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

Dr. Annette Mbogoh*

ABSTRACT

Community paralegals have played a critical role in promoting access to justice for indigent communities in Kenya. Civil society organizations such as Kituo cha Sheria-Legal Advice Centre pioneered the use of the paralegal approach. Paralegals live within the communities that they serve. They respond swiftly to injustices at grassroots levels. Since the inception of the movement in 1973, paralegals have been trained, mentored and supported by civic actors. With time, the movement organically grew establishing informal structures for improved coordination, support, capacity building and outreach. Community and or Social Justice Centres were founded to operate as "first-aid legal centres" in informal settlements, urban, peri-urban and rural areas. Despite their interventions, community paralegals were not legally recognized. They operated in a legal vacuum and were illegitimate legal aid providers. Sustained advocacy resulted in the enactment of the Legal Aid Act 2016, which recognized paralegals viewed as legal aid service providers. The Legal Aid Act has however redefined the concept of paralegalism shrouding it with restrictions and regulations that threaten the historical gains made towards legal empowerment. The article explores the contestations of paralegalism as it has been known before the Legal Aid Act 2016 and the consequences of formalization and legal recognition.

Keywords: *Paralegalism, access to justice, legal empowerment, power, formalization, recognition, state capture*

* Executive Director, Kituo cha Sheria Legal Advice Centre, Advocate and Teacher of Law, University of Nairobi.

INTRODUCTION

Broadly speaking, the concept of access to justice is an aspect of the rule of law. Justice is vital in securing the human rights of every person. Accessing justice requires addressing both the supply and demand. It involves empowering people to seek justice and securing mechanisms to deliver justice[1]. In its broadest sense, access justice includes access to fair and equitable laws, access to public education and information, access to the law and related procedures, access to the courts and tribunals, access to alternative dispute resolution and access to fair administration of justice[2].

It is a tenet in legal systems that ignorance of the law is no defence. This grund norm presumes that every person is legally literate. The Task Force on Justice estimates that the approximately 1.5 billion people are unable to access justice[3]. The reality is that majority of Kenyans are unaware of the laws that govern and regulate their lives. The law is constructed in technical and complex language that is difficult for lay people to understand. In addition, access to basic legal services involves consulting an advocate who will impose fees for professional services rendered. If disputes have to be resolved in court, the litigant has to cater for court and disbursement costs to facilitate the matter. As a result of the high cost of formal justice, majority of Kenyans opt to pursue informal avenues e.g. alternative dispute resolution, paralegals or alternative justice systems.

To achieve enhanced access to justice it is imperative to simultaneously build capacities of the judicial sector whilst legally empowering grassroots communities. Therefore, access to justice programmes should not solely focus on legal literacy of communities; they must also address structural barriers within justice systems.

The United Nations Development Programme (UNDP) defines access to justice as "empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and

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1 International Development Law Organization (IDLO) (2020) https://www.idlo.int/what-we-do/access-justice (accessed on 15 November 2020).

2 ibid

3 HiiL (2019) Innovating Justice: Needed and Possible: Report of the Innovation Working Group.

countering biases inherent in both systems, to provide access to justice for those who would otherwise be excluded"[4].

It is against this backdrop that the concept of paralegalism or the paralegal approach emerged. Since pre-independence, Kenya has employed paralegalism as a crucial aspect of access to justice. The Constitution espouses that the sovereignty of the Republic and judicial authority is derived from the people of Kenya and should be exercised in line with their aspirations and ensuring their active and meaningful participation as users of justices and courts. The paralegal approach is now anchored in the Constitution of Kenya 2010. Paralegalism exemplifies this constitutional transformation.

Part one of the article begins by defining the concept of paralegalism. It distinguishes the terminologies of "paralegal" and the "community paralegal" as provided in traditional legal empowerment programming and the Legal Aid Act 2016 (hereinafter "the Act"). In part two, the article highlights the legal reforms on paralegalism and critically analyses power within the strategy. The article problematizes the contestations between the two binaries i.e. the old versus the new paralegalism. The analysis considers three aspects of regulation i.e. curriculum development and training, accreditation and financing. Finally, the article discusses conclusions and recommendations.

Defining "the Paralegal": Conflicting Perspectives within the Kenyan Jurisdiction

The term "paralegal" is closely related to the terms "paramedic or paramilitary". The latter are a category of workers found in the medical or military profession.[5] Consequently, paralegals are also found in the legal profession. They support lawyers, advocates and judicial officers.

