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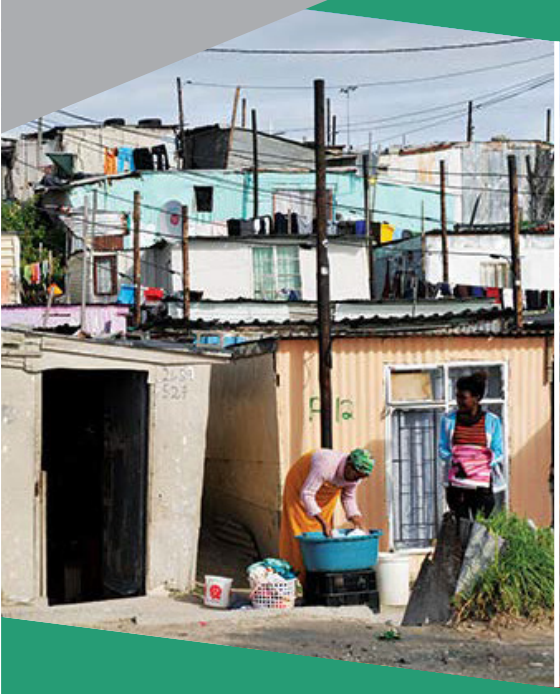

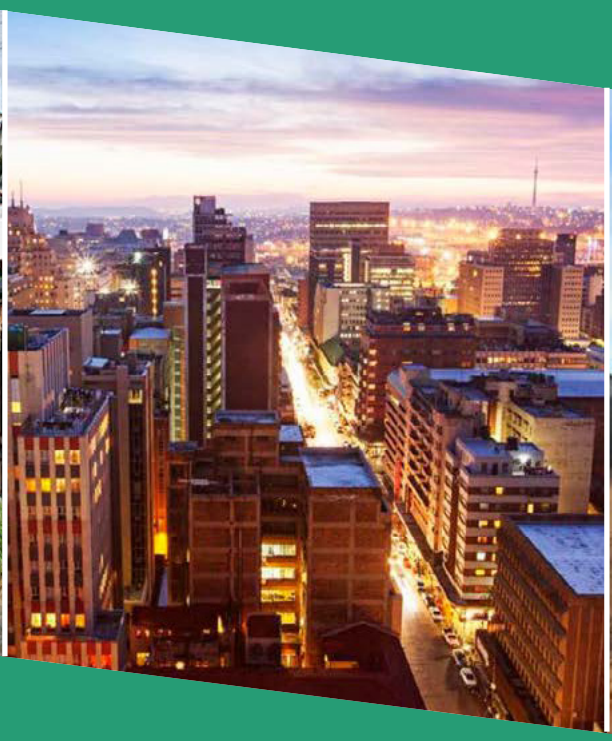

ESR REVIEW

Economic & Social Rights Review in Africa

ENSURING **RIGHTS** MAKE REAL **CHANGE**

SPECIAL EDITION ON ACCESS TO JUSTICE

DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

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Editorial

Welcome to the first issue of *ESR Review of 2021*, which is part of an ongoing special series on access to justice. At the time of this writing, the world bears witness to brutal attacks by the Nigerian government on #EndSARS protesters over the past three weeks. The Special Anti-Robbery Squad (SARS), a police unit, was established in 1992 to combat rampant armed robberies and crime, but since its inception, it has abused its power by harassing, extorting and murdering the people of Nigeria.

Human rights activists have long condemned these actions, and earlier this month, on 6 October 2020, the country's youth reiterated the call for justice by staging nationwide protests against police brutality and demanding change from the government.

Though SARS was 'disbanded' on 11 October, grave human rights abuses continued. On 20 October, the Nigerian government, through its security forces, instated a 24-hour curfew to suppress protests and instructed the army to enforce the order. This led to security forces firing live ammunition at peaceful protesters gathered at the Lekki Toll Gate, killing at least 12 people and injuring many more.

These actions were condemned by the international human rights community. Likewise, we at the Dullah Omar Institute, an organisation committed to entrenching constitutionalism throughout Africa, submitted an official request for emergency intervention to the African Commission on Human and Peoples' Rights.

There is still much to be done, however, and the fight is not over. The #EndSARS movement requires global traction in the form of education, protests and amplification of the voices of the Nigerian people. Samuel Otigba, a member of #EndSARS, told CNN he was stopped and harassed by a SARS officer for not giving the officer a bribe, stating that the officer said to him, 'You know if I shoot you, nothing will happen. The most anyone will do is cry [injustice] on Twitter.'
It is imperative that access to justice is achieved. The Nigerian people are demanding the release of all arrested protesters, justice for the victims and families of those subjected to police brutality, and an end to impunity on the African continent.

As the fifth issue in our series on access to justice, this edition of ESR Review presents several feature articles on the theme. The first explores the role of language as an element of justice, while the second investigates children in conflict with the law. The third feature discusses children's rights amid precarious human settlements in urban neighbourhoods, and another examines paralegals as anchors of the justice system.

The Events section provides highlights of webinar events hosted by the Socio-Economic Rights Project (SERP) of the Dullah Omar Institute.

We hope you find this issue stimulating and useful in the fight for the realisation of SDG 16 in Africa and beyond. We wish to thank the anonymous peer reviewers and our guest authors for their insightful contributions.

Paula Knipe
Guest Editor

FEATURE

Language as a Social Determinant of Access to Justice

Michelle du Toit

Introduction

The social determinants of socio-economic rights such as access to justice include the political economy, the ability to physically access justice, the affordability of justice, the availability of recourse to justice, and education and information on rights and remedies. Various social factors affect the accessibility of justice. A prominent such factor is language: if people do not have information about their rights in a language they understand, then their access to justice is limited. Communicating about injustice in a language other than one's mother tongue can be a huge hindrance to judicial recourse and democratic participation.

Goal 16 of the United Nations (UN) Sustainable Development Goals (SDGs) and aspiration 3 of the African Union (AU) Agenda 2063 pertain to justice, yet fail to consider the issue of language in the pursuit of realising the right of access to justice. Arguably, the targets of goal 16 of the SDGs should consider language in seeking to promote the rule of law and ensure equal access to justice for all. The targets pertaining to accountability, transparency, and participatory practices should also consider the issue of language.

Language can encumber people's ability to participate in the pursuit of justice from a personal level to an international institutional level. This article demonstrates the importance of language as a social determinant of access to justice in all aspects of SDG goal 16, and then identifies potential means of overcoming this barrier to realising goal 16.

> **'If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart' – Nelson Mandela**

Social determinants of access to justice

There are various determinants of access to justice. Physical access serves as a good example – if people cannot physically get to, say, a legal aid clinic, then they do not have access to justice. Similarly, financial affordability and the availability of information are determinants of access to justice. Other rights also serve as determinants of access to justice. For instance, if a person does not have access to education providing information about legal rights and the government's obligations to its people, then he or she does not have

access to justice in terms of legal services or in terms of participatory democracy (UNDP 2013: 11, 20).

As the United Nations Population Fund (2005) notes, human rights are interdependent on each other, as 'each one contributes to the realization of a person's human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs'. The principle of interrelatedness recognises that the fulfilment of one right is often dependent on the fulfilment of other rights. In South African jurisprudence, this principle was articulated by Yacoob J in The Government of the Republic of South Africa v Grootboom (2001 (1) SA 46), at paragraph 23:

> *Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the Constitution].*

Whilst this refers specifically to the relationship between socio-economic rights and civil and political rights, it illustrates how the fulfilment of one right can affect the fulfilment of others. Likewise, the fulfilment of the right to access to justice is not possible if people do not have rights, among other things, to information, education and participation.

