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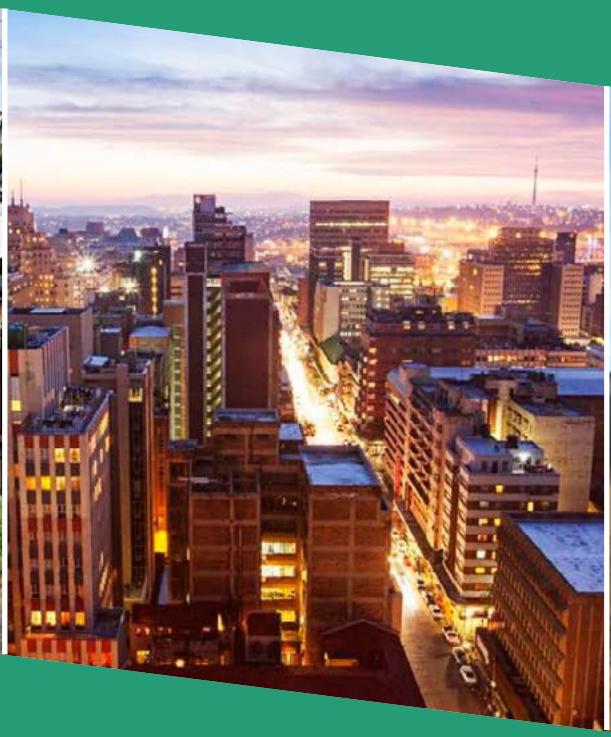

ESR REVIEW

Economic & Social Rights Review in Africa

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

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Editorial

Welcome to the fourth issue of ESR Review in 2020. This is the fourth in a series of special issues on access to justice.

The COVID-19 pandemic and ensuing lockdown across most of the world have highlighted the extent to which people and communities are exposed to social and economic vulnerabilities. To compound these vulnerabilities, in many states the response to the pandemic has had a profound impact on the functioning of justice systems. Court closures and curtailed operations have aggravated case backlogs, adversely affected the provision of timely and fair hearings, and increased the length of proceedings. Those who are especially vulnerable, such as asylum seekers, migrants in detention centres, pre-trial detainees, and women exposed to sexual and gender-based violence, have borne the brunt of these consequences.

As the world slowly returns to a semblance of normality, it becomes ever more urgent to foreground the need for access to justice for all, but particularly so for vulnerable persons. Strengthening institutional adaptability is key. Strengthened institutions and people's participation in governance and democracy are essential to ensuring access to justice for vulnerable groups and persons. Meeting the targets for SDG 16 begins with a focus on the vulnerable.

This issue of the ESR Review presents four feature articles that reflect on how SDG 16, which is related to access to justice, can better serve the needs of the vulnerable. In the first of these articles, Chipo Mushota Nkhata reflects on the role of law students in furthering the goals of access to justice and demonstrates how trial advocacy can be useful beyond the classroom in serving to raise awareness among key players, such as judges, law-makers, clients and lawyers, about barriers to access to justice. The article reflects on how such role-players in the justice sector can be empowered to address barriers that are within their control and so contribute to making justice more accessible.

In the second feature article, Clara Barasa and Anthony Kirima highlight success stories in a pilot project by the organisation Kituo Cha Sheria. This prisons paralegal project empowers inmates to seek redress in instances where they believe justice was not served, and equips them and prison officers with legal knowledge to promote access to justice. The project has been successfully replicated in various Kenyan prisons, but Barasa and Kirima argue that while such interventions are crucial for the achievement SDG 16, they are not prioritised in government plans and thus not sustainable unless sufficient funding and technical support are provided.

In the third feature article, Sithuthukile Mkhize reflects on the experience of those who use the services of legal aid bodies and brings to light the challenges facing South Africa's Legal Aid Board. She argues that although legal aid bodies are created with a view to making legal services more accessible to poverty-stricken individuals, these bodies are often hamstrung by inefficient systems and financial constraints.

Then, in the fourth article, Kristen Petersen reflects on laws and policies on the African continent that disproportionately target poor, vulnerable and marginalised persons whose only crime is that they lack an income or means of subsistence. Petersen delves into legislative efforts that criminalise poverty and, in so doing, hamper the rights and developmental needs of the poor.

In the Events section, the focus is on constitutional resilience and the COVID-19 pandemic in Africa. Paula Knipe provides a round-up of webinar events hosted by the Socio-Economic Rights Project (SERP) and Applied Constitutional Studies Laboratory of the Dullah Omar Institute. In the Update section, we give feedback on the concluding observations on South Africa's initial state report to the United Nations Committee on Economic, Social and Cultural Rights (CESCR).

We hope you find this issue stimulating and useful in the struggle for achieving SDG 16. We wish to thank our anonymous peer reviewers as well our guest authors for their insightful contributions.

Oluwafunmilola Adeniyi
Guest Editor

FEATURE

Crafting Justice through Clinical Legal Education: The Role of Trial Advocacy in Advancing Access to Justice for Marginalised Groups

Chipo Mushota Nkhata

This article explores the potential of trial advocacy as a module in Clinical Legal Education (CLE) in addressing barriers to access to justice for marginalised communities and groups. Traditionally, trial advocacy is taught with the aim of equipping students with litigation skills. The School of Law at the University of Zambia (UNZA) has added another primary objective of teaching trial advocacy, namely empowering key players in justice sector (University of Zambia 2015: 2). The article demonstrates how trial advocacy can be useful beyond the classroom and serve to raise awareness among key role-players – that is, judges, law-makers, clients and lawyers – about barriers to access to justice. It reflects on the role of law students in furthering the goals of access to justice, and examines how role-players in the justice sector can be empowered to address barriers that are within their control and thereby contribute to making justice more accessible, particularly for the vulnerable and marginalised. In short, the article focuses on trial advocacy as a tool for social justice education and the way in which legal education can facilitate the use of this tool by a variety of role-players. Based largely on UNZA's experiences, it begins by discussing the status of access to justice for marginalised groups in Zambia and the role of legal education in advancing access to justice, after which it examines UNZA's experience in this regard.

Access to justice for marginalised groups in Zambia

Marginalised groups in Zambia are susceptible to violation of their legal and human rights yet have the least access to justice. Many factors account for this, such as lack of legal knowledge and the lack of a supportive legal framework for addressing injustice and rights violations (American Bar Association 2014: 9). In Zambia, poor and socially excluded groups include women, children, persons with disabilities (particularly mental disabilities), people living with HIV, the elderly, and prisoners (AfriMAP and Open Society Foundations 2013: 15; Paralegal Alliance Network 2015: 12). To ensure access to justice for these groups, it is important to address the challenges that impede that such access.

Lack of legal knowledge by marginalised communities inhibits their access to justice as they may not know

> **Marginalised communities seldom have the opportunity to participate in creating a legal and regulatory environment that responds to their justice needs**

that the injustice they experience can be redressed at law; even if they do, they may not know how to seek legal redress (McQuoid-Mason 1999: 2). Some perpetrators of rights violations take advantage of marginalised groups' ignorance, consequently worsening their vulnerability to rights abuses and deepening their marginalisation.

Lack of legal knowledge is not the only knowledge gap that affects access to justice. Marginalised communities seldom have the opportunity to participate in creating a legal and regulatory environment that responds to their justice needs. Courts, legal practitioners and law-makers are thus often ignorant of their unique needs and circumstances. Justice services cannot be said to be accessible if they are not client-centred (Legal Aid Service Provider Network 2015: 82). The courtroom does not always provide the context for these communities to tell their life story and describe how it is impacted on by the justice system; indeed, the legal system is usually interested only in the part of the life story directly related to the case before the courts.

This 'one-size-fits-all' approach to addressing legal issues disproportionately affects marginalised groups, whose justice needs are thus overlooked, making the law irrelevant to them, rendering it ill-equipped to address their issues, and reinforcing their antipathy towards the justice system (Special Rapporteur 2012: 8). To ensure their access to justice, the legal framework must be conducive and responsive to their needs (Bodenstein 2016). One of the ways to achieve this is to involve them in shaping the legal frameworks that affect them (Special Rapporteur 2012: 8). Through such participation in law-making, legal processes are demystified and marginalised groups gain knowledge of the law and how to use it.

The accessibility of legal services and justice institutions also affects the extent to which marginalised groups can enjoy justice in Zambia. At least three forms of accessibility may be noted: financial, physical and procedural (AfriMAP and Open Society Foundations 2013: 14–15). Many marginalised groups are indigent and cannot afford the high costs associated with lawyers and legal processes. In addition, justice institutions are often in far-flung areas and not easily accessible by these groups (AfriMAP and Open Society Foundations 2013: 104–105). High transportation costs make it difficult for them to access justice institutions, and in the case of persons with disabilities, justice buildings are often not physically accessible.

These barriers not only impede access to justice services but prevent marginalised groups from learning how the justice system operates. The less they interact with the justice system, the less knowledgeable they are about the law and its processes. Financial and physical inaccessibility therefore impacts negatively on procedural accessibility, that is, marginalised groups' understanding of legal processes and their ability to navigate them. Many legal procedures are complicated, and marginalised groups do not have the opportunity to learn about them until they are already involved in a legal matter.

Lack of understanding of legal processes and inability to navigate them also impacts on the decision to seek legal remedies in courts of law (Paralegal Alliance Network 2015: 78–80). People do not spend time or money in pursuing ventures they do not fully understand, particularly where they have other, competing demands on them. Procedural inaccessibility can thus impact in turn on physical and financial inaccessibility.

> **...legal curricula should be reviewed periodically to assess the extent to which they prepare law students for engaging with the market they are likely to serve**

The role of legal education in advancing access to justice

Legal education, including professional legal education, has the potential to empower all key role-players in the justice sector, namely, clients (in this case, the marginalised groups), lawyers, law-makers, judges and other law enforcers. Legal education can enable indigent clients to know their rights, engage in legal and institutional frameworks for enforcing their rights, and participate in shaping laws and policies that affect them; it can also help institutionalise client-centred approaches to justice (Legal Aid Service Provider Network 2015: 82).

