

THE ROLE OF THE JUDICIARY IN SAFEGUARDING AND ENSURING ACCESS TO CRIMINAL JUSTICE: THE CASE OF ZAMBIA¹

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Introduction

The phrase “access to justice” tends to conjure a very specific mental image: poor people needing legal aid because they are unable to afford the legal services of private legal practitioners. The Legal Aid Board is seen as the institution that facilitates access to justice for the poor. This, however, is only part of the story. The Legal Aid Committee of the Law Association of Zambia and a number of civil society organisations also help facilitate access to justice.

Accessing justice can be challenging in Zambia. The poor have some access to both criminal legal aid and civil legal aid, but the government focuses resources on criminal legal aid. This creates an overwhelming burden on the poor who often have to deal with civil cases unaided. Even in criminal court, legal aid does not cover all cases; the majority of criminal cases which take place in the subordinate courts are prosecuted by public prosecutors (schooled and experienced in prosecution) while the accused persons defend themselves. This paper focuses on the criminal justice system.

This paper argues that the justice system in Zambia should make a concerted effort to guarantee the rights and liberties of citizens, residents and visitors. This effort must include the whole legal profession: legal aid providers, prosecutors and, perhaps most importantly, the judiciary. The judiciary should take a leading role to promote access to justice and the rule of law.

The judiciary must ensure access to criminal justice. It should take measures to protect access and prevent any legal occurrence, whether procedural or substantive, which will restrict or take away access to justice. In addition the judiciary must be proactive in enhancing access to justice. Increasing the capacity of the courts are essential to helping people in Zambia access justice.

Access to justice does not exist in a vacuum. Access to justice can only be meaningfully discussed in a broad context that includes the rule of law, human rights, good governance and democratic values.³ The international community has taken steps to codify and protect these rights. Some of the key international human rights instruments include the International Covenant on Civil and Political Rights (ICCPR), the Convention of the Elimination of all Forms Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Zambia has ratified

1 This paper was presented at a Judicial Colloquium entitled Working towards just, peaceful and inclusive societies: Promoting rule of law and equal access to justice, held at Twangale Park Hotel, Lusaka, on 21 and 22 April 2016.

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3 J Shezongo-Macmillan “Zambia: Justice Sector and the Rule of Law” *Open Society Initiative for Southern Africa* (March 2013) 102 to 113.

these instruments as well as the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).⁴

Rule of Law and Access to Justice

Access to justice as a concept can be defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.⁵ There are three pillars on which access to justice stands namely substantive law, legal institutions and legal services.⁶ Access to justice deals with how members of society work through various justice institutions to deal with their legal issues. Members of society can include men, women, children, groups, incorporated and unincorporated bodies, offenders, victims, rich and poor. One of the obvious obstacles to accessing justice is the limited infrastructure and funding challenges that justice institutions have to operate in.

Rights can only be meaningfully asserted or protected in a justice system that secures remedies for the aggrieved persons. Rights can be easily disregarded if the justice system cannot be accessed or if it fails to provide a fair and just hearing, and outcome.

In 2013, Lord Neuberger, current President of the UK Supreme Court, considered some of the practical implications of the rule of law on access to justice:

“The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves. And the rule of law also requires that, save to the extent that it would involve a denial of justice, the determination of any such claim is carried out in public. So citizens must have access to the courts to have their claims, and their defences, determined by judges in public according to the law...Courts exist to resolve disputes, and also to vindicate rights – and to do so in public.”⁷

Lord Neuberger noted that access to justice has a number of components:

“First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the court; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice.

Cutting the cost of legal aid deprives the very people who most need the protection of the courts of the ability to get legal advice and representation. That is true whether one reduces the types of claim which qualify for legal aid or increases the stringency of the requirements of eligibility for

⁴ See ICCPR article 2(3) (access to judicial processes for redress of any violation of rights); article 6 (right to life); article 9(4) (recourse to the courts to challenge unlawful deprivation of liberty); article 14 (fair and public trial); and article 26 (equality before the law and non-discrimination).

⁵ “Access to Justice: The concept” Van Vollenhoven Institute (2010) available at <http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-to-justice/the-concept.html> (last accessed: 18 November 2016).

⁶ Commission on Legal Empowerment of the Poor, Republic of Zambia, Draft Working Group 1, Access to Justice and the Rule of Law Meeting, July 2007.

