



## Shrinking Civic Spaces in Institutions of Higher Learning Project

### Paralegal Training



#### Paralegal Training Report

3-5 November 2020 | Young Men's Christian Association, Shauri Moyo, Nairobi

Compiled by Leonida Odongo

## **Disclaimer**

The content of this publication is the sole responsibility of Haki Nawiri Afrika and does not necessarily reflect a position of RLS.

## Table of Contents

Paralegal Training Report .....	2
Background .....	7
<b>Part 1: Ice Breaking and Expectations .....</b>	<b>7</b>
<b>Expectations.....</b>	<b>7</b>
<b>Pre-Test.....</b>	<b>8</b>
<b>Part 2: Introduction to Paralegalism, Law and Society.....</b>	<b>9</b>
Defining Law.....	9
Functions of the Law .....	9
Defining a paralegal.....	10
<b>Part 3: Citizenship, Refugees and Minority Rights .....</b>	<b>12</b>
Citizenship .....	12
Refugee Rights.....	12
Minority Rights.....	13
<b>Part 4: Gender and Development.....</b>	<b>13</b>
Challenges relating to sexual identity.....	14
<b>Day 2: Wednesday, 4th November 2020 .....</b>	<b>17</b>
<b>Part 1: Recap .....</b>	<b>17</b>
<b>Part 2: Property and Inheritance Rights .....</b>	<b>17</b>
Participants Comments .....	20
<b>Part 3: The Justice Procedure.....</b>	<b>21</b>
Rights of an Arrested person.....	21
To start the session, participants were asked to share their experiences of being arrested. The shared experiences were as follows: .....	21
Case 1 .....	21
Case 2 .....	21
Case 3 .....	21
Case 4 .....	21
<b>Part 4: Introduction to Criminal Law and Criminal Trial Process .....</b>	<b>22</b>
Arrests and Searches.....	22
Plea of not guilty.....	24
Bail.....	24
Rights of an accused person.....	25
Filing an appeal .....	25
Compensation .....	26
Observations .....	26
Participants' Comments .....	26
<b>Part 5: Alternative Dispute Resolution .....</b>	<b>27</b>
Bill of Rights and the Kenyan Constitution.....	30
Repugnance in Justice .....	30
<b>Part 6: Child Rights.....</b>	<b>30</b>
Survival Rights.....	31
Development Rights .....	31
Protection Rights .....	32
Participation Rights.....	32
Questions .....	32

<b>Day 3: Thursday, 5th November 2020 .....</b>	<b>33</b>
<b>Part 1: Recap .....</b>	<b>33</b>
<b>Part 1: Democracy and Governance .....</b>	<b>34</b>
<b>Part 2: Advocacy from a Legal Lens .....</b>	<b>35</b>
<b>Observations.....</b>	<b>37</b>
<b>Part 3: Action Plans.....</b>	<b>39</b>
<b>Conclusion.....</b>	<b>39</b>

## Abbreviations

**AG:** Attorney General

**AU:** Africa Union

**CUEA:** Catholic University of Eastern Africa

**CUEASO:** Catholic University of Eastern Africa Students' Organisation

**DSJC:** Dandora Social Justice Centre

**EACRN:** East Africa Child Rights Network

**EALA:** East Africa Legislative Assembly

**ICESCR:** International Covenant on Economic Social and Cultural Rights

**IO:** Investigating Officer

**LRF:** Legal Resources Foundation

**MMU:** Multi-Media University

**MSJC:** Mathare Social Justice Centre

**NMS:** Nairobi Metropolitan Services

**NPS:** National Police Service

**OB:** Occurrence Book

**SEKU:** South Eastern Kenya University

**SDGs:** Sustainable Development Goals

**PAR:** Participatory Action Research

**PLHAS:** Person Living with HIV and AIDS

**UDHR:** Universal Declaration of Human Rights

**WILD:** Women in Liberation and Development

**WMW:** World March of Women

## Background

With support from Rosa Luxemburg Stiftung -Eastern Africa Regional Office, Haki Nawiri Afrika organised a 3-day paralegal training from 3-5 November 2020 at the Young Men's Christian Association Centre in Shaurimoyo-Nairobi. The training was under the Shrinking Civic Spaces Project whose goal is to expand the civic space among students in institutions of higher learning. The objectives of the project are: To Enhance the capacity of university students to demand and defend their rights; To strengthen responsiveness to issues affecting students in institutions of higher learning; Enhance the capacity of university students to access justice and enable students solve community problems. The three-day training had a total of 150 participants and was a mix of students and young activists, artistes, smallholder farmers, community health practitioners and community members drawn from Nairobi, Machakos and Kiambu counties.

# Day 1: 3 November 2020

## Part 1: Ice Breaking and Expectations

The participants were asked to introduce themselves, their universities and mention their expectations of the training. The represented universities were: University of Nairobi (UoN), Catholic University of Eastern Africa (CUEA), Kenyatta University (KU), South Eastern Kenya University (SEKU), Daystar University, Kenya School of Law, Multi-Media University (MMU), Mathare Social Justice Centre, Kiambiu Social Justice Centre, Dandora Social Justice Centre, Kenyan Peasants League, World March of Women and Eastern Africa Child Rights Network (EACRN).