The Act defines and distinguishes the terms "paralegal" and "accredited paralegal". Section 2 of the Act provides that an "accredited paralegal" is a

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4 Smith R.H. (1919) *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law, with Particular Reference to Legal Aid Work in the United States* Carnegie Foundation p.9.

5 Soy A (2018) "Kenya's Community-Based Paralegals" in Maru V & V Gauri (Eds) *Community Paralegals and the Pursuit of Justice* Cambridge: Cambridge University Press pp. 165-209 https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/ (accessed on 22 November 2020).

person accredited by the Service to provide paralegal services under the supervision of an advocate or an accredited legal aid provider". Additionally, section 2 enumerates a paralegal alongside other legal aid providers.[6] On the other hand, the same section defines a "paralegal" as a person employed by the Service or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education."

The Paralegal Support Network (now Paralegal Society of Kenya) simply 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".[7] Paralegal workers are viewed as development workers and community members who educate people about the law or offer basic legal services. According to the Paralegal Society of Kenya, paralegals can also refer to persons who are part of the legal process e.g. probation and children officers, court clerks etc. Although these persons are not lawyers, they offer essential legal services as part of their work[8].

There is a departure between the definition of the term "paralegal" by the Paralegal Society of Kenya and the law. The concept of a paralegal as espoused by the Paralegal Society of Kenya is in line with the understanding of non-state legal aid service providers. A paralegal is viewed as a community-based person that provides basic legal services alongside other vocational roles. Paralegalism is viewed as a skill as opposed to a profession. Legal empowerment organizations select trainees from respectable members of the community who undertake short-term skills transfer training session. On the other hand, the law conceptualizes paralegalism as a professional qualification requiring accreditation, licensing and regulation by a state agency. The difference in definitions sets the stage for even more contestations on the existing paralegal approach and what is stipulated in law. While there is a place for professional paralegals, the role of community-

6 "Legal aid provider" means —(a) an advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organization or public benefit organization; (b) a paralegal; (c) a firm of advocates; (d) a public benefit organization or faith-based organization; (e) a university or other institution operating legal aid clinics; or (f) a government agency, accredited under this Act to provide legal aid.

7 Paralegal Support Network (PASUNE) (2018) *Handbook for Paralegals*. Nairobi: PASUNE.

8 ibid.

based paralegals in enhancing access to justice cannot be undermined. The legal exclusion of community-based paralegals is the foundation of challenges relating to their recognition, legitimacy and financing.

The Organic Emergence of Paralegalism as a Legal Empowerment Approach in Kenya

The former President: A Historical Perspective Moi regime was marked by egregarious human rights abuses such as unlawful detention, torture, extrajudicial killings and excesses of the Presidency among others. There was clamping down of the freedom of expression, opinion and inaccessibility to information. The voices of the community, much less of the indigent, was silenced; they were rendered invisible to a powerful state. Against this backdrop, the paralegal approach in Kenya evolved from an extended tradition of activism during the Moi's administration[9].

Prior to that, the legal profession was underdeveloped and principally operated as an administrative body in service to the colonial state.[10] Under the colonial rule, the legal system was incapable of assisting local communities to access justice. The formal system of law was foreign and superimposed on the people. Customary law, which resonated with Kenyans, was mostly viewed as being repugnant to morality and justice.

A historical reflection on paralegalism reveals that the approach found its origin within informal spaces consisting of community-established structures. The approach organically evolved outside formal spaces of law and regulation as a natural response to the authoritarian and dictatorial regimes. The paralegal space was an open, unrestricted, unregulated and non-state space where empowered communities to vocalize their views and priorities against repressive regimes within their localities. Paralegalism was not concerned with conditionalities in order to engage within its spaces. It focused on dedication, passion and drive for adherence to human rights ethos. That notwithstanding, the paralegal approach has been seen as dynamic and ever-

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9 Moy A (2018) "Kenya's Community-Based Paralegals" in Maru V & V Gauri (Eds) *Community Paralegals and the Pursuit of Justice* Cambridge: Cambridge University Press pp. 165-209 https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/ (accessed on 22 November 2020).

10 ibid

changing as it remodels itself to address the contemporaneous community justice needs.