⁷ Lord Neuberger “Justice in an Age of Austerity” *Tom Sargent Memorial Lecture* (15 October 2013) paras. 23 and 27 available at <https://www.supremecourt.uk/docs/speech-131015.pdf> (last accessed: 18 November 2016).

legal aid. The recent changes have done both. If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs' time and of the judge's time in and out of court. So that it means greater costs for the court system, and delay for other litigants.”⁸

Access to justice through legal aid secures a voice for the weakest members of society. Access, financial means, knowledge of legal rights, the ability to claim the rights, and effective representation are all necessary to achieve true equality before the law. Where there is no effective legal aid system the indigent and vulnerable persons are denied the right to enforce their rights. Access to justice accordingly includes access to courts, access to counsel, understanding rights and remedies, access to information, and access to remedies and enforcement mechanisms. Equal access to justice should be regarded as essential to economic development and maintenance of social harmony.

Implementing Goal 16

There are many substantial issues facing the international community, such as global development, peace, good governance, and an increasingly interconnected economy. To address these, the United Nations adopted seventeen sustainable development goals at the United Nations Sustainable Development Summit in New York in September 2015.⁹ Goal 16 challenges States 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.” Under Goal 16, there are ten targets to be achieved by 2030. Some of the most relevant to this discussion include:

- “...16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all...
- 16.6 Develop effective, accountable and transparent institutions at all levels...
- 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.”¹⁰

Goal 16 has stirred up some controversy:

“Much of the discussion of this highly controversial SDG has focused on reducing violence, security, the rule of law, and creating strong inclusive and effective institutions to deliver justice and public services, alongside the difficulty of creating appropriate targets and metrics. SDG 16 is both an end in itself, and a crucial part of delivering sustainable development in all countries. It has in fact been seen by many commentators as being *the* transformational goal and key to ensuring that the Agenda can be accomplished.”¹¹

It is the duty of both the State and the citizens to create and maintain peace; they should take deliberate steps towards an inclusive society. Inclusiveness is important because it addresses the issues of marginalised communities, such as the poor, the vulnerable, persons with disabilities,

⁸ *Id* paras. 31 and 44.

⁹ A/RES/70/1 (21 October 2015).

¹⁰ *Id* 25 and 26.

¹¹ “UN Sustainable Development Goal (SDG) 16 – importance of participatory institutions and policymaking” *Foundation for Democracy and Sustainable Development* (2016) available at www.fdsd.org/ideas/sustainable-development-goal-sdg-16-democratic-institutions/ (last accessed: 18 November 2016).

women, children, and minority groups. Society must uphold the rule of law and fundamental freedoms, and ensure equal access to justice. Laws and policies should be formulated and enforced without unlawful discrimination.¹² Goal 16 accordingly has the ability to facilitate social transformation, but only if governments and citizens work together towards its targets.

There are tangible steps we can take to achieve equal justice as set out in Goal 16.

First, we need a cadre of professional leaders in the justice sector who are well-meaning, personally trained and situated in institutions with the capacity to advance the agenda of justice.

Second, we need to realise that laws by themselves do not guarantee inclusion of marginalised and disadvantaged people. Good laws do not guarantee good governance. Good laws must go hand in hand with legal and political empowerment at the local and national levels. Individuals, whether vulnerable or disadvantaged, will often require a guiding hand in order to effectively assert their rights and access justice. Those with the least means are the most disadvantaged and are routinely left out. Although this may not be intentional, it is still the duty of the various functionaries to deliberately seek out and assist the poor and vulnerable.

Third, we are in an era of enhanced information and communication technologies. Creative use of these technologies can help make information readily available to those who need it. Presentation formatting can be targeted at selected groups to better achieve the desired understanding. When people do not understand information that has been presented to them, this is a communication failure that needs to be addressed.

Access to Justice and the Current Policy Framework in Zambia

Access to justice is heavily impacted by the capacity of judges, lawyers and the institutions they work in. Zambia's Sixth National Development Plan (SNDP)¹³ and the Revised Sixth National Development Plan (RSNDP)¹⁴ were the overall planning framework from 2011 to 2016. Governance was not a stand-alone feature of these plans. It was featured as a cross-cutting issue and good governance was referenced as "the cornerstone for prudent management of public affairs and ensuring that development outcomes benefit the people of Zambia".¹⁵ The government focused on developing human capacity and infrastructure for governance institutions to enhance their delivery capacity. Whether or not the government achieved these goals has yet to be evaluated.

