

Judicial Reform in Africa

On 16 February 2024, the African Judiciaries Research Network (AJRN) and Southern African Institute for Policy and Research (SAIPAR) organised a policy roundtable in Lusaka on judicial reform in Africa with support from the British Institute in Eastern Africa (BIEA). The discussion brought lessons from Kenya (where the judiciary has undergone substantial reform since the post-election crisis of 2007/8) and Malawi (where reforms have been slower paced since the 1994 constitution) into conversation with current discussions around judicial reform in Zambia. This report draws from that discussion and from an academic workshop on judicial reform held in Lusaka on 15 February 2024.

Summary:

- There is a **pressing need for judicial reform** in Zambia and, while reforms will not be easy, there are some opportunities. It is important that discussions around reforms be connected to discussions around **alternative dispute resolution** to ensure that justice delivery is organised around people's needs. Further research is required to better understand people's justice journeys and the justice gaps.
- Judicial reform works best when the judiciary is invested in reforms and a **multi-pronged approach** is adopted. However, even incremental changes – together with the growth of progressive jurisprudence from other common law contexts – can have a significant impact.
- When greater judicial independence leads to decisions that run against elite interests and/or the grain of public opinion, this can inadvertently increase public attacks, undermine **public confidence**, and lead to a backlash. Attention needs to be given, not only to what the courts do, but to how judges behave and to how they are supported to help protect judicial independence and bolster public confidence in the long run.
- **Civil society** in the justice space is currently relatively weak in Zambia. It is important that this sector be strengthened given the critical role that an active civil society can play in lobbying for reforms, but also in ensuring that reform windows are taken full advantage of and that reform processes are supported and sustained.
- It is worth considering **justice innovation** and how new technology – from the use of online meetings for court proceedings to e-filing – could help to improve access to justice.
- Key actors from Zambia should be supported to learn **lessons from other countries** in the region and particularly from Kenya – a country that shares a similar history and problems and has experienced substantive reforms in recent years.

Thinking about justice needs: Judicial reform and alternative dispute resolution

The judiciary is a key democratic actor. It is critical that the judiciary be independent and that it be seen to be independent for justice to be done and be seen to be done. An independent judiciary can help to hold the executive and legislature to account and enjoy public trust to determine civil and criminal cases.

The Zambian judiciary is chronically underfunded and there is an insufficient supply of courts, judges, and judicial staff. Perceptions of corruption and political interference also undermine

the legitimacy of the Judiciary.¹ There are also problems with appointment processes and funding controls. However, there are some opportunities for reform. This includes the Judicial Training Institute of Zambia Act 2023 and discussions around constitutional reform.

It is important that discussions around judicial reform consider access to justice beyond the formal courts and the connections between formal and informal justice mechanisms. A study of justice needs in Kenya in 2017 found that only a small minority of citizens – and even fewer from low-income groups – engage a formal dispute resolution provider (such as a court or lawyer), and that people are much more likely to use alternative dispute resolution provided by family, churches, and traditional leaders.² Panellists told a similar story from Zambia with some rural courts underused (despite a national case backlog) because citizens opt to rely on alternative dispute resolution.

To ensure that judicial reform efforts are data driven and that they respond to people's justice needs it is critical that further research be conducted to better understand people's justice journeys and the barriers to justice, and that this research consider the relationship between formal and informal justice mechanisms and how this might be strengthened.

Reform models

Kenya and Malawi provide examples of different approaches to undertaking reform. Kenya's post-election crisis of 2007/8 and 2010 constitution provided an unprecedented window for reforms. This included a new Supreme Court, massive investment in new courts and judicial officers, the vetting of judges, the reinvigoration of the Judiciary Training Institute (now the Kenya Judiciary Academy), and new HR policies and codes of conduct. Critically these multi-pronged reforms focused on institutional design, capacity, and culture with a new emphasis placed on judicial learning, behaviour, and management styles. They were also supported by the judicial leadership particularly that offered by Chief Justice Willy Mutunga (2011-2016). However, there are still problems – from a case backlog to ongoing problems with corruption – while greater judicial independence has resulted in some decisions that run against elite interests and/or the grain of public opinion. This has led to judges being publicly admonished by the political class and popular commentators with implications for public confidence.

Malawi has adopted a different and slower-paced model of democratic reforms since the 1994 constitution. The current focus of debate is on proposals for a new Judicial Service and Administration Bill, which is being pushed by the Malawi Law Society with delays revealing the difficulties of pushing through reforms without clear buy-in from the government and judiciary. At the same time, the fact that the Malawian Supreme Court was able to nullify the 2019 presidential election reveals the impact of incremental reforms and the influence of progressive jurisprudence in other common law jurisdictions (the Malawian decision facilitated in part by the Kenyan decision two years previous).

The lesson: while a multi-pronged approach that focuses on institutional design, capacity, and culture is optimal, even incremental changes – together with the growth of progressive jurisprudence from other common law contexts – can have a significant impact. It is important that opportunities be taken to support judicial reform and that judges be supported to lean

¹ World Bank (2022) *Zambia – Judicial Sector Public Expenditure and Institutional Review: Final report*.

<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/09991510622221125/p1774970cda153050b46c012b2b1cd85ef>.

