

FEATURE

The Value of Paralegals in Kenya's Justice Chain

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Introduction

Article 22 of the Constitution of Kenya, 2010, provides for the enforcement of the Bill of Rights and empowers 'everyone' to institute court proceedings on the basis that a right or fundamental freedom has been denied, violated, infringed or threatened. In addition, article 49(1) (c) provides for an arrested person to communicate with 'other persons whose assistance is necessary', while article 50(7) allows for intermediaries to assist complainants. Article 159(2)(c) promotes the resolution of disputes through alternative mechanisms such as mediation, reconciliation and other traditional means.

These constitutional provisions are grounded in article 48, which guarantees access to justice for all and provides an anchor for paralegals services. Research indicates that a majority of Kenyans face impediments in their quest to access justice, a situation exacerbated by lack of legal literacy and high levels of poverty. The more than 17,000 lawyers currently registered with the Law Society of Kenya (LSK) operate mainly in urban centres, thus leaving a large proportion of the populace to seek services elsewhere when navigating the country's complex legal system (LSK n.d.). An estimated 3,000 paralegals in various parts of the country provide a range of legal services, mostly either pro bono or at nominal cost.

This article discusses the place of paralegals in Kenya's justice chain from the perspective that they remain necessary despite the unfolding reforms within the justice sector and against the backdrop of the newly launched National Legal Aid Programme (NALEAP).

Paralegals and paralegalism

Paralegals are individuals who possess basic legal knowledge and skills. Section 2 of Kenya's Legal Aid Act of 2016 defines a paralegal as a person employed by the National Legal Aid Service (NALAS) or an accredited legal aid service provider who has completed a training course in the relevant field from an institution approved by the Council for Legal Education. An accredited paralegal is one who has received accreditation from the NALAS to provide paralegal services under the supervision of an advocate or an accredited legal aid provider. By contrast, section 2 of the Law Society of Kenya Act defines a paralegal as a person offering support services to legal practice.

The concept of paralegalism evolved as a mitigating strategy in the face of numerous challenges faced by indigent persons in accessing justice. It entails equipping non-lawyers with basic knowledge of law and legal procedures so that they can inform members of their community about their legal rights. The concept was long championed by civil society in Kenya, and, by 2003, several organisations, including trade unions, service and lawyers' organisations, law firms and legal resource centres, NGOs and CBOs, had established paralegal services in the form of community advice centres, community organisations, and the like.

Paralegalism is not a profession and therefore requires no standard qualifications or threshold for qualifying from participants. However, there are qualities and skills that make one a successful paralegal, such as basic literacy, knowledge of the law, skill in community mobilisation, effective communication, a spirit of volunteerism, knowledge of the culture and language where one operates, an objective and analytical mind, trustworthiness and integrity, tolerance and good listening skills, gender sensitivity, adherence to basic human rights principles of equality, non-discrimination, experience and dedication to community service, as well as self-confidence, humility and self-sacrifice. Before the establishment of the NALEAP, the Paralegal Support Network (PASUNE) played a big role in the training, support and coordination of paralegalism and paralegals in Kenya.



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The Constitution, in articles 48 and 50(2)(g)(h), provides that it is the duty of the state to ensure access to justice and the right to choose legal counsel or representation at state expense where substantial injustice would occur. Access to justice has been taken to mean the ability of people to seek and receive solutions through formal or informal institutions of justice for complaints made and in a manner that respects human rights standards (UNDP 2004). It entails formal recognition and protection of rights, awareness and knowledge of existing legal protection mechanisms, the provision of legal aid and counsel where required, settlement of disputes in a just, fair and speedy manner, faithful implementation of decisions of courts or other alternative justice forums, and critical civil society supervision; it is not equivalent to access to lawyers (ibid).

It is noteworthy that goal 16 of the United Nations Sustainable Development Goals (SDGs), the ultimate aim of which is peaceful, just and inclusive societies, would be well served through provision of access to justice. It is generally acknowledged that SDG 16 serves a catalytic purpose and that other SDGs would be achieved only once the aims of goal 16 have been met.

In 2007, The Government of Kenya, through its ministry then responsible for justice affairs, established the NALEAP, whose aim was to ‘create awareness with the Kenyan public about legal aid, to provide legal advice and representation mainly to the poor, marginalised and vulnerable in the Kenyan society’. This was against the backdrop of the position that legal aid is a human rights issue and that NALEAP was necessary for creating a practical, affordable and effective legal awareness and legal aid service delivery scheme that increases access to justice for all. Pilot projects rolled out under this programme by government relied heavily on paralegals and laid the groundwork for legal aid, whose constitutive Act, the Legal Aid Act, establishes the legal grounds on which to operate.

