

RAISING THE VOICE AND EMPOWERING THE MARGINALISED IN THE ADMINISTRATION OF JUSTICE

– A VIEW FROM COURT

*A Presentation by Hon Lady Justice Percy Night
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1. Who are the marginalized?

1.1: Marginalization is the process of according less importance to something or someone. It is a societal phenomenon of excluding a minority, sub group, or undesirables by ignoring their needs, desires and expectations (The Law Dictionary). It means depriving a person or group of persons of opportunities for living a respectable and reasonable life as provided in the Constitution (Equal Opportunities Act 2/2007). **To marginalize is to treat someone as if they are not important.**

1.2: The word marginalized is not defined in the Constitution. However Article 32 of the Constitution provides that the state shall take affirmative action in favour of groups marginalized on basis of gender, age, disability, or any other reasons created by history, tradition or custom for the purpose of redressing imbalances which exist against them.

Who are the marginalized, contd.

- **2.3: The Marginalized** could include **women, children, people with disabilities (PWD), the elderly and the poor.**
- However the list is not exhaustive. Emerging trends reveal various other disadvantaged or vulnerable groups, for example, **Persons Living with HIV/AIDS (PLWHIV/AIDS), Persons Living With Albinism, the transgender/transsexual, etc.** Some Policy Statements have categorized vulnerable groups as:
- **conflict related** (Refugees, internally displaced, war orphans, abductees, and households living near conflict zones.
- **Demographic Categories** (Asset-less widow(ers), Orphans and abandoned children, female headed households, child headed households, PWDs, the chronically sick, PLWHIV, Victims of Domestic Violence, ethnic minorities, and street children.
- **Poverty Related** (urban and rural poor, urban unemployed, low paid workers, informal sector workers, beggars, landless, Nomadic pastoralists, peasants, plantation workers and unemployed youth.

2. The International Legal Framework

Uganda is signatory to various **International Human Rights Instruments** which provide for **protection of the marginalized**. These include but are not limited to:-

- The Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social, and Cultural Rights (ICESCR)
- The Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and its Optional Protocol
- The United Nations Convention on the Rights of the Child (CRC)
- The United Nations Declaration on Violence Against Women (DEVAW)
- The African Charter on Human and Peoples Rights (ACHPR)

3. The Policy Framework

Uganda has put in place various **policy measures** towards **protecting and empowering the marginalized** and **integrating them into the justice delivery system**. These policy measures include but are not limited to:-

- The National Gender Policy 2007
- The National Equal Opportunities Policy 2006
- The National HIV/AIDS Strategic Plan 2015/2016 – 2019/2020, *and many others*.

The policies are generally **consistent with the national and international Human Rights Instruments**. They address gender equality and justice, women's empowerment and elimination of discrimination. The Gender Policy mandates the Government Ministries to **mainstream gender in all sectors**. The National HIV/AIDS Strategic Plan among other things also states that every Government Ministry/Department/Agencies shall mainstream HIV and AIDS activities into their policies and development programmes and ensure there is an HIV and AIDS Focal Person plus a Coordinating Committee at institutional level.

- The Judiciary has also put in place a gender policy.

4. The Constitution

4.1: The National Objectives and Directive Principles of State Policy provide for:

- Gender balance and fair representation of marginalized groups (obj. vi)
- Recognition of women in society (obj. xv)

4.2: Substantive Provisions of the Constitution include :-

4.2.1: Equality before the law – Article 21 guarantees equality of all persons before and under the law in all spheres of political, economic, social and cultural life and the enjoyment of equal protection of the law in all respects.

4.2.2: Affirmative Action - Article 32(1) - the State shall take affirmative action in favour of groups marginalized on the basis ***of gender, age disability, or any other reason created by history, tradition or custom,*** for the purpose of redressing imbalances which exist against them.

The Constitution, contd.

