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

SPECIAL ISSUE ON ACCESS TO JUSTICE

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Editorial

Welcome to the first issue of ESR Review in 2020. It is the second in a series of five special issues focusing on access to justice.

Our first feature article, by Chipo Mushota Nkhata, examines the institutional barriers that incarcerated women face in accessing justice, and argues for a gender-nuanced approach to legislation. The author contrasts this with traditional approaches to legislation and how they impact on access to justice for women.

The second feature article, by Mohamed Shafie Ameermia and Peacemore Mhodi, evaluates the role of the South African Human Rights Commission in facilitating access to justice through litigation. Access to justice is a fundamental human right and a cornerstone in the protection and enforcement of other human rights. The authors define access to justice, delve into its broader conceptualisation, and consider the challenges that arise, after which they address the role the Commission plays.

In our poetry section, Stanley Malematja reflects on institutions that are mandated to ensure that access to justice is not stifled. Using a blend of styles and themes, the poem engages with various characteristics of the Independent Police Investigative Directorate.

This edition includes sections on events and updates. In the events section, Paula Knipe reports on an inception meeting, held in in Kigali, Rwanda, 21–22 February 2020, in regard to research on community paralegals in Africa. The update section offers insights on the resolution passed on 14 May 2019 by the African Commission on Human and People's Rights in Sharm El Sheikh, Egypt, on non-state actors the and realisation of the rights to education and health.

We thank the anonymous peer reviewers and all our guest contributors, and trust that readers will find this issue stimulating and useful in the advancement of socio-economic rights.

Robert Doya Nanima
Guest Editor

FEATURE

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

Chipo Mushota Nkhata

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

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

Defining a cess to justice

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

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

For women prisoners, such barriers include limited

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

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

Institutional and legal barriers

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

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

> **Examples abound of institutional barriers that prevent women from accessing justice**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A gender-nuanced approach to legislation

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

This all points to the need for a gender-nuanced law that promotes gender equity as well as women's rights. In determining the form that such gender-nuanced law should take, one has take into account issues that impact on women's access to justice (CEDAW General Recommendations 33: paragraphs 40–53); the norms for addressing gender equality and women's rights (Beijing Platform, CEDAW, Bangkok Rules, Maputo Protocol etc.); human rights norms and guiding principles, such as the rights-based approach and programming principles in the United Nations Development Assistance Framework (UN, UN Women, UNDP, et al. 2018: 27–38); and the peculiarities of a particular legal system (Pearshouse 2008: 5–10).

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

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

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

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

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

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

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

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

2. Particularities of the legal system

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

By the same reasoning, one can determine the type of legislative intervention which is required, that is, whether to introduce omnibus or mainstreaming legislation or a hybrid of them. Zambia does not have an administration of justice law or statute that specifically addresses access to justice. Furthermore, no legislative action has been proposed in the recent past. On the other hand, there are ongoing discussions about penal reforms for enhancing prisoners' rehabilitation and implementing the recent paradigm shift in penal justice. It is thus necessary in the Zambian context to effect law reform, preferably by repealing and replacing the current Prisons Act with one which is more gender-sensitive.

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

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

Traditional approaches to legislation

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

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

justice and the objectives of the substantive law;

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

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

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

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

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

Furthermore, comprehensive legislation contained in a single statute makes enforcement easier as the law is often designated to one institution. If the law designates more than one institution for its implementation, it should clearly list all the responsible institutions within its provisions and set out their roles and responsibilities. By contrast, when legal provisions are splintered across different laws, as happens in mainstreaming legislation, it is harder to enforce the law and for vulnerable groups to access it.

> **Omnibus legislation has the disadvantage of having a higher potential to conflict with existing laws**

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

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

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

Conclusion

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

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

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FEATURE

The Role of the SAHRC in Facilitating Access to Justice through Litigation

Mohamed Shafie Ameermia and Peacemore Mhodi

Access to justice is a major issue, one receiving recognition locally, regionally and internationally. For instance, it is recognised as a fundamental human right in the Universal Declaration on Human Rights (UDHR). The UDHR declares that, as a human right itself, it is also a vital ingredient in the protection and enforcement of other human rights: 'everyone has the right to an effective remedy by the competent tribunals for acts violating the fundamental rights granted him by the Constitution or by law' (UDHR: article 8). Moreover, the Sustainable Development Goals (SDGs), particularly in SDG 16, call for all societies to 'promote peaceful and inclusive societies for sustainable development, [and] provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. In South Africa, the Constitution in section 34 guarantees the right to have access to courts.