Traditional approaches to legal education tend to prepare everyone except communities to work with the law. For legal education to be transformative and contribute to the goals of access to justice for marginalised clients, it is important that there be close interaction among all role-players in the justice sector. Such interaction is necessary for sharing experiences and ensuring that identification of and response to access-to-justice challenges are based on the lived-reality experiences of marginalised groups (Holnes 2013: 340–342). This is particularly important in countries like Zambia where there is a paucity of research on access to justice for different marginalised groups and a tendency to take the research findings for one group and generalise them to all others (AfriMAP and Open Society Foundations 2013: 10).

A further consideration is that developing well-prepared lawyers entails, inter alia, that they undergo a legal curriculum which is responsive to societal needs. This means legal curricula should be reviewed periodically to assess the extent to which they prepare law students for engaging with the market they are likely to serve (Macfarlane & Manwaring 2006: 264). In a developing country like Zambia, legal education cannot ignore the plight of marginalised groups. Interaction with marginalised groups presents an opportunity to review legal curricula through their eyes and take into account their experiences.

It is ironic, then, that in a country with a huge population of marginalised groups, Zambian legal education has not situated itself in a position where it serves the masses. This is particularly evident in the case of professional legal education, where the curriculum does not adequately cater for learner legal practitioners who seek to practise public law; currently, it has to few to no modules that equip students with practical lawyering skills involving marginalised communities.

For practising lawyers, continuing professional development enables them to respond to societal changes. Lawyers who did not take certain courses in their formative legal education, or who want to upgrade their knowledge, can do so through training programmes, conferences and other forms of professional development. This could be particularly relevant in contexts such as Zambia's where there is limited preparation of practising lawyers in the area of public law. Institutions of higher education can create a platform for facilitating community-centred public law education programmes. This could be effectuated through the mainstream legal curriculum or via activities aimed at contributing to the public sector and community development.

The design of UNZA's CLE course seeks to contribute to all the ways above of creating interactive spaces for players in the legal field, the overall aim being to raise awareness of the law and improve the justice system. Of relevance to this article is the module on trial advocacy.

UNZA's experience in using trial advocacy to advance access to justice

The School of Law at UNZA introduced CLE as a course in 2014. One of the arguments for its introduction was that it would improve students' analytical and advocacy skills. Trial advocacy, as a module in the course, was thus instrumental in having the CLE course approved. Traditionally, trial advocacy has been used as a teaching method for sharpening courtroom practice and lawyering; trial advocacy is, as such, a skills course, and typically targeted at law students.

However, this traditional implementation of trial advocacy has been criticised on a number of grounds. According to Hegland (1982: 62), these include the following:

- it focuses on teaching skills to students that reinforce inequality;
- it focuses on teaching skills to the exclusion of the 'philosophical and psychological underpinning of lawyering techniques';
- it ignores the emotional side of lawyering and learning;
- it teaches skills 'in a moral vacuum of hypothetical cases'; and
- it focuses on winning cases irrespective of the issue or cost.

One would conclude that trial advocacy primarily serves lawyers seeking to practise in private law. This seems especially true of contexts such as Zambia's where there is relatively little public-law-related litigation and legal education is skewed towards private-law practice. However, the importance trial advocacy has for all types of litigation cannot be overemphasised, given the centrality of litigation in justice systems. Burger (1973: 230) observes in regard to trial advocacy that poor practice of the law can negatively impact on the quality of the entire justice system; as such, it can also be used to sharpen the skills of law students seeking to practise public law.

The importance trial advocacy has for all types of litigation cannot be overemphasised, given the centrality of litigation in justice systems.

Hegland argues that 'rethinking trial advocacy and Clinical Legal Education as a whole offers new goals for advancing justice through legal education' (1982: 71). Trial advocacy can provide a forum for addressing barriers to justice for marginalised groups in both private and public law. This makes it suitable both as a teaching aid in legal education and as a means of serving the justice needs of marginalised communities and groups. It should be noted, however, that different models of trial advocacy can and should be developed to serve different communities and contexts. This article presents only the model currently used by UNZA and does not purport to suggest that is a panacea to use trial advocacy as an access-to-justice tool or a tool in legal education.

In the first implementation of trial advocacy at UNZA,

students were given a hypothetical set of facts to work with and assigned different roles to play. The university was granted permission by the judiciary to use one of its courtrooms for a mock trial. Students were required to be fully robed and to conduct the trial in line with their lessons. Although the module was taught in the context of CLE and the facts the students were litigating highlighted the experiences of a marginalised community, the expectation was that students would use the traditional litigation style inherent in legal training and practice to define the rights of the marginalised. It became apparent in the debriefing session, during which students and lecturers had to reflect on their experience of the trial, that this approach was not appropriate for serving the needs of marginalised communities.

The most compelling evidence of this was the fact that students and lecturers made many erroneous assumptions about the lives and justice needs of these communities. The exercise demonstrated that such assumptions on the part of lawyers can remove the agency of the communities, thereby inhibiting them in telling their story fully and getting the justice they seek.

Lawyers invariably adopt the role not only of experts in the law but experts in regard to their clients' social circumstances; on this basis, they deem themselves fit to make decisions about 'their clients' best interests'. This approach has a negative impact on marginalised communities. The mock trial demonstrated that although marginalised groups interacted with the legal system during the litigation, the latter did not create opportunities for them to learn about the law and its processes. It also demonstrated that they did not have an opportunity to provide opinions on how court processes could be made user-friendly to enable them to participate effectively.

In the following year, we thus changed our approach to trial advocacy. A hypothetical case was not used; instead we used facts from a real case. Although the students did not meet the actual persons concerned, they were given opportunities in other modules in the CLE course to consider the factors affecting the marginalised group in question (for instance, through legal research, client interviewing,

> **Trial advocacy can provide a forum for addressing barriers to justice for marginalised groups in both private and public law**

and community service and engagement). In terms of the skills taught, the focus was on striking a balance between advocacy skills and creating space for the lawyer to facilitate greater interaction between the marginalised groups and the justice system with the aim of attaining a win-win outcome. Thanks to these changes in course design, we were able to effect a trial that mitigated against assumptions and to identify spaces for greater interaction of marginalised groups with the justice system.

In the third year of implementing trial advocacy, we sought to test the identified spaces to see to what extent they would be appropriate for raising awareness of the law and legal processes among marginalised groups. Students were tasked to litigate real-life facts that UNZA's Human Rights Law Clinic had been researching with communities of persons with disabilities who are HIV-positive. We invited organisations and communities of persons with disabilities to witness the mock trial, which was held at the Supreme Court. Some court officials were present, mostly to help with logistics. The judge in charge was also present to welcome participants, observe the trial in part, and offer comment on courtroom practice.

Reflections on this trial advocacy revealed the following:

- Students were better prepared to represent

> **The spaces for engagement that trial advocacy present would enable stakeholders in the justice sector in Zambia to have open discussions**

marginalised groups as they allowed the latter's lived realities to be reflected in the court process. Knowledge of these realities had beneficial results for student counsel for the clients with disabilities as well as student counsel for the state and for witnesses.

- Students were able to show how inaccessible courtrooms were, with student counsel demonstrating the need for accommodating persons with disabilities.
- Persons with disabilities, their representatives and other law students (who were not part of the CLE class) were able to ask questions about the court processes and the law and to provide feedback on their observations.
- Faculty members who were also practising lawyers and court officials were able to give feedback to the students on their performance.

Although many lessons and good practices can be learnt from the UNZA experience, some challenges were encountered. First, few faculty staff have undergone training in CLE methods. Most of them were from the public law department – three members of the public law department had undergone such training, compared to one in the private law department. This has had a strong influence on which areas of law the course focuses on. There is hence a need to train more faculty staff from the private law department on CLE methods, including trial advocacy, so as to enable key stakeholders, students among them, to address private law issues that impact on marginalised communities and strike a balance between public and private law matters.

Secondly, those staff member who have been trained have not collaborated with other faculties to ensure a multidisciplinary approach to justice problems experienced by marginalised groups. There is thus a need for the law faculty to work with other faculties, such as education, humanities and natural sciences, to explore holistic solutions to the access-to-justice problems of marginalised groups.

Thirdly, certain legal terms and procedures are difficult to explain to marginalised communities in a single trial advocacy session, a fact which highlights that trial advocacy on its own is not enough for addressing all the access-to-justice barriers that marginalised communities face. By implication, trial advocacy should be used together with other CLE methods to ensure a holistic conversation and sharing of experiences on the legal and justice system among key stakeholders in the legal field.

Lastly, it is not easy to get all the different role-players in the justice sector in one room at the same time. This is particularly so for judges and lawyers, who are usually overburdened with pending cases and pressed for time.

However, given that stakeholders are interested in ensuring a functional and relevant justice system that advances the ends of justice, more often than not they are willing to participate in fora that serve this purpose. It is thus good practice to schedule fixed periods for trial advocacy sessions, akin to activities in court and academic calendars, so that key players can reserve these dates in advance. It is also sensible to issue timely and individualised invitations to key players relevant to the subject of trial advocacy to ensure that all the targeted stakeholders participate.

The spaces for engagement that trial advocacy present would enable stakeholders in the justice sector in Zambia to have open discussions about barriers inhibiting marginalised groups' access to justice and possible solutions to these. As Holnes (2013: 334) argues, practical lawyering skills involving marginalised communities present an opportunity for law students to appreciate the socio-economic

challenges of these communities as well as confront the ethical issues that arise in legal practice. Indeed, these benefits could extent to other actors in the justice sector through their participation in the trial advocacy model of UNZA, which creates a neutral space for actors to engage with each other free of any acrimony.