- 4.2.3: Protection from discrimination – *laws, cultures, customs or traditions* which are against the *dignity, welfare or interests* of *women* or any *marginalized groups* to which clause 1 relates or which undermine their status are ***prohibited*** by the Constitution - Article 32(2). All laws and customs that are **inconsistent with the Constitution are void** to the extent of the inconsistency – Article 2(2).**
- 4.2.4: Rights of the family (Article 31); women (Article 33); children (Article 34), etc**
- 4.2.6: Principles of exercise for judicial power – Article 126 - that justice shall be done to all irrespective of their social or economic status; it shall not be delayed; adequate compensation shall be awarded to victims of wrongs; reconciliation between parties shall be promoted; substantive justice shall not be administered without undue regard to technicalities.**

5. Access to Justice by the Marginalized/Disadvantaged

Access to Justice – relates to:-

- whether or not individuals, groups or communities get *de facto* justice from the ***enforcement of substantive law***.
- the ***quality of justice meted out on them*** by the justice delivery system.

This can be through:-

- 5.1: Physical access** - how close the users are to law enforcement agencies or justice institutions.
- 5.2: Access in financial terms** - how affordable legal services are to the users (costs of administration of justice).
- 5.3: Access in technical terms** - how comfortable users are with the legal language and procedural requirements, including treatment of users by judicial officers or court staff, their legal representatives or counsel. It could also include the type of laws prevailing, that is whether they are discriminatory or not, or the level of legal awareness of marginalized individuals or groups.

5.1: Physical Access

5.1.1: Distance – Most **courts** and **other legal service providers** are mainly based in urban areas (*the appellate courts are Kampala based, High Court is based in Kampala while its circuits are spread out in major towns countrywide, magisterial courts are also spread out countrywide*). Even organizations that offer free legal services like FIDA, Legal Aid Project, *etcetera*, are based in Kampala and major towns. The Local Council (LC) courts may perhaps be **the most easily accessed physically and in terms of being less stressing**. However they handle comparatively minor disputes and their terms have expired. The majority of Ugandans, especially the poor, live in rural areas. This implies **transport costs** for them if they are to access the formal law courts.

It is a double jeopardy for **women** who, by virtue of their gender roles, have to complete them before they leave for court; for **children** who depend on their parents/guardians for any financial court expenses; and for the **elderly** whose incomes are almost always diminishing with age: and for other marginalized groups who by virtue of their vulnerabilities or disadvantaged situations may not afford expenses associated with litigation.

Physical Access, contd.

5.1.2: Inaccessible Court Structures –

Most Court structures in Uganda including the recently constructed ones, lack facilities for disadvantaged persons, *e.g*, parking/toilets/wheelchair ways for **PWDs**. Some courts, like those housed in Twed Towers, are not located on ground floors. On Monday we were informed PWDs, including Counsel, cannot easily access the Supreme Court and they have to be carried upstairs in their wheelchairs. The building where the Family Division is housed in Makindye is only one year old but it lacks facilities for PWDs. This makes it complicated and bothersome to **PWDs** to access court. This in a way hampers physical access to justice. It is a common complaint for **transgender** people that all laws, policies and practices discriminate against them because they only cater for males or females, whether it is preparation of forms to fill in, facilities like rooms of convenience (toilets) or even legal provisions, which mostly assume one is either male or female.

Physical Access, contd.

5.1.3: Inaccessible Court Records

In some courts it is a nightmare to access court records say for perusal, appeal or review, extraction of orders or certification of court documents. For example in the Family Division it is near to impossible to locate a file from the Archives because after shifting from Crusader House to Makindye the files were just dumped in a heap tiny room. Then there is the issue of files “disappearing” only to resurface in 5 minutes if an ultimatum is given.

5.1.4: Non Conducive Court Surroundings– Most court structures in the country are not user friendly to all court users especially the marginalized. This hampers access to justice. It necessitates creating user friendly court surroundings so that all court users especially the marginalized are made to “*feel at home*”. This makes them more relaxed and less intimidated, *e.g*, having in place **breastfeeding rooms for breastfeeding mothers; playrooms for children, special parking lots for PWDs, proper directions and guidance to Court Users, etc.**

5.2: Access in financial terms

5.2.1: Poverty – is a major constraint to accessing justice. The Uganda National Household Survey (UNHS) 2005/06 states that 31.1% of the total Uganda population is poor. The **poor** cannot afford to engage lawyers or even pay court fees or “user fees” or “facilitation” for those organizations that offer free legal services. In most cases the poor also have low literacy levels and they lack legal awareness.