Conceptualising the right of access to justice

The concept of access to justice has evolved from being understood narrowly as entailing accessing legal and other state services to being understood broadly as a right which ensures the attainment of social justice, economic justice and environmental justice, amongst others. The right of access to justice, particularly in the South African context, is regarded as a right that unlocks all the other rights in the Constitution.

There is, as such, a need to move from a formalistic, legalistic perspective on access to justice to a socio-economic perspective. This shift would help to ensure that more resources are directed to enabling the marginalised and vulnerable in society to have enhanced access to justice through extended legal services and assistance.

Challenges to accessing justice

Despite the legal recognition of the right of access to justice and its constitutional entrenchment, accessing justice remains but a wishful dream for a significant number of people. Globally, it is estimated that more than five billion people around the world are outside

the protection of the law (Task Force on Justice 2019: 18). Lacking access to efficient and effective justice institutions, they are at risk of exploitation by state and non-state actors. Barriers to access to justice include poverty, inequality, unemployment, illiteracy and discrimination (Bingham Centre for the Rule of Law 2014: 14).

In South Africa, the triple challenges of poverty, unemployment and inequality are the greatest barriers to access to justice. This means there is a correlation between being poor and being unable to access justice. South African society is beset by great disparities in wealth and an ever-widening chasm between the haves and have nots that prevent vulnerable groups from being able to access justice given that the cost of legal services is prohibitive to them. According to a research, the average black South African household would need to save a week's income in order to afford a one-hour consultation with a legal practitioner (AfriMAP & Open Society Foundation of South Africa 2005: 29).

Another barrier to access to justice in South Africa is lack of education. Access to economic resources is still largely defined by levels of literacy and education. Thus, the unpleasant nexus arises in which those who are poor are mostly illiterate and lack the capacity to understand and enforce rights, as a result of which they are not able to access justice. Numerous surveys point to the dearth of constitutional literacy in the country (Foundation for Human Rights 2014: 11). This means that, to address the access to justice deficit, it is imperative to bolster initiatives aimed at fostering constitutional literacy.

How to enable refugees' access to justice

TNational human rights institutions (NHRIs) are considered to play a salient role in protecting and promoting human rights locally and regionally. According to Cardenas (2003), NHRIs exist to 'promote' or 'protect' human rights. Hence, they play a crucial role in ensuring access to justice. In terms of the Paris Principles (1993), NHRIs are tasked with a myriad functions all aimed at ensuring access to justice for all human rights. This stems from the realisation that NHRIs are a vital cog among the institutional mechanisms created by states to further access to justice and advance the implementation and realisation of human rights.

The South African Human Rights Commission (SAHRC), an NHRI, is a state institution supporting constitutional democracy and mandated, among other things, to promote respect for human rights and a culture of human rights, promote the protection, development and attainment of human rights, and monitor and assess the observance of human rights in the Republic (Constitution: section 184(1)). The SAHRC is an avenue through which every person may access justice. It has exercised this function in various ways, including by receiving complaints, conducting national inquiries, and regularly monitoring the extent to which the state has taken measures to progressively realise the rights in the Bill of Rights.

The SAHRC is also vested with the powers to make ***amicus*** interventions to guide courts on how to interpret and apply international human rights instruments, and to pursue public interest litigation in its own name, or on behalf of a person or a group or class of persons (South African Human Rights Commission Act 40 of 2013: section 13).

The selection of court cases below highlights how the SAHRC has used litigation as a means to further access to justice by vulnerable and marginalised persons in South Africa.

The SAHRC's use of litigation to enhance access to justice

The SAHRC defines vulnerable groups as those sectors of society with diminished and poor capacities in comparison to those of more empowered sectors of society. These groups are generally prone to socio-economic hardships, discrimination and human rights abuses. In view of that, and recognising that the right of access to justice deserves a broader definition if poverty and inequality are to be tackled meaningfully, the SAHRC has at times used litigation to foster access to justice.

For instance, it has intervened as a friend of the court in the High Court cases of ***Nedbank Ltd v Thobejane and related matters***, ***National Credit Regulator v Standard Bank*** and the Constitutional Court case of ***University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services and related matters.*** The common thread in these cases is that they dealt with vulnerable members of society.

