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The promise and peril of paralegal aid

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ABSTRACT

Strengthening the rule of law and promoting access to justice in developing countries have been long-standing international policy objectives. However, the standard policy tools, such as technical assistance and material aid, are routinely criticized for failing to achieve their objectives. The rare exception is paralegal aid, which is almost universally lauded by policymakers and scholars as effective in promoting the rule of law and access to justice. This belief, however, rests on a very limited empirical foundation regarding what paralegal programs accomplish and under what theory they operate. This paper critically examines the conventional wisdom surrounding paralegal initiatives through case studies of two successful paralegal programs in post-conflict Timor-Leste that are broadly representative of the type of initiatives commonly implemented in developing countries. These programs did improve access to justice services, bolster choice between dispute resolution forums, and increase local knowledge of progressive norms on human rights and women's rights. Yet, as this article shows, even successful programs can expect to achieve only incremental gains in promoting the rule of law because advances largely depend on alignment with the priorities of powerful state and non-state actors, donors, program implementers, and paralegals themselves. To date, the literature has not acknowledged these limitations. This article addresses this gap by demonstrating that paralegal aid faces multiple challenges that mean paralegals cannot necessarily transcend or modify deep seated norms and power structures. These issues include principal agent-problems due to the extensive delegation required, internal limitations resulting from paralegals' limited authority and independence, and external constraints from state and non-state justice actors. Paralegal programs also face program design, implementation, and sustainability challenges. Consequently, scholars, practitioners, and policymakers need to adopt a more balanced view of paralegal aid.

1. Introduction

The rule of law produces immense benefits. It has been widely linked to the creation and maintenance of democratic government (Diamond, 1999; Fukuyama, 2014) and can foster both economic and human development (Acemoglu & Robinson, 2012; North, Wallis, & Weingast, 2009). Promoting the rule of law and more equitable state legal systems that facilitate access to justice has emerged as a significant, internationally recognized priority. Yet the results of these efforts have been limited (Kleinfeld, 2012).[1]

At the same time, scholars and policymakers have recognized the role of non-state justice in establishing and maintaining local order. Non-state justice systems, rooted in custom, religion, ethnicity, tribalism or some other shared bond, resolve most disputes in developing countries (Kyed, 2011: 5). Non-state justice actors can play particularly vital roles in conflict-prone states where state institutions have limited capacity or legitimacy (Menkhaus, 2007). International policymakers and practitioners seeking to improve the justice sector have increasingly determined that engaging with justice providers beyond the state is essential. The dual emphasis, however, on promoting a state bound by the rule of law and access to justice while simultaneously engaging powerful and respected non-state actors is challenging because these

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[1] The rule of law and access to justice are distinct concepts though often related in practice. Unsurprisingly, the rule of law is a contentious concept. At a minimum, the rule of law requires that "law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone" (Tamanaha, 2007: 3). Other more robust conceptualizations of the rule of law include significant economic, cultural, and political requirements (Jensen, 2003: 338–340). In turn, access to justice is a concept that speaks directly to the idea of equality under the law for everyone, which entails a concern for "both procedural and substantive fairness" (Rhode, 2009: 872). International paralegal programs usually seek to advance both the rule of law and access to justice by making sure that people understand the law, ensuring matters that by state law should be resolved in state courts are referred to state courts, and ensuring that all people, but especially vulnerable populations, are able to access state courts and protect their legal rights.

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institutions almost invariably operate according to different normative foundations (Migdal, 1988: 31). In some instances, they can even be diametrically opposed (Swenson, 2017).

One area of international support, however, where optimism remains the norm is paralegal aid. Paralegals are "lay people with basic training in law and formal government who assist poor and otherwise disempowered communities" (Maru, 2006: 429). Paralegal programs are seen as making a significant contribution to the rule of law independent of the state's capacity, reach, and legitimacy and the non-state justice sector's structure and principles. Stephen Golub, for instance, contends that "paralegal development merits special mention because it transcends many societies and sectors" (Golub, 2003: 31). Paralegal assistance seems to offer that ever-elusive commodity: a do-no-harm intervention with the capacity to improve both the state and non-state justice sectors in almost any setting, including post-conflict societies (Stromseth, Wippman, & Brooks, 2006: 340–341).

