



Policy Brief

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Access to justice in Africa

Comparisons between Sierra Leone, Tanzania and Zambia

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INTRODUCTION

Legal systems play a significant role in development processes from state formation to the enshrining of democratic principles through the constitution; from the provision and protection of human rights to the regulation of economic relationships. Legal systems contribute to the development process as they enable the establishment and strengthening of institutions, stimulate confidence in governance, engender an environment of stability and security, and provide a benchmark for social and economic interaction. In short, they are pivotal to the construction of the foundations necessary for effective development.

However, the role a legal system plays in development may not follow this path. Chronic underfunding and personnel deficits, in conjunction with misuse of the system by ruling political and economic elites, serve to undermine the developmental process. However, arguably it is access, or lack of access, to justice that represents the biggest challenge in positioning legal systems as a champion of the development process.

ACCESS TO JUSTICE

A definition for the term 'access to justice' encompasses a number of different aspects, for example the fairness with which litigants are treated; the justness of results delivered; the speed with which cases are processed; and the responsiveness of the system to those who use it. More generally, access to justice refers to the equity with which those from differing backgrounds are able to gain from the justice delivery system.

If it is accepted that the justice system and the effective rule of law represent significant mechanisms in ongoing social, political and economic developmental landscapes, then it must also be accepted that such mechanisms reflect the interests of the citizens of the state and provide an avenue through which these interests can be protected. To that end it follows that access to justice should be equal; that the poor should not be excluded on the basis of poverty; that women should not be silenced by the voices of men; that the young should be protected by adults when necessary; and that there should be equity between the provision of justice in rural and urban areas.

The level of access to justice in a state can be vital in underpinning the roots of democracy and the development of that state. Should equality in access to justice prevail, this would go a long way towards meeting the commitments of African heads of state set out in the Declaration on Democracy, Political, Economic and Corporate Governance¹ by NEPAD (the New Partnership for Africa's Development), of which Sierra Leone, Tanzania and Zambia are all signatories. Specifically, these commitments 'undertake to work with renewed determination to enforce: the rule of law; the equality of all citizens before the law and the liberty of the individual; individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the constitution; equality of opportunity for all; the inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and, adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments'.²

Conversely, in the absence of such equality of access would serve to undermine all efforts to establish a just, free and fair society in which the rule of law is upheld and democratic principles are followed. Lack of access to justice – for various reasons to be outlined below – would promote corruption, lower criminal convictions, increase poverty, and reduce confidence in government. In all of the three countries under review, such access remains elusive for the majority of the citizens.

CHALLENGES TO ACCESS

Information and illiteracy

Across all three case countries, information and illiteracy were cited as significant reasons for certain groups' relative lack of access to justice. In Zambia, awareness of the law was low for various reasons. For example, many illiterate people are intimidated by the formal legal systems and engage only with the informal systems with which they are familiar. Similarly, geographical proximity to rural-based informal systems deflects attention away from urban-based formal systems, which are seen as out of touch and rigid. This was also the case in Tanzania and Sierra Leone. Again in Zambia, limited access to the media - along with legal restrictions placed on legal and paralegal institutions advertising their services - placed the illiterate and indigent at a distinct disadvantage.

Illiteracy represents one of the biggest challenges to increasing access to justice. A significant factor in enhancing such access is increasing awareness. Basic understanding regarding the law is not forthcoming in many areas and this not only presents a danger in terms of unwittingly breaking the law, but also through ignorance over civil and human rights.

When considering how illiteracy - and therefore a lack of effective information channels - affects specific groups, it became apparent that two key groups in Sierra Leone, Tanzania and Zambia are affected in terms of access to justice. Women constitute a key group because of their higher levels of illiteracy compared to their male counterparts. With female adult illiteracy constituting 61, 63 and 63 per cent of adult illiteracy in Sierra Leone, Tanzania and Zambia respectively,³ it follows that such an impediment to access information is a significant factor in limiting female access to justice.

The second group greatly affected by illiteracy constitutes a significant proportion of the populations of these

countries: the rural population. For various reasons the rural population have lower access to quality education resulting in higher rates of illiteracy and limited access to justice.

Illiteracy therefore affects a significant proportion of the population in all three case countries and thereby represents an important challenge to access to justice. Any reform process that attempts to increase such access needs to take into account the lack of awareness regarding the law.

Mechanisms of justice

The mechanisms of justice in Sierra Leone, Tanzania and Zambia all represent significant challenges to the provision of access to justice for a number of reasons.