² HiiL (2018) *Justice Needs and Satisfaction in Kenya 2017: Legal problems in daily life*. https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf.

about jurisprudence from similar jurisdictions. Plans for a Judicial Training Institute of Zambia could help with the latter.

Public confidence

Judicial reforms in Kenya have brought significant gains. The country's higher courts regularly make decisions that are clearly independent of government – from the nullification of President Kenyatta's re-election in 2017 and verification of the opposition's victory in 2022 to cases around constitutional reform, the associational rights of LGBTQI+ people, and tax laws. Access to justice has also improved and most people's personal experiences of the court are positive.³ Nevertheless, if one compares Afrobarometer data over time one finds that public confidence in the courts is lower today than in 2003 (when the first Afrobarometer survey was conducted in Kenya).⁴

This disjuncture can be explained by two facts. First, greater judicial independence has led the courts to be more frequently involved in highly political and divisive cases. Second, this independence and the fact that the courts have ruled against people across the political divide has led the judiciary to face concerted public criticism by a range of actors. This criticism draws on the unpopularity of certain rulings, but also on examples of judicial behaviour that suggest the courts may be biased (from dismissive language used in certain rulings to the banning of a Senior Counsel from the Supreme Court) and on claims (some likely true) of ongoing corruption.⁵

The Kenyan case thus offers another important lesson: greater judicial independence near-inevitably leads to a political backlash. This means that it is critical to think – not only about what judges do – but about how they do things on and off the bench to help better protect them from accusations of impropriety and bias. It is also critical that attention be given to how the courts can be protected once reforms have begun to guard against institutional backtracking and an undermining of public confidence. This leads to the role of civil society.

Civil society

At the time of Kenya's 2007/8 post-election crisis, lobbying for, and discussions around, judicial reform in Kenya had been ongoing since the early 1990s. These conversations had been kept in the public domain by prominent civil society organisations and opposition politicians. The decades of work that these actors had put into thinking about judicial reforms meant that when a window of opportunity for reforms opened in the wake of the 2007/8 post-election crisis, there was already a clear sense of what was required. In turn, the fact that judicial reforms are currently being discussed in Malawi – most notably around the need for a Judicial Service and Administration Bill to reconstitute the Judicial Service Commission – is largely the result of concerted efforts by civil society organisations led by the Malawi Law Society.

Panellists noted the relative weakness of civil society in Zambia and agreed that it was important that this sector be strengthened so that it could help to lobby for reforms as had occurred in Kenya and Malawi. Two other lessons were drawn. First, reformers can take advantage of a window for constitutional and institutional reform if there is already a clear and

³ People's personal experiences of courts was gauged in a March 2023 nationally representative survey conducted by TIFA Research. For details, please contact Gabrielle Lynch (g.lynch@warwick.ac.uk).

⁴ <https://www.afrobarometer.org/countries/kenya/>

⁵ For example, see, Makau Mutua, 28 January 2024, 'The folly of banning Ahmednasir Abdullahi', *Sunday Nation*, <https://nation.africa/kenya/blogs-opinion/opinion/the-folly-of-banning-ahmednasir-abdullahi-4505706#story>

detailed sense of the reforms desired. Second, if judicial reforms are to be sustained and if judicial independence is to foster greater levels of public confidence it is critical that the judiciary have strong allies. The implication: a stronger civil society would be beneficial to promote, but also to prepare for and then protect judicial reforms.

Justice innovation.

Kenya has invested heavily in court infrastructure since 2010. For example, in 2011 there were 16 High Courts and there are now 42. However, with the COVID pandemic the country moved to online court proceedings, which worked so well that court cases (except for some deemed to be of particular public interest such as presidential election petitions) are still held online. This reminds us of the ways in which judicial innovation can help to improve access to justice if it is well supported. This may be something for Zambia to consider given that it would be cheaper to invest in local civil centres where members of the public could be helped to file and participate in cases online than to build all the new courts required to clear case backlogs and facilitate access to justice for communities across the country.

Broader lesson learning

The Zambian experts on the panel were struck by the similarities between Zambia and Kenya prior to reforms – from the nature of access to justice problems and reliance on alternative dispute resolution to minimal trainings, problematic appointment processes, and hierarchical institutional cultures. Panellists agreed that it would be good for key actors from Zambia to visit Kenya to engage in more concerted lesson learning about what has and has not worked and why. A concrete example would be the new Judicial Training Institute of Zambia that is soon to be established following the 2023 Act. Kenya long had a Judicial Training Institute (JTI) that was relatively ineffectual with few sessions on offer, a judiciary characterised by anti-intellectualism, and little evidence of the institute’s impact on judgements. However, under Mutunga this changed – the JTI converted into a Judicial Academy that provides an extended and vibrant offering and is widely believed to have had an influence on both the quality of judicial culture and judgements. One example given was the Supreme Court’s learning on the scrutiny of the vote between the 2013 and 2017 election petitions.

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Moderator: Gabrielle Lynch (University of Warwick), g.lynch@warwick.ac.uk

Panellists: Tinenenji Banda (SAIPAR), Martha Gayoye (Keele University), O’Brien Kaaba (SAIPAR), and Patrick Mpaka (Malawi Law Society)

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