The UN SDGS and AU 2063 Agenda

The UN's SDG 16 is to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. The goal entails promoting the rule of law, ensuring inclusive participatory decision-making, strengthening participation, and ensuring public access to information. In turn, the AU Agenda 2063 envisages an 'integrated, prosperous and peaceful Africa' and aspiration 3 seeks to achieve

Language is a determinant of access to justice. If information about rights, governance, and participatory democracy is not accessible to persons due to a language barrier, their access to justice is hindered. Even where people have been educated and information about rights and obligations is available, their access to justice is compromised if the information is not in a language they understand.

Arguably, in the same way as doctors are expected to explain procedures to patients in an understandable manner, states should be obligated to ensure that citizens can understand the laws, rights and obligations of the state. This would not only be to the benefit of the citizens but also guarantee that participatory democracy is possible – for people cannot participate if they do not understand. They need to understand the law in order to rely on the law (Maru 2017).

In an age when there is such an emphasis on diversity and inclusion, allowance should be made for this in the law, especially with regard to something as fundamental as access to justice. South Africa, for example, has 11 official languages, so information (and thereby access to justice) should be provided in least all of these languages. Furthermore, in areas where there are varying degrees of education and illiteracy is prevalent, provision should also be made for the manner in which legal information is made available.

Language is a determinant of access to justice.

'[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law'. In terms of this aspiration, the 'continent's population will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favour'.

These two instruments coincide with each other as they pursue similar aims of inclusive participation, access to information, promotion of the rule of law, equal access

to justice, and respect for human rights. However, they fail alike to recognise the fundamental role that language plays in seeking such ends. These aspirations are unachievable if language barriers are not addressed. Without a proper examination of how language acts as a barrier to access to justice in the sense conveyed by the AU Agenda 2063 and the UN SDGs, access to justice for all will remain a distant, unattainable vision.

Language should be considered by such goals and aspirations, as it is vital to their realisation. If people are unable to learn about the rule of law, participatory democracy, or human rights as a result of a language barrier, how could such goals be attained? The failure to recognise the fundamental nature of language as an underlying condition for the realisation of these goals is concerning and raises doubt about their attainability. Given the emphasis placed on inclusivity in these instruments and the fact that Africa has great diversity in languages, one would think there would be at least some recognition of this.

Language as a social determinant of access to justice

Language should be considered by such goals and aspirations, as it is vital to their realisation.

While working in a legal aid clinic, I had an experience that made me start learning more South African languages. I had a woman come in with her nine-year-old daughter. It was a sensitive matter, with the end result being the need for a restraining order against the woman's boyfriend. She had her daughter come into the consultation room. She did this because she could not speak English well enough to explain to me what had happened. My isiXhosa at that stage was minimal, so I had the young girl translate for me. We had translators, but the woman declined using them as she had already prepared her daughter for the task.

This heart-breaking experience raised numerous questions in my mind. Would I be able to explain something that had happened to me in my second language? Would I be reassured by any advice or help I receive in a language other than my mother tongue? How enthusiastic would I be about participating in the democratic governance of the country if I were not able to engage in my own language? Furthermore, what additional issues would I be able to resolve if I had access to information about rights and obligations available to me in my language? What if someone qualifies for a grant but does not know they do, or even that they can get one, because there is no understandable information available to them about this?

South Africa makes provision for requests of legislation in the language of your choosing – but this presupposes that you understand English well enough to know this is possible. Additionally, we also need to consider the illiterate when we look at countries with varying degrees of education and access to education. When illiteracy rates are high, then arguably there is all the more reason to ensure that legal information is available to people in an understandable manner *in their first language.* In the absence of this, people are denied access to information, which has implications for their place in democratic society, their realisation and access to other rights, and their respect for the rule of law.

The Constitution of South Africa states that the country is founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'. With these values in mind, access to justice is essential for ensuring that the rights guaranteed in the Constitution are both protected and realised. However, for this to materialise, barriers need to be addressed. Language, and the barrier it can pose to the right of access to information, to understanding of rights, and ultimately to access to justice, is an

aspect of law which has been neglected and requires more attention, especially in a country with 11 official languages. Making the law understandable through language accessibility should be at the forefront of agendas for development and promotion of the rule of law.

Kofi Anan, former United Nations Secretary-General noted the following:

> *The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means and we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to justice and the rule of law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers, as well as many issues beyond the criminal justice system.*

Anan holds that justice is not a side issue but a matter that affects every aspect of society and governance, and the same may be said of language: without language, without communication, we cannot have understanding, and without understanding, we cannot pursue our aspirations and goals. To achieve access to justice, there must first be an understanding of how justice affects or is present in the lives of people. It is estimated that 4.5 billion people are excluded from the social, economic, and political opportunities the law provides (Task Force on Justice 2019). Justice and the rule of law are undeniably interconnected and interrelated. They are also central to ensuring the realisation of other rights. This is evident in the UN SDGs, where justice is a consistent thread throughout all 17 goals.

The United Nations Development Programme (UNDP) (2013) makes a pertinent observation:

> *Where people are knowledgeable about their rights and the mechanisms to access them and have means of access, then attaining human rights becomes a possibility. Nonetheless, either as a result of underlying vulnerabilities such as poverty, disability, social status, gender or technical barriers such as language, distance to the justice systems, corruption or court technicalities, people may lack knowledge and may have neither the voice nor the means to fulfil their rights. As a result, justice remains elusive for the vast majority of the population who are still unable to access not only civil and political but also social and economic rights.*

Language, I argue, is also fundamental to the realisation of other rights. Language is the first barrier to overcome in educating people that they have enforceable rights; that there are means by which to enforce these rights; that there are ways to participate in democratic government; and in respecting the rule of law. Without language, these rights are not accessible.

The Constitution of South Africa states that the country is founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'.

Overcoming the challenge

Geraldine Fraser-Moleketi, the director of the Democratic Governance Group in the Bureau for Development Policy in the UNDP, notes that

> *[l]aw, legal and judicial institutions are crucial to reducing poverty, strengthening social and economic equality, and achieving human security and development, and they should therefore be people centred. In that regard, rule of law, accessible legal and judicial institutions, and a legally empowered citizenry facilitate the enjoyment of social, economic and political justice and its benefits should be all inclusive and sustainable. Such an understanding helps to ground law and justice considerations in a sustainable human development agenda. However, measures taken to strengthen the rule of law and enhance access to justice have tended to focus more on enacting rules and developing frameworks and institutions. The transformative role of law, legal and judicial institutions and legal empowerment have not been fully explored and as such, it is often difficult to present evidence of impact from decades of legal and judicial reforms.*

The AU Agenda 2063 and the UN SDGs need to recognise the role of language in realising their aspirations and goals. Recognising language in this regard will ensure inclusivity and respect for diversity. Furthermore, provision needs to be made for the illiterate. But recognising language is not enough alone to address adequately the relationship between access to justice and language. Perhaps a bigger question is, Why are the law and agendas to transform the law still confined to pen on paper when the majority of the world is barred from access to them?

Michelle du Toit is a doctoral candidate in the Department of Philosophy at Rhodes University. She holds an LLB (Rhodes University) and LLM (University of Stellenbosch). Du Toit is a member of Atlantic Fellows for Health Equity in South Africa, and serves on the People's Health Movement South Africa Steering Committee.