## Expectations

The participants stated their expectations as follows:

- Learn about basic laws
- Understand criminal law
- Be able to differentiate between a paralegal and public litigation
- Understand property and inheritance rights
- Learn how paralegal work is financed
- Learn more about paralegals
- Be able to solve some problems in the community
- To be able to understand the role of a paralegal /advantages to the community
- Gain skills to bring change in own community and university
- Learn how to defend the less fortunate ones in the society when they are involved in any kind of problem

- To learn and unlearn duties of a paralegal in the community
- Internalise dynamics on legal justice and criminal reforms procedure on correctional facilities
- To learn the rights of an arrested person and rights of remandees
- To understand how to solve problems regarding court matters
- Learn how to apply the law effectively
- Gain knowledge on legal literacy
- Understand roles of the police
- Learn how to resolve conflicts within the community
- Understand how to engage law keepers when encountered
- Learn more about legal representation
- Learn more and see the gaps that need to be filled

### Cross section of participants



### Pre-Test

The participants were taken through a pre-test to gauge their level of knowledge on basic law. The pre-test assessed knowledge on roles of a paralegal in the community, sources of law, knowledge of examples of legislations in the Kenyan context, steps to undertake when handling cases of gender based violence, violations of the right to citizenship, rights of an accused person, roles of justice system institutions (police, prisons and courts and the process of handling cases of sexual offence.

## Part 2: Introduction to Paralegalism, Law and Society

It was explained that the law regulates all aspects of people's lives and that it is always said that ignorance of the law is no defence. It was emphasised that the assumption that everyone must be aware of law, therefore makes it important for passing basic legal information through paralegalism.

The participants were asked to imagine a land without laws and how life would be in that situation. A reference was made to Thomas Hobbes book, the Leviathan<sup>1</sup>, which describes that life without law, was short and brutish and emphasised the importance of order. It was mentioned that the laws are formulated to regulate man's behaviour and that law exists because we live in a society where one's actions affect people in one way or another. It was pointed out that there is need to regulate conduct in order to control society.

Laws were said to be broadly categorised into two; Legal rules which are rules that have the force of the law and non-legal rules also known as norms and morals which do not have the force of the law but control morals in society. It was mentioned that laws can be divided into municipal law or international law, public or private law, civil or criminal law, statutory or non-statutory law and substantive or procedural law. It was further said that a judge could also make a law.

### Defining Law

The law was defined as a set of rules and customs that regulate orderly conduct of and affairs in society. It was said that members of society make laws and the enforcement is by the state machinery. In Kenya, laws are made by parliament on behalf of the citizenry and the enforcement is through the government by officers such as Provincial Administration (PA), the police, magistrates and prisons department among others.

### Functions of the Law

It was said that the law guarantees and defends the rights of the people. It was pointed out that through laws, society is stabilised and this helps promote peace and liberty. It was explained that the law ensures violations of rights is monitored. However, despite the existence of laws, it was cited that violations and abuse still continues in Kenya and in some cases set laws do not apply to everybody equally with the poor being the most affected by rights violations and injustices. In discussing law, various sources of law were described. These are moral law where actions are determined to be either right or wrong and statutory sources of law, which are determined through bills discussed in parliament.

---

<sup>1</sup> <https://www.britannica.com/topic/Leviathan-by-Hobbes>



It was mentioned that moral law are things considered repugnant but not necessarily criminal in nature. Other sources of law were described as the constitution, which is the highest law of the land, written statutes, customary law which is derived from customs such as the case of Kenya's northern frontier. An example was given of Marsabit where if one commits a murder and the victim is male, the perpetrator pays 100 camels and when the victim is female, the perpetrator pays 50 camels. It was said that customary law is respected by the community and is accepted as a result of the existing customary practices which are passed on over time. It was emphasised that on matters of defilement, customary law is not upheld and the perpetrator must be tried in a court of law.

It was said that despite customary precedence in some communities, legal statutes also simultaneously apply. For example, it was said that in Turkana, when murder is committed and the perpetrator gets arrested and charged formally in court, the community keeps monitoring the case and when the perpetrator gets released, his family is still expected to compensate the family of the person murdered before the jail term commenced. It was said that stories of what happened would be passed on for years in the community until the perpetrator re-joins the community from jail and compensates the aggrieved family for the loss.

### Defining a paralegal

A paralegal was defined as individuals based in the community who has basic knowledge of the law but are not lawyers. It was mentioned that paralegals play the role of assisting community members handle basic legal matters and offer legal services on voluntary basis. It was said that paralegals play various roles in the community such as:

- Handling disputes at the local level
- Negotiating on behalf of the community
- Community mobilisation to demand and defend rights
- Preparation of basic legal documents
- Conducting referrals
- Lobbying and advocacy work at the local level
- Monitoring and documenting human rights violations
- Conducting referrals and linking the community with the services they need

The participants were further taken through basic legal concepts, which included:

**Plea:** This is the process of receiving and recording the response to the charges of the accused. It is important for the accused person to understand what is the charges and if they don't they have a right to request for the charge to be re-read to them.

**Plea bargaining:** This is when a defendant agrees to a compromise. It was said is important when asking for plea bargaining to ensure that one is guilty. It was explained that plea-bargaining is a process of requesting for a lesser sentence. An example was given of a case where a person who pleaded guilty and was sentenced to death. It was said that the accused person did not understand the gravity of pleading guilty.

It was emphasised that paralegals are important in helping an accused person journey through the justice process and that in the example of the defendant who pleaded guilty, a paralegal would have advised them on the consequences of pleading guilty. It was said that in some cases people plead guilty because they want the case to be finalised in the shortest time possible.

The participants were however cautioned against plea-bargaining to only accept plea-bargaining after thoroughly assessing their case and are sure that the options they choose are the best given the prevailing circumstances. It was further explained that a plea of guilty implies admission of the charges whereas a plea of not guilty is a denial of the charges.

**Plea agreement:** This is the final agreement between the defendant and the court on the terms of the plea bargain.

**Defendant:** This is the person who is accused

**24-hour rule:** This is the number of hours that an arrested person should spend in a police cell. Being placed in a police cell for over 24 hours was said to be a violation of rights. It was mentioned however that courts have the power to warrant a person to be kept in police custody for longer than the stipulated 24 hours pending investigations.

