

FEATURE

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

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Introduction

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

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

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

Defining access to justice

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

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

In southern Africa, a special court known as the SADC Tribunal was established formally in 1992 and went operational in 2005. The Tribunal was a step forward in advancing the right of access to justice, as it provided SADC citizens locus standi to bring their governments before the Tribunal for human rights violations (Lungu

and Mandlate 2018). However, its suspension in 2010, and the termination in 2014 of its power to adjudicate human rights cases brought by individual SADC citizens, reversed the gains made and took the right to access justice on a regional level two steps backwards.

The problem of access to justice in SADC

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

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

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



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

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

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

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

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

Socio-economic challenges in SADC countries

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

A study conducted in Malawi revealed that the legal system limits access to justice for the poor and those living in rural areas despite the constitution’s affording

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

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

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



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Arguments for and against the Tribunal's dissolution

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

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

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

In December 2018, the Constitutional Court of South Africa upheld the High Court's decision, and also found that the decision to invoke the 2014 SADC

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

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

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

Opportunities to enhance access to justice in the region

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

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

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

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

Conclusion

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

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

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