Some of the issues identified through trial advocacy and in research on communities have been shared formally with the Zambian judiciary and legislature. The CLE team at UNZA has also created further spaces in which marginalised communities and students can share their experiences with these branches of government. In future, UNZA intends inviting a larger audience that includes parliamentarians, the administrators of state and quasi-state institutions, practising lawyers, and members of the judiciary.

Constant self-reflection and engagement with stakeholders will be central in all adjustments aimed at improving the practice of trial advocacy for the benefit of enhancing legal education and its role in advancing access to justice for marginalised groups.

Conclusion

Legal education is well suited to raising awareness of the access-to-justice barriers that marginalised groups face. Such legal education can reach a wide audience and play a major role in shaping the law and legal system. Traditional court practice does not provide sufficient space for dialogue among key players, who need to interact in spaces which are free of the acrimony of real-life litigation and explore ways in which different justice interests can be met. Legal education, through skills courses such as trial advocacy, provides this space.

Chipo Mushota Nkhata is a doctoral candidate at the University of Cape Town. She holds an LLM (University of Cape Town) and LLB (UNZA), and is a Special Research Fellow at UNZA. Chipo is one of the pioneers of the CLE course at UNZA, having been involved in drafting its concept note and motivation for senate approval as well as co-teaching in the course since its inception. This article draws on a presentation she made at the 9th Global Alliance for Justice Education (GAJE) conference, held in Mexico in December 2017.

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FEATURE

Kituo Cha Sheria: Staying the Course in the Journey to Legal Empowerment

Clara Barasa and Anthony Kirima

Goal 16 of the Sustainable Development Goals (SDGs) seeks 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. Access to justice can be attained only when rights-holders are aware of their rights and able to understand court proceedings and courts are within the reach of the ordinary citizen. Legal empowerment aims at filling the existing gaps by equipping people with knowledge, confidence and skills to enable them to realise their rights. In order to ensure access to justice, the capacity of citizens to press for justice has to be strengthened and the functioning of justice systems needs to be improved.

How can interventions in line with SDG 16 be sustained when they operate in an environment where funding such projects is not a priority?

The 2016 UNDP Global Study on Legal Aid Country Profiles showcased 49 countries. In sub-Saharan Africa, the focus was on Benin, Burkina Faso, Cabo Verde, Chad, the Democratic Republic of Congo (DRC), Ghana, Kenya, Mauritania, Mauritius, and South Africa (UNDP & UNODC 2016: 70). Save for Cabo Verde, Chad and the DRC, most of these countries have a specific law on legal aid. In the case of Kenya, it enacted the Legal Aid Act in 2016. The aim of the statute is to actualise access to justice for vulnerable groups in line with SDG 16, and its effect is that, for the first time in Kenya, the role of paralegals in access to justice has been recognised.

Globally, funding is increasingly being set aside for development projects at the expense of humanitarian projects. With the exception of Cabo Verde and Ghana, the countries in the study did not have a budgetary allocation for legal aid in their annual justice budgets, with legal aid being supported through donor funding and civil society organisations – in Chad, legal aid costs are covered solely by civil society organisations (UNDP & UNODC 2016: 96, 124 & 135).

In Kenya, its Legal Aid Act provides for a legal aid fund,

with money to be allocated by Parliament; however, more than three years later, much of the Act remains to be implemented. In the 2019/2020 financial year, the judiciary took drastic measures to meet a 50 per cent budget cut imposed by the treasury. Tribunals and mobile courts suspended hearings indefinitely, with adverse effects on those who have matters in court. It took the intervention of Kenya's bar association to have the judiciary's budget restored through the ruling made in ***Law Society of Kenya v The Cabinet Secretary-National Treasury & another.***

This raises the question: How can interventions in line with SDG 16 be sustained when they operate in an environment where funding such projects is not a priority?

Access to justice is a vital part of any society that aims to reduce poverty and strengthen democratic governance.

A champion of legal empowerment: Kituo Cha Sheria

Kituo Cha Sheria is a leading Kenyan legal aid organisation which for more than 47 years has provided pro bono legal aid and education to the poor and marginalised. It brings together a team of change-makers who engage with social challenges and seek to develop innovative solutions to them. Kituo Cha Sheria's work has had real impact and contributed significantly towards attaining goal 16 of the SDGs.

Kituo has been involved for many years in training paralegals in various regions of Kenya. Training paralegals is a direct means of legal empowerment that enables the poor and excluded to use the law, the legal system, and legal services to advance their rights and interests as citizens. Kituo has used its limited resources to create community and prison justice centres where paralegals are equipped with the skills to offer accessible and independent legal services to fellow citizens in prisons and in communities. At the community level, the paralegals provide legal first aid and mediate in basic matters; at the prison level, they use the knowledge they have acquired from Kituo to prepare for cases and appeals.

Access to justice is a vital part of any society that aims to reduce poverty and strengthen democratic governance. It is also central to the journey Kituo has been taking, mindful as it is that, within the context of justice reform, there is a specific niche to be found in supporting justice and related systems so that they work for those who are poor and disadvantaged. Accordingly, Kituo seeks to empower the poor and disadvantaged to obtain remedies for injustice, to strengthen linkages between formal and informal systems, and to counter exclusionary biases inherent in these systems. Given that access to justice is a basic human right as well as an indispensable means to combat poverty and prevent and resolve conflicts, the organisation aims to stay the course and make access to justice for all a reality in Kenya.

A case study: Mr Wilson Kinyua

In 1998, Mr Wilson Kinyua, then 19 years old, had moved to the capital, Nairobi, from his home in Nyahururu, a rural town in central Kenya, to pursue his higher education. There, he enroled at Strathmore College and studied for about three months. One day, while in the central business district, he was caught in cross-fire between police and armed robbers. In the chaos that ensued, he and others wound up in the hands of the police. Some of those with whom

Through a sponsorship programme, the project enables prisoners and prison staff to study law in the University of London's international programme.

he was arrested were released after members of the public came to their defence, stating that they were well-known locals innocently going about their daily duties. Mr Kinyua, however, was new in town and had no one to vouch for him.

The then young man was taken to court and charged with robbery with violence, a capital offence that attracts the death penalty. Unable to afford legal representation, Mr Kinyua went through the legal process without any knowledge of the law and lacking the ability to defend himself properly. He was convicted of the charges he faced and sentenced to death, after which he was sent to Kamiti Maximum Security Prison to await the hangman.

Kamiti Maximum Prison is one of the locales where Kituou has established prison justice centres in its project entitled 'Promoting access to justice for the poor and marginalised'. Mr. Kinyua was trained as a prison paralegal in 2012 when Kituo conducted free paralegal training for inmates. The paralegals were equipped with knowledge concerning the criminal justice process, self-representation, and the way to address judicial officers correctly and articulate issues in court.

This proved to be a turning-point in Mr Kinyua's quest for justice, as he was inspired to initiate an appeal against his sentencing while also representing 11 other inmates. The appeal was lodged in the High Court of Kenya as Nairobi Petition No. 618 of 2010. After a lengthy process, Mr Kinyua finally got his date with freedom on 13 February 2019, when Justice Luka Kimaru released him and five of the 11 others he had personally represented in a constitutional petition.

In an interview with Kituo Cha Sheria, he expressed his gratitude for the paralegal training he received: 'I acknowledge the work of Kituo Cha Sheria, especially in their programme of training paralegals. It is something they started small but [which] has had a great impact [on] many people. The trainings on basic legal rights and on court processes equipped me well to represent myself in court and secure my freedom.'

Mr Kinyua affirmed that with knowledge comes better self-expression and communication: in using the knowledge they gain from Kituo's training, prison paralegals are better equipped to support their peers.

Upon completion of a three-week training course, paralegal officers are able to offer legal advice to fellow inmates. They are also encouraged to enrol for a diploma in law after six months, followed by a degree in law. The latter are offered through the Africa Prisons Project of the Justice Changemaker Programme, which provides training and services for prisoners and prison staff across East Africa to enable them to develop legal and human rights awareness and learn how to support others with free legal advice.

Through a sponsorship programme, the project enables prisoners and prison staff to study law in the University of London's international programme. This support assists many prisoners who otherwise would have been denied a fair trial due to lack of funds. Senior prison professionals are under masters and postgraduate studies linked to penal development and the provision of basic services such as education, health and access to justice.

In addition, professional secondment opportunities are provided for senior prison and criminal justice personnel to enable them to learn from UK prison management systems. This initiative seeks to ensure that prisoners' rights are upheld and that everyone

enjoys their entitlement to a fair and speedy trial, along with the opportunity to access bail and to appeal against unjust circumstances.

Mr Kinyua was a beneficiary of the project and proceed to study law. In November 2019, several inmates, many of them incarcerated at Kamiti Maximum Prison, graduated with law degrees after four years of learning behind bars. Ten of the 17 graduates were inmates in prisons in Kenya, while three of them, Mr Kinyua included, were former convicts who had enroled in the programme when still in prison; as for the rest, one was a staff member of the African Prison Project and the others were prison officers. The project's law graduates are allowed to sit bar exams and start practising. Currently, 30 inmates at Kamiti, Naivasha and Lang'ata Women's prisons are enroled in the degree programme.

Innovating to ensure access to justice

Mobile phones are a popular, cost-effective and reliable means of communication that allow anyone to ask questions from anywhere and receive answers. Kituo cha Sheria thought of them when looking for cost-effective way of enabling better delivery of legal services and information to greater numbers of people, in particular the poor and marginalised. The result is the M-Haki mobile telephony service – the name is short for '***haki mkononi',*** which can be translated as 'justice at the tips of your fingers'.