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Language is the first barrier to overcome in educating people that they have enforceable rights; that there are means by which to enforce these rights; that there are ways to participate in democratic government; and in respecting the rule of law.

FEATURE

Access to Justice through Diversion of Child Offenders: Reflections on Emerging Case Law

Karabo Ozah and Zita Hansungule

Introduction

The United Nations (UN) High Commissioner for Human Rights defines access to justice as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child (CRC). It applies to civil, administrative and criminal spheres of national jurisdictions and covers all relevant judicial proceedings, affecting children without limitation, including children alleged as, accused of, or recognised as having infringed the penal law.

International law places an obligation on states to treat children in conflict with the law with dignity and respect. Article 37 of the CRC calls on states to ensure that the arrest, detention or imprisonment of children in conflict with the law are used as measures of last resort. The African Charter on the Rights and Welfare of the Child (ACRWC) supplements this, in article 17, by calling on states to treat children in conflict with the law 'in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'.

A definition of child-sensitive justice developed by the Council of Europe, as referred to by the UN General Assembly (2013), finds application here:

> *[child-sensitive justice] means creating a justice system which guarantees the respect and the effective implementation of all children's rights, giving due consideration to the child's level of maturity and understanding and to the circumstance of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights.*

One of the challenges in relation to child offenders is the perception that older children commit more heinous crimes than younger ones and as a result should face harsher sentences. In South Africa this was the reason given by the state when it passed the Criminal Law Sentencing Amendment Act 38 of 2007 ('the Minimum Sentence Act') and made the minimum sentences applicable to child offenders who are 16 and 17 years old. The Constitutional Court, in Centre for Child Law v Minister of Justice and Others [2009] ZACC 18; 2009 (6) SA 632 (CC) (minimum sentences case) found the application of the minimum sentence legislation to be unconstitutional. The Court stated:

> *We distinguish them [from adults] because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.*

The Constitutional Court has noted that, when a child is found to have a committed a crime, obligations set out in human rights instruments call for states to take

measures to recognise that children are 'less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults'. The Court also emphasised that childhood ends at 18 years and that there is hence no justification for including 16- and 17-year-olds under the Minimum Sentencing Act.

This article examines the impact of the Child Justice Act 75 of 2008 ('the Act') on child offenders who are 16 and 17 years old at the time of committing their offences, with the focus on how the courts have interpreted their obligations to ensure that these children also benefit from diversion and its rehabilitative objectives.
The basis of this examination is that the Child Justice Act came into effect after the minimum sentencing judgment of the Constitutional Court and therefore adopted the principles set out in the judgment.

This article examines the impact of the Child Justice Act 75 of 2008 ('the Act') on child offenders who are 16 and 17 years old at the time of committing their offences, with the focus on how the courts have interpreted their obligations to ensure that these children also benefit from diversion and its rehabilitative objectives. The basis of this examination is that the Child Justice Act came into effect after the minimum sentencing judgment of the Constitutional Court and therefore adopted the principles set out in the judgment.

Overview of the South African legislative scheme

Historically, the use of diversion in South Africa was largely unregulated by law until the introduction of the Child Justice Act (Sloth-Nielsen 2017: 683). Prior to the Act, diversion programmes were introduced and run by non-governmental organisations (Mujuzi 2005: 44; ibid). Diversion operated by way of prosecutorial discretion: prosecutors would withdraw charges against children pending their referral to and successful completion of diversion programmes (ibid). However, even with guidance having been provided in the Act, there are prosecutors who still use this unregulated approach, which is not in line with the protective provisions of the Act – this has been seen in cases such as *S v LM*, High Court of South Africa, Johannesburg, Case Nos. 97/18, 98/18, 99/18 and 100/18.

Diversion is part of the Child Justice Act's increased emphasis on seeking effective rehabilitation and reintegration of children in order to minimise the potential for re-offending. The Act creates these processes with the recognition that 'before 1994 [during apartheid], South Africa … had not given many of its children, particularly black children, the opportunity to live and act like children'. The Act aims to combat these injustices and give children in conflict with the law a fighting chance.

The objectives of diversion as set out in section 51 of the Act include that:

- a child be dealt with outside the formal criminal justice system in appropriate cases;
- the child be encouraged to be accountable for the harm caused and that the particular needs of the individual child be met – this includes the promotion of the child's reintegration into his or her family and community, and provision of an opportunity to those affected by the crime committed to express their views on the impact of the crime;
- victims be provided with some symbolic benefit or the delivery of some object as compensation for the harm;
- reconciliation be promoted between the child and the person or community affected by the harm caused;
- diversion aim at preventing the stigmatisation of the child and protecting him or her from the adverse effects of exposure to the criminal justice system;
- the potential for re-offending is reduced and the child is prevented from having a criminal record; and
- the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society is promoted.

The Act states that in order for a child to be diverted, he or she must acknowledge responsibility for the

offence; there must be a *prima facie* case against the child; the child and the parent or appropriate guardian or caregiver must consent to the diversion; and the prosecutor agrees that matter be diverted. Diversion occurs at different levels of the child's interaction with the criminal justice system:

- Prosecutorial diversion: when a child is charged with an offence but before he or she appears before a preliminary inquiry, the National Prosecuting Authority can decide to divert the child.
- Diversion at the preliminary inquiry: an informal pre-trial procedure is conducted during which, among other things, reports by probation officers are considered, as is the question of whether the child concerned can be sent to a diversion programme.
- Sentencing courts are also given the power to impose community-based sentences; they can harness the options provided in the provisions dealing with diversion. Compliance with this sort of sentence is monitored by probation officers.

Diversion programmes include 'life skills training, community service, arts and music, mentoring, involvement of the family and victims and the outdoors' (Steyn 2012: 77). In order for the principles, purposes and objects of the Act to benefit children sufficiently, it is important that implementation and interpretation of the Act are aligned with the Act itself as well as the Constitution. What follows is a discussion of selected case law on the diversion of 16- and 17-year-old children in conflict with the law.

Emerging case law

Since the enactment of the Child Justice Act, courts have deliberated on the manner in which diversion should be implemented to serve the best interests of the child offender as well as the interests of the victim and the community.

1. S v ZG [2019] ZAWCHC 45; 2019 (2) SACR 162 (WCC)

State actors must have comprehensive knowledge of the Child Justice Act

In this case, the child offender, ZG, was apprehended and charged for the unlawful possession of cannabis. He was 17 years old at the time. He was accompanied to the police station by his mother. The police officers, knowing that ZG was under 18 years, advised him and his mother that if an admission of guilt fine were paid, he would be released and the matter would not pursued further. A written notice was given to ZG which made provision for the payment of the fine in terms of section 56(1)(c) of the Criminal Procedure Act 51 of 1977. At no stage did the police officers concerned explain to ZG or his mother the full consequences of the payment of an admission of guilt fine. His mother paid the fine and ZG was released from custody.
The matter was referred to the High Court by the magistrate with the recommendation that the admission of guilt fine and the conviction in terms of section 56(6) of the Criminal Procedure Act be set aside.

The High Court took the correct view that the case had been handled irregularly. It noted, first, that provisions in section 18 of the Child Justice Act had not been applied at all. Section 18(2) of the Act expressly states that section 56(1)(c) of the Criminal Procedure Act does not apply to a written notice in terms of the Child Justice Act. Secondly, ZG and his mother were not informed of ZG's rights and the consequences of paying an admission of guilt fine. Thirdly, since the advent of the Constitution, courts have insisted that fair procedure be followed when an accused is faced with option of paying an admission of guilt fine.

