ACCESS TO JUSTICE FOR AFRICA'S MARGINALIZED

IMPEDIMENTS AND OPPORTUNITIES IN ELEVEN COUNTRIES

A BASELINE REPORT

The Kenyan and Swedish Sections of the International Commission of Jurists (ICJ)
African Human Rights and Access to Justice Program (AHRAJ)

SEPTEMBER2009

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> ***It's not what a lawyer tells me I may do; but what humanity, reason & justice tells me***
>
> ***Edmund Burke, 2nd speech on conciliation, 1975***

List of abbreviations

ACHPR : African Charter on Human and Peoples' Rights

ACRWC: African Charter on the Rights and Welfare of the Child

ADR Alternative Dispute Resolution

APRM : Africa Peer Review Mechanism

Art: Article

A-G: Attorney-General

AU: African Union

AI: Amnesty International

AIPPA: Access to Information Protection of Privacy Act

AHRAJ: African Human Rights and Access to Justice

AIDS: Acquired Immune Deficiency Syndrome

APAP: Action Professional Association for the People

ANPPCAN: Association for Nation-wide Action for Prevention and Protection against Child Abuse and Neglect

ACHPR: African Commission on Human and Peoples' Rights

AJPRODHO: Association des Jeunes pour la Promotion des Droits de l'Homme

AVEGA: Association des Veuves du Génocide

AWRN: African Workers' Rights Now Labour Centre

BA: Brong Ahafo Reion

BEST: Business Environment Strengthening for Tanzania

BAKWATA: Baraza Kuu la Waislamu Tanzania

BAZ: Broadcasting Authority of Zimbabwe

BSA: Broadcasting Services Act

BTC: Belgian Technical Cooperation

CAT: Convention Against Torture

CERD: Convention on the Elimination of Racial Discrimination

CHRAJ: Commission on Human Rights and Administrative Justice

CHREA: Centre for Human Rights Education Advice

CHRI: Commonwealth Human Rights Initiative

CJ: Chief Justice

CJC: Child Justice Courts

CRC: Convention on the Rights of the Child

CLAA: Chief Legal Aid Advocate

CLAN: Child Legal Aid Network

CA: Court of Appeal

CFRN: Constitution of the Federal Republic of Nigeria

CAT: Court of Appeal of Tanzania

CAP: Chapter

CEDAW: Convention on the Elimination of all forms of Discrimination against Women

COSTECH: Commission for Science and Technology

CBO: Community Based Organization

CSO: Central Statistical Office

CAURWA: Communauté des Autochtones Rwandais

COPORWA: Communauté des Potiers du Rwanda

CSOs: Civil Society Organizations

DPP: Director of Public Prosecutions

DIHR: Danish Institute for Human Rights

DSW: Department of Social Welfare

DVVSU: Domestic Violence and Victims Support Unit

EHRCO: Ethiopian Human Rights Council

EWLA: Ethiopian Women Lawyers Association

ECOWAS: Economic Community of Western States

ELCT: Evangelical Lutheran Church of Tanzania

EU: European Union

List of abbreviations

FEDOMA: Federation of Disabled Organisations in Malawi

FGD: Focus Group Discussion

FMOJ: Federal Ministry of justice

FRN: Federal Republic of Nigeria

FDRE: Federal Democratic Republic of Ethiopia

FIDA: Federation of International Women Lawyers

FHC: Federal High Court

FT: Family Tribunal

GFD: Ghana Federation of the Disabled

GOK: Government of Kenya

GJLOS: Governance, Justice, Law and Order Sector Wide Reform Program

GN: Government Notice

GALZ: Gays and Lesbians of Zimbabwe

HPRs: House of Peoples Representatives

HC: High Court

HIV: Human Immunodeficiency Virus

HRCT: Human Rights Commission of Tanzania

ICESR: International Convention on Economic, Social and Cultural rights

ICESCR: International Convention on Economic Social and Cultural Rights

ICPD: International Conference on Population and Development

ILO: International Labour Organisation

IAG: Inter Africa Group

ICJ: International Commission of Jurists

ICCPR: International Covenant on Civil and Political Rights

ICUTR: International Trade Union Centre

IGP: Inspector General of Police

IHRL: International Human Rights Law

IRC: Industrial Relations Court

ILPD: Institute for Legal Practice and Development

JA: Justice of Appeal

JUSUN: Judicial Staff Union of Nigeria

KHRC: Kenya Human Rights Commission

LC: Legal Clinic

LAP: Legal Aid Providers

LGA: Local Government Authorities

LHRC: Legal and Human Rights Centre

LLM: Masters of Laws

SGBV: Sexual and Gender Based violence

SC: Supreme Court

Sec: Section

SADC: Southern African Development Community

SIDA: Swedish International Development Agency

SPSS: Statistical Package for Social Scientist

TIG: Travaux d'Interet General

TV: Television

TAMWA: Tanzania Media Women Association

TLS: Tanganyika Law Society

TAWLA: Tanzania Women Lawyers Association

TAYODEN Temeke Youth Development Network

UDHR: Universal Declaration of Human Rights

UN: United Nations

URT: United Republic of Tanzania

USA: United States of America

UNDP: United Nations Development Programme

USD: United States Dollar

UNICEF: United Nations for Children Funds

UNILAK: Université Laïque Adventiste de Kigali

UJLOS: Uganda Justice Law and Order Sector

VR: Volta Region

v: versus

WLAC: Women Legal Aid Centre

WLSA: Women and Law in Southern Africa Research

WAJU: Women and Juvenile Unit

WILDAF: Women in Law and Development

ZACPRO: Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender

ZimRights : Zimbabwe Human Rights Association

ZLFH: Zimbabwe Lawyers for Human Rights

ZAFELA: Zanzibar Female Lawyers Association

ZLSC: Zanzibar Legal Services Centre

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Executive summary

This baseline survey was conducted in eleven countries in sub-Saharan Africa namely Tanzania, Uganda, Kenya, Rwanda, Ethiopia, Malawi, Zambia, Zimbabwe, Nigeria, Sierra Leone and Ghana. The survey describes the current situation before the start of the third phase of African Human Rights and Justice (AHRAJ) interventions. Perceptions and experiences of identified marginalized groups regarding their access to justice among them the urban poor, women victims of violence, urban refugee population, minority community, pastoralist/nomadic community, people living with HIV/AIDS, prisoners, hawkers, sex workers and people with disabilities are at the core of findings, conclusions and recommendations of this baseline. The views given are complimented with expert opinions as well as responses from different categories of justice duty bearers in respective countries such as judges, magistrates, legal Civil Society Organizations and scholars.

The objectives of the baseline were to understand and analyze the experience of the marginalized groups who have accessed the justice sector institutions or have not accessed these institutions even though they were in need of justice dispensation, collate people's perspective on the contributing and dis enabling factors in the dispensation of justice and how these factors can be overcome, understand and analyze the work of various human rights groups, lawyers and legal aid institutions seeking to use litigation, advocacy and lobbying to address human rights violations within the focus countries and provide people-centric measurable indicators to monitor the progress of justice sector reforms in the focus countries.

The focus of the study is primarily on the endeavour by marginalized groups to attain equal opportunity to participate in the formal justice system, both in terms of access to legal services and access to courts and tribunals.

By access to justice, it was assumed that issues like the funding and allocation of legal aid, the costs of legal services and legal proceedings, and the public availability of legal information are important, in addition to the equal ability of all in society to access the processes to enforce existing rights or laws, the existence of widely accepted rights under international and regional laws that may not be protected through the domestic justice system, equal access for all marginalized/minority groups to all legal rights enjoyed by the privileged/majority and discussing the relative underdevelopment of the common law in areas associated with poverty, due to the lack of access to litigation opportunities.

With the exception of Ethiopia, all the countries targeted by the study are former colonies or protectorates of western countries. As a result, they have many similarities in their constitutions and legal systems, especially among former colonies of Britain whose legal systems are heavily influenced by the "commonwealth tradition." This exerts significant ideological influence on the legal systems of member states through peer influence, institutional capacity building of member justice departments through its secretariat and sets standards. Although Rwanda's legal system is influenced by the Belgian/French tradition, its current republic is leaning heavily towards the commonwealth.

Having attained self rule between 1957 and 1985, the legal systems in these countries have undergone reversals and rough times. Ghana, Uganda, Sierra Leone, Ethiopia, Nigeria and Rwanda have experienced a series of military take-over, ethnic instability, civil war and general political turmoil that have left ominous marks on the development of the judiciary. Though not having gone through such extremes, Kenya, Tanzania, Zambia, Malawi and Zimbabwe have had their own share of internal political dynamics that have influenced the direction of their constitutions and legal structures with serious implications on the rule of law.

Marginalized groups across the study countries feel seriously constrained with regard to access to justice. There were two categories of problems identified as impediments to access to justice for the marginalized, structural and legal. Among the structural problems identified included under-funding of justice departments, overworked and underpaid staff, poor conditions of service of staff in comparison to lawyers in the private sector and other employments have acted as a disincentive for qualified lawyers to work with the Ministries of justice in nearly all study countries. Prevailing lack of proper and effective coordination between the various sections of the justice sector was leading to many serious problems within the sector, including overcrowding in the prisons and remand centres, corruption within the sector, backlog of cases and poor legal aid services. Lack of access to public services, which are often expensive and cumbersome and with inadequate resources, personnel and facilities also contribute to the structural problems. Police stations and courts may be non-existent in remote areas, and the cost of legal processes (such as legal fees and fines) is often unaffordable to the very poor. In addition, the marginalized's ignorance of court procedures, lack of information and awareness about their own rights which is worsened by lack of free legal representation, inability of the structural systems in place to cope with heavy workload leading to serious delays in handling cases that in turn results in prison congestion are factors that frequently deny justice to the marginalized all contribute to structural impediments to access to justice.

On the other hand, legal impediments include the adversarial justice system which places the burden of establishing validity of a case on the parties, leaving the magistrate/judge as a neutral referee such that it gives undue advantage to the better endowed. Besides, quasi-judicial mechanisms have also not been easily accessible for the marginalized, while the justice system often has "hostile" entry points such as police stations/ officers that inhibit many of the marginalized from entry or even approaching the system. Interference from other arms of government was also noted and particularly so for Zimbabwe where political and economic instability have given rise to judicial interference by the executive.

Marginalized groups felt their access was not improving or likely to improve in the near future. The exception to this trend was Sierra Leone that is in a reconstruction phase after a civil war. Views ranged from a strong perception in Kenya and Zimbabwe that the future is bleak- that indeed all the evidence points to the situation getting worse. Kenya is a paradox of sorts because it has perhaps one of the largest establishments of judicial officials per population in sub-Saharan Africa and a relatively high number of legal aid/human rights NGOs as well as a high production of law graduates and advocates- but still these numbers have not translated into better access to justice by the marginalized. Leading among reasons for the uncertain future of accessing justice is the lack of finances to pay for legal services including management of related logistics. Unfriendly gate keepers to justice mechanisms such as police, corruption, and endemic ignorance of the law coupled with few legal education/support opportunities and bad laws were among other reasons given for the static or worsening access to justice situation. Poor socioeconomic circumstances of the marginalized denied them finances necessary to access justice – since poverty appears to be on the rise in most of the countries, justice will increasingly become more difficult to access.

On free legal aid services, most of the countries had relatively acceptable constitutional and legal frameworks for provision of free legal services to those who may not afford it save for Kenya whose legal framework does not quite bind the state to providing legal services except in cases of convicts on death row. However, where such provisions exist, the

commitment and capacity to provide free legal services was deficient. In all the countries, these provisions lacked a workable coordination and implementation framework. It was instructive that hardly any of the marginalized individuals/groups showed awareness of government legal aid programs- in contrast they all had knowledge of services offered by human rights and legal aid NGOs. NGOs with clear ideological leanings towards defending rights of specific groups such as women victims of violence received the highest scores from respondents. However all the NGOs interviewees admitted that they had capacity problems and that their support was a drop in the ocean.

On international conventions/treaties, all the study countries do not take international conventions and treaties as seriously as they should. This was reflected in their failure to ratify the treaties but more critically failure of their respective legislatures to adopt them in the local laws. Even where local laws give provision for application or at least consideration of the treaties by courts of law once ratified (such as is the case in Ghana and Rwanda), the judiciary has not shown enough enthusiasm to apply, blamed on the conservative nature of the judiciary in all the study countries except Tanzania. When a local law conflicts with an international instrument the local law prevails in the dualist states and can only effectively apply an international law only if domesticated through local laws.

On alternative justice institutional mechanisms, study countries had a number of alternatives to the formal/ mainstream justice system where the marginalized largely pursue their grievances and conflicts. These are often neither well documented nor given legal weight and recognition in law or policy of Ministries of Justice. They include traditional customary (law) systems, peace or reconciliation forums, Islamic courts and interventions of the local government administration officials. Others include elders' councils, religious leaders' mediation forums and kinship group forums. ADR mechanisms offer an enormous challenge in the pursuit of justice by marginalized groups because of their accessibility and easily understandable by the marginalized. ADR mechanisms are, on the other hand, beset with problems of condoning human rights violations as they often discriminate against women and other categories of the marginalized such as children and people of lower caste. Nearly all the mainstream justice systems studied do not have a formal link with them and neither do they recognize their decisions, meaning they only give partial mutually agreed cover to litigants. Even those ADR mechanisms employing statutory law principles such as forums by paralegals lack a policy-legal framework to make them effective at protecting rights of the marginalized and as a result improving their access to justice. On prisons, these were the most neglected of justice institutions analyzed. Among similar recurring problems in the reports were that prisons are punitive rather than corrective, there is congestion/overcrowding thus the need to increase the number of prisons, there is massive violation of rights of the prisoners and unfairly long detention periods as well as corruption.

It can be concluded that marginalized groups have very limited access to justice generally, but particularly within the formal justice system. They are far from benefiting from ratification/adoption of international human rights instruments because of weak application. To address their particular concerns, justice systems have to aim for social justice, which need to address and redress existing inequalities socially as well as within the justice system. Alienation from the justice system and ultimately justice itself is worse for the categories of marginalized suffering (moral) stigma such as sex workers, LGBT and even PLWHIV. Existing laws appear to make their status illegal outright or alternatively are amenable to popular moralistic interpretation and enforcement that justifies injustice and gross violation of rights

Among the core recommendations that touch on all issues of marginalization raised and discussed in the report and their determination of the nature and degree of access to justice include:

- Having ongoing constitution review encompass a "pro marginalized" orientation and perspective particularly since access to justice problems affect majority of people within countries under study who are placed among the poor,
- There should be review of legislation preferably with participation of the marginalized to make it

conform to favourable constitutional provisions and guarantees to their access to justice,

- Justice infrastructure and services including "entry points" such as police and provincial administration should be expanded proportionately and reformed to take cognizance of the needs and interests of marginalized groups as well as be accountable to them for facilitation of justice,

- Government supported/facilitated comprehensive legal aid services should be expanded equitably to the marginalized wherever they are to be found and

- Alternative dispute resolution mechanisms and services need to be strengthened through policy/ legal review that would among other things recognize services of paralegals, government officers such as in provincial administration and Children's Department, traditional/religious leaders to enable them enhance access of the marginalized to mainstream justice system.

Finally, there is need to conduct action research on perspectives of access to justice by the marginalized (such as on the efficacy of public interest litigation) in all the target countries and use the findings to pilot/ put in place effective legal aid and justice mechanisms (including ADR) appropriate to the socio-political and legal circumstances of respective countries.

But how is the legal plunder to be identified? Quiet simply. See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong, see if the law benefits one citizen at the expense of another by doing what that citizen himself cannot do without committing a crime

- Fredric Bastiod

AHRAJ would like to call upon all those responsible for legislation in Africa and beyond to frequently interrogate the text of the laws to be promulgated and to audit those already in place to ensure the same does not either intentionally or inadvertently prejudice the rights of the poor & Marginalized.

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CHAPTER ONE

Introduction

1.1 Background information on the African Human Rights and Access to Justice Program

Access to justice and justice remedies are indispensable means for the citizenry to protect their socioeconomic, cultural and political well being. Imbalances in the socioeconomic dynamics in society lead to abuse of power, violation of human rights and failure by the State to meet its international obligations as enshrined in various international human rights treaties. AHRAJ seeks the domestication of international human rights. This is through case support, noting the challenge that many states face in implementing international treaties on human rights. In addressing human rights violations, AHRAJ has supported cases to strengthen access to justice, which includes strengthening both the demand for and supply of justice. This entails people's legal empowerment to claim their right to redress, as well as the capacities of those mandated to respond to fulfil their obligations in that respect. A key strategy involved here is impact litigation designed to trigger the observance of international human rights standards. This report is a baseline survey undertaken by AHRAJ in 11 African countries to inform the optimal implementation of the third phase of the program.

1.2 Purpose and objectives of the baseline survey

The main task of this baseline was to carry out a survey in 11 focus countries, namely Nigeria, Ghana, Sierra Leone, Ethiopia, Tanzania, Uganda, Rwanda, Kenya, Malawi, Zambia and Zimbabwe, in which phase 3 of the AHRAJ program will be implemented. Baseline findings will be considered in the preparation of a program design to be submitted to the Swedish International Development Cooperation Agency (SIDA) for the third phase which is envisaged to be a long term intervention towards improved access to justice in Africa. The baseline was initiated to:

- Collate qualitative and quantitative data on the present situation,
- Provide inputs into developing reliable qualitative and quantitative indicators to be used to monitor and evaluate people's access, utilization and satisfaction of the justice sector institution during the third phase, and
- Support the evaluation of efforts that will be addressed to engage in access to justice and sector reforms at the national and regional level on the domestication of international human rights treaties.

The baseline attempts to ascertain facts and comprehend issues relating to access to justice from people's perspectives, including:

- Domestication of international human rights treaties by member states within the focus countries,
- Domestication strategies adopted within the focus countries,
- The existing justice sector institutions viz. police, prison, prosecution and the courts dispensing justice,
- People's perceptions on the present accessibility of

the existing justice sector institutions and effectiveness in dispensing justice,

- People's expectations from the justice sector institutions,
- People's views on the bottlenecks in accessing justice, and
- People's views on how these bottlenecks can be removed.

Specific objectives of the baseline were to:

- Understand and analyze the experience of the marginalized groups viz. women, children, persons with disabilities, minority groups and other disadvantaged groups who have accessed the justice sector institutions or have not accessed these institutions even though they were in need of justice dispensation,
- Collate people's perspectives on the contributions and dis enabling factors in the dispensation of justice and how these factors can be overcome,
- Provide people-centric measurable indicators to monitor the progress of justice sector reforms in the focus countries, and
- Understand and analyze the work of various human rights groups, lawyers and legal aid institutions seeking to use litigation, advocacy and lobbying to address human rights violations within the focus countries.

1.3 Conceptual framework to the study

This study is conceived from two standpoints, that is, law and justice and the human rights of marginalized groups. The central question in this conceptual framework is how justice systems secure the rights of marginalized groups. Responding to this question is central to understanding how marginalized groups understand, perceive, affect and are affected by justice within its multifaceted institutional mechanisms.

The "marginalized" refers to those individuals and groups of people who are limited in their capacity to get full recognition as participants within mainstream society praxis. They often lack power and as a result do not enjoy full rights and tend to be treated as second class citizens either overtly or covertly. With regard to the modern justice system, they are the ones who are most likely to be targeted for or benefit from legal aid and other forms of related assistance.