1. University of Stellenbosch

The case of ***University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others and related matters*** 2016 (6) SA 596 (CC) (***University of Stellenbosch***) culminated in the Constitutional Court, having arisen in the Western Cape High Court where the SAHRC had intervened as friend of the court to champion the human rights of people who are poor and vulnerable. The matter concerned low-income earners whose salaries were subject to emoluments attachment orders (EAOs) for the payment of oftentimes trifling debts, resulting in considerable rights violations. In terms of an EAO, a person's salary may be attached should he or she be in arrears and fail to make alternative arrangements regarding the settling of the debt.

The SAHRC was concerned mainly about the constitutionality of the provisions relating to EAOs in the Magistrates' Courts Act 32 of 1944 (MCA). It was the contention of the SAHRC that the absence of judicial oversight by a magistrate in the issuing of an EAO had an egregious impact on the rights of the marginalised and the vulnerable. The SAHRC's submissions were anchored on the fact that, in terms of international law, states have a duty to prevent and remedy human rights abuses committed on their territory by private parties, this through creating effective judicial measures to prevent or punish the infringement of a debtor's rights.

Judge Desai in the Western Cape High Court declared section 65J(2) of the MCA unconstitutional to the extent that it allowed for the issuing of EAOs without judicial oversight. Desai J said he frowned upon the practice of credit providers' 'forum shopping', that is, shunning courts that are accessible to debtors and their employers, and instead choosing courts that have no jurisdiction and are far removed from the debtor's influence. In that regard, Desai J held that in proceedings brought by a creditor for the enforcement of any credit agreement concluded in terms of the National Credit Act 34 of 2005, it would be impermissible for a judgment debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which that debtor resides or is employed.

In the light of the fact that the Western Cape High Court had ruled on the constitutional validity of the MCA, the Constitutional Court had to confirm the order of constitutional invalidity made by the High Court. In ***University of Stellenbosch***, heard at the Constitutional Court, the SAHRC intervened as a friend of the Court and made submissions on the treatment of EAOs in international law and other jurisdictions, as well as the appropriate remedy for the court to order in these circumstances.

In a judgment handed down on 13 September 2016, the Constitutional Court did not confirm the order of constitutional invalidity but rather ordered the reading-in, and severance of, certain words in section 65J(2)(a) and (b) of the MCA to cure the constitutional defect. In essence, after 13 September 2016 no emoluments attachment order may be issued unless a court has authorised the issuing of such emoluments attachment order after satisfying itself that it is just and equitable and that the amount is appropriate.

Following ***University of Stellenbosch***, Parliament introduced the Courts of Law Amendment Bill on 11 May 2016 to address the abuse of emoluments attachment orders. On 31 July 2017, the President signed and assented to the Courts of Law Amendment Act 7 of 2017 (CLA). The CLA came into effect on 2 August 2018. The CLA is envisaged to bring about change in the landscape of EAOs to ensure more protection for judgment debtors by including safeguards in the debt collection process.

2. Thobejane

The case of ***Nedbank Limited v Thobejane and related matters*** 2019 (1) SA 594 (GP) (***Thobejane***) dealt with the practice by the banks to institute legal proceedings against defaulting home owners in the High Court

when magistrates' courts closer to debtors' homes also has jurisdiction to hear these matters. In this particular matter, some of the debtors' homes were situated hundreds of kilometres away in Limpopo and the North West. None of the debtors defended the actions against them, and the banks proceeded to apply for default judgments.

The central question for determination by the High Court in ***Thobejane*** was whether an obligation exists on financial institutions to consider the cost implications and principles relating to access to justice of financially distressed debtors when deciding on whether to institute legal proceedings in the lower or superior courts.

The SAHRC intervened as a friend of the court and argued that the right of access to justice dictates that financial institutions are obliged to take into cognisance the cost implications and access to justice of financially distressed people in choosing a forum where a matter should be heard. Thus, the SAHRC was of the view that inasmuch as it might be legally permissible for the high courts to hear matters that also fall within the jurisdiction of the magistrates' courts, the high courts should not always entertain matters falling within the jurisdiction of the magistrates' courts.

The view of the SAHRC was that creditors should not circumvent the need for inexpensive justice by refusing to approach an appropriate magistrates' court for their relief on the basis that such courts are allegedly ineffective. Thus, according to the SAHRC, the practice among financial institutions of resorting to a high court when a magistrates' court has jurisdiction constitutes a violation of the rights of distressed debtors, in particular their access to justice which, in the context of this matter, is a procedural right that can be used to safeguard other rights in the Bill of Rights, in particular the right to have access to adequate housing, under section 26 of the Constitution, and the right to property, under section 25.

