

FEATURE

Taking a Gender-Nuanced Approach to the Access-to-Justice Needs of Women in Zambia's Prisons

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Goal 16 of the Sustainable Development Goals (SDGs) is to provide access to justice to every person and build inclusive institutions. Institutions, including justice institutions, are set up pursuant to a legal instrument. Thus, an examination of institutional barriers to accessing justice and ways to address such barriers has to commence by examining the legal instruments that create these institutions and the laws impacting on their operations.

While SDG 16.3 seeks to guarantee the development of inclusive societies that meet the justice needs of vulnerable and marginalised communities, it is limited in scope as it focuses only on two aspects of access to justice. These are, first, the ability of victims of violence to report their victimisation to a competent authority, and, secondly, the proportion of unsentenced detainees relative to the overall prison population. This narrow scope of SDG 16.3 ignores the multifaceted nature of access to justice, which is something that applies both to criminal as well as civil matters and entails a wide range of indicators.

Defining a ccess to justice

This article adopts the definition of access to justice of the American Bar Association Rule of Law Initiative, one in which access to justice refers to citizens' ability to use justice institutions to obtain remedies for their common justice problems (ABA ROLI 2014: 9). In this broad definition of access to justice, states should have conducive legal frameworks that safeguard the rights of citizens, while citizens should have sufficient legal knowledge to be able to claim legal rights guaranteed in law. Furthermore, citizens should have access to legal services, fair procedures and enforceable solutions (ABA ROLI 2014: 9).

The narrow conceptualisation of access to justice under SDG 16.3 not only limits measurement of the extent to which vulnerable and marginalised communities enjoy this right but also limits the impact that access to justice could have on sustainable development. This article highlights the importance of a broad conceptualisation of access to justice by analysing how a country's legal framework and systems impacts on vulnerable and marginalised groups such as women prisoners. The analysis shows that a legal framework aimed at establishing and capacitating justice institutions has to respond to justice needs and address access-to-justice barriers experienced by its target beneficiaries.

For women prisoners, such barriers include limited

access to legal advice and representation due to their incarceration, ignorance, lack of finances and negative social and cultural norms, the existence of complex legal procedures, and an inadequate legal framework to support their claims of injustice. Many laws in Zambia do not address women's needs because they have been drafted in gender-biased and gender-neutral terms, consequently discriminating against women both directly and indirectly.

The Constitution and the Prisons Act, for example, couch many of their provisions using the pronoun 'he', which not only indicates their gender bias but the likelihood that the gender dimensions of the provisions have not been properly thought through. Women affected by the Zambian correctional system are disproportionately affected due to the social exclusion that prisoners experience. This group includes women prisoners and women with relatives who are incarcerated.

Institutional and legal barriers

Zambian correctional facilities house approximately 22,823 prisoners, 3 per cent of whom are women prisoners (Institute for Crime and Justice Policy Research). The laws directly applicable to correctional facilities include the Constitution and Prisons Act (Chapter 97 of the Laws of Zambia). The Prisons Act contains Prisons Rules that provide detail on how the Act should be operationalised. The Constitution does not specifically provide for the rights of prisoners but does guarantee everyone the right to a fair trial. This can be relied on to advance the access-to-justice needs for women prisoners, but only to a limited extent.

The Constitution does not adequately guarantee women's rights and in fact permits discrimination that is premised on personal law. This further disadvantages women and weakens the legal framework for the protection of their rights. Similarly, the Prisons Act contains few provisions on women prisoners. The lack of a detailed provision for the rights of women prisoners in the Constitution, Prisons Act and Rules, coupled with the country's relatively small number



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of women prisoners, renders women invisible and impedes the extent to which they can access justice.

Women in the Zambian correctional system are susceptible to human rights abuses due to the social exclusion of prisoners, both male and female. Research indicates that incarceration makes an especially strong impact on prisoners' health and family life (Africa Criminal Justice Reform and University of Western Cape 2017). The social exclusion of women prisoners subjects them to institutional barriers that impact on their ability to access resources for advancing their justice needs, among others. For example, whereas a woman in the general population who is raped can access a police station to lay a complaint, a woman prisoner cannot do the same. The lack of police within correctional facilities, coupled with the low social standing of prisoners and the likelihood that the violator is from within the prison community, makes it difficult for the woman prisoner to lay a complaint.

