THE RECOGNITION OF PARALEGALS AND ACCESS TO JUSTICE IN ZIMBABWE

LEGAL RESOURCES FROUNDATION

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PREFACE

ABBREVIATIONS

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1. GENERAL INTRODUCTION AND BACKGROUND

One of the major challenges that has been faced by the majority of African population has been access to justice. This has been a historical challenge that can be traced back as far as precolonial times. With the advent of colonialism access to justice became more formalized with the introduction of the formal Court system, Magistrates, Judges, Legal Practitioners, Evidentiary rules and legal fees. This was alien to the African population and it was made worse by the inherent exclusion nature of colonialism. The market place became more commercialized that had to be guided by legislation and property rights were no exception. In addition, matrimonial disputes became more formalized as well as inheritance issues. With time, the legal system took the centre stage as the preferred system of dispute resolution. As more African countries became independent in the early 1960s onwards, constitutionalism took root. With it came the recognition, promotion and protection of human rights. One such right was – justice- which today remains one of the major areas of research in term of its interpretation, content and character.

The purpose of this study is to examine the role of paralegals in the context of access to justice with special focus on Zimbabwe. In order to do that, this study takes a comparative approach with Malawi, Kenya and Liberia. Simply put, this study seeks to answer the question: what role does paralegalism play (if any) in enhancing access to justice within the African continent? Inevitably, the study will shed more light on the two keys concepts, namely, ‘paralegalism’ and ‘access to justice’, in no particular order. The Study will share highlights of access to justice issues in Zimbabwe as well as the evolution/recognition of paralegalism.

1.1 Access to justice in Zimbabwe

It is imperative to elaborate on access to justice as a concept or a right or obligation, depending on perspective, in order to eventually locate the role of several players in its realization, especially paralegals. The elaboration will also set its parameters and components that could then be matched with access to justice stakeholders be they state or non-state in profile.

The right to access to justice is recognized under international and regional human rights instruments. Article 8 of the 1948 Universal Declaration of Human Rights (UDHR)

recognizes it.[1] Similarly, Article 7(1) of the African Charter on Human and Peoples' Rights (African Charter).[2] Similarly, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) refers to the right to an effective remedy[3] for all the rights in the Covenant.[4] This implies access to justice because one needs to access justice delivery institutions in order to obtain an effective remedy. Further, Article 14(1) ICCPR provides that 'all persons shall be equal before the courts and tribunals'. Equality before the law is introduced as yet another aspect of access to justice. Whatever its full content, the right of access to justice was domesticated in the Constitution of Zimbabwe and couched as the right to a fair hearing reserved for everyone as provided in section 69 thereof.[5]

Notwithstanding the provisions quoted from human rights treaties above, access to justice is a fluid subject. Its meaning may not be very obvious as the term has become one of art signifying various things to different people,[6] depending on the context. The lack of a common definition for access to justice may be attributed to the attempts to define access to justice in the context of the evolution of perceptions of what the meaning of access to justice ought to be or what it entails.[7]

In one perspective access to justice entails an individual's right to have his or her claims heard, understood and fairly decided upon by a competent court of law or tribunal and have rights determined in that forum. This is a necessary requirement for the consolidation of democracy and development in any society. On its part the United States' Institute of Peace broadly defines this concept as

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1 United Nations General Assembly (UNGA), Universal Declaration of Human Rights, UN Doc. A/810 (1948), Article 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

2 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter") (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58.

3 International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2(3)(a).. *See also* ICCPR, Articles 9(4) and 14(1).

4 CCPR, General Comment No. 31, para. 10.

5 Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

6 For more on different meanings of access to justice see Marc Galanter, 'Access to Justice as a Moving Frontier' in Julia Bass, W. A. Bogart and F. H. Zemans (eds), Access to Justice for a New Century: The Way Forward, (Law Society of Upper Canada, 2005) 147 and Grossman, 128.

7 Roderick Macdonald, Access to Justice in Canada Today: Scope, Scale and Ambitions in Julia Bass, W. A. Bogart and Frederick H. Zemans, Access to Justice for a New Century: The Way Forward, (Law Society of Upper Canada, 2005) 19.

> The ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.[8]

It further emphasises that access to justice is lacking where citizens, particularly the marginalised groups, fear the system, perceive it as alien, or are unable to access the justice system due to financial constraints, inadequate information or knowledge of their rights or where the justice system is weak.[9]

Further, access of justice has traditionally been referred to 'the system by which people may vindicate their rights and/or resolve their disputes under the auspicious of the state. This system must be equally accessible to all, and second, it must lead to results that are individually and socially just'.[10] According to the UNDP, 'access to justice' typically refers to the ability of persons to make full use of the existing legal processes designed, formally or informally, to protect their rights in accordance with substantive standards of fairness and justice.[11] This applies to every stage of the "justice chain,"[12] from rights awareness within civil society, to the conduct of law enforcement entities, or from having a case heard in a court of law, to seeking and obtaining an appropriate remedy.[13] In other words, it is the possibility to make use of the processes established to provide redress where rights may have been violated.[14]

Scholars such as Akram have defined it relatively contextually, defining the term "access to justice" as referring to opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation

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8 United States Institute of Peace, `Necessary Condition: Access to Justice' (United States Institute of Peace) <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice> accessed 22 February 2015.

9 As above.

10 M Cappelletti & B. Garth (1978) Access to Justice Vol 1 A World Survey, Sijthoff and Noordhoff, Milan, p6.

11 United Nations Development Programme (UNDP), Programming for Justice: Access for All (2005), p. 5. See also F. Francioni, The Right to Access to Justice under Customary International Law. In: Access to Justice as a Human Right (F. Francioni (ed.), 2007), pp. 3-4.

12 The "justice chain" is "the series of steps that a woman has to take to access the formal justice system, or to claim her rights." UN Women, Progress of the World's Women: In Pursuit of Justice (2011), p. 11.

13 UNDP, Programming for Justice: Access for All, p. 5.

14 J. McBride, Access to Justice for Migrants and Asylum Seekers in Europe (report prepared for the Council of Europe) (2009), para. 6.

by the law and legal institutions.[15] Access means a way of being able to use or get something one needs. So, in an ordinary sense, access to justice means a way of being able to get justice. In other words, access to justice means access to a fair, respectful and efficient legal process resulting in a just and adequate outcome through either judicial or other processes.[16]

Francioni summarizes the meaning of access to justice generally as the reference to the "right to seek a remedy before a court of law or tribunal which is constituted in accordance with the law and can ensure independence and impartiality in the application of law".[17] Put differently, this is the ability to bring a matter before a court or tribunal for adjudication. Further, from the perspective of an ordinary person, the term access to justice is ordinarily perceived to be the right to seek a remedy before a court or tribunal that is able to assure them of independence and neutrality in the application of law.[18]

Moreover, access to justice may sometimes be presumed to be synonymous with the achievement of substantive justice.[19] However, access to justice primarily focuses on improving people's chances of achieving substantive justice for themselves by first gaining access to the justice system before they can even have a chance of achieving justice.[20] Apparently, despite the necessity of access, access is neither a basis for nor an assurance for obtaining justice through the legal system. However, access is and will remain a symbol of justice and a significant element of democratic legitimacy.[21] Hence

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15 Md. Saleh Akram, "A Critical Analysis of Access to Justice in Bangladesh" International Journal of Humanities and Social Science Invention ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714 www.ijhssi.org ||Volume 6 Issue 8||August. 2017 || PP.50-58

16 Md. Saleh Akram, "A Critical Analysis of Access to Justice in Bangladesh" *International Journal of Humanities and Social Science Invention ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714 www.ijhssi.org ||Volume 6 Issue 8||August. 2017 || PP.50-58*

17 Francesco Francioni, 'The Rights of Access to Justice under Customary International Law', in Francesco Francioni (Ed.) Access to Justice as a Human Right, (Oxford University Press, 2007) 1

18 Patricia T. Rickard-Clarke, 'Access to Justice: Accessibility', (2011) 11 Legal Information Management, 159- 164.

19 J. B. Grossman and Austin Sarat, 'Access to Justice and the Limits of Law' (1981) 3 Law and Policy Quarterly 125, 125.

20 Roy Sainsbury and Hazel Glenn, 'Access to Justice: Lessons from Tribunals' in A. Zuckerman and Ross Cranston (Eds), Reform of Civil Procedure: Essays on 'Access to Justice', (Oxford University Press, 1995) 413, 421.

21 J. B. Grossman and Austin Sarat, 'Access to Justice and the Limits of Law' (1981) 3 Law and Policy Quarterly 125, 129.

the significance of 'access' cannot be overlooked because it is the essence of access to justice.

Access to justice can also be understood as ensuring that the legal and judicial process and outcomes are themselves "just and equitable."[22] The right is not necessarily fully realized when only a system securing access to justice is put in place. Instead, the more critical thing is that the individual is enabled to practically access such system, including in view of their individual disadvantages and vulnerabilities. Access to justice is ultimately achieved when the decision made by the relevant justice institutions is enforced and implemented. It is one thing to obtain a remedy and another to have it implemented thereby addressing the negative consequences of violation of one's rights. In other words, what counts is that such remedies are effective and that they provide fair and impartial justice, without discrimination.[23] Where relevant, for example, adequate information must be provided and financial barriers must be neutralized (e.g. prohibitive court fees), while non-discriminatory, free legal assistance needs to be provided by the State if indispensable for the effective access to court. This brings in legal aid or assistance as a huge aspect of access to justice. Legal aid defrays or neutralizes the economic access to justice.

Access to justice has traditionally been seen as access to the courts or the availability of legal assistance, but this is a narrow view. Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms.[24] Similarly, legal assistance programs are only one part of a complex system. Previous waves of reform to access to justice have been based around the courts as the central supplier of justice. The 'waves' of justice reform have been described in academic literature as follows:[25]

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22 McBride, para. 9 ("The broader view of access to justice can be seen as being particularly concerned with the substantive aspect of justice - notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives. It may thus be concerned as much with the ability to seek and exercise influence on law-making as with ensuring access to law-implementing processes and institutions.").

23 F. Francioni, 'The Right to Access to Justice under Customary International Law. In: *Access to Justice as a Human Right*' (F. Francioni (ed.), 2007), pp. 3-4.

24 *Access to Justice Taskforce Attorney-General's Department "A strategic framework for access to justice in the federal civil justice system" September 2009*.

25 C Parker, *Just Lawyers: regulation and access to justice*, 1999, p 31.

Wave 1: Equal access to legal services (lawyers and legal aid) and courts.

Wave 2: Correcting structural inequalities within the justice system: changing the law, court procedures and legal practice to make access to justice more meaningful. This includes streamlining the civil litigation system and 'de-mystifying' the law through plain language drafting and community legal education.

Wave 3: Emphasis on informal justice and its importance in preventing disputes from occurring and escalating—including greater use of non-adversarial alternatives to legal justice, such as alternative dispute resolution (ADR).

Wave 4: Emphasis on competition policy: implementing competition policy in order to allocate justice resources, whether formal or informal, as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services.

Therefore after taking into consideration the different perspectives of access to justice, there is no room to accord a restrictive meaning to access to justice. The definition should encompass both procedural and substantive guarantees. Legal awareness is an important element of legal empowerment for purposes of accessing justice as people may otherwise fail to seek justice simply for being oblivious to the law and their rights under the legal system. Every justice system should be able to remove procedural barriers and facilitate access to courts as well as formal and informal institutions of dispute settlement, otherwise known as alternative dispute resolution. It should include access to legal information, training and education on justice related matters. The actual process of having a cause heard by a tribunal is part of access to justice, including facilitators such as financial access through court fees, court process-serving fees and legal representation (legal aid). The impartiality and competence of justice institutions (institutional impartiality) and personnel manning them (individual impartiality) is part and parcel of access to justice. Jurisdiction of courts or tribunals presiding over disputes is also part of it. In criminal processes, legal assistance from the time of arrest until appellate proceedings are finalised is crucial. When all is said and done inside a court or tribunal, the effectiveness of the remedy rendered is dependent on its enforceability. Accordingly,

removal of impediments to full implementation of remedial measures to avoid recurrence of violations or similar disputes account for access to justice. The overall ambition for access to justice is the goal to improve people's access to the legal process and generate more positive outcomes, or to enhance people's participation and ultimately their ability to affect justice as an end in itself.

