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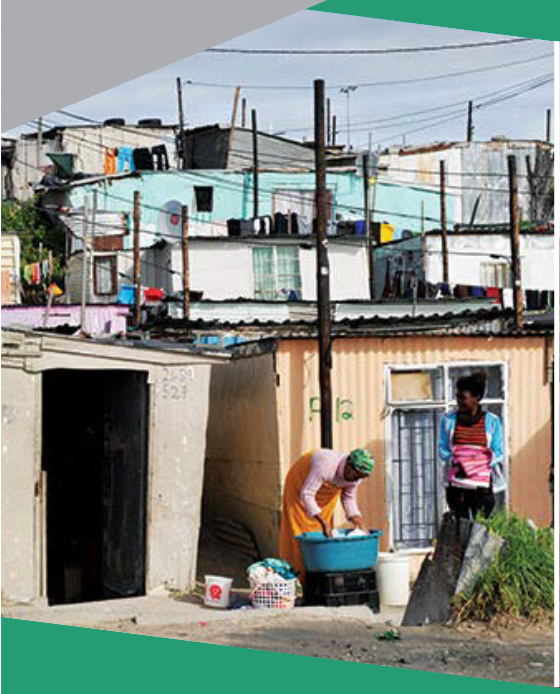

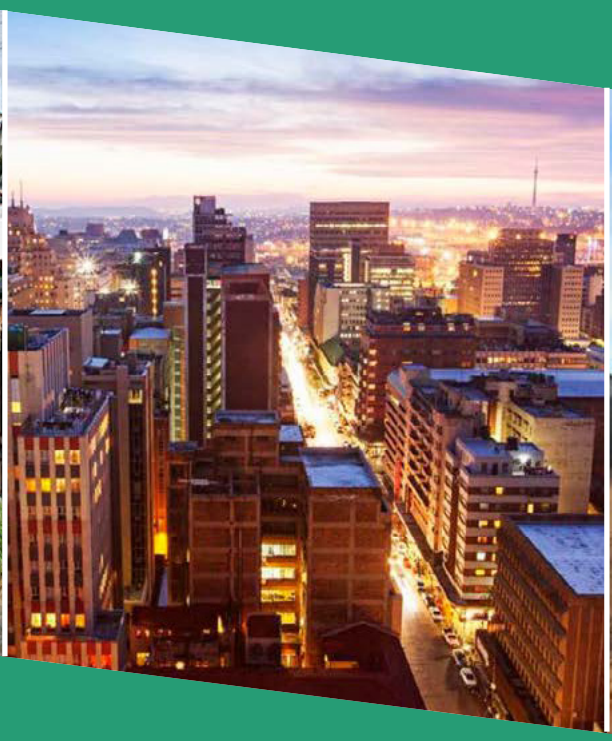

ESR REVIEW

Economic & Social Rights Review in Africa

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

SPECIAL ISSUE ON ACCESS TO JUSTICE

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Editorial

Welcome to ESR Review 2 of 2021. This is the fifth issue of the ESR Review series with a special focus on access to justice. Ensuring access to justice for marginalised and disadvantaged groups requires political will and mobilisation of resources by states. If, truly, no one is to be left behind, as envisaged by the Sustainable Development Goals (SDGs), states must redouble their efforts in creating an enabling environment for institutions and bodies that deliver justice to the people to function at their optimal level.

In many parts of developing countries, particularly Africa, institutions that deliver justice to the people are grossly underfunded, with little or no support from the government. This is unfortunate and requires urgent attention by the states.

Many people continue to languish in prison under inhuman conditions due to poor infrastructure in the prison system. Similarly, due to inadequate funding and a dearth of skilled personnel, the court system that ought to be a source of hope for disadvantaged groups has become a 'house of horror'. This is inconsistent with the norms and standards established at international and regional level that require states to commit resources to realising access to justice for the people.

For instance, the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) calls on governments to adopt measures and allocate resources to ensure effective and efficient delivery of legal aid to marginalised and disadvantaged groups. More recently, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012) urge states to ensure that resources are made available for ensuring access to justice for all, particularly marginalised groups.

Committing resources to realising access to justice does not mean supporting state institutions or initiatives only. Rather, it also requires the state to support other initiatives by civil society, such as those that provide paralegal services, including community-based paralegals, to facilitate access to justice for millions of people.

This is crucial if states are to meet the targets for SDG 16.3. The recent inclusion of indicators for civil matters for SDG 16.3 makes it all the more imperative for states to ensure that resources are made available for the realisation of access to justice for vulnerable and marginalised groups. Without global commitment to allocate resources in this way, millions of people will be deprived of their rights and continue to languish in pain.

This issue of ESR Review features an article that examines the role of paralegals in advancing access to justice in Africa; another article considers the significance of voluntary national reviews, while yet another examines how the dissolution of the SADC Tribunal has negatively impacted on the right to access justice. A fourth article deals with the right to approach courts in the public interest.

The events section reports on the highlights of webinar on student hunger and COVID-19, an event hosted by the Socio-Economic Rights Project of the Dullah Omar Institute at the University of the Western Cape.

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

Ebenezer Durojaye
Chief Editor

FEATURE

Plugging the Legal Aid Gap in Africa: Paralegals to the Rescue?

Stanley Ibe

Introduction

Although they bear the brunt of some perverse justice systems in Africa, many poor people on the continent lack access to legal aid or assistance. Regrettably, the conversation about legal aid often begins and ends with lawyers, who are in short supply and therefore out of the reach of the poor.

Paralegals offer an opportunity to mitigate the crisis of legal aid, one which will probably get worse unless the responsible authorities act fast. In doing so, they do not have to undermine the authority of lawyers or others in the legal aid spectrum. As a matter of fact, this article suggests they will complement the role of lawyers.

There is an urgent need to recognise the role of paralegals across the continent as an additional tier of professionals to support the already existing tiers – law clinics and lawyers – in advancing access to justice for the poor and powerless across the continent. This has become imperative in view of the dwindling ratio of lawyers to populations in many countries in Africa, coupled with an exploding population growth rate unmatched by economic opportunities.

Paralegalism proceeds on the assumption that not every 'legal' problem automatically requires the services of a lawyer. Recognising this, and focusing attention on the broad goal of access to justice, creates the incentive for the different tiers of professionals involved in this field to work collaboratively.

Background context

In its report Access to Legal Aid in Criminal Justice Systems in Africa, the United Nations Office on Drugs and Crime (UNODC) (2011) acknowledged that 'laws governing legal aid recognize a lawyer centered model'. This was back in 2011. Unfortunately, not much has changed today. What is even worse is that lawyer-to-population ratios are abysmal. A few examples help illustrate the situation.

According to estimates by the United Nations Population Fund (UNFPA World Population Dashboard 2019), Nigeria has a population of 201 million and a lawyer population of 105,000 – a ratio of one lawyer to 1,914 people. This statistic does not take into account that a sizeable number of lawyers are working outside mainstream legal practice and therefore may be unavailable to provide legal aid. It also does not reflect the fact that most lawyers operate from urban areas rather than rural ones, where the majority of the poor reside.

The website of the Law Society of Kenya puts the number of 'practicing advocates' at 17,000. For a country of 53.7 million people, that is a lawyer–population ratio of 1: 3,158. It is disturbing, particularly in view of the fact that – as in Nigeria – most of these lawyers operate out of urban areas. Indeed, 63 per cent of Africa's population lives in rural areas (United

Nations Population Division's World Urbanization Prospects: 2018).

For its part, the Law Society of South Africa (2019) lists the total number of 'attorneys' at 27,200 and 'candidate attorneys' at 7,000 – a total of 34,200 for a population of 59.3 million. Although better than the ratio in Kenya and Nigeria, one lawyer to 1,733 individuals is quite appalling.

> **Although these countries have official legal aid institutions designed to provide free legal services to the majority poor, these institutions are often under-resourced and thus barely able to make a significant difference.**

Fixing the problem

To begin a reflection on fixing the problem, it might help to find answers to a rather difficult question: How do you fix the problem of inadequate lawyers in contexts where states are not producing enough lawyers and the lawyers often feel that non-legal professionals have little or no role to play?

The easy answer could be: Get the states to train more lawyers. However, that is pretty complicated, because the infrastructure to do that is not necessarily available, and many states will not prioritise legal aid. Even if states were to overcome this hurdle, there is no guarantee that newly trained lawyers will turn to legal aid as a matter of practice.

The figures from three of Africa's highly populated countries suggest that there are not enough lawyers to confront the continent's growing legal aid challenges. Although these countries have official legal aid institutions designed to provide free legal services to the majority poor, these institutions are often under-resourced and thus barely able to make a significant difference. Besides, they often rely on lawyers in their employment to provide the service.