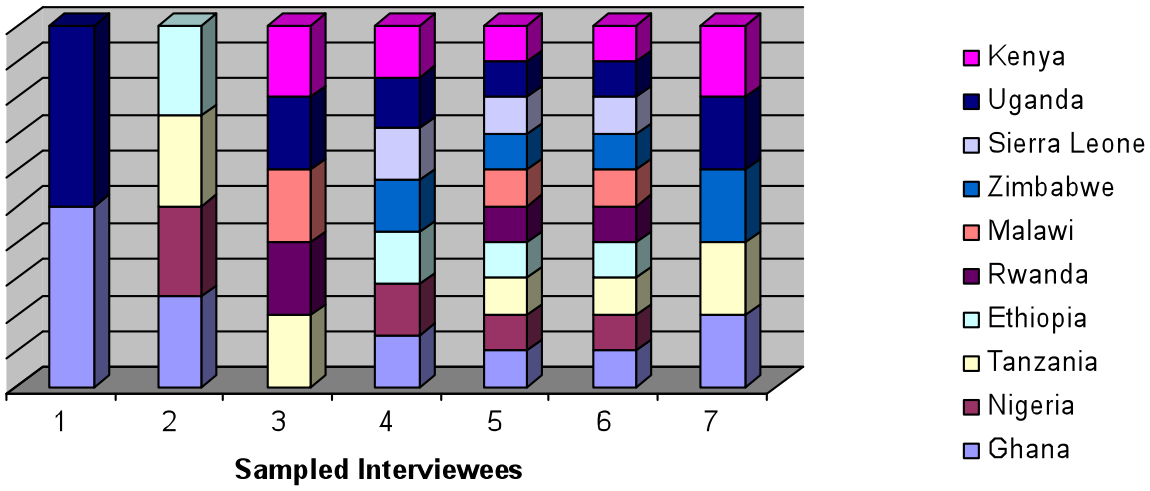
Figure 1: Marginalized Groups Sampled per Country

Please note that figure 1 and figure 2 should be read alongside each other

	Group	Specific marginalized group	Country
1	Uneducated	Illiterate and semi-literate	Ghana, Uganda
2	Unemployed and under employed	Street hawkers, mechanics, traders, farmers, boda boda, fuel pump attendants, shoe shiners, unskilled workers, food vendors, guards, waiters, informal sector workers	Ghana, Nigeria, Tanzania, Ethiopia
3	Religious, social and ethnic minorities	Islamic activists, religious leaders, genocide survivors, people living with HIV and AIDS, historically marginalized people, pastoralists,	Tanzania, Kenya, Uganda, Rwanda and Malawi

	Group	Specific marginalized group	Country
4	Disabled and Albinos	Blind people and Albinos	Ghana, Nigeria, Kenya, Uganda, Ethiopia, Zimbabwe, sierra Leone
5	Children and youth	Orphans, street families, drug users, children from broken homes, students from poor families	Ghana, Nigeria, Tanzania, Kenya, Uganda, Ethiopia, Zimbabwe, Rwanda , sierra Leone and Malawi
6	Women	Waitresses, commercial sex workers, disabled women, single mothers, widows, market women, violated women, elderly women	Ghana, Nigeria, Tanzania, Kenya, Uganda, Ethiopia, Zimbabwe, Rwanda, Sierra Leone and Malawi
7	Others	Opposition activists, prison detainees, urban poor, squatters, refugees and aged people	Zimbabwe, Ghana, Tanzania, Kenya, Uganda

Figure 2: Marginalized Groups sampled per Country



"Justice" as used in this study implies three things:

- State systems of justice that are administered through statutory laws and institutions such as the judiciary, police and prisons,
- Non state systems of justice applied by customary institutional forms such as by traditional leader's courts, and
- The lived reality and expectations of people when they need to have their problems dealt with by institutions beyond their immediate families and the realization of the same.[1]

Access to justice then encompasses ability to utilize/ appropriate the justice systems in place for one's welfare. This can be in terms of:

[1]Derived from: "Access to Justice for the Poor in Malawi: An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums" Wilfred Scharf, Chikosa Banda, Ricky Rontsch, Desmond Kaunda and Rosemary Shapiro. Unpublished research paper for DFID 2002.

- Institutions,
- Fair laws,
- Understandable procedures,
- Resources to pursue justice (affordability),
- Appropriate and implementable remedies,
- System that broadly conforms to acceptable norms and values and is accountable to all sectors of society

The term 'access to justice' is most commonly used in reference to the various mechanisms by which an individual may access the justice system. However, for one to be in a position to access justice the following conditions must exist:

Figure 3: Requirements and means to access to justice

Requirement	Means
Normative Protection (Existence of remedy)	• By international and constitutional law • By legal and regulatory frameworks • By customary norms and jurisprudence
Capacity to seek a remedy (legal empowerment)	• Legal awareness • Legal counsel • Capacity to access formal & informal justice
Capacity to provide an effective remedy (adjudication, enforcement and oversight)	• Effective adjudication and due process: judicial, quasi judicial, informal and transitional systems. • Enforcement: police and prisons • Civil Society oversight.

Relevant also is the 1994 Commonwealth Governments' appointment of the Access to Justice Advisory Committee.[2] It looked at the concept of access to justice more broadly so as to encompass socioeconomic as well as legal aspects. The Committee stated that the concept of 'access to justice' involves three key elements, namely:

- Equality of access to legal services, which entails ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests,
- National equity which entails ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy, and
- Equality before the law which entail ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services.

The above framework underscores the focus of this study, which primarily looks at the endeavour by marginalized groups to attain equal opportunity to participate in the formal justice system, both in terms of access to legal services and access to courts and tribunals. Issues such as funding and allocation of legal aid, costs of legal services and legal proceedings, and public availability of legal information will be important. The broader interpretation of the phrase 'access to justice' will

[2]Commonwealth Secretariat Reports 1994.

however yield a number of possible perspectives on 'access to justice' that go beyond the focus on access to legal services. These include:

- The equal ability of all in society to access the processes to enforce existing rights or laws. This perspective assumes that the rule of law provides (or should provide) an effective vehicle to achieving just or fair outcomes. Accordingly, such a perspective concentrates on equitable access to adjudication, conflict resolution institutions and intermediaries and legal remedies,
- The existence of widely accepted rights under international and regional laws that may not be protected through the domestic justice system (for example, the application of ratified international conventions),
- Equal access for all marginalized/minority groups to all legal rights enjoyed by the privileged/majority. This approach would not accept differential laws applying to, for example, asylum seekers vis-à-vis citizens, or homosexuals vis-à-vis heterosexuals,
- Discussing the relative underdevelopment of the common law in areas associated with poverty law, due to the lack of access to litigation opportunities.

The study therefore seeks to examine the ability of disadvantaged people to:

- Obtain legal assistance regardless of circumstances,
- Participate effectively in the legal system through access to courts, tribunals and alternative dispute resolution,
- Obtain assistance from non legal advocacy and support,
- Participate effectively in law reform processes, and
- Receive requisite facilitation to justice through gate keeping institutions such as police and government public administration machinery such as the provincial administration.

Since justice takes place and is influenced by past and current political, social and economic realities/ contexts, analysis of the context of justice is given prominence. Under this approach, access to justice, the organs of justice which people choose to access and the way in which justice is administered or how the law is interpreted and applied by the duty bearers of justice is therefore of interest. The effect on rights bearers in the process of delivery of justice is equally important. Others considered as crucial to the realization of justice particularly by the marginalized groups include the connections between the different organs of justice, an understanding of both the exogenous factors such as resources, training, and justice bureaucratic machinery and endogenous factors such as context of the changing political and economic model, emergence of new and different legal problems and continuing evolution of the importance of traditional (customary law) authority.

From considering the above, it can be said that access to justice for the marginalized is exercised differently in various areas of action such as civil, labour and criminal (conflicts) in different penal contexts. It also involves a diversity of social constraints as well as those deriving from the functioning of the administrative machinery.[3] Conflict management in the courts and other arenas of justice is therefore a result of the combination between judicial agents, social representations and practice and the content of the law. In analyzing the experiences of the marginalized in the process of seeking to resolve conflicts, the justice sector is heterogeneous and diverse as it encompasses courts and other organs that are decisive in conflict management as well as police, traditional/chiefs and other actors that play a role in social stability. This study will analyze social and "legal" behaviour of different levels of justice with regard to disputes that involve marginalized groups in order to understand how the system manages justice in such cases. Social inequality is replicated in the constitution and behaviour of the justice system often with ominous implications towards the marginalized. In view of this, the study seeks to find out how the justice system is structured and the multiple constraints that bear on its delivery to the marginalized.

Different experiences and perceptions of the marginalized only reinforce the understanding that law

[3]Eulalia Temba, (2000), The Justice Delivery System and the Illusion of Transparency Women and Law in Southern Africa Research Trust, Maputo: Mozambique, Page 22.

is neither universal nor natural. Rather, they understand it as a product of a segregationist and discriminatory social model that is organized, adjusted and reproduced through inequalities such as those lived by marginalized groups. Authorities meant to enforce this social model and the actors that get access to and operate in it such as state judicial organs, police, prisons and traditional authorities are also important in an analysis of this nature. When it is considered that the application of law often entrenches inequalities, the reason why disputes are often resolved in violation of rights of the marginalized, be it by formal court organs or intermediary organs such as the police, or organs that are socially recognized as mediators (such as elders), can be clearly understood. These discourage the marginalized from seeking solutions from the formal justice systems and resort to seeking consensual community solutions that emphasize social cohesion as opposed to pursuit of individual justice and rights. Written law is quite often in contradiction with social reality for the majority of the population[4], particularly the marginalized, since most of them access justice only through the informal route which in most cases are political structures, traditional mechanisms or religious arrangements. Ultimately, the organs of justice which people choose to access and the way in which justice is administered or how the law is interpreted and applied affects and configures access by marginalized groups who often are forced to make choices that may be in violation of their rights.

1.4 Overview of study countries' legal systems

Virtually all the countries targeted by the study are former colonies or protectorates of western countries. As a result, they have similarities in their constitutions and legal systems with the biggest similarities being among former colonies of Britain whose legal systems are heavily influenced by the "Commonwealth tradition." Though largely a lame-duck political grouping of former colonies of Britain, the Commonwealth continues to exert significant ideological influence on the legal systems of member states through peer influence, institutional capacity building of member justice departments through the Commonwealth Secretariat and setting of common standards. Though Rwanda's legal system is influenced by the Belgian/French tradition, the country's current administration is showing preference for the Commonwealth.

> ***Where Justice is denied, where poverty is enforced..... neither person nor property will be safe***
> ***Fredric Douglass***
>
> ***AHRAJ believes that for law to accomplish its stated function of maintaining law and order through protection of lives and property of citizens then every section of that citizenry must perceive that justice will be availed to her/him at all time irrespective of her/his societal class..***

1.5 Brief introduction to the judiciary in study countries

1.5.1 Ethiopia

Ethiopia, due to its history of non-colonization with only a brief Italian occupation is the only exception. Ethiopia also has the distinction of being a largely "indigenous" nation with a long history, longer than even a number of western colonial powers that partitioned Africa amongst themselves and consolidated geographical regions into nation states often with little regard to ethnic identities and sensibilities. Ethiopia's first written constitution is the earliest in Africa dating to 1931. Prior to 1931, legal transactions were conducted

[4]Ibid

in accordance with customary laws of the different nationalities in the country. The constitution was revised in 1955 while some laws were enacted in the form of proclamations. Since then, laws were adopted from western countries and enacted in the form of Codes. In doing so, experts from the countries considered were invited and hence the content of the codes were highly influenced by foreign legal systems. This in turn categorized Ethiopia as one of the countries with civil law legal tradition. Another feature of Ethiopian legal tradition is the influence of common law legal tradition in its procedural laws. The Ethiopian procedural laws, both civil and criminal, have been adopted from western countries with the common law legal tradition. The big change came from 1974 to 1991 when the country was ruled by a military government headed by Mengistu Haile Mariam[5], which adopted a constitution based on a socialist-Marxist model. Mariam's regime promulgated many laws to pave way for implementing its adopted socialist-Marxist agenda. However, the previous procedural codes remained unchanged. The military regime was overthrown in 1991, paving way for a new government that ushered in a new constitution that laid ground for the Federal Democratic Republic of Ethiopia (FDRE) that was adopted in 1995. The basic feature of the FDRE Constitution is respect for the fundamental human rights, federalism and separation of powers among the legislative, executive and judiciary organs of government. The constitution has enshrined commonly acceptable democratic and fundamental human rights principles and the independence of the judiciary. The constitution has also recognized the importance of international laws to which Ethiopia is signatory. Furthermore, it legalized a federal system of government and empowered the regional governments to form their independent legislative, executive and judicial bodies.

The FDRE Constitution in Articles 78 to 84 provides for the establishment of a dual court system at the federal and the regional levels to try cases and give verdicts. These provisions describe three tiers of federal and regional state court structures. At the federal level, the structure consists of the Federal Supreme Court on the apex, the Federal High Court at the middle and the Federal First Instance Court at the lower level. In the regional states, the structure consists of State Supreme Court at the top, Zonal Courts in the middle and Woreda (district) First Instance Courts at lower levels.

According to Article 78 (2) of the Constitution, the Federal Supreme Court is the supreme judicial authority in the country, while the State Supreme Courts have the highest and final judicial power over regional matters. The Constitution delegates the power of the Federal High Court to the Supreme Courts, and that of the Federal First Instance Court to Zonal Courts of the regional states. Such delegation of power of the federal courts to state courts reduces the dual court system into a single or mono-court system. The House of Peoples Representatives (HPRs) is likewise given the mandate by Proclamation No. 322 of 2003, to maintain the dual nature of the system by establishing Federal High Courts and First Instance courts. Based on this Constitutional provision, the HPRs has established Federal High Courts in Afar, Benishangul, Gambella, Somali and Southern Nations Nationalities and Peoples Regional States.

As per Article 24 of the 1996 proclamation, the Federal Supreme court sits in Addis Ababa. Similarly, the Federal High and the Federal First Instance courts sit in Addis Ababa as well as Dire Dawa, and others may be considered later in accordance with Article 78 (2) of the Constitution. Despite the establishment of Federal High Courts in regional states mentioned above, there is no permanent court sitting in these areas up to now, and it is the circuit benches of the Federal Court which are presiding over cases. In general, the Federal Courts have jurisdiction over cases arising under the Constitution, federal laws and international treaties. These courts have also jurisdiction over parties and places specified under the federal laws.

As stated under Articles 4 and 5 of the 1996 proclamation, also amended in the 1998 and 2003, the Federal courts have criminal and civil jurisdiction. The criminal jurisdiction includes offences against the national state, foreign states, the fiscal and economic interest of the government such as counterfeit currency, the safety of aviation, illicit trafficking of dangerous drugs, falling under the jurisdiction of courts off different

[5]He now lives in exile in Zimbabwe.

regions or under the jurisdiction of both the Federal and Regional courts as well as concurrent offences and offences committed by officials and employees of the Federal Government in connection with their official responsibilities or duties. In civil cases, the Federal Courts have jurisdiction over cases to which the government organ is party, suits between persons permanently residing in different regional states, cases to which a foreign national is a party, involving nationality issues, business organizations registered or formed under the jurisdiction of Federal Government Organs, relating to patent, literary and artistic ownership, insurance policy and application for habeas corps.

The Federal Supreme Court is an appellate court and has jurisdiction over decisions of the Federal High Court rendered in its first instance jurisdiction and decisions of the Federal High Court rendered in its appellate jurisdiction in variation of the decision of the Federal First Instance Court. The Federal Supreme Court has an exclusive original jurisdiction over offences for which officials of the federal government are held liable in connection with their official responsibility and without prejudice to international diplomatic law and custom offences for which foreign ambassadors, consuls as well as representatives of international organization and foreign states are held liable. Likewise, the Federal High Court has first instant and appellate jurisdiction over civil and criminal matters. In its first instance jurisdiction the Federal High Court has jurisdiction over civil cases involving an amount in excess of Birr five hundred thousand and cases regarding private international law, nationality application and enforcement of foreign judgements and decisions. The Federal High Court has first instance jurisdiction over offences against the Constitutional order or against the internal security, foreign states, the law of nations, safety of aviation, illicit trafficking of dangerous drugs and any other criminal cases arising in Addis Ababa and Dire Dawa, which are Federal territories. The Federal High Court has an appellate jurisdiction over decision of the Federal First Instance Court.

The Federal First Instance Court has the jurisdiction over civil cases involving an amount not exceeding Birr Five Thousand and over cases the value of which cannot be expressed in monetary terms. The First Instance Court has jurisdiction over cases that do not fall under the jurisdiction of the Federal Supreme Court, Federal High Court and any other cases in Addis Ababa and Dire Dawa that is not vested by law on other judicial organ. On the other hand, the Federal First Instant Court has criminal cases which do not fall under the jurisdiction of the Federal First Supreme Court and Federal High Court and offences committed in Addis Ababa and Dire Dawa but do not fall under the jurisdiction of other judicial organs.

In Addis Ababa City, Kebele Social Courts have been established by the Addis Ababa Revised Charter Proclamation No. 361 of 2003. These courts have civil, criminal as well as first instance and appellate jurisdictions. The social courts have civil jurisdiction over suits arising from possessor rights, issuance of permit or land use; in connection with the regulatory powers of City Government; the administrative contracts concluded by the city; in connection with the government owned houses administered by the City Government; applications to change names; applications of succession and guardianship and/or tutorship or spousal certificates, applications for the declaration of absence or presumption of death. The City Courts have criminal jurisdiction over cases of petty offences, remand in custody and bail applications on Federal offences, and cases of execution of penalties imposed upon petty offences by the executive and municipal organs. The Kebele Social Courts have jurisdiction over cases regarding property and monetary claim where the amount involved does not exceed Birr Five thousand. The jurisdiction of Kebele Social Courts over city hygiene and public health contravention and other similar petty offences are to be determined by the law issued by the city council. A party dissatisfied with a decision of Kebele Social Court may appeal to the First Instance of City Court.

1.5.2 Nigeria

Like Ethiopia, Nigeria is a federal republic composed of 36 states and 1 federal capital territory (FCT) and this is reflected in the structure of the administration of justice. There are Federal justice institutions and State justice institutions. Some Federal justice institutions also have divisions at the state level. Nigeria operates a multi-legal system: Common Law (Based on the Received

English Law), Customary Law and Islamic/Sharia Law. The Constitution[6] establishes both Federal Courts and State Courts in the following hierarchical order:

- The Supreme Court of Nigeria.[7]
- The Court of Appeal.[8]
- The Federal High Court[9] /The High Court of the Federal Capital Territory, Abuja/High Court of a State.
- The Sharia Court of appeal of the Federal Capital Territory, Abuja/Sharia Court of Appeal of a State.
- The Customary Court of appeal of the Federal Capital Territory, Abuja/Customary Court of Appeal of a State.

Southern Nigerian states have Magistrates' Courts and Customary Courts while Northern Nigeria has District Courts and Area Courts. The Supreme Court is the highest court of the land and is headed by the Chief Judge of the Federation. There are 3 Presidents of the Court of Appeal in the 3 divisions. Chief Judges head the 36 High Courts established in each state. The Federal High Court currently has divisions in 30 states[10] and 1 division in Abuja, the Federal Capital Territory. The head of the Sharia Courts are Grand Kadis while its judges are known as Kadis. The heads of the Customary Court of Appeal are known as Presidents. The Federal Ministry of Justice (FMOJ) is based in Abuja coordinated by the Minister of Justice and Attorney-General of the Federation (AGF). In particular, the AGF is responsible for monitoring the federal government's obligations under international treaties. The FMOJ has oversight responsibility over the work of the Legal Aid Council of Nigeria. There is also the National Industrial Court established under the Trade Disputes Act[11] for adjudicating on trade disputes. Juvenile Courts exist by virtue of the Children and Young Persons Laws of the various States. However, in practice there are Magistrates' or District Courts designated as Juvenile Courts usually on direction of the Chief Judge of the State. In Lagos State, matters affecting children are handled by the newly constituted Family Courts.

Each of the 36 States in Nigeria has a Ministry of Justice led by a Commissioner of Justice and Attorney-General of State. The various ministries of justice have similar functions in relation to their state or federal responsibility. These duties include but are not limited to:

- Institution and prosecution of criminal matters at the high courts, and in the case of appeals, at the Court of Appeal and Supreme Court,
- Representing their respective government in civil matters in Court,
- Planning training for prosecutors,
- Advising government, its departments, agencies, ministries and parastatals on matters concerning them,
- Legal drafting of government documents including bills,
- Maintenance of relations with other justice institutions including the police and the prisons, and
- Addressing public complaints and petitions brought against the government or any of its agencies.

There are about 17 Justices of the Supreme Court and two of them are women: Justice Aloma Mariam Mukhtar JSC and Justice Olufunlola Adekeye JSC. The Court of Appeal has over 100 Justices of the Court of Appeal. The Lagos State Judiciary is one of the oldest in Nigeria. There are currently 50 judges in the high court and about 110 magistrates in the state. The High Court of Lagos State is structured into 5 subject-matter divisions: Criminal, Land, Probate & Family, Commercial and General Civil; and 4 territorial districts: Ikeja, Lagos, Epe and Ikorodu. There are also 7 magisterial districts in Lagos: Ikeja, Lagos Island, Yaba, Apapa, Ikorodu, Badagry, and Epe. The State also has Customary Courts grade A and grade B.