Similarly, when a woman prisoner is unable to enforce rights against a debtor for provision of her parents or children, or when her husband does not provide financial support for her or her infant child who is in prison with her, she cannot access the courts or other justice institutions to enforce her rights to the same extent as a woman in the general population in the same circumstances. Incarceration thus has far-reaching adverse consequences for women prisoners and those under their care.

Examples abound of institutional barriers that prevent women from accessing justice. First, the laws that regulate correctional facilities do not sufficiently enable them to facilitate access to justice



Failure to facilitate access to institutions curtails women's effective access to justice

for incarcerated women. Until recently, the Zambia Correctional Service (ZCS) was an institution meant to punish criminals but its mandate has been changed to fostering the rehabilitation of prisoners (Ministry of Justice, et al. 2017: 3). However, the Prisons Act has not undergone significant reform to align it with the change in the ZCS's mandate from providing penal services to rehabilitative services.

Specifically, the Act has major limitations with regard to women prisoners' justice needs. This is not surprising given that the Zambian correctional system was not created with women in mind (Bake and DIGNITY 2015: 40). The Act does not provide for prisoners to access the services of justice institutions such as the Human Rights Commission, National Legal Aid and the Zambia Police Service. Neither does it contain provisions that allow for coordination among justice and other institutions such as the Social Welfare Department. Institutions are thus not adequately funded and trained to provide legal services to women. Failure to facilitate access to institutions curtails women's effective access to justice.

Furthermore, the requirement of the ZCS to facilitate prisoners' access to courts is restricted to matters for which they are imprisoned (rule 14 of subsidiary legislation to the Prisons Act). This disproportionately affects women, who often deal with a range of social problems that need interventions from justice institutions, including seeking maintenance for themselves and their children from their partners, seeking custody of children, or seeking remedies for physical and sexual abuse in police custody prior to imprisonment or later in a correctional facility.

The Act is progressive to the extent that it permits prisoners to lay complaints and make applications to several officials, including the Commissioner of Prisons as well as visiting officials and official visitors (rule 140 of the Prisons Act). However, the Act does not mandate the officer in charge to immediately facilitate access to these officials. Prisoners are entitled to meet with the officials in their next visit. These visits do not have fixed schedules, and it may be a long time before the said official visits the prison again. Timely response to complaints is hence compromised. The Act has thus not been sufficiently amended to reflect the new mandate of the ZCS, a situation that affects women disproportionately.

Secondly, the laws that regulate some of the rights violations experienced by these women are not holistic enough to cover their situation. For instance, the law on affiliation and maintenance of children is restrictive in terms of when, how and by whom an affiliation application can be made (sections 3 and 6, Affiliation and Maintenance Act, chapter 64 of the Laws of Zambia). As such, once a woman is sentenced to imprisonment and brought within the bounds of the Prison Act and its Rules, she faces challenges in applying for affiliation orders under the Affiliation and Maintenance Act due to the stringent timelines and the evidentiary burden placed on her.

Without support from the state and other sources, the discharge of this evidentiary burden is an uphill task in light of the timelines. Section 8 of the Act only empowers the parents of a child to apply for a maintenance order. This limits the standing of NGOs and state institutions such as the ZCS to apply for maintenance on behalf of the woman. However, under section 14, maintenance is payable to a custodian of the child. This would imply that since the mother of the child and the ZCS have custody of the child, they would be entitled to receive maintenance money for the child who is in prison with its mother.

Another indirect effect of the Prisons Act is evident in the matters of maintenance both under civil and customary law. There is no legal requirement for an incarcerated spouse to pay maintenance to his wife under customary law (since incarceration entails that the woman is not contributing to the family, a basis

for her maintenance under many Zambian customary laws). Under civil law, there is no provision for maintenance to be paid to an incarcerated spouse.

This would pose a problem for incarcerated women seeking to claim maintenance since the context in which it is payable is attached to a matrimonial cause such as divorce or separation, which is premised on the same grounds as divorce. Even if the parties are separated by virtue of imprisonment, there is no legal provision that empowers them to claim maintenance unless they institute divorce or separation proceedings.

Women may nonetheless experience challenges in divorce or separation proceedings as they might not be able to find supporting grounds for these applications, for example an imprisonment term of 18 months is not long enough to warrant a divorce as the law requires a minimum of two years and by law.

Legislative interventions are thus necessary for meeting women's justice needs.