While it is useful to train more lawyers and help propel them to practise in the public interest, the population growth rate of many countries in Africa makes it fairly difficult for the lawyer-to-population ratio to shift significantly over the short to medium term. Therefore, we probably need to think a bit more strategically about making more personnel available to support legal aid. Given the scenario described above, it is clear that we need to think beyond the legal profession. That takes us back to the question of changing perceptions about non-legal professionals and the value they can bring to the subject of legal aid. Like the medical profession, the legal profession has to recognise that it operates within a universe of challenges that require skill-sets beyond the law and therefore that opening the space for a few more non-legal professionals will be necessary.

In the context of legal aid, I advocate for a tiered system, with lawyers occupying the highest level and non-lawyers – law students and paralegals – the lower tiers. This is necessary primarily because we do not have the numbers but also fundamentally because not every seeming legal problem requires the services of a lawyer. Given the penchant for law enforcement to mass-arrest putative criminal suspects and the requirement in most legal systems for access to legal aid for individuals in this situation, it is critical to recognise, train and deploy paralegals to offer support to individuals who might not be reached in the current legal aid universe.

The idea of a tiered system is one in which paralegals and law clinics serve as primary contacts for clients who have 'legal' challenges in the rural areas. After reviewing the cases, they can decide – on the basis of information and evidence available to them – to take

on the problem to the highest possible extent allowed by law and then pass it on to lawyers where it becomes necessary, for instance where the case cannot be handled otherwise than by a judicial process. What this approach offers is an opportunity to groom a generation of paralegals and law clinics to fill the yawning gap already identified without compromising quality.

To be clear, legal aid goes beyond legal representation. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013) define legal aid to include 'legal advice, assistance and representation', as well as the provision of legal education, access to legal information and other services such as alternative dispute resolution and restorative justice.

Similarly, The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2014) defines legal aid as 'legal advice, assistance, representation, education and mechanisms of alternative dispute resolution', and indicates that stakeholders in service provision could include 'non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academic institutions'.

These definitions clearly extend the frontiers of legal aid beyond lawyers. Fundamentally, legal aid is central to the attainment of the UN Sustainable Development Goals (SDGs) (2015) in particular, goal 16, dealing with peace, justice and strong institutions, prioritises the promotion of the rule of law and human rights.

Reflections on existing paralegal models

The section below is an examination of two highly successful paralegal models in Africa, the PASI model in southern Africa and the TIMAP model in west Africa.

PASI Malawi

Fortunately, paralegals are not necessarily new to the legal profession in some parts of Africa. The Paralegal Advisory Service Institute (PASI) pioneered a paralegal programme in Malawi in 2000 which has been so successful that it has exported the model to Bangladesh, Uganda and Enugu State, Southeast Nigeria, among other places.

Malawi is distinctive in that it has about 500 lawyers to a population of 17 million – a ratio of one lawyer to 34,000 people (Malawi Law Society 2019). This obviously means that the lawyer-centred approach to legal aid has little to no chance of succeeding, particularly in a context where more than 70 per cent of the lawyers are based in the two main cities of Lilongwe and Blantyre.

The paralegals run human rights clinics and educational programmes within the prisons and throughout the criminal justice system.

The PASI model was therefore a child of necessity, but it offers some insights about what to expect elsewhere. The PASI model trains and deploys paralegals to police stations and prisons to assist 'criminal detainees and prisoners' (Open Society Justice Initiative 2010: 4). The paralegals run human rights clinics and educational programmes within the prisons and throughout the criminal justice system. Significantly, the model was designed to complement and facilitate the work of lawyers – indeed, the organisation is led by a lawyer.

Nonetheless, the model confronts fairly significant challenges from lawyers and the bar association. The main challenge relates to the perception that

paralegals could impersonate lawyers and potentially steal their clients. This is a problem that could be solved with more pragmatic communication and a clear delineation of roles.

Another fairly significant but non-fatal challenge relates to the question of legal recognition: paralegals are not legally recognised yet in any law in Malawi. This does not necessarily hamper their work, but creating a legal basis would enhance it.

Finally, there is the perennial question of (in)competence of paralegals with respect to specific issues. This challenge could be addressed with a combination of capacity-building, clarity of purpose and effective oversight.

TIMAP Sierra Leone

The Sierra Leone Bar Association lists 399 lawyers on its website, while World Population Review estimates a population of 7.81 million – this translates to a ratio of one lawyer to 19,573 people. As in Malawi, most of the lawyers are based in the main city, Freetown.

Founded in 2009, TIMAP for Justice provides 'frontline legal assistance to pretrial detainees, using local community members who have received basic legal training as paralegals' (Open Society Justice Initiative 2015: 2). An external evaluation of the TIMAP paralegal model found that

in comparison to control sites where paralegals did not work, TIMAP's paralegals reduced the number of new arrivals in prisons and increased the share of detainees accessing bail. In addition, the share of detainees being held without trial or conviction was reduced by 20% (ibid: 6).

In recognition of its outstanding work, TIMAP for Justice received a grant of USD 1 million from the World Bank to extend its paralegal model to further parts of Sierra Leone. Nonetheless, the model has to contend with a number of challenges, including sustainability and independence.

The question of sustainability is critical to keeping the programme afloat. TIMAP for Justice relies almost exclusively on donor funds for its paralegal project. This means the project is susceptible to shocks that occur when donors decide to shift focus. It is not clear how this challenge can be addressed, but it is critical to think carefully about it. The other equally significant challenge is the question of independence. Paralegals perform a state function. Therefore, they require the support of state institutions to make any progress. Unfortunately, getting and sustaining that support could impact on the independence of paralegals.

Luckily, paralegals are recognised under Sierra Leone's Legal Aid Act. An 'accredited paralegal' is defined under the Act as

[a] person employed by the Legal Aid (Board), a government department, an accredited civil Society organization or a non-governmental organization and who has completed a training Course in the relevant field of study at the Judicial and Legal Training Institute or an Educational institution approved by the board.

Although this definition limits the training of paralegals to an educational institution and the Judicial and Legal Training Institute, it nonetheless appears to set minimum standards for becoming paralegals. This standard could be limiting in a context where most people are poor and can little afford the luxury of paid education. Additionally, the location of the referenced institutions might also be challenging for people in the remotest areas – assuming that they are able to overcome the challenge of funding.

Given this background, countries looking to adopt a paralegal programme must endeavour to have the bar association and other relevant institutions, such as the courts, law enforcement and ministries of justice, on their side early on. This provides an opportunity for concerns to be voiced and addressed in a collegial fashion. In addition, states can benefit from learning exchanges with existing paralegal programmes.

Law clinics as complementary service providers

Law clinics are becoming increasingly popular in many parts of Africa as legal aid centres for the poor and powerless. In Nigeria, the Network of University Legal Aid Institutions (NULAI) has affiliate law clinics providing criminal-justice-focused assistance in about 20 universities. The Association of University Legal Aid Institutions (AULAI), which inspired the establishment of NULAI, also has a network of law clinics offering this service.

Inculcating a culture of social justice in law students increases the chances that they will commit to offering pro bono service when they become lawyers. The only problem is that not enough lawyers are being produced to make a significant difference in the short to medium term.

NULAI and its affiliate law clinics have been active in providing legal aid and assistance to indigent persons mostly in rural communities. The clinics focus on criminal justice, access to information and alternative dispute resolution. They have also taken bold steps to monitor the implementation of administration of criminal justice laws in four states of Nigeria.

What is more, some law clinics have intervened directly in making freedom-of-information requests on behalf of under-served communities.

Despite these strides, the law clinic movement still grapples with the challenge of sustainability (Lagi 2017: 24), particularly in terms gaining full recognition of the clinical legal education (CLE) programme in law faculties and overcoming over-reliance on donor funding. Fortunately, the Nigerian Law School has made CLE compulsory, thereby paving the way for law faculties to follow; with respect to funding, NULAI has taken steps to diversify its funding base by introducing of membership dues.

Conclusion

The number of lawyers available to provide legal aid and assistance to indigent people in Africa is grossly inadequate; at the same time, significantly increasing the number of lawyers may not be feasible for a variety of reasons, including resource constrains. Therefore, involving other professionals is the way to plug the continent's ever-expanding legal aid gap. There are clear lessons to be learnt from states that have already deployed paralegal models, and prospective states would do well to look to them to avoid repeating the same mistakes.

Stanley Ibe is a lawyer on the Africa Programme of Open Society Justice Initiative. He writes in his private capacity.