In this section, the article traces the origin of paralegalism. It critically analyses the manifestation of power within the paralegal movement in Kenya. It further discusses the struggle for recognition, the advent of formalization and problematizes the vagary of regulation of paralegalism and legitimacy.

Paralegalism in Colonial Kenya

Through a series of laws passed from 1897 to 1930, the British colonial government established a plural legal system that applied a separatist approach. The British settlers and indigenous Kenyans had different rules applicable to them. The latter were subjected to an informal legal system based on administrative as opposed to judicial principles. The former had access to a formal legal system that was based on judicial principles, protection and due process within formal courts. The matters affecting indigenous Kenyans were addressed by native courts and local tribunals using customary and religious laws, which were not found as repugnant to justice and morality.

In the same vein, the British colonialists excluded indigenous Kenyans from the legal profession. In native courts, judicial officers had powers to license Africans to deliver limited legal services as paralegals than they did within independent Kenya. The individuals were known as "*vakeels*" meaning "local persons knowledgeable in basic court procedures, although possessed of no legal qualifications"[11]. The Legal Practitioners Act (1906) barred *vakeels* from formal legal practice as the Advocates Act Cap 16 of the Laws of Kenya excludes paralegals from formal practice of law. The legal space was a closed and restricted space; it was expressly and impliedly rendered inaccessible by members of the public.

In 1949, the legal profession was extended to non-Europeans. However, it was only until the later 1960s that African lawyers joined the profession. This was due to the colonial policy that denied state funding to African students wishing to study law. Also the British colonial government was seemingly "obsessed with fear that lawyers would promote political difficulties for it. Indigenous lawyers were regarded with extreme distrust. This attitude stemmed in part from the British experience in India…and partly from West

[11] ibid.

Africa…where lawyers were already agitating for the safeguarding of the rights of Africans"[12]. The colonial authority preferred to rule by exerting visible and invisible power to control the conduct, minds, perceptions and attitudes of the colonized. It was perceived that legal education would in a sense decolonize minds of young African lawyers stirring a revolution and push for independence.

As a result of the plural legal system and systematic exclusion of African lawyers, the Law Society of Kenya failed to address the problems facing the African community until after independence. Instead, the problems of indigenous Kenyans were addressed through public meetings (*barazas*) with the local administration. The *barazas* provided a forum for indigenous Kenyans to deliberate on social issues, resolve impending disputes and raise complaints with the colonial state. Opinion leaders had a strong voice within these spaces. However, the *barazas* were also used to disseminate and enforce colonial policies.

It is clear that during pre-independence, the colonial law and policy aimed at creating visible and invisible barriers to exclude Kenyans from the formal legal space. Indigenous Kenyans were restricted to the informal, community-based space that was at a lower cadre than the formal, state-based space. The former evolved into a safe space where locals exercised their freedom of thought, opinion, expression and resolved disputes.

Paralegalism in Independent Kenya

During the regime of Kenya's President Kenyatta and the early years of Moi's (1978–82), the first crop of African lawyers began joining the LSK. In 1960, a committee was established to investigate and improve legal education in Africa. Its recommendation resulted to the founding of legal education programmes for African students e.g. the Faculty of Law at the University of Nairobi.

[12] Ghai YP (1981) "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" in Dias CJ et al *Lawyers in the Third World: Comparative and Developmental Perspectives* New York: International Center for Law in Development p.148.

In 1973, a small group of young African lawyers from the University of Nairobi established Kenya's first non-governmental legal aid organization[13]. It was named *Kituo Cha Mashauri*; it was later renamed *Kituo cha Sheria* and registered as "Legal Advice Centre"[14]. The founders, who are now esteemed members of the Kenyan legal fraternity, recognized the need for legal aid services for indigent Kenyans. Kituo cha Sheria (hereinafter "KITUO") has since then largely dealt with legal disputes relating to housing, labour and land. The organization targeted domestic workers, manual labourers, inhabitants of informal settlements and victims of forced evictions.

The number of African lawyers and law students volunteers in Kenya grew. Their increasing numbers was still insufficient to adequately supply the demand for pro bono legal services. To bridge the gap, KITUO began training opinion leaders and community members in basic law so that they could assist with cases.[15] These people came to be known as Kenya's first paralegals.