A gender-nuanced approach to legislation

The ZCS directly impacts on women's ability to access justice. However, its own ability to guarantee access to justice to women is affected by the legal framework that establishes it (UN, UN Women, UNDP, et al. 2018: 42). It is evident from the earlier discussion that the gaps in the law establishing the ZCS and the laws affecting women's rights play a significant role in curtailing women's access to justice. Furthermore, failure to protect rights of all prisoners has negative consequences for both women prisoners and women in the general population.

This all points to the need for a gender-nuanced law that promotes gender equity as well as women's rights. In determining the form that such gender-nuanced law should take, one has take into account issues that impact on women's access to justice (CEDAW General Recommendations 33: paragraphs 40–53); the norms for addressing gender equality and women's rights (Beijing Platform, CEDAW, Bangkok

Rules, Maputo Protocol etc.); human rights norms and guiding principles, such as the rights-based approach and programming principles in the United Nations Development Assistance Framework (UN, UN Women, UNDP, et al. 2018: 27–38); and the peculiarities of a particular legal system (Pearshouse 2008: 5–10).

1. Norms on gender equality, women's rights and human rights

Paragraphs 40–53 of CEDAW's General Recommendation 33 provides recommendations in regard to women's access to justice in specific areas of law. The Committee identifies the following areas of law as having the greatest impact on women's access to justice: constitutional law; various kinds of formal law (including family, criminal, administrative and other social laws); and informal laws (including customary and religious laws).

Areas of law with the greatest impact on women's access to justice must be prioritised and swiftly addressed. Omnibus legislation is best suited to achieving this. Zambia already has omnibus legislation regulating the ZCS. Reforming this law to create gender-nuanced prisons legislation would promote a comprehensive and visible legal framework for addressing the justice needs of women affected by the justice system. This would be in line with the global strategy for promoting gender equality set out in the Beijing Platform for Action (1995) (Office of Special Advisor on Gender Issues and Advancement of Women August 2001: 1).

To be effective, the Act must ensure that it is gender-sensitive, addressing the needs of female and male prisoners and the effects that barriers to accessing justice have both on women prisoners and women in general. Without reinforcing negative cultural norms that perpetuate gender discrimination, the Act must ensure that offenders' incarceration does not subject them and their families to unfair treatment.

If gender-nuanced prisons legislation were to provide protection for gender equality and recognise women's rights to justice, women's access to justice would be enhanced. Such legislation would also

enable an immediate and timely enhancement of women's access to justice ahead of amendments to other pieces of legislation such as the Matrimonial Causes Act and the Affiliation and Maintenance of Children Act.

This is particularly important in view of women's dire realities for ensuring continuous inclusion of different groups of women: women are not a homogenous group. Legislative efforts addressing gender equality must seek not only to guarantee women's rights but to recognise the diversity among women and the social circumstances associated with such diversity (OSAGI 2001: 1). The mainstreaming option cannot offer immediate protection and relief to women affected by the correctional system as law reform activities are unending and would not provide holistically for women affected by the correctional system, thereby violating their human rights.

Gender-nuanced prisons legislation would also make it easier for the legislature to effect amendments and for the ZCS to implement such amendments without having to rely on other social institutions.

2. Particularities of the legal system

The particularities of a legal system are an essential consideration in that understanding them is key in determining the most effective intervention to make. By examining what laws exist in relation to an issue, one can tell whether additional laws have to be enacted and/or existing ones amended. For example, Zambia has a Matrimonial Causes Act which, inter alia, regulates divorce, custody and maintenance among people married under civil law. It also has other laws regulating maintenance and custody of children. Any legislative interventions in the area of maintenance and child custody must be justified by the need for them.

By the same reasoning, one can determine the type of legislative intervention which is required, that is, whether to introduce omnibus or mainstreaming legislation or a hybrid of them. Zambia does not have an administration of justice law or statute that specifically addresses access to justice. Furthermore,

no legislative action has been proposed in the recent past. On the other hand, there are ongoing discussions about penal reforms for enhancing prisoners' rehabilitation and implementing the recent paradigm shift in penal justice. It is thus necessary in the Zambian context to effect law reform, preferably by repealing and replacing the current Prisons Act with one which is more gender-sensitive.

