

FEATURE

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

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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



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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.



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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 too 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



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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.

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,



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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



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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 extend 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.

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