M-Haki started operation on 8 March 2016, and has been of service so far to more that 6,400 clients. It utilises SMS technology to disseminate legal information to clients. Kituo has a dedicated mobile number (0700777333) to which members of the public can text legal questions; these are answered by the organisation's lawyers and volunteer advocates. The service thus works from phone to web and back to mobile phone again. People with legal problems type out their queries, send them to the M-Haki number, and get a response on their mobile devices in the form of an SMS.

It only costs one Kenyan shilling to send an SMS; furthermore, some service providers offer bundled

> **Technological innovation cannot happen without collaboration with partners**

services that allow users to access the service at even lower costs. This is a clear cost-saving to clients who would otherwise spend money on transportation costs to come to Kituo Cha Sheria in person for legal services – costs that could be high depending on the distance between the client's home and Kituo's offices in Nairobi and Mombasa.

The M-Haki service means, for example, that an impoverished Kenyan in rural El-Wak, northern Kenya, does not have to endure a 14-hour trip across 860 kilometres to travel to Nairobi to access legal advice. He or she simply needs to have the M-Haki number and the most basic of telephones by which to send an SMS to it.

Legal questions addressed on the M-Haki platform are categorised, in line with Kituo's core mandate areas, into land rights and succession issues; labour rights, refugee rights and forced migration issues; and housing and eviction matters. There is an additional category – general legal inquiries – catering for areas beyond the scope of Kituo's core mandate. Examples include reports that parents are selling land without consideration to their families; matters to do with unpaid dues; claims that chiefs are demanding bribes for certain services; and allegations of misconduct by advocates.

Technological innovation cannot happen without collaboration with partners. In developing M-Haki, Kituo brought to the table psychologists, business developers, web developers, marketing specialists, and, crucially, the communities with which it works. The latter entailed elaborate market research that was conducted in selected counties across Kenya.

From this research, Kituo learnt that family, consumer and employment relationships are among the major sources of legal needs in Kenya today. It is important to note that Kituo is one of the oldest and most experienced legal aid organisations in Kenya, with networks and an institutional memory spanning nearly five decades.

Kituo cha Sheria was invited to attend the UN Development Programme (UNDP) in Kenya's High-Level Stakeholders' Consultative Forum, co-hosted by the SDG Accelerator Lab for Kenya in October 2019. The UNDP has been conducting a stakeholder consultation on a new accelerator lab established by its country office. The lab offers opportunities for innovating and mapping policy solutions to challenges that civil society organisations face, particularly in regard to their work on human rights and access to justice. More specifically, the SDG Accelerator Lab is a new service that works with the government, private sector, civil society, philanthropists, academia, and young people to reimagine development for the 21st century.

The consultation was intended to create an opportunity for a co-creation process that would enable the accelerator lab to be more responsive and catalyse actions relevant to Kenya's development. The forum gave participants a platform to network and showcase their innovations. In this regard, Kituo believes that its M-Haki innovation can play a role in advancing SDG 16, albeit that the organisation's biggest challenge is inadequate funding. The innovation has faced funding gaps, with donor funds affected by changes in strategy or shifts in approach in the context of other emerging issues. In addition, technology partners such as mobile network service providers are biased towards commercial endeavours and the pursuit of the profit motive, as a result of which the M-Haki service has not been scaled up at the pace intended.

Conclusion

The SDGs were adopted by all United Nations member states in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. The 17 SDGs are integrated – that is, they recognise that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability.

At the heart of the SDG Accelerator Lab, for example, is an attempt to reimagine how development work is done and to promote a culture of innovation and experimentation. The capacity to adapt in a rapidly changing environment will be key for the UN to stay relevant and provide effective support to countries to achieve the SDGs.

SDG 16 can only flourish with local consensus-based targets and indicators complemented by investment and implementation. Achieving the SDGs requires involving government, civil society, youth, and the private sector. Kituo cha Sheria is committed to staying the course in the legal empowerment journey, one step at a time.

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FEATURE

Legal Aid Bodies and Access to Justice in South Africa

Sithuthukile Mkhize

Legal aid bodies serve the purpose of making legal services more accessible to poverty-stricken individuals seeking access to justice. In South Africa, those unable to afford the benefit of their own legal representatives constitute, by far, the majority of the population. The day-to-day issues they grapple with include matters related to domestic violence, protection from harassment, spousal and child maintenance, divorce proceedings, and small monetary claims; their needs also extend to criminal matters of various kinds.

Indeed, the list is endless, and the role played by legal aid bodies in assisting less-fortunate individuals is significant – such individuals are entirely reliant on legal aid bodies to fight for their causes. The question, then, is: How is it even possible for legal aid bodies to handle all these cases if they lack the capacity, resources and, sometimes, the competence to do so?

This article reflects on shortcomings in the functioning of the Legal Aid Board in South Africa. It identifies the source of the shortcomings and then provides insight into how they could be overcome in the interests of ensuring proper access to justice for poor litigants.

Background

Legal Aid South Africa ('Legal Aid SA') is an independent statutory body established in terms of the Legal Aid Act 39 of 2014 ('the Act'). Section 34 of the Constitution of South Africa grants everyone the right to access the courts and have any legal dispute resolved in a court of law, while the Act makes it mandatory for Legal Aid to render its services and to do so at state expense.

Moreover, the United Nations Sustainable Development Goals 2030 (SDGs) – specifically goal 16(3), which envisages peace, justice and strong institutions – provides a further mandate to institutions such as Legal Aid SA to fulfil their role of ensuring the provision of access to justice. SDG 16(3) requires countries to 'have effective, fair and accessible laws and justice systems that ensure security and protection for all people and enable meaningful avenues of redress for criminal and civil wrongdoing'. This entails that institutions such as Legal Aid SA have to ensure that the rule of law is upheld by availing access to justice to qualifying individuals.

The importance of Legal Aid SA's role cannot be stressed enough. In its most recent annual report (2018–2019), it reported that it had handled a total of 416,203 new matters in the year, with similar trends in evidence in preceding years. This highlights not only its significance but the high demand for legal services among indigent persons in South Africa.

However, Legal Aid SA's mandate, as provided for on paper in the Constitution, the enabling Act, and, at an international level, SDG 16(3), is unfortunately not a lived experience on the ground for those who utilise its service. This can be attributed to the various shortcomings that the body faces and which are outlined below.

Shortcomings of Legal Aid South Africa

1. Lack of resources and financial capacity

The first, most obvious, obstacle that hampers Legal Aid SA are its limited resources and financial capacity. One may argue that while this is a common problem among state institutions in South Africa, Legal Aid SA is such an important body that its case ought to be different. It provides the most vulnerable members of society, who are often the most exploited, an opportunity not only to access justice but have their voices heard and ensure that their basic human rights under the Constitution's Bill of Rights are realised.

Statistics in reports show that, at least in the past three financial years, the budget allocated to Legal Aid SA has been wholly insufficient. The budget is regulated by the Public Finance Management Act (PFMA 1999), with Legal Aid SA listed under schedule 3A of this statute. In the 2015–2016 financial year, Legal Aid was allocated approximately R1.7 billion, of which it exhausted 99.1 per cent of it (Legal Aid SA 2015–2016). Similar trends are seen in the preceding financial years: the budgetary allocation is largely exhausted but sees very little increase year on year. It is clear from the statistics that the rough average of R1.8 billion allocated each year does not serve Legal Aid South Africa's expenditures to capacity.

> **...at least in the past three financial years, the budget allocated to Legal Aid SA has been wholly insufficient**

According to the Parliamentary Portfolio Committee on Justice and Correctional Services and Legal Aid SA's 2017/2018 annual report, the office received a slightly higher budget that year than in the one before. As a result, it handled a total of approximately 767,656 cases, of which 426,617 were new matters.

Legal Aid SA's budget is not enough to meet the operational capabilities required of it. As at 31 March 2018, its staff complement was at about 2,700 members. Its legal staff, including paralegals, account for 79.3 per cent of the office, with only 64 legal offices across the country. When looking at the number of new matters taken on in the 2017/2018 financial year, nationwide this number is not commensurate with its staff numbers: in other words, there is a vast disproportionality between the work done by the office and its number of employees. Indeed, it would seem that much more could be done with only a slight increase in the staff complement.

The limited staff capacity within the office speaks directly to the insufficient resources and funding allocated to it – a situation which, it seems, will only get worse. The budget in 2018–2019 decreased by 5.5 per cent, with further reductions anticipated in coming years, all of which will undoubtedly aggravate this institution's capacity constraints experienced by legal aid.

This article therefore recommends, in its conclusion, that the government needs to reflect seriously on the current situation, seeing as continuing budgetary reductions will lead inevitably to further denial of access to justice.

2. Lack of competent staff members

Whilst the quantity of work carried out by Legal Aid SA is important, the quality of its legal services are equally important. The fact that these are offered free of charge

to the poor does not mean they should be of any lesser quality than paid-for services – if they were so, this would be an injustice not only to the poor but to the taxpayers who contribute to government revenue.

It has become evident that Legal Aid SA has rejected numerous applications for legal aid not because the cases lack merit or prospect of success but because, in my view, there is a lack of competent staff members within the office. In my experience of working in public interest law firms (which operate as law clinics), I have seen on numerous occasions people seeking pro bono assistance in legal matters and having Legal Aid SA shut its doors on them for 'lack of prospect of success'; when I have assessed the same matters that were apparently rejected for lack of merit, this seems not to have been the case. In most instances where we have been unable to take on a matter (for lack of human or resource capacity), we would have had to conduct successful referrals to alternative organisations.

It is important that Legal Aid's staff are sufficiently and constantly trained so that their skills are upgraded and they are fully equipped to deal with various matters. It would also appear (from my experience) that most of the matters rejected are civil matters. Although Legal Aid has a civil department, it seems that at the moment this unit is especially under-equipped.

