

QUESTIONNAIRE of the 1st Commission 2007

Access to justice

Introduction:

Everybody should be guaranteed access to the courts, whether this is to make or defend civil claims or to defend a criminal charge. (See: UN-Basic Principles on the Independence of the Judiciary paragraph 5 or European Convention of Human Rights Article 6 and other similar provisions).

This questionnaire aims to find out if there are obstacles to this access to justice and what means may be used to overcome it. The questionnaire concentrates on access to justice for individuals, as opposed to corporate entities.

I.) The costs of bringing or defending a civil claim or defending a criminal charge:

It is a fact that the costs that a party has to pay, when it wants to use the court system (for instance to bring or defend a civil claim) will influence an individual's decision on whether to go to court at all or to pursue/defend a claim in court. Different systems of legal aid try to reduce this obstacle to justice. A special problem may occur if the costs of experts cannot be met from legal aid funds.

Question 1: (a) Is there legal aid in your country?
Yes. The Legal Aid Board is a State Funded organisation that was established by an Act of Parliament, directed by a Board of Directors as per the Act and receives its funding from parliament. The legal Aid Board consists of 58 Justice Centres nationwide, 32 satellite offices, 4 regional offices and one National office. The LAB employs 1300 qualified attorneys, advocates and candidate attorneys.

(b) Is this available for individuals in all courts, both civil and criminal?
Yes, in criminal matters, depending on the applicant passing the means test and in civil matters and family law matters, depending on the applicant passing the means test and the matter having merits. We do labour court matters, but not CCMA matters and in domestic violence only where the applicant passes the means test and the other party is legally represented.

Question 2: Which costs are covered by legal aid?

(a) The costs of using the court?
There is no such cost in South Africa. Once legal aid is granted, all costs are covered. If the matter is done by a practitioner not in the employ of the Legal Aid Board (Judicare), a set tariff is paid. The attorney is not allowed to charge the client additional fees.

(b) The costs of the lawyer?
Yes. We use in house salaried practitioners as well as contracted private practitioners. 85% of the work is performed by in-house practitioners.

(c) The costs of experts (either appointed by the court or engaged by the parties directly)?
The Legal Aid Board fund expert witnesses as deemed necessary by the Legal Aid Board attorney.

Question 3: What are the limitations of legal aid?

Criminal matters: means test. Legal Aid available for trial leave to appeal, appeal and petition.

Civil matters: Means test, merits and capacity. 85% of budget allocated 15% to civil work. The Legal Aid Board will not pay any cost orders against any client.

(a) Are there financial limits to legal aid in (i) civil; and (ii) criminal cases?

See above.

(b) Are there limits on (i) the type or (ii) choice of lawyers or experts that can be used if legal aid is claimed by an individual?

No applicant has a choice of a lawyer. 85% of all matters are allocated to in-house salaried practitioners and is allocated according to the practitioner assigned to the court. Private work is allocated according to an accreditation list that works on a rotation basis.

Question 4: Who grants legal aid for civil and/or criminal cases? Is it granted by a body which is under the control of the judiciary or by an extra judicial organ?

If the latter, describe this organ.

All applications for Legal Aid is considered and granted or refused by the legal Aid Board.

It is granted by the Legal Aid Board, an extra judicial body in charge of same. We also have justice centres and law clinics by Community Organisations and Universities respectively.

II). Information about the judicial system:

Only those who know about the possibility of using the courts to make or defend a claim, and the possible procedures that they are going to face there, will be able or willing to go to court. Therefore information and knowledge about how the courts and the judiciary function are essential:

The Courts are separated according to a specific field of the law. We have family law Courts, Private law and Public law Courts. The Magistrates work in all the Courts. They form part of the Department of Justice and Constitutional Development. We also have prosecutors in charge of prosecuting criminal cases. We also have clerks of the Court in charge of the Administrative duties of the Courts. We have Provincial Divisions and Lower Courts. The Lower Courts are divided into Regional and District Courts. In civil proceedings individuals present their own cases, sometimes with the assistance of a lawyer.

Question 5: Are students in:

(i) schools and

(ii) universities and colleges,

taught about the court-system, the jurisdictions of the various courts, the judiciary, the rights of citizens to use the court systems and how the system functions?

This is done to a minimum. Although some are taught, they are not properly taught to clearly ensure proper awareness.