1.2 Challenges to Access to Justice in Zimbabwe

Having established, albeit briefly, the normative content of access to justice, it follows that there is need to demonstrate constraints to accessing justice by people of all walks of life in Zimbabwe. These challenges dovetail well with aspects identified in the expanded definition of access to justice in so far as the discussion hinges on the extent to which each of the aspects is accessible in Zimbabwe. The discussion will go further to demonstrate the appropriate avenues of intervention by paralegals as a way to enhance rather than to undermine access to justice. Once the connection between access to justice and paralegals is, making a case for the formal recognition of paralegals in Zimbabwe would be a manageable enterprise.

Turning to challenges, the remarks of the Chief Justice of Canada On the occasion of the 7th Annual Pro Bono Conference Vancouver in British Columbia on the 8th of October, 2018 tie up the importance of access to justice and inherent access issues in any justice system. The Chief Justice remarked as follows:

> Whenever I think about access to justice, a quote from Honoré de Balzac comes to mind. He said that, 'Laws are spider webs through which the big flies pass and the little ones get caught.' To me, that image perfectly captures not just the inequities in our legal system, but the tangible effects those inequities have on people. While the system is meant to treat everyone equally, some people get stuck, and expend a great deal of time and energy trying to break free. Others breeze through to resolution, and move on with their lives. Giving people access to justice is like giving them the tools to free themselves from the spider's web.[26]

While there is no perfect judicial system in the world, access to justice in Zimbabwe has been marred by several social-cultural factors ranging from gender, geographical location

[26] Remarks of the Right Honourable Richard Wagner, P.C. Chief Justice of Canada On the occasion of the 7th Annual Pro Bono Conference Vancouver, British Columbia October 4, 2018.

of the courts caused by poor funding, language barriers, illiteracy and financial/economic factors as well as mistrust in institutions of administration of justice.[27] Therefore, this section critically evaluates access to justice in Zimbabwe and the challenges caused by these diverse factors. It reveals that while Zimbabwe has made progress in terms of establishing a modern legislative framework for the administration of justice such as the constitutional framework providing for equality, legal aid and right of access to independent, impartial and competent tribunals, a lot would need to be done to address factors hindering full access to justice that are context-based.

1.2.1 Institutional Challenges

Adequate public funding is critical to the successful functioning of any institution including the judiciary. Therefore, for the citizens of Zimbabwe to enjoy access to justice, there have to be adequate funds to run the judicial institutions by inter alia building adequate courts, employing and training personnel and ensuring adequate remuneration of judicial officers. This will ensure that there are enough courts to adjudicate upon cases, avoid incarceration of pre-trial detainees and reduce chances of bribery and corruption among judicial officers.[28]

Unfortunately, for a country like Zimbabwe that has suffered over a decade of socio-economic collapse, funding of institutions has been a major challenge and the judiciary as an important institution has suffered considerably from such lack of funding. According to the cooperative Report of the Government of Zimbabwe and the UNDP, one significant challenge in relation to access to justice is the shortage of financial, human and capital resources which reduces the ability of the judicial institutions to effectively deliver

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27 Government of Zimbabwe and United Nations Development Programme, 'Enhancing Justice Delivery and Human Rights for All' (United Nations Development Programme, 2012) <http://www.undp.org/content/dam/undp/documents/projects/ZWE/PRODOC%20JUSTICE.pdf> accessed 08 April 2015.

28 Zimbabwe Lawyers for Human Rights and the Law Society of Zimbabwe, 'Pre-trial Detention in Zimbabwe: Analysis of the Criminal Justice System and Conditions of Pre-trial Detentions' (Open Society Initiative for Southern Africa, 2013) <http://www.osisa.org/sites/default/files/pre-trial_detention_in_zimbabwe.pdf> accessed 24 March 2015, 21-22.

justice.[29] It observed that '[t]he Judiciary, inclusive of the ordinary and specialised courts, is faced with deteriorating infrastructure and brain drain resulting in case backlogs'.[30]

It further adds that, apart from lower courts, most of the higher and specialised courts such as the High Court, Supreme Court and Constitutional Court, are centralized in major cities which makes is difficult for locals to access these courts.[31] To this end, continuous training of judicial officers and provision of legal materials would be critical in ensuring effective justice system and enhanced access to justice at all levels. However, people's capacity to gain access to justice may be limited by institutional and political barriers and a social environment that serves to inhibit rather than support the understanding and exercise of rights.[32]

As for funding the judiciary, in 2019, the Chief Justice of Zimbabwe made revealing remarks responding to austerity measures meted by Government, which included ring-fencing budgetary allocations to the judiciary thereby resulting in possible underfunding. He said this had a bearing on the rule of law:

> Any such [austerity] measures are a threat to the independence of the Judiciary and to the rule of law. An independent Judiciary is one that receives enough funding to run the courts in order to protect the rights of its citizens. It is only a Judiciary that is independent which decides matters impartially without fear, favour or prejudice; and is impervious to extraneous influences.[33]

Until recently when the Masvingo and Mutare High Courts were established, the High Court only sat in Harare and Bulawayo and would sit in selected towns and cities for a few days as circuit courts. Also until 2019 the Supreme Court only had registry in Harare, but has now added another one in Bulawayo. The construction of more than 50 magistrates' court buildings around the country with donor assistance has seen more and

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29 Government of Zimbabwe and United Nations Development Programme, 'Enhancing Justice Delivery and Human Rights for All' (United Nations Development Programme, 2012) <http://www.undp.org/content/dam/undp/documents/projects/ZWE/PRODOC%20JUSTICE.pdf> (accessed 8 February 2020), 9.

30 As above, 10.

31 As above.

32 As above 53-54.

33 'Malaba attacks Ncube's austerity measures' *Newsday* 15 January 2019. Available at: https://www.newsday.co.zw/2019/01/malaba-attacks-ncubes-austerity-measures/ (accessed on 23 February 2020).

better infrastructure at the court level. That court also conducts circuit sittings around the country to improve on physical access of this court. However, customary and local courts handle an estimated 70% of legal disputes but their infrastructural status is largely unknown.[34]

1.2.2 Lack of Public Awareness

Legal awareness, legal counsel and legal aid are closely linked in ensuring viable access to justice. Even section 7 of the Constitution obliges the Government to promote public awareness of the Constitution by partnering with CSOs, school curricula and translation into local languages. Public awareness of the law and especially rights under the legal system of a country is a necessary prerequisite for an individual's 'seeking redress through the justice system'.[35] While freely accessible legal information provides the knowledge for this purpose, the understanding thereof may be limited by the technical nature of the law, access to justice may require legal representation by those with legal training. The broader legal profession is, therefore, necessary for a legal system to function and is grounded in the establishment of an effective legal education. This legal education is not exclusive to lawyers, but covers paralegals as well. In reality assistance and advice by lawyers is inaccessible to individuals in need due to various constraints. This lacuna maybe covered by an operative and sustainable legal aid system. Ultimately, however, political, institutional and socio-cultural challenges pose risks to the viability of the justice system.

1.2.3 Costs of Legal Services

There is a cost to justice. Government ought to make justice economically accessible by bringing down the cost, yet individuals may be required to contribute to administration of justice by paying part of costs. The establishment of courts as a means of resolving genuine civil and criminal disputes without high costs of infrastructure and personnel among other operational costs. Zimbabwe protects this right.[36] While the rule of law requires accessibility of courts, most legal systems encounter challenges relating to

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34 These are traditional courts presided over by Chiefs and Headmen/women in rural areas.
35 As above 7.
36 See section 70 of the Constitution.

expenses and delay in meeting this requirement.[37] Although cognisant that the justice system was not designed to exclude any category of persons, many of the poor are naturally excluded due to costs associated with access.[38] The exclusion of certain categories of people from the civil justice system undermines the rule of law and its consequences may extend beyond the individual litigant.[39]

The high costs of legal services may compromise access to justice for those who cannot afford to pay for lawyers (legal representation) because it deters them from taking matters to court for adjudication on the basis of the perception that legal assistance from lawyers' results in expensive and complex proceedings.

There are also costs related to court fees. The legal aid practice in Zimbabwe is that a beneficiary of legal aid contributes by paying court fees. Depending on the status of the individual, these court fees, copying and service costs may be beyond their reach. There is no known practice of exemptions. Such financial constraints hinder universal access to courts of law.

Table: Law Society of Zimbabwe 2019 Fee Tariff[40]

30 Years' Experience & Over	Basic Hourly Ranges
20 – 29 Years 11 Months	ZWL$3 000.00 – ZWL$5 250.00
15 – 19 Years 11 Months	ZWL$2 625.00 – ZWL$4 650.00
10 – 14 Years 11 Months	ZWL$1 875.00 – ZWL$3 150.00
5 – 9 Years 11 Months	ZWL$1 275.00 – ZWL$2 250.00

37 Tom Bingham, The Rule of Law, (Penguin Books, 2011), 86

38 Karen A. Lasht Pauline Gee Laurie Zelontt', 'Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession', 1998-1999 17 Yale Law and Policy Review 489, 494

39 Karen A. Lasht Pauline Gee Laurie Zelontt', 'Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession', 1998-1999 17 Yale Law and Policy Review 489, 493

40 The Tariff also provides for once-off transactions such as drafting agreements of sale (ZWL$7 500.00 – ZWL$12 000.00 or 1% of value), lease agreement (, last wills and testaments, notarial work etc where fees are payable in lump sums

2 – 4 Years 11 Months	ZWL$1 050.00 – ZWL$1 800.00
0 – 1 Years 11 Months	ZWL$ 750.00 – ZWL$1 125.00
Unregistered Law Graduate whose name is recorded by Law Society	ZWL$450 – ZWL$ 900.00

Source: Law Society of Zimbabwe website

1.2.4 Complexity of Formal Justice Proceedings

The first level of complexity is in the substantive law that is often criticised for being too complex and inaccessible[41] and results in the lack of sufficient awareness by the citizens of their rights, especially among the poor and marginalized.[42] The next level of complexity is what is contained in Lord Woolf's as complexity in the procedures and the manner they are expressed in the Civil Procedure Rules that result in high cost and delay. Lord Woolf attributes the complexity if the procedures to the state of the civil procedure rules,[43] which he describes as an aspect of the civil justice system which both litigants in person and those who have legal assistance find difficult to understand and is further complicated by the 'incoherent and illogical' manner that the civil procedure rules have increased over time, with different rules being applied in different courts.[44] This has been the case with the Zimbabwean justice system.

1.2.5 Physical accessibility

Access to justice is affected by the physical accessibility of justice institutions. Where justice institutions are physically remote, the barriers to justice will be greater especially

41 R. Cranston, How Law Works, (Oxford University Press, 2006) 9

42 Access to Justice/Rule of Law/ Security Democratic Governance Group Bureau for Development Policy, Accelerating Access to Justice for Human Development -A UNDP Rule of Law Initiative-2010 Global Programme Annual Report (UNDP, 2011) 5 accessed from <www.undp.org/content/dam/undp/library/Democratic Governance/RoL-A2J GP Annual Report 2010 DGGBDP.pdf > (accessed on 19 February 2020)

43 Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Lord Chancellor's Department, 1995) 15.

44 Robert Dingwall and Tom Durkin, 'Time Management and Procedural Reform: Some Organizational Questions for Lord Woolf', in A. Zuckerman and R. Cranston (Eds), Reform of Civil Procedure: Essays on 'Access to Justice', (Oxford University Press, 1995) 371, 376

if transport is poor or unaffordable.[45] These effects are felt more acutely by people living in rural areas. There are costs associated with physical access to justice service points such as court buildings. For instance, a rural resident who wants to appeal against a decision of a local court has to find the nearest Magistrates' Court, which could be several kilometers away. The same with appealing to the High Court, the Supreme Court or accessing the Constitutional Court.