The handling of criminal law matters is also questionable. In interviews with a few people who have used Legal Aid SA's services, they have generally said that the services offered have been unsatisfactory. They have reported that in most occasions Legal Aid has advised people to admit guilt or plead guilty even where there is little or no evidence which proves their guilt. This has often left people with criminal records and unnecessary prison sentences where this could easily have been avoided if quality legal services were provided. In domestic violence matters, Legal Aid clients (especially women) are often advised to settle the matter by negotiating with their abusive partners. Maintenance and divorce matters often follow the same trend.

The more matters are rejected for lack of competence, the greater the miscarriage of justice to the poor. It is commendable that, as a developing country, South Africa is in a position to ensure the provision of free legal services to those who qualify; however, the

Although Legal Aid has a civil department, it seems that at the moment this unit is especially under-equipped

government needs to invest sufficiently in the office to ensure that its services are not only of sufficient quantity but, equally, of sufficient quality. In this way, the government would be able to restore the deteriorating confidence and trust in the Legal Aid office.

3 Delay in case approvals

Legal Aid SA's case intake requires that applicants follow an application procedure that leads eventually to an approval process by the office. Depending on the nature of the case, on the documents that have to accompany the application, on the steps to be taken in acquiring these documents, and Legal Aid's own internal processes, this approval process can be lengthy; as a result, it often causes delays in acquiring legal services.

A delay in acquiring legal representation could be so severe in certain instances that one forfeits his or her legal claim due to the time restrictions prescribed by the court rules as well as various pieces of legislation. It is common for a layperson, who lacks an understanding of the law and its processes and who may even be illiterate, to fail to respond to legal papers within the prescribed time limits or to delay seeking legal representation, consequently losing his or her legal claim. Although one may argue that court rules do make provision for an application for condonation (in which the court is asked to excuse a

litigant for failing to abide by prescribed time limits), it is clearly preferable that a person access legal services as soon as reasonably possible and without unnecessary delay.

In view of this, Legal Aid SA's approval process should be more efficient and not require clients to wait at length for their matters to be taken on. It ought to be simple, easy and accessible. It should also recognise that poor litigants, who may be illiterate and hail from remote areas, should not have to endure lengthy application and approval processes to gain access to justice.

Unnecessary delays can, and often do, result in justice's being delayed and eventually denied, as is demonstrated in ***Mphukwa v S*** (2012). In this criminal case, the magistrate's failure to explain to the accused his right to legal representation – specifically, his right to legal representation at the state's expense – was compounded by other delays caused by the clerk of the same court and resulted in the accused's appeal application being delayed for at least seven years. When it eventually heard his application, the High Court described this as a grave injustice.

A contributing factor was the poor administration of justice on the part of the state. It is therefore safe to conclude that the effects of poor administration of justice by institutions of justice can have dire consequences for litigants, especially indigent, illiterate ones who, as in ***Mphukwa***, have little means of affording legal representation and are heavily reliant on bodies such as Legal Aid SA. For Legal Aid SA to be able to render efficient services to the poor, efficient systems need to be in place, along with greater financial resources.

Recommendations

In the light of these shortcomings, the first, most significant recommendation is that the state allocate a larger budget to Legal Aid SA to enable it to strengthen its resources, particularly its human resources. The funds can and should be sourced at

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the national level by the national treasury. There are creative ways of doing so, including by absorbing legal costs in favour of state organs and directing a portion of those funds to Legal Aid SA, as well as by reducing the funding of the judicial commissions of inquiries that have rapidly emerged in recent years. Funding arising as a result of personal costs orders against individuals employed by government should also be (in part) directed to Legal Aid SA's budget in each financial year.

Parliament, through the justice portfolio committee, ought to be active in finding ways to ensure that Legal Aid's budget is either constantly increasing or at least consistent (in that it does not depreciate). There are, in addition to what is suggested above, further creative mechanisms for channeling greater funding to Legal Aid SA. These include reviewing the entire Department of Justice budget to reprioritise funds and assign them to institutions where the need is greater; implementing a performance- and demand-based budget within the various agencies in the Department; and minimising the risk of adverse court orders against Legal Aid SA.

The latter would entail investing in the training

and development of practitioners in the office and setting strict criteria for appointing external legal practitioners to ensure that competent and professional practitioners are employed. This would result in a better-performing office, which in turn would be likely to attract more funding. Ensuring diversity in the funding of the office is another way to increase its resource bases. This would entail applying for funding from the private sector to supplement funds from the public sector. Parliament could also engage with Legal Aid SA and other stakeholders, including civil society, in a campaign to increase the allocation of funds to the office.

In this regard, Legal Aid SA's integrated annual report for 2017–2018 reveals that this was the seventeenth consecutive year in which it received an unqualified audit opinion. Such a record of clean audits stands it in good stead for attracting funding as this demonstrates that the money is very unlikely to be mismanaged.

Legal Aid's budget could and should be increased without interfering in the budgets of other institutions in the justice and correctional services portfolio, which may be in equal need of additional funding. The National Prosecuting Authority and Chapter 9 institutions such as the Human Rights Commission and Public Protector face similar budgetary constraints. Their work is also important, so the idea is not to eat into their budgets but to find innovative ways of increasing Legal Aid SA's budget.

Legal Aid SA also requires intensified skills development programmes to improve its performance. These programmes would again require increased budgetary allocations, but there are other, innovative ways too in which skills can be acquired. One obvious suggestion would be an exchange programme among organisations, specifically those practising as law clinics, in which Legal Aid SA employees are placed in law clinics and pro bono organisations that provide legal services to the less fortunate. This would encourage diversity in approach to legal issues, as well as contribute to career growth. Such a programme would be a win-win situation for the organisations involved, and, given the practicality of the skills development involved, is likely to be more beneficial to Legal Aid staff than only attending seminars and courses.

> **The best place to start in implementing the exchange programme would be with short-term employees**

The best place to start in implementing the exchange programme would be with short-term employees such as candidate attorneys. This would not only diversify their training regime as aspiring attorneys but be to the benefit of the Legal Aid office, particularly if the same individuals were retained by the office after completing their two-year training stint.

Constant theoretical training is also a component of skills development. Legal aid employees should attend frequent training programmes offered by academic institutions and the Law Society of South Africa. There are also many other skills development programmes, offered pro bono, that would be beneficial to the office.

Internal skills development, too, is very important. This relates to the transfer of skills within the Legal Aid office. If this is already in place, it should be undertaken more frequently and also made available to employees across the board.

Forming critical partnerships between legal aid and other law clinics is another essential component of skills development, over and above the suggested external and internal 'exchange programmes'. Partnerships between organisations could explore various collaborative efforts, such as hosting seminars, having debates on various issues, and setting up information-sharing channels. This is also a tool that would entail less resource-shedding by the office.

Legal Aid SA's current 'impact litigation programme', which allows for the appointment of external attorneys to assist indigent people, is an excellent way to enhance access to justice for indigent persons. The recommendation is that more funds be allocated to this programme. The increase in funding would not only widen its reach to the indigent but enable development of the law, which could indirectly reduce the need for new legal claims, especially by the indigent. The programme is beneficial too in that it increases human capacity within the office.

Legal Aid SA could also invest in improved case-approval systems to address case-approval delays. Improving case-approval systems would require more funding and hence an increased budget, but once again there are creative ways in which the office could improve its systems without having to deplete an already over-stretched budget. For instance, it could collaborate with other state bodies and institute uniform systems for ascertaining people's earning capacities and/or whether or not they qualify for legal aid assistance in terms of the means test.

The office could also trim the red tape on its internal 'signing-off' procedures such that the process does not require too many approval signatures before a case is taken on. In addition, it could conduct more outreach workshops for the indigent to educate them about the importance of acting expeditiously when served with legal documents.

As a further means of improving its human resources capacity, the office should form partnerships with university law clinics in order to use the services of senior law students. The students could be deployed in various ways so as to increase the office's capacity. Although the office would have to provide a minimum of training, this could go a long way in assisting it – nor would it necessarily require any funding from the office to remunerate the students, albeit that in time the programme could be restructured to allow for stipends to be paid to the students.

Conclusion

The Legal Aid office is an extremely important one that has the potential to do much more in fast-tracking access to justice. Engagement with stakeholders, collaborative efforts, and innovative thinking are necessary both to improve its functioning and, most importantly, increase its revenue. Parliament is urged to initiate discussion with Legal Aid SA and key stakeholders in order to find the urgent solutions that are needed to improve its performance.

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FEATURE

Law and Policy: Barriers to Accessing Justice for Sustainable Development

Kristen Petersen

Despite the fact that Goal 16 of the United Nations (UN) Sustainable Development Goals (SDGs) calls for states to bring about just, peaceful and inclusive societies through non-discriminatory laws and policies for sustainable development, states are still enforcing discriminatory laws that fail to promote and protect the fundamental rights and freedoms of the poor and marginalised. A key instance of this is that people continue to be arrested under discriminatory laws for vagrancy and nuisance-related offences – such as begging, loitering, and being idle and disorderly – that criminalise life-sustaining activities or conduct in public.

These laws remain on the statute books even though they violate fundamental liberties and freedoms, perpetuate poverty and inequality, and hamper access to justice and sustainable development. This article highlights the nexus between, on the one hand, discriminatory laws that criminalises life-sustaining activities or conduct in public, and, on the other, human rights and access to justice for sustainable development. The point it makes is that, to achieve just, peaceful and inclusive societies, authorities in Africa would have to eradicate discriminatory laws and policies.

The nexus of law, policy, equality and development

Target 16B of the UN SDGs recognises the fundamental role that law and policy play in regard to access to justice. It accepts that, in order to overcome the burden of inequality, poverty and lack of development, governments across the world must ensure that their laws and policies respect and protect the basic human rights of people by enforcing laws that are non-discriminatory.

Key human rights instruments that safeguard people's basic civil, political, social and economic rights – among them the Universal Declaration of Human Rights (UNDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and African Charter on Human and Peoples' Rights (ACHPR) – guarantee everyone, without distinction, the right to equality and non-discrimination.

