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**COMMUNITY BUILDING AND ACCESS TO JUSTICE IN THE CONTEXT
OF HUMAN RIGHTS PROTECTION, INDEPENDENCE OF THE JUDICIARY,
THE RULE OF LAW AND DEMOCRATIC GOVERNANCE IN SADC**

CONTEXT PRESENTATION ON ACCESS TO JUSTICE

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CONTEXT PRESENTATION ON ACCESS TO JUSTICE

In the context of a renewed commitment to democratic principles, good governance and the rule of law on our continent and particularly at the level of SADC countries, I believe the debate on access to justice is giving us an opportunity to address broad issues at a new level. As a matter of fact, there is a new opening which arises from the way in which African leaders in the NEPAD have prioritized their commitment to strengthening the administration of justice and rule of law, and adhering to international human rights norms and standards. The proposed peer review mechanism which is already at work and will monitor progress made by African countries on obligation arising both from international, regional and national instruments. Today, we are addressing issues of justice and access to justice as a fundamental human right, with an increased sense of ownership and responsibility. This principle has been fully endorsed by African leaders, as it appears in the preamble of the Constitutive Act of the African union (AU) in which African heads of states commit to “to promote and protect human and peoples rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of Law...in accordance with the African Charter on Human and Peoples Rights and other relevant instrument such as the UN Charter and the Universal Declaration on Human Rights”

Although we all admit that human rights principles are universal, indivisible and interdependent, it is also admitted that reference should be made to African regional instruments which better incorporate socio-cultural values. As a matter of fact, every people with its own historical personality and his cultural ethos, is the primary source and agent for its own development, being development understood as genuine only if endogenous and not germinated from seeds adverse to the conditions of the soil.

I- Fundamental Principles on Access to Justice.

Access to Justice is a concept related to fundamental principles of law and legal systems of many governments, an ideal embodied in the principles of equality and non-discrimination that founds the very concept of Law. Efforts to facilitate access to justice

embody the manner, mechanisms, and methods by which individuals are able to get legal information, legal services, and resolve disputes.

Access to Justice is aimed at the effective delivery of high quality legal services to all, especially those with low-incomes, the vulnerable and marginalised, in a holistic and integrated manner, and as a mechanism to highlight the importance legal awareness contributes in improving the delivery and accessibility to Justice.

The principles on Access to Justice are focused on economic, social and political justice with emphasis on distributive justice. These principles are assessed in their capacity to be translated through simplified and streamlined systems that are designed for all citizens.

Generally speaking, states are expected to take steps towards the provision of efficient justice services and mechanisms, as provided for under the following national and international obligations, by:

- Providing legal information for judges, lawyers, prosecutors and public defenders;
- Increasing the availability of legal information to the public;
- Promoting alternative dispute resolution techniques and reforming informal mechanisms;
- Strengthening the active participation of civil society in justice sector reform;
- Strengthening national public defence systems and improving legal aid for the poor;
- Promoting domestication of international human rights instruments;
- Integrating human rights with development by reducing institutional and cultural barriers;

The Protocol to the African Charter on Human and Peoples Rights Preamble mentions the awareness and commitment of States to the need for justice.

Most International human rights instruments guarantee the right and access to Justice. All the seven core UN Conventions have made provisions for states to ensure that mechanisms are put in place to protect individuals or groups who claim rights recognised in these convention and do justice when these specific rights have been

violated. International human rights law unequivocally insists on access to justice, monitor conditions for proper administration of international justice.

The international treaties and procedures, quasi-judicial and strictly judicial procedures can be set in motion through individual, groups and even states complaints. The aim here is to not only remedy possible human rights violations for a particular individual, but where need arise, to induce states to modify their law so as to bring it into conformity with their international legal obligations. As stressed yesterday, regional and international legal procedures and cases have contributed to positively influence domestic laws in many countries. However, it should be reiterated that human rights can only be effectively protected at domestic level by national courts, magistrates and lawyers and that international procedures provide remedies of last resort when internal mechanisms have failed.