By the mid-1980s, African Kenyans would finally constitute the majority of the legal profession. However, there was an abrupt increase in systematic human rights violations and repression by government. Organizations that publicly criticized the government were blacklisted, targeted and intimidated by the state officers.[16] In response, solidarity between lawyers, activists and the LSK members was intensified. For instance, KITUO transformed into an agent of social change. As it grew, KITUO forged strategic partnerships with the National Council of Churches of Kenya (NCCK) and young lawyers in the University of Nairobi's law school. The affiliation expanded KITUO's presence and scope in rural areas.

Other civil society organizations adopted the paralegal approach. In 1983, the Public Law Institute was founded. It established legal aid clinics manned by volunteer advocates, community paralegals and law students. In the same vein, ICJ adopted best practices on the use of community paralegals and "barefoot lawyers" the International Commission of Jurists (ICJ) from Asia and

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13 The founding members of Kituo cha Sheria included the late Mr. Steve Adere, Rtd Justice Vitalis Juma, Dr. Willy Mutunga (Chief Justice Emeritus), the late Dr. David Gachuki, Hon. Mary Ang'awa, Murtaza Jaffer and Prof. Shadrack Gutto.

14 Kituo cha Mashauri is Swahili for Centre for Advise. While Kituo cha Sheria means Legal Advice Centre.

15 Supra (n. 9).

16 For example KITUO was petrol bombed during this repression. The LSK maintained a low profile.

Latin America [17] . Multiparty politics saw the mushrooming of more organizations that became key actors in the contemporary paralegal movement[18]. A strong grassroots network was established by many of these actors[19]. Each of these organizations began strategically deploying paralegals in programs promoting legal awareness, rights promotion, and conflict resolution. In some organizations, paralegals worked as human rights defenders or monitors. The paralegals were responsible for creation of public legal awareness. Opinion leaders or highly respectable member of the community were identified, trained and deployed to facilitate rights awareness and advise communities on action to when rights are violated [20] . The paralegals worked closely with pro bono advocates and legal aid organizations. The dedicated and skilled paralegals sought to resolve justice challenges themselves and mediate disputes reported by clients. Where necessary, they support clients in formal legal proceedings.

Due to the *de facto,* grassroot organization supported the paralegal movement, it was only natural for the organization to evolve into partnership and collective action. In 2000, twenty-six paralegal organizations established the Paralegal Support Network (PASUNE)[21]. The aim of the network was to share experiences and collaborate to advance paralegalism in Kenya. Two years after the inception of PASUNE, harmonized paralegal training materials were developed. The curriculum was shared with the Kenya School of Law as contribution towards the design of a diploma programme for paralegal studies. PASUNE was actively involved in advocacy campaigns around the then Legal Aid Bill and establishment of a small claims court where paralegal services could be further utilized.

17 Supra (n.9).

18 Amondi C (2014) "Legal Aid in Kenya: Building a Fort for Wanjiku." in Ghai YP & J Cottrell-Ghai (Eds) *The Legal Profession and the New Constitutional Order in Kenya*, 201–20. Nairobi: Strathmore University Press p. 205; Feeley MC (2006) *Transnational Movements, Human Rights and Democracy: Legal Mobilization Strategies and Majoritarian Constraints in Kenya 1982-2002* PhD Dissertation, University of California, San Diego pp. 486,487.

19 Other organizations that later joined the legal empowerment network included the Legal Resources Foundation (LRF), Center for Legal Education and Aid Networks (CLEAN), Widows' and Orphans' Welfare Society of Kenya (WOWESOK), CRADLE-The Children's Foundation) and the Education Centre for Women in Democracy (ECWD).

20 Supra (n.9).

21 In 2020, PASUNE was renamed Paralegal Society of Kenya.

As discussed above, paralegalism in Kenya developed incrementally from the 1900s. It has slowly been embedded into society through informal, self-regulating rules outside of state involvement and formal legal framework on its recognition, coordination, administration and institutionalization. The advent of the Legal Aid Act in 2016 is a paradigm shift of paralegalism as earlier manifested. The law through the Act seems to reinvent the will and presuppose the pouring of a new paralegal approach onto a fabric of an already existing and vibrant movement.