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[6]See Sections 230-284, CFRN 1999.
[7]See also the Supreme Court Act Cap 424 LFN 1990; Cap S15 LFN 2004.
[8]See also the Court of Appeal Act (as amended) Cap 75 LFN 1990; Cap C36 LFN 2004.
[9]See also Federal High Court Act Cap 134 LFN 1990; F12 LFN 2004
[10]Abia, Adamawa, Akwa Ibom, Anambra, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Kaduna, Kano, Katsina, Kwara, Lagos, Nassarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Zamfara and The Federal Capital Territory (FCT)
[11]Cap 432 LFN 1990; Cap T8 LFN 2004, see in particular Section 14

1.5.3 Commonwealth centralist justice systems

All the Commonwealth countries (and Rwanda) attained independence from Britain between 1957 (Ghana) and 1980 (Zimbabwe) so that they have had at least 24 years of self rule. These comprise of Kenya, Tanzania and Zanzibar, Ghana, Uganda, Zimbabwe, Zambia, Malawi, Sierra Leone and (since 1994) Rwanda. The legal systems in these countries have gone through rough times during the self rule period. Ghana, Uganda, Sierra Leone, Nigeria and Rwanda have experienced a series of military take-overs, ethnic instability, civil war and general political turmoil that has left an ominous mark on the development of the judiciary. Although Kenya, Tanzania, Zambia, Malawi and Zimbabwe have not experienced such extreme reversals in the rule of law, they have had their own share of internal political dynamics that have influenced the direction of their constitutions and legal structures that has had implications on the rule of law in each respective country. At the time of the study, most of the countries save for Zimbabwe were enjoying relative peace and security, arguably with corresponding improvements in democratic governance (including human rights protection) under elected governments[12]. Most have western-style constitutions that provide for multi-party democracy with parliaments and executive presidents who are both chief of the Executive branch of government and Heads of State[13]. Under this arrangement, the executive still has substantive influence on the legislature and judiciary[14]. The constitutions of the countries under study provide for a single legislature (except Nigeria that has a Senate in addition to Parliament). The commonwealth countries are further characterised by centralized governance systems with a huge bearing on the judicial systems. They have a dual legal system comprising a formal stratum and an "informal" stratum embodying customary legal principles applied through traditional customary courts.

1.5.3.1 Kenya

The Kenyan constitution provides for the establishment of the High Court and the magistrates courts. It however does not provide for independence of the judiciary, leaving it dependent on the Executive. The Judiciary is headed by the Chief Justice who may sit as a high court Judge if he so wishes in any case as provided by section 60(2) of the Constitution but often does sit as a Court of Appeal Judge in the Court of Appeal (64(2) of the constitution), the highest court in Kenya. The Court of Appeal is established under section 64(1) of the Constitution. The Chief Justice is appointed by the President under section 61(1) of the Constitution while other judges are appointed by the President on recommendation of the Judicial Service Commission (section 61(2) of the Constitution). Chapter 4 of the Kenyan Constitution running from sections 60 to 69 of the Constitution establishes courts in Kenya. Section 60(1) establishes the High Court as a superior court of records with unlimited jurisdiction. The Court of Appeal is described in section 64(1) of the Constitution, while the magistrate's courts are described under section 65(1 of the constitution) and the Kadhis courts under section 66(1) of the constitution. The magistrates' courts are vested with both civil and criminal jurisdiction. In courts outside Nairobi, magistrates often do both civil and criminal matters. In the headquarters, magistrates are often assigned to do any of the two. In the recent past, a division was established to handle corruption matters. The Children's Court was also established and empowered to handle matters relating to children in need of care. A magistrate's court is a court of facts and law. The language of the court is both English and Kiswahili (section 198(4) of the Criminal Procedure Code Cap 75 of the Laws of Kenya), though in reality, proceedings are recorded in English. For those who do not understand any of the two languages arrangements are often made for interpreters to be availed under section 198(1) of the Criminal Procedure Code Chapter 75 of the Laws of Kenya.

1.5.3.2 Zimbabwe

The justice system in Zimbabwe comprises the Supreme Court, the High Court, the Administrative Court, Magistrates' Courts, a system for the administration of the courts, the Office of the Attorney General and associated public prosecutors and the legal profession. The Supreme Court's jurisdiction and powers are

[12]Ghana has just concluded what has been acclaimed as a democratic election resulting in change of government while Kenya is emerging from post 2007-election crisis and taking steps to strengthen democratic structures and the rule of law.
[13]There are current trends in Kenya and Zimbabwe to share executive power between the president and prime minister as a way of managing political turmoil but such arrangements remain temporary.
[14]CSOs in Kenya, Zimbabwe and Uganda have sustained an onslaught on the executive/presidency.

conferred upon it by the Constitution and the common law. It is the superior court of record and the final court of appeal for Zimbabwe. It operates from Harare where it is located. The Supreme Court consists of the Chief Justice, two or more other judges as the President may deem necessary and any additional judge or judges appointed for a limited period by the Chief Justice. Section 81 (1) of the Constitution provides for the creation of a High Court as a superior court of record. The High Court consists of the Chief Justice, the Judge President of the High Court and any other judges of the High Court as may from time to time be appointed. The High Court is physically located in Harare, the capital city and Bulawayo, the second largest city. The Court sits permanently in Harare and Bulawayo and goes on circuit to Mutare, Gweru, Masvingo and Hwange. All the proceedings are open to the public and the media. Physical access to the high court is limited to six (6) out of 28 urban centres in Zimbabwe.

The High Court has unlimited original jurisdiction in civil and criminal cases save for cases brought in terms of the Constitution where the Supreme Court has original jurisdiction. Its jurisdiction, powers, practice and procedure are laid down in the High Court of Zimbabwe Act 1981 and through other statutory provisions and precedents. Provision is also made therein for the Court's power to consider appeals and reviews from decisions of inferior courts and tribunals. The Administrative Court was established in 1979 through the Administrative Court Act. It is one of the special courts in terms of the Constitution of Zimbabwe. It is headed by a President. The Magistrate's Court is headed by a Chief Magistrate. He/she is followed by Regional Magistrate, Provincial Magistrate situate in the ten administrative provinces of the country, Principal Magistrate, Senior Magistrates mostly at provincial level and selected District Magistrate's Courts and magistrates who take care of the day to day magisterial issues in the courts. Unlike judges who fall under the Judicial Services Commission, magistrates fall under the Public Services Commission. The Attorney-General is an independent prosecutorial authority empowered to order investigations of criminal or alleged offences and bring criminal proceedings and with exclusive power to take over and continue or take over and discontinue prosecutions commenced either by him or by other persons.

1.5.3.3 Ghana

The Justice sector in Ghana comprises of the police, the prisons service, the courts, the Ghana Bar Association and the social welfare department, with the Attorney General's Department and the Ministry of Justice serving as the coordinating body for the sector and responsible for the administration of justice in the country. The Ministry of Justice comprises of the Attorney General's Department, Registrar-General's Department, Serious Fraud Office, Law Reform Commission and the General Legal Council for Law Reporting and the Legal Aid Board. The AG's office is responsible for the initiation and conduct of all prosecutions of criminal matters.

1.5.3.4 Rwanda

The highest court is the Supreme Court situated in the capital Kigali. There are five High Courts namely at Nyamirambo in Kigali, in Nyarugenge District, at Nyanza in Southern Province, at Rwamagana in Eastern Province, at Rusizi in Western Province and at Ruhengeri in the Northern Province. In addition, there are 12 Intermediate Courts spread across the country. Two of these courts are situated in the City of Kigali. Besides, there are 60 Primary Courts distributed according to the size of a given population in a given area to facilitate easy access to justice for all. Gacaca courts charged with the responsibility of prosecuting and trying the perpetrators of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 were established by Organic Law no. 10/2007 of 01/03/2007, modifying and complimenting Organic Law no. 16/2004 of 19/6/2004 which had established the organization, competence and functioning of Gacaca Courts. The courts operate at community level, incorporating aspects of traditional justice and largely dispensing with most of the procedures of formal courts. Prosecution is headed by the prosecutor general assisted by his deputy, a Secretary General and a team of Inspectors. S/he is also assisted by prosecutors with national jurisdiction and the prosecution's general headquarters is situated in Kigali. The Ombudsman is set up by law No.

25/2003 of 15/08/2003 and its office is situated in the capital city Kigali, but operates throughout Rwanda. Among the attributions of the office of Ombudsman that make possible for marginalized groups to get access to justice is its role of acting as a link between the citizens, public and private administration, preventing and fighting injustice, corruption and other related offences in public and private institutions, receiving and examining complaints from individuals and independent associations against the acts of public officials or organs, and private institutions and mobilizing officials and institutions in order to find solutions to such complaints if they are well founded.

1.5.3.5 Malawi

Malawi judiciary consists of the Supreme Court, the High Court, the Commercial Court, the Industrial Relations Court, the National Compensation Tribunal, Community Services Directorate Headquarters and the Magistrates Courts. The Magistrates Courts are divided further into the Chief Resident Magistrate Court, the Principal Resident Magistrate Court, the Senior Resident Magistrate Court, the First Grade Magistrate Court, the Second Grade Magistrate Court and the Third Grade Magistrate Court. Like in other commonwealth countries, the High Court has unlimited original civil and criminal jurisdiction. The High Court also has the power (of judicial review) to review any law and any action or decision of the government for conformity with the Constitution. The High Court also decides cases in which people appeal against decisions of subordinate courts.

Section 110 of the Constitution provides for the establishment of subordinate courts to be presided over by professional and lay magistrates. The magistrates' courts have the power to decide criminal and civil cases of various types. Under the Children and Young Persons Act, magistrates' courts may also sit as juvenile courts. Magistrates fall into two categories, namely resident magistrates, who as a minimum have a law degree[15], and lay magistrates, who have basic legal qualifications below the level of a law degree. The highest ranking magistrate's courts are called Chief Resident Magistrates' courts. The highest lay magistrates' courts are called the First Grade Courts. Resident and First Grade magistrates may try any cases except those of murder, manslaughter and treason, and may pass any sentence, other than those of death or imprisonment that exceeds fourteen years. Civil jurisdiction over civil matters is regulated by the amounts involved with highest magistrates handling cases with higher amounts. Below the level of the First Grade Magistrates' courts are second, third and fourth grade magistrates' courts, whose jurisdiction is limited, in civil cases, to disputes with the lowest.

There are specialised courts of two categories, the first being composed of courts that are provided for by the Constitution. Section 110(2) provides for an Industrial Relations Court, subordinate to the High Court, with jurisdiction over cases that involve disputes between employers and employees relating to their contracts of employment. Section 110(3) of the Constitution also grants Parliament the power to enact laws that provide for the establishment of traditional or local courts whose mandate is to decide cases involving customary laws and some minor criminal offences[16]. Other categories of specialised courts may be created by specific Acts of Parliament. Since 2004, there has been a move towards creating specialised courts in the areas of constitutional law and commercial law. The commercial Court has since been established and is located in Blantyre with 3 judges sitting on it. In the area of constitutional law, an amendment to the Courts Act effected in 2004 provides that every High Court matter which expressly and substantively relates to or concerns the interpretation or application of the provisions of the Constitution must be heard and disposed of by not fewer than three judges (rather than the usual one).

1.5.3.6 Uganda

Uganda's legal system is constituted by the 1995 Constitution and other laws that include Acts of Parliament, subsidiary legislation, case law, principles of common law and doctrines of equity and customary law.[17] The Court system of Uganda is established under Article 129 of the Constitution and consists of the

[15] Fidelis Edge Kanyongolo (2006) Malawi: Justice Sector and Rule of Law. A Review By AfriMAP and Open Society Initiative For Southern Africa OSISA Johannesburg pages, page 40-41
[16] Kanyongolo Ibid page 42
[17] Judicature Act Cap 13, Sec 14

Supreme Court, the Court of Appeal, the High Court and subordinate courts as Parliament may establish. Subordinate courts include the Magistrate's courts[18], Qadhis Courts etc and quasi judicial institutions such as Local Council Courts[19], Land Tribunals[20], and Family and Children's Courts. There are, in addition, laws which establish specialized judicial institutions, for example, the Tax Appeals Act which establishes the Tax Appeals Tribunal, the Employment Act that establishes the body of the Labour Officer with jurisdiction to handle labour disputes, the Arbitration and Settlement Act that establishes the Industrial Court to handle labour disputes among others. The army is subjected to a different legal regime governed by the Uganda Peoples' Defence Forces [UPDF] Act 2006. The Act establishes military courts with original and appellate jurisdiction. In essence when adjudicating cases whether of a criminal or civil nature, courts are subject to the law and should ensure that justice is done to all irrespective of their social or economic status and that justice is not delayed[21]. In the criminal justice system of Uganda, the key players are the Uganda police[22], the Directorate of Public Prosecutions [DPP][23], the Courts of Judicature and the Uganda prisons. The police and prisons fall under the Ministry of Internal Affairs, while courts fall under the Ministry of Justice.

1.5.3.7 Sierra Leone

The Judiciary is established by the Constitution[25] as the third organ of state (after the Executive and Legislature) and it is headed by the Chief Justice, who acts on the advice of the Judicial and Legal Service Commission which he chairs. Within the formal legal system, the hierarchy of courts is as follows:

- Magistrate Court (Lowest)
- High Court
- Court of Appeal
- Supreme Court (which is the highest court in Sierra Leone).

The hierarchy of courts in the 'informal' or customary legal system is as follows:

- Local Court (Lowest)
- Group Local Appeal Court (this is almost defunct; so appellants go directly to the)
- District Appeal Court (the Highest court)

In practice, there is no strict division between the two sets of courts because a case can make its way from the local court up to the Supreme Court through appeals. Lawyers are however barred from practising at the local courts. Further, courts within the customary legal system are only present in the Provinces. There is a magistrate's court in each of the 12 districts (with many more magistrate courts, about 11 in the Western Area). There is one High Court in each of the 3 Provincial headquarter towns of Makeni, Bo and Kenema. Both the Court of Appeal and Supreme Court are located in Freetown.

1.5.3.8 Zambia

The independence of the Judiciary is explicitly spelt out by the Republican Constitution and the Judicial Code of Conduct[26] but full independence of the institution is still being consolidated. The structure of the Zambian Judicature is established, in order of seniority by Article 91[1] of the Republican Constitution which provides that "(t)he Judicature of the Republic shall consist of:

a) the Supreme Court of Zambia
b) the High Court of Zambia
c) the Industrial Relations Court
d) the Subordinate Courts
e) the Local Courts; and

[18]These are governed by the Magistrate Courts Act
[19]Governed by the Local Council Courts Act 2006
[20]Founded under the Land Act, The Land Tribunals were established in most districts, but these institutions never set off and claim was laid on the huge cost of facilitating them.
[21]Article 126(2) of the Constitution
[22]Established under Article 211 of the constitution
[23]The directorate is established under Article 120 of the constitution
[24]Established under Section 3 the Prisons Act Cap 304
[25]S. 120
[26]Act No 13 of 1999, passed on the 19th of May 1999.

f) Such lower Courts as may be prescribed by an Act of Parliament.

The Supreme Court is the final Court of Appeal in Zambia with appellate jurisdiction to hear and determine any matter referred a judgment of the High Court, Industrial Relations Court and Lands Tribunal. The High Court of Zambia has within the provisions of Article 94 [1] of the Republican Constitution unlimited and original jurisdiction to hear and determine any matter whether such arises from a statutory or customary law. The High Court further has appellate jurisdiction to hear and determine on appeal matters arising from decisions of the Subordinate Court[27], whether such be criminal or civil. The High Court is on the same level as the Industrial Relations Court and the Lands Tribunal. However, there is no express provision on any Zambian statute books that establishes that the High Court, Industrial Relations Court and Lands Tribunal are on the same hierarchical level. It is the manner of appointment and qualification of judicial officers as well as the appeals system that greatly underlines their hierarchy.

The Subordinate Courts are established by virtue of Article 91 [1] [d] of the Republican Constitution as read with Section 3 of the Subordinate Court Act [Cap 28], the Subordinate Courts are Courts of record.[28] The Subordinate Court is also an appellate Court.[29] Small Claims Court is newly established in the hierarchy of courts. The court deals with small civil claims. There is no need for legal representation. Litigants appear in person and the Small Claims Court Act specifies a period within which a matter brought to the court ought to be concluded. The court has not been popularised yet by the State. Local Courts are the lowest in the hierarchy. The Local Courts are found in almost all rural and urban communities around the country and are therefore much more accessible to most people than other courts. The law under which the Local Courts are established is African customary law applicable to any matter before it in so far as such is not repugnant to natural justice or morality or incompatible with the provisions of any written law.[30] The local courts are also allowed to hear and determine criminal matters under Section 9 of the Local Court Act except any case in which a person is charged with an offence in consequence to which death is alleged to have occurred or which is punishable by death." The Office of the DPP is a Constitutional office created pursuant to Article 56 [1] of the Republican Constitution. The DPP has power to institute and undertake criminal proceedings against any person before any court.[31] Thus, the DPP is the country's chief prosecutions officer.

1.5.3.9 Tanzania

Though technically a federation of two states Tanzania is less like Nigeria and Ethiopia and more like other non-federated Commonwealth countries. This is because Zanzibar and Tanzania mainland are run almost like two parallel systems that are joined by the Tanzania Court of Appeal. The Judiciary consists of three organs: the Court of Appeal of the United Republic of Tanzania, the High Courts for Mainland Tanzania and Tanzania Zanzibar, and Magistrates Courts and Primary Courts. Tanzania's legal system, like that of the other commonwealth countries is based on common law. The Court of Appeal is the highest judicial instance and final court of appeal in Tanzania. The High Court is the appellate court for the magistrates courts and has unlimited jurisdiction. The Judiciary on Mainland Tanzania is headed by the Chief Justice, with the Registrar of the Court of Appeal as the Chief Executive Officer. The Principal Judge assisted by the Registrar of the High Court, is in charge of the administration of the High Court and the courts subordinate thereto. The High Court is divided into Zones, which are administered by Judges-in-Charge with the assistance of District Registrars. At Regional and District levels, the administration is under Resident and District Magistrate-

[27]Section 28 of the Subordinate Court for civil matters and Section 321 of the Criminal Procedure Code for criminal matters
[28]Section 11 of the Subordinate Court Act
[29]Section 56 Subordinate Court Act.
[30]Section 12 of the Local Courts Act
[31]Article 56 [3] [a] of the Constitution

in-Charge. District Magistrates-in-Charge also supervise Primary Courts in their respective districts. On their part Primary Courts oversee the operations of Ward Tribunals.

1.5.3.10 Zanzibar

Zanzibar has a distinct and separate legal system from the Mainland that draws a lot from Islamic legal tradition. The Court of Appeal, however, is a Union matter, though there is a qualification as to what matters can be taken before it. The Court system in Zanzibar has a High Court, Kadhis Courts and the Magistrates Courts. There are three tiers to the Kadhis Court, the lowest being the Kadhi's Court followed by the Chief Kadhis Court which is an appellate forum. Appeals from the Chief Kadhis Court are heard in the High Court of Zanzibar only.

The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread
Jacques Anatole Franqois Thibault (the red lily)

AHRAJ is convinced that equality and equity (more so in the face of the law) are two different things, equality of un-equals breeds inequity – equity (fairness) demands that unequal parties be treated differently to achieve equity. Legal systems ought, specifically where the poor & marginalized are concerned, to seek equity rather than equality.

CHAPTER TWO

Methodology

2.1 Introduction

The main task of this baseline was to carry out a survey in 11 focus countries, namely Nigeria, Ghana, Sierra Leone, Ethiopia, Tanzania, Uganda, Rwanda, Kenya, Malawi, Zambia and Zimbabwe, in which phase 3 of the AHRAJ program will be implemented. It was initiated to:

- Collate qualitative and quantitative data on the present situation,
- Provide inputs into developing reliable qualitative and quantitative indicators to be used to monitor and evaluate people's access, utilization and satisfaction of the justice sector institution during the third phase, and
- Support the evaluation of efforts that will be addressed to engage in access to justice and sector reforms at the national and regional level on the domestication of international human rights treaties.

Specifically, the objectives of the baseline were to:

- Understand and analyze the experience of the marginalized groups viz. women, children, persons with disabilities, minority groups and other disadvantaged groups who have or have not accessed the justice sector institutions even though they were in need of justice dispensation,
- Collate people's perspectives on the contributions and dis enabling factors in the dispensation of justice and how these factors can be overcome,
- Provide people-centric measurable indicators to monitor the progress of justice sector reforms in the focus countries, and
- Understand and analyze the work of various human rights groups, lawyers and legal aid institutions seeking to use litigation, advocacy and lobbying to address human rights violations within the focus countries.

2.2 Key research methods and process

2.2.1 Background

The main research methods used in the study were purposively qualitative. This is so because it lays emphasis on views, opinions and reflections on issues of access to justice by a cross-section of players, mainly the marginalized groups who in this case are the right holders and duty bearers who include officers/staff heading or working in justice institutions. Quantitative information was, however, collected via a mapping instrument and a researcher administered questionnaire that targeted members of the marginalized groups such as people with disabilities, women in general but poor women in particular, the urban poor, squatters, orphans and vulnerable children (OVC), religious minorities, pastoralists, mountain communities, lesbian, gay, bisexual and transvestites (LGBT), sex workers, hawkers, street families and albinos. Total sample sizes of up to an average of 300 interviewees per country were selected from a cross-section of the marginalized groups above and requested to respond to researcher administered questionnaire meant for general informants.