Studies show that poverty impacts differently on different groups, for instance that women tend to be poorer than men; that this is more severe for widows including households headed by widows; that **women** who are mainly involved in **non monetized type of work** like digging for subsistence and household chores do not have money to cover court expenses; that even in cases where some organizations provide free legal services most women cannot afford to come to those institutions since in most cases it is the husband who controls the household income; further that women cannot afford the popular “user” fees required to obtain services that deliver justice in Uganda today. Such fees include fees to have a case filed, to facilitate interviewing potential witnesses *etcetera*.

Sources: JLOS Desk Review of Gender and Access to Justice in Uganda 2002 p.24; National Gender Policy 2007 (Situation Analysis)

Access in financial terms, contd.

- It is noted though that court fees, as opposed to lawyers' fees, in my opinion, are not that exorbitant. Secondly, the Civil Procedure Rules (Order 32) provide that persons not possessed of sufficient means to enable them pay the fee prescribed by law for the plaint can apply to sue as paupers.
- The challenge is that such people, who are often lack awareness about the law, **may not be aware of the option of pauper proceedings.**
- For those who are aware, the **procedure to sue as paupers is in itself complicated and elaborate, involving presentation of the application, examination of the applicant, adducing evidence to prove pauperism, etcetera.** This alone can be a further hindrance to access to justice.
- In my experience as a judicial officer these are rare proceedings and I am yet to handle any.

5.3: Access in technical terms

5.3.1: Intimidating Court atmosphere

Court atmosphere is at times **intimidating** to court users especially the disadvantaged/marginalized. This could be in terms of the set up of court, the language used or the dressing gear/robes worn by Judges in court. It the duty of courts to create a user friendly environment to raise confidence among court users.

5.3.2: Technical Court Language

The official language of the court is English. However most court users do not speak or understand English, let alone legal English which is full of legal jargon including Latin or French maxims. In situations where court users do not speak or understand English, court **Interpreters** are utilized. However even where English is used in court, we use **simple English** and **avoid legal** jargon, *e.g*, when addressing children we avoid use of words like “*submit*”

5.3.3: Delayed Justice

The common adage *justice delayed is justice denied* **occasions injustice** to all court users, but more so, the marginalized who find it hard to access justice in the first instance. The **elderly** for instance may never live to enjoy the justice if their cases are not given priority.

Access in technical terms, Contd.

5.3.4: Biases, Stereotypes & Prejudices

- Studies show that **socialization** in our communities creates biases consciously or unconsciously, for instance, *that female rape victims are responsible for being raped, men have a propensity to be corrupt or to commit violent crimes, etc.*
- Some judicial decisions clearly reflect the bias or stereotypes held by judicial officers (eg, ***Nakachwa V Kiggundu 1978 HCB 139*** – *trial judge held that the father has a natural and superior right to the custody of a child.*

Unless we make a conscious effort to be more sensitive and objective as judicial officers or court staff, such biased attitudes often lead to miscarriage of justice especially to the marginalized. Judicial Officers bear the obligation of ensuring access to justice to the marginalized without discrimination so that they receive equal protection of the law.

Also see: *The Commonwealth Judicial Bench Book on Violence Against Women and Girls in East Africa February 2016; The Gender Bench Book: Women's Access to Justice in Uganda 1st Edition, September 2016, pp. 33 & 34*

6. Strategies and Best Practices to Access the Marginalized to Justice

6.1: The Family Division of the High Court covers the areas of marriages, divorces, children (custody, adoption, and guardianship) and administration of estates.

6.2: We have adopted a number of **strategies** and **good** or **best practices** to ensure that the marginalized are comfortable with the legal language and procedural requirements, that they are treated well by judicial officers or court staff; and that their cases are expedited. Some of the Division's strategies and best practices are listed below. The strategies and practices are, I am sure, existent in all the other courts since most of them are based on procedural and evidential rules both in the civil and the criminal areas, while others are based on judicial creativity and innovations. They include the following:-

6.2.1: Prejudices/Stereotypes/bias

The Constitution, Judicature Act, Human Rights Instruments, code of Conduct, Judiciary Mission Statement and Values, *etc*, prohibit bias and prejudices, not only in court, but also in judgements or other decision making. As judicial officers we should take note of this.