A Power Analysis of Paralegalism Before and After the Legal Aid Act 2016

Legal empowerment strategies such as paralegalism challenge power and systems of domination and authoritarianism. The concept of "power" is complex and contested and its meaning is as diverse as it is contentious. Power is seen as being held by actors-some who are powerful and others are powerless. In this particular case, power is arguably held by state actors, influential corporates and wealthy individuals. In comparison, grassroots and indigent communities are powerless in decision-making, agenda setting, law-making and development. Power is seen as a zero-sum concept whereby gaining power for one means others must give up power. Since the powerful rarely give up power, handing over power often involves conflict and struggle.

Paralegalism is a strategy whereby power is transferred to the people with the aim of building agency, capacity and legal empowerment to transform and shape lives using the law as a tool. To illustrate the power dynamics within evolution of paralegalism in Kenya, Steven Lukes theory on the typology of power becomes particularly useful. Lukes asserts that power has four dimensions i.e. "power over", "power to", "power with" and "power within". "Power over" is negative power displayed by use of coercion. The other three forms of power are positive power.[22]

[22] Lukes' also added the form of "beneficent power" whereby the government exercises its authority and power to protect and promote the human rights of all; Crawford, G. and B.A. Andreassen (2013) "Human Rights, Power and Civic Action: Theoretical Considerations" in Andreassen BA and G Crawford (Eds) *Human Rights, Power and Civic Action: Comparative Analyses of Struggles for Rights in Developing Societies* Abingdon, Oxon, Routledge p. 6.

Since its inception in the 1970s, the paralegal movement demonstrated elements of positive power. "**Power to**" is about agency, empowerment and capacity which are all characteristic of the paralegal movement as we have known it. The knowledge of the law has always been a preserve of elitists and members of the legal fraternity. In essence paralegalism dismantles the existing barriers for grassroots communities to access legal knowledge. The capacity building of communities into paralegals within their localities empowered ordinary women and men into change agents. Their capabilities have been expanded. As a result, opportunities of joint action or "**power with**" are opened up. In this case, paralegals were seen to jointly provide each other mutual support through the establishment of community or social justice centres. Through these centres, citizen education and advocacy efforts were enhanced based on the belief that every person has "power to" bring change. Power with is collaborative power; the development of paralegalism was centred around social mobilization and building of alliances through social movements. The paralegal network is closely linked and founded within social mobilization. The establishment of community or social justice centres demonstrates the collaborative power generated through paralegalism. "Power with" requires finding commonalities and building on collective strength. It concerns building capacity through agency. Like "power to" is entails the process of empowerment. The history shows paralegal groups building coalitions and alliances such as Paralegal Society of Kenya.

Effective legal empowerment programmes are hinged on generation of power from within an individual. Paralegalism has to do with agency and the ability to act and change the world. It involves the development of an individual's sense of self-respect, self-worth and self-esteem. "Power within" increases an individual's potential to act upon the world. Through the legal knowledge they garner, paralegals undergo the process of empowerment, which inspires agency from within.

Prior to the Legal Aid Act, paralegalism operated in informal spaces and civic actors were actively involved in generating power to, power with and power within paralegal groups within the country. Formalities and regulation was minimized and the focus of the movement was community-driven change through the use of the law. The disadvantage of the informal and community-based paraleglism is the absence of legitimacy from the state. Consequently, the lack of recognition easily discredits the work of paralegals.

The advent of the Act tilts the power scales in favour of the State. Through the Act, the practice of paralegalism receives recognition and legitimization

from state law. However, the law re-conceptualizes and re-designs paralegalism in exclusion of the already existing, entrenched and self-regulated paralegal movement. The "new" form of paralegalism must operate within 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. The new regulations are designed without due regard to the dynamics on the grounds that relate to inequalities and inequities. Instead, the "new", legalized form of paralegalism is expected to be imposed on an already well-established social and countrywide movement of community-based paralegals.

The power of law and the state is evident in the conceptualization and implementation of the new form of paralegalism. Lukes defines "power over" as the ability of powerful forces to secure compliance by less powerful people. In this case, the state and its agencies formulated the draft regulations in isolation. Through the power of the law, the state will secure compliance with these new regulations. Engagement with stakeholders was done after the conceptualization of the regulations. Even then, due to limited resources, stakeholder engagement was inextensive. One aspect of "power over" is that power struggles involve empowerment for some people at the expense of disempowerment for others. The power of law is in its ability to define paralegalism and confer importance on its own definition than that by civic actors and communities. Individuals that served as community paralegals prior to the Act that do not possess the pre-requisites under the new regulations will be unable to provide paralegal services.