1.2.6 Information and illiteracy

Another barrier to access to justice is lack of access to legal information. This is a broad discourse of access to information in general, yet this is restricted to access to legal information. People in communities ought to have sources of information on where to take their legal issues. For instance, while a customary court could be a stone throw away, the same court has no jurisdiction to entertain criminal cases hence one has to look for a police station to lodge a complaint and trigger investigation. There is a high chance that, even after lodging a complaint, the Police will be incapacitated to reach a remote area for purpose of investigation. With available assistance, one would already know which institution to approach for the resolution of certain issues.

To this end, CSOs in Zimbabwe have done well in terms of providing legal information on thematic areas to targeted audiences such as women's law on inheritance/succession and maintenance (alimony). The LRF, the ZWLA and others have over the years become synonymous with assisting communities with legal information to challenge grabbing of property by relatives of a deceased spouse.

Moreover, legal illiteracy represents one of the biggest challenges to increasing access to justice. A significant factor in enhancing such access is increasing awareness. Basic understanding regarding the law is not forthcoming in many areas and this not only presents a danger in terms of unwittingly breaking the law, but also through ignorance over civil and human rights. When considering how illiteracy and therefore a lack of effective information channels affects specific groups. The second group greatly affected

[45] "International Access to Justice: Barriers and Solutions" Bingham Centre for the Rule of Law Report OCTOBER 2014

by illiteracy constitutes a significant proportion of the populations of these countries: the rural population. For various reasons the rural population have lower access to quality education resulting in higher rates of illiteracy and limited access to justice.

1.2.7 Underfunded Legal Aid Framework

Section 31 of the Constitution of Zimbabwe provides as follows regarding legal aid:

> '[t]he State must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice'

Furthermore, Section 50(1)(b) of this Constitution stipulates that any person arrested 'must be permitted, without delay … (ii) at their own expense, to consult in private with a legal practitioner […] of their choice'. Section 70 provides that any person accused of an offence has a right '(d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner', or '(e) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result'. Three quick conclusion could be made, namely, that legal aid is subject to availability of resources, which then explains its inadequacy in practice. Second, the Constitution does not provide guidance as to the meaning of "substantial injustice", a phrase drafted in to guide cases where legal aid should be availed. Third, legal aid is expected at the time of trial and not soon after arrest or detention or even first court appearance where issues of bail are considered. The reason behind this cautious approach is the issue of cost related to providing state counsel early on. This is contrary to Principle 7 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, which requires States to "ensure that effective legal aid is provided promptly at all stages of the criminal justice process".

This constitutional objective on legal aid is operationalized by the Legal Aid Act [Chapter 7:16]. Part III of this Act is committed to provision of legal aid. One applies for legal aid and is eligible in terms of section 8 of the Act if they cannot afford a lawyer on their own, they have reasonable grounds to initiate or defend legal proceedings and they are in need of the service they apply for (legal aid). Such a recipient may be required to make a

contribution to the legal aid in terms of section 15 in accordance with their means. The legal aid is funded by the legal aid fund funded by Government through different means.

The legal aid framework in Zimbabwe is regarded as weak for the provision of Legal Aid to indigent members of the society. Those who cannot afford the services of a legal practitioner remain hopeless as the Legal Aid Directorate is ill-equipped to cater for their needs due to several factors with the main being related to funding. It also fails to live up to the requirements of international law in terms of prioritizing vulnerable members of the society such as children or guardians of children, PWDs, women and so on. With the dire economic situation in the country, it is not possible to achieve universal and equal access to justice unless there is a robust, decentralized, equipped Legal Aid Directorate in Zimbabwe. To fill the gap, much legal aid has been offered by CSOs working in different sectors and they continue to do so as partners of Government.[46]

1.2.8 Adversarial nature of judicial proceedings

Traditional rules about the legal system were developed in the context of an adversarial system where both sides were represented by counsel or at least have to provide evidence that proves their case. These rules have become barriers to justice for self-represented litigants/self-actors (SRLs/SAs). Much as judicial officers alleviate the problem by taking an accommodative approach such as guiding the actor during proceedings, the system remains inclined towards represented litigants familiar with technical rules of procedure.

1.2.9 Gender dynamics of access to justice

Access to justice very well has gender dynamics with women very likely to miss out on it due a combination of factors. Unless CSOs such as ZWLA come to their aid, women, especially rural women are more likely to be prevented from accessing legal recourse due to financial incapacitation. As a result of this hindrance, they are likely to face huddles defending matrimonial property after a husband dies based on traditions. Lack of knowledge about property rights during inheritance or succession would see traditional conceptions of success divesting women of property and preventing girls from inheriting

[46] LRF, ZLHR, ZWLA, JCT, Zimbabwe Human Rights NGO Forum, LSZ, Veritas.

from estates of their deceased parents notwithstanding that the law is on their side. These are common and recurrent contestations in society. Further, in the advent of land reform women may not be aware of their right to inherit the “Offer Letter” held by the deceased spouse so that they have a chance to keep fending for the family. These are but some of ‘small’ but vexing legal issues women may have to contend with.

1.3 Conclusion on Access to Justice in Zimbabwe

The brief discussion on access to justice in Zimbabwe started off defining the parameters of access to justice as a multi-disciplinary issue and/ as a right. The intention was to elaborate elements of access to justice with a view to connecting it to common access to justice issues in Zimbabwe today. The major findings were that cost lies at the heart of access to justice be it from the perspective of Government as provider or individuals as consumers of justice. However, there are other factors that continue to hinder access to justice which are intrinsic to the dual legal system in force, complexity of the formal dispute resolution system through courts of law and so on. Further, but also related to funding is the issue of legal aid, which is key to access to justice by masses of the people of Zimbabwe due to their restrictive socio-economic situation. Legal aid in Zimbabwe needs to be revamped so that it becomes inclusive and sensitive to vulnerabilities of different populations such as women, children, PWDs, migrants, stateless persons and so on. Of particular worry is that it is provided so late into the justice delivery process such that it makes little impact to the realization of justice especially in criminal proceedings.

Having made these findings, which are largely common cause, it is appropriate that focus shifts to the discussion on finding possible solutions to access to justice challenges in Zimbabwe. More lines of funding is one of the solutions. However, one of the proposed novel solutions is, at least in Zimbabwe, formal recognition of paralegals. These are people with legal training but who are not lawyers per se, the distinction being based on the content of the legal education they were exposed to. There are proposals that these professionals be drafted into the formal and informal justice delivery processes to assist alleviate some of the challenges identified above. However, being a novel discussion in the Zimbabwean context, the discussion will seek to allay certain fears inherent in some justice delivery stakeholders that formal recognition of paralegals may not be the best of

ideas. Clearly, formal introduction of paralegals in a profession dominated by lawyers will require definition of competences of each group. Regulation will be necessary.

1. HISTORICAL DEVELOPMENT OF MODERN PARALEGALISM

For a country such as Zimbabwe that is pondering on formal recognition of paralegals, it is important to elaborate on the definition and scope of work of paralegalism. One of the prominent features of the concept 'paralegal' is the diverse meanings attributed to it not only across various judicial systems but also within a particular judicial system and Zimbabwe is no exception. The *International Paralegal Management Association* defines a paralegal as,

> 'a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible'.[47]

The *Paralegal Society of Ontario* defines it as 'an individual qualified through education or experience licensed to provide legal services to the general public in areas authorized by the Law Society of Upper Canada'.[48] In the United Kingdom (UK), the *National Association of Licensed Paralegals* (NALP) regards a paralegal as 'a person who is educated and trained to perform substantive legal work that requires knowledge of the law and procedures but who is not a qualified solicitor or barrister'.[49] Professional bodies within the United States of America (USA), such as the *American Bar Association*,[50] *National Federation of Paralegal Associations*,[51] *National Association of Legal*

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47 The International Paralegal Management Association, *Position Paper on U.S. Paralegal Regulation*, (2011).

48 The Law Society of Upper Canada, *Paralegal Rules of Conduct*, (2017).

49 Hamilton, A, "A fine distinction - Amanda Hamilton takes the stand in the paralegal definition debate", (2012), available at: *New Law Journal* https://www.newlawjournal.co.uk/content/fine-distinction-2. (accessed 7 February 2020).

50 American Bar Association; Standing Committee on Paralegals, *ABA Model Guidelines for the Utilization of Paralegal Services*, (2012) Chicago, Ill.: American Bar Association, Standing Committee on Paralegals p. 1.).

51 National Federation of Paralegals Associations, "Paralegal Definition", (2016), available at: *Paralegals* https://www.paralegals.org/i4a/pages/index.cfm?pageid=3315.) (Accessed 10 February 2020).

Assistants[52] and the *American Association for Paralegal Education*,[53] have their own definition of a paralegal, yet there is a golden thread of three criteria that is common to these definitions. First is **specialized training**, **supervision by an attorney** is second and, finally, the **substantive legal nature of the work that they perform**. All the aforementioned definitions share one key feature, namely, the lawyer centeredness of the concept 'paralegal'.

On the African continent, countries that have embraced paralegalism also have different definitions. However, the community-based nature of its work seems to be a common feature. The *Paralegal Advisor Services Institute in Malawi* (PASI) describes paralegals "like paramedics or bare foot doctors, [who] provide "first" legal aid to ordinary people."[54] The *Nigeria Community-based Paralegal Training Manual* describes it as 'a community-based person trained with the basic knowledge of the law and the legal system.'[55] In Sierra Leone they are regarded as 'laypeople working directly with the poor or otherwise disadvantaged to address issues of justice and human rights'.[56]

However, Sierra Leone's Legal Aid Act defines 'accredited paralegal' as 'a person employed by the Board, a government department, an accredited civil society organization or a non-governmental organization and who has completed a training course in the relevant field of study at the Judicial and Legal Training Institute or an educational institution approved by the Board'.[57] The inclusion of paralegals in the Legal Aid Act in Sierra Leone is a significant development towards recognizing these

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52 National Association of Legal Assistants Inc, "NALA Code of Ethics and Professional Responsibility", (2007), available at: https://www.nala.org/certification/nala-code-ethics-and-professional-responsibility. (Accessed 10 February 2020).

53 AAfPE describes paralegals according to their scope of practice: 'Paralegals perform substantive and procedural legal work as authorized by law, which work, in the absence of the paralegal, would be performed by an attorney. Paralegals have knowledge of the law gained through education, or education and work experience, which qualifies them to perform legal work. Paralegals adhere to recognized ethical standards and rules of professional responsibility.' American Association for Paralegal Education, *Statement on Academic Quality*, (1998).

54 The Paralegal Advisory Service Institute, *Where there is no lawyer: Bringing justice to the poorest of the poor*, (2015).

55 Akinrimisi, B, *Paralegal Training Manual for Nigeria*, (2010) Heinrich Böll Foundation.

56 Maru, V, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide', (2006), 31, *The Yale Journal of International Law*, pp. 427–476.

57 Section 1 of the Sierra Leone Legal Aid Act (2012).

professionals into the conventional legal system and strengthening the legitimacy of the service that they provide.

In South Africa, the *Paralegal Manual*[58] contains different definitions of the paralegal. In one instance the paralegal is defined as 'a person without a law degree who has legal skills, knowledge and experience',[59] and in another, it is described as 'an accredited person who has a basic knowledge of the law and procedures, knows about conflict resolution and procedures and who shows motivation, commitment, attitudes and skills'.[60] Neither definition is useful for the purpose of identifying the paralegal in South Africa as no system of accreditation of paralegals, statutory or voluntary, exists and the definition is out of sync with the latest development in paralegal education.[61]

Dugard and Drage highlight the 'amorphous' nature of the term paralegal.[62] They nevertheless argue that, whether the paralegal is an unpaid volunteer or a salaried worker, they share one common characteristic, namely, 'direct legal and quasi-legal interface with clients and/or the communities they serve'.[63] The community-based paralegal, in particular, straddles the social development and legal systems, hence the socio-legal nature of their work. It is, therefore, not surprising that they deal for the most part with 'the most serious remaining fault lines' in South African society.[64]

Modern paralegalism is well established concept in the Western countries. As for the Africa, owing to persistent access to justice challenges faced by the masses, there is a clear need to persuade African governments to recognize paralegalism. Such persuasion has been gaining momentum overtime that culminated into the convening of a *Regional Conference on the Formal Recognition for Criminal Justice Paralegals*, that was held from 9 to 10 November 2017 in Lilongwe, Malawi. The importance of this Conference was that

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58 Education and Training Unit, *Paralegal Manual*, (2011) Black Sash p. 653.
59 The Black Sash (2011).
60 The Black Sash (2011) p. 585.
61 The Unit for Applied Law at the Cape Peninsula University of Technology became the first institution of higher learning to be accredited by the Council on Higher Education to offer a Bachelor of Paralegal Studies degree.
62 Dugard, J & Drage, K, 'To whom do the people take their issues? The contribution of community-based paralegals to access to justice in South Africa', (2013), 21/2013, pp. 1–41.
63 Dugard, J & Drage, K (2013) p. 11.
64 Dugard, J & Drage, K (2013).

it was the first meeting that formally urged African governments to enact laws that recognize paralegalism in the interest of justice. Although the Conference was coined from a criminal point of view, it laid a sound foundation on the role of paralegals in enhancing access to justice. It is important to take cognizant of the fact that paralegals provide not only criminal justice advice but rather any area.