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FEATURE

Access to Civil Justice in the 2019 Voluntary National Reviews

Beatriz Esperanca and Sumaiya Islam

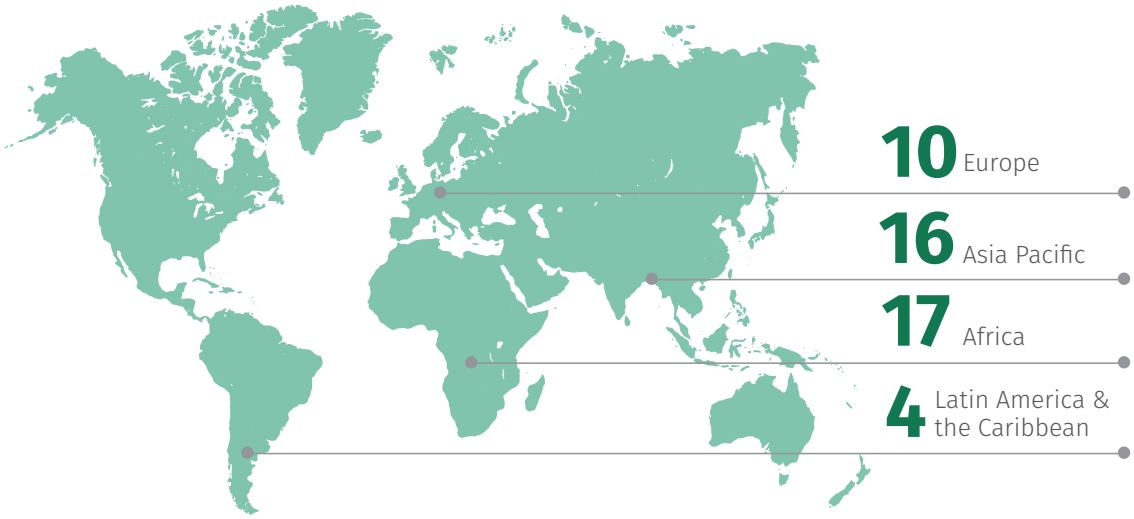
Introduction

The United Nations (UN) 2030 Agenda for Sustainable Development envisages a 'just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met'. Nearly 5.1 billion people – two-thirds of the world's population – lack meaningful access to justice (source). Justice advocates around the world see the inclusion of a justice goal (Goal 16) in the Sustainable Development Goals (SDGs) and a specific target to 'ensure equal access to justice for all' (SDGs 16.3) as an opportunity to advance justice as a developmental priority and strengthen the links between access to justice, inclusive development and open government. 2019 marked the fourth year of monitoring and reviewing the ambitious universal agenda, with 47 states having presented their reports at the High-Level Political Forum (HLPF) in July 2019 in New York.

> **...just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met**

This article examines 42 of the 47 voluntary national reviews (VNRs), publicly accessible in English, French and Spanish, that were submitted in 2019, doing so to understand key civil justice issues highlighted by member states, to analyse how countries deliberated on progress on access-to-justice targets, and to offer insight on transforming commitments to access to justice into meaningful action. This analysis of the 2019 VNRs focuses on their substantive content on access to justice, particularly civil justice.

The voluntary national review process



Heads of state and government adopted the 2030 Agenda for Sustainable Development, containing the 17 Sustainable Development Goals (SDGs) and 169 targets, on 25 September 2015. As a follow-up and review mechanism, member states are requested to 'conduct regular and inclusive reviews of progress at the national and sub-national levels, which are country-led and country-driven' (2030 Sustainable Development Agenda: paragraphs 72 to 90).

The reviews are meant to be voluntary, state-led and a collaborative effort by multiple stakeholders. They are presented at the HLPF, which meets annually under the auspices of the UN Economic and Social Council and once every four years under the auspices of the General Assembly (UN General Assembly, Resolution 67/290). The first HLPF since the adoption of the 2030 Agenda was in 2016, at which point 22 VNRs were under review (HLPF: 2016). Each annual HLPF has its own theme and, since 2017, these occasions have focused on five or six of the SDGs, with SDG 17 being under review every year (see the accompanying table).

YEAR	THEME	GOALS
2016	'Ensuring that no one is left behind'	N.A.
2017	'Eradicating poverty and promoting prosperity in a changing world'	1, 2, 3, 5, 9, 14 (and 17)
2018	'Transformation towards sustainable and resilient societies'	6, 7, 11, 12, 15 (and 17)
2019	'Empowering people and ensuring inclusiveness and equality'	4, 8, 10, 13, 16 (and 17)

Table 1: *HLPF themes (2016-2019)*

Over time, member states have shown an increasing interest in the VNR process: 22 countries presented VNRs in the first year (2016) of implementation, while 43 presented in 2017 and 46 in 2018; in 2019, 47 presented. Of the 47 countries, six presented for the second time (Azerbaijan, Chile, Guatemala, Indonesia, Philippines and Sierra Leone). The process has also generated interest among stakeholders.

2019: Truly the year of justice?

Although SDG 16 was not the main focus of the review in previous years, countries could still highlight their efforts in regard to justice in their VNRs. Of 64 VNRs from 2016 and 2017, only 41 mentioned SDG 16 and, of these, only 16 VNRs discussed it in at least one paragraph or more. In contrast to 2016 and 2017, the VNR reports were generally more extensive and detailed in 2018. In 2018, most countries referred to SDG 16 to some extent.

The 2019 VNRs are, overall, more substantial than those in previous years. Most VNRs are longer than a hundred pages, with some even longer than 400 pages. This added level of detail and analysis also applies to SDG 16. Although certain VNRs are still fairly weak and do not deviate much from the official indicators, a significant number of reports refer to civil justice, with a focus on legal aid, within their description of SDG 16. Civil justice is also prevalent in other sections of the VNRs under other SDGs.

Given that SDG 16 was under review in 2019, almost all VNRs referred to justice. Pakistan was a glaring exception, as its VNR made no mention at all of SDG 16. However, a few countries stood out by placing justice as the centre of their account of their SDG implementation. For instance, Sierra Leone identified 'SDG4 (education) and SDG16 (justice) as accelerators for pursuing its developmental agenda, based on estimations that both goals are particularly central in the country's transformational aspirations'.

Various VNRs referred to access to Justice in connection to certain vulnerable groups, particularly women, people with disability or illnesses, LGBTIQ+, children, and marginalised populations. Particularly striking is how Côte d'Ivoire addressed the issue of the extreme relevance of access to justice to people with HIV.

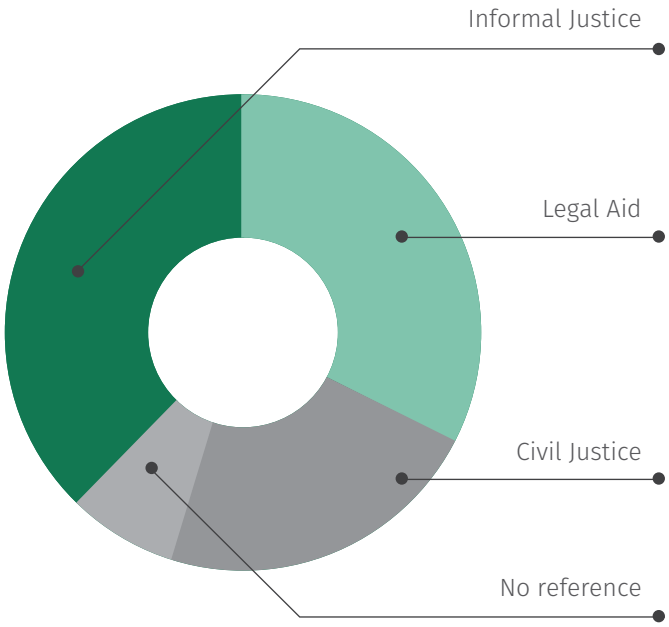


Figure 1: *References to civil justice in the 2019 VNRs*

SDGs 16.3 and access to civil justice

There is no official indicator on access to civil justice in the SDGs, particularly for SDGs 16.3. It is thus not surprising that 22 states do not focus on demonstrating progress on access to civil justice. However, it is noteworthy that a significant number of reports take a broader approach to SDG 16 by making direct mention of civil justice (13 countries), legal aid (19 countries) or informal justice systems (four countries).

Some VNRs refer to SDG 16.3 only in terms of the official indicators, namely the 'proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms' (SDG 16.3.1) and 'unsentenced detainees as a proportion of overall prison population (16.3.2)'. However, nearly half of the reports take a broader approach to SDG 16 and make direct mention of civil justice.

Common references include:

- introduction of civil, administrative, commercial, family and labor courts, or divisions in existent courts;
- development of new civil procedure legislation;
- introduction of new case management systems to facilitate the settlement of civil cases (for example, Rwanda's 'Unique Integrated Electronic Case Management System'); and
- establishment of alternative dispute resolution or mediation services.

Another indirect mention of civil justice is the reference to legal aid or availability of legal services for the poor. These references reflect a broader understanding of justice and access to justice. At least 19 VNRs mention legal aid. Countries often emphasise the relevance of legal aid in their VNRs. For example, Turkey refers to legal aid as 'one of the important means of access to justice'. Sierra Leone describes the Legal Aid Board as 'one of the major successes of the Government on goal 16 ... especially serving the indigent and rural population'. In this case, the connection to civil justice is made clear, seeing that the VNR continues by explaining that the Legal Aid Board 'facilitated legal representations covering issues ranging from child protection and land disputes, to criminal cases, domestic violence, rape, defilement and juvenile offences'.