**Bond:** This is an amount where an accused person while in custody binds themselves to comply with conditions set by the court and failure to comply he or she pays the fixed amount.

**Free bond:** This is the bond determined by police officers in petty offences where the accused is not a flight risk.

**Bail:** This is the amount of money paid by the accused person as surety for his release as the case proceeds. The bail terms must be a reasonable amount according to the Kenyan Constitution.

**Appeal:** This is the process of requesting for a case to be reviewed because the defendant does not agree with way the justice had been dispensed.

“In Kenya justice is rarely served, it goes to the highest bidder”-  
Mercy Mbatia, law student UoN

We need to re think some of these old regulations in our varsities”. -  
Thuku Mburu, Legal Resources Foundation

## Part 3: Citizenship, Refugees and Minority Rights

### Citizenship

It was discussed that citizenship is contained in Chapter 3 of the Constitution of Kenya (COK). It was mentioned that a person becomes a Kenyan citizen by birth if the person is born of either a Kenyan mother or father. It was mentioned that Kenyan citizens can also be a child found in Kenya who is less than 8 years of age and whose nationality or parents are unknown is presumed to be a Kenyan, a foreigner can also apply to be a Kenyan citizen by registration.

It was discussed that every person who becomes Kenyan citizen commences being a citizen on the day the citizenship is acquired. It was said that citizenship could be acquired by birth, that is being born in Kenya of Kenyan parents or if born outside Kenya and either of the parents is a Kenyan or by registration. It was further mentioned that citizenship couldn't be lost through dissolution of a marriage. It was discussed that every citizen has rights and privileges that can only be limited by the constitution, for example when one commits a crime, however, citizenship by birth cannot be revoked. It was further said that through citizenship, one is entitled to apply for either a passport or an identity card. It was also mentioned that the Kenyan Constitution 2010 allows for dual citizenship.

### Refugee Rights

It was said that refugees are a vulnerable group on matter of citizenship because they have run away from their countries either because of war, persecution or other forms of abuse. It was mentioned that refugee rights demand recognition because they suffer from discrimination and are in need of protection.

It was discussed that due to vulnerability, sometimes refugees do not get access to medical services, lack of identity cards or identity documents may hinder them from accessing basic services such as education or they may be forced to pay more for services compared to local citizens. It was explained that some of the reasons that make refugees become discriminated is the fear of locals that refugees will take away their jobs. Examples of vulnerabilities cited were xenophobic attacks against non-residents in the case of South Africa due to lack of jobs.

Language barrier was also cited as a reason making refugees vulnerable because of their inability to communicate or express themselves. It was said that in case one comes into contact/conflict with the law and does not understand either English or Kiswahili, they have the right to request to have an interpreter in a language that they would understand.

## Minority Rights

In discussing minority rights, it was explained that various characteristics contribute. Examples given were language, culture and behaviour. An example of sexual minorities was given as a category of people who due to their nature can be subjected to rights violations either intentionally or unintentionally, for instance a case of an intersex person who has both male and female organs being taken to a males' prison where they are at risk of sexual abuse by male inmates. Another example given was the case of gays and lesbians who are subjected to arrests because of their sexual orientation.

### Deliberation on Minority Rights



## Part 4: Gender and Development

It was explained that both men and women should equally participate in development. It was pointed out that in some instances people face discrimination based on their gender or on what they ascribe to.

Sex was defined as the biological characteristics and attributes of men and women designated at birth. It was said that sex is universal and that biological indicators of sex are internal sex organs and external genitalia. Gender was defined as socially constructed roles and responsibilities of men and women in society. These include the qualities and opportunities associated with being male and female and are learnt through the socialisation process. It was explained that gender roles differed within and between cultures. In some cultures, women are responsible for construction of houses, in others this is

seemed as taboo. It was also mentioned that gender is influenced by a wide range of social and economic factors whereas, sex is influenced wholly by genetic factors.

It was said that gender stereotypes occur in the workplace and within communities with men taking up masculinity roles hence assuming “control” at the expense of women. It was also noted that gender stereotyping is also experienced in education and training where women are subjected to lower cadre jobs compared to men. It was mentioned that most African societies are patriarchal and that almost all family assets are owned and controlled by men.

Sexual orientation was defined as sexual relations between those to whom one is physically or romantically attracted. It was said that these could be straight (heterosexual), gay/lesbian (homosexual), intersex, bisexual (having sexual relations with both males and females) and pan-sexual (having sexual relations with everybody). Bisexual was described as a person who is emotionally, physically and or sexually attracted to both males and females.

Intersex was described as a variety of conditions resulting into a discrepancy between external genitalia and internal reproductive organs (testes and ovaries), resulting into a condition in which a person is not easily classifiable as either male or female. An example of this was given as Semenya<sup>2</sup>. Transgender was described as a condition in which people whose gender identity, expression or behaviour is different from that typically associated with the sex assigned at birth.

Gender identity was defined as a person’s innate, deeply feeling physiological identification as a man or woman and as an identity that may not correspond from the sex assigned to them at birth. For example, at birth one’s sex may be assigned as female but they identify as males. Other examples include cross-dressers who can be male but dress as females or females who dress as males. Another example is transsexual who are people assigned a gender identity different from their assigned sex as well as asexual -people who do not have sexual organs and therefore are neither defined as males or females. Pansexual was referred to as people who get attracted to everybody irrespective of gender identity or sex.

### Challenges relating to sexual identity

Challenges related to sexual identity were discussed as follows:

- Stereotyping on basis of sexual orientation
- Inability to operate *mpesa*<sup>3</sup> because they are neither males or females for example in the case of intersex
- Discrimination
- Social ostracism

---

<sup>2</sup> Semenya is a South African athlete

<sup>3</sup> *mpesa* is mobile money transfer

- Hate crimes
- Distrust by authorities
- Lack of legal status or documentation

It was also mentioned that gays and lesbians also go through intolerance and fear from mainstream community who identity as heterosexuals. It was explained that in some cases when children are intersex, parents tend to force their children to undergo surgery to “correct” their sex.