Formal Recognition or State Capture: The 2016 Legal Aid Act in Kenya

Upto 2016, the lack of formal recognition of paralegals posed serious challenges for the movement. The paralegals faced instances when they were dismissed for lack of legitimacy or accused of masquerading as advocates.[23] The Advocates Act prohibited any person who is not admitted as an advocate of the High Court of Kenya from providing legal advice and representation. Local leaders demanded a clearer understanding of who a paralegal is, the nature of training required and the roles they are authorized to play. The legal challenges of paralegalism limited its effectiveness in enhancing access to justice. Therefore, paralegals faced difficulties accessing courts and supporting clients to mediate disputes, monitor court proceedings and administration of cases.

[23] Supra.

On this basis, legal empowerment organizations sustained advocacy efforts that led to the enactment of the Legal Aid Act 2016 which recognizes paralegals as legal aid providers so long as they are supervised by an advocate or an accredited legal aid provider. The Legal Aid Act encapsulates some gains for access to justice and more specifically paralegalism.

Firstly, the Act, as discussed hereinabove, defines and gives formal recognition of paralegalism. It defines legal aid as broadly including legal empowerment activities that are undertaken by community paralegals such as raising legal awareness, alternative dispute resolution and community driven advocacy initiatives. The role of paralegals in the Legal Aid Act is not limited to courts and other formal forums traditionally associated with legal aid. Secondly, the Act confers accredited paralegals with authority to provide legal advice and assistance that previously could only be done by advocates. Thirdly, the Act establishes the Legal Aid Fund through which accredited paralegals can access financing for provision of legal aid. Therefore, paralegals are prohibited from soliciting or accepting payments from clients who qualify for legal aid. The Act criminalizes paralegals who seek financial gain in exchange for their services. Fourthly, the Act obliges the National Legal Aid Service to develop programmes "for legal aid, education and the training and certification of paralegals." This mandate of the National Legal Aid Service may positively contribute towards harmonization of training programmes and certification. However, the training programmes and certification may potentially be exclusionary in terms of the minimum qualifications for trainees, accessibility of the training programmes and inflexibility in regulation.

That notwithstanding, the formal recognition of paralegalism comes with trade-offs, over-regulation heavy state involvement and a complete reinvention of paralegalism as we have known it. The Legal Aid Act interacts with and yet supersedes the existing legal empowerment programming. It is imperative to be alive to the fact that the law does not and cannot operate in a vacuum; it operates within a context riddled with power intrigues, interests and dynamics.

In the case of paralegalism, the prolonged absence of a specific legal framework resulted in the development of "informal" rules and regulations outside the officially sanctioned state arena. These informal rules and regulations were enforced and reinforced without state action. For instance, a training curriculum for community paralegals was developed under the auspices of the then PASUNE. Civic actors have used the PASUNE

curriculum in training community paralegals in weekly modules. In the same vein, a formal three years training programme on paralegalism was also offered by the Kenya School of Law which mainly targeted professional paralegals, court and or advocates' clerks.

The Legal Aid Act and its appurtenant rules allocate responsibility for regulation of paralegalism. The assignment of roles and responsibility has however not been made clear on the ground. Mechanisms for coordination, cooperation and dissemination of information on implementation of reforms among all actors and stakeholders have not been consistent and well established. The National Legal Aid Service plays a critical role in coordination, cooperation, awareness raising and overall implementation of the law. However, due to funding constraints, the Service is unable to effectively play this role. New developments are occurring within mostly closed and or invited spaces. There has been a deliberate effort by organizations working with paralegals to seek information on reforms and educate existing community paralegals on how they will be affected. The danger of using this approach in implementing the Act is that there is inadequate participation of stakeholders. Further, crucial changes in paralegalism may be made without the knowledge of existing paralegals.

A case in point involves and implement the accreditation of paralegals. The draft regulations were not widely shared with stakeholders and the general public. On 8th July 2020 and 14th July 2020 respectively, the Legal Aid Code of Conduct for Accredited Legal Aid Providers, 2019 and the Legal Aid (General) Regulations, 2020 were gazzetted. Rule 29 of the Legal Aid (General) Regulations, 2020 provides as follows:

(1) A person is eligible for accreditation as a paralegal if the person-
    (a) has completed a training course for paralegals that is approved by the Council of Legal Education;
    (b) is employed or supervised by an advocate or accredited legal aid provider; ***and***
    (c) is a member of a duly registered association of paralegals. (Emphasis added)

The application of rule 29 disqualifies a majority of existing community paralegals from accreditation. The use of the term "and" in the enumeration of the grounds for eligibility may be interpreted to mean that all the three conditions must be present for accreditation of a paralegal.

