

# **Challenges of Strengthening Access to Justice in Tanzania: A Governance Point of View by Adv.Asina Omari.**

## **Introduction**

Access to justice is simply the ability to seek and obtain a remedy through a formal or informal justice system and or institution.<sup>1</sup> This is a right; it emanates from human rights standards that require for there to be equality for all before the law, the right to be treated fairly by any tribunal among others.<sup>2</sup> The constitution of Tanzania guarantees equality before the law and equal protection before the law as provided for under Article 13(1). The right of the people of Tanzania to access justice is faced with myriad challenges. These challenges are either systemic and in some cases they are structural. Some of the challenges emanate from those who are supposed or are seeking to access justice, others from those who are dispensing or are supposed to dispense justice and allied services.

## **Challenges in strengthening access to justice in Tanzania**

There are a number of challenges that are attributed to those who seek to access justice. Lack of knowledge of the legal landscape and justice system in general is a problem that many of the users and would be users face. In theory the role of dispensing justice is that of the judiciary, this is one of the three pillars of a democratic state. The judiciary is charged with the responsibility of interpreting laws and adjudicate over disputes.<sup>3</sup> This arm of the state that is supposed to dispense justice is arranged in hierarchy from the primary court to the court of appeal.<sup>4</sup> The lowest court of the land is the Primary Court<sup>5</sup> is where in most cases a “normal *mwananchi*” would most likely seek justice (it is also important to consider that a lot of people use traditional and informal means such as their clan meetings, ten cell leaders, village chairman etc to seek justice), over small matters. The procedures in the Primary Court are supposed to be simple and to a minimum

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<sup>1</sup> Ministry Constitutional and Legal Affairs (MoCLA) National Human Rights Action Plan 2013-2017 p18

<sup>2</sup> *ibid* see also the Universal Declaration of Human Rights Articles 6,8,9,10 and 11

<sup>3</sup> Issa Shivji et al Constitutional and Legal System of Tanzania:A Civics Source Book Mkuki na Nyota p221

<sup>4</sup> There are ward tribunals that are established by the Ward Tribunals Act, these are not part of the formal judicial system but exist at ward level and are manned by lay people.

<sup>5</sup> Established by the Magistrates Courts Act RE 2002

and the parties represent themselves.<sup>6</sup> The law provides that there should be a Primary Court in every district as a measure to bring the courts closer to the people. In reality a district is too large an area to be serviced by a single court so there are several courts within the district, however there are still serious consideration of the fact that majority of the population still has to travel long distances to reach the courts. Although the Primary Court may lack the technicalities in procedure and those who man the courts but this does not justify the lack of representation at this level, since Primary Courts have the potential to deprive a person of their liberty.<sup>7</sup> Representation need not be advocates who are not only few but also expensive.<sup>8</sup> There is growing paralegalism which if properly nurtured and regulated could prove to be valuable in ensuring that even in the lower courts and in remote areas where advocates may not be available people receive some form of legal representation.<sup>9</sup>

Which brings us to the issue of inadequate legal representation. If access to justice includes not only the right to seek and obtain remedy but also to have equal protection under the law; then it is obvious that the right to legal representation is an essential component of any effort to strengthen access to justice. The situation in Tanzania leaves a lot to be desired, currently the Roll of Advocates stands at 4345 advocates (dead and alive as well as those who are not in active practice) that is supposed to serve the whole lot of the 45 million plus Tanzanians.<sup>10</sup> To make matters worse most of the advocates work in urban centres, while a substantial number does not even engage in active practice. While there is need to increase the number of advocates in Tanzania, there is also need to consider the realization that quantity does not always translate to quality, neither does it translate to availability of services on the ground (especially in rural areas).<sup>11</sup> There's also the issue of most people who need legal services not being able to afford legal fees that are on the high side, coupled with the fact that majority of the legal aid providers

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<sup>6</sup> The law does not allow advocates to appear in the Primary Court and until recently primary courts were manned by lay magistrates (without law degrees), now Primary Courts are manned by law degree holders who will soon replace the lay magistrates.

<sup>7</sup> Shivji et al *Op.Cit* 224

<sup>8</sup> Ibid

<sup>9</sup> Currently there is no policy that governs either legal aid or paralegalism in Tanzania however, the government is in the process of enacting a Legal Aid bill which will among other things provide for the regulation of legal aid and paralegal activities in Tanzania.

<sup>10</sup> The Roll was obtained from the Tanganyika Law Society (the Bar Association of Tanzania Mainland) in August 2014.