It was emphasised that gender equality is a fundamental human right and that men and women ought to have equal opportunities, rights and obligations in life. However, it was said that women and men in some cases go through various forms of discrimination as a result of their gender. An example of this was given as property rights where widowed women are ostracised and their property taken away and where women are deprived of property rights under the assumption that they are likely to inherit from where they marry whereas males have both control and user rights in relation to property.

It was discussed that gender stereotypes are preconceived ideas of what roles males and females are assigned on the basis of their gender. It was elaborated that stereotypes based on gender have a negative impact in limiting development of natural talents, professionalism as well as deter both men and women from achieving their life opportunities. It was explained that stereotypes originate from deeply imbedded prejudices, values, norms and attitudes against women. It was said that men use these stereotypes to justify discrimination and the power domination on women. It was emphasised that gender roles are learned and imposed by social values and that everything a man can do; a woman can also do.

### Deliberation on Minority Rights



Examples of stereotypes were given as follows; men should be good in sports, women cannot figure out how to fix a puncture, men are rough and messy, women should look pretty and stylish, boys excel in science and technology, a wife should be beaten just a little.

It was mentioned that in some Kenyan communities, women are the ones that encourage the stereotypes and in extreme cases violence, for example communities where women believe that if they are not beaten they are not loved.

To further emphasise on inequality in access to justice within communities, an artiste from Dandora , Kgz Heavyweight gave a performance on hurdles communities in informal settlements face on human rights and access to justice.

### *Artistic Performance on access to justice -the Kenyan experience*



# Day 2: Wednesday, 4th November 2020

## Part 1: Recap

During the training, a recap of the previous session was done on daily basis. The purpose was to assess whether the participants were internalising the training content and at the same time prepare the participants for each day's session. Using a ball, participants were each asked to share key things learnt the previous day and what stood out for them. The participants acknowledged gaining new information, skills and better understanding of legal processes. The participants also gained practical skills in advocacy on legal issues and human rights.

### Recap



## Part 2: Property and Inheritance Rights

It was discussed that property and inheritance rights are contained in Chapter 160 of the Laws of Kenya. It was mentioned that property issues are often contested across Kenya especially when the deceased had left no will and when the deceased never shared the existence of this property with other family members. It was added that when one loses a family member, it is important for them to visit the website of Unclaimed Assets Authority to get information about property that is unclaimed.



It was said that what one needs is an identity card of the deceased which is keyed into the website to access information. It was said that many people have also lost property due to their mental status.

Property rights of widowed women were discussed in-depth, it was pointed out that as much as the Kenyan Constitution stipulates that males and females are equal during burial of a deceased husband, especially in rural areas brothers and other in-laws disinherit widowed women and deprive them of property.

It was said that land is a very important resource among Kenyans and that this is the most contested property in the country today. It was mentioned that land is important because it is a source of livelihood, source of identity, and many people depend on land for survival. It was pointed out that article 260 of the Kenyan constitution interprets property as a right or interest that arises from; money, land, goods or personal property, intellectual property or other improvements of land. It was said that land is broadly divided into public land, private land and community land. It was explained that there is gender discrimination in relation to land in Kenya with traditional customs discriminating women against ownership of land. It was mentioned that despite their population (over 50 percent) of the Kenyan population, women own very small portions of land. It was discussed that widow disinheritance is on the rise and many widows have lost land to their brothers in law.

It was noted that when dealing with land issues, an identity card is a very important document during settling disputes. It was observed that across many African communities writing is equated with bad omen or death. It was noted that due to discrimination of women on matters of property and inheritance, many women resort to buying land without the knowledge of their spouses. It was pointed out that women have user rights but not transfer rights in relation to land, and this makes it difficult for women to sell off land because they do not have the rights of transfer of ownership in many households.

It was noted that women suffer more in the rural areas where burial takes place because customary laws in many communities take precedence. It was said that property rights issues for widows is an issue that paralegals can take up to ensure protection not only of the widows but also children left behind. It was said that it is important to write wills to safeguard a family against disinheritance and to ensure those left behind are taken care of. It was observed that gender relations make women remain out of the visible job market and hence their actual contribution is never quantified, an example of this was given as unpaid care work.

“There is a lot of mistrust in families and this is made more difficult when property and inheritance issues arise”. - Kang’ethe Gaudenzio, student, Kenyatta University

## Experience sharing on property and inheritance rights



## Experience sharing on youth arrests and challenges in accessing justice from a Youth's Perspective



## Experience sharing on justice at the community level on issues related to land rights



“There is law in practice and law in books and sometimes they contradict” -  
Brian Abok, Kenya School of Law

### Participants Comments

- In an ideal situation, one should be innocent until proven guilty the reality is quite the opposite
- An arrested person has a right to an advocate and to communicate
- Prisons should be places of rehabilitation
- An arrested person has the right to remain silent, the law provides for this, but many a times arrested people get bullied into confessions
- Why do we have very few lawyers in relation to those who need legal services in Kenya?
- Who is responsible for the mental health of persons in the justice system?
- Laws will not work unless there is investment in dialogue
- You cannot have plea bargains in cases of murder and sexual offences in Kenya
- We need to talk about issues affecting minorities
- Will writing is important in law because it prevents conflicts in the event of death
- Property and inheritance rights are a component of family law

## Part 3: The Justice Procedure

### Rights of an Arrested person

To start the session, participants were asked to share their experiences of being arrested. The shared experiences were as follows:

#### Case 1

“I had boarded a *matatu*<sup>4</sup> and got talking with a fellow passenger not knowing that he was wanted by the police, I exchanged contacts and was in communication for a period of time. One day I got tracked using my phone and was arrested and taken to Criminal Investigation Department (CID) headquarters in Nairobi, kept at the CID for two weeks. I was being fed but under constant watch. My cell phone confiscated and monitored. It was a scary feeling. I was eventually released to go home”.