One of the most thorough VNRs on legal aid is South Africa's. The country highlights the relevance of legal aid to addressing lack of access to justice and declares its aim to have a 'world class legal aid system, able to provide legal aid services in criminal and civil matters as well as legal advice services'. South Africa emphasises the relevance of legal aid to civil justice by stating that '[l]egal aid has also made great progress in providing civil legal assistance and legal advice focusing on protecting and defending the rights enshrined in the Constitution ...'. The country also recognises the challenge of the 'data gap in meeting the demand for civil legal aid services and reaching all people who require civil legal aid'.

South Africa emphasises the relevance of legal aid to civil justice by stating that '[l]egal aid has also made great progress in providing civil legal assistance and legal advice focusing on protecting and defending the rights enshrined in the Constitution ...

Figure 2: *Interlinkages between 6 goals in the 2019 VNRs*

Civil justice beyond SDG 16.3

Countries highlighted key civil justice issues across several goals in their VNRs, indicating the clear interconnection between access to civil justice and the realisation of the other SDGs. Civil justice problems related to property rights, family disputes and consumer rights were raised as important areas of progress under different SDGs (for example SDGs 1, 5, 8).

Below are the main examples:

- Birth registration: Most states discussed the SDG 16.9 target and challenges in reaching out to the most marginalised populations.
- The most common issue raised across the VNRs is women's property rights.
- Rules on business registration.
- Social insurance and workers' rights.
- Difficulties in combining formal with informal justice systems.
- Family law and child protection, which are often interconnected with domestic violence.
- Disability rights.

Challenges in achieving SDG 16.3

It is important to consider the main obstacles to access to justice identified by the countries themselves in the review process. Since most countries focused on the supply side of the access to justice, the challenges highlighted below also focus on the supply side problems. Below are some of the main challenges mentioned in the VNRs:

- Delayed justice, or backlog of cases.
- Physical access to justice – the distance of justice institutions from the general population and the low number of courts, particularly in the case of rural populations.
- Lack of awareness of existing legislation and regulations.
- Lack of independence and influence from politics.
- Lack of trained lawyers and justice providers.
- Poor court and institutional infrastructure.
- The need to strengthen court processes and management systems.
- Lack of resources among legal aid organisations, coupled with the inexistent structures for or recognition of paralegalism.
- Challenges connected to new technology, such as the need for cybersecurity, the existence of and fake news, and abuse of social media.
- Lack of coordination between different sections of government and between government and civil society organisations.
- Discrimination against minority groups, such as the LGBTIQ+ community, migrants, and people with disabilities.
- Gaps in collecting and assessing justice data.

South Africa took a comprehensive approach to thinking about the challenges on SDG 16. Its VNR included a list of challenges, among them the following:

- Lack of adequate resources to support and fund efforts by civil society and community-based organisations to improve access to justice for vulnerable and marginalised groups.
- The need for formal recognition of the activities of paralegals.
- Removing barriers to justice for vulnerable and marginalised groups in informal settlements or rural areas.
- Gaps in meeting the demand for civil legal aid services and reaching all people who require civil legal aid.
- A disconnection between what legislation says and how it is implemented.
- Racism and other forms of discrimination.
- Excessive bureaucracy.

South Africa took a comprehensive approach to thinking about the challenges on SDG 16.

Where is the access-to-justice data?

Most VNRs do not provide relevant data on access to justice, more particularly on civil justice matters, and, when they do, take different approaches to presenting it. A common approach to demonstrating commitment is to calculate the number of citizens or individuals who have benefited from legal aid services or publicly funded legal services.

An example is found in Sierra Leone's VNR: 'Since May 2015, when the [Legal Aid] Board was established, about 215,000 less privileged persons have benefited from legal representation, advice and education: 25,000 during May-December 2015; 83,000 in 2017; and 107,000 in 2018. About 14 percent of these were females and 19 percent children. Females and children accounted for most of the beneficiaries of Alternative Dispute Resolution Mechanism, at 80 percent'.

A few countries highlight a bolder approach – Indonesia, for example (see below).

Case study: Indonesia's Access to Justice Index

The Indonesian report emphasises the importance of measurement and adopts an approach of 'what can be measured, can be done'. On access to justice, it discusses at length the country's efforts to develop and implement a national 'access to justice index'.

As the VNR notes, 'The interesting thing is, the development of this index has also involved some both civil society and state actors and is supported by the Ministry of National Development Planning, Ministry of Law and Human Rights, and Central Bureau of Statistics. This collaboration is a sign that there are new opportunities for government and non-government actors to partner in developing meaningful measures of progress on access to justice.'

From commitment to action

It is difficult to determine from a textual analysis alone whether the statements and commitments by member states have changed things on the ground and if states have directed significant resources to identify and respond to the justice gap. The VNRs talk about their commitment to access to justice mainly in aspirational terminology and without specifying its application in practice and in policy-making.

However, a few countries do refer in their VNRs to measures that have been taken to implement stronger access to justice initiatives following the adoption of the SDGs. A number of examples, such as Chile, Mauritius and Rwanda, were mentioned above under the civil justice section. Common implementation measures across the various VNRs include:

- developing new courts or court chambers of civil, commercial and administrative law;
- increasing the number of courts and jurisdictions in the country;
- digitalising the judicial system;
- establishing mobile courts;
- improving free legal aid services;
- investing in alternative dispute resolution mechanisms;
- undertaking general reform of the justice system; and
- providing training to justice providers.

When the SDGs were adopted in 2015, 193 countries made a commitment to ensure equal access to justice for all, though for years progress has been slow. The VNRs are an innovative approach to reviewing progress, but lack information on explicit strategies to identify the scale of the access-to-justice needs and on initiatives to apply the principle of 'leaving no one behind'.

The reports also do not sufficiently recognise the important role of civil society actors in ensuring access to justice for all. The shadow report of the Chilean environmental NGO, FIMA, for instance, notes this significant absence:

As for the initiatives of non-governmental actors working on issues of access to justice, the Report does not contain any information in this regard. For example, the report does not contain data that reflect an examination of the work carried out by universities, through Legal Clinics, where law students are allowed to attend cases of low-income people and represent them judicially. There is also no data on civil society organizations dedicated to train and work for the legal empowerment of communities or providing free legal advice or assistance.

One of the reasons for the lack of acknowledgment stems from a failure to engage meaningfully with CSOs from the justice sector during the process of drafting the VNRs.

While focusing on their achievements, countries also seldom discuss failed initiatives or serious challenges in implementing the justice agenda. In many cases, countries take advantage of the VNR process for political propaganda in the international arena. This is the case with Azerbaijan, which had presented VNRs twice yet did not reflect on its closing civil space and lack of engagement with civil society actors. Shadow reports from the different countries drew attention to the disconnect between the VNR reports and reality. In South Africa, Puselto Maile of African Monitor notes that 'there were … omissions in respect of highlighting the unsafe environment for [the] functioning of CSOs, human rights defenders, trade unionists and journalists at community level'.

Overall, it is clear that the reports overemphasise efforts at addressing the goals without providing a balanced account about the challenges to achieving them on the institutional, policy, financing and implementation fronts. Moreover, the VNRs do not recognise alternative sources of data. Most of them refer to only governmentally produced data, which might not depict the whole picture and which are often inconsistent.

A shadow report on the South African VNR commented precisely on this point, explaining that 'it has become clear that disaggregated data, as well as targets that affect the bottom 40 per cent, are wholly inadequate or even missing'. Similarly, the shadow report of the Indonesian Legal Aid Foundation notes that their organisation, alongside other legal aid CSOs, has been providing legal aid for the poor and victims of human rights abuses long before the Indonesia government, yet such efforts are not adequately highlighted in the reports.

Furthermore, some of the data alluded to are outdated. For example, Indicator 16.3.1 in Chile's VNR contains data only for the years 2015 and 2016. The data reported appears to be obscure and unclear across different contexts – for example, Rwanda's VNR points to how 'access to justice has been subject to a decline followed by a stable rating since 2014 (80.25%) to 76.4% in 2016 and 77% in 2018', yet does not explain how these numbers were arrived at.

This collaboration is a sign that there are new opportunities for government and non-government actors to partner in developing meaningful measures of progress on access to justice.

Conclusion

In 2019, there was a significant improvement in the quality of the VNRs compared to previous reporting years, particularly so on the issue of advancing justice as a development priority. While this article focused only on SDG 16.3 and, within that, on the specific issue of civil justice which is not yet included in the official UN indicators, it is important to note that meaningful engagement with civil society actors and other partners is essential for the realisation of the entire SDG agenda. Our reading of the VNRs also reveals that the current set of official indicators is insufficient to address the most prevalent justice issues impacting marginalised populations.