2.2.2 Literature Review

In a number of countries, literature relating to justice institutions especially around issues of access to justice were reviewed and discussed in view of the objectives of the study. There was extensive literature review of published and unpublished documents particularly studies undertaken within the past 5 years on the justice system touching on the objectives of the research, government policies and laws proposed and/or put in place, parliamentary debates on policy and laws related to justice for all and the marginalized in particular. The literature was analyzed paying attention to frequency and enactment of relevant laws/ follow up action. Also considered were government reports to UN committees, UN committee reports to government, CSO reports on government to the UN and other rights/justice bodies, reports on CSO activities on rights/justice system and government programs/committees/tribunals/commissions specifically targeting access to justice/rights and how they have been implemented.

2.2.3 Mapping

Mapping of law/justice/rights institutions and personalities/offices was done within respective study countries paying attention to the legal infrastructure within respective countries and the kind of organizations and what they do, who they serve and scope (coverage) of their services.

2.2.4 Institutional Capacity Assessment

This was carried out on the above institutions. It included general assessment of outcomes based on documented information, as well as sampling of a few of the organizations and directly looking at their individual capacities from organizational documentation and interviews with key staff/clients. There was also a review of previous assessments on capacity/performance as contained in evaluations, yearly/quarterly reports and donor partner reports as well as media reports. Particular attention was paid to potential capacity against actual performance weighted against meeting prevailing needs. Press reports/assessment of public perception of the performance of justice institutions was also crucial even when not based on a scientific study.

2.2.5 Key Informant Interviews

These involved human rights personalities, NGO executives, pro-bono lawyers and women's rights groups as well as activists. The interviews aimed at having them explain what they do and the effectiveness of their work. Also, officials of government/state as well as CSO legal aid schemes, officials in the justice system such judges, magistrates, advocates and court registry staff were interviewed partly to verify data collected by other instruments, provide latest data trends and give informed opinions and facts about the human rights/ justice situation. Judges, chairs of special courts and tribunals which address matters of the marginalized and committees for similar purposes were also interviewed. UN and international agency officials within the respective countries and in the regional offices were sought out to give informed opinions on the status and performance of justice systems/mechanisms.

2.2.6 Focus Group Discussions/Debates

These were conducted among relatively homogeneous groups mainly among the marginalized with information and/or experience on the nature/performance of the justice system.

2.2.7 Observation techniques

These were used simultaneously with interviews to take note of things such as state of maintenance of facilities, crowds waiting to be served, behaviour of duty bearers such as justice officials towards their clients and punctuality and preparedness of different players in the justice system as well as their confidence levels.

2.2.8 Case studies

Case studies were taken on the experiences of marginalized groups' efforts to access justice such as already documented cases of public interest litigation. Issues of enforcement (or none) of the rulings in the aftermath were considered to make conclusions on whether access to justice had been improved or not.

2.3 Study Respondents

Eighty five percent of all respondents had a relatively substantive interaction with at least one of the justice departments as prisoners, suspects, witnesses, defendants and/or complainants. Up to 20% of the respondents interacted with the departments as the accused. Fifteen per cent of the respondents based their comments on their own knowledge and/or observations.

2.4 Baseline limitations

- The time frame within which to complete the research was unrealistic, leading to a situation where it took more time than originally envisaged,
- The time at which the study was conducted (during December Christmas holiday) and early January (New Year) was challenging since many office activities either slowed down or came to a complete standstill,
- There were difficulties experienced in interviewing some categories of the marginalized such as sex workers, street hawkers and slum-dwellers. In the case of sex workers, their late working hours (11PM until the early hours) were quite unfriendly for interviews. Questionnaires tended to frighten some of the interviewees because of the illegal nature of their trade,
- There was scarcity of literature since there are very few studies which evaluate situations where marginalized groups have been unable to access justice institutions,
- Strike action by the Judicial Staff Union of Nigeria (JUSUN) prevented researchers in Nigeria from gaining access to most judicial officers and staff and this delayed the research work,
- More men than women were willing to participate in the surveys, thus giving the baseline a male bias,
- There was general suspicion that the research could have been a trap laid by journalists or police to arrest participants,
- There were vast geographical sizes to contend with in some focus countries such as Nigeria,
- Access to key documentation was curtailed and key personalities who would have approved the research were unavailable when they were needed, and
- Some marginalized communities were left out because of cost implications.

2.5 Summary of findings

Marginalized groups across the study countries feel seriously constrained with regard to access to justice. There were two categories of problems identified as impediments to access to justice for the marginalized, structural and legal. Among the structural problems identified included under-funding of justice departments, overworked and underpaid staff, poor conditions of service of staff in comparison to lawyers in the private sector and other employments have acted as a disincentive for qualified lawyers to work with the Ministries of justice in nearly all study countries. Prevailing lack of proper and effective coordination between the various sections of the justice sector was leading to many serious problems within the sector, including overcrowding in the prisons and remand centres, corruption within the sector, backlog of cases and poor legal aid services. Lack of access to public services, which are often expensive and cumbersome and with inadequate resources, personnel and facilities also contribute to the structural problems. Police stations and courts may be non-existent in remote areas, and the cost of legal processes (such as legal fees and fines) is often unaffordable to the very poor. In addition, the marginalized's ignorance of court procedures, lack of information and awareness about their own rights which is worsened by lack of free legal representation, inability of the structural systems in place to cope with heavy workload leading to serious delays in handling cases that in turn results in prison congestion are factors that frequently deny justice to the marginalized all contribute to structural impediments to access to justice.

On the other hand, legal impediments include the adversarial justice system which places the burden of establishing validity of a case on the parties, leaving the magistrate/judge as a neutral referee such that it gives undue advantage to the better endowed. Besides, quasi-judicial mechanisms have also not been easily

accessible for the marginalized, while the justice system often has "hostile" entry points such as police stations/ officers that inhibit many of the marginalized from entry or even approaching the system. Interference from other arms of government was also noted and particularly so for Zimbabwe where political and economic instability have given rise to judicial interference by the executive.

Marginalized groups felt their access was not improving or likely to improve in the near future. The exception to this trend was Sierra Leone that is in a reconstruction phase after a civil war. Views ranged from a strong perception in Kenya and Zimbabwe that the future is bleak- that indeed all the evidence points to the situation getting worse. Kenya is a paradox of sorts because it has perhaps one of the largest establishments of judicial officials per population in sub-Saharan Africa and a relatively high number of legal aid/human rights NGOs as well as a high production of law graduates and advocates- but still these numbers have not translated into better access to justice by the marginalized. Leading among reasons for the uncertain future of accessing justice is the lack of finances to pay for legal services including management of related logistics. Unfriendly gate keepers to justice mechanisms such as police, corruption, and endemic ignorance of the law coupled with few legal education/support opportunities and bad laws were among other reasons given for the static or worsening access to justice situation. Poor socioeconomic circumstances of the marginalized denied them finances necessary to access justice – since poverty appears to be on the rise in most of the countries, justice will increasingly become more difficult to access.

On free legal aid services, most of the countries had relatively acceptable constitutional and legal frameworks for provision of free legal services to those who may not afford it save for Kenya whose legal framework does not quite bind the state to providing legal services except in cases of convicts on death row. However, where such provisions exist, the commitment and capacity to provide free legal services was deficient. In all the countries, these provisions lacked a workable coordination and implementation framework. It was instructive that hardly any of the marginalized individuals/groups showed awareness of government legal aid programs- in contrast they all had knowledge of services offered by human rights and legal aid NGOs. NGOs with clear ideological leanings towards defending rights of specific groups such as women victims of violence received the highest scores from respondents. However all the NGOs interviewees admitted that they had capacity problems and that their support was a drop in the ocean.

On international conventions/treaties, all the study countries do not take international conventions and treaties as seriously as they should. This was reflected in their failure to ratify the treaties but more critically failure of their respective legislatures to adopt them in the local laws. Even where local laws give provision for application or at least consideration of the treaties by courts of law once ratified (such as is the case in Ghana and Rwanda), the judiciary has not shown enough enthusiasm to apply, blamed on the conservative nature of the judiciary in all the study countries except Tanzania. When a local law conflicts with an international instrument the local law prevails in the dualist states and can only effectively apply an international law only if domesticated through local laws.

On alternative justice institutional mechanisms, study countries had a number of alternatives to the formal/ mainstream justice system where the marginalized largely pursue their grievances and conflicts. These are often neither well documented nor given legal weight and recognition in law or policy of Ministries of Justice. They include traditional customary (law) systems, peace or reconciliation forums, Islamic courts and interventions of the local government administration officials. Others include elders' councils, religious leaders' mediation forums and kinship group forums. ADR mechanisms offer an enormous challenge in the pursuit of justice by marginalized groups because of their accessibility and easily understandable by the marginalized. ADR mechanisms are, on the other hand, beset with problems of condoning human rights violations as they often discriminate against women and other categories of the marginalized such as children and people of lower caste. Nearly all the mainstream justice systems studied do not have a formal link with them and neither do they recognize their decisions, meaning they only give partial mutually agreed cover

to litigants. Even those ADR mechanisms employing statutory law principles such as forums by paralegals lack a policy-legal framework to make them effective at protecting rights of the marginalized and as a result improving their access to justice. On prisons, these were the most neglected of justice institutions analyzed. Among similar recurring problems in the reports were that prisons are punitive rather than corrective, there is congestion/overcrowding thus the need to increase the number of prisons, there is massive violation of rights of the prisoners and unfairly long detention periods as well as corruption.

It can be concluded that marginalized groups have very limited access to justice generally, but particularly within the formal justice system. They are far from benefiting from ratification/adoption of international human rights instruments because of weak application. To address their particular concerns, justice systems have to aim for social justice, which need to address and redress existing inequalities socially as well as within the justice system. Alienation from the justice system and ultimately justice itself is worse for the categories of marginalized suffering (moral) stigma such as sex workers, LGBT and even PLWHIV. Existing laws appear to make their status illegal outright or alternatively are amenable to popular moralistic interpretation and enforcement that justifies injustice and gross violation of rights

2.6 Recommendations

Among the core recommendations that touch on all issues of marginalization raised and discussed in the report and their determination of the nature and degree of access to justice include:

- Having ongoing constitution review encompass a "pro marginalized" orientation and perspective particularly since access to justice problems affect majority of people within countries under study who are placed among the poor,
- There should be review of legislation preferably with participation of the marginalized to make it conform to favourable constitutional provisions and guarantees to their access to justice,
- Justice infrastructure and services including "entry points" such as police and provincial administration should be expanded proportionately and reformed to take cognizance of the needs and interests of marginalized groups as well as be accountable to them for facilitation of justice,
- Government supported/facilitated comprehensive legal aid services should be expanded equitably to the marginalized wherever they are to be found and
- Alternative dispute resolution mechanisms and services need to be strengthened through policy/legal review that would among other things recognize services of paralegals, government officers such as in provincial administration and Children's Department, traditional/religious leaders to enable them enhance access of the marginalized to mainstream justice system.

Finally, there is need to conduct action research on perspectives of access to justice by the marginalized (such as on the efficacy of public interest litigation) in all the target countries and use the findings to pilot/put in place effective legal aid and justice mechanisms (including ADR) appropriate to the socio-political and legal circumstances of respective countries.

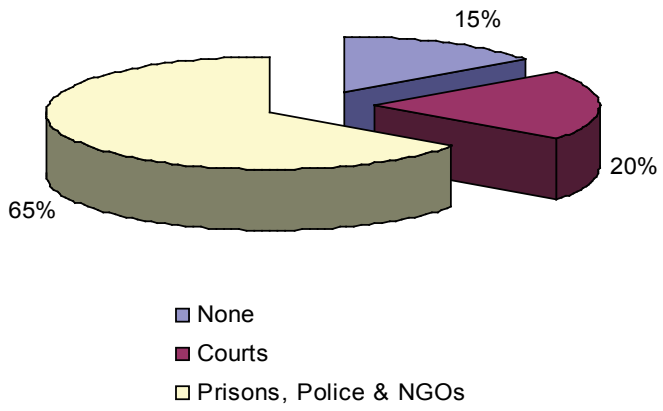
CHAPTER THREE

Findings

3.1 Introduction

A significant majority of marginalized groups' respondents had dealt with justice institutions among them courts, police, prisons and NGOs in different capacities as illustrated in Figure 3 below. This gave them a basis for commenting on access to justice issues from a perspective informed by their experiences.

Figure 3: Justice Institutions' respondents had dealt with



3.2 Experience in dealing with Justice Institutions

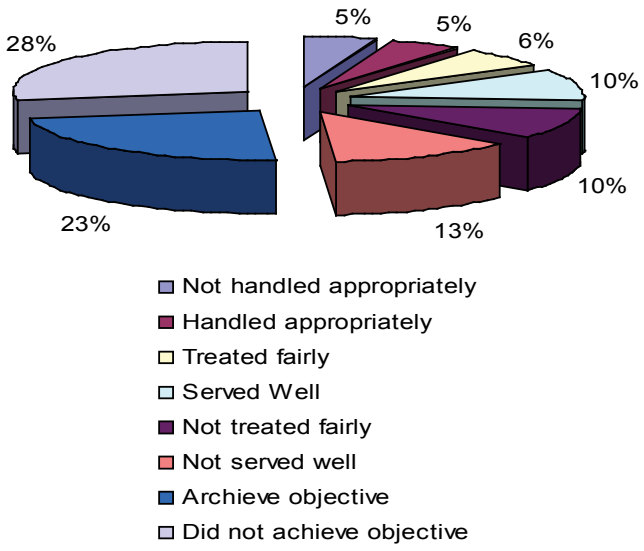
Twenty eight percent of the respondents were not positive about their interaction with the justice system when asked to describe their experience in relatively generic terms that brought out their feelings about the justice institutions they had dealt with. This is illustrated in Figure 4 below:

The Failure to invest in civil justice is directly related to the increase in criminal disorder. The more people FEEL there is injustice the more it becomes part of their psyche

William Joseph – director legal aid bureau of Maryland; 2003

AHRAJ calls upon all actors in the justice sector to evaluate how they handle matters brought to their attention by the marginalized if these members were to find utility in these institutions; the alternative would be for these sections of society to resort to taking the law in their own hands hence bringing them into conflict with these very institutions that they distrust and view as instruments of injustices

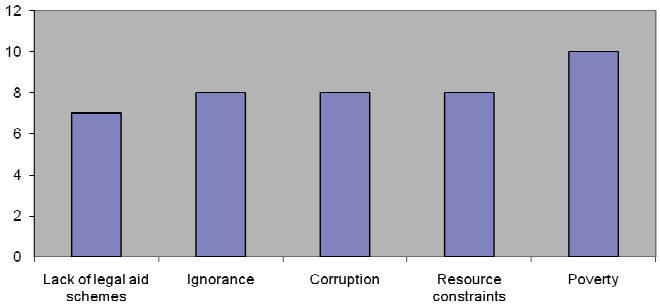
Figure 4: Experience in dealing with Justice Institutions



3.3 Problems the marginalized face in accessing justice

Overall, the most frequent reason for low levels of confidence in litigation was the perception that poverty and general lack of material resources by majority of the marginalized makes it difficult for them to benefit from the formal justice system because it is inherently expensive. People perceived to be of a higher economic capacity were thought to have better access to justice because they can afford to hire good lawyers or/and bribe/pay their way out when the need arose. Reference was made to expenses related to travelling to court, getting police to cooperate, being available over long periods of time to attend court, transporting witnesses among other that accompany litigation as making it impossible for the marginalized to receive their share of justice. Resource constraints combine with poverty to cater for almost half the perception of marginalization with respect to justice. Figure 5 below is a representation of frequency of problems cited by the marginalized on why they may not access justice.

Figure 5: Problems marginalized groups face in accessing justice



Analysis of individual countries' legal aid situation however, brings out differences in application of provisions of such support per country that informs mostly negative attitudes that fuel mistrust for litigation. Asked what should be done to improve their access to justice the following were the most frequent responses:

Freedom and equality of justice are essential to a democracy and denial of justice is the short cut to anarchy

AHRAJ call upon the responsible authorities to take concrete steps to remove structural barriers to access to justice especially those facing the marginalized to restore confidence in them for continued loss of confidence in these institutions could breed anarchy and undermine democracy.

Figure 6: How can marginalized groups gain better access to justice

Respondents also appreciated litigation as a means of accessing justice as depicted in the figure below.

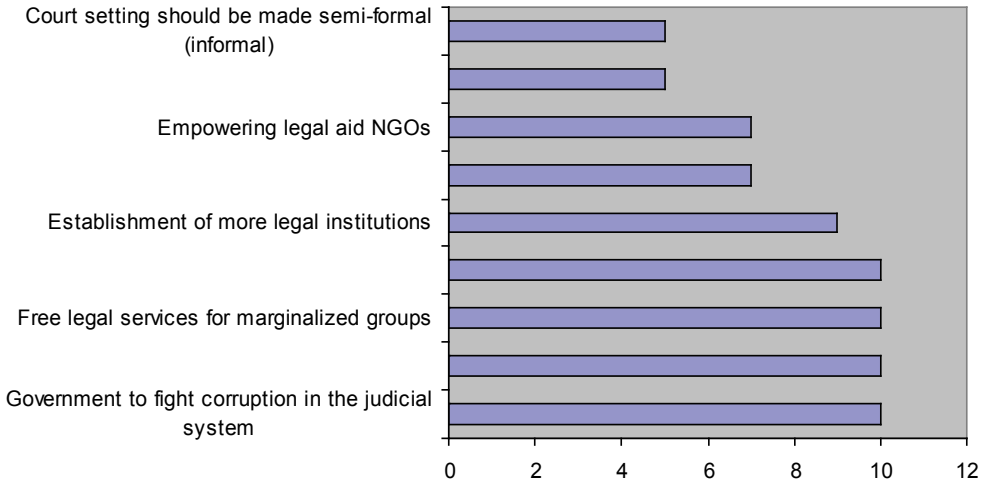
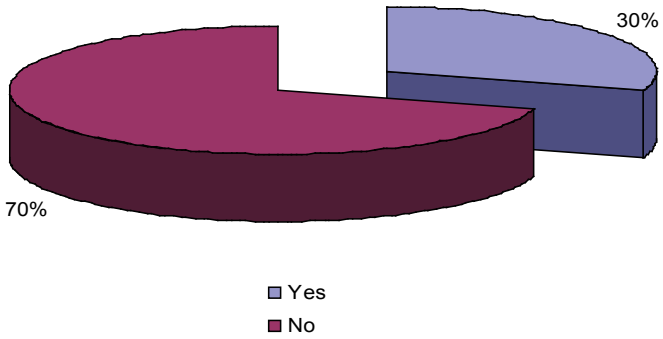


Figure 7: Litigation as an effective way of promoting justice



3.3 Issues within justice departments affecting access to justice by the marginalized

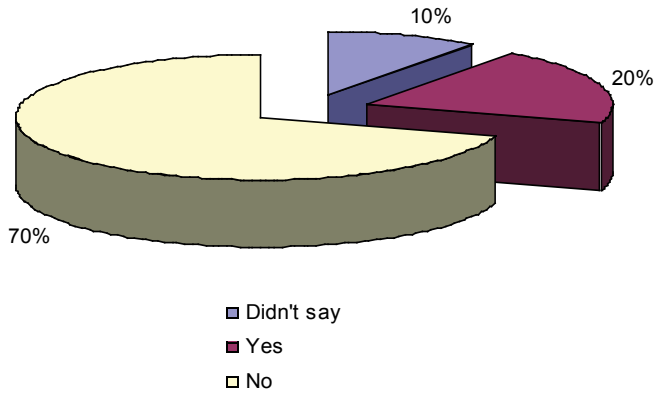
Under-funding of justice departments, overworked and underpaid staff, poor conditions of service of staff in comparison to lawyers in the private sector and other sectors of employment have acted as a disincentive for qualified lawyers to work with the Ministries of Justice in nearly all the countries under study. Other issues identified as having an impact on the functioning of the justice sector in the study countries were overcrowding in the prisons and remand centres, corruption within the sector, backlog of cases and poor legal aid services. For Ghana, the Ministry of Justice has had to rely on newly qualified and inexperienced lawyers and lawyers engaged on an ad hoc basis to support its work. This has hampered effective functioning of the justice sector. Ghana also reported lack of proper and effective coordination between the various sections of the justice sector as leading to many serious problems within the sector. For Tanzania, inadequate facilities force some judges and magistrates to work in shifts thus exacerbating the problem. According to Fauz (2006), "(i)t can take weeks for a litigant to appear in Court for the first mention and the process of filing pleadings, determining preliminary and interlocutory matters may take months if not years. By the time the case is ready to go for trial, so much time would have been wasted that many litigants find it not worth the trouble... Even when the litigation comes to an end, another problem usually arises - that of enforcing whatever decree or order a person might have obtained from the Court. The enforcement of judicial decisions poses a significant problem. The execution process is full of procedural complications, especially where, as in most cases, the losing party is not willing to comply

with the Court order." The Zimbabwe justice system appears to be the most affected by political instability and gross interference from the executive. In Nigeria, judicial officers face interference from other bodies, influential people and royal chiefs among others while performing their duties. Besides, lack of an effective court machinery including dictation machines affect the quality of work being done.