2.1 Types of paralegals

Paralegals may be put into categories depending on institutional affiliation and the content of work they provide. A term **community based paralegals** often refers to paralegals who provide a wide range of general and basic legal aid services to communities in which the paralegals are based. These mainly work in the villages and rural communities in which they live. This is the category often trained by CSOs drawn from rural or marginalised communities and deployed back there after training. Their strength is knowledge and trust of people they live with, familiarity with customs, traditions or religious values regarded as critical by members of the community. Trust and knowledge by feuding parties are essential to resolution of conflicts while preserving the social fabric.

Another category is that of **specialized paralegals**. They specialise in areas such as criminal justice or health or labour law or human rights paralegals working with specialised civil society organizations or relevant government institutions on the matter. These work with the support of lawyers higher up in their organizations based on programming areas. They are specialised in the sense that they focus on thematic disputes such as those related to employment, women's rights, children's rights, SGBV etc.

There is also **corporate paralegals** who are non-lawyers working in private firms of lawyers and operate as their assistants. These are basically assistants to lawyers and commonly located in business hubs where commercial transactions are common. They are nearly absent from rural or marginalised communities where community-based paralegals would like to work and flourish.

Depending on the country in which they operate, paralegals may assist also in civil or criminal matters, may act as individuals or as part of state or non-state organisations, may be volunteers or paid, and provide different services. They aim at achieving practical

remedies to facilitate access to justice for the poor by resorting to education, mediation, organisation, advocacy, monitoring and, with the assistance of lawyers, litigation.[65]

2.2 Recognition of paralegalism

Recognition of paralegals is one of the issues that has vexed this sector from the conception of the idea. National, regional and international efforts to achieve recognition have resulted in the adoption of soft law to encourage and guide states to formally recognise paralegals for the service they render especially in the context of legal aid. In this regard the *2004 Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, subsequently adopted by the African Commission on Human and Peoples' Rights (ACHPR) in the form of *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, which refer to paralegals' role in achieving fair trial and legal assistance in African countries.[66] Almost a decade later, the 2012 United Nations *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*[67] were adopted to urge states to recognise the role played by paralegals in providing legal aid services where access to lawyers is limited. The instruments cover five critical areas, namely;

- **Legal representation in court** - formal, but also least accessible and most expensive form of legal aid, and should be used only as a last resort;
- **Legal assistance -** assisting a person in taking legal steps to resolve a matter using the formal justice system;
- **Legal advice -** providing information to an individual in relation to his or her particular problem;
- **Legal education and information -** providing general information to individuals and communities on their rights and the different legal avenues available to exercise their rights, and

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65 V Maru and V Gauri, Bringing Law to Life: Community Paralegals and the Pursuit of Justice (draft) (on file with author); S. D. Rao, "Paralegal Education in India: Problems and Prospects" 1 J. Nat'l L. U. Delhi 94 2013 at 97.

66 Available at: https://www.achpr.org/resources (accessed on 20 February 2020).

67 Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (accessed on 22 February 2020).

- **Mechanisms for alternative dispute resolution** and restorative justice processes.

When fully achieved, recognition of paralegals often entails what the *ACHPR 2003 Principles and Guidelines* provides, namely, rules governing the activities and conduct of paralegals; rules on the training and qualification procedures for paralegals; the importance of a linkage between paralegals and the formal legal profession; the granting of similar rights and facilities to paralegals and lawyers; and the importance of allowing paralegals to exercise their mandate independently.[68] Several African countries are moving towards recognition of paralegals. For instance, community paralegals in South Africa have taken many initiatives to self-regulate. As way back as 1996, the National Community Based Paralegal Association (NCBPA) was created in order to organise the sector and facilitate advocacy initiatives, including seeking formal recognition and ensure quality services by developing standardized training and practice. The adoption of legal aid legislation in Nigeria (2011) and Sierra Leone (2012) in which paralegals are referenced is a sign of statutory recognition of the role paralegals play in enhancing access to justice. For Nigeria, the Legal Aid Council is authorised to grant licenses to 'to persons who have undergone a prescribed course in paralegal services to render such services in appropriate situations', and to also adopt regulations 'for the involvement of Para-Legal aid provision in accordance with the provisions of this Act'.[69]

This clearly is not the case in Zimbabwe. The Legal Aid Act makes no reference to paralegals, although it is a feat that at least a law on legal aid already exists. The quest for recognition continues to bear fruits in other countries such as Mali, Zambia, Kenya, South Sudan, Liberia, Tanzania, and Uganda and so on.[70] Invariably, due to different contexts, these countries will adopt varying models of recognition although guided by the same international and regional soft law frameworks.

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[68] See Principle H(h), (i), and (k) of the ACHPR 2003 Principles and Guidelines.

[69] Nigeria Legal Aid Act, 2011, sec 23(4).

[70] G. Dereymaeker, 'Formalising the Role of Paralegal in Africa: A review of legislative and policy developments' *Dullah Omar Institute (CSPRI), Open Society Justice Initiative and Paralegal Advisory Service Institute* (2016), 27.

Challenges associated with non-recognition include a lack of standardized training and professional standards, such as a code of conduct; an inconsistency in their mandate and powers; a lack of internal and external oversight over their work; varying remuneration schemes; no formalized relationship with, and therefore referral mechanism to, lawyers, and an inability to fully exercise their mandate because of limited recognition from formal justice actors.[71] Formal statutory recognition would definitely address all these aspects also as a way of regulating the sector.

From the perceptive of paralegals, Maru and Gauri identify four grounds upon which paralegals would seek formal statutory recognition.[72] These grounds include:

- to be given more legitimacy,
- to obtain more sustainable financing,
- to increase the quality and standard of work of paralegals, and
- to set up a national body which would coordinate their work.

In a sense, these grounds mimic the advantages inherent in formal statutory recognition of paralegalism. The more paralegals remain unrecognized, the more scores of people are deprived of access to justice, which is conveniently available through paralegalism. More and more states ought to be urged to initiate the process of studying their context, initiate stakeholder dialogue on the subject, and, if conditions are ripe, implement formal or statutory recognition of paralegals.

2.3 Regulation of paralegals

Depending on the model, regulation often comes along with statutory recognition of paralegals as actors in the justice delivery chain, unless the sector is based on self-regulation. Regulation serves several purposes. First, it should set standard training programmes. This means the minimum body of knowledge for the qualification as a paralegal is provided for. This standardizes the training. For instance the curriculum for

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71 Dereymaeker, 4.

72 V Maru and V Gauri, Bringing Law to Life: Community Paralegals and the Pursuit of Justice (draft) (on file with author). See also UNODC, Handbook on improving access to legal aid in Africa, Criminal Justice Handbook Series, 2011, pp. 33 and 39, quoted by Dereymaeker above, 4.

the Diploma in Paralegal Studies offered by the Midlands State University will have to meet minimum requirements and certified by higher education regulators.[73]

However, without regulation as is the case, CSOs will also produce their own paralegals utilizing a different module, thereby making paralegals different in terms of knowledge and skills. For instance, Article 2 of the Kenya Legal Aid Act defines a paralegal according to quality of training one has completed a training course in the relevant field of study in an 'institution approved by the Council of Legal Education' in terms of Article 7 of the Act.

Second, the law may set criteria to enter the paralegal profession. This is key so that it is not a free for all sector, but entered into by persons with capacity to understand the law due to the public importance of their work. In many cases, entry requirements are set by training institutions themselves for quality control purposes. Once a paralegal is certified as qualified, the legal aid scheme would then accredit them as a trained professional. To this end, the MSU Diploma in Paralegal Studies lists entry requirements as follows:

> To be eligible for admission, applicants must have passed at least five Ordinary level subjects including English Language and Mathematics OR holds a qualification accepted by the University as equivalent to the foregoing. Relevant professional qualification(s) and/or experience will also be considered.

Third, regulation should set up registration or accreditation frameworks of paralegals. The Kenyan Legal Aid Act requires not only that a paralegal ought to be accredited by the Legal Aid Service as a legal aid service provider but the institution to which they are attached as well.[74] This is the same case with Sierra Leone, which accredits both the institution and paralegal.[75] The Zimbabwe Legal Aid Act will have to provide for this with necessary amendments.

Fourth, regulation should lead to the adoption of codes of conduct. In other words, the sector needs to have set rules that govern how service is rendered, and enforcement

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73 To find out more on the programme see https://ww5.msu.ac.zw/home/faculties/law/diploma-in-paralegal-studies/ (accessed on 24 February 2020).

74 Kenya Legal Aid Act, art. 2.

75 Sierra Leone Legal Aid Act, sec. 1.

mechanism to discipline errant players as is the case with lawyers' associations. Whether this is self-regulated or not depends on the model preferred.

Fifth, regulation should determine competences of paralegals in terms of the kind of service they can provide such as granting paralegals the right to visit detainees or appear in court as the last resort. Sixth, a law should set up mechanisms for monitoring or evaluating paralegal programmes. It is important to always know what is working or not working through evaluations. Seventh, regulation may provide for accountability mechanisms. Legal advice is an important public function hence, those who hold such power should be held accountable.

The eighth aspect of regulation is that it should ensure sustainability of the paralegal profession through financial support. The trend is always that these programmes flourish with consistency in funding, and fail to continue once seed funds are depleted. Those paralegals connected to state legal aid schemes have continuity as a result of government funding. However, privately run arrangements may not have the same chances of survival.

Finally, regulation should guarantee independence of paralegals for purposes of holding the State accountable. The legal profession is largely self-regulating is therefore independent. Legal service providers need to be independent in order to offer balanced advice. However, the independence comes with accountability as stated above.

All in all, the overall objective of regulation, however is to ensure high quality standards of work in the fulfillment of paralegals' mandate. Regulation should always project paralegals as full professionals although practically they fall under supervision of lawyers. This sense of independence attracts community approval of paralegals and disassociation from some public institutions in which the community has no trust. This is common in politically polarised societies. Measures to achieve regulation must, therefore, strive to strike a delicate balance between sufficient leeway to allow paralegals do their work, and sufficient regulation to ensure that paralegals offer quality services and remain accountable to consumers of their services.

2. BRIEF HISTORY OF PARALEGALISM IN ZIMBABWE

Paralegalism is not a new phenomenon in Zimbabwe. What is new would be its formal recognition and the drafting of paralegalism into formal justice delivery system, especially in the public legal aid system. This method of easing just delivery was recognized early on by CSOs, especially those that operate in remote communities, and to an extent in poor urban communities. For instance, the 'LRF started training paralegals in 1993, and since then 100 people had been trained by 2001, of whom 43 at the time had remained in the service of the LRF. The training programme entailed in-house training at the Legal Projects Centres, and short residential courses. A paralegal had to undergo four stages of basic training, and this takes at least two years. The training manuals were developed by the Curriculum Unit of the LRF, and they consisted of Zimbabwean laws, international human rights instruments, and the skills necessary for the work of a paralegal'.[76]

In 2012, building on the publication of the Family Law Handbook in 2009, UNDP is working with the Ministry of Women Affairs Gender and Community Development (MoWAGCD), to develop a Family Laws training manual for paralegals, in a move meant to improve access to justice for all in Zimbabwe.[77] The Family Law Handbook simplifies family laws such as the Domestic Violence Act, the Matrimonial Causes Act, and the Deceased Estates Act, making them accessible to especially women. Drawing from this publication, Women and Laws in Southern Africa (WLSA), a regional think tank, has been commissioned by the MoWAGCD to develop a training manual for paralegals.