Across Africa, and certainly in the three case countries, legal systems operate in a bifurcated manner: a mix of formal and informal justice. The legal systems of all three case countries are based on - at least in part - antiquated British judicial systems, and this has ramifications for how well justice can be accessed, not least because the illiterate of Sierra Leone, Tanzania and Zambia face enormous obstacles in accessing and understanding formal justice systems. Formal justice systems tend to play a dominant role in the provision of justice in urban areas because of the geographic positioning of court infrastructure. Access to justice - at least to the formal kind - is concentrated in urban centres, thus reducing access by rural populations.

Owing to factors of geography and literacy, among others, significant proportions of the populations in Sierra Leone, Tanzania and Zambia fall under the jurisdiction of informal justice systems. Indeed, 85 per cent of Sierra Leoneans fall under the jurisdiction of customary law.⁴ In the Western Province of Zambia the traditional courts systems such as the Kuta are mostly used while the role of the chiefs in these processes has been recognised by the government through an Act of Parliament.

Customary, traditional or informal legal systems fill the gaps in formal mechanisms, particularly for the indigent and those from rural areas who do not have geographical access to formal courts. These systems play a vital role in the provision of justice, as well as the strengthening of social cohesion through their (invariably) restorative nature. Traditional courts are often favoured in rural areas because of their relatively informal nature, their use of local languages and vernacular, and their close proximity to users. Without informal, or semi-formal,

legal systems, access to justice for the masses would be even further restricted.

This does not mean that traditional systems are without problems. Being couched in tradition, customary legal systems often marginalise or exclude women. For example, it has been reported that in Sierra Leone, chiefs act illegally by imposing fines, punishments and, in some cases, arbitrary detentions. Indeed, before the 2007 review of the constitution by the Constitutional Review Commission (CRC), specific laws regarding adoption, marriage, divorce, burial, devolution of property on death and other personal laws, all of which are of great importance to women, fell under the purview of customary law.⁵ Similarly, in Zambia patrimonial systems are reinforced by customary legal systems as they are invariably administered by men. In addition, it was stressed that customary systems do not recognise international treaties, protocols and conventions and therefore do not guarantee certain human rights, instead promoting group rights over individual rights.

Whilst traditional or customary law continues to play a role in African society, and specifically in the three case countries examined, in some cases this role is diminishing. For example in Tanzania, since the 1960s, the influence of customary law in criminal law has been largely eroded. Indeed, customary law essentially holds sway only in primary courts (the lowest level of court) and that is due to the limited knowledge of the assessors of the English-rooted principles of the Tanzanian criminal justice system. This means that customary practices do have some influence in the formal system, as administrators of the law fall back on these doctrines. However, it is generally in civil matters that customary law has the most influence. With the restrictions placed on customary or traditional courts, access to justice is further limited, creating significant difficulties for those with least access.

Poverty

Poverty represents perhaps the most significant challenge with regard to access to justice in Sierra Leone, Tanzania and Zambia, and indeed, all other African states. Like the illiteracy barrier, geographical barriers result from poverty. However, the principal barrier posed by poverty is the inability to meet the costs of legal representation.

According to the 2007 Human Development Report,⁶ the gross domestic product per capita (US\$ PPP) in Sierra Leone, Tanzania and Zambia is \$806, \$744 and \$1 023 respectively. These values are in the lowest third

of countries with an HDI (**Human Development Index**) ranking, and it should be noted that large proportions of the populations of these countries will produce less than these amounts. In each of these countries poverty affects people's ability to access justice by creating barriers to legal representation, particularly for the indigent and women.

Under article 10 of the Universal Declaration of Human Rights⁷ 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his [or her] rights and obligations and of any criminal charge against him [or her]'. Pursuant to this article, the constitutions of all three case countries guarantee equal access to justice. Indeed, Sierra Leone's constitution states that 'opportunities for securing justice are not denied any citizen by reason of economic or other disability'. However, although in all three cases access to justice is intended to be available to all, the costs of legal representation are acknowledged to be prohibitive.

Despite all three case countries having some form of legal aid provision - whether through the constitution, the governmental or civil society/NGOs - such provision is essentially insufficient. A combination of inadequate funding, cumbersome administrative systems and a limited presence in rural areas has constrained the impact of legal aid provision to date. In addition, in all three countries paralegal services provided to the poor to assist their navigation through the legal process, despite their best intention to offer legal education and advice, are often encumbered by a lack of funding and geographical factors. In this way, two of the key mechanisms to increase access to justice (legal aid and the provision of paralegal services) are limited in their ability to enhance such access.