Apart from a few exceptions, the 2019 VNR reporting countries did not limit themselves to the indicators 16.3.1 or 16.3.2, nor to only criminal justice matters – nevertheless, the absence of official access to civil justice indicators inhibits focused discussion on implementation challenges and progress. It is worth highlighting that countries struggling with serious criminal justice problems consider access to civil justice a priority issue and are keen to respond to the problems as a global community.

Access to civil justice is also considered important in advancing gender equality, strengthening child protection, advancing workers' rights and addressing economic inequality. However, more robust evidence is needed at national, regional and global levels to enable better understanding of and response to the civil justice problems that impact on poor and marginalised populations.

The 2030 Agenda and the SDGs provide a universal framework but recognise that countries differ in their challenges and resources. Countries are therefore called upon to develop their nationally specific agendas. We recognise that the VNRs are not a comprehensive assessment of national approaches.

However, it is important that governments are honest in their reports and focus as much on challenges and lesson learnt in advancing implementation as on achievements and commitment. This would help ensure that VNRs do lead in fact to an exchange of knowledge and ideas between governments and civil society actors that assists in finding actual solutions to complex problems – such as ensuring access to justice for all in a sustainable manner.

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FEATURE

One Step Forward, Two Steps Back: The Rise and Fall of the SADC Tribunal

Janelle Mangwanda

Introduction

The African Union (AU) has adopted the 'AU Agenda 2063: The Africa We Want', a 50-year socio-economic transformation plan setting out a number of goals for the continent to achieve by 2063. One of them is 'good governance, democracy, and respect for human rights, justice and the rule of law'. The aim here is to promote the rule of law at the continental and national level and ensure equal access to justice for all. The goal entails the development of effective, accountable and transparent institutions that ensure public access to information and protection of fundamental freedoms in accordance with national legislation and international agreements.

This aspiration is aligned to the United Nations Sustainable Development Goal (SDG) 16, which is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective accountable and inclusive institutions at all levels'. At the nexus of Aspiration 3 of the AU Agenda 2063 and Goal 16 of the SDGs is the promotion of human rights and access to justice at continental, regional and national level. Indeed, according to the United Nations Development Programme, access to justice is crucial for the implementation of other SDGs.

This article focuses on the SADC Tribunal and highlights how it was useful in promoting access to justice for citizens in the Southern African Development Community (SADC); it also highlights how, given the many socio-economic challenges in SADC countries, its dissolution has impacted negatively on the right to access justice, particularly for vulnerable and marginalised persons. The article presents recommendations for reviving the Tribunal and enhancing access to justice at both the regional and national level.

Defining access to justice

Access to justice is a basic principle of the rule of law and a fundamental human right that opens the door to achieving other important rights (Ameermia 2019); in other words, failure to access justice can block the realisation of other rights. Traditionally, the concept has been defined as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, in conformity with human rights standards' (Foundation for Human Rights 2019). However, a broader interpretation of the concept takes socio-economic realities into consideration.

This means that access to justice no longer simply refers to having access to legal services, but also having access to social justice, economic justice as well as environmental justice (Nyenti 2013). As such, before citizens are able to gain access to courts and other institutions to resolve their legal issues, they need to have the ability to reach justice. In other words, their socio-economic contexts must be conducive for them to attain justice. Marginalised persons – the poor, women, children, and those living in rural areas – should not be disadvantaged in achieving access to justice (Bowd 2009).

In southern Africa, a special court known as the SADC Tribunal was established formally in 1992 and went operational in 2005. The Tribunal was a step forward in advancing the right of access to justice, as it provided SADC citizens locus standi to bring their governments before the Tribunal for human rights violations (Lungu and Mandlate 2018). However, its suspension in 2010, and the termination in 2014 of its power to adjudicate human rights cases brought by individual SADC citizens, reversed the gains made and took the right to access justice on a regional level two steps backwards.

The problem of access to justice in SADC

SADC is a regional bloc formed in 1992 to promote peace and security as well as economic development. A revision of the SADC Treaty in 2001 emphasised the importance of democracy and the need for a court to play the crucial role of dealing with the legal and institutional integration of the region (Ruppel and Bangamwabo 2008). Accordingly, the SADC Tribunal was launched in 2005 in Windhoek, Namibia, as the judicial institution of the regional bloc (Ruppel 2009).

As a regional court, the Tribunal focused on resolving disputes stemming from economic and political ties; however, it quickly became evident that it could also play a role in dealing with human rights violations (Ruppel and Bangamwabo 2008). The Tribunal heard disputes between SADC member states as well as disputes between natural persons and states. The latter cases were heard only if local remedies had been exhausted and cases were unable to proceed under domestic jurisdiction (Nathan 2011).

According to the Protocol on the Tribunal in the Southern African Development Community, the judicial independence and impartiality of the Tribunal lay in the fact that each country could nominate qualified judges who possessed the qualifications required for appointment to the highest judicial office in their respective states (article 3(1)). Furthermore, the judges could not hold any political or administrative office in their respective countries (article 9), which limited the possibility of inter-state interference and accusations that a particular state was not represented.

> **“Marginalised persons – the poor, women, children, and those living in rural areas – should not be disadvantaged in achieving access to justice (Bowd 2009).**

In addition, according to the Tribunal Protocol, the rulings of the Tribunal were final and binding (article 32(3)) and failure to abide by them would result in the matter being reported to the SADC Summit, which had the power to take appropriate action in regard to the member state concerned (article 32(3)(4)).

After a few years of operation and ruling on only a handful of cases, the Tribunal was suspended in 2010 and subsequently dissolved in 2014. This came after a judgment was handed down in favour of a group of white farmers who filed an application to the Tribunal after challenging the Zimbabwean government regarding the expropriation of land in a land distribution programme (Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008). The applicants alleged that they faced discrimination by the government on the basis of race, as well as a lack of due process in terms of compensation after the deprivation of their property. The Tribunal ruled in favour of the applicants, ordering the Zimbabwean government to compensate them fairly; however, the government refused to enforce the Tribunal’s judgement (Ndlovu 2011), labelling it ‘an exercise of futility’ (Nathan 2011).

The case was referred to the SADC Summit for direction on the situation; however, the Summit folded under pressure by former President Robert Mugabe, who questioned its purpose and called for its suspension, saying the southern African community had 'created a monster' (Nathan 2013).

While there were other important decisions by the Tribunal, the Campbell case was its most notable, particularly in view of what ensued as a result. Shortly after the judgment, an independent review of the Tribunal was commissioned. It affirmed the supremacy of SADC law in relation to domestic laws and confirmed that the Tribunal had jurisdiction in hearing cases of human rights violations against individuals (Nathan 2013). However, in the aftermath of the review, the SADC Summit failed to renew the contracts of the Tribunal judges, whose five-year terms were to due to end in 2010 and 2011, and so in effect crippled the Tribunal, rendering it non-operational as there were no judges to adjudicate new cases.

In 2014 a revised SADC Protocol was adopted, one which omitted the mandate of the Tribunal to adjudicate on cases filed by individuals against states and thus left it only to adjudicate cases brought by member states in the regional bloc (Lungu and Mandlate 2018). This has denied access to justice to 277 million people within the SADC grouping as they can no longer rely on the regional court to adjudicate on human rights violations (Nathan 2011).

Socio-economic challenges in SADC countries

The poor socio-economic conditions present in many SADC countries make citizens, and particularly, marginalised groups such as the poor, women, children and those living in rural areas, susceptible to human rights violations, a situation that poses challenges in terms of accessing justice.

A study conducted in Malawi revealed that the legal system limits access to justice for the poor and those living in rural areas despite the constitution's affording all citizens the right to access courts (Scharf et al. 2002). This right is further hindered in rural areas, where courts are known to provide limited services and be poorly resourced and managed. The study also found that geographical inaccessibility and poor road infrastructure forces those in rural areas to travel long distances to cities in order to attain justice (ibid). The same challenges are present in countries such as Zambia and Tanzania, where there is low awareness of the law, limited access to the media, and illiteracy (Bowd 2009).

In the case of Botswana, access to justice is particularly cumbersome for women, who face legal, economic, as well as social obstacles in accessing justice (ICJ 2013). In Namibia, the high rate of legal costs is a hindrance to access to justice, as many poor people are unable to afford good quality legal services (Hinson and Hubbard 2012). In the case of Zimbabwe, there is a general lack of legal knowledge, coupled with rampant unemployment and financial constraints, which make it difficult for the average citizen to attain justice (Kayereka 2018). Furthermore, research in Mozambique, Kenya, and Zambia shows there is an adverse socio-economic impact, such as a loss of income and high travel and food costs, on families and households which are supporting detainees awaiting trial (Muntingh and Redpath 2015).