As much as the law does not apply retrospectively, it is good practice to have transitional provisions in any new legislation. Further, the regulations view paralegals as mere appendages to advocates as opposed to collaborators and change agents in the access to justice sphere. The Legal Aid Act and its appertenunt rules do not have transitional provisions providing directions on how to deal with already existing legal empowerment programmes 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.

As discussed hereinabove, accreditation is a critical precondition for providing legal aid within the purview of the law. That notwithstanding, rule 29 only acknowledges paralegal training programmes that have been approved by the Council of Legal Education. Also, paralegals are required to be members of a duly registered association of paralegals. It is not clear whether this will refer to only one paralegal association or many paralegal associations may be registered for membership. As it stands, the National Legal Aid Service has only recognized the Paralegal Society of Kenya. Therefore, paralegals from across the country will have to be duly registered members of the Paralegal Society of Kenya for accreditation.

The existence of one umbrella body for paralegals in Kenya is a positive step towards building alliances and a unified voice. However, the existing paralegals may have a sense of loyalty to legal aid organizations that they have been closely engaged with. They must therefore be convinced of the cost benefit of membership in the Society. Further, they ought to be reassured that membership in the Society does not translate to separation from their respective mentoring organizations.

Additionally, rule 29(1)(a) requires paralegals to complete a training course approved by the Council of Legal Education. This rule is anchored on section 7 of the Legal Aid Act that provides for the functions of the National Legal Aid Service. Section 7(1)(h) provides that, "in consultation with the Council of Legal Education, develop programs for legal aid, education and the training and certification of paralegals." Further, section 7(1)(o) states that NLAS shall "coordinate, monitor and evaluate paralegals and other legal service providers and give general directions for the proper implementation of legal aid programs."

Currently, training programmes for community-based paralegals are sponsored, short, abridged, flexible and accessible. The training programmes

are informed by the PASUNE curriculum and are conducted in weekly phases with experiential learning under the supervision of advocates. Trainings have been conducted by well seasoned legal aid and empowerment organizations with funding from development partners. The legal aid organizations issue certificates of participation enumerating the areas covered in the training. Also, civic actors may issue badges to trained paralegals to show recognition and nexus with their respective organizations.

On the other hand, the Kenya School of Law runs a Diploma in Law (Paralegal) Studies programme for a period of not less than two (2) years and not more than three (3) years. The programme is full time and fees are payable to the Kenya School of Law. It targets mainly the Kenya Police, Kenya Prisons, the Judiciary, the State Law Office, the Bar and Government departments among other stakeholders. A Diploma certificate is issued by the Kenya School of Law upon successful completion of the examinations.

The legal reforms under the Act introduce the Council of Legal Education as a key actor in training of paralegals. The Council of Legal Education is established under the Legal Education Act No. 27 of 2012 with the primary purpose of:

1) Promoting legal education and training and the maintenance of the highest possible standards in legal education providers; and
2) Provision of a system to guarantee the quality of legal education and legal education providers[24].

The Legal Education Act redefines the Council of Legal Education as a regulator and supervisor of legal education in Kenya and separates the Council from the Kenya School of Law. The latter is a Government agency, established by statute for post-university professional legal training.[25] The Council of Legal Education develops curricula and mode of instruction for legal education programmes, accredits, licenses, monitors and evaluates legal education providers and provides oversight in mode and quality of examinations.

The Legal Aid Act and Legal Education Act disrupt the training programmes for community-based paralegals. Currently, a paralegal training curriculum is being developed by the Council of Legal Education in consultation with the National Legal Aid Service. This is especially problematic as section 18(5)

[24] See section 3 of the Legal Education Act No. 27 of 2012
[25] See the Kenya School of Law Act No.

and (6) of the Legal Education Act invalidates all certification or documentation issued as evidence of an award of a degree, diploma or even certificate in law unless the Council had licensed the programme or training. The licensing procedures of the Council are expensive, rigorous, technical and lengthy. Few legal aid providers will meet the demands for licensing and delivery of the curriculum.