The Friedrich-Ebert-Stiftung also assisted efforts by CSOs to formally train paralegals for the labour sector. They even developed a manual.[78] Now the MSU is the first academic institution of higher learning to offer a Diploma in Paralegal Studies.

There has also been a formal utilization of law students working on practical matters within Law Clinics in all law schools. These students give legal advice to indigent clients for no fee. The services they provide include legal advice, drafting papers and all other work

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76 H. Othman & D. von Riese, 'Legal Services to the Poor People in Zimbabwe' *SIDA Evaluations* (2001) 10.

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78 N. Manu-Mabiza, *PARALEGAL HANDBOOK: Module 1: An Introduction to Law* Friedrich-Ebert-Stiftung (2015).

except court appearance, which is done by the supervising lecturer who should be a licensed legal practitioner. They are essentially 'paralegals', community-based as they offer advice to the university community as well as outsiders that meet their criteria.[79]

When law students go on work-related learning, they are attached to public justice delivery institutions in the first instance, and then later to law firms. At public institutions, they are usually attached at magistrates' court across the country. As part of their training, they are issued with temporary authority to prosecute real cases before courts under supervision of the resident public prosecutor. The permanent staff at these institutions regard them useful in legal research, advice and actual handling of files.

When attached to civil courts law students actually give legal advice on real life matters such as assisting women with filling in forms for purposes of claiming maintenance and advising families on administration of estates of the deceased relatives, and only refer people to the LAD when preparation of court papers is necessary. This is essentially paralegalism in practice.

3.1 Role of paralegals in enhancing access to justice in Zimbabwe

Having unpacked the concept of paralegalism articulating it with reasonable clarity with regards to the nature, types, competences and roles of paralegals in the justice system, it is timely to make a case for recognition of paralegals in Zimbabwe. We hasten to mention that African countries that have pursued this approach in addressing deficiencies in access to justice adopted different models primarily as a result of unique legal, political, socio-economic and even cultural contexts.

A case for recognition of paralegals in Zimbabwe or any other place hinges on a single question: whether there are access to justice issues in the country suited for resolution by paralegals, and if so, the nature and profile of such challenges.

In the case of Zimbabwe, much space was committed in this paper to demonstrate the extent and scope of access to justice challenges. Barring repetition, some of the major

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[79] The MSU has a Law Clinic focussing on Disability Rights while the rest of law schools at the University of Zimbabwe, Zimbabwe Ezekiel Guti University (ZEGU) and Great Zimbabwe University (GZU) operate generic law clinics.

highlights were that majority of people in rural and marginalised communities find restricted physical and economic access to justice a lived reality.[80] As a matter of fact, scores of urbanites also cannot afford services of lawyers due to the high cost associated with hiring such professionals as evidenced by numbers resorting to an ailing public legal aid system.

The other reason for a strained legal aid system is that it is grossly underfunded and understaffed.[81] This is a result of austerity measures deployed by Government to resuscitate the economy that have resulted in the freeze on recruitment of public officials including lawyers. The legal aid system is also not sufficiently devolved or decentralized within the reach especially of rural populations. Even where at its headquarters in Harare, there is a scramble for the free or subsidized legal services with the effect of overworking the few staff members serving this huge demand.

The legal aid system of Zimbabwe is poorly developed. It can be classified into three categories, namely civil court legal aid usually referred to as the *informa pauperis* system; the criminal court legal aid or *pro deo* system and legal aid by non-governmental organisations. Generally, there are two schemes of criminal legal aid in Zimbabwe. The first one is criminal legal aid under the Legal Aid Act, which can either be at the instance of an applicant or the court and Prosecutor General.

The second one is at the instance of the Registrar of the High Court who maintains a roster of registered lawyers who periodically allocates a civil or criminal matter to lawyers based on the register of legal practitioners. Certain cases such as armed robbery, murder, treason and the like deserve appointment of a *pro deo* lawyer. The lawyers are appointed at the time of indictment. This is shortly before the trial commences.

Pre-detention populations across the country may also help to paint the picture. Surveys conducted at places of detention reveal that 'some prisoners have been in detention for more than 10 years despite international and domestic standards suggesting that they

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80 Law Society of Zimbabwe, *Justice Delivery Sector Survey Report Zimbabwe* (2018). The survey revealed that lawyers', Deputy Sheriff's, and Court fees were all 'unreasonably high'.

81 Aberdeen University Lawyers Without Borders, Report on Access to Justice in Zimbabwe (2015), 25.

should be released'.[82] The Report attributed extended pre-trial detention to State incompetence in terms of handling the cases or failure to locate witnesses. Their matters keep on being deferred to future dates.

Reports on surveys conducted on the areas of concern in terms of access to justice include the following:[83]

3.1.1 Legal aid services for the survivors of sexual and gender-based violence (SGBV)

Survivors of SGBV need assistance with filing damages and compensation claims or generally dealing with the situation. These are areas in which existing CSO legal aid providers lack competence and/or capacity to assist with. Few such cases are brought because there is nobody to assist the clients. This highlights an area of real unmet need. Some legal aid providers are so overwhelmed and under-resourced that they do not come forward. Child victims of sexual abuse are often left without support.

3.1.2 Legal aid for suspects in police custody

Stakeholders often underline the fact that 'most arrested persons do not have access to private lawyers despite the fact that section 50 of the Constitution of Zimbabwe provides for their right to legal representation", albeit at their own cost and those who have been arrested or detained are entitled to get in touch with a lawyer of their choice. The suggestion is that legal aid should ideally be located nearer police stations to ensure access to justice for those who require legal aid services. This is a role that paralegals drafted into the formal justice delivery could do.

3.1.3 Access to legal aid for children in conflict with the law

This is an area of particular concern. In practice, specialist CSO legal aid providers such as JCT and CATCH Trust find that 'the child is not always represented during the police investigation. This means that pertinent issues may not have been taken into account

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82 Zimbabwe Human Rights (NGO) Forum, Rights Behind Bars: A Study of Prison Conditions In Zimbabwe (2018).

83 Law Society of Zimbabwe, *Review of the Pro-Deo System in Zimbabwe and Prospects for a New Model* (2015), 16-17.

such as self-incrimination or that insufficient evidence is used to bring a charge'. When a legal aid lawyer ends up being called in at short notice to represent a child, s/he may find that valuable witnesses or person who could speak for that child has not been called.

3.1.4 Legal representation in employment and labour disputes

The Legal Aid Directorate (LAD) has taken on very few labour cases. The view is that there is no real public awareness of the LAD that it can handle such cases. There are other actors that potential clients tend to, and would prefer to, use rather than going to the LAD – for example, the Workers Unions. These cannot provide qualified lawyers, but they can represent employees in cases brought before the Labour Courts. It is worth underlining the fact that there is considerable unmet need in this area of litigation.

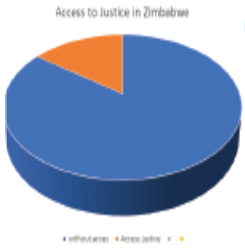
3.1.5 Legal aid for prisons

The Zimbabwe Prisons and Correctional Service (ZPCS) is one of the most organized and open public institutions in Zimbabwe. With 42 penitentiary institutions across the country, it plays a critical role in the justice delivery system as it is the custodian of all persons awaiting trial in custody and those convicted of offences. The ZPCS does not run a legal aid system, but has opened its doors to all players especially CSOs to bring in legal aid to assist inmates in terms of challenging detention, enforcing the right to trial within a reasonable time and other fair trial rights. This is a good gesture from the institution. Much of the legal advice for prisoners could be done by paralegals guiding inmates on how to asset their rights in court such as applying for bail and generally conducting a trial by asking relevant questions during cross-examination or asserting prisoners' rights. That will go a long way addressing some basic justice issues faced by this population.

3.1.6 Support for traditional leaders

It is believed that customary and local courts (traditional courts) account for at least 70% of legal disputes in Zimbabwe. This could be the case since more than 50 percent of the population is rural. Traditional courts are part of the formal court system as provided in section 162(g) of the Constitution, which primarily apply customary law to resolve disputes.

3.2 A case for formal recognition of paralegalism in Zimbabwe



"85% of people who appear at rural courts do not have legal representation, yet the procedure is complex and most of the cases are thrown out based on technicalities". Law Society of Zimbabwe Survey

The deficiencies above can begin to disappear if paralegals who are less expensive and more accessible than lawyers are trained and formally recognized in their role of empowering the poor and marginalized in their interactions with police, prosecutors, the courts and prisons. In Zimbabwe however, there has been a lack of formal recognition of role paralegals and such could be attributed to a number of factors, chief of which is that the law is silent on their existence. There is also a lack of comprehensive empirical research on the role and importance of the paralegalism in Zimbabwe. The service has not been professionalized to date. This means that there are no standards relating to education and training, scope of practice, ethical conduct or certification. Everyone who trains paralegals does so according to their own requirements and not to meet any minimum threshold in terms of body of knowledge and skills set.

Yet in fact, paralegals would provide a crucial link to justice services and legal redress in Zimbabwe, particularly for the rural poor and marginalized groups. Although the 2013 Constitution guarantees a broad range of rights everyone, including the right to legal assistance, accessing many of these benefits remains a challenge for those who live in remote areas and those who cannot afford legal representation.

Further, paralegals would fill this gap by providing dispute resolution and legal support that is both geographically and financially accessible. Such advice will be informed by a deep understanding of the context in which disputes occur. Despite the prevalence and importance of paralegals in the Zimbabwean justice sector, their role remains largely informal and unexplored.

3.2.1 Recognition efforts in Zimbabwe

In Zimbabwe the Legal Aid Act, the Legal Practitioners Act,[84] and the Legal Practitioners (Code of Conduct),[85] are all silent on the issue of paralegals. There is no statutory recognition of paralegalism. Efforts towards its recognition are being made by the LRF, which runs urban, suburban and rural legal advice centers, mobile legal aid clinics, primarily staffed by paralegals who are supervised by legal practitioners. So far, LRF trains paralegals that are associated with other organizations. It provides a fairly long and comprehensive training program. After the full course, paralegals can sit for a Paralegal Certificate examination. The certificate is recognized by the Council for Legal Education, a body comprised of eight attorneys appointed by the Justice Minister to oversee education requirements in the legal profession.[86] There is a new certification program every six months.

3.2.2 Resistance to recognition

In other countries such as Malawi,[87] the major source of resistance to the formal recognition of paralegalism came from associations of lawyers, who took the view that paralegals would compete with them for work. They further argued that it would be difficult to regulate paralegals as they were already facing challenges regulating lawyers.

In Zimbabwe, the issue of resistance has not yet been fully explored as the dialogue on formal recognition of paralegals is gathering momentum. There is need of more stakeholder engagement to find ways of dealing with fears, if any. Without empirical research on the matter, so far this would be largely speculative.

3.2.3 Comparative analysis on the scope of requisite legislative framework

This part of the paper perpetuates the quest for the formal recognition of paralegalism in Zimbabwe by highlighting the key legislative arrangements that need to be put in place in order to achieve this objective. In order to enhance this legislative reform, lessons and

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84 Legal Practitioners Act (27: 07).

85 Statutory Instrument 37 of 2018.

86 O. Saki and T. Chiware, The Law in Zimbabwe (Feb. 2007), available at http://www.nyulawglobal.org/globalex/zimbabwe.htm.

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inspiration will be drawn from fellow African countries have charted this way. For purpose of drawing more lessons from different regions, case studies of Kenya, Sierra Leone and Malawi are discussed below. Thereafter, recommendations on paralegalism and access to justice in Zimbabwe will follow.

