have preceded theory.[170]Understanding the theoretical bases of the law has never been so important to the In-house Counsel than at a time when laws and regulations are enacted at an ever-escalating speed and without much clarity to the general public as to their rationale. Thus, taking time to understand the theoretical rationale of the law offers the In-house Counsel an invaluable perspective as to why certain legal provisions have been made and how and why they impact the general operations of the relevant organisations. This also provides an opportunity to critically question the essence of certain provisions in law which are not aligned with the social and operational contexts of the organisation.

An illustration of the above is the impact of the Finance Bill tabled in the Kenyan National Assembly annually. This Bill has an impact on the operations of all organisations in the country most specifically with regard to taxation. One must therefore, be at the forefront of appreciating the contents of the Bill, the reasons behind the proposals made therein, the impact that it shall have on the organisation once assented to, and further the requirements of compliance. The theory behind this Bill of course is centred on the requirement that the state should annually review and provide guidance on the country's finances, most specifically, what is paid and received in amounts as well as the provision of guidance on the taxation regime. An In-house Counsel will therefore be required to appreciate the taxation framework and its impact on the organisational operations. Once assented to, the In-house Counsel is required to further follow up and review whether the organisation is implementing the legislative provisions in terms of compliance. If not, establish the legal risks posed by non-compliance. This is done on an annual basis as changes will occur each year requiring the Counsel to be up to date on the latest legislative provisions to execute their duties effectively. In essence, what I have learnt is that the applicability of a particular law must bridge the gap between theory and practice at every given moment for one to effectively discharge their roles.

It is, therefore, crucial for an in-house counsel to take time during the induction stage of onboarding into an organisation to familiarise oneself with the laws applicable to the organisation.Furthermore, Counsel needs to appreciate the background, the rationale behind why the laws were enacted,as well as the context in which the enactment was undertaken. This is fundamental in adding value to the organization. The spirit of law is best understood when you link theory to practice, an illustration of the same is evident in the writing of legal opinions which require extensive research. To simply cite the law would be a disservice to the recipient of the opinion. On this, one will therefore have two choices: to assent or dissent. However, when the opinion is properly detailed in explaining the legal provision, one will find it easy to appreciate why a certain decision must be taken and therefore make informed inquiries on other available options.

Another context, in which legal practice can be viewed is from the perspective of legal officers who work as program officers supporting and advocating various human rights causes. To appreciate the service rendered in this context is to fully understand why certain laws are applied to their respective subjects. For example, the campaign against female genital mutilation (F.G.M.). Female

170 Bartleby: https://www.bartleby.com/lit-hub/s-austin-allibone/sir-william-hamilton/ (accessed on 7.7.24)

genital mutilation was outlawed in Kenya by the Prohibition of Female Genital Mutilation Act (Cap 62B of the Laws of Kenya). However, this heinous act is still prevalent in certain ethnic communities in Kenya. How then does one link theory to practice in this context? My opinion lies in the Counsel's understanding of the impact of female genital mutilation on the community and the girl child's inability to benefit personally and economically through the trauma faced by undergoing the cut. It is the Counsel's responsibility to investigate the impact that F.G.M. has had on society to understand why the legal provision was made. In doing so, a spirited campaign is rendered by the Counsel to confront the vice and thereby shape society as was envisioned by the drafters of the law.

Theory and practice work symbiotically, are dynamic and subject to evolution. The theories exhibited years ago constantly change and have therefore been adapted to the environment in which the laws currently exist. They, therefore, evolve to address the changes and challenges exhibited in society. This requires the In-house Counsel to constantly re-examine the context in which the theory currently exists to establish whether the purpose with which it was created remains applicable or whether there is a need for reform. This constant review and re-examination of theory has led to legislative reform where theories previously applied have changed and evolved to fit into current contexts thereby facilitating effective practice. In consideration, of the illustration previously given on the Finance Bill, one will note that the need to tax as part of revenue collection continues to evolve. The country and the world in general currently operate on a technological platform that continues to grow and offer opportunities to render services on virtual platforms previously unrecognised in legal provisions or theory.