Despite the legal maxim that ignorance of the law is no excuse, many Kenyans, as is the case in most of Africa, lack knowledge of statutes that govern their daily lives and regulate their conduct. This, coupled with the legal and technical language in which statutes are couched, makes it pertinent for one to access legal services, usually by lawyers who charge professional fees for services rendered. Furthermore, distance of courts plus high court fees and attendant costs create more impediments for people to access justice.

A further Act that led to the operationalisation of the constitutional provisions with regard to legal aid was Constitutional Petition 318 of 2011, which sought orders to stop prosecution for all indigent persons in Kenya faced with criminal offences carrying the mandatory death sentence on conviction until the state implemented article 50(2)(h) of the Constitution (which provides for the right to have an advocate assigned to an accused person by the state and at state expense if substantial injustice would otherwise result and for the person to be informed of this right promptly). The court, in arriving at its decision, highlighted the need for the state to put in place not only a legislative and

institutional framework but to also avail resources to provide indigent persons charged with capital offences the necessary legal representation.

The subsequent formulation of the Legal Aid Act 6 of 2016 is therefore a response for bringing to life the constitutional provisions on access to justice. The Act creates a national legal aid service with various functions and whose organising principles are equality before the law, fair administrative justice and equal access to justice for all. Other functions of the Legal Aid Act include the accreditation of legal aid providers and recognition of paralegals as legal aid service providers under section 7 thereof. The Council of Legal Education and the NALAS have been given the responsibility to train and certify paralegals and develop programmes for legal aid education. NALAS has also the responsibility for coordinating, monitoring and evaluating paralegals and other legal service providers to ensure the proper implementation of legal aid programmes. Under section 68 of the Legal Aid Act, only accredited paralegals employed by the NALAS and supervised by an accredited body may provide legal advice and assistance.



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The Act thus places community paralegals at the centre of legal aid, given that often they are the first contact with the community and are able to promote legal awareness continually, offer legal assistance and promote alternative dispute resolution without resorting to courts. Another legal provision that speaks to this matter is section 4(g) of the Law Society of Kenya Act, which includes amongst the LSK's functions 'facilitat[ing] the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training'. Section 41(o) of the same Act gives the LSK the power to make regulations on the recognition and regulation of paralegals that then become binding on all its members.

Paralegals and paralegalism are therefore properly entrenched in Kenyan law. It is anticipated that they will continue to change the landscape with regard to legal aid services and thus facilitate access to justice in law.

The role of paralegals in Kenya's justice chain

The main function of legal aid is provision of free legal aid services to facilitate access to justice. Such services can be provided by paralegals, advocates, public benefit organisations or any duly accredited agency whether governmental or from the private sector. Under the Kenyan model, a government agency, the NALAS, is to provide legal aid services as well as develop guidelines governing its role and work.

Paralegals are expected to play a key role in providing legal aid services, which in summary include enlightening the public about their legal rights and supporting them to solve legal problems. Paralegals can also be an avenue for alternative dispute resolution, as envisioned under article 159(c) of the Constitution; negotiate for members of local communities; consult and liaise with lawyers and legal aid organisations; mobilise communities to defend and advocate for their rights; prepare legal documents; monitor and document human rights violations; conduct preliminary investigations and fact-finding before referring briefs to advocates; refer matters to relevant parties for resolution; lead and organise communities to lobby and advocate for legal reforms; and make referrals. Paralegals may also act as court clerks in small claim courts and have powers to act on behalf of a group or in the public interest to redress violations of the Bill of Rights under the provisions of article 22(2) of the Constitution.

The formation of courts users' committees also provides paralegals the opportunity to serve in identifying challenges and gaps affecting the administration of justice and processes apart from playing practical roles identified for them in access to justice. The paralegal model challenges the assumption that only lawyers are necessary to assist indigent clients at every stage of the criminal justice process.



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Paralegals are also expected to continue playing their advocacy role in Kenya's justice chain at various stages of the numerous processes. They will train prisoners to file applications for release and to present their cases in court. This is especially important in a context where many members of the public continue to identify laws and the government in negative terms, a tendency reinforced by negatives such as police brutality, indifferent or corrupt public officers, and intimidation of court processes. Paralegals are usually representatives of the society and are critical to increasing the legitimacy of legal aid in the eyes of the communities they represent; as such, their importance has been underlined by their inclusion among parties permitted to represent clients in court under article 22 of the Constitution.