There is also an obligation on states to ensure that their laws prohibit any discrimination and guarantee all persons equal and effective protection against discrimination (ICCPR, art. 26). Governments have a duty to ensure that all citizens have equal access

> **it is the case that legislation in many parts of Africa contains vagrancy and nuisance-related offences**

to civil and political rights as well as economic, social and cultural rights without discrimination on grounds such as race, colour, sex, language, religion, political opinion, or national or social origin. Where law or policy provisions discriminate unfairly against persons on any ground, this is an indicator that the law or policy might be in violation of the principles of equality and non-discrimination.

Against this backdrop, it is the case that legislation in many parts of Africa contains vagrancy and nuisance-related offences that disproportionately target poor, homeless and marginalised persons based on their status. Such offences include begging, loitering, sleeping in public, and being 'a rogue and vagabond,' 'vagrant', idle and disorderly', and 'a nuisance.' Most of these laws criminalise the performance in public places of life-sustaining activities such as begging, sleeping, bathing, hawking or otherwise earning a livelihood. The problem with these laws extends to both their enactment and their enforcement by criminal justice actors.

Such offences are often described in law in vague or overly broad terms and do not explain sufficiently what the prohibited conduct is. This gives law enforcement officials wide discretion to determine the ambit of the prohibited conduct. For example, a 'rogue and vagabond' is often broadly defined in law as someone with 'no ostensible means of subsistence' and 'who cannot give good account of him or herself', while in some francophone countries it is a crime to be 'a vagrant', often defined as a person who does not have a fixed abode or means of subsistence. (Meerkotter 2019). In Sierra Leone, the offence of loitering in effect criminalises the act of being 'in a place' irrespective of whether the person is trespassing in that place, causing disorder or possessing any illegal purpose (Advocaid 2018).

Further examples of laws in regard to being 'a rogue and vagabond' or 'idle and disorderly' are found in Zambia's Penal Code, Chapter 88 of the Laws of Zambia, as well as in the legislation of other anglophone countries such as Uganda and Malawi (see, for instance, Penal Code Act, Cap. 120 Laws of Uganda, s. 167 and 168; Malawi Penal Code, Chapter 7:01, s. 180 and 184(1)(c) (repealed).)

Zambia's Penal Code Act provides that 'every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose shall be deemed to be a rogue and vagabond' (art. 181(d)). Similarly, article 178 deems persons to be 'idle and disorderly persons' and liable to imprisonment if, among other things, they 'wander or place themselves in any public place to beg or gather alms', or, without lawful excuse, publicly commit 'any indecent act' or conduct themselves 'in a manner likely to cause a breach of the peace'.

Phrases such as 'having no means of subsistence' or 'no fixed abode' offer illustration of the wide ambit of these laws. It is also clear that the laws target persons on the basis of their social or economic status, given that the conduct being prohibited is usually conduct exercised by poor, homeless, or other marginalised individuals. Such provisions grant law enforcement officials wide discretion to arrest and detain persons arbitrarily for offences based on their economic or social status or on mere observation of their appearance. Faugeron (1995) describes the detention of such people as 'the imprisonment of differentiation' – that is, as designed to exclude people in social categories deemed 'undesirable', notwithstanding that their only crime is that they are without a means of subsistence or are trying to earn a livelihood.

There is, furthermore, extensive literature which

> **numerous overly restrictive trading laws or nuisance-related city by-laws target people seeking to earn a living through street hawking**

shows the disproportionate enforcement of such laws against poor and vulnerable persons such as the homeless, women, children, street vendors, sex workers and lesbian, gay, bisexual, transgender and intersex people (AdvocAid 2018; Muntingh & Petersen 2015; HURAPF 2016; SALC & CHREAA 2013; UN Doc. A/67/278).

The arbitrary enforcement of these laws infringes on fundamental rights guaranteed under the ICCPR and African Charter. Such rights include the right not to be discriminated against and the rights to human dignity, equal protection of the law, freedom against torture or cruel, inhuman or degrading treatment or punishment, and security of person, including the right not to be subjected to arbitrary arrest or detention (ICCPR, arts. 2, 3, 6, 7, 9, 10, 12 and 26; ACHPR, arts. 2, 3, 5, 6, 12 and 18). Laws against loitering, or being idle and disorderly or rogue and vagabond, also restrict a person's freedom of movement and right to liberty (ICCPR, art. 12; ACHPR, art. 12).

Moreover, across the continent, numerous overly restrictive trading laws or nuisance-related city by-laws target people seeking to earn a living through street hawking (Killander 2019; Muntingh & Petersen 2015). Persons violating restrictive trading or nuisance-related laws face arrest and detention, or are heavily penalised. The Special Rapporteur on Extreme Poverty and Human Rights (2012) has raised concerns about governments imposing bans, onerous licences or strict restrictions on street vendors. She notes that such restrictions severely undermine the rights of persons living in poverty to earn a living.

The punitive enforcement of restrictive trading laws prevents people from realising their socio-economic rights. States are failing to safeguard everyone's right to the opportunity to gain work that he or she freely chooses; they are also infringing on people's rights to an adequate standard of living, including the rights to adequate food, clothing, housing and development guaranteed under international human rights law (ICESCR art. 6 and art. 11(1)–(2); ACHPR, art. 22). Street vendors should not face arrest and detention for trying to earn an income to provide for their families; instead, other measures that exclude criminalisation should be in place to deal with trading in contravention of laws or city-by-laws.

As has been emphasised, many of these laws disproportionately target and penalise poor and marginalised persons, thereby violating the principles of equality and non-discrimination. This is not in line with the sustainable development goal of promoting just, peaceful and inclusive societies and protecting the fundamental rights and freedoms of poor and marginalised persons. The principles of equality and non-discrimination in law and policy are important for the development of people. Conversely, discriminatory laws may cause and perpetuate poverty and thus present obstacles to alleviating poverty; in particular, anti-poor laws impair the ability of poor and marginalised persons to obtain fair justice outcomes.

The effects of discriminatory laws on persons

Various human rights bodies have expressed concern that, along with a variety of measures that regulate public spaces, laws prohibiting activities such as loitering, camping, begging, and lying in public spaces have a disproportionate effect on vulnerable groups and people living in poverty (A/HRC/31/54, A/67/278, CERD/C/USA/CO/7-9, ACHPR/Res. 366 (EXT.

> **...many of these laws, as noted, are overly broad and grant police the discretion to make arrest without a warrant**

OS/XX1) 2017). Contravening these laws and policies entails severe punitive consequences for poor and marginalised persons (AdvocAid 2018; Muntingh & Petersen 2015; HURAPF 2016; SALC & CHREAA 2013 UN Doc. A/67/278). Sometimes the consequences are arrest and detention; sometimes, the imposition of excessive fines. As Killander (2019) and Muntingh & Peterson (2015) note, the punishments meted out for such minor offences are often disproportionate for non-violent conduct.

The enforcement of such laws is also often associated with long periods of pre-trial detention when accused persons are unable to pay bail or when bail is denied. The detention of accused persons for such minor infractions of the law is associated as well with severe socio-economic consequences for their own wellbeing and that of their families (Muntingh & Repdath 2017; Wacquant 2001). Research into the socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia has shown that when individuals (particularly family breadwinners) are detained, their families and other households associated with them feel the impact. The research shows too that the impact on children is severe where the detainee is female (Muntingh & Redpath 2017).

Indeed, the UN Special Rapporteur on Extreme Poverty and Human Rights (2012) has highlighted the fact that those who are poor and vulnerable are likely to leave detention financially, physically and personally disadvantaged. Detention can lead to loss of income and employment. The adverse health consequences of conditions of detention, combined with stigmatisation due to having a criminal record, further entrench the marginalisation of people living in poverty.

Another consideration is that many of these laws, as noted, are overly broad and grant police the discretion to make arrest without a warrant. This may encourage police corruption, harassment and extortion.

The laws, in short, are likely to perpetuate discrimination and marginalisation, hinder the development and empowerment of the poor, and push them further into poverty. What is essentially a social justice issue is met with a criminal justice response that may well aggravate the problems the laws are supposed to resolve.

Towards law and policy for sustainable development

Discrimination is one of the main underlying causes of inequality. The enforcement of discriminatory laws such as those under discussion perpetuates poverty and inequality and fails to protect the fundamental rights of the poor and vulnerable. States are using the criminal justice system to respond to homelessness and life-sustaining behaviours rather than adopting measures to address the root causes of the problem.

There is thus an urgent need, on the one hand, to thwart the multiplication of judicial laws and practices that widen the penal dragnet and, on the other, to develop social, health, or educational alternatives for addressing social problems (Wacquant 2001). The public funds spent on police and criminal justice operations to penalise 'undesirables' can be better used to assist families with social services, health care, and education and training that empowers them. Killander (2019) argues that the issue of illegal trading (or traders operating without license) cannot be resolved through criminalisation but rather through active engagement with traders and

by viewing the permitting of trade as a social issue rather than an income-generating activity for the municipality.

In her report to the Human Rights Council, the Special Rapporteur on the Right to Adequate Housing (2105) underlined that homelessness is caused by the failure of states to respond both to individual circumstances and to a range of structural factors – factors which include laws and policies that discriminate against homeless people. Among her recommendations to governments is that they embark on the immediate review and repeal of laws, policies or measures that discriminate directly or indirectly against poor or homeless people.

There has been some effort at the regional level to address the discriminatory impact of law and policy on poor and marginalised people. The Principles on the Decriminalisation of Petty Offences in Africa ('Principles') were adopted by the African Commission and call for a holistic approach to the challenges that arise in Africa at the intersection between poverty, justice and human rights. Amongst other things, the Principles urge governments to decriminalise offences that criminalise the status of a person, with such offences including those relating to performing life-sustaining activities in public places (ACHPR/Res. 366 (EXT.OS/XX1) 2017).