Access to justice was also one of the priority areas for the Government under the Governance Chapter in the Fifth National Development Plan (FNDP)¹⁶ which covered the period 2006 to 2010. The FNDP identified policy and programme coordination in the justice sector as critical but weak. The diversity of agencies with a "governance" mandate, the limited tradition for institutions

12 Section 266 of the Constitution of Zambia (2 of 2016) defines "discrimination" as "directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status".

13 SNDP 2011-2015 "Sustained Economic Growth and Poverty Reduction" Republic of Zambia (2011).

14 RSNDP 2013-2016 "People Centered Economic Growth and Development" Republic of Zambia (2014).

15 SNDP 2011-2015 "Sustained Economic Growth and Poverty Reduction" Republic of Zambia (2011) para. 3.2.

16 FNDP 2006-2011 "Broad based wealth and job creation through citizenry participation and technological advancement" Republic of Zambia (December 2006).

to work at cross-institutional level, and human resource capacity shortages contributed to this situation. Weaknesses were found at institutional levels, individual institutions had capacity constraints in planning and implementation, cross-institutional coordination was very limited and budgetary and legislative follow-up on national plans and reforms rarely happened.¹⁷

Access to Criminal Justice

An uncomfortable reality is that there are shortcomings in society such as achievement gaps, income gaps, transportation gaps, infrastructure and technology gaps, and political gaps. One of these apparent gaps is a justice gap. The absence of concerted efforts by the State and other players to make access to justice a reality will prevent any sort of bridging process from developing that would lessen the gap.

The presence of legal aid in Zambia has helped more indigent clients access justice through a limited policy and legal framework that covers the Legal Aid Board. However, there is no policy or legal framework to guide the provision of legal aid services by civil society organisations (CSOs) and community-based organisations (CBOs). These services are provided in an ad hoc and unregulated manner. The Law Association of Zambia has not been active in legal aid matters except under the legal aid scheme administered by the Legal Aid Board. In addition, the scope of the legal profession's legal aid work remains limited as there is no specific framework supporting the provision of legal aid by legal practitioners in private practice.

The judiciary has a role to play in changing this scenario. In Zambia, the judiciary has not traditionally been seen as being a key player in helping people to access justice. The judiciary if often seen as a laid-back arbiter that waits for litigants to present their cases and thereafter makes rulings and/or delivers judgments.

The judiciary can however enhance access to justice by encouraging pro bono work by the bar, seeking bar students¹⁸ and law students to provide legal assistance to the needy, and facilitating connections between corporate counsel and criminal defendants. In fact, doing so will ensure that the judiciary complies with its constitutional mandate:

Article 118(1) of the Constitution¹⁹ provides that judicial authority "shall be exercised in a just manner and such exercise shall promote accountability". Article 118 continues:

- "(2) In exercising judicial authority, the courts shall be guided by the following principles:
 - a) justice shall be done to all, without discrimination;
 - b) justice shall not be delayed;
 - c) adequate compensation shall be awarded, where payable;
 - d) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted, subject to clause (3);
 - e) justice shall be administered without undue regard to procedural technicalities; and
 - f) the values and principles of this Constitution shall be protected and promoted."

¹⁷ *Id* 279.

¹⁸ Bar students are those at the Zambia Institute of Advanced Legal Education.

¹⁹ Act 2 of 2016.

Access to justice goes beyond access to a court and having legal counsel. Access to justice does not exist if poor or marginalised groups, such as persons with disabilities, are afraid of the justice system or see it as complex and unusable. Similarly, there is no access to justice if the justice system is weak, financially inaccessible, or people have no knowledge of their rights.²⁰ Integrity, independence and impartiality of the judiciary are critical pillars for the due performance of judicial office, protection of human rights, upholding the rule of law and ensuring a fair trial. Achieving equal access to justice is within grasp when these three pillars are in place. It is for the judiciary to stay on the path of integrity, assert independence, and ensure equality of treatment to all. In so doing the judiciary will effectively play its role of safeguarding and ensuring access to criminal justice.