Paralegals can advocate too for alternatives to pre-trial incarceration, since this adversely affects an accused person's ability to prepare for trial and consult with his or her advocate. Cases are known where accused persons have spent long periods in remand prison awaiting finalisation of their case where they were unable to post bail. In some cases, these periods have been longer than the maximum sentence for the crime they were charged with. Paralegals can ameliorate this injustice by conducting investigations that unearth facts which could be presented to court in the accused person's favour.

It is noteworthy that many advocates representing accused persons rarely engage in detailed pre-trial investigations since most of them concentrate on the adjudication part of the proceedings through court representation. Paralegals will come in handy at this stage, as it is generally straightforward and may be handled easily by non-lawyers so long as they have the requisite skills and knowledge.

Paralegals can also conduct research, prepare and file legal documents and assemble case studies to be relied on during trial. They can organise required evidence for presentation during trial, tasks that previously have

been handled by court clerks in many law firms. While conducting investigations, they can visit crime scenes and understudy police investigations by making note of all exhibits found and interviewing witnesses to the crime from the perspective of the defence case. Arranging for provision of other necessary services such as counselling, health checks, maintain communication channels with the family and the defence team plus highlighting to the relevant authorities or addressing concerns over the situation of detention. They can also arrange for services such as counselling, health checks, liaise as communication channels with the family and the defence team and report to relevant authorities on concerns over the situation of detention.

Under article 22 of the Constitution, 'every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened'. Paralegals can comfortably take up this role, even so under article 22(2) where a person can act on behalf of another person in the interest of a group or class of persons or in the public interest. Where accused persons or parties to a suit cannot afford an advocate or ably represent themselves, paralegals may take up the cause.



Arranging for provision of other necessary services such as counselling.

As argued earlier, the decision as to whether the interests of justice demand representation by an advocate often depend on the seriousness of the case subject or sentence that the court may impose, especially if it is a custodial sentence. Accredited paralegals, suitably trained in trial representation, may take up the role of legal representative. They can present mitigation re-

ports for accused persons, testify as experts based on the investigations they have conducted, and identify other suitable witnesses.

During sentencing, it is often the prosecution that gives evidence of the accused's criminal record. Rarely do advocates conduct independent investigations into their client's family background, education, financial means and health history. Proper representation at sentencing would require such efforts, and since most advocates may be pressed for time, paralegals can fill this gap in support of advocates.

Once the outcome of the case has been given, paralegals can assist in the appellate and post-conviction proceedings through preparation of records of appeal and briefs. Few accused persons exercise their right of appeal after conviction due to lack of resources or timely acquisition of trial records. Paralegals can assist in this regard, including by making a record of any rights violations that occurred in the course of the trial and which could form the basis for an appeal.

Thus, in addition to their regular work, paralegals, with their knowledge of the law and skills in community development, can empower society and serve as agents of change, bearing in mind that access to justice is a critical pillar of economic development and poverty eradication.

Conclusion

The role of paralegals in the provision of community-level legal services cannot be overemphasised. Equal access to law for all is critical for the maintenance of rule of law. The provision of legal aid services bridges the gap between access to justice and indigence; furthermore, paralegals serve other functions, such as mobilising the community for public participation, which is now a constitutional requirement in certain governmental undertakings, and facilitating alternative dispute resolution within the legal and human rights framework. They can assess community needs with a legal lens and engage in all necessary advocacy with authorities. Kenya has taken the lead among developing countries in providing legal aid services through a governmental scheme, and it is hoped that it will meet with success. It is estimated that the programme is ca-

pable of reducing the case backlog by almost 50 per cent when properly functioning.

The following are recommendations for enhancing this scheme:

- Paralegals should perform their duties with commitment and discipline. A code of conduct needs to be developed to regulate them as a means of making them accountable and protecting the public.
- They will be required to cultivate good working relations with the communities they serve, their peers, and other parties and institutions involved in legal service delivery. This will call for collaboration and networking for the success and sustainability of the programme.
- There is a need for continuous learning and experience-sharing in investigation techniques and new developments in law.
- A case management system with a standardised procedure for opening and maintaining case files, records and documentation and doing follow-up on cases will need to be put in place.
- Since paralegals will be government employees, it will be important for them to be independent in the performance of their work so as to inspire confidence in the public concerning their ability to hold government accountable when required.

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