The challenges above are only some of the hurdles that citizens in the region have to overcome in order to reach justice. Even when they do reach justice, it is not always guaranteed that justice will be accorded to them by their domestic courts. This is why, in its initial format, the SADC Tribunal acted as an additional protection against human rights violations among SADC citizens.

The challenges above are only some of the hurdles that citizens in the region have to overcome in order to reach justice.

Arguments for and against the Tribunal's dissolution

The Tribunal's dissolution by the SADC Summit raises questions about the regional bloc's commitment to access to justice and promoting human rights.

One of the main arguments for the suspension of the SADC Tribunal was premised on the fact that post-colonial African countries have always been wary of supranational judicial supervision, as it is deemed to be a ploy by colonial powers to control the sovereignty of these states (Ruppel and Bangamwabo 2008). This stems from the idea that the SADC Tribunal is modelled on the European Court of Justice, which promotes speculation that the EU tends to promote and fund its replicas worldwide (Nathan 2011). Admittedly, the regional bloc's budget for 2011 was USD 83 million dollars, of which USD 31 million dollars came from contributions from member states, with the remaining USD 52 million dollars coming from donors (Nathan 2011). This argument was used to suggest that there were hidden Western forces pushing the Tribunal to act against African governments and that rulings of the Tribunal were intolerable acts of interference in the domestic affairs of countries.

The adopted and signed 2014 SADC Protocol proposed a revised, watered-down version of the Tribunal and removed from its mandate the ability to adjudicate cases brought by individual citizens against their state. This was met with condemnation and triggered reactions from a number of civil society organisations across the region. In 2018 and 2019, legal societies in South Africa and Tanzania brought cases to their respective High Courts regarding their respective government's role in the dissolution of the SADC Tribunal. In the application brought by the Law Society of South Africa, the High Court of Pretoria found that the participation of then President Jacob Zuma in the decision to dissolve the Tribunal was 'unconstitutional, unlawful and irrational' (Maromo 2008).

In December 2018, the Constitutional Court of South Africa upheld the High Court's decision, and also found that the decision to invoke the 2014 SADC Protocol undermined the country's international law obligations under the treaty (Erasmus 2019). The Court further asserted that in his capacity as President of South Africa, Jacob Zuma did not have the authority to sign away the fundamental right of access to justice, which is a right also provided for in the South African Constitution (Law Society of South Africa and Others v President of the Republic of South Africa and Others). The Court remedied that the incumbent President, Cyril Ramaphosa, withdraw South Africa's signature from the Protocol, which he did in 2019.

Elsewhere on the continent, the Tanganyika Law Society similarly challenged the adoption of the new Protocol before the High Court of Tanzania (Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania). The Court ruled that the suspension of the Tribunal was inimical to the rule of law, which is a foundational principle of SADC. The Court further condemned the government for putting the legitimacy of the SADC regional bloc in jeopardy and advised the government to review its position (Rickard 2019).

These two judgments are testament to the fact that access to justice is an indispensable right and that the Tribunal played a key role in the protection of human rights in the region.

Opportunities to enhance access to justice in the region

Access to justice must be enhanced, and not restricted, in the SADC region – and there are opportunities for collaboration to ensure this takes place. What is recommended, first, is the reintroduction of the SADC Tribunal, with checks and balances in place to allow it to operate in an impartial, independent manner and with clear separation of powers to avoid interference from other SADC structures. Given the orders provided by the South African and Tanzanian courts and the overall condemnation of the dissolution of the Tribunal, there is a window of opportunity to revive the original Tribunal.

This is also made possible by the fact that none of the heads of states who signed the revised 2014 SADC Protocol are currently in power (Rickard 2019). This provides an opportunity for current SADC leaders to reconsider the decision made by former leaders to dissolve the Tribunal and 'un-sign' the Protocol. In the current political climate, it is not certain whether SADC heads of states will have the political will to do so. It is foreseeable that some countries (such as Zimbabwe, which initiated the call to dissolve the Tribunal) will be hesitant to retract their signatures. It is submitted, however, that if civil society organisations apply enough pressure, domestic courts can instruct leaders to retract their signature, as was the case in South Africa (Fabricius 2019).

Secondly, lessons for a revived SADC Tribunal can be drawn from similar regional courts such as the ECOWAS Community Court of Justice, which has competence to adjudicate cases and complaints of human rights violations by individuals against their governments. Unlike the SADC Tribunal, the ECOWAS Court of Justice does not have the requirement that individuals must first exhaust domestic remedies before approaching it. This reduces the time that it takes for individuals to obtain justice, especially when domestic courts drag out cases or are reluctant to grant individuals the justice they deserve.

In the third place, it is important that courts on a domestic level adjudicate effectively on issues without government interference and in adherence with the principles of the rule of law and the upholding of human rights. Adequate funding of legal aid institutions and domestic courts is crucial, as poor and marginalised persons often do not have the means to afford private representation and rely on legal aid to uphold their rights in cases of violations by the state. These institutions must have a strong geographical presence in rural settings in particular, as they are often centred in major cities, which poses a challenge for those in rural areas (Bowd 2009).

Conclusion

Aspiration 3 of AU Agenda 2063 and Goal 16 of the SDGs are directly interlinked with each other, and both must be achieved at the continental, regional and national level as far as the right to access to justice is concerned. The SADC Tribunal was a step forward in the promotion of access to justice in the southern African region, but its dissolution in 2014 took the region two steps backwards as far as protecting individuals from human rights violations by their governments is concerned. Recent developments in South Africa and Tanzania point to an opportunity for reviving the Tribunal, but kickstarting the process will take political will, a uniform effort by all SADC heads of states, and increased pressure from civil society organisations across the region.

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The SADC Tribunal was a step forward in the promotion of access to justice in the southern African region..

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FEATURE

The High Calling of Public Interest Representatives in South African Bill of Rights Litigation

Kathryn de Villiers

Introduction

The introduction of public interest standing in the Constitution of South Africa, 1996, was a welcome departure from the strict rules of standing under the common law. By doing away with the direct interest requirement, section 38(d) of the Constitution makes provision for anyone to approach a court seeking relief in the public interest for an infringement or threatened infringement of a right in the Bill of Rights.

Public interest standing thus holds great potential for constitutional democracy: for holding the state accountable for its obligations to the people of South Africa, for vindicating the rights of those who are disadvantaged by their socio-economic circumstances and for securing access to justice for all. However, to act in the public interest is a high calling, and shouldering the burden of representing the public interest requires true social conscience, as the relief of public interest proceedings is not enjoyed purely by the litigant, in the event that he or she derives any benefit at all.

For these reasons, it is important to investigate who may invoke public interest standing in South African Bill of Rights litigation and to analyse what these applicants' roles entail.

The development of section 38(d) of the Constitution

Soon after the interim Constitution came into effect, the South African Law Commission (SALC) began investigating the need to introduce legislation to deal with public interest suits. In 1998, the SALC explicitly recommended legislation regulating actions brought in the public interest to prevent public interest standing from being developed haphazardly or not at all. This was proposed in the form of recommendations and a bill. However, the bill was not passed and the development of public interest standing in South Africa over the past 20-odd years has remained the responsibility of the judiciary.

...Constitution makes provision for anyone to approach a court seeking relief in the public interest for an infringement or threatened infringement of a right in the Bill of Rights.

Despite the absence of promulgated legislation to give content to section 38(d), the courts have developed public interest standing consistently and, in so doing, have generally evaded the fears of the SALC. The landmark Constitutional Court judgments of Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (Ferreira 1996) and Lawyers for Human Rights and Another v Minister of Home Affairs and Another (Lawyers for Human Rights 2004) currently still provide relatively clear guidance, and have most recently been confirmed by the Constitutional Court in Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (Freedom of Religion 2019).

However, one particular recommendation made by the SALC in respect of public interest matters that has not yet been addressed adequately by the courts in South Africa pertains to the need for, and role of, appropriate public interest representatives.

The test for an appropriate public interest representative

(a) Objective inquiry into actual or threatened rights infringement

According to the SALC's recommendations, section 38(d) of the Constitution entitles any person or organisation to launch an action in the public interest. Applicants need not have any direct, indirect or personal interest in the relief they seek. The SALC recommended further that the person claiming relief should identify the action as one being brought in the public interest and nominate a suitable person to act as a public representative in the matter.

The courts have since confirmed that an applicant approaching the courts in terms of section 38(d) need only show an infringement or threat to a right in the Bill of Rights in order to claim relief in the public interest. In Lawyers for Human Rights, the Constitutional Court noted that South Africans are increasingly aware of their constitutional rights and infringements thereof. In theory, therefore, it should not be difficult for a prospective public interest applicant to prove the objective requirement for invoking public interest standing.