Sierra Leone

The Constitution of Sierra Leone recognises the right to legal representation, but does not contain any provision on a public funded legal aid scheme.[88] However, in 2012, the Parliament of that country adopted the Legal Aid Act (6 of 2012), to provide for legal aid and determining the conditions under which it will be provided. The Act constitutes a model of comprehensive legislation recognising the role of paralegals as part of the legal aid framework.

The statutory recognition was recorded as a result of persistent advocacy work by CSOs launched in 2008 following the convening of the first national consultative conference on legal aid in Sierra Leone. The conference was convened by the Minister of Justice and the Justice Sector Development Programme.[89] The two key steps that came out the conference were, first, identification of a legal aid suitable for Sierra Leone depending on its context, and second, the development of draft legislation on legal aid in which paralegals would later be recognised. Legislative enactment takes some time hence, the draft law was only discussed at a second consultative conference in 2010, which law was eventually adopted in 2012 with traceable compromises between CSO and Government demands.

One of the take homes from the Legal Aid Act is the broad definition of legal aid, which reads as 'the provision of legal advice, assistance or representation to indigent persons'.[90] Clearly, this is so broad to cover any legal service associated with access to justice. Legal advice and assistance are in turn defined as:

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88 Constitution of the Republic of Sierra Leone, s. 17(2)(b).

89 This is a Department of International Development – United Kingdom.

90 Sierra Leone Legal Aid Act, sec. 1.

> Providing information in both criminal and civil cases about the relevant law and legal processes, assisting with ADR, advising on legal issues, assisting with the drafting of documents other than instruments prohibited under section 24 of the Legal Practitioners Act, 2000, referring matters to legal practitioners and doing other things that do not constitute legal representation.[91]

The Legal Aid Act also defines an "accredited paralegal" as:

> A person employed by the [Legal Aid] Board, a government department, an accredited civil society organization or a non-governmental organization and who has completed a training course in the relevant field of study at the Judicial and Legal Training Institute or an educational institution approved by the Board.[92]

The Sierra Leone statute captures the essence of recognition discussed above. First, paralegals are expressly listed as legal aid providers, alongside with legal practitioners, civil society organisations, non-governmental organisations, and university law clinics, although they can only provide legal advice and legal assistance (not legal representation in court).[93] Second, accredited paralegals must be employed by an accredited organisation. Third, they must have completed compulsory training offered by a particular institution. Fourth, each paralegal must also be accredited with the Legal Aid Board.[94]

The Legal Aid Act creates a Legal Aid Board, chaired by a judge, who is appointed by the President. An organisation working with paralegals does not need to be represented on the Board.[95] The majority of the Board's membership drawn from the legal profession. This may be a limitation as it may bring the Legal Aid Board to focus too much on legal representation, to the detriment of the other forms of legal aid. The powers and functions of the Board includes accrediting legal aid providers (individuals and organisations, including paralegals), enter into cooperation agreements with legal aid providers, determine the types of cases in which legal aid can be provided, and determine the maximum level of income to qualify as an "indigent person".[96]

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91 Sierra Leone Legal Aid Act (6 of 2012), s. 1. The instruments prohibited under s24 of the Legal Practitioners Act, 2000 are instruments relating to real and personal estates of individuals and companies.

92 Sierra Leone Legal Aid Act (6 of 2012), s. 1.

93 Sierra Leone Legal Aid Act (6 of 2012), s. 1.

94 Sierra Leone Legal Aid Act (6 of 2012), s. 30(1)(d) and (2)(b).

95 Sierra Leone Legal Aid Act (6 of 2012), ss. 2 and 4.

96 Sierra Leone Legal Aid Act (6 of 2012), ss. 9, 10 and 21.

The Legal Aid Board is required by the Act to 'appoint at least one paralegal to each Chiefdom, who will;

> (a) to provide advice, legal assistance and legal education to the Paramount Chief and the inhabitants of the Chiefdom; and
>
> (b) where appropriate, to assist in diverting certain cases to the formal justice system'.[97]

This provision seeks to address tensions inherent between formal and customary law, as well as the possible abuse of power by some traditional leaders, which have arisen in the past in Sierra Leone. Having someone sound in both systems of the law would assist in diffusing causes of the tensions by advising traditional leaders on what is lawful and not, at the same time advising inhabitants to assert and vindicate their rights before traditional leaders.

The second part of the provision speaks to the role that paralegals play in promoting ADR, and their mediation between the formal and traditional justice systems. However, there are doubts on implementation of this provision as challenges are envisaged. It appears it will require a number of trained paralegals, which the country does not (yet) have.

Further, under the Legal Aid Act, legal aid, including paralegal services, is provided to indigent persons 'if the interest of justice so require'. However, the Act does not provide further indications on how to determine this interest of justice, leaving it, to a certain extent, to the accredited legal aid providers to do so.

All institutions who are independent of the Legal Aid Board, whether they offer legal representation, advice or assistance, and therefore who may work with paralegals, can only provide legal aid if they have entered into a cooperation agreement with the Legal Aid Board.[98] The Board has to first approve legal aid where indigent persons need legal representation in court, whether in civil or criminal cases.[99] Legal advice and assistance,

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97 Sierra Leone Legal Aid Act (6 of 2012), ss. 14(2).

98 Sierra Leone Legal Aid Act (6 of 2012), s. 33.

99 The Legal Aid Act sets a detailed procedure to apply for legal aid representation, including a system of appeal against the Legal Aid Board decision: see ss. 23 to 28.

which paralegals can provide, need not be approved by the Board in every case but are legally described as benefitting indigent persons only.[100]

Furthermore, the Act states that if the legal aid provider, when providing legal assistance and advice, is not funded by the Legal Aid Board, then the legal aid provider can set its own criteria to determine the provision of legal aid.[101]

It is important to note that legal representation in criminal matters has to be provided from the moment of arrest until a possible appeal is decided upon. There is no similar requirement that legal assistance and advice be provided for the same duration.

In terms of section 35, a police officer who arrests a person, a magistrate r judge presiding over proceeding and a prison officer who take custody of a person they consider indigent may in the case of a judge or magistrate, and shall, in the case of police officer and prison officer, refer the person to the Legal Aid Board so that s/he may apply for legal assistance.

Therefore, all legal representation in court can only be provided to indigent persons (the maximum level of income being set by the Legal Aid Board) and has to first be approved by the Legal Aid Board, and legal assistance and advice, including paralegal services, can be provided to the same indigent persons if funded by the Legal Aid Board, or to a broader pool of individuals if these services are not funded by the Legal Aid Board. However, all legal aid providers, whether their interventions are funded by the Legal Aid Board or not, have to be accredited with the Legal Aid Board.

The Legal Aid Act also provides for mechanisms of oversight. Firstly, all legal aid providers must keep records of individual cases they intervene in and must report quarterly to the Legal Aid Board.[102] Legal practitioners providing legal representation can be subject to disciplinary action if their conduct is unprofessional,[103] and organisations providing legal aid (including paralegal services) can see their cooperation agreement with the Legal Aid Board cancelled if a legal aid provider fails to meet its obligations under

[100] Sierra Leone Legal Aid Act (6 of 2012), s. 20
[101] Sierra Leone Legal Aid Act (6 of 2012), s. 36.
[102] Sierra Leone Legal Aid Act (6 of 2012), s. 31.
[103] Sierra Leone Legal Aid Act (6 of 2012), s. 32.

a cooperation agreement with the Board.[104] Not being accredited or providing legal aid without a cooperation agreement constitutes a criminal offence, of which both individuals and organisations can be held liable.[105]

For the above reasons, the Sierra Leonean Legal Aid Act should be seen as model legislation for legal aid and paralegals in Africa. Its accreditation, operational and oversight mechanisms are clearly articulate. Its provisions are sufficiently rigorous to ensure high quality legal aid services, but also some flexibilities such as approval of individual applications for legal representation only, possibility to work outside the Legal Aid Board scheme and conditions if receiving its own funding. We concluded above that statutory recognition needs to strike this delicate balance.

In conclusion, the Legal Aid Act is slowly being implemented, as the Legal Aid Board was only set up in 2014 and moving towards operation on full capacity. The content of the training programme for paralegals has yet to be agreed upon between the different stakeholders. The accreditation and oversight mechanisms are not yet operational. However, the take-homes from the Sierra Leone experience will be highlighted as recommendations in the final part of the paper.

Kenya

The Republic of Kenya has a Constitution (2010), which not only guarantees access to justice for all,[106] but, on purposive construction may be regarded as constitutionally recognition paralegals. Like in many national constitutions, any arrested person has the right to 'communicate with an advocate [lawyer/attorneys], and other persons whose assistance is necessary'.[107] The Constitution does not, however, indicate who determines under which circumstances such assistance is necessary, but this seems to be an administrative decision. Free legal representation at the time of trial is applicable 'if substantial injustice would otherwise result'.[108]

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[104] Sierra Leone Legal Aid Act (6 of 2012), s. 33(2).

[105] The sentence is a 'fine not exceeding thirty million Leones or to imprisonment for a term not exceeding three years': Sierra Leone Legal Aid Act (6 of 2012), s. 38.

[106] Constitution of Kenya, s. 48.

[107] Constitution of Kenya, s. 49(1)(c).

[108] Constitution of Kenya, s. 50(2)(h).

The Constitution may also be read as recognizing paralegals during trial, as it reads that 'in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court'.[109] However, no constitutional provision can be read as recognising a role for paralegals in assisting detainees. Furthermore, it remains unclear how these provisions will be interpreted or at least implemented through Acts of Parliament such as the Kenyan Legal Aid Act (2016), Legal Aid and Awareness Policy and the Action Plan (2017 – 2022).[110]

As is the case with Sierra Leone, the Kenyan Legal Aid Act encompasses a broad definition of legal aid, which reads as including legal advice and awareness; legal representation; assistance (resolving disputes other than by legal proceedings, taking steps preliminary or incidental to any proceedings; and arriving at or giving effect to any out of court settlement that avoids or brings to an end any proceedings); the provision of legal information and law-related education; access to justice, and undertaking law-reform and advocacy work on behalf of the community it serves.[111]

Of relevance to this discussion is that the Act also defines an "accredited paralegal" as

> A person employed by the [National Legal Aid] Service, a government department, accredited body who has completed a training course approved by the Kenya School of Law, the [National Legal Aid] Service or a training course conducted by a university in Kenya, an accredited body and who provides free legal advice and assistance and legal awareness education under the general supervision of an advocate but is not licensed to practice as an advocate.[112]

A paralegal under the Kenyan law is therefore an accredited person who is not a qualified lawyer, but who has completed compulsory training and provides free legal aid and assistance, under the supervision of a lawyer. The compulsory training must be approved and offered by the Kenya School of Law or offered by any other university in Kenya or an accredited body. This speaks to the diversity of providers of training to paralegals that

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109 Constitution of Kenya, s. 50(2)(h).

110 Available at: https://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf (accessed 25 February 2020).

111 Kenya Legal Aid Act (2016), s. 2 on definitions.

112 Kenya Legal Aid Act (2016), s. 2.

may include CSOs as long as they are accredited and their course is approved by Kenya School of Law.

The Legal Aid Act establishes a National Legal Aid Service ("Service"), with a broad powers and functions that include

- the establishment and administration of a national legal aid scheme;
- provide funding to institutions providing legal aid;
- manage the Legal Aid Fund;
- monitor and evaluate the work of paralegals, and
- develop, in consultation with the Council for Legal Education, paralegals' training courses and certification process.[113]

The Board of the Service is chaired by a judge and consists of representatives of all relevant actors in the legal aid field, including human rights commission.[114] The mandate of the Board includes among other things, entering into cooperation agreements with institutions providing legal aid, and accrediting legal aid providers, but not paralegals (see below).[115] The Act creates a Legal Aid Fund, managed by the Service which, among others, funds legal aid providers and finances the legal representation of indigent persons.[116] This is the primary source of legal aid funds funded publicly or/ through donations and gifts from well-wishers.