In addition to international treaty-based mechanisms, the United Nations has established special procedures which deal with particularly serious human rights violations. These procedures which are aimed at creating cooperation with the governments concerned in order to redress the violations consist of thematic and country procedures involving working groups and special rapporteurs, special representatives and independent experts. They also include the 1503 complaints procedure, which seeks to identify situations of grave human rights violation affecting large numbers of people.

- Domestication of International Law in relationship to Access to justice in national systems.

Much has already been said about the need for domestication of international instruments. One may just add that all African countries as part of United Nations are encouraged to put in place mechanisms that will facilitate access to international and regional instruments by national legislative and judiciaries. Addressing this first level of dualism would greatly help in revising our national legal frameworks which still

contains provisions that contradicts commitments and principles enshrined in most of our constitutions and most treaties.

It is important to note that since universal and regional laws are not static and their adaptation is often effected by means of interpretation, judges and other law practitioners should keep themselves continuously informed about these legal developments.

Under National Framework, some adjustments have taken place:

*The declaration in September 1995 by the South African Constitutional Court that certain sections of the Magistrates Court Act are invalid (these sections had been the bases of poor people e.g. in Port Elizabeth being incarcerated for not being able to pay their debt, not out of negligence but because of poverty).

The South Africa Constitution and its Bill of Rights remain references not only within the SADC region, but beyond

II- Challenges in creating a conducive environment for access to Justice.

How much has been done regarding the implementation of these principles at national and regional level?

As far as our countries are concerned, African legal and judiciary systems are still grappling with serious problems of accessibility and effectiveness, some of which being closely related to ethical, socio-economic and cultural factors encountered in the context of their implementation.

The current challenges faced by most of African legal systems that renders access to justice pervasive for the majority is the structural dualism created by the juxtaposition of the formal legal systems inherited from colonial powers on the non formal indigenous systems labelled as traditional or customary law. Although, in many African countries, the majority of civil cases and even common offences (more than 80% in the case of Botswana) are dealt with by the so called traditional courts or informal

structures with no clear definition of their competence or system of reference in terms of definition of rules and principles. Given the inter relatedness of Justice, human rights protection and human development, one cannot ignore the negative impact of these multiple and parallel legal and judicial arrangements that put additional constraints in terms of lack of a coherent vision and comprehensive approach in addressing the challenges, insufficient resources and qualified staff, inadequate infrastructures, training needs, etc...

As a result of the above problems encountered are multiple:

Problems Encountered

1) Limitations under "modern" systems inherited from colonial powers.

*Modern systems of law is financially based, utilising legal counsels which many local people may not be able to afford.

* The questioning of cultural relativism regarding human rights and modern justice which is propounded as an alien or western construct against African values needs attention. The impact of stereotypes presenting human rights as an alien concept has led to a general reluctance to discuss human rights as a component of access to justice both at community, local, national and local levels.

- Dichotomy between legal /official systems and traditional customary systems.
- Traditional justice systems have been negatively influenced by the political and ideological evolution of African countries during oppression and colonization. This has lead to patriarchal dominated systems both under traditional and formal justice systems (discriminatory laws and practices against women, unfair two speeds level of justice, supremacy of written codes despite their inadequacies to development challenges, etc.), all this impending on the principle of equal access to Justice and “justice for all”.

- Insufficient knowledge of human rights instruments by the “duty bearers” and the “claim holders”, which could be an impediment for their use and reference to those instruments.
- Economic imbalances between men and women and new role of men as the source of livelihood and insufficient empowerment of women. Gender discriminatory laws as for example the Botswana case, *Dow Unity Vs. The Attorney General*, calling to question the Citizenship Act of Botswana on the bases of internally recognised human rights principles are praiseworthy.

** Inefficient Structures from legal and socio-economic and organisational perspectives: Most systems favour the privileged classes, influence and corruption hold sway over the rule of law.