(b) Subjective inquiry into genuineness of applicant

The objective requirement for public interest standing must be complemented by a subjective inquiry into the genuineness of the applicant. Essential to the nature of public interest standing is that applicants must be motivated primarily by a desire to benefit the public – whether at large or in part – and not themselves. To determine whether an applicant is acting genuinely in the public interest, South African courts have been given considerations to take into account in view of the facts and circumstances of each case. These were laid down by O'Regan J in her minority judgment in Ferreira. The list was later confirmed and lengthened by the majority in Lawyers for Human Rights, as well as a minority judgment by Madala J. Factors relevant to determining whether a person is genuinely acting in the public interest have again been confirmed recently in the unanimous decision by the Court in Freedom of Religion.

The consolidated – but not closed – list of considerations includes 'whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court' (Ferreira, para 234); 'the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right' (Lawyers for Human Rights, para 18); and 'the egregiousness of the conduct complained of' (Lawyers for Human Rights, para 73).

O'Regan J referred to the factors that she originally proposed in Ferreira as 'considerations', while Madala J uses the comparable term 'guidelines' when adding to the list later in Lawyers for Human Rights. These choices of wording indicate the flexibility in the approach to section 38(d) taken by the courts. However, at the same time, O'Regan's judgment warns that courts must be 'circumspect' in affording public interest standing. This displays the courts' commitment to ensuring nevertheless that matters brought in the public interest be treated with care.

Appointment of a suitably qualified representative of the vox populi

The vox populi – or voice of the people – is naturally inherent to the concept of public interest standing. Anyone representing the public interest in court when alleging that a right in the Bill of Rights has been infringed or threatened is, by implication, speaking on behalf of the public. Thus, when considering the role of the public interest litigant, it is undoubtedly desirable to have the most representative of litigants before the courts (Binch 2002: 384).

Whilst the ground of public interest standing has many merits, the words 'in the public interest' are difficult to define objectively and will depend on the impact of the alleged violation. What is clear, however, is that the public will ordinarily have an interest in the objective breach of a right in the Bill of Rights. This is supported by section 7(1) of the Constitution, which states that the Bill of Rights 'enshrines the rights of all people in our country'. Whether or not the public then has a sufficient interest in the particular relief sought will be up to the public interest litigant to prove.

The SALC recommends that the public interest applicant be the one to nominate a representative in the matter once obtaining the nominee's consent. The representative may be the applicant him- or herself or another person or organisation. Cote and Van Garderen note that institutional applicants (such as NGOs) usually represent the public interest in South Africa (Cote and Van Garderen 2011: 174). The authors argue that, unlike most individuals, these institutional applicants are able to prevent cases from being lost if clients are no longer able or willing to continue.

The representative can be appointed by the court after the court is satisfied that the action is a bona fide public interest action. Should he or she later appear not to be an appropriate representative, the SALC recommends that the representative should be removed and replaced by the court either mero motu or on good cause shown by an interested party. This is possible at any time before judgment is handed down, and presents a way of safeguarding the public interest. It is worth noting that the SALC speaks of the appointment of a 'suitably qualified' representative by the court, a requirement intended to limit unmeritorious public interest actions. Such a person might not be easy to find. This qualification raises the question of whether courts are in a position to exercise the power of appointment exclusively. Although the SALC does not provide detail, it can be assumed that the public interest applicant will have to provide reasons for his or her choice of nominee for representative.

What is clear, however, is that the public will ordinarily have an interest in the objective breach of a right in the Bill of Rights.

Adequate representation of the voices of affected persons

As mentioned, the notion of a suitably qualified public interest representative has not yet been adequately expanded upon by the SALC, the courts or literature on the subject since the introduction of section 38(d). Although on the face of it the term 'suitably qualified' may refer to abilities, experience or resources of the representative, it is submitted that this needs to be understood more broadly in the context of public interest standing and access to justice.

Currently, there is no requirement that those acting in the public interest must have engaged with those they represent in court. There is consequently a risk – even a reality (Binch 2002: 384) – that those whose rights are directly affected by a given case brought in the public interest will not be given a meaningful opportunity to be heard or participate in the litigation and will be forced to accept consequences without having been involved in the process determining those consequences. However, due to the potentially large impact of judgments handed down in litigation in the public interest, as well as the fact that the representative represents the vox populi in these matters, it is submitted that such persons or organisations cannot be considered suitably qualified if they do not speak on behalf of all people affected by the infringement of rights in a particular case.

In Lawyers for Human Rights, the court acknowledged that the 'illegal foreigners' detained at ports under various provisions of the Immigration Act 13 of 2002 may well have been deported within a matter of days. This afforded the applicant organisation very little time to engage with the victims. In this regard, the public interest dictated that the constitutionality of the impugned provisions be challenged as soon as possible to prevent further rights violations.

However, the second applicant in Lawyers for Human Rights was a certain Ann Francis Eveleth, who was an American land activist and spokesperson for the National Land Committee. Eveleth had been arrested illegally at the World Summit on Sustainable Development and detained for failing to renew her residency permit, and was as such a suitably qualified representative for the 'illegal foreigners' in the Constitutional Court (Independent Online 2002). Yacoob J did not mention this in his majority judgment and instead permitted her involvement because it would have a minimal impact on the cost of proceedings.

Madala J, in his minority judgment, did make reference to the suitability of the second applicant to the proceedings, however, by stating that she had been illegally arrested and detained without trial under the repealed Aliens Control Act 96 of 1991. It is submitted that Madala J's reasoning shows greater understanding of the importance of having a suitably qualified representative in public interest cases, especially if time is limited and opportunities for meaningful interaction are few.

> **..opportunity for the Court to give further content to public interest standing in a matter in which the rights of vast numbers of South Africans were affected by the judgment...**

In the Freedom of Religion decision, the Constitutional Court recognised the impact that its judgment, which dealt with the constitutionality of the common law right of parents to chastise their children moderately and reasonably, would have on almost all parents and children in South Africa. However, none of the parties in the High Court proceedings either wanted to, or were able to, challenge the matter in the Constitutional Court. Freedom of Religion South Africa (FORSA), a non-profit organisation and amicus curiae in the court a quo, consequently relied on section 38(d) of the Constitution to assume that responsibility.

In a unanimous judgment, the Court acknowledged its uncertainty about whether or not to grant public interest standing to FORSA given the change it sought in its role in the matter at hand. In its deliberations, the Court used the considerations laid down in Ferreira and Lawyers for Human Rights as its point of departure and duly granted standing to FORSA under section 38(d), primarily because it was the only way put to the Court to challenge the declaration of invalidity.

However, in view of the fact that the SALC's recommendation pertaining to the need for an appropriate public interest representative in public interest matters has not yet been addressed by the courts, and that this case presented an opportunity for the Court to give further content to public interest standing in a matter in which the rights of vast numbers of South Africans were affected by the judgment, it is disappointing that the Court did not unpack the significance of the role of public interest representatives in its decision to grant standing.

The only engagement with FORSA's suitability as a public interest representative related to the fact that, as a former amicus curiae, it was familiar with the issues that it sought to raise – in addition to which a footnote acknowledged that its objectives include the advancement freedom of religion in South Africa through public awareness, lobbying and research.

It is also recommended that courts should require proof of engagement between public interest representatives and those they represent...

Conclusion

The right to approach courts in the public interest is the widest ground of standing available in South Africa. No longer must potential litigants prove a personal interest in the relief they seek in such cases: their rights need not have been affected at all. This creates great potential for anyone to seek access to justice on behalf of those who cannot.

This relaxed approach to locus standi permits litigants to act on behalf of sections of the public whose human rights have been infringed, whether or not the victims are aware of these violations or able to approach the court for relief themselves. Conversely, however, public interest standing enables litigants to represent people without any prior engagement and can result in mala fide applicants wasting judicial resources.

The two-legged threshold test for public interest standing developed by the courts entails an inquiry into the subjective position of the party claiming to act in the public interest, as well as proof that it is objectively in the public interest for the matter to be brought before the court.

Whilst it is true that South African courts now adopt a broad approach to the procedural requirement of standing, judges nevertheless need to apply their minds to the two-legged threshold test in order to prevent applicants from pretending that actions are being brought in the public interest with a private, political or profit motive.

Despite the SALC's recommendations that public interest standing be granted specifically to suitably qualified representatives, this consideration has not yet been given content by the courts in the determination of genuineness of applicants invoking standing under section 38(d) of the Constitution. The remaining challenge facing South African courts will be to ensure that the disenfranchised are given a voice in public interest cases with outcomes that affect them directly, so as to be faithful to the public interest.

This could be achieved by requiring public interest applicants to nominate representatives who will act on behalf of the public on court approval, as suggested by the SALC. It is also recommended that courts should require proof of engagement between public interest representatives and those they represent, especially (and at least) those with a material interest in the outcome of the case.