The full bench of the Gauteng Division of the High Court in Pretoria agreed with the submissions of the SAHRC, and accordingly ordered that, with effect from 2 February 2019, civil actions and applications, where the monetary value claimed is within the jurisdiction of the magistrates' courts, be instituted in the magistrates' courts having jurisdiction, unless the High Court has granted leave to hear the matter in the High Court. The Court further held that the High Court has the power to transfer a matter to another court, if it is in the interests of justice to do so.

Recently, the High Court in Makhanda, Eastern Cape, ruled that in view of the fact that the National Credit Act 34 of 2005 (NCA) sought to 'balance the inequities arising from unequal bargaining power between large credit providers and credit applicants' and 'level the playing field between the relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider', access to justice would be better served if civil cases in the Eastern Cape arising from the NCA were instituted in the magistrate's court (***Nedbank Limited v Gqirana N.O and Another and other related matters***).

The ruling by the High Court in the Eastern Cape fortifies the SAHRC's reasoning that, in the light of the fact that South Africa is a resource-scarce country beset by deep-seated poverty, social economic inequalities and prohibitive costs of legal representation, access to justice is better served when courts are made accessible to the majority of the members of society.

The financial institutions involved in ***Thobejane*** have since appealed the judgment of the Gauteng High Court at the Supreme Court of Appeal. The SAHRC has been granted leave to intervene as a friend of the Court to advance arguments that, although litigants (in this case financial institutions) have a right to recover debts through the judicial system, the ***modus operandi*** of using courts that are situated hundreds of kilometres away from debtors' homes has adverse consequences for distressed debtors that deny their right of access to justice.

2. NCR

In ***National Credit Regulator v Standard Bank of South Africa Limited*** 2019 (5) SA 512 (GJ)(***NCR***) the SAHRC furthered the discourse on access to justice for consumers by making an ***amicus*** brief in the Gauteng Local Division of the High Court in Johannesburg, in which it argued that the common law principles of the right of set-off to satisfy debts that are owed by consumers is not applicable to credit agreements concluded in terms of the provisions of the National Credit Act 34 of 2005 (NCA).

The SAHRC submitted to the High Court that the application of the common law principle of set-off to credit agreements has a detrimental effect as it takes away the income that indigent debtors rely upon for subsistence, without their consent or without affording them the protection offered by the NCA. It was the contention of the SAHRC that this type of action removes the ability of debtors to plan their finances effectively for the future and/or to pay for basic necessities they require for survival.

The High Court found that credit providers are not entitled to rely on the common law principle of set-off to satisfy debts that are owed by consumers in terms of credit agreements that are subject to the provisions of the NCA. The SAHRC sees the ruling by the High Court as in line with the objects of the NCA, which are to advance the socio-economic welfare of South Africans. The judgment also shows how the SAHRC is pursuing its objective of protecting the rights of the marginalised through strategic litigation in the public interest.

Conclusion

The right of access to justice is indispensable to the full enjoyment of human rights in that it is a vehicle through which other human rights may be protected, promoted and enforced in the justice system. Ensuring access to justice is one of the critical component of a state's obligation under international human rights law. Unfortunately, due to the barriers mentioned earlier, many in South Africa, particularly the vulnerable and marginalised, have difficulty in exercising their constitutional right to have access to justice.

The problem has to be addressed in order to carry out the 2030 agenda of sustainable development, the goals of which are to eradicate poverty in all its forms, tackle inequality and promote shared prosperity. NHRIs are part of the mechanisms established to further access to justice. As an NHRI, the SAHRC plays a pivotal role in ensuring the realisation of the right of access to justice. In that regard, the SAHRC has sought to do so by using litigation as a tool to further access to justice for the marginalised and vulnerable in the society.

Advocate Mohamed Shafie Ameermia is a Commissioner, and Peacemore Mhodi a Research Advisor, at the SAHRC.

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Who Guards the Guardians?

A poem about the role of the Independent Police Investigative Directorate in denying the gateway right to protest and to access justice

Stanley Malematja

To me, Justice is a like a fancy building with a humongous **'RIGHT OF ADMISSION RESERVED'** sign on it. As I keep on enduring the brutal attack on my human rights, access to justice remains a dream as I kick and scream, justice to me is inaccessible.