> **The High Court found that the Child Justice Act had been ignored in its entirety and the payment of the fine was not in accordance with justice.**

and did not follow the provisions of the Child Justice Act. The conduct of the arresting officer fell far short of what was required by law. Further, the magistrate should have picked up the irregularity. If the magistrate had acted properly, he or she would have noticed that ZG was a child and that the payment of the admission of guilt fine was prohibited by section 18 of the Child Justice Act. The High Court found that the Child Justice Act had been ignored in its entirety and the payment of

the fine was not in accordance with justice. It ordered that the admission of guilt be set aside and that the entering of ZG's particulars in the criminal record book be set aside and the particulars expunged.

Although not dealing specifically with the issue of diversion, this matter emphasises the need for state actors interacting with children in conflict with the law to have comprehensive knowledge of the Act, particularly of how it affects their functions, irrespective of how old the child is. This allows them to determine adequately how a child should be dealt with, including referral to diversion, particularly in cases like this where an admission of guilt fine is not applicable.

2. S v NS [2016] ZANCHC 73

The importance of the correct determination of the age of a child offender

The question of whether an accused is dealt with as an adult or child offender hinges on the accurate determination and recording of the accused's age. Failure to carry out this function could lead to an infringement of his or her right to just administrative action. In this matter, the accused was arrested, held in custody and charged for the theft of six pairs of trousers. The police docket and charge sheet both indicated that he was 18 years. The accused – who was legally represented – pleaded guilty and was convicted.

When the accused's legal representative addressed the court on mitigating factors to consider during sentencing, it was revealed that the accused was actually 17 years old. There were several postponements because of the need to verify his age. He remained detained in a child and youth care centre during that time. The trial magistrate then stopped the proceedings and submitted the matter for review to the High Court.

The High Court found that the accused had been prejudiced by the fact that the matter had not been conducted in terms of the Child Justice Act. The High Court held that a real prospect existed that the accused could have been diverted away from the criminal justice system. The High Court took this view because

the offender was a child and did not count it against him that he was an 'older' child. This was the correct manner in which to approach the case and in line with the pronouncements made by the Constitutional Court in the minimum sentencing judgment.

The High Court went on to express concern at the manner in which the accused's attorney and the police conducted their duties. The fact that the attorney did not seem to realise the implications of the age of the accused, especially in the context of the Child Justice Act, was troubling. The police, as well as prosecutors, should be careful about determining the age of youthful offenders.

On the question of how to proceed, the High Court held that the proceedings in the trial court had, strictly speaking, not been conducted in terms of the Child Justice Act and therefore a review could not take place on the basis of provisions of the Act. The High Court further declined to try the matter de novo. The High Court took the view that the accused could be charged again if the prosecution decided to do so. Should the decision be made to divert the accused, then the period he spent in detention could be taken into account. The High Court ordered that the proceedings in the magistrate's court be set aside.

3. S v LR 2015 (2) SACR 497 (GP)

Raising the option of diversion and inclusion of victims in the process

Section 52 of the Child Justice Act provides, inter alia, that for a child to be diverted at the preliminary inquiry stage, the prosecutor must indicate whether a matter may be diverted after considering the views of the victim or any person who has a direct interest in the affairs of the victim. The prosecutor must also have consulted with the police officer tasked with investigating the matter.

In this matter, a 16-year-old boy faced a charge of culpable homicide. He drove recklessly and without a licence, and caused a motor vehicle accident that led to the death of a victim. His legal representative brought an application for diversion at the preliminary inquiry. The magistrate referred the matter for diversion.

The magistrate's decision was referred to the High Court on review by the senior magistrate. The High Court found that the magistrate had misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of section 52 of the Act. The Court found no evidence of either the deceased's family or any person with a direct interest in the affairs of the accused or of the police official responsible for the investigation of the matter demonstrating having been consulted before diverting the matter. The court subsequently ordered that the diversion order be set aside and that the accused be referred to the Child Justice Court for trial.

4. S v MK 2012 (2) SACR 533 (GSJ)

When diversion and the child's circumstances can be considered

This matter affirmed the fact that diversion of a child offender can be considered at different stages of the criminal justice process. The matter also affirmed that the individual circumstances of the child concerned must be taken into account in order for decisions to have the necessary impact.

The accused, a 16-year-old child, on his pleas of guilty, was convicted on two counts of rape of two children. He was sentenced to five year's imprisonment. During the trial, the probation officer recommended that a level two diversion option be imposed, but the trial magistrate rejected this by holding that 'the court is of the opinion that this is a diversion option which is available prior to a person being convicted'. She further reasoned that the seriousness of the crimes outweighed correctional supervision sentence options and that there are sufficient youth prisons in South Africa that are more than equipped for dealing with the accused's disorders and conducting programmes to assist him.

The matter was taken on automatic review. The review court concluded that the trial magistrate clearly misdirected herself, as the option of diversion can be considered at any time during the trial. In reconsidering what an appropriate sentence would be, the review court had regard to the Constitution, which dictates that imprisonment of children should be a matter of last resort.

Noting the convicted child's personal circumstances and environment, including the fact that he suffered from, what the court called, 'moderate mental retardation', the review court concluded that it was abundantly clear that the child was in dire need of guidance, correction, rehabilitation and reintegration into his family and the community.

The review court agreed with the social worker's recommendation, which was that the accused be dealt with in the following manner:

i. that he be detained at a mental health facility for intensive therapy and treatment;
ii. that he thereafter be referred to and be ordered to attend sexual offenders' programmes; and, finally,
iii. that he be placed under the supervision of a probation officer for monitoring and follow-up.

These recommendations have the potential to advancing the mental well-being of the child. Ultimately, they could resort in the realisation of the right to health of children. The review court remitted the matter to the child justice court to consider and impose sentence afresh in the light of the judgment.

> **The Child Justice Act provides a holistic framework that enables child offenders to be diverted to rehabilitative programmes...**

Conclusion

The Child Justice Act provides a holistic framework that enables child offenders to be diverted to rehabilitative programmes and thereby possibly reduce recidivism. This is an approach to be followed for all children no matter their age, taking into account the circumstances of the case and the individual circumstances of the child concerned. However, what the South African case law indicates is that a comprehensive legal framework is but the first step towards strengthening the child justice system.

The fact that decisions made by preliminary inquiry magistrates are set aside due to failure to follow important procedures such as correctly determining the age of a child offender, his or her criminal capacity and acknowledgment of responsibility are a grave cause for concern. Office-holders who play a critical role at the beginning stages of a child's contact with the criminal justice system seem to lack the necessary knowledge to apply the Act correctly. This highlights the need for continuous and in-depth training of these role-players on the procedures in the Act and how such procedures should be applied.

Nonetheless, it is encouraging that mechanisms such as the automatic review of decisions of the magistrate's court by the high courts have led to a child-centred jurisprudence. The latter reminds us that each child's circumstances differ and that procedures must be followed to ensure that child offenders are treated in a manner that takes into account their best interests, dignity and equality.