Strategies and Best Practices, contd.

6.2.2: Alertness to emerging trends in law and progressive jurisprudence

- As Judicial officers we are **alert to emerging trends in law and progressive jurisprudence** so that our interpretation of the law reflects the latest jurisprudence/dynamics/trends in law. The doctrine of precedent binds us to follow and apply the decisions of higher courts.
- Equality can be achieved through progressive jurisprudence even where laws lag behind. At the moment there is considerable jurisprudence that has emerged on equality, despite the gaps and *lacunae* in the marriage divorce and succession laws.
- This is mainly due to the favourable constitutional provisions on equality, prohibition of discrimination and affirmative action - provisions of the law that were discriminatory were successfully challenged and declared unconstitutional and null and void. These provisions mainly concerned rights of children and women and other marginalized groups. Some of the cases which set the pace include constitutional court decisions, court of appeal decisions and supreme court decision are listed below:-

Strategies and Best Practices, contd.

6.2.3(i): Law and Advocacy For Women in Uganda V Attorney General, Constitutional Petition Nos. 13/05 & 5/06 – Some sections of the Succession Act were declared by the Constitutional Court to be inconsistent with Articles 21(1)(2)(3), 317 33 of the Constitution and therefore null and void, that is:-

Section **2(n)(i)(ii)** which preferred a male heir when defining a legal heir, leaving out females; **S. 27** which governed distribution of property in intestate estates in that it did not accord equal treatment of male and female beneficiaries; **S. 44** which authorized only a father to appoint testamentary guardian(s) by will for his children, leaving out the mother and set out the hierarchy of people to be appointed statutory guardians leaving out female relatives, plus **S.29** rules 1, 7, 8 & 9 of **schedule 2** to the Succession Act which required a widow to lose her right to occupy the matrimonial home on re marrying. The same did not apply to the widower.

Strategies and Best Practices, contd.

6.2.3(ii): Uganda Association of Women Lawyers & Others V Attorney General Constitutional Petition No.2/2003 – section 4 of the Divorce Act which set up different grounds of divorce for a husband (who had to prove only adultery) and a wife (who had to prove adultery and another ground) was declared null and void by the Constitutional Court. Thus grounds for divorce are now equally available to a husband and a wife.

6.2.3(iii): Julius Rwabinumi V Bahimbisomwe Supreme Court Civil Appeal No 10/2009 – the Court of Appeal decision that the parties should share matrimonial property equally when there was evidence that the contribution was not equal. The SC noted that while the Constitution guarantees equality of treatment of a wife or husband on divorce, it does not require that all property individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally on divorce, irrespective of whether the claimant proves direct or indirect contribution toward the acquisition of property A **matrimonial home** was also defined to be that property which the spouses choose to call home and which they have jointly contributed to.

Strategies and Best Practices, contd.

6.2.3(iv): *Mifumi (U) Ltd & Others V Attorney General & Another Constitutional Appeal No, 02/2014* – the Supreme Court held that demand for refund of bride price undermines the dignity of women and violates Article 31(1) & 33 of the Constitution.

6.2.3(v): Legal Reforms

The Children (Amendment) Act 2016 which commenced on 2nd June 2016 has addressed the lacunae that was pertaining in the Children Act, for example by providing for guardianship.

6.2.4: Proceedings in Camera

We hold proceedings in camera especially in matters concerning the family or children where matters of sensitive or personal nature are to be addressed. The Children (Amendment) Act and other laws allow this especially where children are involved.

Strategies and Best Practices, contd.

6.2.5: Protection of Witnesses from scandalous or insulting questions

The law allows a trial court to protect a party to a suit or a witness from insulting, indecent or scandalous questions. **Section 150** of the **Evidence Act** gives discretion to court to forbid any questions or inquiries it regards as indecent or scandalous unless they relate to the facts in issue or to matters necessary to be known in order to determine whether or not the facts existed. **Section 151** states that the court shall forbid any question which appears to court to be intended to insult or annoy or which though proper itself appears needlessly offensive in form.