There are specific groups within Zambia who are more vulnerable to be left out of the justice system than others. Special mention should be made of women and persons with disabilities.

Gender-based violence²¹ is one of the most frequent issues facing women in Zambia. The media is replete with stories of women being subjected to various forms of abuse.²² There is an apparent lack of sufficient awareness and knowledge among adjudicators, prosecutors, police, and defence counsel on what constitutes gender-based violence and sexual harassment. The general population suffers from the same knowledge gap. The judiciary can safeguard access to justice for women by providing specific training to adjudicators on issues of gender-based violence.

The Gender Equity and Equality Act provides that “both sexes shall have equal access to justice and protection before the law”²³ and that “the Judicature shall take necessary measures to ensure that both sexes have equal and effective protection and equal benefit of the law without discrimination”.²⁴ Zambia’s Anti-Gender-Based Violence Act²⁵ further provides that a victim who is not represented should be advised by the clerk of the court on the remedies available and procedure for lodging an application for a protection order.²⁶

While a lot has been said and attempts are being made to enable persons with disabilities,²⁷ the situation remains one which violates their right to access to justice. One conspicuous effort undertaken by the judicial department is the addition of ramps to court buildings and other public buildings. For persons with disabilities, courts should have a plan for how they are going to afford

20 MA Zaza “Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices” *United Nations Development Programme* (2013) 6 to 8.

21 Section 3 of the Anti-Gender-Based Violence Act (1 of 2011) defines gender-based violence as “any physical, mental, social or economic abuse against a person because of that person’s gender, and includes – a) violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship.”

22 See “Gender Based Violence is on the Increase-Zambia Police” *Lusaka Times* (6 June 2016) available at <https://www.lusakatimes.com/2016/06/07/gender-based-violence-increase-zambia-police/> (last accessed: 18 November 2016).

23 Act of 2015, section 14(1)(b).

24 Act of 2015, section 15(3).

25 Act 1 of 2011.

26 *Id* section 10(2).

27 Constitution of Zambia (2 of 2016) section 266, defines “disability” as “a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an activity or perform a function as specified in this Constitution or as prescribed” and “person with disability” as “a person with a permanent physical, mental, intellectual or sensory impairment”. See also the definitions in section 2 of the Persons with Disabilities Act (6 of 2012).

persons with disabilities all facilities necessary to defend themselves as accused persons or help the prosecution of their cases as complainants. This obligation is in line with section 8 of the Persons with Disabilities Act 6 of 2012 which provides that:

- “(1) A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life.
- (2) The Judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.
- (3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities, to enable the person with disability to access justice and participate effectively in the proceedings.”²⁸

The challenge of pro se litigation (self-representation)

Self-represented litigants present legal and ethical issues to judges, magistrates and court staff who interact with them. To fully understand self-representation, it should be examined in context of its constitutional basis, the decisional law concerning pro se litigation, ethics, opinions, and the general opinions of lawyers concerning judicial and court staff assistance to self-represented litigants.

Self-represented litigants in the criminal justice system are typically remanded in custody awaiting trial in the subordinate courts. Some are granted police bond or bail. In the High Court and the Supreme Court, legal aid is guaranteed to all persons who appear for trial, sentencing, confirmation, and appeals; it is rare to have self-represented litigants in these courts. Occasionally an accused person declines legal aid services and opts to represent themselves.

Self-representation occurs and will continue to occur in subordinate courts. One of the major reasons for pro se litigation in criminal cases in the subordinate courts is the lack of sufficient numbers of legal aid counsel. As a result, the pro se litigant seeks the assistance of court staff and magistrates to help navigate the procedural rules that make up the fabric of the judicial process. They do not understand the rules of cross-examination or the grounds for objecting to certain questions and admission of evidence. They do not know how defences are to be set up or how they are to be proved.

Understandably, court staff are already overburdened with many duties. Having to deal with both lawyers and pro se litigants who need assistance in civil cases as to which rules or forms to use and how to use them merely adds to the weight they have to carry. The court staff may not have the time to help an accused person and it is difficult to assist parties during court proceedings.

