

Kenya Judicial Sector Assessment

Social Context in the Magistrates Courts

Concept Note

March 2008

The proposed judicial sector assessment will focus on justice at the level of magistrate courts in Kenya. In addition to the general challenges faced by magistrates, it will concentrate on the role of the ‘social context’ in dispensing justice. Social context in this sense means underlying socio-cultural structures and belief systems of a community as well as socio-economic backgrounds. This ESW will assess the extent to which the social context of a particular region jeopardizes equality before the law; whether magistrates take the social context into account in their judgments; and the degree to which they can take it into account within the limits of the law. The main objective of the assessment is to better understand magistrate needs given the various socio-economic environments of Kenya within which they work. These insights will be used to inform ongoing justice sector reform strategies with the aim of making the magistracy service more equitable and accessible.

Objectives and Scope

The Kenya Country Progress Report (2004-2008) provides for the preparation of a judicial sector assessment as one of its analytical initiatives. The objective of the Kenya Judicial Sector Assessment (KJSA) is to focus on a specific problem area in the Kenyan judiciary and to make recommendations to address it. Preliminary literature reviews indicate that limited empirical data exists regarding the magistrate level of the judiciary, which deals with the majority of cases that come to court.

Furthermore, initial field research conducted by the World Bank (Bank) ’s ‘Justice for the Poor Program’ (J4P) in Kenya indicates that local socio-cultural systems and their normative concepts are often at odds with official laws and legal processes.¹ The latter is based mostly on British common law and its underlying notions that define what is ‘just’, what is a crime, and who should solve a conflict. These notions may differ significantly from the norms of local societies. The discrepancy affects the way people perceive the official justice system: including the way they interact with courts, whether they accept judgments, and whether judgments therefore have the ability to pacify relations within a community.²

¹ See www.worldbank.org/justiceforthe poor

² www.worldbank.org/justiceforthe poor. In the ASAL areas of Kenya, these discrepancies have led to the development of ‘declarations’, which provide a basic penal code for what local communities perceive as ‘wrongful’ acts. The ‘declarations’ utilize local understandings of crime and restitution. They have successfully re-established peace in communities, but, in effect, have also constituted a parallel legal system in the country.

Discrepancies vary considerably depending upon the nature of different local systems. Kenya consists of a variety of ethno-linguistic groups, ranging from pastoralists to farmers and speaking multiple languages. Depending on their socio-cultural background, communities behave differently in their interaction with the official justice system. For example, while in one area people are willing to take any small dispute to court, in other areas, they withdraw most cases from the court, including capital offenses in order to solve them through local mechanisms.³ Furthermore, there are wide socio-economic gaps between communities in Kenya's urban and rural areas.

In a recent stakeholder workshop organized by the Chief Justice, magistrates and judges described the challenges posed by different local socio-cultural systems.⁴ For example, in Northern Kenya, official judgments target the individual perpetrator of a crime but the local justice system prescribes the punishment of the entire kin group of the perpetrator. The official judgment does not pacify the community. Magistrates are confronted with people from a broad spectrum of socio-economic contexts. In order to dispense justice equitably and equally to all, they require a deeper appreciation of those contexts.⁵ For magistrates and judges, understanding the socio-cultural background of court cases and of peoples' behavior regarding court procedures can be crucial to successfully implementing the law. However, judges and magistrates are posted to different regions every 4-5 years, and each time they face a different type of behavior from the local community while lacking proper documentation of locality specific challenges and a proper induction to appraise them of what the challenges will be.

The recent post-election crisis in Kenya has shown that social inequality and ethnic differences are root causes of violence.⁶ It is therefore crucial to support the judiciary in promoting an increased sense of equality and a sense of universal access to justice among the population.

There appear to be two important ways in which Kenyan magistrates can be supported: (a) by providing general guidance on overcoming discrepancies between local understanding and official law – in order to provide for equality and to re-introduce peaceful relations in communities; and (b) by providing specific guidance on particular socio-cultural contexts in the various regions of Kenya – in order to prepare for new postings. One possible means of such support is through social context training of judicial personnel.

³ World Bank Justice for the Poor, 'Access to Justice among the Pastoralists of Kenya,' forthcoming 2008.

⁴ The Workshop was held in December 2007. The main purpose of the workshop was to launch the Bank's 'Judicial Performance Improvement Project' (JPIP), which is currently under preparation.

⁵ Some actions have been taken to mitigate this problem. For example, in an innovative attempt to improve access to justice for women and tackle inequality before the law, the Kenya Women Judges Association has developed benchbooks, elaborating family laws and guiding judges and magistrates in dealing with family matters. See Justice Mary A. Ang'awa, 'The Role of Public Officers in Protection and Preservation of Women Rights in Kenya. An Audit of the Kenya Family Courts as an instrument for Enhancing Women's Access to Power in Kenya,' Paper delivered at the Seminar for Gender and Human Rights, Nairobi, May 2007.

⁶ See also World Bank, Kenya Country Social Analysis, forthcoming 2008.