In addition, an advisory opinion is pending at the African Court on Human and Peoples' Rights on whether vagrancy-related offences are contrary to articles 2, 3, 5, 6, 7, 12 and 18 of the ACHPR (Request for Advisory Opinion No. 001/2018). There has also been a successful constitutional challenge in Malawi against one of the offences of being a rogue and vagabond (Mayeso Gwanda v The State). In Kenya, a commitment has been made to review discriminatory laws (Judiciary of Kenya 2018)

While these efforts are to be welcomed, governments in Africa are not doing enough to address problematic laws. Much depends on their political will to review their laws in line with SDG 16. To ensure that all persons can access justice equally, states need to identify laws and policies that are anti-poor and violate the principles of equality and non-discrimination; through legislative or administrative reform, the relevant laws should be repealed or amended.

To ensure that all persons can access justice equally, states need to identify laws and policies that are anti-poor and violate the principles of equality and non-discrimination

Conclusion

Although there is a duty on states to adopt legislative measures to ensure the progressive realisation of socio-economic and civil and political rights, governments are failing in their obligations by retaining discriminatory laws on their statutes. Legislative reforms are needed to limit arrests and imprisonment for vagrancy and nuisance-related offences.

As the UN Special Rapporteur on Extreme Poverty (2012) notes, persons living in poverty are not to blame for their situation, and so governments should not punish them for it. Instead, as a matter of urgency, governments should adopt wide-reaching measures to eliminate the conditions that cause, exacerbate or perpetuate poverty and aim to ensure the realisation of all the economic, social, cultural, civil and political rights of those living in poverty.

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EVENT

First Webinar on Constitutional Resilience and COVID-19 in Africa (12 June 2020)

Paula Knipe

On 12 June 2020, the Dullah Omar Institute (DOI), University of the Western Cape, hosted the first of its webinars in a series on the constitutional resilience of countries in response to COVID-19. While countries have taken different approaches to the pandemic, with some declaring states of emergency and others, national disasters, every country affected has experienced human rights complications. The international community reacted quickly to guide states by highlighting that their responses should comply with international human rights standards; at a domestic level, many countries also put accountability mechanisms in place to minimise human rights violations.

Against this backdrop, the webinar invited four panelists, from Kenya, Malawi, Zambia and Nigeria, to discuss the constitutionality of the measures their respective states have adopted in response to the pandemic.

In his opening remarks, Prof Ebenezer Durojaye of the DOI said that while this is not the first-ever global pandemic, its impact is unprecedented. Even so, in times of crisis a balance needs to be struck between response measures and the protection of human rights. Bearing in mind that most constitutions have a limitation clause on the enjoyment of human rights, it is crucial that any limitations are in line with international criteria. Notably, in the Siracusa Principles of the International Covenant on Civil and Political Rights of 1966 (Siracusa Principles), the Human Rights Committee set out the steps to be taken by a state which is deliberately imposing a limitation on human rights.

This series of webinars aims to generate discussion on state responses to COVID-19 and, as part of this, examines the role of the judiciary and the legislature, which act as the highest form of checks and balances in keeping the state accountable. The series also investigates how states can ensure that the regulations they pass are in line with public policy and the extent to which individuals can challenge these regulations. To this end, and for the sake of comparative analysis, the series intends to consider case studies across jurisdictions as the pandemic unfolds.

The first panelist, Dr Enoch Chilemba, is a Lecturer in Law at the University of Malawi, Deputy Head of the Department, and Coordinator of the Disability Rights Clinic. Malawi was facing a peculiar situation at the time, given that presidential elections were due to be held in 2020 and many suspected that the government was politicising the pandemic and using it to delay the elections. At that point, the country had conducted 6,708 COVID-19 tests, with 481 positive cases.

The Malawian Constitution allows for the derogation of rights during public disasters or war; however, it does not permit it during a state of emergency. All decisions in response to the pandemic were being made by a task force predominantly comprising members of the executive, a factor that exacerbated an already fraught political climate.

The government introduced several measures under

> **while Zambia's Constitution enshrines a Bill of Rights which provides for a state of emergency, the COVID-19 pandemic was not declared as such**

the Disaster Preparedness and Management Act and the Public Health Act. The District Assembly and City Council also passed a number of regulations, along with the government's creating the Public Health Coronavirus Prevention, Containment and Management Rules of 2020. While all these measures were made through regulations and/or subsidiary legislation, none were enforced by enacting a particular law, as the Constitution requires, and as such the court overruled every one of them.

Christopher Phiri, the second speaker, is an Advocate of the High Court of Zambia. He explained that while Zambia's Constitution enshrines a Bill of Rights which provides for a state of emergency, the COVID-19 pandemic was not declared as such. The measures taken were based not on the Constitution but rather the Public Health Act, the sole aim being to stop the spread of COVID-19. These were not sweeping measures but applicable only to certain vulnerable people in high-risk areas. The measures nevertheless caused much concern and unrest. Zambia too finds itself in a challenging political climate, as its next election is planned to take place in 2021 and concern has been growing that the measure to limit public gatherings is aimed at preventing meetings and rallies by opposition parties.

As for Zambia's oversight bodies, among them its National Assembly and judiciary, there has been little activity from them. The National Assembly was the first governmental body to adjourn indefinitely in response to the pandemic, and at the time of the webinar had not issued statements on any of the measures put in place by the executive. The judiciary had also been largely inactive, as it too had suspended operations barring for matters classified as 'urgent', albeit that there were no specific criteria for determining which matters fell into this category. This has exposed the state's unpreparedness for the pandemic, particularly so in the case of the oversight institutions mentioned above, which have become virtually redundant for the time being.

The third speaker, Olubayo Oluduro, is a Professor of Law and Director of the Linkages International Programmes Office at Adekunle Ajasin University, Akungbaakoko, Ondo State, Nigeria. The first positive COVID-19 case in Nigeria was reported on 27 February 2020, and was also the first confirmed case in Africa. The President reacted under the Quarantine Act of 2004 and issued the Covid Regulations of 2020. At the time of the webinar, there were a total of 14,554 confirmed cases, 4,494 recoveries and 387 deaths. The government deployed national forces, including the police and army, to enforce its measures. It also established the High-Power Presidential Task Force to coordinate the government's response to the pandemic and advise committees on the socio-economic and other implications of the pandemic.

The Constitution of Nigeria, 1999 (as amended), provides for the derogation of human rights if it is in the interests of public safety, public order or public health. However, some measures have been put in place without consideration of their effects on human rights, most notably the right to life. The National Human Rights Report documents that 18 people were killed when law enforcement officers were permitted to use fatal force against citizens when enforcing COVID-19 response measures.

Concerns have also been raised about disregard for the right to a fair hearing, as many have been arrested and detained unlawfully, in addition to which there have been multiple cases of discrimination across Nigeria. The judiciary has exercised little oversight, as it suspended its operations except for matters considered 'urgent or essential'. The Chief Justice

issued a directive that virtual hearings may proceed and that the Federal High Court should appoint three judges across Nigeria's six geopolitical zones to hear matters of necessity.

Looking at their long-term implications, all the measures taken in Nigeria were introduced in the National Assembly under the Control of Infectious Diseases 2020 Bill, which seeks to replace the Quarantine Act. The Bill was met with many concerns, as it grants overwhelming power to elected executives. Section 14 of the Bill gives the Director-General power to place a citizen under surveillance on mere suspicion, while section 15 allows the Minister of Health to declare any premises an isolation area, which gives power to expropriate private property. The Bill also allows the Director-General and other executives to be unaccountable, and permits law enforcement officers to arrest people without a warrant in so far as they suspect that a person has committed an offence under the Bill. Better constitutional and oversight measures should be put in place to prepare for future pandemics.

The fourth speaker, Joe Kilzono, is a lecturer at Strathmore University, Nairobi, Kenya. The Kenyan government responded in line with the new Constitution. The government issued various directives and created an Emergency Covid Fund to cushion the economic effects of the pandemic. Kenya's two tiers of government, the national government and county government, have separate functions, including some within the health sector, and as such were both supported in order to respond effectively to COVID-19. The government has held daily briefings on the spread of the virus and the measures it has in place. It has also generally respected the media by allowing them to report accurately and objectively on the COVID-19 pandemic.

Nevertheless, there have been notable concerns about human rights abuses. For instance, quarantine facilities have been used as punishment facilities; there have also been reports of violations of the right to life and freedom from torture, with 15 incidents having been reported of excessive use of force by police officers.

In regard to oversight mechanisms, Parliament recognises that it is a central pillar in a democratic

Like many African countries, Kenya has struggled to follow constitutional principles during the COVID-19 pandemic

society and has continued to convene and monitor the executive; to cushion the economic effects of the pandemic, it passed the Tax Law Amendment of 2020 Bill. The judiciary has been less active, given that the National Council of the Administration of Justice scaled down court operations and only limited online court sessions were taking place. Like many African countries, Kenya has struggled to follow constitutional principles during the COVID-19 pandemic. This could negatively affect efforts to promote constitutionalism in Kenya in that such efforts are likely to be weakened by some of the response measures, resulting in long-lasting effects that extend into the future beyond the pandemic.

Prof Derek Powell of the DOI gave the closing remarks. He noted that these conversations add significant value to our understanding of the effects of COVID-19. The pandemic presents an unprecedented opportunity to examine how constitutional states fare in managing an international public health emergency. It also intersects with other global phenomena, such as mass displacement of people, climate change, poverty, the rise of authoritarian regimes, and increasing structural inequalities. The situation is complex, with a range of issues beginning to crystallise as symptoms of crisis.