In the courtroom the self-represented accused person faces barriers to justice. The judge or magistrate has a heavy workload, and other judges or magistrates may be waiting to use the court room. There will be very little room for “time-wasting”. This can be problematic if an accused person makes procedural mistakes representing herself and must be corrected. The judge or

²⁸ See also section 41(1) of the Persons with Disabilities Act (6 of 2012), which provides that “A person shall not, on the ground of disability, deny a person with disability – a) admission into any premises to which members of the public are ordinarily admitted; or b) the provision of any services or amenities to which members of the public are entitled.”

magistrate often does not have the time to give a full explanation of the litigation process.

The barriers encountered by the self-represented litigant inside and outside the courtroom deprive her of access to justice. The criminal justice system must meet the needs of all people equally, including the self-represented litigant. The Zambian Constitution, tenets of democracy, and the rule of law require fairness and equality.

The judiciary must establish pro se assistance programs, consider changes in procedural rules and judicial ethics principles, and take other measures that serve to promote fair and meaningful hearings for all litigants.

Legal services for the indigent and paralegals

Legal services for the poor include legal advice, legal education, counselling, and representation in court. Legal services can “include mediation, representation before non-judicial fora, assistance with the legal aspects of administrative processes, assistance provided by [non-advocates and] non-lawyers trained to acquire legal knowledge and skills (paralegals), and even non-formal legal education.”²⁹

The use of paralegals will go a long way in filling the gap of providing legal information, legal assistance, and know-how on navigating the rules and procedures of court. The judiciary can safeguard access to criminal justice by embracing paralegals.

The ethical responsibilities for paralegals are substantially similar to those of lawyers. A primary ethical responsibility for paralegals is knowing their limitations. Other ethical responsibilities include:

- Confidentiality – this is at the heart of legal ethics. Confidences and secrets of the client must be kept;
- Honesty in dealing with others – these include courts, lawyers, paralegals, clients;
- Conflict of interest – loyalty at all times to the client;
- Malpractice – carelessness by a paralegal. Pay attention to details, ask questions, use systems (for example filing, communications, records of deadlines).

Paralegal certification entails that a paralegal has reached a certain level of competency in the profession. For paralegals who desire to work in law firms and organisations that do court work (such as Legal Resources Foundation) certification must be mandatory. Certification must be voluntary for paralegals in government ministries and institutions such as the Legal Aid Board, National Prosecution Authority, and in this instance there will be an effective exemption as is the case with lawyers. Should it be deemed necessary other groups or individuals can be included on the exempt list.

29 J Crichton, et al “Topic Guide on Justice” *Governance and Social Development Resource Centre* (2012) 15.

Conclusion and Recommendations

The judiciary ought to take a leading role in safeguarding access to criminal justice. There are many ways in which access to criminal justice can be safeguarded. These include relaxing the application of some rules of practice and procedure when required by rules of equity and applying ethical considerations in such a way that balances access and procedural fairness. Breaking conservative procedural moulds can help more people better access the judicial system.

The judiciary should encourage pro bono work by the bar in criminal cases so that as many people as possible are legally aided in defence of their liberty. The judiciary should include new players in the justice system such as paralegals and “lawyers in transit”.

The judiciary should consider setting up an office with a specific mandate to aid self-represented litigants. The office could begin as a pilot program in Lusaka and later be replicated in other jurisdictions. Court staff should be trained and allowed to assist both counsel and litigants in court and outside court. Continuous professional development should not only be encouraged, but also undertaken consistently.

Access to justice is concerned with making justice institutions accessible to all. Justice institutions, including the judiciary, must have an effective and efficient system of justice delivery that allows for innovative and creative ways of delivering on its mandate. The judiciary must take a lead in improving the apparent poor institutional linkages and coordination among the justice institutions and other stakeholders.

As the judiciary becomes innovative and creative in making justice accessible to all, it must put in place measures to monitor, discourage, and curb corruption among the staff members who have contact with members of the public. It is very easy for someone to levy unofficial fees to unsuspecting members of the public on the provision of information and necessary forms for court cases.

Finally, the judiciary in collaboration with the National Prosecution Authority can consider giving information to the public on the role and function of the Director of Public Prosecution and the National Prosecution Authority. Very few Zambians know about the role and function of the Director of Public Prosecution. That makes it possible for some prosecutors to mislead, misinform, and even intimidate accused persons, their family members and the general public.

A proactive approach by the judiciary will make a significant contribution towards addressing the access to justice gap.