The right to protest is my constitutionally guaranteed right
This right paves a way to access my other human rights
This is my gateway right
Although I get brutalised during exercising my gateway right
The government does hear my cry
My right to access to justice is in jeopardy
This is because the guardians are unguarded
I rely on them to bring me justice
But all they bring is injustice, this a cold reality
I am denied access to justice and I exercise my gateway right in fear
Police brutality is rife
I dodge rubber bullets and live ammunition projected from an assault rifle
And the guardians do nothing about it
The police are not being held accountable
My complaints enter the IPID system and instantly go out the guardian's window
My human dignity was stripped away in broad daylight
I was stopped and searched, insulted, assaulted, pepper-sprayed, handcuffed and thrown into a holding cell
I was kept in captivity like an animal
My angelic demands landed me in the pits of hell
My demand for access to water landed me in a desiccated place
I was denied medical attention and told to bare the pain
What for?
For demanding that the government provide water for my village
I was brought before a court of law and labelled a criminal
The pain was excruciating I pleaded not guilty but to be taken to hospital
I saw men wearing the same uniform as the men who assaulted me

The shocking part is they are still roaming the streets
What for?
To protect?
No, to assault those who cannot obey their thirst
I am the victim, I was assaulted for demanding the government to provide water for my village
We are tired of sharing a dirty stream with our livestock
The presiding officer looked at my bruised and swollen body
He did not ask what caused my disturbing physical appearance
He rather told me that I am released pending further investigation
My aching body was gracious to be outside the pits of hell
My mind was fixated on the bottle of water in front of the presiding officer
I was tempted to ask for a sip and quench my thirst
Then it hit me really hard that I am in this situation because I asked for sip from the government
that I voted into power
The pain of not having access to water is agonising
I looked at the presiding officer and said I was badly assaulted by those who ought to protect me
The pain of being assaulted by the police is excruciating
I am being horribly assaulted by the government that I voted into power
Go straight to the IPID and report the police conduct, said the presiding officer
Who or what is that, I asked
They independently investigate the wrongful and criminal conduct of those who are supposed to protect you
I thought this was good news, finally those who did me wrong will be chained with the accountability shackles
I rushed to the watchmen, the guardians of the guardians
The Independent Police Investigative Directorate
Finally, I will get justice
Not knowing that the watchmen are just going to turn a blind eye to my plight
I tried to open the eyes of the watchmen but the eyelids are tight
My rights are simply stripped away and I call this a constitutional mutilation
The watchmen are not there to see if the police serve and protect me
They are rather there to watch policemen beat me to a pulp
They say launch a civil claim
Well, these police must be as civil as they claim
Where do I get money for the costly civil litigation?
Custos custodum, guardians of guardians, the watchmen
You constantly turn a blind eye to complaints of police brutality
You are a barrier to my access to justice
Now the police walk all over me because of your incompetent practice
Multiple complaints are piled up in your office

IPID, you are standing between me and justice
You are the 'right of admission reserved' sign on the justice building
IPID, are you independent?
Before you answer that, tell me if you are relevant?
Do you even understand your position in this constitutional dispensation?
Or, are you positioned to support human rights defenders' brutalisation?
Investigate: do not instigate the brutalisation of human rights defenders
IPID, you are the gatekeeper of my access to justice
IPID, you are derailing our constitutional train
IPID, you are adding to my pain
IPID, is my pain disdain?
IPID, listen to me
The police attacked me in broad daylight
I did not fight, I only asserted my rights
Surely, as the watchmen, you can see this
Or are you waiting on Lady Justice to remove her blindfold and show you this?
Or are you just ignoring me because ignorance is bliss?
Watchmen, your failure to investigate and hold the police accountable causes grave injustice
This is an unconstitutional practice
IPID, you are barricading my access to justice
IPID, you are blatantly refusing to hold the police accountable

Now I live in fear, I am afraid to seek a better life
I am afraid to demand access to water
It is that demand that turned me into victim of police brutality
IPID, you are barricading my constitutional right to protest
The thirst of my community led to my veins being punctured, by fists, kicks, batons and handcuffs
Independence and impartiality are foreign to IPID
Integrity and honesty are foreign to IPID
Transparency and openness are foreign to IPID
Equity and fairness are unfamiliar to IPID
Courtesy and commitment are strangers to IPID
The guardians are unguarded; the police are on a rampage
I dare you to demand access to water if you want to see the police turn savage
I dare you to exercise your constitutional right to protest if want to see the police turn barbaric
Now I exercise my constitutional right to protest in fear
It matters not whether I am peaceful and unarmed
IPID plus the South African Police Service are equivalent to a disaster package