3.4 Accessibility of Justice systems/ facilities

When the marginalized groups were asked if the system is accessible to them, only 20% were confident that it was. A more significant 70% felt it was not, while 10% could not make up their minds as illustrated in Figure 8 below:

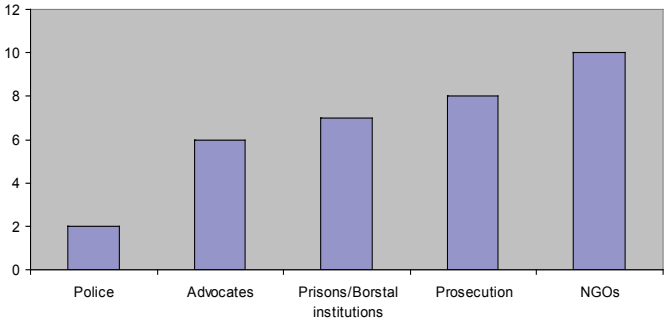
Figure 8: Accessibility of Justice Systems



Physical accessibility in most of the study countries, particularly Nigeria, Rwanda, Tanzania, Ethiopia, Ghana and Zimbabwe is not a particularly serious problem for the marginalized litigants. In all these countries, urban and per-urban areas enjoyed the best proximity to courts in general and lower courts in particular. High Courts tend to be located in the capital city and very few other major towns. The situation was similar in Kenya but with a more serious problem of physical accessibility in some arid and semi arid districts. Kenyan respondents expressed the highest alienation from actual access to courts with a significant number characterizing courts as hostile to the marginalized, with some respondents even claiming to have been "chased away." Probing of FGD participants revealed that court orderlies and security personnel within and at the gates of courts of law were seen as mean and hostile to people who looked poor, a category that includes most of the marginalized. For Sierra Leone, the issue of accessibility of the marginalized to the court system drew two contrary opinions. Those of the opinion that courts are accessible cited work by legal aid advocacy institutions, the attention that courts pay to cases involving disabled and other marginalised groups, the provisions within the Constitution which protect against any discrimination, the work of human rights observers/defenders who are increasingly using the courts to make sure that the rights of the marginalised are protected and the presence of both national and international laws that protect the rights of the marginalised.

Those who held the contrary view said courts are inadequate as there are only a few formal courts outside Freetown, while judges/magistrates are in short supply. In addition, some cases involving certain marginalized groups require medical attention/ certification that is not readily available at a cost-free basis. Other reasons cited included lack of knowledge about court procedures, language barrier due to the fact that although English is the language of instruction in formal courts, only about 18% can use it. Besides, the formal legal principles, evidentiary and procedural rules are mostly different from customary 'rules' which are more familiar and very informal. There is also a high incidence of poverty that impedes access to justice by the marginalized.

Figure 9: Accessibility of institutions of justice



Never doubt that a small group of thoughtful committed citizens can change the world. Indeed it is the only thing that ever has
Margaret Mead

AHRAJ salutes all gallant men and women (both in and out of governments) who every day work tirelessly towards improving access to justice especially for the poor and marginalized

To further access to justice for this wide base will need two sets of efforts, mainly state-centred reforms (like engaging and improving the judiciary, police, prisons, government) and working directly with ordinary people. In spite of the changes by countries above to improve access to justice for the marginalized, respondents rated NGOs higher in terms of facilitating access to justice as summarized in Figure 6 above. The high rating of NGOs was attributable to their work in legal aid and advocacy for the rights of the poor and marginalized. Respondents also felt that prosecutors are relatively proffessional in handling cases that get to them. Advocates scored highly in some countries such as Kenya because respondents said if one could afford to hire or enjoy their services through legal aid, they had better chances of accessing justice.

3.4.1 Whether access to justice improving or getting worse

Only 20% of consolidated respondents felt that access to justice by the marginalized was improving as seen below. Since majority of respondents already thought it was bad, they either maintained that it was equally bad or getting worse.

Figure 9: Access to justice by marginalized

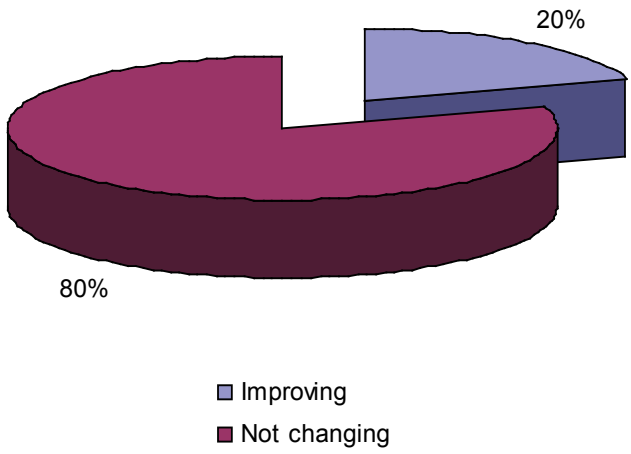


Figure 10: Reasons why access to justice is not improving

Country	Perspective of judicial officials	Perspective of the marginalized
Kenya	Shortage of staff and facilities and adversarial judicial system	Corruption, lack of representation in key decision making organs, poverty, legal jargon, illiteracy, fear of courts and police harassment
Ghana	Backlog of cases, corruption, poor remuneration overcrowding in prisons and remand centres, lack of proper and effective coordination between the various sections of the justice sector and adversarial nature of the justice system	inaccessibility of courts, illiteracy, poverty and institutional prejudices

Country	Perspective of judicial officials	Perspective of the marginalized
Nigeria	Ignorance on human rights awareness and corruption.	Corruption, ignorance, legal jargon and poverty
Tanzania	Poor coordination between institutions, lack of recognition of international standards, inadequate funding to the justice sector and insufficient human resources and skills.	Corruption, police harassment, lack of representation in key decision making organs and backlog of cases
Uganda	Backlog of cases, adversarial nature of the justice system, corruption, poor remuneration for justice sector workers, poor facilities, ignorance and inadequate human resources	Backlog, corruption, legal jargon, poverty and prejudices of judicial institutions
Sierra Leone	Disregard for international law, inadequate facilities, insufficient human resources capacity, back log of cases, ignorance, political interference and poor remuneration.	Poverty, lack of representation in key decision making organs, police harassment, corruption, ignorance, discriminating laws, few legal aid institutions and backlog
Malawi	Case backlog, inadequate human resources, insufficient facilities, lack of public confidence in justice institutions, inadequate funding for the justice sector, challenge of traditional courts and disregard for International Human Rights Law (IHRL).	Backlog, corruption, long distances to courts, poverty, ignorance, police harassment and apathy
Zambia	Inadequate facilities, insufficient human resources and capacity and disregard for international law.	Backlog of cases, poverty, ignorance and lack of free legal aid for the poor.
Ethiopia	Ignorance, poor remuneration and insufficient human resources.	Ignorance, poverty and corruption.
Rwanda	Interference from other arms of government, insufficient human resource and capacity, lack of public confidence in the judicial system, harassment by police and poor law enforcement.	Backlog, lack of legal aid, corruption, weak law enforcement, ignorance, poverty, apathy, discrimination against women and other marginal groups, culture and congested prisons.
Zimbabwe	Inadequate funding to the justice sector, disregard for international law, weak Bill of Rights, poor coordination of the justice sector, interference from other arms of government and lack of interest in marginalized groups by lawyers.	Ignorance, inadequate laws to protect the marginalized, political harassment, corruption and interference from the executive.

> *National governments commitment to the justice sector and in extension their commitment to justice for their people can be determined by interoggating their national budgetary allocation to this crucial sector. The smaller the allocation relative to other sectors the smaller its commitment and vice versa*

Both the rights holders (marginalized) and duty bearers (Judiciary) share similar concerns about issues affecting access to justice by the marginalized. There were, however, additional institutional issues such as poor terms of service, ideological ones such as adversarial system and constitutional ones such as inadequacies in the constitution that the marginalized did not seem aware of but which were important enough in determining access to justice by the marginalized. Justice institution personnel were more guarded in their judgement of access, preferring to view the situation as stagnating rather than getting worse as the marginalized felt. This may have to do with the fact that they are not themselves marginalized from the justice institutions for solutions that often mean so much to their welfare.

3.4.2 Role of justice institutions in ensuring access to justice by the marginalized

In all study countries, judges presiding over cases do not have responsibility for ensuring access to justice by marginalized groups.[32] However, they sometimes advise poor litigants to get free legal service from legal aid providers, and instruct advocates to advice the accused on the spot in court rooms. Court administration is responsible for ensuring accessibility of justice by everyone, including marginalized groups. For Ethiopia for instance, there are laws which exempt the poor from paying court fees and enable them get free legal services from Public Defence Office, under the Federal Supreme Court and pro bono lawyers. Moreover, social courts are established by law at the kebeles (lowest government units) throughout the country, in order to ensure justice is accessible by the majority of the population. These are believed to minimize the geographical, financial and language barriers encountered by the disadvantaged sections of society. Many claims of the poor fall under the jurisdiction of the social courts and therefore marginalized groups can appear before these courts and settle their cases. Nevertheless, these courts are mandated to see civil cases only and it cannot be assumed that barriers in accessing justice by the poor are resolved.

In Nigeria, the federal and regional state courts work hand-in-hand to ease geographical and language barriers in accessing justice. The Federal High Court presides in regional states through its circuit courts, while the Federal Supreme Court reaches the capitals of the regions through video conferencing. Presently, efforts are being made to improve court facilities to make it accessible by everyone, including the disabled, children and pregnant women. Judicial officers however admitted that, despite the existing legal framework and attempts of the court administration, the problems of marginalized groups in accessing justice are not solved.

In Ghana, there is no coordinated effort by all justice institutions to make the courts accessible to marginalized groups, but individual attempts are observed to make accessibility a reality. Among other things, training on human rights is being given to the police while justice institutions are in the process of being reformed. While judges generally accept that court processes are too formalistic and therefore a great hindrance to accessibility, they argue that any changes of the type introduced by the more progressive Indian Supreme court in public interest litigation cases will have to go through the constitutional route and this takes time. Corruption and lack of integrity within Ghana's justice sector and access to justice were also negatively correlated.

[32]The Presidents of the Federal High Court and Federal First Instance Courts interviewed as part of the survey.

The role of the Judiciary in ensuring access to justice: The Case of Kenya

Kenyan magistrates stated that as members of the judiciary established under Chapter 4 of the Constitution of Kenya they have a duty to dispense justice to all. Thus their work is to administer justice to all who come to their courts and this includes the marginalized groups. But their work starts when one institutes proceedings in court. This duty goes to the extent of according the marginalized groups an opportunity to clearly state their case but not to assist them in preparing their cases or presenting them. Laws in Kenya are adequate for the protection of rights of marginalized groups and isolated the constitution and various specific laws such as Children's Act as examples. They however, acknowledged existence of such minorities as GLBT community and sex workers who are not legally protected in the strictest sense but opined that such groups have their fundamental rights protected under the constitution and have the duty to use the courts to claim them.

> *"The Kenyan system is adversarial and to that extent we are only to guide the parties in observing court procedures and the law but it is upon them to advance and present their cases. Courts cannot carry out inquiries but I think the inquisitorial system would really go a long way in helping marginalized groups access justice."*[33]

Practically all judiciary interviewees were of the opinion that access to justice by the marginalized groups in Kenyan judicial system remain a mirage in the context of the adversarial system (otherwise called trial by battle) that judges and magistrates have to operate within. A senior principal magistrate was emphatic that the adversarial system bars them from investigating anything in the process of trial and/or during judicial reasoning. He said Kenyan jurisprudential tradition discouraged and even punished what was even vaguely perceived as activism on the part of a judge or magistrate. Any inquisition by the trial judge/magistrate opened them up to charges of possible bias and malicious interest in the case.[34] When a magistrate appears inquisitorial his/her ruling or judgment risks being quashed either on appeal or judicial review especially in the High Court on what is normally said to be acting in bad faith or considering extraneous factors which he or she might have found out in the course of the hearing.

Once the High Court finds that s/he tried to investigate anything that was not brought out or made out by either of the parties, a ground for an application for a judicial review and appeal is established. Besides, insistence on knowing certain factors relevant but not prompted by any party attracts an application of disqualification due to a likelihood of bias. The connection with justice for the marginalized is that since they are most likely not represented and may not be well versed in even rudimentary legal/rights matters they may not be in a position to raise issues that an empathetic magistrate or even one who is just after equality before the law may use to ensure fairness. Non-marginalized parties on the contrary have the advantage of legal counsel and usually use it to have favourable rulings legally within the adversarial system.

[33]Views of a Kenyan Senior Principal Magistrate

[34]The magistrate gave an example of an expatriate judge who had to resign on being irregularly transferred in the middle of a sensitive human rights case after he ordered police to produce the body of a man suspected to have been tortured to death and supervised two days of unsuccessful exhuming of bodies in a graveyard.

In Uganda, magistrates, being at the lowest tier of the judicature structure act as the courts of first instance with the exception of the Local Council Courts and are closer to the ordinary citizen than the judges and senior lawyers especially of the High courts. Although some magistrates interviewed revealed that they do their best to offer judicial services as provided under the law to vulnerable persons, courts experience constraints in administering justice to the vulnerable due to a number of factors identified earlier. In addition, there has been an ongoing intervention under the JLOS strategic plan to enhance equitable access to justice for women and juveniles. In this regard, magistrates noted that emphasis has been laid on increasing the capacity of Local Council Courts in equitable application of law, the functionality of the Family and Children's Court and strengthening legal aid. This is geared towards lowering the cost of access to justice by the poor. However, the implementation of these services has been on halt for the last two years due to conflicts currently prevailing within the LC administration.[35] These changes are geared towards dealing with problems earlier experienced by the courts through the incorporation of court performance standards, effective planning and budgeting processes and addressing the other logistical problems faced by the country's judiciary.

The Advocates Act demands lawyers in Uganda to offer pro bono services so that poor persons get an opportunity to legal representation and where they are not able, they contribute a certain fee to the Uganda Law Council to help facilitate those who are able to. Though yet to be made available to the public in a comprehensible manner, court procedural guidelines have been developed. With regard to case backlogs that had crippled the system the lawyers interviewed pointed out that the Case Backlog Project initiated to help reduce backlog of criminal cases (at the High Court) is having results.

Zimbabwe's long political and economic woes make judiciary's focus on issues of the marginalized less of a priority as the whole institution fights for survival from subjugation to the executive. The judiciary has been under attack because it has been the voice of reason which has challenged and checked the excesses of the executive, political and human rights violations and slowed down the complete subversion of the Constitution by the Executive.[36] Among the tactics used in the process of subjugating the judiciary have comprised of judicial bashing, including incidences of assault, arbitrary arrests and detentions, malicious prosecutions, character assassination using the state controlled media, politically organized demonstrations, politically motivated invasion of court and disruption of judicial proceedings and threats and intimidation. Others have included arbitrary transfers and being overlooked for promotion without cogent reasons.[37] This has had a negative impact on protection of rights, including the marginalized.

In some cases, magistrates avoid handling what are deemed as politically sensitive cases. One such case is Operation Murambatsvina.[38] In most situations, cases concerning Operation Murambatsvina would find no takers at the magistrate's court. Magistrates would claim that they did not have jurisdiction over Operation Murambatsvina even though they had. In the few cases where the magistrates agreed to determine the cases, they would not rule against the local authorities.

In Rwanda, the law has been considerate in protecting the rights of marginalized persons. Among the examples cited in giving this view were the law that relates to rights and protection of children against violence, the Rwandan penal code (article 77, 82, 83 and 97) on issues of excuses, mitigating circumstances and postponement of punishments, the law of succession which gives the girl-child the right of inheriting family property and the law regulating criminal procedure as modified to date which protects juvenile offenders (article 185) where it is stated that prosecution is under the obligation to find a lawyer/advocate for a juvenile offender. When these laws are respected by judges/magistrates, they ensure accessibility to justice by marginalized persons. Unfortunately, resources present a serious limitation to implementation of some of these laws.

[35]There have not been any LC elections for two years now. This is a political or local government administration predicament to which there are no certain answers.
[36]ZHRF and A Tsunga, 2004
[37]Refer to Appendices- Case Study 1- Zimbabwe
[38]In May 2005, Government of Zimbabwe instituted Operation Murambatsvina (OM) a state-sponsored campaign to stifle independent economic and political activity in the country's urban areas. The scope of OM was wide and the main victims of OM were younger, unemployed families whom state security agents saw as potential recruits for social unrest. Whereas OM undoubtedly disrupted the informal economy, it did not succeed in banishing urban dwellers to rural areas or permanently shutting down illicit trade. Moreover, the crackdown thoroughly discredited the police and other state institutions (Bratton and Masunungure, 2007).

In Sierra Leone,[39] magistrates and judges have a role in ensuring that marginalized groups have access to justice. Their suggestions on the role include:

- Enquiring into the evidence available in court and giving appropriate judgment,
- Conducting speedy trials in cases involving marginalized groups,
- Ensuring that marginalized persons are not unnecessarily refused bail,
- Upholding the rule of law and erasing apparent societal imbalances of power,
- Explaining the relevant sections of the law to litigants for proper understanding, and
- Building the confidence of some of these marginalised groups like sex workers, gays and lesbians by hearing cases relating to them in chambers.

While new reforms in legislation have responded to the needs of certain marginalised groups like children[40] and women,[41] other marginalized groups among them the disabled,[42] gays and lesbians have been ignored. Other respondents were of the view that current laws were too old and impractical given the realities of present day Sierra Leone. Those of the view that current laws were adequate argued that the protection accorded by laws providing for non-discrimination were of general application and should be so applied by the courts for the protection of everyone, marginalised or otherwise. Those against cited the manner in which cases involving certain groups (like juveniles and sex workers) are handled, for instance, the speed at which they are charged without diligent investigation as well as corruption and nepotism on the part of highly placed persons.

In Malawi, the major impediment was lack of adequate personnel to work in the justice sector. For instance, by February 2009, there were 700 vacancies in the judiciary and an acute shortage of stationery in the courts as well as archaic filing systems of case records. Eight of the vacancies were in the Supreme Court, 18 in the High Court, 23 for senior resident magistrates and 12 for first grade magistrates. The issue of interference from the executive was also noted in Malawi, where though not of a recent era, the use of traditional courts for political purposes under the Banda regime has continued to haunt traditional courts ever since the re-introduction of multi-party politics.[43] When Malawi was transitioning to a multiparty democracy, one of the first institutions to be "scrapped" off was the traditional courts as they were a strong reminder of the atrocities of the Banda regime. However the so called "scraping off" was a mere executive declaration by the Attorney General in October 1993 through suspension of the courts[44] at that time as part of the negotiations. In reality, these courts still exist though largely on paper. They have not been repealed by an Act of Parliament nor have they been removed by a judicial process.

In the last 14 years of multi-party democracy in Malawi (since 1994), these courts have been stuck in limbo. The court personnel were incorporated into the formal justice system while the courts themselves were supposed to be run as per the Courts Act. Several arguments have been proffered on how to deal with the courts. Of concern is the fact that despite their negative historical tenets, they served a bigger purpose that made access to justice by the local Malawian person easier. Their processes were based on traditional norms and practices and they spoke the language of the people. They also had the backing of the local state machinery. What ensued after the absorption of the traditional courts into the formal courts system was basically a crisis. They were faced with both technical difficulties alluded to above as well as under-funding as soon as they were incorporated in the formal system.

Like in other study countries, reference was, however, made to reforms especially geared towards dealing with the problem of inadequate staff, through a partnership between the Malawi Government and the EU's Rule of Law Programme and the DFID's Malawi Access to Justice Programme aimed at training as many lay magistrates as possible to occupy the village-based courts once they are rehabilitated. In the 2008/9 year,

[39]It seems that the questionnaire used in Sierra Leone was different from others, given the responses received from justice providers. Question is, do we keep it this way?
[40]CRA
[41]RCMDA, DEA, DMA
[42]Although there is presently a bill before Parliament that essentially provides for the protection and welfare of the disabled (cite bill).
[43]Traditional Courts Act 1962 (Act 8 of 1962) Chapter 3:03; Laws of Malawi, sections 4 and 5 cited by Kanyongolo Ibid pg 45
[44]Kanyongolo supra, page 45

there were 51 trainees at Mpemba Staff Development Institute who are being trained as lay magistrates for 14 months. In addition, the EU's Rule of Law Program is working towards the rehabilitation of courts while the DFID's Malawi Access to Justice Programme has, through joint efforts with government, rehabilitated 64 courts all over Malawi.