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FEATURE

Advancing Children's Quality of Life through Housing and Justice: Grass-roots Organisations in Collaborative Conversation

Ezekiel Ntakirutimana

Introduction

In South Africa, housing needs in city centres pose a serious threat to children's quality of life. There are perceptions that the cities have a narrow agenda and lack an integrated response to the most pressing needs of communities. In 2018, of nearly 1.7 million children, 9 per cent lived in backyard dwellings or shacks, and Gauteng was the province with the second largest number of children living under such conditions (Hall 2019). Difficulties in prioritising the housing of poor and vulnerable families have led to deprivation and exploitation (Greenhalgh & Moss 2009: 16). As the values of 'family', 'society' and 'shelter' are overlooked, the result is that children face adversity from an early age.

Being deprived of basic rights, their fate is bound up with the lack of safety and protection they require as a necessity and which can be obtained through proper housing. Living in undesirable conditions destroys abilities and positive self-image. If such conditions are unaddressed, they slow down children's natural environment of growth without the family support they need to reach their full potential. Breaking down child vulnerability is at the heart of this paper, which challenges a society that violates its own norm of 'it takes a village to raise a child' (Mohamed 1996: 57).

Given this background, the City of Tshwane faces a housing crisis. While assessing the extent of the problem, it was observed that children living with their families on urban social margins are among the most affected people. They face poor living conditions in untenable settlements. For example, children and their families live together in highly concentrated backyard shacks that are prone to fire as well as health hazards caused by unhygienic living conditions. Desperate families and their children are forced to live in dangerous hijacked or abandoned properties, exposing themselves to high levels of crime while paying excessive rent to illegal landlords – this results in exploitation and abuse (Maromo 2016).

These dwellings offer families alternative accommodation, but in reality they are dangerous to live in, particularly for children. Life is challenging as the dwellings lack basic services. Infrastructure is degraded, and the neighbourhoods point to a dying city centre. Children, already vulnerable, are exposed to inhumane conditions. A toxic and contaminated environment; pollution from the continuous overflow of sewage and illegal dumping; and substance abuse – these factors are all unsafe for residents (Sibiya 2021).

Worrying about the future of their children, some frustrated families do not hesitate to tell their stories: 'I didn't know how cocaine looked like before I moved to this building … Any drug you want, it is available … if you cannot afford the elegant apartments in this city, then you live in hell' (Maromo 2016). These are legitimate

complaints from resilient families conveying a message to the public and to city officials that children in the City are not safe in substandard dwellings.

Attempting to address the housing crisis, the City has adopted a policy on homelessness. Its framework makes reference to mobilising resources 'to fight poverty, build clean, safe and sustainable communities' to protect the most vulnerable families and children (Social Development 2016). Regrettably, the objective, to foster urban social change, is not being taken seriously. The local government's failure to tackle the roots of the proliferation of informal settlements and slums in the city centre widens social inequality.

At the centre of the problem lies government's poor planning, poor urban management and inability to cope with rural–urban migration (Aigbavboa & Thwala 2015: 1). It appears that the City is aware of the housing crisis, but does not understand how to respond more appropriately and proactively. Within the City's administration system, the absence of information from a database to assist with measuring the extent of human vulnerability is one of the limiting factors in encouraging transformation (Chatindiara 2019: 7).

> **Children, already vulnerable, are exposed to inhumane conditions.**

A commitment to strong collaborative conversations, involving both grassroots organisations and local government working closely with community representatives, has the potential to break the cycle of the housing crisis and ultimately human vulnerability in general. Turner & Fichter (1972:72) uses collaborative conversation or "implied dialogue" to advocate for quality "low-cost housing", "self-help housing" and "site-and-services" as models that could be explored to advance quality of life in urban squatter settlements. Turner's central thinking is that housing crisis cannot be appropriately addressed without building capacity for people take control and ownership of their own housing process. For him, "what really matters in housing, is what it does for people rather than what it is" and "the economy of housing is a matter of personal..." (Turner 1972).

It is clear that encouraging communities to take charge of their own lives promotes a sense of sustainability, responsibility, and, ultimately, ownership of their own community upliftment. In view of that goal, one of the challenges experienced in the City concerning the right to housing is the difficulty of accessing land for housing development purposes. This has led to 'land invasions', as poor and vulnerable people see the City as a big opportunity to advance themselves. 'Baghdad' informal settlement in Salvokop is an example of land invasion in the inner city. Land release in order to house affected families and other individuals in housing distress is not just a tactic to stop land invaders or to unlock special urban development projects (Moatshe 2020). The primary objective is 'redressing the legacy of apartheid' by prioritising the identified needs of the most historically disadvantaged people' (Royston 1998). In other words, 'no house can be built and maintained without land, without tools and materials, without skilled labour, and management' (Turner & Fichter 1972: 154).

The role of grassroots organisations in collaborative conversations is clear and well-known in that they have a unique way of reaching the poor and others not served by public agencies or commercial establishments, as they act with more 'empathy' and 'compassion' (Thiesenhusen 2003). Human values empower them in advocating for land release for housing development in strategic locations closer to, inter alia, schools, clinics, work opportunities, police stations, and child-care facilities (Hall 2019). Another value is 'justice', which is entrenched in the penultimate Sustainable Development Goal (SDG).

SDG expectations for grassroots organisations are to remind the government of pledges made, to achieve community participation and representation in decision-making at all levels, and to seek the elimination of discriminatory laws and policies for improving the living conditions of communities by the year 2030. The integration of compassion, sympathy and justice becomes a guiding principle in promoting children's quality of life in Pretoria West, one of the grey neighbourhoods facing a housing crisis.

> **As the crisis deepens, children are among the most affected people living in overcrowded conditions in old houses and backyard shacks.**

The area in question is one of the segregated neighbourhoods in the inner city, the strongest node in terms of job opportunities, retail space and offices in the metropolitan area (City of Tshwane 2018). It is adjacent to the middle-income neighbourhoods of West Park, Proclamation Hill, Philip Nel Park and Moot. The neighbourhood is a hive of industries, including food-processing factories. This is an indication of how the area contributes to the local and national economy. Another such contribution is Pretoria West Power Station, established in 1920 to supply electricity to the entire city.

A concern is the failure to address the degradation of infrastructure, including the power station itself. Reports reveal the alarmingly poor condition of unmaintained old houses that were built for white workers under the Group Areas Act during the apartheid era. Since then, no development has been undertaken in the neighbourhood. Instead, slumlords and hijackers have taken control, demonstrating the failure of the City to deal with the situation (Mudzuli 2015). In 2019, hijackers took over 80 houses, an indication of the extent of the housing crisis in this important part of the city (Van Petegem 2019).

As the crisis deepens, children are among the most affected people living in overcrowded conditions in old houses and backyard shacks. The Gauteng Premier's speech recommended large-scale investments in low-cost housing to prevent the displacement of the people (Mudluzi 2015). Considering the relationship between children's quality of life and the case of Pretoria West, the Premier's proposal could work well because it proposes integrated mixed land-use providing quality housing for the most deprived families and their children in the city centre.

Besides the Pretoria West case, the children of Salvokop's informal settlements also face a housing crisis while living in a neighbourhood surrounded by well-developed public infrastructure. Freedom Park, the Garden of Remembrance, the Voortrekker Monument and the Department of Correctional Services represent government's commitment to the city's transformation. The Pretoria Station transport node, connecting the City to the rest of South Africa's provinces and beyond the country's borders, raises hope and shows future opportunities for the vulnerable children of Salvokop. Conversely, previous development incorporating the historic Salvokop NZASMA Village does not reflect the City's efforts to advance children's quality of life as they face a housing crisis with their families. Construction led to the demolition of Crossroad Kids Care Centre that provided accommodation to the most disadvantaged children in the city (Tlhabye 2019). The current Salvokop Precinct Development Project to build more department offices does not prioritise the housing needs of poor families who fear that their homes will be demolished, with the possibility of eviction from the City (Maotshe 2020).