To facilitate collection of revenue, the Bill recognises the role of service providers in virtual platforms as part of the income generation fraternity that is subject to taxation thereby enhancing the tax base to aid in effective service delivery to its citizens. It is, therefore, notable that organisations have taken up virtual platforms as trading grounds by virtue of their cost-effective and efficient service delivery nature however certain challenges have come up through the uptake of this type of trade which was previously unknown. One of these challenges includes data theft which has led to the development of data protection laws that facilitate the overall constitutional right to privacy. The In-house Counsel, therefore, must expand their knowledge of the theory and practice in the aforementioned context to effectively render services to their employer noting the legal exposure in terms of data protection.

Lastly, legal theory is essential in challenging the status quo and therefore, enabling in-house counsels to confront various biases in the legal systems in which they operate. This, therefore, leads to the creation of a just society. As in-house counsel, we must be driven by the desire to not only aid the organisation in the achievement of its mandate but also positively serve and impact the community and environment in which we operate. This is evident in the rise of Environment, Social and Governance (ESG) as a concept adopted by most operating agencies in the conduct of their business. It has also been adopted as a mandatory reporting framework for organisations as part of the Triple Bottom Line Approach initiative of 'People, Planet and Profit' to create a sustainable and eco-friendly world. This is an evolution of the theory behind Corporate Social Responsibility (CSR) where organisations in the execution of their mandate are required to contribute to the positive development of society. The evolution of ESG from the CSR setting has placed a greater emphasis on the establishment of metrics to guide and assess the ethical performance of organisations and their impact on society in general with the inclusion of good corporate governance. This theory has led to the development of a legislative regime around ESG that ensures that organisations comply with the requisite regulations prescribed to promote good governance and positively impact society and the environment. These are some examples of how

theories continue to evolve and subsequently lead to the evolution of practice.

How then can we maintain a proper balance? First, we need to take time, to identify the laws applicable to the organisations in which we serve. Key amongst them is the law establishing the organisation or the regulatory framework in which the organisation is regulated. Upon doing so, the next step is to identify the theories behind the law and appreciate the objective of the National Assembly in enacting the laws. This will require us to delve into societal challenges and issues which led to the enactment as well as the emerging issues in operations for the particular organisation to appreciate the theoretical framework behind the legislative provision. Upon conclusion, Counsel can fully appreciate and adequately assess whether the legal provisions are adequate by linking the theory to the practice currently implemented. From this, we can question and assess whether the provisions are adequate, whether there are any loopholes and the impact of the same on the organisation. By doing so, I have found and appreciated the value of linking theory with practice which has been critical in the provision of legal advisory services and in advancing or defending a legal position on behalf of the organisation I serve.

Whereas the above sounds time-consuming and strenuous, it is fundamental in enabling the In-house Counsel to remain relevant and effective in the performance of their role. It further ensures compliance by the organisation, lowers legal risks and further allows counsel to guide in elevating performance in the form of execution of the organisational mandate. This article aims to cement the aphorism, that '*Without theory, there can be no practice'* from the In-house Counsel's perspective and further endeavours to state that regardless of the type of practice, legal theory remains the key driver of practice in all aspects of the legal profession. In conclusion, I seek to highlight two jurisprudential quotes that demonstrate how the two remain forever intertwined. 'Experience without theory is blind, but theory without experience is mere intellectual play'.[171] 'He who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast,'.[172] I have found that to be able to effectively and efficiently discharge your role as in-house counsel linking theory to practice is a fundamental prerequisite.

171 Thomas B. Fordham Institute: https://fordhaminstitute.org/national/commentary/theory-without-experience-intellectual-play#:~:text=To%20be%20clear%2C%20it's%20important,experience%20is%20mere%20intellectual%20play.%E2%80%9D (accessed on 7.7.24)

172 Business Insider: https://www.businessinsider.com/intertwining-theory-and-practice-2012-10?r=US&IR=T (accessed on 7.7.24)

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