3.5 Legal aid for marginalized groups

Most of the countries had relatively acceptable constitutional and legal frameworks for provision of free legal services to those who may not afford it including marginalized people, save for Kenya whose legal framework does not bind the state to providing legal services except in cases of convicts on death row. In Malawi, the government has an institution that which provides legal aid and services to poor people. There are formal vetting procedures that involve assistance from paralegals. The target group consists of people with insufficient funds, especially children, orphans, widows and vulnerable men. In terms of effectiveness, the overwhelming numbers of people who go to the legal aid chambers to seek redress is indicative of the positive impact on the society. In Rwanda most of marginalized groups receive legal assistance mainly from Legal Clinics of Universities, HAGURUKA and COPORWA. Legal Clinics of Universities are legal clinics of the Faculty of Law of UNILAK and National University of Rwanda. The Rwandan law[45] stipulates that the Bar Association of Rwanda shall offer free legal assistance to poor persons, although in practice, its main concern is legal advocacy, from its headquarters in Kigali. The Ministry of Justice in partnership with the Belgian Technical Cooperation (BTC) involved recruitment and placement of two advocates in each of the twelve former provinces across the country, specifically to provide legal assistance to minors. The survey established that other organisations such as Advocats sans Frontières and the Danish Institute also entered cooperation arrangements with the Bar Association and the Corps of Judicial Defenders to provide representation services primarily to accused and civil parties in genocide cases.

In Zambia, there exists a Legal Aid Board, with the Law Association of Zambia (LAZ) mandated by law to provide legal aid services. The Law Association of Zambia is enjoined by the Act to co-operate with members of other professions in furtherance of the justice system in the country. It has a Legal Aid Committee that regulates LAZ's contribution to legal aid, mainly pro bono services. Under the auspices of the Women's Rights Committee, the LAZ Legal Aid Clinic for Women has been established. It is run by a small grant from LAZ, but mainly by donor funds. The Clinic caters for women and children indigents, who are unable to afford legal fees. These two complement the work of NGOs that provide legal aid services to the indigent population, primarily legal advice and information, but some legal representation in the courts is also provided. Following a Stakeholders Conference (LASP), particularly involving organisations with paralegals, the Law Association of Zambia and the Legal Aid Board, an expanded PAN was established. A memorandum of understanding was executed by member organisations whose aim is to increase capacity building, collaboration and coordination among civil society LASPs, which will ultimately lead to a more accessible and equitable legal aid system in Zambia, for the benefit of indigent members of society.

Country	Conditions favouring legal aid	Conditions against legal aid
Kenya	Provision of legal aid services by human rights bodies	• Lack of legal framework from the state to provide legal aid except for death row convicts • Deficient capacity to provide legal aid services • Lack of awareness of existence of legal aid by the marginalized

[45]No. 3/97 of 19/03/1997 establishing the organization and functioning of the Bar Association in Rwanda

Country	Conditions favouring legal aid	Conditions against legal aid
Ghana	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Ethiopia	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Rwanda	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Uganda	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Malawi	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Zimbabwe	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Zambia	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Sierra Leone	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Nigeria	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)
Tanzania	• Existence of constitutional and legal framework for the provision of legal aid (1a) • Provision of legal aid services by human rights bodies (2a)	• Deficient capacity to provide legal aid services (2b) • Lack of awareness of existence of legal aid by the marginalized (3b)

However, not all countries run effective legal aid schemes as is the case with Malawi, Rwanda and Zambia, even where provisions exist for legal aid to the marginalized. In these countries, the commitment and capacity to provide free legal services was deficient. The Ethiopian study, for instance, did not record incidents of the state carrying out some of the functions of legal aid to the poor/marginalized such as instituting reparation/restitution cases on their behalf. The same applied to the other study countries, where, for instance in Ghana, provision for pro-bono services lacked a workable coordination and implementation framework. It was instructive that hardly any of the marginalized individuals/groups showed awareness of government legal aid programs.

In contrast, all the marginalized groups and individuals had knowledge of services offered by human rights and legal aid NGOs. In essence, almost all legal aid projects in study countries were run by NGOs. This however comes with its own challenges. For instance, NGOs could hardly cover the entire country. More often than not they are located in the town centres of districts, employ under-qualified staff especially in the remote rural areas of operation mainly due to budgetary and human resource constraints and lack computer and transportation facilities. Most of these upcountry offices act as satellite stations with skeleton staff. Other challenges in the way of legal aid provided by NGOs include dependency on international donors for support of their programs and as such they are vulnerable to donor interests as opposed to their client's needs and interests.

Most of the official legal aid schemes in the study countries faced challenges of low level of committed legal practitioners to handle legal aid cases, the high poverty rate among clients, high level of ignorance, resulting in the inability of parties to resolve simple legal issues, inadequate structures for legal aid delivery between the urban and rural communities, lack of pro-bono Legal Aid Scheme and lack of proper coordination between the judicial service and the Legal Aid Board in the disposal of cases. They also faced the challenge of not being able to cover the whole country. Because of the general reliance on lawyers for the provision of legal services, and also, because of the concentration of lawyers in the bigger cities, the schemes could not set up offices in the districts. Ethiopia's legal aid scheme though for instance provided for in Article 20 (5) 1996 Ethiopian Constitution there are no precedents to date of cases instituted by the ministry on behalf of victims of crimes for compensation. Similar offices have been set up in all the regional states in the country.

> ***Formal declarations on the protection and promotion of rights of people would be meaningless if the institutions and individuals mandated to actualize these rights are not doing so for one reason or the other – these institutions should not go into paralysis due to their being beholden to form rather than substance. Justice is about substance above form***

Legal Aid for the Marginalized: The example of Nigeria

The law regulating criminal procedure protects juvenile offenders in Article 185 where it is stated that prosecution is under obligation to find a lawyer advocate for a juvenile offender. CSOs and government bodies combine to offer free legal aid in Nigeria among them:

- Legal Aid Council of Nigeria (LAC),
- National Human Rights Commission (NHRC),
- The Lagos Multi-Door Courthouse (LMDC),
- The Directorate for Citizen's Rights
  - The Human Rights Protection Unit
  - The Citizen's Mediation Centre (CMC)
- Office of the Public Defender (OPD),
- CLEEN Foundation,
- Project Alert on Violence Against Women,
- Alliances for Africa (AfA),
- Centre for Counselling of Deportees & Refugees,
- Constitutional Rights Project (CRP), and
- Access to Justice (AJ).

The provision of legal aid is a recommendation of the Nigerian Constitution to the Country's Legislative arm [46] making it legally binding for government to provide legal aid to its people. This is done through the Legal Aid Council of Nigeria an Independent body established by Statute under the Legal Aid Act 1976 Cap 205 LFN 1990. It is headed by a Director-General and has branches all over the federation. It is funded by the Federal government and is a parastatal under the Federal Ministry of Justice. Its main function is to provide free legal services, advice and support for indigent persons in the community. The LAC Act also provides that recent law school graduates serving in the NYSC[47] scheme shall be directed by the LAC to provide free legal aid[48]. In recent times, this has been the practice by posting lawyers to each of the local government areas (LGAs).[49]

Nigeria has a National Human Rights Institution (NHRI) known as the National Human Rights Commission (NHRC). It is a body established by Statute under the National Human Rights Commission Act of 1995.[50] The Executive Secretary is the chief executive of the NHRC who is appointed by the President on the recommendation of the Attorney-General of the Federation.[51] The head office is located in the Federal Capital Territory, Abuja. It also has 6 zonal offices in Maiduguri, Kano Jos, Enugu, Port-Harcourt and Lagos. It is funded by the Federal Government and is a parastatal under the Federal Ministry of Justice. However, it can also receive funds from private organisations provided it is for the fulfilment of any of its functions.

[46]Section 46(4), (b) (i), CFRN 1999
[47]National Youth Service Corp – A one-year service scheme for fresh graduates from Nigerian Higher Institutions
[48]Section 14 Legal Aid Act, Cap L9 LFN 2004
[49]Nigeria operates 3 levels of executive government: Federal, State and Local government. There are about 774 LGAs.
[50]Cap N46 LFN 2004.
[51]Section 7(1) NHRC Act 1995

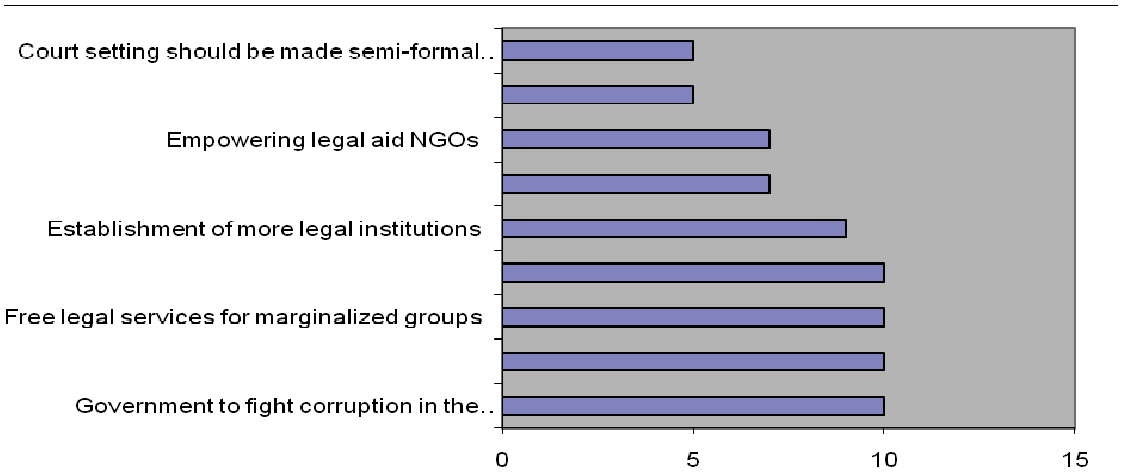
Legal Aid for the Marginalized: The example of Nigeria

The function of the commission includes assisting victims of human rights violation and seeking appropriate redress and remedies on their behalf.[52] Other functions include monitoring investigation of alleged cases of human rights violations in Nigeria, undertaking studies on human rights, organisation of workshops and seminars, cooperating with local and international organisations on human rights and maintaining a library. [53] It maintains a litigation unit under the Legal and Investigation department which is responsible for handling all matters concerning the NHRC and its clients in the courts in Nigeria. Legal aid is provided in the form of legal advice, litigation support and counselling for indigent citizens whose rights have been violated or who cannot afford legal representation in criminal cases.

The Office of the Public Defender was established under the unit of the Directorate for Citizens Rights in the Lagos State Ministry of Justice in 2000. Its main objective is to offer free legal services to poor people in Lagos State and thereby enhance their access to justice. The Lagos State House of Assembly passed the OPD Law in 2003 and it was reviewed in January 2008. The new OPD Law 2008 creates the office as an independent autonomous body. Its objectives however, remain the same. Legal aid is available to all indigents (i.e. the poor) living in Lagos State regardless of tribe, language, race, religion or gender.

'Alliances for Africa (AfA)' is an African-led international NGO with a regional office in Lagos. AfA established an office in Lagos in 1993 prior to which it had been working in the UK. AfA carries out activities under the Women's Rights, Economic & Social Rights, Peace and sustainable development and African Human Rights Institutions. AfA's main targets are women, particularly rural women. AfA also works with political parties, government departments, the National Assembly, courts, lawyers and other NGOs. AfA offers legal advice, counselling and support for women who face child custody issues, unfair widowhood practices, violence and general violation of their human rights. AfA does not conduct litigation but partners with other NGOs when required.

Figure 12: How can marginalized groups gain better access to justice



[52] Section 5(c) NHRC Act 1995
[53] Section 5 NHRC Act 1995

3.6 International Conventions/Treaties

Generally, constitutions in the study countries recognize international law. Figure 13 below shows the laws and conventions ratified in these countries. Constitutions in study countries further provide that domestic laws are interpreted and applied in line with the international human rights instruments ratified by those countries. The constitutions remain the countries' supreme law while the international instruments retain the status of proclamation. Where local laws are in conflict with the international laws, this is resolved by applying rules of interpretation . Local courts may apply international instruments in passing decisions. Regionally, the countries are signatory to the African Charter on Human and Peoples Rights, the African Charter on the Rights and Welfare of the Child and the African Charter on the Women's Rights Protocol among others.

On the other hand, though required to submit reports on the stateof implementation of international conventions, there is no practice among the study countries of doing so to the relevant bodies, , leaving this to NGOs. For instance, Ethiopia has submitted reports to the UN only for CEDAW in 1993 and 2000 and for CRC for 1995, 1998 and 2005. The study found out that state justice systems in study countries are yet to fully embrace the use of international human rights instruments, though there is some notable improvement on the same.

Generally, judicial officials agreed that human rights instruments are important in their work. In Malawi magistrates felt that they apply the IHRL and CEDAW as a reference and some specific articles are cited in the course of their judgments that sometimes mention them as the international laws that are available to which Malawi is a party to, and therefore the IHRL apply to the Malawian situations as well. Some magistrates[54] said that where they think that there is a gap in the domestic laws, they apply the IHRL, especially CEDAW, which is applied in most civil cases, particularly where marriages are not recognized. Among judicial interviewees were those who held that international conventions are mainly persuasive but do not hold much legal force. While some judges are trying to measure up to international human rights standards by citing instruments such as CEDAW in their arguments, the application of such instruments is very minimal. The reluctance can be attributed to the conservative nature of the justice system, especially in relation to application of international human rights instruments that are yet to be domesticated.

International laws ratified	Country
CEDAW, ICESCR, ICERD, Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (CAT), Convention on the Rights of the Child (CRC) African Charter on Human and People's Rights, African Charters on the Rights and Welfare of the Child, African Charter on Women's Rights Protocol	Ethiopia
CERD, UN Human Rights Committee, CAT and African Commission on Human and People's Rights	Ghana
All the above and APRM	Tanzania
All the above	Kenya
All the above	Zimbabwe
All the above	Sierra Leone
All the above and those from the OAU, AU, ECOWAS etc, Robben Islands Guidelines, and International Covenant on Civil and Political Rights (ICCPR)	Nigeria
All the above	Malawi
All the above	Zambia

[54]H/w Banda , Thyolo

Tanzania is perhaps the only study country where the judiciary has been robust in the use of international instruments. It is reported that the reluctance by the Legislature to formally adopt international human rights instruments into national laws has not deterred the Tanzanian courts from applying human rights principles in key judicial landmarks. Previously, such a trend was confined to a few liberal justices, but increasingly the practice is becoming more prevalent with the highest courts in Tanzania demonstrating a respectful level of judicial activism with regards to first generation rights but less so to matters involving the rights of women, not just as individuals but as members of a group e.g. Muslim women and inheritance rights.

A few legal officers of HR/Legal Aid organizations felt the judiciary took some international treaties such as CRC, ACHPR, UDHR, Beijing protocol, ICPD, CEDAW, ICESR, ILO with a certain amount of seriousness because elements of the treaties or whole sections had been included in local laws. The Children's Act for instance is a "copy and paste" version of the CRC. Public Interest Litigation (PIL) cases often referred to international treaties because of the nature of the cases but generally courts do not appreciate them. [55]

The Case of Zimbabwe

Zimbabwe is an extreme case of state authorities behaving as if they are not bound by international law unless the law is legislated by Parliament into the local statutes of Zimbabwe. A mere signature on any Treaty or Convention is not enough to give binding effect to that Convention or Treaty in Zimbabwe. The government refuses to be bound by international laws, Protocols, Conventions or Treaties as they do not form part of Zimbabwe's laws. Political rhetoric from the highest levels is hostile to anything that appears "foreign." This has caused difficulty for lawyers trying to argue their cases on the basis of international Treaties and Conventions or Protocols despite the fact that Zimbabwe might be party and signatory to such. The Judiciary finds it easy to dismiss such cases on the basis of Section 111B of the Constitution.

On the other hand, Chapter III of the Constitution of Zimbabwe provides for the right to life, the right to be free from slavery and forced labour and inhuman treatment. People are guaranteed freedom of expression, assembly, association and movement. Furthermore, the Declaration of Rights is addressed directly by the Supreme Court. The executive is not given much say on it since, generally, it is seen as an interested party. An interpretation at the international level is accorded to the Declaration of Rights to avoid limited local interpretations.

On Operation Murambatsvina,[56] the government of Zimbabwe was challenged to take cognizance of the provisions of various international and regional human rights declarations and instruments which it has ratified or assented to. On preparations of reports to the bodies established under the various United Nations human rights instruments to monitor State party compliance with treaty obligations, the Zimbabwe government has made sure that where necessary information is suppressed or relevant NGOs are threatened into silence.

[55] Kituo handles few PIL cases; currently they have 4 such cases.
[56] A code name for an army operation that led to the massacre of many people in Matabeleland - a strong opposition zone. The operation attracted international condemnation

3.7 Prisons

Among all the justice institutions analyzed, prisons were the most neglected across all the study countries. This is summarized as follows in the Figure 13 below:

Figure 13: Common problems identified in prisons of study countries

Problem	Country
Violation of prisoners' rights	All
Unfair long detention	All
Corruption	All
Prisons as punishment rather than corrective	All
Sexual harassment	Tanzania
Warden overload	Tanzania
Inadequate legal assistance	Ghana, Kenya
Neglect of the marginalized	Ghana
Poor living standards for wardens	Tanzania, Ghana, Nigeria and Ethiopia

3.8 Alternative Justice Institutional Mechanisms

Country studies that covered alternative justice systems for the marginalized identified traditional customary courts/systems or adaptations of the same as the ADR mechanisms that most categories of the marginalized have access to. The more formal ADR that are recognized by the courts and to which they refer cases for arbitration were largely not spheres of justice for marginalized groups identified. Generally the customary/traditional justice systems tend to operate outside of the formal law system often without mention or recognition even in administration rules and procedures. This was so in most countries under study except Uganda (Local Council Courts) and to an extent Malawi where the lowest courts at the village level are largely guided by customary law principles and practices. In both cases the courts had been "absorbed" into more formalized legal systems but were largely dormant.

For the case of Malawi the courts were disbanded (though not formally, for they remain in the statute books, they never the less are in a state of limbo for they are not operational) because of political developments. What has continued to be of greater concern is that despite the historical tenets of traditional courts, they served a bigger purpose since they made access to justice for the ordinary Malawian easier. The processes were based on traditional norms and practices. They spoke the language of the people and had the backing of the state machinery. It may appear that the absorption of traditional courts has left a yawning gap that has mostly affected the access of the marginalized to justice.

Some of the problems that customary law suffer in almost all the countries under study except to an extent the non-formalized Kenyan case study is the lack of development of uniform customary law jurisprudence partly because of lack of skills by the practitioners but also because of absence of a central coordinating committee with scholarly capacities. Most of the "judges" handle customary cases unsupervised and often do not apply "genuine" customary laws- rather it is often a crude hybrid of customary, personal biases of the "judge" and even notions of common law. The law applied is un-codified and subject to different interpretation from area to area depending on historic and socio-cultural factors. This is particularly so when applied by government appointed chiefs who may want to wield the combined traditional authority of chiefs and elders without requisite orientation but also enforce the power of modern administrative system that is crafted on common law.

Outside these groups of semi-traditional practitioners, few people with legal training and functions have academic orientation to customary law since most law schools and universities have shown scant interest in the subject. Expertise in customary law is often the preserve of linguistic and anthropological scholars who do not often have formal links with legal scholars even when operating from the same academic institutions. What this means is that the interpretation and application of customary law is erratic and largely dependant upon the whims of the applicants, leaving litigants at

their mercy. Unfortunately this is the most accessible justice mechanism for the marginalized because of its simplicity, familiarity of language and even customary foundation of the law, it is affordable and immediate. Customary "jurisprudence" is based on the principles of restorative justice and the need to maintain social harmony in the community[57] - this is what contributes to its popularity among most marginalized groups. Below is a rough comparison between principles of "customary" and statutory law that partly explains why marginalized people may prefer to use the latter dispute resolution mechanism:

Principles of Customary Justice	Principles of Statutory Law Justice
The legal subject is an integral part of the community that has ongoing reciprocal dependencies- i.e. even while being accused does not cease to exist as part of community.	The state system constitutes the legal subject as a single and separate social atom and devoid of reciprocal dependencies- even physically isolating them in custody during trial.
Aims at fostering reconciliation	Aims at judgement often in favour of one party and may not bother with aftermath of ruling
Restoration of social harmony	Adherence to the letter/spirit of the law
Application of traditional and customary law	Application of constitutional/statutory law
Forward looking towards maintenance of social harmony rather than backward- looking at the act which led to the dispute before the court	Backward looking clinically towards the act which led to the dispute before the court.
Restorative	Retributive
Inquisitorial	Adversarial

Other factors that may make alternative customary based dispute resolution more attractive to marginalized people is their relative efficiency and effectiveness. Usually lawyers or other forms of third party representation are not required and the inquiry tends to engage the parties directly. More often than not mediators strive to resolve disputes within the minimum period- usually one day or less. Being accountable to the larger "community court" of public opinion mediators often strive to maintain fairness as members of the same communities who interact with disputants often on a daily basis.