Yet there is a surprisingly weak empirical foundation for these beliefs that paralegal programs can consistently transcend the challenges of promoting the rule of law and access to justice (Carothers, 2003). This article serves, in part, as a corrective to this prevalent narrative. It argues that paralegal aid can have a positive impact, but programming faces far more obstacles and limitations than is generally acknowledged. While paralegal initiatives can help promote the rule of law and access to justice under certain conditions, this article demonstrates that paralegal initiatives face intrinsic obstacles that cannot be eliminated through better program design, management practice, or participant selection. It seeks to add empirical rigor to the analysis of paralegal assistance and explore its theoretical implications. The research also has significant policy implications because "programmes with paralegals, facilitators or barefoot lawyers are now among the most popular methods to increase access to justice in developing countries" (Maurits Barendrecht, Gramatikov, et al., 2012: 7). This trend shows little sign of abating as "future justice programming is expected to place greater emphasis on primary justice and non-state actors, including paralegals" (UNDP, UN Women, UNICEF and Danish Institute for Human Rights, 2012: 257).

1.1. Paper overview

Paralegal programs constitute a vital yet understudied and undertheorized area of inquiry. This article examines the theory and practice underpinning paralegal aid and its implications for policy through six sections. The first section outlines predominant beliefs about paralegal assistance among scholars, practitioners, and donors through a review of existing academic and non-peer reviewed grey literature produced by governments, international organizations, non-governmental organizations (NGOs), and other relevant actors. The second explains and justifies the case selection. The third section provides a historical background of law and justice in Timor-Leste, while the fourth describes Timor-Leste's two largest donor-funded community paralegal initiatives. The fifth section details these programs' accomplishments. The sixth section looks at the intrinsic challenges these initiatives encountered, including principal-agent problems due to the extensive delegation required as well as internal constraints that arose from paralegals' lack of inherent authority. It highlights significant external constraints as paralegals were subject to the influence of both state and non-state authorities. These programs also face design, implementation, and sustainability challenges that influence their ability to achieve their objectives. The conclusion assesses the overall impact of paralegal approaches in Timor-Leste along with their theory testing and theory building implications, and identifies areas for further research.

2. Positive views of paralegal assistance in academic and grey literature

Scholars', donors', and NGOs' generally positive assessment of international paralegal support stands in stark contrast to the sustained criticism development assistance has faced in general (Easterly, 2006) and with regards to the legal sector (Tamanaha, 2011a).[2] This favorable view extends to support in highly legally-pluralist settings including conflict-prone states (Stromseth et al., 2006: 339–340, Maru, 2010).

2.1. Academic literature

International paralegal assistance has not received the scholarly attention it deserves, especially given its prominence in international assistance. The existing academic literature is predominantly positive, even in challenging situations. Stephen Golub, the leading proponent of a legal empowerment approach that prioritizes "strengthening the roles, capacities and power of the disadvantaged and civil society," strongly endorses paralegal assistance (Golub, 2007: 53). He maintains that paralegals can undertake a range of activities "from providing basic information and advice on the one hand to representation in administrative processes and assisting litigation on the other" (Golub, 2003: 33). Vivek Maru, a scholar-practitioner who is the co-founder of Timap for Justice, a paralegal organization in post-conflict Sierra Leone that has garnered much attention and received extensive donor support including from the Open Society Foundation and World Bank, has drawn upon his experience to write extensively about the benefits of paralegal programs (Maru, 2006, 2010). He argues that paralegals promote access to justice and legal literacy in a cost-effective and sustainable manner. Maru highlights that paralegals "provide information on rights and procedures, mediate conflicts, and assist clients in dealing with government and chiefdom authorities" as well as oversee "community education and dialogue, advocate for change with both traditional and formal authorities, and organize community members to undertake collective action" (Maru, 2006: 442). Braithwaite posits paralegals can make significant contributions to justice in developing countries like Bangladesh, while also potentially fighting corruption and being "an effective approach to preventing one important root cause of terrorism in the region of greatest rural poverty in Bangladesh" (Braithwaite, 2015: 321).

As for post-conflict contexts, Stromseth, Wippman, and Brooks contend paralegals "may be able to develop useful synergies (and even healthy competition) between the formal and informal dispute resolution mechanisms" after conflict as well as increase popular awareness of legal rights and improve the quality of both state and non-state justice in a cost-effective manner (2007: 340–341). The positive role of paralegals in promoting access to justice, knowledge about the legal system, and dispute resolution has been echoed by the RAND Corporation's highly influential survey on post-conflict nation building (Dobbins, Jones, Crane, & Cole DeGrasse, 2007: 90). Baker has highlighted the important role paralegals play in linking state and non-state justice in post-conflict and low capacity states (Baker, 2010: 610).

Paralegal aid proponents recognize that programming issues can arise. Golub, for instance, acknowledges that paralegals' "effectiveness often hinges on their levels of education, the degrees to which their communities are organized, the extent to which government is responsive, and the overall political milieu within

[2] This positive view of paralegals in developing countries also stands in contrast to debates over paralegals' role in developed, high-capacity legal systems, where the use of paralegals has produced controversy for potentially engaging in the unauthorized practice of law (Abel, 1989; Rhode & Ricca, 2014).