#### Case 2

“I was arrested while in the company of a friend, had been sent by parents to buy a mattress. The police officers put us in a police car locally known as *Mariam* and every few metres we would stop, a few arrested persons would alight and new people join in. We were taken to the police station and had to part with money before we got released”.

#### Case 3

“I got arrested on Friday with a group of friends. When we got to the cells, we found adults and children mixed together. We were told to pay bribe if we did not wish to be taken to court on Monday. In an ideal situation, children should not be mixed with adults because this goes contrary to the rights of the child”.

#### Case 4

“My brother bought a phone not knowing that it was stolen. As a law student, I could have argued the circumstances on possession of the phone with the police on behalf of my brother, but I felt very intimidated and decided to keep quiet. We parted with some money and my brother got released.”

---

<sup>4</sup> Matatu is a public transport in form of a mini bus

## Part 4: Introduction to Criminal Law and Criminal Trial Process

It was mentioned that the law aims to regulate social behaviour and that criminal law is that branch of law that defines crimes and their punishment. It was explained that a crime is an anti-social behaviour meted by a person to another or to an institution. It was mentioned that a suspect is a person who is thought to have committed a crime and an accused person was described as a person who has been charged in a court of law. It was elaborated that in criminal law, once a person is found guilty of an offence, they become convicts. It was said that the general assumption is that everyone is aware of the law and that ignorance of the law is no defence.

### Understanding Criminal Law in Kenya



It was noted that lack of knowledge of the law is one reason as to why there are many cases in court causing backlogs whereas some of these cases can be solved out of court.

### Arrests and Searches

It was said that when a person is arrested, the police officer might search the arrested person and place their belongings such as phones, money and belts in safe custody. It was also said that if the arrested person is female, the search should only be done by a female officer and vice versa.

The rights of an arrested person were discussed as follows:

It was pointed out that at the police station, the arrested person is searched and the list of items taken from the arrested person prepared and signed for. It was said that the arrested person's names, address and reasons for arrest are recorded in the Occurrence Book (OB). It was mentioned that failure to book a person in the OB makes tracing the person a challenge.

It was emphasised that men and women must be placed in separate cells and that children should be separated from adults. It was however observed that in there exists incidences where children are put together with adults. It was also said that an arrested person one is not supposed to be mixed with convicts because upon arrest one is presumed to be innocent until proven guilty.

It was mentioned that an arrested person should be held at the police station for 24 hours and that weekends and holidays are not counted. The 24 hours was explained to only constitute the hours of the working days of the court. It was said that for capital offences the period for holding might be longer such as cases of treason and terrorism. It was explained that every arrested person has a right to bail and that bail applications are made in court. It was emphasised that an arrested person has a right to be released on bail while waiting appearance in court. It was mentioned that every offence is bailable in Kenya courtesy of the 2010 Constitution.

It was said that as an accused person one has the right to remain silent and this right is recognised by the Constitution. It was discussed that the accused has the right to request the charge to be re-read and explained until he or she understands it properly, it was also emphasised that the accused can either plead guilty or not guilty.

It was mentioned that government officials making an arrest have to identify themselves and that when in uniform, they are also required to produce a police identity card. It was also mentioned that if the police officer is in uniform, their official serial number must be clearly displayed. It was explained that during arrest, the police officer must tell the reason for arrest

It was explained that a plea of guilty is to admit the charge and that when a person pleads guilty, the prosecution is required to present facts upon which the charge is based. It was said that for a plea of guilty to be accepted, the accused is given an opportunity to plead for a sentence that is not severe before the sentence is passed.

Examples of pleas were given as follows:

- I am the bread winner in my family and my family depends on me
- I run a restaurant and employ 20 people, my absence will make my employees to lose their income

## Discussions on Rights of an Arrested person



### Plea of not guilty

It was mentioned that a plea of not guilty is a denial of charges presented to the accused person. It was said that, there is no appeal when the accused has pleaded guilty. It was observed that some people plead guilty so that the case can be completed in the shortest time possible. It was said that an accused person could challenge the charges put before him or her on the grounds that they had been previously acquitted of the same charges, are based on a wrong section of the law or are not based on any existing law. It was further said that many people plead guilty because they think that this is likely to lessen their charges.

It was elaborated that when a person records a plea of not guilty, a hearing date is set and there is a mention of the case every 14 days (two weeks) of which the accused is required to attend. The mention date was described as a date where the accused person can renew his or her bail application, apply for its reduction or variation, change a plea or lodge a complaint.

“Arrested persons, just like any other citizen have the right to information and right to remain silent”-Mburu Thuku, advocate, Legal Resources Foundation

### Bail

It was said that bail is a conditional release from custody for an accused person pending the hearing of their case. It was mentioned that there are two types of bail; cash bail where the accused person deposits a sum of money in the court and is given back at the end of the case where or not one is guilty and bond is where the accused person signs an agreement to appear in court whenever required.

It was added that surety is a person who promises to ensure that the accused person keeps his or her part of the bargain and signs another a form undertaking this effect. It was explained that surety deposits assets in court such as a title deed, log book and that in case the accused fails to appear in court as agreed a surety has to surrender the value of the bond to the government

### **Rights of an accused person**

The rights of an accused person were described as follows:

- The right to prepare for their defence
- The rights to defend himself or herself
- The right to an advocate
- Right to an interpreter

### **Discussion on Rights of Arrested persons**



### **Filing an appeal**

It was said that an appeal is filed by presenting in court a written and signed document which summarizes the reasons for the appeal and that this should be accompanied by a copy of the charge sheet, proceeding and judgement of the lower court.