Tanzania/Zanzibar's dual system of statutory law courts operating alongside religious courts governed by the Kadhi's Court Act mimics the same arrangement. These courts have jurisdiction over matters of personal status of Muslims. Administratively each district has a Kadhi. They preside over the respective Kadhi's court normally house in district or regional courts. The Chief Kadhi presides over the Chief Kadhis Court. On the Mainland the aspect of personal law matters of a religious nature would be forwarded to the respective national religious body e.g. BAKWATA or ECLT for determination before being decided upon by the courts.

In Zimbabwe "informal justice" may increasingly refer to intervention by parties who are not necessarily in the justice system but are role models or elders in the society. It also involves members whose ulterior motives are to satisfy self interests through the use or abuse of the system or their positions of power. Since late 1990s and especially after 2002 elections, informal justice system has increasingly become the order of the day. Depending on who is in charge informal justice can be alright or very bad. The ruling group has political thugs who make decisions as they see fit. Their decisions are respected compared to what the police, judges or magistrates say as they carry the force of political/executive clout. They instil fear and break the law with impunity. They operate at party branch level or generally

[57] Scharf. W. Banda C, et al Access to Justice for the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums. DFID, 2002.

at village level. Some elements in the police and the army shield them. In urban areas it is a bit difficult for them because of population density and attitude of urbanites. Political parties at times use youth brigades. In many rural areas there are self elected leaders who police the area vigilante style and run affairs of the village. These streets bureaucrats normally have a godfather. Villagers tend to listen more to these than to people in formal justice. The poor and the vulnerable are the ones who are negatively affected most.

In Uganda Local council courts which form the back bone of the informal justice system have not been operating for the last two years, the access to justice for the poor and the marginalized has therefore been hindered.

In Malawi customary justice forums that are dispute resolution structures run by traditional leaders (village headmen, traditional authorities and chiefs) still function as the accessible dispute resolution mechanism for most poor and marginalized despite not being formally part of the state legal system.[58] 24,000 villages of Malawi are served by 217 formal court centres and 293 posts available to the state for magistrates' courts compared to (a year 2000 count) of 20,984 customary forums.[59] Customary forums end up dealing with crime because of the weaknesses and lack of institutional capacity and reach of the formal courts and preference by disputants because the traditional system will often focus on the damage done and the compensation to the victim or reconciliation and restoration of harmony while the formal system will emphasize the guilt and punishment of the offender.

On the downside, despite the system being more accessible in terms of distance, cost, language, values and outcomes in the study countries, it entails often serious human rights violations of marginalized groups such as women and children who have to suffer the disadvantage of bias caused by entrenched values that are presented as fair because they are customary. There were allegations of bribery of chiefs by well off litigants even if in a socially acceptable manner disguised as gifts. Accountability rules and processes (either to the people or state) were blurred for the chiefs. Chiefs are also deficient in formal education and merit as quite a few are so through inheritance. Generally records of cases are not kept save for some cases where there is a likelihood of appeal to higher courts.

Alternative Dispute Resolution Mechanisms: The Case of Kenya

Kenya has a number of alternatives to the formal/mainstream justice system where the marginalized largely pursue their grievances and conflicts. These are often neither well documented nor given legal weight and recognition in law or policy of Ministry of Justice and Constitutional Affairs, examples include but are not limited to the following:

- Traditional forums/systems
- Peace or reconciliation forums

  Islamic courts are part and parcel of the formal justice system in Kenya – infact they are so pursuant ot a constitutional provision – I suspect this is the case too in Zanzibar (so they are not part of the ADR system
- Interventions/forums of the local (GOK) chiefs

The interface of these different avenues can be challenging for those seeking justice, as people are forced to navigate multiple, and possibly conflicting, justice and rule systems often for different types of conflicts.

[58]Scharf. W. Banda C, et al Access to Justice for the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums. DFID, 2002 PG 39.
[59]Ibid 39

Alternative Dispute Resolution Mechanisms: The Case of Kenya

The reality is that majority of disputes in Kenyan communities do not end up in courts of law but are dealt with in other non formal ADR mechanisms such as elders councils, religious leaders mediation forums, kinship group forums, chiefs and other organs of provincial administration. It is highly likely that most of the mediators and 'judges' above are not schooled in the law, which means they follow customary/community (perceptions) of justice or their own sense of justice based on common sense.

Studies show that in spite of being rooted in tradition, contemporary informal justice systems employ statutory as well as customary or informal conflict resolution methods to resolve conflicts. A (2005 NGO) survey found community justice systems (in Turkana district) fairly constituted, and with most community courts presided over by the assistant chief. Community awareness of the existence and processes of these systems was high.[60] On the downside, cases of unfairness were reported where victims were women or the very poor. The courts even had a system for appeals though most community members interviewed believe in rulings of the court. It was well understood that unsatisfied parties can seek further recourse in the formal system, and that the formal court is not bound by the customary decision. Trust and respect was the main basis of enforcement of court rulings. In some cases use of oaths, which instil fear in parties to a case, lead to unquestioned abidance to courts' ruling. Compensation forms and levels depend generally on frequency of offence, but there are some agreed upon standard penalties for frequently occurring cases.

The type of cases preferred for adjudication in community justice systems to formal courts include cases of land disputes, marital issues, witchcraft, petty theft, family disputes, unprecedented happenings and defamation of character.[61] Although cases of killings are often taken up by the state in formal processes but in some communities, murder, rape, and robbery with violence are still addressed through these courts. In the assessment of respondents community systems are better than the formal systems overall on scores of easy accessibility, faster in dispensing justice, more affordable, friendlier, uncomplicated process, and understandable and familiar language. Fifty six per cent of respondents were satisfied with the quality of service. With regard to access, community justice systems are accessed by all groups of people in society due to proximity and affordability.

Like in other patriarchal justice systems, men accessed justice more easily than women because women and children often have no locus standi in these courts and have to be represented or accompanied by a male even where they are the complainants. In some communities women cannot attend court at all even when decisions are being made about them. Children and youth are often treated as chattels in some communities with for instance no recourse for personal justice, so that recourse for rape and other forms of sexual abuse are in the form of compensation in kind paid to the fathers, uncles or brothers. Women have almost no recourse in cases of domestic violence with all cases ruled against women, and just reprimand for men on the severity of the beating. A study done on resolution of SGBV conflicts among the Maasai communities of Laikipia and Kajiado had similar findings regarding unfair restitution of women victims of violence; there were no penalties for a husband killing his wife as she is considered as part of his property the same way say a cow is.[62] In the same study, women received no compensation directly for violations against them; rather male relations appropriated the fine as legal guardians.

[60] See Balancing the Scales: A Report on Seeking Access to Justice in Kenya. Legal Resources Foundation, Kenya, 2005. P17.
[61] Ibid. 17
[62] "Community Advocacy on Violence Against Women: Baseline Survey Reports on Violence Against Women in Taita Taveta, Laikipia and Kajiado Districts". COVAW 2006.

Alternative Dispute Resolution Mechanisms: The Case of Kenya

Service in customary based systems is at a cost of money or some other stipulated form such as goats or chicken, which must be paid before one is listened to. The amount paid depends on the type and severity of offence, significance of claim or wealth status of the complainant, and whether the accused or respondent is a frequent offender. Because men are the owners of wealth in most of these communities, women's and the children's accessibility to these systems is at the mercy of their husbands, fathers, uncles or brothers. Some of the customary norms acceptable to the community justice systems violate the human rights of victims who are mostly women and girls. Among the Turkanas, Samburu and Maasai, if a girl gets pregnant out of wedlock she is forced to abort the child by being stepped on the stomach by other women in the household. If she gives birth she is ordered to kill the child or else it is killed by older women or men or left out to be trampled by livestock. It may not matter that the same tradition allows young men to ambush and 'rape' young girls they are interested in as a sign of 'making their mark' and claiming the girl. In other cases survivors of the rape are forced to marry the rapist. A case in point is a media report that an elders' court in Kuria District had forced a young man who had assaulted a girl and broken her teeth to marry her as a punishment because the girl was said to have become ugly after the assault and people would laugh at him for marrying an ugly girl.[63] Despite the existence of formal courts customary courts still pass death sentences to murder suspects without demanding the degree of proof required in the statutory law system. Judgments are executed communally through very cruel methods that often involve torture of the suspect and other family members such as women and children.

In spite, however, of the stated violations, the customary justice system seems to have more practical relevance for possibly the majority of Kenyans in rural areas than the formal system. Apart from being accessible, the system offers compensation/restitution to the victim's family as opposed to the mainstream courts which have a punitive approach that emphasizes punishment of the individual offender. Though the quality of justice and equality of access to justice for all is still unsatisfactory by formal standards (as opposed to practice), it resolves conflicts, regulates relations and maintains order in practicing communities. The existence, activities and rulings of customary courts are not always recognized by formal courts, and its decisions do not bind formal courts so it operates almost as a parallel system often in a semi clandestine manner.

[63] Daily Nation June 2007

3.9 The situation of Lesbian, gay, bisexual, transvestite and inter-sex (LGBTI) "community."

"We are saying that we exist and that we are part of society. We want to be treated as people because we are people. We are human beings living in the same world"

Quote from Pauline Kimani [64]

"When Ugandans hear that we are advocating for gay rights they imagine that we want more or extra rights but no. We want what belongs to us which was robbed from us: equal rights which we are entitled to just like any other Ugandans"

Jacqueline of sexual minorities Uganda.

Members of the LGBTI are starting to organize as a community in most countries in Africa, including in the 11 study countries. Discrimination against LGBTI people is official. Laws inherited from colonial tradition in all the 11 countries criminalize homosexual relations. Section 162 of the Kenyan penal code for instance criminalizes consensual homosexual conduct and provides that:

> ***Any person who –***
>
> ***a) Has carnal knowledge of any person against the order of nature; or b) has carnal knowledge of an animal; or c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for 14 years, provided that, in the case of an offence under paragraph. (a) The offender shall be liable to imprisonment for 21years if (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by means of force or threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.***

Section 163 proceeds to state that;

> Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.

While similar laws have been reviewed in the "mother" (former colonial power laws) statutes, they have remained static and threats of strengthening them have been given in some countries. Generally members of the LGBTI community have and continue to exist in great secrecy and exclusivity, without a voice, highly stigmatized and in constant vulnerability to violence and other forms of violations.

In spite of a generally progressive international convention environment for protecting rights of LGBTI people, local human rights NGOs and even international organizations in Africa, have tended to keep off their issues for fear of a backlash from respective government and communities. It took the death of Alim Mongache of Cameroon after being jailed for practicing homosexuality, for the United Nations (UN) on 11-04-2006 to call upon the Cameroonian government to do away with the law that criminalizes same sex relations as according to ICCPR the existence of "sodomy laws" was a violation of right to privacy and non-discrimination.[65] South Africa had earlier

[64] Of the Gay and Lesbian Coalition of Kenya, cited in World Social Forum: Long Fight for Justice for Homosexuals Joyce Milam Inter Press Service News Agency: January 23,2007.
[65] "Is Homosexuality un-African" by Charles A. Matalhia in Sex Matters Urgent Action Fund Africa 2007

set a precedent in Africa by putting a "gay rights" clause in its post-apartheid constitution that expressly mentioned "sexual orientation" and prohibited any discrimination on that basis. South African courts have affirmed the constitution by strengthening jurisprudence on gay relations when they continue to rule against other anti same sex laws in other statues judging them both discriminatory and unconstitutional. The LGBTI community in South Africa celebrated another first (in Africa) when the judiciary made a landmark decision in Nov 2006 to allow same sex-marriage in South Africa.

In the 11 countries under study as is the case in the rest of Africa, the law and political leadership present the biggest challenge to same sex relations.[66] Uganda and Zimbabwe stand out as examples of countries where respective presidents (still in power) and high-ranking officials have openly advocated discrimination against "homosexuals." Even while conceding that homosexuality is criminalized in both countries, the respective presidents' rhetoric bordered on incitement of the general public against them thus encouraging law enforcers to abdicate their responsibility of protecting all citizens irrespective of differences.[67] Others such as retired Kenyan and Namibian presidents preferred to be in denial by popularizing the notion that homosexuality is an immoral import from the West.[68]

The leadership of African faith based organizations (led by the two main faiths of Christianity and Islam) have taken populist homophobic stands against LGBTI persons and greatly contributed to entrenching already existing homophobia and subsequent stigma "trauma of social ostracism and legalized abuse."[69] In Uganda Pastor Martin Ssempa of Makerere University Community Church is leading a grouping called "Interfaith Rainbow Coalition against Homosexuality" on the basis of it being a crime against nature. On the Muslim side is a grouping of Tabliqh Muslims who have expressed readiness to act swiftly and form a squad "that will wipe out all abnormal practices like homosexuality in our society.[70]"

Though media and CSO reports from Uganda where the religious campaign against homosexuality has been vociferous are indicative of a growing culture of systematic harassment and abuse of homo-sexual individuals. Uganda remains one of the very few African countries (outside of South Africa) where somebody has gone to court to challenge mishandling of LGBTI. Victor Mukasa, a transgender lesbian has sued the government for infringing on his right to privacy and protection against illegal police searches.[71] What has followed is indicative of the extreme marginalization that LGBTI persons face. NGOs including Uganda Human Rights Commission have been against him and even the would-be defence lawyer feared jeopardizing his career by representing him. On the positive side, the case has helped Uganda LGBTI activists to organize under their Umbrella Organization "Sexual Minorities in Uganda" (SMUG). Not only have gay African men who have sex with men been largely ignored with regard to HIV Prevention services, but avowedly homophobic organizations are receiving funding for programs that further stigmatize homosexuality."[72]

With increased advocacy and support from international agencies, Kenya now has an unregistered organization called the Gay and Lesbian Coalition of Kenya (GALCK), an umbrella body of 8 member organizations working to represent the interests of lesbians, gays, bisexuals and transsexuals in Kenya.[73] According to Pauline Kimani,[74] denial of LGBTI people basic human rights threatens the health and safety of these individuals and their families. This is why GALCK has started to create a social space for LGBTI people through programs on human rights, sexual rights and reproductive health issues. That most members have not come making it difficult to put a human face to their issues proves that even gay people suffer from homophobia and therefore the need to be sensitized to accept their orientation as normal and not feel bad about it. GALCK has started working with several "strategic partner organizations including NGO'S, GOK funded National Aids Control Council and even reaches out to religious leaders and faith based organizations.

[66]Sex Matters Urgent Action Fund Africa 2007, Page 26
[67]In 1999 Museveni ordered police to flush out detain and prosecute all homosexuals in Uganda
[68]Sam Mujoma, retired Namibia president stated that homosexuality "is a borrowed sub-culture alien to Africa and Africans." Mugabe- current president of Zimbabwe referred to them as "sexual perverts" lower than dogs and pigs and that homosexuality is an un –African disease coming from so-called developed nations and Moi declared that "Homosexuality has no place in Kenya"
[69]"Gay Rights; the View from Uganda "by Charles A Matathia, quoted from Sex Matters Urgent Action Fund Africa 2007 Page 29
[70]Sex Matters Urgent Action Fund Africa 2007 Page 32
[71]Sex Matters Urgent Action Fund Africa 2007 Page 31.
[72]Cary Alan Johnson –2007 workshop, Nairobi Kenya
[73]Pauline Kimani "The rights of sexual Minorities" Quoted from, Sex Matters Urgent Action Fund Africa 2007 Page 69
[74]A founder member and official of GALCK

3.9.1 Opportunities for protecting rights of LGBTI

Under universal human rights standards everyone is entitled to enjoy all human rights as well as to enjoy equality before the law without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law. This not withstanding it is an uphill task to advocate for protection of rights of LGBTI people even using universally acceptable standards. The beginning point may be to get a struggle going for recognition as people deserving of protection then connecting it with other struggles for justice sensitizing the public on similarities. In countries such as Kenya the official independent Kenya National Commission on Human Rights (KNCHR) could legitimately become allies of LGBTI people despite what the law says through their mandate below:

Section 17 OF KNCHR ACT (NO 9 OF 2002) requires the commission in the performance of its functions;

1) To accommodate the diversity of the Kenyan people.
2) Observe the principle of impartiality and gender equality.
3) Have regards to all applicable international human rights standards and in particular to the fact that human rights are indivisible interdependent, interrelated and of equal importance for the dignity of all human beings.

The Act empowers KNCHR to lead the process of decriminalizing LGBTI persons by working towards ensuring that:

- The law prohibits such discrimination and guarantee equal rights to all persons.
- Discrimination in workplaces, public spaces and educational institutions because of sexual orientation is criminalized

> ***Human rights are entitlement to all people by virtue of being human! They are not granted by society, governments or institutions and thus the same cannot take them away on basis of one's orientation, including sexual orientation***

- Punitive sanctions which criminalize homosexuals acts should be repealed

It is highly likely that the opportunity of the Act setting up KNHRC may apply to some among the 10 study countries and can be exploited for the benefit of LGBTI persons.

Another opportunity at advocacy presents itself in the UN treaty compliance reporting system. Zambia was the only country among the countries under study to have presented a Shadow Report on the Status of Lesbian, Gay, Bi-sexual and Transgender (LGBT) Individuals in Zambia in July 2007.[75] If relevant CSO in respective countries used this open avenue to draw attention to their situation, it may become a home grown issue worthy of government attention as opposed to the current situation where most efforts are attributable to external support or appear to be responding to demand from international gay rights movement.

As seen earlier in the report analysis above, the judiciary in all countries but one, is conservative as opposed to activist. Even within the activist (Tanzania) judiciary, it is unlikely that they will warm up to issues of LGBTI people. A legislative solution through parliaments of the 11 countries is even a more remote possibility since being part of society the legislative is likely to remain homophobic for many years to come.

[64] http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=746. Accessed on 18 December 2009

CHAPTER FOUR

Conclusions

4.1 Cross cutting conclusions

Marginalized groups have very limited access to justice generally, but particularly within the formal justice systems that in some cases are in reality on the verge of collapse. They are far from benefiting from ratification/ adoption of international human rights instruments because of weak application. Although many justice systems should aim for social justice, this should address and redress existing inequalities socially as well as within the justice system.

Alienation from the justice system and ultimately justice itself is worse for the categories of marginalized suffering (moral) stigma such as sex workers, LGBTI and even PLWHIV. Existing laws appear to make their status illegal outright to justify injustice and gross violation of rights.

4.1.1 Ethiopia

In Ethiopia, the justice system is largely inaccessible to the marginalized because of obstacles such as inadequate legal literacy of the society in general, insufficient financial and human power of justice institutions, lack of accountability by those in the justice system and inadequate free legal service providers. Commonest impediment to accessing justice is financial. Police are the most inaccessible institution and legal aid NGOs are the most accessible institutions.

4.1.2 Zimbabwe

Dominance of the Executive in relation to the Judiciary and the Legislature is the biggest problem affecting access to justice for everyone in general and marginalized people in particular, who are experiencing serious injustices while the courts, political/military elite, bureaucrats, and business class align to protect each other's interests. Courts treat the marginalized as lesser beings and deprive them of their legal rights. Besides corruption, apathy and general lack of sense of duty has afflicted the courts compromising administration and delivery of the justice system. Physical infrastructure is being left to deteriorate through poor up keep which has increased cost of accessing justice especially in the remote areas. The marginalized are given limited platform to articulate and pursue their legal rights. There is rapid deterioration in the human resources section and therefore there is a serious loss of institutional memory which does not auger well for justice. The key to improved access to justice is political stability which will bring with it improved working conditions and realistic salaries and wages.

4.1.3 Tanzania

The judiciary can make the right to access justice formally or substantially effective. But it is the duty of engaged lawyers and NGOs to stress national and international human rights provisions in courts and to form a legal culture that makes these instruments a means of reducing social inequalities and the denial of rights.[76] Government policies should be guided by a commitment to justice. There is need to legislate with due regard to the conditions of deprivation prevailing in among certain social groups or sectors by mean of special treatment.[77]

[76]Patricia Hellena Massa Arzabe, Human Rights: a new paradigm in the Poverty of Rights, pp.37-38
[77]Hector Gros Espiell, Poverty and Social Justice in Latin America: Economic and social rights and the material conditions necessary to render them ineffective in the Poverty of Rights, pp.131-133

4.1.4 Kenya

All the data collected and analyzed from both the rights holders and duty bearers in the report confirms that the marginalized have very limited access to justice generally, but particularly within the formal justice system in Kenya. This is so because of weaknesses within the Kenyan constitution, specific laws and general tradition of interpreting and applying the same in a manner that does not consider the limitations that the marginalized have. Huge legal aid voids exist because most societies have no realistic access to lawyers and government/NGO programs addressing legal needs of the marginalized. This has led to a situation where majority of disputes in Kenyan communities do not end up in courts of law but are dealt with in other non formal ADR mechanisms such as elder's councils, religious leaders mediation forums, kinship group forums, chiefs and other organs of provincial administration.

