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Expanding
Human Rights
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Litigation

Public Interest Litigation: A Critical Ingredient for Effective Human Rights Activism in Africa

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For many years, many lawyers have spent their lives working with and for many marginalized persons and communities in Africa; trying to assist them navigate the legal labyrinth that represents law in many African countries. Daily, the disadvantaged are confronted with the law; that is whether they like it or not. They do not ask to be illegally arrested by the police; they do not ask to be illegally dismissed from work; they do not ask for rigid and bureaucratic processes of securing a passport or a divorce; and they do not determine how the pension laws should operate – but all these represent their daily encounters with the law.

Having inherited bureaucratic red tape from their colonial masters, many African states have in fact worsened these bureaucracies. Yet, as life must roll within the bureaucratic state, many persons are denied rights, entitlements and services by the minute.

Human rights lawyers spend most of their time trying to study and understand the laws that regulate “the system” and then invoke them in the service of those who are effectively screwed by “the system”.

There are thousands of human rights initiatives on the continent, many of them legal services initiatives. In this paper, a summary of an ongoing investigation into legal aid and Public Interest Litigation (PIL) in Africa, I outline some fundamental fault lines on which human rights lawyers in Africa base their work and the problems they thereby run into. I also propose some initial rethinking of the assumptions that characterize their work and point to ways in which PIL could be useful in refining their strategies and scaling up their efforts.

Faultlines in the conceptualisation of legal aid in Africa

The percentage of people in need of legal services in Africa

The percentage of the population in need of legal aid in Africa makes legal aid very different from traditional legal aid in some other parts of the world. In the Euro-American model of legal aid, a sizeable percentage of citizens can afford legal services. The state (through the public defender), pro bono legal services by private lawyers, law school legal aid clinics and various non-governmental organizations provide legal aid to the smaller percentage of indigent clients who cannot avail themselves of such services. In Africa, with an estimated 40-50% of residents in most countries classified in social and economic terms as poor, and potentially in need of legal aid, the cost necessary to provide such an assistance becomes too exorbitant for either the public, private or not-for-profit sector. In such situations, a completely different approach to the provisioning of legal aid is needed. A case-by-case, person-by-person, provisioning of legal aid will only touch the tip of the iceberg. Only PIL, intelligently and strategically tailored to the legal needs of the teeming and marginalized societies in Africa, can make the gains urgently needed in the delivery of justice to the people of Africa.

Geographic concentration

Flowing from the above, in many Euro-American settings, there are pockets of the poor in every state or county that needs legal aid. In Africa, however, there are whole regions in which virtually everyone qualifies for legal aid. In many regions in Africa, 9 out of 10 persons are classified as poor.

In such situations, it is more strategic to provide legal services to the community as a whole and not to individuals, else very little will be achieved. In what is now called community lawyering,¹ legal aid lawyers use a combination of strategies to service the legal needs of whole regions and districts where virtually everyone needs legal aid. These strategies include the following:

- a. Mass legal literacy campaigns in the communities so that the citizens themselves are able to deal with their legal problems by challenging illegal arrests, distributing inheritance property according to law, insisting on rights and entitlements from others, including government etc.;
- b. Human rights, dispute resolution and legal training for community leaders so that they can provide guidance and backstopping to the rest of the community on legal issues and also run (with the assist-

- ance of lawyers) community dispute resolution centres where community members resolve their disputes for free;
- c. Community mobilization activities in order to change systemic problems related to mass police arrests, lack of access to basic amenities, healthcare reform, etc., so that these are dealt with at a broader level for the benefit of all instead of on a case by case basis; and
- d. Impact litigation, where particular cases are designed and litigated in court or before other adjudicatory bodies so as to have ripple effects on all persons in the community and sometimes beyond.

It is clear that the latter moves of community lawyers smack strongly of Public Interest Law.

The competency of the regulatory state, its social services and the need for legal aid

As we adopt the institutional forms of the regulatory state in Africa, our people's lives, livelihoods, rights, and entitlements are intrinsically tied to the efficiency and effectiveness of the regulatory state. The competency of the regulatory state (the administration, the bureaucracy and social services) is directly proportional to the need for legal aid. This is because failures in "the system" are ultimately remediable through enforcement using legal and quasi-legal techniques and moves. Where the state functions for the social good, at least most of the time, the need for legal aid is minimal. This is because private and public rules of engagement are set, clear, and predictable, and methods of enforcement relatively cheap and quick.

In Africa, where the capacity of many states have been weakened by decades of Structural Adjustment involving the rolling back of the state and getting weaker still with the persistence of various variants of Structural Adjustment, various social services and entitlements are underprovided and under-enforced. In situations such as this there is a huge need for legal aid to enforce, where necessary, the entitlements of the citizenry.

The value of PIL in this regard is that it can help secure, through class actions, benefits for a whole range of citizens who are denied social services and entitlements such as health, education, and pensions.

Legal, institutional and personnel pluralism in the systems of Africa

Another distinguishing mark of legal aid in Africa is that the African legal system is pluralistic. There is a combination of the inherited Anglo-American or French or Portuguese legal systems, the customary law system and in some cases the Islamic law tradition.

These different systems of law also implicate different institutions in the justice arena - Houses of Chiefs that have adjudicatory roles, Custom-

ary Arbitration Tribunals whose judgments are recognized and enforced by the courts etc. They also involve different personnel – Chiefs and Imams who dispense justice legally and illegally.