The Service receives and determines each individual application for legal aid if funded by the Legal Aid Fund.[117] This includes services potentially rendered by paralegals. It is mandated to establish policies to prioritise the types of cases in which legal aid will be provided (which can potentially be civil, criminal and constitutional matters) and which types of legal aid will be provided.[118]

Interestingly, the Act does not seem to differentiate between legal representation and other forms of legal aid, which means that in its current form the Act requires the Service

[113] Kenya Legal Aid Act (2016), s. 7.
[114] Kenya Legal Aid Act (2016), s. 9.
[115] Kenya Legal Aid Act (2016), s. 7 & 11.
[116] Kenya Legal Aid Act (2016), Part V, s. 29.
[117] Kenya Legal Aid Act (2016), s. 27.
[118] Kenya Legal Aid Act (2016), s. 27(2) and (3).

to also approve each individual request for legal advice or every legal awareness initiative. This could be extremely burdensome and unfeasible on the part of the Service to have to hear and determine those applications. It is one thing to approve legal representation but it is another to have to approve all other forms of legal aid including awareness raising.[119]

In terms of section 35, the Act anticipates provision of legal services in respect of;

- civil matters;
- criminal matters;
- children matters;
- constitutional matters;
- matters of public interest;
- any other type of case approved by the Service.

The Legal Aid Act describes the procedure for individuals to apply for a legal aid grant (which in theory would also fund every service provided by a paralegal).[120] The Legal Aid Act sets a list of eligibility criteria to access legal aid, the mandatory criteria being that the person be indigent.[121] The Act does not seem to impose that the Service indicate which form of legal aid (representation, assistance, awareness, information) is to be provided by the legal aid provider identified in the grant decided by the Service.[122] The approval seems to be a blanket one so the each individual case is dealt with to finality. However only the following people apply, provided they are indigent: a citizen of Kenya; a child; a refugee under the Refugees Act; a victim of human trafficking; or an internally displaced person; or a stateless person.[123]

Like the Sierra Leone scenario, the Act puts in place a mechanism of mandatory notification by police and prison officials of every detained person of their right to legal

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[120] Kenya Legal Aid Act (2016), Part IV.
[121] Kenya Legal Aid Act (2016), s. 28(1) to (3).
[122] Kenya Legal Aid Act (2016), s. 40.

[123] Kenya Legal Aid Act (2016), s. 36(1).

aid.[124] The reply must be recorded by the police and forwarded to the Service within 24 hours.[125] Further, judges and magistrates have an obligation to inform individuals of their right to legal aid, to determine if substantial injustice may occur or to order the Service to provide legal aid.[126]

Further, where a child in conflict with the law appears in court unrepresented, the court shall order the Service to provide legal aid, however, the unavailability of legal representation shall not prevent the continuation of any legal proceedings against someone.

The Act also provides for a framework for the accreditation of legal aid providers. It may accredit advocates, law firms, civil society organisations and university law clinics, and may charge fees for accreditation purposes and to monitor the work of legal aid providers.[127] It accredits persons and organisations as legal aid service providers.[128]

Finally, it is also unclear what the future role of current paralegal coordinating structures, such as the NGOs the Paralegal Support Network (PASUNE) or the Kenya Paralegal Association (KPA), will be. However, the Legal Aid Council is mandated to maintain a register of non-governmental organisations and law clinics who provide legal aid (and some of whom work with paralegals), and may enter into cooperation agreements with them.[129] This is for purposes of oversight and evaluation of quality of services rendered.

By and large, the Kenyan Legal Aid Act is an elaborate piece of legislation that formally recognises the role of paralegals in the provision of legal aid. The statute also take into account key recognition issues identified above although many of them seem to have been left out. Conversations as to the fate of paralegals that pre-existed the Act would definitely continue

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[124] Kenya Legal Aid Act (2016), s. 42(1).
[125] Kenya Legal Aid Act (2016), s. 37.
[126] Kenya Legal Aid Act (2016) s.43.
[127] Kenya Legal Aid Act (2016), s. 52
[128] Kenya Legal Aid Act (2016), s.56.
[129] Nigeria Legal Aid Act, 2011, s. 17 (1) and (2).

Malawi

The background to paralegalism in Malawi was that most Malawians cannot access the formal state mechanisms for resolving civil disputes. Consequently, they use non-state institutions and draw on the processes available in the 'informal' or 'primary' justice sector.[130] Malawi primarily depends on non-state institutions, of which the most frequently used were found to be traditional family counsellors, traditional leaders, religious leaders and community, non-governmental, and faith-based organisations. For those who live in villages, the closest Magistrate Court might be 25 to 40 kilometres away. This meant lack of physical access to courts. Public transportation in rural areas is non-existent. The only options available for villagers are walking, biking, or hitch-hiking to court premises.[131] In Malawi, like many other places, the law is drafted and administered in the official language, English, which many poor people are unable to speak and/or read thereby excluding the majority of the population that speak only local languages.[132] In that regard, the law is not accessible to them.

There is a general view that courts are under-funded, and judicial procedures may be inaccessible for those who lack legal representation, which is generally too expensive for the poor. Restrictions on who may practice law and provide legal services are other barriers that can block more accessible forms of legal services such as law student legal clinics and paralegals.[133] Another big issue within the context of Malawi has been the decline in support to the sector following the coming to an end of the UK's Department for International Development's (DfID) five year Justice for Vulnerable Groups Programme in 2016, leaving several partners such as the Paralegal Advisory Service Institute (PASI) and others without secure funding to continue with access to justice initiatives. Lack of legal professionals also hampers access to justice for the ordinary citizens and mostly results in a large backlog at the courts. Statistics showed that as of

130 Mpala Nkonkomalimba "Improved Access to Justice for Unrepresented Accused Persons in the Criminal Justice System in Malawi", End of Programme Evaluation Report for Irish Rule of Law International (IRLI) (2017)

131 As above.

132 As above.

133 A above.

September 17, 2018, there were only 418 licensed legal practitioners in a country of more than 18 million people.[134]

Such a background led organisations such as the Paralegal Advisory Services (PAS)[135] to make strides towards the recognition of paralegals in Malawi as a way of enhancing access to justice.

The system has been largely driven by the NGOs with the most visible being the PAS. However, state organs such as the Malawi Prison Services (MPS) also contributed towards the attainment of a successful paralegal system. The PASI initiative in Malawi dates back to May 2000. This was as an initiative of Penal Reform International (PRI) who sought to create a public or private partnership linking four national NGOs with the Malawi Prison Service. It began with eight paralegals working in the four main prisons in the country. The Malawi Prison Service's 'open door' policy and willingness to pilot a radical reform measure is commended for this success.[136]

The PAS took the initiative to draft a Code of Conduct with the MPS which placed ownership and authority to monitor the movements of the paralegals inside prisons firmly under prison officers' control. Subsequently, the paralegals then developed a work plan in consultation with the prison authorities and prisoners. As for coverage, they gradually expanded their outreach to more prisons, recruiting more paralegals, as the programme took shape and demand for their services (from the prison authorities) grew. The teams were properly equipped.

By 2003, the PAS had 26 paralegals from eight and reached 84% of the prison population. It then next sought to develop services to assist persons in the courts and, initially, young persons at police stations. The ambition of the PAS grew to provide not just advice and assistance to those in prison but to develop a national legal aid service available to all persons in conflict with the criminal law.

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134 Country Reports on Human Rights Practices for 2018 United States Department of State • Bureau of Democracy, Human Rights and Labor.

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136 *Paralegal Advisory Service Institute, "Bringing Justice to the Poorest of the Poor",*

As from early 2009, the project had developed into the Paralegal Advisory Service Institute (PASI) and employed 39 paralegals covering all the prisons in Malawi. PASI also got institutionalized to facilitate funding through the Malawi Ministry of Justice.[137]

A cooperation agreement with the Ministry of Justice and Constitutional Affairs and similar agreements with the prison service, the director of public prosecutions and the largely under-resourced legal aid department of Malawi further consolidated formalisation.[138] In spite of the lack of legislative recognition in Malawi, the PASI has trained community-based paralegals to advise traditional leaders on issues such as timing to divert from traditional dispute resolution mechanisms to the formal justice system. Conversely they also advise the courts when minor offences could be dealt with using traditional dispute resolution systems.[139]

The adoption, in 2011, of the Legal Aid Act which created an independent Legal Aid Bureau empowered to employ paralegals alongside lawyers. Later in 2015 the Legal Aid Bureau replaced the Department of Legal Aid as the institution mandated to provide legal assistance to indigent persons. 'The bureau had 15 lawyers and 18 paralegals in the three offices, located in the largest cities: Lilongwe, Blantyre, and Mzuzu'.[140]

Other critical actors in the establishment of the system

PASI has several institutionalized relationships buffered by memorandums of understanding with key institutions such as the police, prison, the judiciary, the Legal Aid Bureau, the Inspectorate of Prisons, Directorate of Public Prosecutions, Legal Aid Department, the Ministry of Justice, the Ministry of Women and Child Development and Ministry of Health. For instance, these relationships have enabled an open door policy individual prisons and police stations. PASI is currently working in all four judicial regions

[137] Barry Walsh, In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa, 2010
[138] Barry Walsh, In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa, 2010
[139] Paralegal Advisory Service Institute 'Village Mediation Programme' (www.pasimalawi.org/vmp.html. (accessed on 28 April 2017).
[140] Malawi 2018 Human Rights Report

in Malawi, deploying trained paralegals to provide legal education, advice and assistance throughout the criminal justice processes, from arrest to appeal.[141]

PASI also has partnerships with other NGOs working in the justice sector such as the Child Rights Advocacy and Paralegal Advice Centre (CRAPAC), the Catholic Commission for Justice and Peace (CCJP), the Centre for Human Rights and Rehabilitation (CHRR). These organizations seek to promote human rights and also assist poor and vulnerable groups to access justice through among other things education, mediation, assistance in police stations and prisons, and provision of litigation advice for compensation claims.[142]

To date, paralegals also work hand in hand with the police assessing matters before they appear in court to determine if they can be resolved at a community level. If so, they are reverted for mediation in order to ease the burden on the police and courts. Paralegals also act as human rights representatives during mediations and offer legal advice when there is a lack of clarity on the way forward. Police must handle all criminal matters, but gradually they are allowing paralegals to offer advice.

Majority of disputes at a community level are civil matters, which fall within jurisdiction of chiefs. Paralegals are increasingly involved in the resolution of civil matters, freeing up chiefs to focus on developmental issues and adjudication of criminal matters. Paralegals and village mediators focus on reconciliation between disputing parties.[143]

Other organisations such as the Center for Human Rights Education, Advice, and Assistance (CHREAA) are also involved in paralegal work. It assists persons detained at police stations and in prisons through its Malawi Bail Project, camp courts, police cell visits, and paralegal aid clinic to expedite their release. In one year CHREAA reached out to 18,565 detainees, 18,450 of whom succeeded in obtaining bail. Priority was given to

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[141] Anyango Oyieke, Meetali Jain, Ebenezer Durojaye and Esther Gumboh, "African Centre Of Excellence For Legal Empowerment In South Africa Feasibility Study" Field Visit Report (6-27 July, 2-8 September 2016)

[142] Anyango Oyieke, Meetali Jain, Ebenezer Durojaye and Esther Gumboh, "African Centre Of Excellence For Legal Empowerment In South Africa Feasibility Study" Field Visit Report (6-27 July, 2-8 September 2016)

[143] Anyango Oyieke, Meetali Jain, Ebenezer Durojaye and Esther Gumboh, "African Centre Of Excellence For Legal Empowerment In South Africa Feasibility Study" Field Visit Report (6-27 July, 2-8 September 2016)

the sick, the young, mothers with infants, persons with disabilities, and those in extended pretrial detention.[144]

Legal practitioners in Malawi were successful in preventing paralegals in government from undertaking legal aid defence court work for which they had been trained, thus indicating their concern that paralegals would threaten their professional monopoly.[145] The Law Society of Malawi also feared competition from the paralegals. The paralegals in turn emphasize that they did the work that does not need a lawyer and this service creates work for the lawyers interested in criminal matters. Despite requests from the judiciary, the PASI does not appear in the lower courts in order to maintain this professional balance.[146]

The role of the PAS NGOs has been to help with civic education and to prevent crime by educating the communities through the creation of youth groups. PAS also aids in the development of mediation and community policing to divert many cases from the state criminal justice system to the community village chiefs and village headman, where they can be quickly resolves through traditional means. The PASI has established paralegal clinics in prison to educate prisoners in the basic law and procedures that are applicable to their specific situations and enable them to represent themselves in the magistrate courts. In the same vein they assist convicted prisoners with noting appeals to the higher courts.[147]

The paralegals in Malawi primarily focus on the informal justice system. PASI through its initiatives brought up the Village Mediation Programme (VMP). It provides mediation services to the poor and vulnerable that are otherwise constrained to access formal justice. The VMP complements both the formal and the informal justice systems by resolving disputes at the early stages before they escalate. Statistics show that PASI has

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144 Malawi 2018 Human Rights Report

145 Mary E. Ndlovu, "Making Human Rights Real for All *Baseline survey information of paralegal work and training in Southern Africa"* (2005)*Netherlands institute for Southern Africa*

146 Ndalahoma, C. (2004). Eye of the Child- Paralegal Advisory Service, Member. Team Leader. See also Kasambara, C. (2004). Centre for Legal Assistance- Paralegal Advisory Service Member. Executive Director.