The structure of launching complaints while seeking justice is a big issue to the marginalized; the justice system often has "hostile" entry points such as police stations/officers that inhibit many from entry or even approaching the system-police are often rough, insensitive and dismissive in their handling of both complainants and suspects. Court entry points are not any clearer or welcoming for the marginalized who may not afford to access a lawyer to do the filing.

The marginalized are far from benefiting from ratification/ adoption of international human rights instruments because of weak application. The state justice system is yet to fully embrace the use of international human rights standards and generally lacks activism in regards to application of international human rights instruments.

The prisons' and correctional centres philosophy in Kenya still tilts in favour of retributive punishment as opposed to rehabilitation of prisoners. The Prisons Act is archaic and so is the structure and system in the Kenyan prisons. Torture is blatant and rampant. Though the prisons Department initiated an open door policy in 2001, it failed to anchor it in law making it at best a cosmetic reform or an act of window dressing whose impact is also compromised by shortage of facilities and resources for both staff and prisoners.

4.1.5 Nigeria

The marginalized groups have little faith in the justice system. The state of the judiciary presently is worrisome as people have lost hope in the judiciary. This is despite the claims of judicial officers that there is improvement in justice delivery leading to faster dispensation of justice and increase in the number of cases that have been concluded. Marginalized groups have the impression that the litigation process is complex, confusing and expensive, the courts are for the rich and influential who can hire lawyers or/ and bribe.

They consider judges and magistrates too high up in their offices to understand them or the problems they have. On the other hand some judicial officers (judges) believe that the current laws provide adequate protection to the marginalized, others (magistrates) disagree and would prefer a review of the present system. They argue that there are many setbacks that hinder a speedy trial and one of this is money or the lack of it. Harmonisation of salaries across all judicial workers in the various states and at the federal level is a pertinent issue that is seriously affecting access to justice.

The focus on the security, investigation and adjudication processes has led to neglect of the rehabilitation and corrective processes. Prisons are the most neglected institution in the administration of justice in Nigeria. There must be positive changes in the all other justice institutions before a marked change can occur in the prisons. Police are the most 'popular' justice institution as the majority of marginalized groups have had to deal with the police. They are the first institution people contact when disputes arise but they are seen to be corrupt, unfair, carry out extra-judicial killings and subvert the justice system.

The accumulated period of 20 years that Nigeria was under military rule contributed to the systematic breakdown of law and order within the Nigerian Police Force itself. On the other hand, the recent 10years under civilian rule has not been any better. Yet, marginalized groups still approach the police for help. It is a case of any assistance is better than no assistance at all. Government supported Legal Aid

is undermined by insufficient funding. Its current staff strength makes it extremely difficult to deal with the numerous cases it should handle.

Despite overwhelming criticism of the justice system, a large number of the marginalized still believe that litigation is the best option if it is conducted in a fair or transparent way, yet there is a gap between the will and desire of the people and the output from the justice institutions.

The Lagos State government has been one of the most progressive states in Nigeria. Far reaching reforms have led to the establishment of the LMDC, OPD, CMC and the review of the civil procedure rules in the state and the recent Administration of Justice Law 2007 which replaces the old Criminal Procedure Law. At the federal level, there is currently some effort to reform certain laws and enact laws to ensure access to marginalized groups is secured. Marginalized people need more policies and laws that will make access to justice the norm rather than the exception.

4.1.6 Rwanda

Challenges of the post-conflict conditions in Rwanda are conducive for working towards universal access to justice because government believes that, if sound progress can be made in strengthening citizens' access to justice and the justice system at large, sustainable peace and development can be achieved. The four key focus points to strengthen access to justice for marginalized people in Rwanda are:

1. Improving the legal framework in support of access to justice by the government by setting up clear and comprehensive legal framework, developing rules and law on the jurisdiction and procedures of local customary law and working towards the establishment of a rule of law society where every ones human rights are respected,
2. Increasing legal awareness and the ability of the most vulnerable and marginalized to obtain access to justice through legal awareness campaigns and the establishment of free legal aid facilities,
3. Strengthening the institutional capacities of formal and informal justice delivery systems to provide access to justice, uphold the rule of law and protect human rights, and
4. Increasing the capacity of civil society to monitor and advocate for the rights of the most vulnerable and marginalized, disseminate legal and human rights information promote rights and ensure justice sector accountability. These goals should be achieved through the development of a justice resource centre and a small grants facility that will facilitate civil society efforts dedicated to strengthening access to justice as a basic human right for all.

CHAPTER FIVE

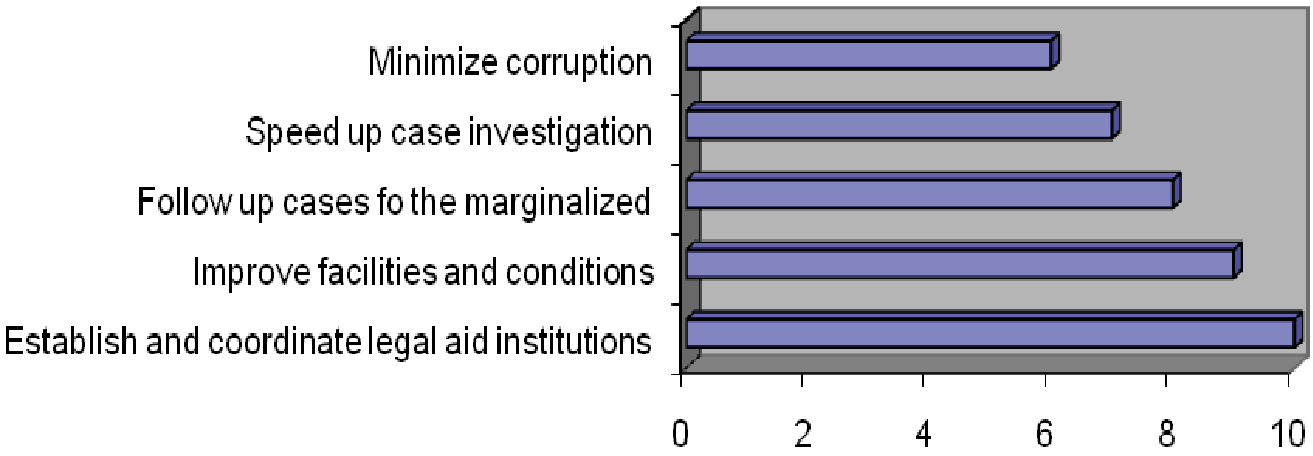
Recommendations

5.1 General recommendations

In the shorter term, there is need to seek ways of strengthening systems already in place that are accessible to the marginalized and explore the best ways of consolidating the existing interactions between the formal and informal systems with a view to making the informal systems more accountable to international human rights standards than it is at the moment.

A number of frequent 'solutions' were suggested on how to improve the performance of justice institutions and access to justice by the marginalized. These are summarized as follows in Figure X below:

Figure 15: Steps to improve performance of justice institutions



Proposed/ongoing constitution review processes in a number of countries under the study should encompass a "pro marginalized" orientation and perspective particularly since access to justice problems affect majority of people within countries under study who are placed among the poor. Constitution making should be followed up with review of legislation preferably with participation of the marginalized to make it conform to favourable constitutional provisions and guarantees to their access to justice.

Justice infrastructure and services including "entry points" such as police and provincial administration should be expanded proportionately and reformed to take cognizance of the needs and interests of marginalized groups as well as be accountable to them for facilitation of justice.

Government supported/facilitated comprehensive legal aid services should be expanded equitably to the marginalized wherever they are and government provide funding of CSO work on legal aid.

Alternative dispute resolution mechanisms and services need to be strengthened through policy/legal review that would among other things recognize services of paralegals, government officers such as in provincial administration and Children's Department, traditional/religious leaders to enable them enhance access of the marginalized to the mainstream justice system.

Conduct action research on perspectives of access to justice by the marginalized in all the target countries and use the findings to pilot/put in place effective legal aid and justice mechanisms (including ADR) appropriate to the socio-political and legal circumstances of respective countries.

5.2 Country specific recommendations

5.2.1 Ghana

There is need for the subject constituency to be substantially involved in any advocacy campaign that seeks to improve the conditions of the marginalized including their ability to access justice. For instance having albinos represent and advocate for their own concerns would greatly help them articulate on those concerns from a perspective of experience. Although the Persons with Disability Act, 2006 proposes the establishment of a Disability Council, 2 years on, this has not yet happened. If and when the Council shall be established, it should not be composed of solely able-bodied persons who have no conception about the various disabilities but rather have substantive representation of the disabled themselves. There is an urgent need for a nation-wide educational programme that specifically targets educational institutions to raise awareness on the problems facing the disabled.

There is need to test the issues of disabilities in the courts. Nevertheless, while this is important, persons with disability need to be very careful. To start any litigation, a really good issue to test would be required. Secondly, a lawyer, (preferably a disabled lawyer) who thoroughly understands the issues and is conversant with comparative jurisprudence should be engaged. Thirdly, a judge who is either himself/herself a disabled person, or thoroughly understands the issues of disability would be required.

5.2.2 Ethiopia

Public education/legal literacy particularly on human rights as well as gender issues ought to be conducted intensively and continuously. Human rights issues should be incorporated in the curriculum of educational institutions to enable the emergence of general consciousness rights and duties. Law enforcement personnel need capacity building and leadership training to ensure better services. Tracking mechanisms ought to be devised to make a follow up of execution of duties and ensure accountability at all levels. Government run legal aid, counselling as well as social support services should be set up to assist victims of violence. Legal representation and child rights program need to be launched and enhanced while the justice system should be made victim-friendly. Child as well as women rights units should be established and/or strengthened at the respective police stations. Finally, the Ethiopian Human Rights Commission needs to be strengthened.

5.2.3 Tanzania

There is need to increase rural legal literacy outreach as well as urban clinics which seek to raise awareness and enable self-help. The outreach should include

legal services, individual advocacy and public interest litigation. In addition, there is need to enhance legal protection, legal awareness, legal aid and counsel, adjudication and enforcement. Besides, there is also need to have CSOs and Parliament provide oversight to the justice delivery institutions. There is need to adopt a paralegal strategy to facilitate access to justice and to redefine the meaning of civic competence to emphasize basic knowledge of laws, rights and duties under the law. Without civic consciousness and a desire to safeguard the same, access to justice will remain an illusion kept alive only by activists and the legal profession.

5.2.4 Kenya

In Kenya, the ongoing constitution review should encompass a "pro marginalized" orientation and perspective particularly since access to justice problems affect majority of Kenyans who are placed among the poor. Constitution making should be followed up with review of legislation preferably with participation of the marginalized to make it conform to favourable constitutional provisions and guarantees to their access to justice. Justice infrastructure and services including "entry points" such as police and provincial administration should be expanded proportionately and reformed to take cognizance of the need and interests of marginalized groups as well as be accountable to them for facilitation of justice. GOK supported/facilitated comprehensive legal aid services should be expanded equitably to the marginalized wherever they are to be found. Alternative dispute resolution mechanisms and services need to be strengthened through policy/legal review that would among other things recognize services of paralegals, GOK officers such as in provincial administration and Children's Department, traditional/religious leaders to enable them enhance access of the marginalized to mainstream justice.

5.3 Recommendations specific to marginalized groups identified

5.3.1 Pastoralist communities and minority groups

Obstacles to justice in the case of indigenous people, pastoralist communities and ethnic minorities' may derive both from their minority status and from features of socio-political systems, lower literacy and awareness of the justice system, and inward looking isolationist mentality. Additional obstacles include bigotry by the more powerful groups that informs attitudes and behaviour towards them, biases within the legal framework and the justice system, persistence of a historical tradition of discriminating customary practices and susceptibility of abuse by law enforcement officials. That notwithstanding, minority/pastoralist groups are distinguished by certain strengths among them existence of traditional justice systems that they use, strong sense of ethnic identity and group cohesion. This is set against challenges of being outside the mainstream in their relative powerlessness. To address their situation, there is need for legal recognition of minority people as in need of special focus with regard to access of justice and strengthened legal frameworks to ensure the system include them, development of adequate legal aid systems with sufficient mobility and cultural diversity and participation of their own CSOs and undertake effective adjudication and due process appropriate to them that would require cross-fertilization of traditional institutions, human rights values and statutory law. In addition, the justice sector should learn to working with "insiders" (gatekeepers, persons with authority, elders, traditional chiefs), to identify major shortcomings of traditional institutions to build on them and instil human rights values. Further action research should also be carried out to strengthen linkages between informal and formal justice systems, including appeal to formal systems, and defining the mandate of informal systems for minor crimes/sentences.

5.3.2 Women Victims/Survivors of SGBV

Obstacles for women's access to justice may be found at two levels: structural and individual. Structural obstacles include the fact that the majority of the SGBV victims are poor, suffer a low status in society and lack representation and participation in decision-making, while being discriminated in access to economic resources. At an individual level often such victims are so psychologically traumatized that they feel powerless and suffer in silence thus propagating the cycle of violence. On the positive side, women victims of SGBV have demonstrated resilience and capacity to overcome oppression through peer support and formal and informal networking. Women are socially

pro-active and able to communicate and articulate their problems. Women have also demonstrated capacity to promote long-term social changes through organizing and mobilizing the group to influence future generations. To address their situation, there is need for law reform to ensure gender equity/equality and adequate representation/ court access, including through special provisions, participatory awareness, advocacy and outreach and expanded legal literacy and legal counsel for women, gender-sensitive dispute resolution mechanisms including in traditional justice structures and religious forums and capacity development of law enforcement agencies to understand and implement initiatives that strengthen women's access.

5.3.3 Persons Living with HIV/AIDs and Persons with Physical or Mental Impairment

PLWHIV face institutional and social obstacles such as social stigma, guilt, fear of repercussions of disclosure, economic hardships from managing condition and discrimination at the workplace. Persons with physical or mental impairment also suffer from social ostracism alongside structural problems such as fewer NGOs working for them in the justice field. Physically or mentally impaired people face additional obstacles such as special difficulties in accessing information and inadequacy of justice services. Both groups also suffer injustice by omission as judges, police and other justice service agents have inadequate skills to understand and handle them. Mentally impaired persons are susceptible to misuse by others in criminal activities without proper awareness. Due process guarantees in determining the existence of mental impairment are too weak to address the risk. A major strength of people from these two categories of disadvantaged population is the strong willingness and commitment on the part of their members to overcome the obstacles they face in leading normal lives, without discrimination. Comparative studies on legal frameworks incorporating HIV/AIDs and disability issues and compilation of ground-breaking jurisprudence against discrimination should be carried out. In addition, mapping NGO and government work in the justice field to identify gaps and establish a list of references, reaching out to networks of persons with HIV/AIDs and physical or mental impairment to involve them in work related to access to justice, establishing "sensitive" judicial procedures (eg fast-track in-camera proceedings) and mechanisms for effective redress, exploring the role of quasi-judicial bodies (ombudsman, national human rights commissions) in dealing with HIV/AIDs and disability-related cases and supporting sensitive prison reforms to ensure prevention of HIV/AIDs and non-discrimination of these groups should also be done.

5.3.4 Refugees

The major obstacle of refugee population access to justice in Kenya has been a weak domestic legal framework for protecting their rights- however even after the Refugee Act 2006 (that largely adopts international standards in local laws) was enacted there has been no significant change by justice gatekeepers such as police and provincial administration.[78] The strength of refugees is their resilience in the face of adversity and capacity to utilize whatever legal aid opportunities are available to improve their lot. There is need for strict observance/implementation of the Refugee Act 2006 to improve protection of refugee rights that are currently trampled upon at will by justice gatekeepers, availing of free legal aid services to all refugees including access to practical legal education by government and development partners and protection of refugees in general under the ongoing constitutional review and in particular, women, children and minority group refugees and those who suffer disabilities.

5.3.5 Sex Workers

These are victims of archaic laws that fuel discriminative practices by law enforcers namely police and city authorities often with the tacit support of the general public. Public moral indignation against sex work is largely the justification for the law enforcers turning violation of rights of sex workers into a profitable industry for themselves. Courts have become partners by omission since they appear to be enforcing sections of the law that are controversial but may not be in a position to do much in the adversarial system until someone challenges

[78] Refugee Protection in the Context of National Security- An Analysis of the Refugee Act 2006"RCK 2008 See also findings of study undertaken by Masheti Masinjila in Dadaab refugee camps published in "Specific Needs of Women and Children in Dadaab Refugee Camp" RCK. 2008.

the basis for such violations. Despite some sex workers belonging to welfare associations, opportunities for public organizing and assembly around issues of protecting their rights are thwarted by considerations of legality of action and moral uncertainty. In view of this, there is need to review and change the existing laws to adequately address issues of protection and respect for human rights of sex workers, facilitate the interpretation and implementation of the Sexual Offences Act and other laws on SGBV to ensure the protection of sex workers and survivors of sexual violence, including sex workers,[79] institute public interest litigation on rights of Sex Workers and avail legal aid to sex workers and in particular representation during the hearing of cases against sex workers. In addition, there is need to support to programs that provide sex workers with information about their human rights and that also sensitize society on the same, train law enforcement officials on legal and human rights standards with regards to sex work and on issues relating to the experience of people involved in sex work and crimes that may potentially be committed against them as well as institute mechanisms that allow sex workers to find redress for human rights violations and hold police officers accountable for their actions and pressurize local governments to repeal existing by-laws that undermine protection and respect for human rights of sex workers and other marginalized groups. Human and women rights organizations such as the Kenya National Commission on Human Rights (KNCHR), Kenya Human Rights Commission (KHRC) and FIDA Kenya should take on the agenda of marginalized populations including sex workers and advocate for awareness on and protection of their rights. There is need also for a human rights audit of sex work in study countries with a focus on protecting the human rights of sex workers.

5.3.6 Prisoners

Prisons' main recommendation is that study countries adopt both restorative and retributive approaches to justice. More specifically however, the Prisons Act needs urgent review to conform to international standards.[80] Rights of persons with disabilities have to be protected and separate facilities provided to cater for their special needs. As a result of their trials and appeals taking too long without legal counsel/advice, there is need to develop paralegal programmes both in prisons and probation. Congestion in prison can be regarded as degrading treatment contrary to the guidance given in the optional protocol of the UN Convention against torture ref E/CN4/2002/WG11/CRP-1, 17 Jan 2007). Thus overcrowding should be addressed as a matter of priority to make rehabilitation of prisoners possible.

There is need to enhance the role of monitoring bodies such as the visiting justices and Board of Review of prisoners' sentences to ensure that all procedures relating to early release are dully followed and substantially reduce the minimum periods of imprisonment which prisoners must serve before they are considered for a form of formal release.[81] This should also facilitate prisoners to present their cases for review. The courts should also be committed towards the process of providing prisons with proceedings and judgments within 14 days from the date of sentences. This will reduce the remand population and hasten the appeal process. Prisoners should be produced in court for trials as required by the law. There is also the need to establish disciplinary procedures deterring the use of torture and other illegal means of punishment. Courts ought to more robustly utilize the enabling legal provisions for non custodial sentencing. There is need to embrace a culture of internal and external accountability through proper documentation and reporting. Annual reports need to be prepared and shared with various stakeholders. Due to lack of oversight over the prisons department, an oversight standing committee to oversee the full and orderly implement of the recounts of prison reform committees (referred to elsewhere in this report). Such committee should evaluate the progress made (if any) in the implementation of all the recommendations made in both reports and other preceding and succeeding documents. Prisoners' earnings should be guaranteed and protected in law. The same should be reviewed

[79] The FIDA reports recommends "Informing all prosecutors and judges that all individuals affected by sexual violence and other crimes are to be treated equally and with respect, and not disregarded or abused because of evidence or assumptions of their involvement in sex work or any other sexual activity; training and monitoring prosecutors to ensure that they are conforming to the law and not disregarding victims of crime who have (or are presumed to have) exchanged sex for money; and thoroughly investigating allegations of criminal conduct by police officers, including seeking convictions where appropriate."

[80] See proposed changes in Appendix.....

[81] Ibid.

since the current rates do not reflect correct wage levels and economic realities. Ideally the earnings were meant to assist the inmate to start a new life after completing his/her sentence by buying tools and materials to start a small business and thus help his/her integration in society and avoid their vulnerability to repeat crime.

Police should be trained and their conditions of service improved, more police stations should be built and new personnel properly screened to ensure discipline in the police force. They should be adequately equipped and their work monitored and corruption issues addressed. Court Prosecutors should be provided with better conditions of service, trained and better supervised. They should be separated from the police to work independently without the influence of money or power and given requisite logistical support to enable them bring witnesses to court and conduct speedy trials. More magistrates/Judges should be recruited/ trained and more courts constructed and their conditions of service improved, facilitated to work and monitored. More Prisons should be constructed to prevent congestion and prison officers trained on human rights and how to deal with prisoners and their conditions of service improved. More legal aid institutions should be established in the country and facilitated to serve more people.

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