The housing crisis arises from this uncertainty and the lack of a strong voice to advocate for proper housing infrastructure that could allow families and their children to rebuild their lives. The current position is that people are trapped in the government's neglected houses without maintenance services. Built between 1890 and 1930 for white railway workers, Pretoria West since then has seen no upgrade. Housing viability started to decay, especially when people started to move to the City to look for better life options upon the reversal of unjust apartheid policies in the early 1994. It was then that Salvokop became a major destination in the City for poor people looking for cheaper accommodation closer to job opportunities.

As the landlord (TransNet) lost control over managing the influx of families, the Department of Public Works failed to stabilise the housing crisis (Ntakirutimana 2017: 5). The neighbourhood now faces an increase of backyard shacks in the middle of overcrowded housing, without proper services including sanitation. As families live in squalor, with broken doors and windows,

leaking roofs and falling ceilings, these problems, along with the collapse of other structural elements, affect children's quality of life. In the absence of any proper housing intervention, 'Baghdad' settlements are very dangerous and concerning. Children live where shacks and houses are intermingled. Illegal taverns operate 24-hours a day and share space with crèches where illegal dumping sites have been allowed (Sibiya 2021; Tlhabye 2017).

Salvokop hosts Jopie Fourie Primary School, one of the more competent government schools in Tshwane. Alarmingly, from interviews conducted before the Covid-19 lockdown, some children alluded to incidents of ridicule by their classmates: 'When teachers are not in class, some kids make fun of us. They ask us to stand up and when you stand, they sing … mokhukhu, mokhukhu … [or shack, shack…]' (Nsibande 2019). Other children said that sometimes they do not attend classes as their parents want them to guard their belongings. This problem occurs when the landlords have locked their shacks due to non-payment of rent, and the parents, when they go to work, cannot leave their property outside unattended (Ledwaba 2019).

Open-minded politicians have started to question a system that it is not working.

The fundamental tenet is that the law must protect the right of these children to live in dignity. Reference is made to the global review of the SDGs for 2030 that frames five dimensions of children's rights: (1) every child survives and thrives; (2) every child learns; (3) every child is protected from violence, exploitation and harmful practices; (4) every child lives in a safe and clean environment; and (5) every child has a fair chance in life (UNICEF 2019).

In the light of those expectations, advancing the quality of life of children is a utopian vision because of many problems apparent in the City of Tshwane. Political leaders are not supportive when it comes to a need to prioritise challenges facing the most vulnerable families. Politicians are believed to be visible only during election time to sell their political agenda (Chatindiara 2019). In addition, the relationships between grassroots organisations and the local government tend to be adversarial when it comes to the call to address the plight of deprived people.

Access to proper housing is a good outcome, and an expression of justice capacitating children to rebuild their lives.

A big challenge is that the decision-making process is exclusive and top-down (Thiesenhusen 2003). It appears that the principle of 'city politics' in governance is at the heart of the problem. There are 'power games between the members of the council, power struggles between the municipal authorities, pressure from rate payers and power struggles between the planning practitioners' (Hillier 2002: 4-5).

Open-minded politicians have started to question a system that it is not working. The whole point is that 'if you don't get people to feel that they have a way of engaging with government and engaging as a community around a particular issue, then that erosion of trust and sense of belonging will really start to become a problem' (Brown 2019). Hard-line organisations like Abahlali baseMdlondolo and the School of Activism, or Ndifuna Ukwazi, emerged from this political tension to resist exclusion and injustice in the city. Their objective has been to reclaim government's underutilised land and unoccupied buildings for housing, so that deprived people may live a dignified existence while rebuilding their lives to take part in the governance of cities (EWN 2021).

The agenda of these movements is that urban settlements for poor people 'must be upgraded through democratic development methods which are inclusive of their needs in the planning process'. Rethinking ur-

ban policies is to ensure that urban land is not sold for private development before proper housing is delivered to deprived people living in shacks (Mathivet 2009). Given the scale of the identified issues, advancing children's quality of life through quality housing and justice is a matter of urgency in the Pretoria West and Salvokop neighbourhoods, where deprivation has become deeply entrenched over the years. Grassroots organisations will be underachieving by simply undertaking collaborative conversations with a 'service-delivery mind-set'. This kind of mentality should not be promoted as it is rooted in a culture of 'entitlement' that holds people back. If it remains unaddressed, vulnerable children will grow without realising that there is 'a culture of self-sufficiency, of doing things for yourself' (Grootes 2014). This principle is aligned with an 'enablement mind-set' to reimagine a future agenda where government's role will be to 'create the conditions from which good outcomes are more likely to emerge' (Brown 2019).

Access to proper housing is a good outcome, and an expression of justice capacitating children to rebuild their lives. With this in mind, grassroots organisations will also be underachieving if they believe that government represents people and therefore understands their vulnerability better (Brown 2019). As argued, this narrow agenda will weaken grassroots organisations in forging a strong groundswell coalition with other entities such as church groups, trade unions, educators, public officials, human rights activists, political parties, journalists, legal experts and others, to advance children's quality of life.

The world renowned Nobel Laureate and economist-philosopher Amartya Sen once said, 'in the world of fish, big fish are free to devour small fish' (Edam 2013). Tackling vulnerability cannot be fully realised in a culture where violation of the rights of the most deprived people is permitted to occur. The implications for grassroots organisations and the City of Tshwane are that advancing children's quality of life through proper housing would be an important milestone mirroring justice and empathy.

Given the depth of the housing crisis and the plight of vulnerable children, collaborative conversations should be aligned in order to ensure proper mechanisms for accessing justice to achieve great positive outcomes. A concrete agenda is then required to fast-track land release while brokering an agreement for the easy access to socially inclusive housing opportunities in the two identified neighbourhoods. That agenda would be open in its design, to target the abandoned buildings, to diversify housing opportunities, and to explain that access to housing in the city is for all and well integrated into the city's revitalisation.

In all these endeavours, community leadership is invaluable. Grassroots organisations journeying with vulnerable children can demonstrate and exemplify a strong yet humble leadership model that takes seriously each one of the above suggested recommendations, so moving forward to a greater realisation of transformation for the most vulnerable people in the City.

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Rethinking urban policies is to ensure that urban land is not sold for private development before proper housing is delivered to deprived people living in shacks (Mathivet 2009).

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FEATURE

The Value of Paralegals in Kenya's Justice Chain

Shatikha S. Chivusia

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.

> **The concept of paralegalism evolved as a mitigating strategy in the face of numerous challenges faced by indigent persons in accessing justice.**

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.

> **The Act creates a national legal aid service with various functions...**

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.

> **Paralegals are also expected to continue playing their advocacy role in Kenya's justice chain at various stages of the numerous processes.**

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 prevision 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 concern s 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 prevision 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 capable 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.

Shatikha S. Chivusiai is a human rights defender with more than 20 years of national and regional experience. She was a Commissioner on the Kenya National Commission on Human Rights from 2014 to 2020.