Canada was among the first countries to introduce training in social contexts for its judges. The model was subsequently exported to Australia and South Africa, among other countries. The rationale for the training was that these countries had multi-cultural societies and a lack of knowledge of social context by judges endangered the equal treatment of citizens before the law. Without being able to recognize forms of inequality and discrimination, judges were not able to deliver equality and access to justice for all.⁷ In South Africa, the rationale for introducing social context training was to eradicate the remaining discrimination that had developed under the apartheid system. The aim was to establish a fair and unbiased justice system, which would take economic, social and cultural diversities into account. While the training in Canada focused on judges, in South Africa it targeted magistrates, who were considered to be at the frontline in providing justice to the majority of the population.⁸ Social context training for judicial officers and clerks has been enacted by legislation through the 'Promotion of Equality and Prevention of Unfair Discrimination Amendment Act' (Act No. 52, 2002)⁹. Social context training for judges or magistrates has been called for since in other countries.¹⁰

The KJSA results will emphasize the relevance of the magistrate level in the provision of justice in Kenya and bring attention to the challenges of social contexts. At a general level, research results will inform policy makers working on justice sector reform in Kenya, and consider the introduction of social context training for judicial personnel and the creation of bench-books for judges and magistrates. In relation to the Bank's proposed Judicial Performance Improvement Project' (JPIP) currently being designed, the assessment results will: (a) feed into the curriculum for the proposed Judicial Training Institute, to be established under the 'Judicial Education and Training' component of JPIP; (b) inform the 'Access to Justice' and the 'Transparency, Public Communication and Outreach' components of JPIP; and (c) complement other assessments and preparatory work for JPIP (e.g. judicial mapping exercise that will establish all court location etc...). Research results will further inform the Bank's Financial and Legal Sector Technical Assistance Project (FLSTAP) on its comprehensive 'Judicial Education Program', and inform the possible revision of the CAS in post-crisis Kenya.

Task Team and Methodology

Since little data about magistrate courts exists, it is important to undertake in-depth qualitative research in multiple selected locations for a comparative understanding of issues. Given the limited scope of the assessment, the study will focus on 2 regions, however broad lessons will be drawn for general guidance. Such qualitative data can be used subsequently as the basis for formulating questions in a more extensive country-wide survey. The study shall be carried out in the Machakos and Mombasa regions,

⁷ Justice Donna Hackett, Richard F. Devlin with Tony George Puthucherril, 'Social Context Education for Realizing Equality Rights. Lessons from the Canadian Experience,' In: The Commonwealth Judicial Education Institute (CJEI) Report, September 2007, pp. 13-17.

⁸ Suki Goodman, 'The Social Context Training Cooperation between Sida and the Law, Race and gender Unit, University of Cape Town,' Sida Evaluation Report 07/19, Department for Africa, 2007.

⁹ . see sections 31 4 (a) and 6(a)

¹⁰ See for example, AfriMap and Open Society Initiative for West Africa and The Institute for Democratic Governance, 'Ghana. Justice Sector and the Rule of Law,' IDEG 2007, p.12.

which include different ethno-linguistic groups that can be compared. High Court judges from both areas have indicated their interest in participating in the study, and the current security situation at both sites allows for safe travel of the research team.

The main research tools will be qualitative, semi-structured interviews with magistrates, judges, and other relevant court personnel, to gain their perspectives on the hurdles they face, but also to determine how cases are underpinned by the social context, and how magistrates respond to resulting challenges. Other stakeholders, such as the police, court-user committees, CSOs and NGOs will be interviewed to better understand the impact of the social context on the dispensing of justice and sources of inequality before the law.

In addition to semi-structured interviews, cases filed during the last year at the magistrates' courts in both locations will be reviewed in addition to other cases, which the magistrates or judges highlight. The purpose of this review is to ascertain the types of cases filed and by whom. Particularly, it will determine whether magistrates took into account the social context in their deliberations. A review of the relevant laws to determine whether judicial officers can take into account the social context will be carried out.

The assessment team will consist of an international expert in local level justice, a Kenyan local legal experts and the TTL of the project. The team will undertake the field research at the two research locations. The legal expert will undertake the review of the relevant laws. The TTL and the international expert will analyze and write up research results, with the entire team developing recommendations for action.

Output Dissemination Strategy

The research results will be presented in a short working paper, including recommendations for further action. Recommendations will specifically target the Bank's JPIP and other ongoing justice sector initiatives. The report will be posted on the Bank's website, presented to the main partners in the Kenyan judiciary, and discussed internally with the JPIP team. A workshop will be held with relevant stakeholders, including members of the judiciary and the Ministry of Justice, to discuss the assessment results and implementation of the recommendations.

Time Table and Deliverables

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| 07 April | Invitation to Reviewers and Dissemination of Concept Note |
| 07 – 17 April | Receipt of comments on Note |
| April 21 | Review Meeting |
| April 22- May 15, | Field research |
| 15 - 27, May | Analysis of research data and drafting of draft report |
| May 28, 2008 | Workshop / dissemination of preliminary research results at the Judicial Education Workshop |
| June 5-10 | Finalization and dissemination of report. |