- Too much bureaucratic "bottlenecks" that breed and foster selectivity, discrimination, exclusion and corruption.
- Access to financial resources/poverty as a factor hindering access to justice.
- Institutional skills, limited knowledge and legal illiteracy, the ability to understand and use the legal system and even the complexity of legal language which put additional barriers on those who are already excluded by the fact that they do not read write or master official languages

Despite the commitment to ensure services delivery in the area of justice, African countries are still not putting enough resources where needed, supposedly because of other constraints such as the debt

Burden, the HIV/AIDS pandemic, conflict and instability, poor governance, etc.

2) Issues of protection of specific groups:

In relation to women, despite the recognized principles of equal access to justice and due process of law under international law, the following questions still require precise answers:

- Are there legal provisions preventing these groups from direct and autonomous access to courts?
- When victims of abuse or sexual offences, are there appropriate measures that create a conducive and supportive conditions to come forward and access justice in a manner that preserve their dignity?
- Are measures taken to ensure equal access to legal mechanisms, in particular in family matters?

Regarding other vulnerable groups such as people living with HIV and AIDS, the disabled, refugees and immigrants, access to justice is also complicated by lack of provisions for specific protection under national laws and the absence of use of international and regional protection instruments by national courts.

3) **Structural and legal impediments**

In fact, according to many analysts, the primary causes of some of those problems are of a structural nature and should, therefore, be sought after at the very core of the same legal and judicial systems, i.e., in their own make up, most of whom are exclusive of principles, values and mechanisms enshrined in the pre-colonial African institutional and political legacy and best practices. As a matter of fact, after centuries of mental and intellectual domination, access to knowledge about African indigenous system have been hampered by certain schools of thoughts that aimed at making Africans believe that they were retrograde, opposed human rights and development, oppressive to women, etc... Yet the historical and scientific legacy show that as ancestors of human kind and human civilization, African peoples have established and managed institutions and produced in their own languages, discourses about their practices.

An illustration of this legacy, which continues to inspire African systems of values, is the concept of **Maat**, from Ancient Egypt, which translates the notion of truth, order, balance, righteousness and justice in the universe. This was found in the law of Ancient Egypt and most ancient codes that were partially written during the Ancient Empire,

that is 2700 to 2100 BC and anterior to the Sumerian code which is commonly presented as the first written code dating from 1700 BC. The same not only acknowledges some basic principles such as the principles of separation and balance of powers, those of representation and decentralization; it also recognizes and protect constitutional rights for minorities, foreigners and of course women, as testified by many, including Arab chronicle writer Ibn Batuta, who visited the Mali Empire in the 13th century.

History also show how external systems of values have been imposed and juxtaposed on the existing system, leading to change of patterns and approaches as regards the very understanding of justice services delivery and access to Justice. The adoption of common law or Napoleonic law has been packaged as a positive evolution which required the progressive adaptation of native institutions to modern conditions. The problem with this process is that it was never a result of consultation with citizens on which suited most their interests, but rather an outcome of so called institutions modernization imposed on Africa at independence. This was implying a devaluation of traditional political and legal systems which was initiated during the process of colonial government sponsored chiefs and institutions presented as representative of indigenous values, principles and structures.

In most African societies, a historical review of legal sets up and forms of disputes resolutions from pre colonial times to the present shows how indigenous justice systems and values established mechanisms at all levels to ensure accessible and affordable justice, structured around the interests of both individuals and communities.

III- How could Chief Justices address the issues in order to contribute to a better access to Justice for ordinary citizens?

- How can lessons learnt from today's shortcomings in the delivery of Justice services help reshape a new approach which give priority to the need to reconcile justice and those for whom it is designed?
- The transformation ability of education particularly as promoted by some academics, lawyers and NGO's in areas of human rights, democracy and justice

who still view education as a way to preserve the status quo instead of questioning distorted perceptions, may lead to further extroversion.

- How can supreme courts and Chief Justices, who have become 'elite's' in terms of their positions and somehow distanced from their societal realities initiate change from within?
- Should they foster a common and integrated conception of African legal systems be inspired by the same patterns to that in the pre-colonial or pos- independence era?
- Which languages should be used in order to make justice accessible to the majority of the population?