It was said that appeal court listens to evidence recorded by the trial court, arguments from both sides and arrives at its own decision. It was said that the person who has lodged an appeal is entitled to be present during the appeal.



## Compensation

It was explained that a wrongfully accused person can obtain compensation in a civil case against his or her accusers, it was however mentioned that getting the compensation itself can be a lengthy process and many people give up midway.

## Observations

- There is a lot of fear of the justice system in Kenya
- Bribery is rampant and used as a shortcut to get out of the justice system
- Bribery has been normalised
- Many people are not aware of their rights and hence vulnerable when it comes handling issues within the justice system

## Participants' Comments

- The police use fear as a tool of intimidation
- Majority of those involved in the criminal justice system are males compared to females
- There is a lot of fear of being fingerprinted, this is also linked to the fear of not accessing Certificate of Good Conduct which is a prerequisite when accessing job opportunities
- Being in police custody is a scary experience
- Police officers have varying personalities, some can listen to reason, others are very intimidating
- Some crimes are very petty and do not warrant fingerprinting but many people are unaware of this
- Finger prints by the police is used to intimidate the arrested person
- Access to justice remains a major challenge more so to young people in an ideal situation you should be innocent unless proven guilty, but the reality is opposite
- Mental health should be looked into within the context of the justice process
- In some instances, rogue police officers are celebrated
- We need to talk to young people that crime is a vice
- It is very important for students to know their rights
- There is a need to form movements in our communities to champion issues of justice and democracy
- We need to speak for ourselves and for others
- We need to decolonize our justice system
- The arresting officer is not the Investigating Officer (IO), but very few people are aware of this
- We need to rethink our justice system
- Being in the justice system is time wasting especially for students
- We need to speak out on issues affecting minorities

- Legislations is part of what is used to enhance shrinking civic spaces
- The constitution-the highest law of the law guarantees an accused person the right to remain silent

“How accessible is justice for persons with disability?”- Brian Odero,  
Student-Kenyatta University

## Part 5: Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) was described as any means of setting disputes outside of the courtroom. It was mentioned that ADR is a restorative justice approach whose objective is to mend a relationship and not to punish.

The reasons given for adopting ADR were described as follows:

- Flexibility and control- parties can set terms of how the process will work
- None adversarial (amicable in nature)
- Speed
- Low cost
- Simplified rules of evidence
- Privacy and confidentiality
- Arbitrator selection (parties to a conflict are the ones that determine who the arbitrator is)
- Longer lasting solution

It was explained that Article 159 (2) (C) of the Kenyan Constitution recognises ADR to include “Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.”

It was said that Article 159 (3) of the Kenyan Constitution stipulates that Traditional dispute resolution mechanisms shall not be used in a way that:

- Contravenes the Bill of Rights
- Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
- Is inconsistent with this constitution or any written law

## Discussion on Alternative Dispute Resolution



The traditional forms of ADR were discussed as follows:

Mediation	<ul style="list-style-type: none"> <li>• An independent neutral third party (mediator) facilitates the parties reaching their own agreement to settle a dispute</li> <li>• Mediator never imposes a decision upon the parties</li> <li>• Depends upon the commitment of the disputants to solve their own problems</li> <li>• The role of a mediator is to keep the parties talking and help them move past more difficult points of contention</li> <li>• Typically takes five stages</li> </ul>
Negotiation/ reconciliation	<ul style="list-style-type: none"> <li>• This is the most common form of dispute resolution and carried out in many forms each day</li> <li>• Parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation</li> </ul>
Conciliation	<ul style="list-style-type: none"> <li>• Similar to mediation with the additional feature that the conciliator, rather than just the parties, has the power to propose compromises and agreements.</li> <li>• Usually applied immediately a dispute arises in order to prevent its escalation</li> <li>• Target is to enhance good relations where there is no winner</li> <li>• The method is widely used in labour matters</li> </ul>

Conciliation	<ul style="list-style-type: none"> <li>• A conciliator is a neutral third party appointed to listen to arguments.</li> <li>• A conciliator does not give a ruling but aims to assist the parties see all sides of a dispute so that they can agree on mutually satisfying outcome.</li> <li>• Outcome not binding though based on mutual respect and the need to preserve relationships</li> </ul>
Arbitrator	<ul style="list-style-type: none"> <li>• Managed by a dispute resolution practitioner called an arbitrator</li> <li>• Disputants present their points of view and facts to the arbitrator and the arbitrator then makes a decision</li> <li>• Much more formal and binding</li> <li>• Often involves independent tribunals chosen by the courts or the parties</li> <li>• Decision enforceable by the courts</li> <li>Advantages of arbitration</li> <li>• Decision of arbitrator is binding upon the parties, whereas parties must agree to a solution in the other forms</li> <li>• Less expensive than litigation</li> <li>• Parties can choose their arbitrator, whereas they cannot choose their judge in litigation</li> <li>• Parties can set some of their own rules in the conduct of the hearing</li> <li>• Can be done at times convenient to the parties</li> <li>• Less stressful than litigation</li> </ul>
Court litigation	<ul style="list-style-type: none"> <li>• Disputants allowed to appoint lawyers</li> <li>• Disputants generally agree to the procedure before the dispute arose</li> <li>• Disputants mutually agree on who will hear the dispute</li> <li>• Persons in dispute mutually agree on who will hear the dispute</li> <li>• The proceedings are less formal</li> </ul>

“We should rethink our justice system and rectify the inherited justice system from Britain”-Brian Odero, student Kenyatta University