I placed my trust heavily on IPID

Relied on the guardians to free from the brutal police bondage

Now I sit nursing my wounds with my dignity wrapped up in bandages

I relied on IPID to aid me to access justice

It turns out that IPID is actually a barricade

Who guards the guardians?

The watchmen do as they please

Do I not deserve access to justice?

Is IPID simply allowing the police to escape with murder?

To me, Justice is a like a fancy building with a humongous **'RIGHT OF ADMISSION RESERVED'** sign on it. As I keep on enduring the brutal attack on my human rights, access to justice remains a dream as I kick and scream, justice to me is inaccessible.

The guardians are at the door of the Justice building and they won't let me in

The watchmen control the justice jigsaw puzzle and they say my complaint does not fit in

Must I kick the door down?

Must I ignore the 'RIGHT OF ADMISSION RESERVED' sign?

What if the find the police inside the building?

Thirsty as I am to access Justice, I still fear for my life

I knocked on the Justice door and the watchmen said 'we are coming'

To date, no one came

The guardians are unguarded and they do as they please

My right to access to Justice remains a dream

The government is denying me access to water

IPID is denying me access to justice

The government is denying me my constitutional right to protest

Welcome to Bizana Ndakeni, a place where access to human rights is denied

A place where the Constitution is defied

The battle for access to human rights is far from over

I am denied access to water, denied access to justice and denied my right to protest

My dehydrated mind, dry and cracking lips resemble the struggle that my village is facing

Man-made wells and Godly made streams are all affected by climate change

I hope for a government change where the Constitution is promoted

Then justice will be accessed and water will be accessed

To me, Justice is a like a fancy building with a humongous **'RIGHT OF ADMISSION RESERVED'** sign on it. As I keep on enduring the brutal attack on my human rights, access to justice remains a dream as I kick and scream, justice to me is inaccessible.

Stanley Malematja is an attorney with the Right2Protest Project.

EVENT

Inception meeting on Research on Community Paralegals in Africa in Kigali, Rwanda, 21–22 February 2020

Paula Knipe

In partnership with the African Centre of Excellence for Access to Justice (ACE-AJ), the Socio-Economic Rights Project of the Dullah Omar Institute hosted its first event of the year on 21–22 February 2020, in Kigali, Rwanda – an inception meeting on research on community-based paralegals (CBPs) in Africa. ACE-AJ is a continent-wide network of African civil society organisations focused on working together to promote human rights, access to justice and legal aid for poor and marginalised communities.

The meeting examined the nature, types and dynamics of CBPs, with particular reference to six selected countries, namely Ghana, Mozambique, Nigeria, Tanzania, Uganda and Zambia. In each case, barring Mozambique, a delegate gave a presentation on the status of paralegals in the country. The discussion centred on the legal recognition and regulation of paralegal activity, and looked at the lessons, challenges, and evolving practices. The aim of this meeting was to contextualise the research project with emphasis on the rationale, objectives, and methodology.

At present, Zambia and Tanzania are the only two listed countries where paralegals are legally recognised. While Nigeria has some formal recognition, there is an ongoing process determining the extent of recognition, leaving some CBPs to informally self-regulate. In Ghana, there is no legal recognition of CBPs, leaving them to informally regulate how paralegals operate. In Uganda, the recognition of paralegals enables them complete training, leading to a diploma in law. People who complete the course can work as clerks in law firms. The diploma is also used a qualification to enable the holders to join universities to study for a law degree.

This research project is aimed at gathering empirical data from the six African countries regarding the role of CBPs in Africa. It will document the findings concerning the historical evolution of paralegals, their position in international and regional laws, and their contribution to access to justice in light of the challenges they face. It will draw on the available literature, policies and empirical data collected through focus group discussions and semi-structured interviews.

While most of the legal profession is still sceptical about the work of CBPs, they have proven very effective in furthering access to justice in Africa by providing appropriate and accessible legal services. In their deliberations, participants looked at the available solutions and the possibility of having mutual benefits for both CBPs and lawyers. Participants also discussed how paralegals could work more effectively alongside the formal justice system.