On training, the trade-off involves civic actors replacing their respective training curriculum with that developed by the state agencies. Consequently, the state capture of training of paralegals will result in shrinking space for non-state actors involved in legal empowerment programmes. Stakeholder discussions around the curriculum for paralegalism point to a twenty-six (26) weeks training programme. The length of the proposed training portrays a formalized, rigid and professional qualification. This is a departure from the training programmes on the ground, which are more flexible, customized, accessible and practical in nature. The short-term training programmes are aimed at imparting basic legal knowledge that is responsive to the community needs of the paralegals. The training programme is tailor-made for professional paralegals who may not be keen with community-based services.

Financing presents another critical challenge. The Legal Aid Act establishes the Legal Aid Fund to "defray the expenses incurred by the representation of persons," "pay remuneration of legal aid providers," or "meet the expenses incurred by legal aid providers[26]" The Legal Aid Fund is yet to be operationalized. However, details on how the fund will work in practice are still being negotiated. To ensure adequate financial support for community paralegals throughout the country, civil society has submitted recommendations to the Kenya government suggesting avenues for interagency coordination around legal aid implementation and financing. These recommendations emphasize sustainable measures, as well as systems for assessing community needs and monitoring progress toward the Act's goals.

Finally, paralegals need to be members of an association to be accredited by the National Legal Service. The condition relies on mobilization of paralegals and their organization into associations. At the moment, the only recognized association for paralegals is the Paralegal Society of Kenya. The Society is in the process of recruiting paralegals as members. The presence of a national

[26] See section 30 of the Legal Aid Act.

association for paralegals is crucial for recognition, monitoring and regulation of paralegals. However, the paralegals should have freedom to establish regional associations or devolved units for better representation. Membership in these regional associations should also be recognizable by the National Legal Aid Service.

RECOMMENDATIONS

It is recommended that the legal reforms should be interpreted and implemented taking into consideration the already well-established paralegal movement. Reinventing the will on organizing paralegalism diminishes the huge investment made to organically grow paralegalism. Failure to do so will result in low uptake and compliance of the new regulations. Consequently, the effectiveness of the paralegal approach in addressing access to justice concerns will be minimized due to the existence of two competing, conflicting and parallel forms of paralegalism.

It is important to distinguish professional paralegals and community-based paralegals. There is indeed a place and space for both forms of paralegalism. It is recommended that the law should therefore allow the inclusion and accreditation of community-based paralegals who are mostly human rights monitors within their localities without undue conditions relating to the level of education and form of training.

Further, it is recommended that there is a need to enhance greater and more meaningful participation of community paralegals in effecting the provisions of the Act that relate specifically to paralegalism. The implementation of the Act should not be undertaken within closed spaces of state and non-state actors; decision-making spaces should be open and inclusionary.

There is an urgent need for civic actors to reflect and engage in in-depth discourse on what would constitute recognition and formalization of paralegalism. A good starting point would be more research, learning and sharing of experiences across jurisdictions on the processes, benefits and challenges involved in formalization of paralegalism. Cross-border conversations through legal empowerment networks in Africa and worldwide present platforms for such conversations. A general consensus on preferred models for formalization may then be reached.

CONCLUSION

It cannot be understated that the Legal Aid Act provides opportunities for paralegalism in Kenya especially through formal recognition and acknowledgment of their work and services within the access to justice chain. The challenge lies in the deep state regulation of paralegalism that is then proposed by the Act. Formal regulation will exclude majority of existing community-based paralegals who mainly provide services at grassroots level.

Paralegals were legally acknowledged due to the extensive services they provided prior to the Act. It is imperative that state agencies implement the Act in a manner that takes cognizance of the existing informal framework of paralegalism that evolved organically through the years. Modelling and imposing a “new” framework can only result in conflict and reduced impact of paralegalism.

The law legitimizes and creates a framework for state coordination of a paralegal movement that has initially been essentially community-driven and self-regulatory. It may be imperative for the State to ensure oversight, accountability and coordination of paralegalism. In doing so, the law and state actors should not be expressly or impliedly exclusionary of the “old” and existing local framework on paralegalism. Disregarding community-driven structures of paralegalism will only reverse substantive gains made in legal empowerment efforts in Kenya.