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EVENT

Webinar: Constitutional Resilience and the COVID-19 Pandemic in Africa (13 August 2020)

Paula Knipe

On 13 August 2020 the Dullah Omar Institute (DOI), University of the Western Cape, hosted its third webinar on the constitutional resilience of countries in response to the COVID-19 pandemic. While countries have taken different approaches, with some declaring it a state of emergency, others a national disaster, every country affected has experienced human rights implications. The international community reacted quickly in guiding states on their responses by highlighting that these should comply with international human rights standards. At a domestic level, many countries have also put accountability mechanisms in place to ensure that minimal human rights violations take place. The webinar invited panelists from South Sudan, South Africa, and Australia to present on the constitutionality of the measures put in place by their states in response to the pandemic.

The first panelist, Joseph Akech, is a human rights lawyer and doctoral researcher at the Centre for Human Rights at Pretoria University. He works for Save the Children International as an advocacy and campaign director. South Sudan is the world's newest country, having gained independence in 2011, but has since been ravaged by conflict, with no functioning constitution. Many government institutions have collapsed due to a fragile peace agreement. A number of pre-existing issues also plague the country, including poor public health care, which has affected the country's ability to respond to the pandemic. South Sudan has relied heavily on NGOs and UN agencies for support. Statistics at the time of the webinar indicated that the country had 2,470 positive cases, 47 deaths and 1,252 recoveries, but this was not considered a true reflection of the pandemic due to insufficient testing capacity.

In its COVID-19 response, South Sudan issued a presidential decree to put measures in place, including the establishment of a high-level committee, and employed highly securitised enforcement mechanisms. Parliament, the courts, and other oversight institutions such as the Human Rights Commission have been inactive as they have no capacity to engage. While there have been incidents of human rights abuses, including arbitrary arrests and beatings by security personnel and a lack of social protection for vulnerable groups, no formal reports have been issued. The measures adopted have been led by the executive, with no accountability mechanisms to monitor its actions. This has resulted in some decisions being challenged by civil society and human rights institutions. COVID-19 has certainly tested South Sudan's constitutional resilience and government institutions, which have proven largely ineffective in managing the pandemic.

The second panelist, Howard Varney, is senior programme adviser at the International Centre for Transitional Justice and a member of the Johannesburg Bar. In May 2020, he contributed to a study for the International Security Sector Advisory Team, a division of the Geneva Centre for Security Sector Governance (DCAF) which conducted a cross-country analysis of COVID-19 measures introduced by 66 selected countries, including 15 African countries.

> **The measures had vast implications for human rights and daily livelihoods, with concerns raised about the possible decline of constitutional democracy.**

While most of the measures were supported by the general population, there were increasing concerns around their scope, legality, proportionality and necessity. The measures had vast implications for human rights and daily livelihoods, with concerns raised about the possible decline of constitutional democracy. Red flags were raised about countries experiencing authoritarian creep, with leaders indicating reluctance to relinquish emergency powers once the crisis subsides.

The study highlighted that countries with strong constitutional resilience are those where constitutions impose checks and balances on their executive, where parliamentary oversight is meaningful, and where the measures were subject to judicial review. The online COVID-19 Civic Tracker showed that measures in 111 countries impacted on freedom of assembly; 33 on freedom of expression; 22 on press freedom; and 28 on access to information. There were 27 incidents involving surveillance; 28 countries restricted the right to privacy; 28 employed contact tracing apps; 15 introduced COVID-19-related censorship; and three countries imposed internet shutdowns despite the pandemic.

Looking at country-specific case studies, Human Rights Watch reported that during the pandemic Ethiopia invoked emergency powers that were used against political opponents. Ghana enacted the Imposition of Restrictions Act of 2020 even though it already had an Emergency Powers Act of 1994 and constitution, with the latter specifically allowing for the declaration of a public health emergency. The duplication of legislation seems redundant, but the new act reserves emergency powers for the president with no oversight, is of general application to any state of emergency, and sets no expiry date for emergency measures. Critics have described it as draconian and open to extreme overreach.

Looking at South Africa, its nationwide lockdown saw the mobilisation of thousands of troops to support police enforcement of lockdown measures, with multiple complaints of brutality against security forces. This led to a landmark judgment from the High Court that ordered the government to draw up a code of conduct for all security forces setting guidelines for their interaction with civilians during the state of disaster. There was also a great deal criticism of massive centralisation of power in the Command Council. Some argued that this power is unconstitutional and has usurped the powers of cabinet and Parliament.

In Uganda, the government invoked the Public Health Act to direct its response. This included some highly restrictive measures such as a ban on the use of privately owned vehicles. The measures were enforced by the army and police, along with an armed paramilitary group. The media reported widespread violations and abuse by security forces, including the arrest of homeless people and targeting of the LGBTQIA+ community.

The study concluded that, as matters and scientific findings were changing quickly, the measures put in place should be adjusted accordingly. Courts and other oversight bodies should be permitted to operate even if virtually. There should also be closer collaboration with citizens and authorities, and a strong and courageous civil society to monitor the pandemic and its consequences.

> **Courts and other oversight bodies should be permitted to operate even if virtually.**

The third panelist, Dr Adetoun Adebanjo, is a researcher and consultant in Australia. Australia's COVID-19 figures stood at 361 deaths and 22,226 cases. The country adopted a similar response to many countries by enforcing measures such as social distancing, self-isolation, quarantining and lockdown. There were conflicting opinions about whether they were necessary, as they encroached on fundamental human rights. The Australian Biosecurity Act informed most the measures taken, as it recognises pandemics and its provisions are broad enough to apply to extreme situations.

Most Australians complied with the measures, but there were a few legal challenges, notably ones protesting at the lockdown. There was contention too regarding border closures. The pandemic also impacted on many vulnerable groups, particularly the immigrants and backpackers who visit Australia every year to assist the agricultural sector. When a global pandemic was declared, immigrants were told to leave the country, a decision that drew a major backlash from the public. The government then aided the situation and put safety measures in place to support them. Similarly, international students were instructed to leave if they were unable to support themselves. This decision was also contested, with the government eventually providing some palliatives to cushion the effects of the pandemic.

The Black Lives Matter Movement (BLM) also highlighted the clash between constitutionality and COVID-19. Conflicting court orders were issued, with one decision stating that protests are allowed and another prohibiting them as contrary to the interests of public health. There were also protests at the treatment of refugees, who were heavily fined and some arrested even though protesters practised social distancing and were in a convoys of cars.

The webinar concluded with a discussion led by Prof Derek Powell and Prof Ebenezer Durojaye of the DOI. The panelists discussed the magnitude of the global phenomenon of unprecedented mass population control. It is necessary to consider the application of constitutionalism in a normal and emergency environment and subsequently where the tension occurs. Consideration should be given to how rights are adjusted and blended with constitutionalism for the wellbeing of the masses. Emergency contexts provide the opportunity to test constitutions, as they bring to light how well the general population understands constitutionalism and the extent of government roles and powers.

The pandemic has also underlined the extreme importance of oversight mechanisms and the need for vigilance. There is legitimate concern about creeping authoritarianism. Definite signs have emerged of governments being opportunistic in taking advantage of the pandemic, with many acting beyond the confines of their legal system. Research shows that this has occurred mainly in countries already rife with social problems and characterised by flawed democracies.

The panelists discussed the relationship between the pandemic and science and technology, which have informed the responses of many countries and been used to justify some of the extreme measures taken. This has been called the rise of a surveillant state. There must be a careful and intentional balancing act between using technological resources for mutual benefit without allowing fundamental human rights to be disproportionately affected. There is also a need for countries to be creative in the responses. This was highlighted in Australia, where the government successfully tested and traced sewerage systems to monitor the spread of COVID-19.