147 Paralegal Advisory Service, (2004). Newsletter Issue 4, February 2004, See also Chirwa, V. (2004). Centre for Advice, Research and Education on Rights-Malawi. (CARER), and Banda, M. (2004). Youth Watch Society-Paralegal Advisory Service, Member. Executive Director.

trained about 1,120 community volunteers as village mediators who complement the work of traditional leaders in resolving disputes. The village mediation services also help to reduce caseload in the formal as well as informal justice systems by assisting with the referral of matters from formal to primary justice agencies.[148] This has resulted in the building of linkages with rural communities and community-based organisations, to spread information about the criminal justice system, and to develop effective referral mechanisms between communities and the justice institutions. Diversionary and reintegration mechanisms have been integrated in the community. Some community mediators are illiterate but are able to skilfully mediate and have proven very effective.[149]

Paralegalism in Malawi also aids the criminal justice system of Malawi. The department of prosecution, which is under staffed and face financial constraints has particularly benefited. Backlogs have kept many defendants in pretrial detention for long periods. At the same time recruitment and retention of government attorneys remains a problem. MPS prosecutors with limited legal training prosecuted the majority of criminal cases. The Directorate of Public Prosecutions in the Ministry of Justice customarily tried high-profile cases and those involving the most serious offenses. As of September 2017, the directorate had 20 prosecuting attorneys supported by 18 paralegals, who also prosecuted certain lower court cases.[150]

Paralegals in the PAS are recognized by the Malawi justice system, and their duties are two-fold. First, they conduct regular clinics in the prisons, targeted especially for pre-trial detainees. These clinics aim to explain the process of criminal prosecution, from arrest and detention through summary trial to committal proceedings and trial in high court. The clinics include participatory dramatizations of bail applications, cross examinations, and pleas for mitigation in sentencing in order to familiarize prisoners with those processes.[151]

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148 Anyango Oyieke, Meetali Jain, Ebenezer Durojaye and Esther Gumboh, "African Centre Of Excellence For Legal Empowerment In South Africa Feasibility Study" Field Visit Report (6-27 July, 2-8 September 2016)

149 Anyango Oyieke, Meetali Jain, Ebenezer Durojaye and Esther Gumboh, "African Centre Of Excellence For Legal Empowerment In South Africa Feasibility Study" Field Visit Report (6-27 July, 2-8 September 2016)

150 Malawi 2018 Human Rights Report

151 Paralegal Advisory Service, Energising The Criminal Justice System In Malawi 8 (2002).

Second, the paralegals provide basic assistance to individual detainees and prisoners. For pre-trial detainees, the paralegals largely handle claims for dismissal and bail. The judiciary, police, and PAS have agreed on a standard form for bail applications which the paralegals are authorized to assist detainees in filling out. Paralegals also help detainees to track down relatives in the community who can serve as sureties. Paralegals meet directly with police prosecutors to review cases, and often succeed in facilitating detainees' release on bail or, in some instances, dismissal for want of prosecution. For convicted prisoners, paralegals assist with appeals of sentences, again using a standard form agreed upon with the judiciary. Between May 2000 and March 2003, PAS estimated that paralegals had facilitated the release of over 1,000 prisoners (including those released on bail). [152]

Training of paralegals

A significant proportion of paralegals have received formal training at a university or polytechnic. About 1-10% of paralegals have been involved at this level, with training lasting between one and three years.[153] The majority of training is offered by NGOs. Although the procedure is not enshrined in legislation in Malawi, the PASI has trained community-based paralegals.

Statutory recognition

The adoption, in 2011, of the Legal Aid Act created an independent Legal Aid Bureau empowered to employ paralegals alongside lawyers. Later in 2015 the Legal Aid Bureau replaced the Department of Legal Aid as the institution mandated to provide legal assistance to indigent persons. The bureau had 15 lawyers and 18 paralegals in the three offices, located in the largest cities: Lilongwe, Blantyre, and Mzuzu.[154]

The Malawi Paralegal Advice Service (PAS) may be the strongest example of paralegals working in cooperation with government. PAS paralegals are authorized to work within the prisons, to fill out bail and sentence appeal applications, and to meet with police

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152 Paralegal Advisory Service, Energizing The Criminal Justice System In Malawi 8 (2002), 11.

153 Mary E. Ndlovu, "Making Human Rights Real for All *Baseline survey information of paralegal work and training in Southern Africa"* (2005)*Netherlands institute for Southern Africa*

154 Malawi 2018 Human Rights Report.

prosecutors for the purpose of negotiating cases. Although these paralegals are presently funded by independent donors, the Malawi government might eventually fund PAS paralegals because the paralegals make the government's own system work more efficiently. At the same time that they improve Malawi's treatment of human rights, PAS paralegals save the government money by eliminating the cost of housing and feeding of wrongfully detained prisoners. These are capital expenses most governments in Africa suffer from. It is also an effective de-congestion measure.

The Malawi Prison Service's 'open door' policy and willingness to pilot a radical reform measure also made the paralegal system successful as it opened avenue for interfaces between the PASI and other government departments such as the Police of the Ministry of Justice.

Malawi has developed effective paralegal scheme through Paralegal Advisory Services Institute (PASI). PASI uses trained paralegals to provide legal aid and advice from pre-trial stage to appeal stage in criminal justice system of Malawi.[155] Paralegals are stationed in police station and in prison and they are equipped with motor-cycles, computers, printers, a copier and cell-phone for urgent communications.[156] Through these facilities paralegals in Malawi have been able to provide required legal aid in pre-trial stage and they have been able to liaise with lawyers to represent accused persons in court.[157]

The use of paralegal scheme in providing legal aid in pre-trial stages is efficient and cost effective in many ways. Proper trained paralegals have helped to reduce prison population in Malawi prisons and also helped to facilitate bail for arrested persons and by doing this they reduced the number of persons held in pre-trial detentions.[158] To this day, however, the legal profession is sceptical about the role of Paralegal and some Law Societies and lawyers are not comfortable with them because they think they are taking their jobs.[159]

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155 Available at: http://pasimalawi.org/index.html (accessed 20 February 2020)
156 As above.
157 As above.
158 United Nations Office on Drug and Crimes, (2014), *supra* note 158, 28
159 As above.

3. RECOMMENDATIONS ON RECOGNITION OF PARALEGALISM IN ZIMBABWE

In this part, recommendations are identified and articulated with clarity. The golden thread in these recommendations is that they should be ***specific*** (clear), ***targeted*** (identifying the action and actor), ***time bound*** (timed) and ***feasible*** (the proposed prioritised thereby classifying them into short, medium and long term depending on their nature, implementation requirements, legal and policy considerations. These recommendations are drawn from the findings made in respect of the full scope of this work. These seek to guide the dialogue on forma recognition in Zimbabwe, taking into account the experienced recorded in other African countries in particular Sierra Leone, Kenya and Malawi that were utilized as case studies in this Report.

4.1 Recommendations on the concept of paralegalism and importance in access to justice:

- Conduct an empirical study in addition to this one to record the baseline issues on all aspects of paralegalism and access to justice in Zimbabwe and utilize its findings to enrich the on-going dialogue by making a good case of recognition of paralegals in Zimbabwe;
- LRF ad partners should spearhead dialogue on recognition of paralegals by convening conferences on the subject in which relevant stakeholders in the justice delivery systems, including LSZ, should attend so that concerns or fears maybe raised early and addressed quickly without derailing the process.
- Priority should be on community-based paralegals who stand to immediately provide legal services to rural and marginalised communities as well as survivors of SGBV, children and other vulnerable populations.
- A generous definition of ‘paralegal’ and ‘legal services/assistance’ should be advocated from the beginning so as to ensure that, upon recognition, the scope of paralegal work is not too narrow as to fail to cater for the most vulnerable persons in society.

- Meanwhile, as dialogue on recognition gathers momentum, the LRF and like-minded CSOs should continue to empower people by training and deploying paralegals in communities as justice cannot wait for formal recognition.

4.2 Recommendations on recognition of paralegalism in Zimbabwe

- The Ministry of Justice Legal and Parliamentary Affairs (MOJLPA) should initiate consultations among justice delivery institutions (the Police, Judiciary, and National Prosecuting Authority, LAD, ZPCS) with a view to establishing gaps or needs in these institutions, which could be resolved by the introduction of paralegals.
- MOJLPA in consultation with CSOs already engaged in paralegal work should convene a Task Force whose terms of reference are to come up with aspects of recognition to be included in an Act of Parliament and cover the following:
    - Formally recognise paralegals as legal service providers in the Legal Aid Act, or some other Act of Parliament;
    - Generously define the scope of legal services to include in-court and out-of court assistance;
    - Clearly define the nature of work reserved for legal practitioners in respect of which paralegals may not participate in.
    - Provide for deployment of paralegals to remote areas where they come from and work as advisors to communities and traditional courts as well;
    - Set entry requirements into formal paralegal training;
    - Prescribe the minimum body of knowledge and skills set requirements for the training of paralegals in Zimbabwe, or delegate the development of such curricula to institutions of higher learning that offer a law degree.
    - Adopt a code of professional conduct for paralegals, an evaluation system, and enforcement framework;
    - Provide for the formal accreditation of paralegals as individuals or through organisations they work for.
- MoJLPA should initiate a process to allow professionally trained paralegals to access prisons through their organisations for purposes of offering paralegal

services to inmates and pre-trial detainees as a way to enforce prisoners' rights and decongestion of prisons.

- Paralegal work should be recognised without limitation in relation to

4.3 Recommendations on the legislative framework for recognition of paralegals

Further to the recommendations in relation to recognition above;

- The MOJLPA should initiate the process to amend the Legal Aid Act with a view to achieving the following:
    - Formal recognition of paralegals as legal aid service providers through government or accredited organisations;
    - Provide for placement of paralegals in key government justice delivery institutions to provide services there under supervision of a lawyer;
    - Extend the eligibility criteria
    - Require police, courts and prisons to refer unrepresented indigent persons to LAD for provision of legal aid;
    - Require unrepresented children to be provided with legal aid at the notice of the presiding judicial official;
    - Allow government-accredited paralegals to work for other non-state organisations in the provision of legal services.
    - Accreditation of organisations which provide legal services to communities for free;
    - Enforcement framework for paralegals to provide work of high professional standards;
    - Accredit institutions that train paralegals with a common body of knowledge across the country;
    - Require legal aid to be provided from the time of arrest until all appellate processes have been finalised and define the roles paralegals could play until the matter if finalised.
    - Second a paralegal to every Chief's court across the country to advise the Chiefs on diversion of cases from formal to traditional court and referral of cases from traditional court to the formal system;

- LRF and MJLPA with assistance of other partners develop a Legal Aid Policy in which paralegals are formally recognised and their areas of competences clearly defined;
- LRF and MOJLPA with assistance of other partners should develop a National Action Plan on Legal Aid with the view to implementing specific aspects of Legal Aid Act and Policy.