Finally, it is submitted that the courts must continue to be cautious in granting public interest standing, especially because of the potentially wide-reaching effects of such judgments. The reasons given by the courts in decisions as to whether or not to grant public interest standing, particularly pertaining to the suitability of the applicant relying on section 38(d) to seek relief in the public interest, are imperative if this area of the law is to develop in a way that prevents potential abuse of this broad ground of standing and truly ensures access to justice for all.

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EVENT

Webinar: Student Hunger and COVID-19: Stakeholders' Roles in Realising the Right to Food of Vulnerable Groups (1 October 2020)

Wilson Macharia

On 1 October 2020, the Socio-Economic Rights Project at the Dullah Omar Institute (DOI), University of the Western Cape (UWC), hosted a webinar on 'Student Hunger and Covid-19', an event forming part of a series of such events aimed at addressing food insecurity in tertiary institutions nationwide through research and advocacy.

The webinar was moderated by Paula Knipe, a researcher at the DOI. In her introductory remarks, she presented a brief history of the project since its inception in 2017 and outlined the objectives of the webinar. These were to identify the roles and responsibilities of various stakeholders in addressing the impact of food insecurity on students in the context of COVID-19 and to highlight collective solutions.

Dr Yvette Basson, a lecturer at the UWC Faculty of Law gave a presentation entitled 'Reimagining the food environment on campuses: What roles can non-state actors play in addressing student hunger?' She began by describing the food insecurity situation at UWC and avenues available to address it.

First, the university's Central Student Affairs Office has a feeding scheme which assists needy students through a special fund. Dr Basson noted, however, that despite the level of confidentiality that is observed by the Centre when handling requests, students are often hesitant to approach it out of shame and embarrassment.

Secondly, a staff member of the university established a social media platform called 'Fairy Godmother', through which she accepts request for assistance by students. The forms of assistance include food, toiletries, and financial assistance. The platform receives between 2,200 and 2,500 requests a year. Dr Basson pointed out that this avenue was preferable to the students due to its level of anonymity.

In January 2020, Dr Basson set up a foodbank in collaboration with Fairy Godmother, which gave her greater insight on the student experience. Between its inception and 15 March 2020, the foodbank received about ZAR 13,000 in financial donations, six donations of actual food items, and other ongoing financial commitments. The sources of the contributions included private individuals, alumni, parents of students, companies, university staff, and international sponsors. Beneficiaries are assisted with food parcels that last about 10 days.

Dr Basson made several observations about what she had learnt from doing the project. First, many people in society at large are willing to contribute to such initiatives, but the challenge is linking potential donors to needy students. Secondly, there are benefits to having private individuals run initiatives like these – in particular, students are more comfortable about approaching them than institutions. Thirdly, potential donors, especially in the private sector, are often discouraged by institutional bureaucracy.

Also, it is difficult for one person to run such an initiative, considering the number of requests received. It is important to explore alternative ways of linking donors to the needy students. In conclusion, Dr Basson called upon other stakeholders to consider such initiatives, since universities can only do so much.

The second panelist, Natalie Mansvelt, is a lecturer in the Department of Social Development Professions at Nelson Mandela University. Her presentation was entitled 'Advocating for hungry students: Adopting a people-centred approach to addressing student hunger'. It was informed by research conducted for one and a half years until December 2019. The objectives of the study were to conceptualise student hunger, identify the needs, and find solutions to address them, with the research involving surveys and dialogue sessions with students off-campus.

> **...it was found that 82 per cent of participating learners were receiving food in school before the lockdown.**

In conceptualising student hunger, the study employed two components: the hunger of the stomach, and the hunger of the mind. The causes of the former are related to the social-economic status of the students. Its negative impacts include poor academic performance and decline of mental health, resulting in anxiety and depression. The latter is determined by the choices that students make. These include using resources for activities that are not in their best interests while ignoring the hunger of the stomach. The problem is linked to a lack of financial literacy. For example, some students prioritise outward appearances to mask their backgrounds and gain a sense of belonging, while neglecting needs such as food.

The research led to four key findings. First, there is no single solution to student hunger. Secondly, there is a need for collective effort, which involves coordinating stakeholders in pursuit of a holistic approach to the issue. Thirdly, students should be involved in these efforts, including by involving them in the planning processes and undertaking meaningful consultation with the student community. Fourthly, it is important to provide financial literacy skills to help students make informed decisions about their resources. This should take a broad approach and cover, among other things, peer pressure, culture, thought processes, and attitude. In her conclusion, Mansvelt reiterated the value of including students in such projects and humanising all the processes that involve them.

The third panelist, Hopolang Selebalo, is a co-head of research at Equal Education. Her presentation was entitled 'Lessons from the school learners' COVID-19 litigation: What CSOs should know'. Her presentation dealt with the South African National School Nutrition Programme (NSNP). Anchored under the Department of Basic Education (DBE), it serves to fulfil the rights to education and to food. Throughout the years, the programme has had several positive impacts, including improved school punctuality, regular school attendance, and improved concentration in class.

These, however, were negatively affected by the national lockdown in response to COVID-19. During this period, all schools were closed and the NSNP was suspended indefinitely. The DBE stated that it was the duty of the families and communities to feed children while they were at home. According to Selebalo, it was clear from the outset that children would struggle, given that most of their guardians would lose their jobs due to the lockdown restrictions. This was confirmed by subsequent surveys, including one that Equal Education conducted in five provinces, which found that a majority of households experienced financial difficulties due to the lockdown.

Additionally, it was found that 82 per cent of participating learners were receiving food in school before the lockdown. However, 63 per cent of them did not have sufficient access to food during this period, and 91 per cent had not received support in form of food parcels from the government; 86 per cent of learners said they would be able to collect food parcels from their schools if these were available.

As a result, various stakeholders took it upon themselves to engage with the DBE on behalf of the learners. For its part, the DBE stated that the NSNP would resume the programme only when schools reopened. Following several other engagements, the DBE minister committed to providing meals to all learners during this period, a commitment which was later retracted. On 12 June 2020, a consortium of organizations presented the matter in court, where they obtained a favourable decision. The High Court directed the DBE to immediately resume the NSNP and furnish the applicants with a detailed plan of how it intended to implement the decision. (Click here to read the Court decision: http://www.saflii.org/za/cases/ZAGPPHC/2020/306.pdf.)

Selebalo noted several challenges that she had observed following this decision. These include lack of information among the learners and their families about the resumption of the programme, lack of disaggregated data on the beneficiaries of the NSNP during this period, and lack of transport to school for the learners.

The Q&A session was moderated by Aluwafunmilola Adeniyi from the DOI. Several key points emerged:

- It is rare for students to abuse the process of receiving food aid. As such, the foodbank was not subject to abuse.
- Considering the nature of the foodbank project, there is no concrete structure to partner with the government.
- Many students still do not know of the existence of such projects. The majority of the beneficiaries of the foodbank were female.
- Only one person with a disability asked for assistance. Interventions are needed in this regard.
- Substance abuse, specifically of alcohol, was a major point of discussion in the study. The issue of 'blessers' was also raised, especially as a common practice among students.
- Monitoring and evaluation has not been carried out. Students should be involved in the process.
- The programme at Nelson Mandela University employs a means test to identify needy students. Students with disabilities also have access to food parcels.
- Lobbying, research, and litigation are the main advocacy tools that were employed. Consultations with relevant stakeholders were prioritised.
- A good number of organisations advocated for the resumption of the NSNP during this period.

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UPDATE

Report of the UN Special Rapporteur on the right to the highest attainable standard of health: Commentary on COVID 19

Ebenezer Durojaye

In his last report to the UN General Assembly, Dainius Pūras building on previous reports calls for a rights-based approach to the COVID 19 pandemic, that recognises the indivisibility and interdependence of all rights. .According to him a rights-based approach to health challenges requires the "recognizes that inequality and discrimination are major contributors to poor health outcomes'. He notes that effective response to a pandemic require that states ensure access to information for vulnerable and marginalised groups. In particular, the report notes that any attempt to curtail the enjoyment of human rights with a view to responding to a pandemic, must be done in accordance with international norms and standards. In addition, the decision-makers must be held accountable for any violations that may result from such actions.

Reinstating the 3As and Q, the report notes that access to goods and services in the context of COVID 19, must be available, accessible, acceptable and of good quality to all. The report calls for solidarity among states with a view to addressing the pandemic In this regard; richer states are enjoined to support poorer ones to address the COVID 19 pandemic. According to the Special Rapporteur, the pandemic has exacerbated inequality and discrimination in the world. It is therefore, important that any measures aimed at addressing the pandemic must give attention to the plights of disadvantaged groups in the world. Thus, the report calls for equitable development and distribution of COVID 19 vaccines that is accessible and affordable to all. The reports commented on the impact of corruption in addressing the pandemic. It ends by making concrete recommendations to states and other stakeholders in addressing the pandemic.

Here is the link to the report https://undocs.org/A/75/163

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