The stakeholders noted that this research project is a beginning in the selected countries, but would extend to the entire continent. The participants agreed that this problem had to be tackled collectively with all the stakeholders. They were elated about the potential growth and possible impact of this project.

It was evident that this research is an opportunity for community-led solutions that equip people to solve their own problems – a skill desperately needed in Africa.

Over the two-day meeting, participants identified many challenges and lessons learnt. The legal systems that were handed down by the colonial masters to Africa did not speak to African problems or communities. This has led to today's disconnect between Western and traditional mechanisms. The official recognition of CBPs remains a major issue for most of the countries, where there are many definitions of who CBPs are and attendant gaps in education, skills, and training. The lack of formal recognition has also meant that most countries have little or no regulation, leading to a lack of protection, self-regulation, inconsistency in training and services, and generally scattered access to justice systems.

The participants also deliberated on the issue of funding. It was highlighted that the aim of this research is to identify ways in which to bridge these gaps, solidify paralegal structures and provide them with the protection necessary to continue promoting access to justice. Participants discussed the benefits of paralegal work in Africa. These included the transfer of the law into accessible information and provision of legal assistance that allows marginalised people to have legal services in their communities. The CBPs also help build trust between the community members and the legal system. It was also noted that CBPs greatly reduce the burden of costs usually associated with legal services.

The most illuminating part of the meeting was when delegates presented on the status of paralegal work in their countries. Each looked at the recognition and roles of paralegals, the challenges faced, and lessons overcome. Across the board, the countries referred to the lack of recognition of paralegal work and the complications that arise from this. As such, some countries have developed their own curricula specific to the needs of people in their communities. Delegates shed light on how legal skills, training and education are structured, how courses are developed, and how paralegals are selected.

A recurrent theme was the issue of no regulation and the wish not to be over-regulated. There was, however, consensus on the need for uniformity regarding who and what CBPs are, their role regarding access to justice, and what the curriculum should entail. Participants acknowledged that regulation should allow for governmental and other financial support to improve the overall functioning of CBPs, but called for the matter to be treated with caution, with recognition and regulation being considered separately.

A key take-away ... was the importance of actively promoting meaningful access to justice

A key take-away from the presentations was the importance of actively promoting meaningful and inclusive access to justice in the light of the international obligation imposed by SDG 16. The participants underscored the fact that CBPs are there to serve the most vulnerable in society, and that due consideration should be given to those who have the least access to justice, to the need for gender considerations, and to the meaning of justice in both the traditional and the Western sense. This discussion highlighted many gaps in the justice system and areas for further research.

While country delegate all identified shortcomings in their legal frameworks, they also described the various ways in which they have overcome these challenges. To date, the most effective method has been the use of referral when one is unable to assist. This practice supports the bigger objective of serving others and creating better access to justice for all. The participants then discussed the details of the research project, activities, outcomes, and the importance of partnerships and a collaborative approach going forward. The inception workshop showcased an exciting opportunity to create African-centred solutions aimed at providing better access to justice in Africa.

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UPDATE

African Commission on Human and People's Rights' Resolution on States' Obligation to Regulate Private Actors

Robert Doya Nanima

At a meeting held on 14 May 2019 in Sharm El Sheikh, Egypt, the African Commission on Human and Peoples' Rights adopted a resolution on state parties' obligation to regulate private actors involved in the provision of health and education services. The resolution (ACHPR/Res. 420 (LXIV) 2019) reminded states of their obligation to regulate private actors involved in the provision of health and education services. Its emphasis was on holding private actors accountable concerning the enjoyment of the right to health and education.

The primary goal of the resolution was to call on state parties to the African Charter to take policy, institutional and legislative measures to ensure respect, protection, promotion and realisation of economic, social and cultural rights, with an emphasis on the right to health and education. The proposed steps included the adoption of legislative and policy frameworks to regulate private actors in social service delivery in conformity with regional and international human rights standards.

The resolution underscored the need for access to health care and medicines by vulnerable groups and marginalised communities. Furthermore, it called for measures to ensure that the privatisation of education does not exacerbate discrimination against children, especially girls, children with disabilities and other similar vulnerable and marginalised categories. The resolution also proposed the use of a transparent and participatory policy formulation process.

For more information, visit www.achpr.org/sessions/resolutions?id=444.

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