Thus, the common conception of court or tribunal-centred legal aid with the support of lawyers and judges becomes rather problematic in this setting. Legal aid lawyers in Africa need to start thinking of innovative ways to use the multiple systems of law, legal institutions and personnel in the service of their clients.

Public Interest Litigation (PIL) that is aimed at securing, refining and bolstering up some of the more progressive institutions and personnel who are more effective in the delivery of everyday justice to the people would be a good place to start.

Formalism and limited innovation in solving Africa's legal aid problems

As noted earlier, many legal aid projects in Africa take their colour from Euro-centric conceptions and are either first-generation transplants or second-generation transplants from Eastern Europe or South Africa – which, as we often whisper, is really 'not' part of Africa.

Where we inherit the system of legal aid together with all the other unnecessary, even debilitating trappings of legal aid, there is a problem. There are so many formalistic and ceremonial aspects of the court system that do not need to come with the package. When they do, they stifle innovation in legal aid provisioning in Africa because of the very different character of the legal aid problems on the continent.

To cite one example, the problems of congested prisons due to delays in bringing awaiting trial detainees to court can be obviated by reducing the ceremonial aspects of our inherited judicial system and moving court to prisons and detention centres. This has been tried in Malawi with successes and the Ghanaian courts are currently rolling out such a pilot scheme. One huge contribution that PIL can make is to support such innovations and where necessary litigate their legality and develop acceptable jurisprudence to support their operations.

Access to justice in Africa: Where should we be going?

Acknowledge the fundamental misconception and misconstruction of legal aid problem and remedy in Africa

A considerable percentage of the African problem is not just in wrong diagnoses of the problem, the world is slowly getting this right. It is also not in mechanisms and initiatives for finding solutions to the problem – there are in fact too many of these. The problem today lies in the speed with which we move from diagnoses to remedy, not least in the case of

the problem of legal services and legal aid. Wrong remedies are as bad as wrong diagnoses of problematic social phenomenon.

We have already noted the points at which we diagnosed the disease wrongly, and made a quick jump into prescribing remedies. We have also seen that the remedies have not really worked. The first thing we can do is to acknowledge the grave mistakes we have made. This will allow for the necessary attitudinal change and for thinking out of the box for innovative solutions to the problem of legal services.

Clarify what constitutes legal aid

Another fundamental thing to do is to clarify what legal services and legal aid mean in the African setting. Because the range of avenues for accessing justice is far broader than courts, judges and lawyers, legal aid is far broader than traditional assistance in a judicial or quasi-judicial setting.

Once we clarify that the majority of citizens access justice in "extra-judicial", but legal, fora such as in the chief's palace, then our efforts at improving access to justice and legal aid will go beyond the provision of human and material resources to the Magistrate's Courts and the legal aid board as the panacea for our access to justice. In Africa, access to justice involves many other processes other than litigation and many other actors other than judges and lawyers. And this is true no matter how much lawyers will hate us for destroying their business by importing justice personnel who do not wear bibs, wigs and gowns in the smouldering tropical heat.

Identify all practitioners of legal aid

Once we clarify how broad the access to justice (or injustice) terrain is in the African setting, the next logical thing is to identify the correspondingly broad range of persons and institutions that are in the business of providing access to justice in the region.

The list currently includes the following:

- a. Lawyers and judges
- b. Paralegals
- c. Chiefs
- d. Community and opinion leaders
- e. Religious leaders
- f. Civil society organizations
- g. Non governmental organizations
- h. Community based organizations
- i. Faith based organizations
- j. Individuals through self-help

It is not possible to list all the institutions to which Africans go to access justice. Suffice is to say that the list is long indeed. What interventions are possible in such a setting? Researching the access to justice avenues in each setting and the levels of utilization by the citizenry will be useful. PIL can then be used to sanitize the operations of these avenues so that they administer real justice to the citizenry. PIL can also be used to bolster up the more promising avenues so that they can scale up their operations qualitatively and quantitatively.

Improve administrative services and reducing need for legal aid

Another contribution that PIL can make is to litigate to improve the processes for accessing public and social services. Once such processes are effectively streamlined at the macro level, it reduces the number of strictures citizenry may encounter in accessing these services and therefore the need for legal aid to enforce access.

The organization, management and delivery of public and social services can be debilitatingly inefficient in Africa. Mounting PIL challenges to the inefficiencies in the public and social service sectors can create important dividends to the development process in African countries.

Legal reform through PIL

African countries have a broad legalistic governance infrastructure inherited from colonialism. The daily social interactions between the citizenry and the government and between citizens are mediated by a body of laws and regulations dating in some cases to the period of colonialism. Most of these laws once passed remain unchanged. PIL has two opportunities in this regard. First, PIL can litigate for the abrogation or reform of the dysfunctional laws and regulations that inhibit liberties and social progress. Secondly, PIL can pre-empt issues in the daily process of developing policies through law and ensuring that the laws meet basic functional, efficient, human rights and public interest criteria.

Conclusion

Africans need to start thinking of constructing societies where the law is not a constraint that disempowers people but rather an opportunity for realizing personal and societal dreams and for making social progress. PIL has a unique and critical role to play in this project.

Note

1. See how the Legal Resources Centre, Ghana uses Community Lawyering as a strategy to service the legal needs of poor communities in Ghana at www.lrcghana.org.

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