<sup>11</sup> The increase in numbers of advocates is attributed to the newly established Law School of Tanzania, which has the mandate to train candidates for their Post Graduate Diploma in Practical Legal Training before they are enrolled as advocates.

are in big cities and town centres. This places majority of the citizens at a disadvantage in terms of getting legal services, especially those who live in the periphery and might only have paralegals to rely upon.<sup>12</sup>

For there to be access to justice there is need for an independent judiciary. It is trite knowledge that for a judiciary to be able to dispense justice, be trusted and accepted by the people (have legitimacy) it must be able to do its work with a high degree of impartiality.<sup>13</sup> This will and can only be possible if the judiciary is independent. Although the article 107A and 107B of the Constitution of the URT provides for the independence of the judiciary in Tanzania, there are still challenges in so far as the extent to which the judiciary is really independent. The judiciary in Tanzania is faced with various challenges among others there is resources to enable it to perform its functions.<sup>14</sup> In 2012, the Chief Justice of Tanzania told the annual meeting of the Tanganyika Law Society that there were only 1,105 primary courts in the country, of those only 628 had magistrates that were permanently stationed.<sup>15</sup> Reform in the judiciary has been a key part of the Legal Sector Reform Programme (LSRP) which is being wound up.<sup>16</sup> During the lifetime of the LSRP there was an increase of High Court Registries, appointment of judges both of the High Court and justices of the Court of appeal, construction of and rehabilitation of court houses among many other things.<sup>17</sup> One of the ways to foster access to justice at a greater level is by ensuring that there is the necessary infrastructure and human resources to dispense justice in all areas of the country this requires prioritization of budgetary allocations as well as monitoring and evaluation.

Access to justice is not only affected by what goes on in the judiciary, it is also affected by what goes on in the other parts of the system. In criminal justice for instance the work of the police, the prosecutors and correction institutions greatly informs the work of the judiciary. These other organs and institutions are also affected by the lack of resources that the judiciary also finds it self in and at times even worse. There is a problem with coordination among the law

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<sup>12</sup> Legal Aid Committee University of Dar es Salaam, Research on University Based Legal Aid Clinics, 2014 Forthcoming

<sup>13</sup> Shivji et al Op.Cit 44

<sup>14</sup> MoCLA Op.Cit p19

<sup>15</sup> Ibid

<sup>16</sup> The LSRP was built around five basic principles of speedy dispensation of justice, affordability and access to justice, integrity and professionalism, and independence of the judiciary and a legal framework and jurisprudence of high standards.

<sup>17</sup> LSRP Implementation Guide, See also MoCLA ibid

enforcement agencies, the police, the directorate of public prosecutions, the courts, the prisons and the social welfare department. All these are involved in the dispensation of criminal justice at one level or another of the due process of law.<sup>18</sup> This lack of effective coordination, coupled with problems within each organ or institutions makes it even more difficult for an ordinary citizen to access justice. A good example is when a person who has been sentenced to a prison term and is seeking to appeal and the prison authorities are unable to make follow up on behalf of the prisoner due to lack of fuel or transport while the court may also delay in the issuing court records due to lack of equipment and or poor record keeping.<sup>19</sup>

The justice system needs not only to be efficient but also effective, the old adage is justice must not only be done it must be seen to be done. This means the populace needs to believe in the justice sector for them to see justice is done. A persistent problem in this country has been mob justice that in many cases people justify by blaming justice sector institutions for failure to do their work. While in some cases this might be justified, in others it is simply a lack of knowledge of the laws and procedures, many people do not know the procedures of obtaining police bail or even the possibility of the obtaining the same, thus, when an alleged criminal is released by the police on bail there is usually blame on corruption on part of the police which in turn leads the people to think it is better to deal with criminals in their own way since criminals will be released anyhow.<sup>20</sup> This is also a problem that leads to overcrowding of prisons since most people (including the officials) see incarceration as the only punishment thus limiting the use of community service and parole.

Access to justice is an integral part of any democratic society as is the corner stone of the rule of law and good governance and human rights. Governance or good governance is an important element in giving people confidence in their country and government, facilitating for them the public and private space to thrive, grow, innovate and most of all hope in a better future.<sup>21</sup> In the first instance governance is about establishing policies, laws and institutional arrangements that allow people to thrive and in safely, fairly and justly getting their livelihoods. It must be about

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<sup>18</sup> MoCLA Op.Cit p20

<sup>19</sup> Ibid

<sup>20</sup> See various reports of the LHRC Human Rights Report for the effects of mob justice

<sup>21</sup> Murtaza Jaffer Strengthening Administration of Justice and Upholding the Rule of Law in East Africa: Challenges and Opportunities, A paper presented at an ICTR symposium.

justice at the economic level.<sup>22</sup> This is reflected in cluster three of the National Strategy for Growth and Reduction Poverty (NSRGP or as commonly known as MKUKUTA) which is about Governance and accountability. The goals among others in this cluster are to ensure that the rights of the poor and vulnerable groups are protected and promoted in the justice system and to effective public service framework in place to provide foundation for service delivery improvements and poverty reduction.<sup>23</sup> This basically means access to justice also needs to be looked from the point of view of governance and the various challenges it poses. However, the challenges also need to be looked at from the point of view of seeking holistic solutions.

### **Conclusion**

Access to justice should not be a mantra that is chanted by those in the legal sector or in civil society to justify their various projects. Access to justice is a right that needs to be realized by all for Tanzania to even consider itself a democratic society. While challenges are many there are also various solutions that can ensure that there is an increase in access. The constitution has the basic requirements of what this right should entail, there are however lacunas in various places like the guarantee of the right to legal representation including legal aid and the rights of people who are in conflict with the law and those that are incarcerated. The constitutional making process that is underway should also be used as a process to foster the right of access to justice both from an institutional/structural level as well as a practical level.

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<sup>22</sup> Ibid

<sup>23</sup> Goal 3 and 4 of the NSGRP