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EVENT

Second Webinar on Constitutional Resilience and COVID-19 in Africa (30 June 2020)

Paula Knipe

On 30 June 2020, the Dullah Omar Institute (DOI), University of the Western Cape, hosted its second webinar in a series on the constitutional resilience of countries in response to the COVID-19 pandemic. The webinar invited four panelists, from Mauritius, Zimbabwe, Ghana and Switzerland, to discuss the constitutionality of the measures put in place by their respective states in response to the pandemic.

In his opening remarks, Prof Ebenezer Durojaye of the DOI noted that the webinar included coverage of Switzerland and that this would be beneficial to a comparative country analysis that looks beyond the African region. Also, in recent weeks there had been significant developments in South Africa in which courts heard constitutional challenges to some of the COVID-19 response measures. People were testing the judiciary and exercising their democratic rights, which served as a reminder that governments cannot adopt emergency measures without considering their wider implications. Responses had to comply with international and regional standards and find a balance between managing the pandemic effectively and ensuring the protection of human rights.

The first panelist, Tinotenda Chidhawu, is a University of the Western Cape PhD candidate working with the United Nations Developing Programme in Zimbabwe. He said the Zimbabwean government had adopted a two-pronged approach to the pandemic. The first entailed legislative measures that included declaring COVID-19 a national disaster and passing a regulation, entitled The Prevention, Containment and Treatment of COVID-19, which prescribed the national lockdown. Most of the measures were informed by the Public Health Act of 2018.

The second prong was the administrative approach of establishing the Inter-Ministerial Task Force for COVID-19, which is aimed at responding to issues concerning transportation, law enforcement, and other logistical issues.

COVID-19 has had devastating effects on all sectors of the economy and public life in Zimbabwe. While the Constitution allows for the limitation of rights during a public emergency, and the government referred to the pandemic as such, it only declared COVID-19 a national disaster. Zimbabwe has seen widespread limitation of its human rights and freedoms, including the right to movement, assembly and association, education, labour and media. The country also saw drastic changes to its criminal system. For example, COVID-19-related media publication was criminalised, carrying the punishment of 20 years' imprisonment.

Many government processes came to a halt, with Parliament adjourning and the executive and judiciary becoming inactive save to hear emergency

matters and those related to holding government accountable. The High Court of Zimbabwe heard cases in relation to government provision of personal protective equipment and to excessive use of force by law enforcement officers in implementing the lockdown. Generally, Zimbabwe has been struggling to strike a balance between managing the pandemic and protecting fundamental rights and freedoms.

The second panelist, Amar Roopanand Mahadew, is a Senior Lecturer in the Department of Law at the University of Mauritius. Similar to many countries, Mauritius took measures in response to the COVID-19 pandemic including a lockdown and amendments to its health and sanitation facilities. Mauritius had seen 350 positive cases and ten deaths in a population of 1.3 million people.

Parliament, in its legislative response, created the COVID-19 Miscellaneous Provisions Act of 2020, which amended 57 pieces of legislation. The majority of these amendments were brought in a fair and legal manner, with no objections from opposition parties or civil society. However, one amendment met with contention, this in relation to the Worker's Rights Act of 2019. The amendment saw limitation on employment, salaries and gratuities. As the pandemic had resulted in a complete slowdown of economic activity, particularly in the tourism sector, the country's main industry, many had lost their jobs or been forced to resign without adequate compensation.

Although Mauritius has fared relatively well, the pandemic has exposed a few weaknesses in its Constitution and the accessibility of its legal system. The Worker's Rights Act was subjected to much debate in Parliament, as opposition parties, civil society organisations and the general public voiced their concerns and condemned the actions of the government. Many people wanted clarity on the measures taken but no explanation was given. However, the government eventually compensated those working in the informal sector, medical assistance was made free, and tenant payments were paused.

Despite these disputes, Mauritius is one of the few countries which has not heard a COVID-19-related case. It does not have a constitutional court but a Supreme Court with the jurisdiction to interpret the

civil society organisations and the general public voiced their concerns and condemned the actions of the government

Constitution – the latter does not include economic, social or cultural rights, which is major reason that it was difficult to challenge amendments to the Worker's Rights Act. Other barriers in this regard are that there is no mechanism for strategic impact litigation or class action and that regional and international complaint mechanisms are absent in Mauritian legal culture.

The third panelist, Dr Daniel Mekonnen, is an independent consultant from Switzerland. He is also a Fellow of the African Service Centre at Leiden University and serves as Chairperson of the Law Society. Pandemics by nature are fertile ground for human rights violations and the abuse of governmental power. Therefore, every country affected is experiencing constitutional challenges as it tries to respond to this unprecedented disruption. While Switzerland has one of the world's longest histories of a resilient constitutional order, COVID-19 has given rise to a number of other critical legal issues. In particular, there were regulatory uncertainties about the emergency powers of the executive (Federal Council) during the period of confinement in which parliament was in a prolonged hibernation.

At the time of the webinar, there had been 31,714 cases, 29,000 recoveries, and 1,962 deaths in a population of 8.5 million people. The Federal Council relied on the Swiss Constitution and the Epidemics Act of 2012 to implement emergency measures in terms of a national crisis and promulgated an ordinance

to prescribe its response. There were multiple amendments to the ordinance, with contention regarding its implementation due to unprecedented restrictions on public life in general and human rights in particular.

At least two attempts had been made by private individuals at the level of the Federal Administrative Tribunal to challenge the constitutionalism of the ordinance, but they were unsuccessful on procedural grounds. There was no parliamentary oversight, as Parliament had adjourned on 15 March 2020. However, the Federal Council is permitted to put emergency measures in place for up to six months – in case of measures lasting longer than six months, it requires approval from Parliament.

Another concern to emerge in the pandemic is the use of science and technology in tracing, monitoring and storing data, with controversy surrounding the issue of privacy. The government has since noted that any COVID-19-related data must meet strict encryption requirements and not be stored regularly.

The fourth and final panelist, Dr Bright Nkrumah, is involved in the Climate Change Adaption Programme at the Global Change Institute at the University of Witwatersrand. He explained that Ghana responded to the pandemic by drafting the Impositions of Restrictions Act 2020. This was opposed by minority parties in Parliament and civil society due to the number of issues it raised. The first issue concerned duplication of legislation, as Ghana's Constitution gives the President power to declare a state of emergency, as does the Emergency Powers Act of 1994. As such, there was no need to draft new legislation, which many believed was a waste of state resources and intended to overreach previous accountability mechanisms, given that existing legislation uses vague language and makes no specific mention either of COVID-19 or the length of the lockdown and when it would be lifted.

As in other countries, the issue of privacy also came to the fore. Previous legislation did not give the President the power to monitor individual activities but instead the mandate to limit movement. However, the new Act gives the President the power to conduct surveillance and intercept individual and group communications, power which could be grossly abused. The new Act also permits a person to be detained for up to a period of four years without any limitation. This has led to conflict between the executive and legislature, with little room open for debate. While governments should be given the authority to contain COVID-19 through the use of extraordinary measures, it is imperative that this power is not abused for personal or political gain.

the new Act gives the President the power to conduct surveillance and intercept individual and group communications

Prof Derek Powell of the DOI gave the closing remarks. COVID-19 is an unprecedented phenomenon, he said: there has never been a natural occurrence that has seen a simultaneous response from states with such impact on the global population. This presents a unique opportunity for comparative analysis organised around a common framework. Three themes seem especially salient: first, the constitutional organisation of governments; secondly, the emergency powers of a normal constitutional government, with due consideration of legal basis, proportionality, legality, validity and rationality; and thirdly, the effect of technologies in areas such as surveillance, privacy and dignity, which has transformed the way in which governments operate and enabled them to reach across conventional boundaries. It is necessary to interrogate what this means for constitutionalism in the future.

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UPDATE

CESCR Concluding Observations on the Initial Report of South Africa

Paula Knipe

South Africa's initial state report to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) was examined on 1–3 October 2018 at the Committee's 64th session, held on 24 September – 12 October 2018 in Geneva. South Africa submitted its initial report to the Committee on 25 April 2017.

Having signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in October 1994, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015. The Constitution requires South Africa to comply with these obligations. The initial state report foreground the efforts South Africa has made to implement the ICESCR. Both the South African Human Rights Commission and civil society were consulted in the preparation of the state party's report and in the review process.

The CESCR comprises international experts in the field of socio-economic rights. It examines each state party's report and addresses its concerns and recommendations to the state party in the form of 'concluding observations'. Its concluding observations to South Africa were issued on 29 November 2018. The South African government is required in terms of its ICESCR obligations to report on its progress in implementing specified recommendations within 18 months, that is, in October 2020.

South Africa is expected to indicate steps and measures taken in response to the three priority areas identified via the concluding observations:

- the preparation of a composite index on the cost of living and access to social assistance for adults between 18 and 59 years of age;
- a proposed increase in social grants to orphaned and abandoned children; and
- access to education for undocumented migrant, refugee and asylum-seeking children.

The South African government is yet to report to the Committee on measures adopted to implement these recommendations. Additionally, it is required to submit its second periodic report on the measures taken to fulfil its obligations under the Covenant by 31 October 2023.

The progressive realisation of social and economic rights is central to the transformation of South Africa, and the concluding observations have a direct impact on issues at the centre of public debates about the need to accelerate economic transformation, expedite wealth redistribution, and eliminate inequality in

South Africa. They provide an opportunity for the government to re-evaluate its progress in fulfilling the constitutional promise of socio-economic rights.

South Africa is yet to ratify the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The OP-ICESCR will allow individuals and groups within South Africa to seek justice from the United Nations should these rights – which include the rights to adequate housing, food, water, health, work, social security and education – be violated by the government.

By ratifying the OP-ICESR, the South African government would show its commitment to reducing poverty and ensuring access to justice for all. Moreover, it would send a signal to other countries that we can no longer be complacent about the marginalisation and neglect of those living in poverty.

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