Question 6: What means are there for informing potential litigants or other users of the court system about

(i) The court system and how it is organised: **None**

(ii) The judiciary: **None**

(iii) The procedure in courts (civil and criminal): **None**

(iv) How to get assistance to make or defend a case in court: **None**

(v) How much court procedures may cost? **None**

(Examples of means to disseminate this information may be: internet; advice bureaux; books/pamphlets published by the court service/government)

Although the government does on intervals publish pamphlets and embark on Road Shows, this has

proofed not sufficient. It is a fact that the first time that many people get to know about the Courts is when they have a case or are to appear as witnesses in a case. The other way to know about the Courts and how they function is if a person knows someone who is in the field of law (i.e. Magistrates, lawyers, prosecutors etc).

III). Access for minority groups (eg. ethnic or language groups):

Special efforts may be necessary to ensure that members of minorities have the same rights of access to justice as do the majority group in a country.

Although there are efforts by non-governmental organizations, they are not for the entire communities. The government is not doing much in this respect. We have Labour organizations, Health organizations and Prisons organizations. The government does have the Human Rights Commission, but the outreach of this organisation is limited to those with access.

- Question 7:**
- (a) Are there special arrangements to ensure that ethnic/language minorities are aware of their rights of access to justice. **No.**
 - (b) What special arrangements (if any) are made to ensure that those minorities are able to obtain equal access to justice? **None.**
 - (c) Are there facilities to enable ethnic/language minorities to have cases conducted in their language/the proceedings translated for them to follow? **Yes.**

IV). Delays in the justice system:

“Justice delayed is justice denied”. The problem of delays in dealing with both civil and criminal cases is encountered in many countries. Delays in cases can amount to a serious denial of the right to access to justice for individuals.

There are mechanisms in place to curb this, both in criminal and civil proceedings.

- Question 8:**
- (a) In your country are there serious delays in dealing with civil or criminal cases because of “structural” reasons – e.g. a lack of judges/courts/experts/ lawyers who are prepared to deal with legal aid cases.
Yes, mostly with regard to interpreters in civil proceedings. Also the costs of obtaining an expert.
 - (b) If there are please explain what they are.
Our country has eleven languages. It is difficult to have an interpreter of a specific language at a certain time. Some judicial officers don’t want to work. Lawyers double book matters and as such they fail to turn up at Courts. The costs of preparing and presenting a proper case are too much, as such; people end up settling matters in less favourable terms.
 - (c) Are there plans to deal with these problems?
The government is trying, but as to when will this be achieved, no one knows. I don’t think the problems can be totally addressed, but at least they need to be put under control.

V). Procedure in courts:

Formality in procedures may prevent individuals having access to justice.

- Question 9:** Are there any examples in your country. Please describe the problems. (e.g. mandatory representation by a lawyer, but heavy cost/few lawyers available; necessity to appear at court but excessive distances to court buildings etc.).
I have addressed this in paragraph 8(c).

VI). Enforcement:

Effective access to justice also includes the need to ensure that judgements are enforced effectively.

- Question 10:**
- (a) Who ensures that a judgment is properly registered and enforced against a party?
The clerk of the court ensures that the judgment is properly registered against a party whilst the plaintiff ensures for the enforcement of a judgment.
 - (b) Do problems with effective enforcement exist?
In criminal proceedings, the South African Police Services and the Correctional Services ensure that this is properly effected. In civil proceedings individuals must ensure that the judgments they obtained against others are given effect to. This can be achieved by employing the services of a Sheriff of the Court for execution and in some instances with the assistance of the SAPS.
 - (c) If so, please describe them? What might help to improve the situation?
I have already described them. I wish to add that to achieve proper justice and enforcement of judgments; people must execute their duties without fear and favour. The other drawback is corruption (i.e. where judgment has been given and the guilty party is known to the SAPS official or the Sheriff of the Court).

VII). Other Obstacles:

- Question 11:** Are there other obstacles to access to justice? If so, please, describe them.
Corruption is the major obstacle to justice. The other thing is people who do not want to work. People taking unaccounted leave and people living their offices before their knock-off time. Lack of professionalism. Justice personnel must respect each other according to their ex-officio capacities.

VIII). Recommendations:

- Question 12:** In your country are there any existing practices or reports/proposals for the future on the subject of improving access to justice that you would recommend to the judiciaries of other countries.
There are efforts on same. We have television programmes, projects by non-government organisations and the media is also lately actively involved in reporting to the public about all legal developments and controversial cases. The starting point for developing countries is to involve both the government and private sector. Ensure that legislative measures are put in place to address all shortcomings in the law. Without legislation, not much can be achieved. The governments should respect the independence of the judiciary and the rule of law. Awareness must start with the youth as they are the future. Mentorship programmes must be encouraged and curriculum revisited. Empowerment must be targeted according to need of previously disadvantaged (i.e. women, children and racial demographics).

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