Accordingly, a legislative environment conducive to accessing justice can be created by way of the following:

- Enacting gender sensitive provisions that protect women's rights and grant them remedies for rights violations. This would enhance women's access to the law as they would have only one principal law to refer to.
- Clearly identifying an institution, such as the ZCS or justice and other social institutions, for example the Human Rights Commission and social welfare department, responsible for implementing the Act and guaranteeing access to justice for women. If more than one institution is identified, the Act can define their roles and relationship to each other.
- Stipulating how the institution(s) responsible for the Act would be financed. Such provisions can guarantee budgetary allocations to interventions for women's access to justice (UN, UN Women, UNDP, et al. 2018: 42).

Traditional approaches to legislation

There are two traditional approaches to law reform: the creation of specific stand-alone legislation (i.e. omnibus legislation) and the amendment of several statutes to address different aspects of a problem (i.e. mainstreaming legislation). In order to decide on an appropriate law reform approach, the following should be considered:

- the subject and objectives of the legislation;
- how procedural laws impact on women's access to

- justice and the objectives of the substantive law;
- how the proposed legislation would affect existing laws on the subject; and
- the feasibility of the legislative agenda.

The advantages and disadvantages of the two traditional approaches must be considered. First, omnibus legislation allows for the speedy creation of laws. For instance, a single statute can be enacted to provide for access to justice for women affected by the criminal justice system. This approach ostensibly creates an enabling legal framework for the issue and demonstrates political will to address it, but is also susceptible to tokenistic interventions. Compared to mainstreaming legislative provisions, omnibus legislation can contain subtle discriminatory provisions, as is the case with the current Prisons Act.

On the other hand, mainstreaming legislation is time-consuming as it requires reforming different statutes that relate to the subject for reform. Thus, rather than bringing about access-to-justice legislation for women affected by the criminal justice system, the mainstreaming option would require that laws affecting access to justice are reformed to ensure that their legislative purpose advances the justice needs of women affected by the criminal justice system.

This is a demanding exercise, but it demonstrates a higher degree of political will inasmuch as it entails continuous engagement. The chances of there being tokenistic interventions are thus slimmer in the mainstreaming option. The mainstreaming option, however, has the disadvantage of setting in motion a never-ending law reform exercise touching on many matters, thus making it onerous and costly.

Secondly, omnibus legislation allows for comprehensive regulation of a matter since it is often quite detailed. This makes it relatively easy to access, as one refers to only a single statute, whereas it is a harder task to cross-reference legislation contained in many different statutes.

Furthermore, comprehensive legislation contained in a single statute makes enforcement easier as the law is often designated to one institution. If the law designates more than one institution for its implementation, it should clearly list all the



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responsible institutions within its provisions and set out their roles and responsibilities. By contrast, when legal provisions are splintered across different laws, as happens in mainstreaming legislation, it is harder to enforce the law and for vulnerable groups to access it.

However, mainstreaming legislation has the advantage of ensuring that legislative provisions on a subject are properly contextualised in the different pieces of legislation that affect that matter. It can thus provide for women's justice needs in different statutes that cover different areas of law covering, for example, the constitution, family, employment and health. The contextualisation of an issue within the broader purpose of different legislation helps to reduce the chances of omitting important issues related to the matter of concern.

Omnibus legislation has the disadvantage of having a higher potential to conflict with existing laws. For example, if a Prisons Act is already in existence and the legislature enacts another law that regulates how women prisoners can access justice, the implementing institutions may have conflicting roles and responsibilities. If the later Act is placed under the responsibility of the same institution, the institution may not enforce it to the same extent as it does the Prisons Act, particularly if no additional resources and training are allocated for the additional responsibilities.

Thirdly, omnibus legislation makes it easier for the law-maker to effect amendments as it requires amendment to only one statute. However, mainstreaming legislation may require amendments to different pieces of legislation, thereby making it onerous.

Conclusion

This article has argued that laws must respond to the justice needs of women and ensure that women are sufficiently enabled to pursue legal remedies. Many laws assume that women affected by the correctional system can access justice institutions and hence be in a position to enforce positive court judgments that assert their rights and which enable them to provide for their families. However, without the requisite institutional support, a conducive legal framework and accessible procedures, such women cannot access justice.

This warrants an examination of the laws establishing justice and other social institutions as well as those promoting and protecting rights. It also requires critical analysis of the required legislative interventions. In the Zambian context, a hybrid of the forms of law is necessary, that is, a gender-nuanced reform of the Prisons Act and statutes affecting women's rights such as the family and workplace. To guarantee access to justice for women affected by the Zambia correctional system, a wider conceptualisation of access to justice than that envisaged under SDG 16.3 is needed.

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