## Bill of Rights and the Kenyan Constitution

The Bill of Rights and their alignment to the Kenyan Constitution was described as:

- Right to life (Article 26)
- Equality and freedom from discrimination (Article 27)
- Human dignity (Article 28)
- Freedom and security of the person (Article 29)
- Right not to be subjected to slavery, servitude or forced labour (Article 30)
- Right to privacy (Article 31)
- Freedom of religion (Article 32)
- Freedom of expression (Article 33)
- Freedom of association (Article 36)
- Freedom of movement (Article 39)
- Right to property (Article 40)
- Right to family (Article 45)
- Access to justice (Article 48)
- Fair hearing (Article 50)

## Repugnance in Justice

It was mentioned that some incidences are considered repugnant /unacceptable and cannot be handled using ADR. Examples given were:

- Murder
- Defilement
- Rape
- Indecent assault
- Female Genital Mutilation

It was emphasized that the Kenyan law has no leniency when it comes to sexual offence matters and that Section 40 of the Sexual Offences Act stipulates that the decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued rests with the Attorney General (AG)

## Part 6: Child Rights

It was mentioned that Kenya has ratified the Convention on the Rights of the Child and that children issues are handled while taking into consideration the best interests of the child. The Geneva Declaration (1924) was described as the international document setting down the fundamental principles for the protection of the right of children. It was elaborated that the Universal Declaration of Human Rights (UDHR) of 1948 was the first document drafted after the formation of the United Nations that recognized human rights,

example given were right to adequate standard of living and right to education. It was said that the declaration was intended to be a standard for countries and it adopted 10 basic principles for the protection of the welfare of children. It was elaborated that in Kenya, child rights are contained in the Children Act (2001).

### Session Right of the Child



The Convention on the Rights of the Child (CRC) outlines the rights of children as divided into four broad categories. These were described as

#### Survival Rights

- These are rights that protect the lives of children and ensure their survival. They ensure that conditions that guarantee a child's survival are put in place. The rights include:
- The inherent right to life (Article 6);
- Right to access to health and medical services (Article 24); and
- Adequate standards of living guaranteeing access to Nutritious food, decent shelter, clean and safe drinking water and appropriate clothing;(Article 25)

#### Development Rights

- All children have a right to develop well intellectually, physically, morally, emotionally socially and in all aspects. A child's development rights include:
- Right to free and compulsory Education (Article 28);
- Access to appropriate information (Article 17);

- Social security including social insurance (Article 26); and
- Parental love and care (Articles 5,7,9 an
- Armed conflict and hostilities (Article 38);
- Harmful cultural practices (Article 24 (3))

### Protection Rights

These ensure children are safeguarded from all forms of abuse, exploitation and neglect.

- Protection of children from minority communities and groups (Article 30)
- Torture, inhuman and degrading punishment and treatment (Article 37)
- Right to rest, play, leisure and recreation (Article 31)

### Participation Rights

This involves children's freedom to express their opinions including having a say in matters affecting their lives, participating in associations to nurture them towards adulthood.

It was discussed that according to the Children Act, every child has a right to life and that all actions undertaken on behalf of children must be in the best interests of the child. It was elaborated that no children should be discriminated on any ground such as language, disability, colour, race or anyother status.

It was discussed that every child has the right to parental care and that in case the child cannot live with the parent, the best alternative parental care should be identified. The right to education was described as an important right and the responsibility for the provision of this right was said to lie with the parents of the child and the government. It was said that every child in Kenya is entitled to free basic education. On religion, it was explained that children have the right to religious education and this is subjectto appropriate parental guidance. It was emphasised that child labour is outlawed in Kenya and that every child has the right to a name and nationality. It was mentioned that children are vulnerable and the law protects them from sexual exploitation. It was discussed that children officers are responsible for handling cases of vulnerable children and those in need of protection.

### Questions

Q. If child labour is outlawed in Kenya, why was the Nairobi Metropolitan Services (NMS) using street children<sup>5</sup> in constructing a section of the road onMoi Avenue in Nairobi?

A. *This is a wrong move and illegal because, legislations in Kenya do not allow for child labour*

It was said that every parent has a responsibility towards ensuring that their children have adequate diet, shelter, medical care, education, guidance and shelter. It was said that every child has rights and these rights come with responsibilities. It was discussed that the International Covenant on Economic, Social and Cultural Rights (ICESCR). Through the ICESCR governments to recognize that special measures should be taken on behalf of children to protect them from economic and social exploitation. This may be done by ensuring that employment in work harmful to their morals or health or dangerous to life or likely to hamper their development is made punishable together with the employment of children below the age limits set by law.

The Beijing Rules were cited as the main international instruments detailing acceptable standards for the administration of juvenile justice and that the rules provide guidelines for the protection of children's rights and respect for their needs while in the juvenile justice process.

It was discussed that within the justice process, children are presumed innocent until proven guilty, children must be informed promptly of the charges, cases of children should be determined without delay, children have the right to legal representation and assistance, court proceedings should be a last resort when dealing with children cases and that diversion is considered a better alternative. It was further said that when a child is in the justice process, their dignity should be maintained at all times and effective measures put in place to reintegrate them back into society. It was emphasised that deprivation of liberty among children should be a last resort.

## Day 3: Thursday, 5th November 2020

### **Part 1: Recap**

During recap, the participants shared what stood out for them and what they had learnt. They also shared in brief how the new learning had challenged the perspectives previously held on law and the justice system in the Kenyan context.



## Recap - Sharing knowledge and skills gained



### Part 1: Democracy and Governance

Governance was described to refer to how a group of people living or working together manage their relationships and control behaviour within the group. It was said that good governance ought to be democratic and participatory and that it takes into account the people's concerns when decisions are being made.