The panelists also weighed in on the nature and effectiveness of the measures taken, particularly palliative measures taken by governments to cushion the effects of the pandemic. Many countries have seen corruption in the use of emergency funds, which has meant that people needing the most support wind up receiving less. There are many lessons to be learnt to better prepare for future pandemics.

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EVENT

Webinar: Our Voices Matter – The Impact of the Lockdown on Gender-Based Violence (7 September 2020)

Wilson Macharia

On 7 September 2020, the Socio-Economic Rights Project at the Dullah Omar Institute (DOI) hosted a webinar to assess the impact of the South African national lockdown on gender-based violence (GBV). The webinar was moderated by Gladys Mirugi-Mukundi of the DOI. In her introductory remarks, she reminded the participants that South Africa commemorates August as 'Women's Month', which draws attention to important issues that women still face, such as domestic violence, discrimination, harassment in the work place, equal pay, and lack of education. The Declaration on Elimination of Violence against women defines 'violence against women' as any act of violence that results, or is likely to result, in physical, sexual or psychological harm or suffering to women. These includes threats or acts of coercion against women.

Women's Month in 2020 was commemorated during the Covid-19 national lockdown. During this period, GBV and femicide cases increased tremendously. This sparked mass protests in July, when women called for justice for victims. As a result, Women's Month was dominated by dialogues on enhancing the government's response to GBV and how to increase access to justice for victims and survivors of GBV. Unfortunately, people living in informal settlements, who are the most affected by the lockdown, were not involved in these discussions.

The panelists in the webinar shared their experiences during this period, in their capacities as community members and leaders, and as organisations that work with communities in informal settlements. In so doing, they provided information to back up what most women already know and build a solid foundation to further engage men from a policy and governance perspective, particularly about their role in making communities safe places for women and children.

The first panelist, Yolanda Anderson, is a community leader in the Overcome Heights informal settlement, which hosts more than 48,000 people. According to her, the initial stages of the lockdown saw a reduction of the number of GBV cases in the community. This could be attributed to the ban on alcohol consumption and the presence of the police and the military in the community. From the cases witnessed, it appears that financial dependency and other family responsibilities make victims remain in abusive environments.

Unfortunately, victims of GBV seldom reported cases to the police for fear of being arrested for flouting the lockdown restrictions. When GBV cases are reported to community leaders, the leaders intervene, and where necessary refer the victims to NGOs in the community or in other communities. Increasingly, the community leaders have identified safe houses in which the victims of GBV can be accommodated for 24 hours. Often, the victims are accommodated in a different section of the settlement, away from the area where they were abused.

Anderson noted that despite the intervention by the community leaders, the final decision on the actions that should be taken lies with the victims. In concluding her reflections, she said her main concern was that most of abuses against women during the Covid-19 period were perpetrated by the police and the military.

The second panelist, Kyle Cupido of the NGO Where Rainbows Meet, pointed out that GBV cases increased significantly during the lockdown period, especially after the ban on alcohol consumptions was lifted. In his view, the community leaders have a major role to play in addressing GBV cases, particularly through identifying their root causes. As a community organisation, Rainbows has a good working relationship with the community police and involves them in seminars, including those on GBV. It also works with other entities, including civil society and companies, that can assist in addressing GBV. Cupido emphasised the need for further collaboration between organisations that work in the communities.

The third panelist, Mymoena Scholtz, also of Where Rainbows Meet, pointed out the factors that hinder the effective address of GBV in the communities. These include strained resources and lack of community shelters for housing the victims of GBV. Additionally, the call centre that was set up by the government during the Covid-19 period is not effective. Where there are mechanisms that can be employed, too much bureaucracy is involved, which in turn limits access to such mechanisms. She indicated that where necessary, personnel from Rainbows host the victims of GBV, which is difficult due to limited resources. She concluded by emphasising the need for the establishment and resourcing of community shelters for hosting victims of GBV.

The fourth panelist, Annah Moyo, works at the Centre for the Study of Violence and Reconciliation (CSVR). She said that during the Covid-19 period the victims of GBV were in the constant presence of their abusers, which added another layer of vulnerability. The limitation of movement meant that victims of GBV could not travel to safer places, join support groups, or report GBV cases where law enforcement agencies are a distance from their households. Moreover, most places where women would find safety, including workplaces, social groups, and other public places such as churches, were no longer available. The loss of income in some households has also led to an increase in abuse.

Moyo noted that there is little knowledge on mechanisms for addressing GBV amongst persons in informal settlements. Such information is often disseminated through social media and other electronic platforms, which are out of reach for the majority. As such, it has been easier for community leaders to intervene directly and assist the victims of GBV. The danger that arises is that the community leaders employ a humanitarian approach, which often leaves the perpetrators to go scot free. CSVR works with community psychosocial supporters who respond to GBV incidents and refer the victims to other support systems. In conclusion, Moyo pointed out that CSVR has a toll-free number and other social media platforms that people can use to access the Centre's clinicians and services.

The fifth Panelist, Namuma Mulindi of Sonke Gender Justice, said that 2,300 complaints related to GBV were reported within the first three days of the lockdown. Most of them were from places with a high prevalence of poverty and households where women were the breadwinners before the lockdown. The GBV hotline set up by the government was overwhelmed by the large number of calls. For communities in informal

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settlements, access to electricity and data is also limited, meaning that they could not access critical information on GBV. Even before the pandemic, there were challenges regarding the systems in place to address GBV. Covid19 has exacerbated the situation and further exposed their ineffectiveness.

> **As such, it has been easier for community leaders to intervene directly and assist the victims of GBV.**

Mulindi said the causes of GBV are poverty, alcohol abuse, patriarchal gender norms and the exposure of children to abuse in their households. She noted that people in informal settlements have been working together to assist the victims of GBV from within community settings. While this is commendable, it indicates that the government is not giving enough attention to addressing GBV. In conclusion, Mulindi emphasised the need to address GBV from the home structure, which can be achieved by identifying the root causes and dealing with them.

During the question and answer session, the need for collaborative efforts between different entities such as NGOs, law enforcement agencies, local governments, provincial departments of social development, and churches was highlighted. Commendably, more men are actively involved in addressing GBV issues in the communities. Nonetheless, there is still a need for buy-in from the community. A number of policy measures to curb the abuse of alcohol and drugs in the community were also proposed by the panelists. These include regulating the sale of alcohol and drugs, training communities on their rights, securing their involvement in the formulation of the policies, and implementing existing policies.

In her concluding remarks, Gladys Mirugi-Mukundi said it was clear from the presentations that GBV has gone beyond the family setting. There is interplay between individuals, communities, and social, economic and religious factors – factors that need to be addressed head-on. Notably, instead of offering much-needed protection, law enforcement agencies have been a danger to the victims of GBV. To address such issues, conversations on curbing GBV must continue.

Wilson Macharia is an advocate of the High Court of Kenya and a senior graduate assistant at Strathmore University Law School. He also coordinates the Public Participation Disability Inclusion Index project in Kenya. At the time of writing this article, Wilson was an LLM candidate at the Centre for Human Rights, University of Pretoria, and was serving an internship with the Dullah Omar Institute.

> **For communities in informal settlements, access to electricity and data is also limited, meaning that they could not access critical information on GBV.**

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