Poverty of the state exacerbates the problems faced by individuals. The challenges of weak delivery institutions and inadequate human resources are aggravated by chronic under-resourcing and corruption. When a significant part of the population has limited access to legal systems, these systems serve to maintain the power positions of the elite, who use such systems to their own benefit. Therefore, the opening up of access to justice will require significant reform of current systems.

RECOMMENDATIONS: ENHANCING ACCESS TO JUSTICE

Enhancing access to justice represents a significant challenge for Sierra Leone, Tanzania and Zambia, as

it does for other African states. Important structural changes mean that reform processes would be difficult to enact and implement for a number of legal and resource constraint reasons. That said, there exist a number of recommendations that could enhance the level of access to justice of many citizens of these three countries:

- **Legal aid institutions** are perhaps the best method through which access to justice can be increased. It is crucial that such institutions have access to adequate levels of funding and efficient human resources, and have a good geographical presence. Additionally, in order to be effective, they have to be guaranteed independence from government
- **Paralegals** offer a significant opportunity to access remote and rural localities where the poor are severely limited in their access to justice. Paralegals have the potential to reach large numbers of people and offer basic education of the law, both formal and informal, in ways that can be easily understood. Therefore the use of paralegals should be encouraged and supported
- **Civil society** has the potential to play a considerable role in the provision of greater access to justice. Lobbying government and the international community to provide better services and limit the costs of private legal services could be beneficial. In addition, civil society is well placed to increase awareness of legal issues, particularly in rural areas and among women
- **Synergy between the formal and informal legal systems** is important in the development of a legal system that would benefit individuals as well as society in these countries. Despite the existence of a dual system in which formal and informal systems operate in tandem, these separate but intrinsically linked systems do not work as effectively as they could and sometimes undermine each other. It would be beneficial to institute a review process to determine how these systems could be operated together in order to complement each other and increase access to justice
- **The development of a proper infrastructure** for formal legal systems in each of the three countries is a key requirement for increasing access to justice. The provision of adequate infrastructure and resources (human and financial) would go a long way in reducing case backlogs and ensuring that the poor have access to justice - providing such resources reach their intended targets
- **Specific targeting** of women and other vulnerable groups by government agencies, civil society and the international community would prioritise these

groups in the delivery of legal services that would help increase the access to justice of the most marginalised in the system. Such targeting should also be applied to the development of the formal/informal legal synergy

CONCLUSIONS

The provision of justice represents a significant challenge to developing countries, not least Sierra Leone, Tanzania and Zambia. Where justice is apparent, and the rule of law upheld, the processes of development and democratisation are supported. Where justice is not evident, these processes are undermined.

In order for justice to prevail, everybody should have equal access to the mechanisms of justice. Barriers such as illiteracy, poverty and cumbersome legal mechanisms present long-term challenges to the provision of justice. Such barriers serve to further marginalise social groups such as the indigent, women, children and the disabled.

Equality of access to justice in Sierra Leone, Tanzania and Zambia is currently not forthcoming and various social groups are experiencing restrictions to such access. However, a number of recommendations can be implemented in order to increase the level of access. Efforts should be made to ensure that such recommendations are carried out and equality of access is established.

NOTES

- 1 New Partnership for Africa's Development (NEPAD), Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII), 18 June 2002.
- 2 Ibid.
- 3 UNESCO, Institute for Statistics, Education Digest 2009, http://www.uis.unesco.org/ev_en.php?ID (accessed 21 September 2009).
- 4 Sierra Leone Human Rights Commission, *The state of human rights in Sierra Leone*, Freetown: The Commission, 2007.
- 5 African Human Security Initiative, *Sierra Leone: a country review of crime and criminal justice 2008*, Monograph 160, Pretoria: Institute for Security Studies, 2009.
- 6 United Nations Development Programme, *Sierra Leone National Human Development Report 2007*, Freetown: UNDP, 2007/8.
- 7 United Nations, Universal Declaration of Human Rights, New York: UN, 1948.

This brief is derived from the country reviews conducted by the AHSI in Zambia, Sierra Leone, Mali, Benin, and Tanzania. See

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the following ISS monographs: The Criminal Justice system in Zambia, No 159; Sierra Leone: A country review of crime and criminal justice, No 160; Mali: Criminalité et Justice Criminelle, No 162; Benin: Revue de la Justice Criminelle, No 163. The monograph on Tanzania is forthcoming.