Levels of governance were discussed to involve, family level, community level, county government level, regional level and national level. It was discussed that governance is an element of power and that sources of power include instrumental power which is acquired, natural power which originates from the mind and body and human power which can either be male or female oriented. Democracy was defined as rule of the people, by the people for the people. It was explained that democracy comes from two Greek words *demos* meaning people and *kratos* meaning authority. It was mentioned that democracy recognises a greater freedom for the people, a just society, equality under the law, respect for the rule of law and equal opportunities for all.

It was said that in democracies, people rule themselves either directly or indirectly through representatives. It was explained that democracy could be direct where all adult members make decisions on day-to-day issues affecting them or indirect which is done through representatives.

The participants were further taken through governance under the Moi<sup>6</sup> regime and how decisions were made including appointments and demotions over the radio. Causes of conflict in the context of governance were identified to include competition, lack of understanding and mistrust. It was mentioned that for smooth governance, the leaders and the led must have a similar vision. It was said that in effective governance, there must be election, appointment,

consultation and institutions responsible for decision-making.

The participants were further taken through forms of governance, which included autocracy where power and control rests on the hands of one person. The advantages given for autocracy were faster decision making, absence of opposition and image of a strong leadership. The disadvantages of autocracy were cited as it gives rise to the practice of absolute power, there is no accountability, and the leadership is life long and that there is rule by force, which sometimes is utilized through fear. In democratic governance, the advantages given were accountability in terms of leadership and representation. The disadvantages cited were there this form of governance is susceptible to manipulation; there is slowness in decision making because consensus must be sought

Features of good governance were described to constitute the following:

Participatory

- Consensus oriented
- Accountable
- Transparent
- Responsive
- Effective and efficient
- Equitable
- Inclusive
- Observes the rule of law

## **Part 2: Advocacy from a Legal Lens**

To start off the session, participants were divided into two groups. Each group was asked to identify a volunteer who would be responsible for navigating the justice terrain. Along the terrain, pieces of paper and flowers were strewn to represent landmines (barriers to accessing justice). The volunteer was then blindfolded and asked to walk towards a justice cup. The volunteer's teammates were not expected to talk but use various sounds to guide the participants towards the Justice Cup.

## Navigating the Justice terrain



It was explained that access to justice is a challenging process and there are a lot of barriers, which can be at individual level (lack of information, misinformation) as well as institutional level (police, courts). Other examples given were loss of files and witnesses not showing up in court. It was said due to the technical nature of the law; many people in Kenya are unable to access justice. It was explained that interpretation of the law could also vary, resulting in barriers. It was noted that the majority of those negatively impacted by inability to access justice are the poor. It was emphasised that it is important to have basic knowledge of the law to prevent exploitation and rights abuse.

## Practical experience on challenges in access to justice



### Observations

- There was a lot of distractions from the opponent side
- Sometimes the volunteer was unable to follow the instructions given
- There was a lot of interference
- The volunteers were very anxious to reach the justice cup without stepping on the landmines

### Experience sharing on advocacy and lobbying from a student's perspective



Roles played by paralegals in justice related advocacy were described as awareness creation where communities get access to legal information and advice, simplification of laws to citizens enabling them understand, participation in policy processes, advocacy to repeal outdated laws or laws that have contradictory elements. It was also explained that paralegals can mobilise communities to fight for justice as well as being the voice of the community on issues of human rights.

Advocacy at regional level was described to involve targeting policy makers such as at the East African Community (EAC), East Africa Legislative Assembly (EALA) or the African Union (AU). It was said that regional advocacy is a process and involved mobilisation and framing at the county level. It was explained that advocacy comes in to unearth existing gaps or bring to the attention of policy makers matters of urgency. It was said that organisations can champion human rights at the African level through various platforms including the Civil Society (CSO) Forum and the Sustainable Development Goals (SDGs) Forum at the EAC level.

It was also mentioned that advocacy and lobbying could be done through the Africa Chapter on Human and Peoples Rights - headquartered in Banjul, in the Gambia. It was further said that youth issues could be lobbied through Youth Ambassadors, which is an initiative recognized by the Africa Union (AU).

### Experience sharing on Regional Advocacy



Experiences were shared of how Eastern Africa Child Rights Network (EACRN) engages in child rights advocacy through linking up with other organisations in Eastern and Southern Africa championing the rights of children and youth. Other examples given were conducting research to ~~as~~ implementation of

various Protocols in relation to children and youth and how countries were adhering to implementing the agreed upon provisions. It was emphasised that membership to regional networks is an important element when amplifying an advocacy issue.

### Part 3: Action Plans

The participants were asked to share what they would do with the knowledge and skills gained from the training. Each participant was given a piece of paper to fill data on an identified problem they would like to address in their community or university, the objective, activities to be undertaken, resources need and expected results.

The participants were asked to identify simple activities that they can do without requiring funding. It was pointed out that other forms of resources that they could utilise are people and time. Some participants developed joint action plans because they originated from the same community or were students from the same university. It was also pointed out that the participants could seek collaborations with other organisations and individuals and also work with fellow students when implementing the work plans.

### Conclusion

It can be concluded that the training was a success, the participants learnt about legal processes, roles of paralegals and how they can collaborate to solve community's problems. The participants reported gaining new knowledge on justice and appreciated the forum, especially in simplifying legal processes. The training was also an eye opener for the students to identify contentious issues in relation to justice such as the importance of having in place a Judicial Review Committee mandated to evaluate the credibility of the trial process to ascertain the credibility of the trial process and prosecution.

Sponsored by the Rosa Luxemburg Stiftung with funds of the Federal Ministry for Economic Cooperation and Development of the Federal Republic of Germany. This publication or parts of it can be used by others for free as long as they provide a proper reference to the original publication.