6.2.6: Alternate Dispute Resolution (ADR)

We have embraced **ADR** since it is less costly and it takes less time to have a dispute resolved. We have in particular exploited court annexed mediation which is now mandatory for all civil matters. This allows parties to tell their experiences in a free and less intimidating atmosphere.

Strategies and Best Practices, contd.

6.2.7: Custody, Adoption, and Guardianship

These matters mainly concern children and their welfare. They are mainly resolved on affidavit evidence. For adoption and guardianship only the petitioner's side is represented. As judicial officers we endeavour to call additional evidence, where necessary, including interviewing the parties and the children where circumstances dictate.

6.2.8: Administration Causes (ACs)

We query records where it is apparent that beneficiaries, for instance, widows, children, *etc* have either not been consulted, or have not been listed as beneficiaries, if such omissions would prejudice them. It is a common tendency for instance for petitioners to merely list widows as beneficiaries yet the minutes of the family meeting will indicate they either never attended the meeting or were never consulted in selecting who is to administer the estate of their deceased husband. In worse scenarios the widows are even not listed but further queries bring out the truth that a widow/widows are still living.

Strategies and Best Practices, contd.

6.2.9: Utilizing Bench Books

We make good use of the Bench Books when handling cases. These currently include *the Judicial Bench Books in Criminal and Civil Procedures (LDC)*, *the Gender Bench Book (Judiciary)*, and *the Commonwealth Judicial Bench Book on Violence Against Women and Girls in East Africa February 2016*, to mention a few. The Judicial Bench Books by the Judiciary and the Commonwealth can be accessed online.

6.2.10: Prioritising cases for the elderly

These are given a matter of priority once they are drawn to the attention of court. This however is often frustrated by the heavy workload or caseload for judicial officers. The current CCASS system cannot identify cases filed by the elderly or those affecting them. So they are mostly identified administratively on request by a court user. We hope the improved ICT Strategy of the Judiciary will work out a mechanism for identifying such cases so that they are fast tracked. This will blend well with the proposed civil procedure reforms which recommend that such cases should be prioritized.

Strategies and Best Practices, contd.

6.2.11: Directions/User Guides

We have put in place **guidelines or criteria** for applications for letters of administration. Ideally finances allowing they should be further polished and developed into Best Practices, or, at best, Practice Directives for all courts. The same could be developed in all areas of law or practice. It eases access to justice by guiding court users on what to do to get justice.

6.2.12: Court Users Committees and Open Days

These fora allow court users to express themselves and openly criticize courts on any shortcomings regarding their access to justice. The challenges of court, stakeholders and court users are addressed collectively and a way forward is forged.

7. Recommendations

- Judicial Officers and staff should pay special attention to marginalized groups to fast track their cases so that their disposal is expedited.
- The ratio of a judicial officer per person should be lowered, *eg* by increasing the number of judicial officers and allocating judicial officers a humanly bearable caseload or workload. At the High Court alone only 50 judges are serving a population of 38 million Ugandans. Compare this for instance to Members of Parliament (MPs) who are more than 400 in the same country. At the moment the resource human factor in the Judiciary as an Arm of Government is too lean to be able to offer expected access to justice for the population.
- Courts should be within a reasonable distance for the population so that parties and other court users are able to go to court and return to their homes on the same day. This can be supported by readily available and affordable public transport.

Recommendations, contd.

- All court structures should have facilities for PWDs and other vulnerable groups, including Rest Rooms, Child Play Centers, *etc.*
- The Judiciary CCASS system and electronic systems, including file allocation systems should be strengthened so that retrieval of court records, including records of proceedings, is fast, transparent and automated.
- The Judiciary should prepare and avail court users Users' Guides and Directives in simple English and local languages, including signals and Customer Desks managed by friendly staff.
- The policy of zero tolerance to corruption should be strengthened by putting in place strong enforcement machinery, *eg*, transparent and electronic file movement systems, strong disciplinary procedures at all levels, name tags for all staff, *etc.*
- ***Courts should have “a human face” as part of accessing the marginalized to justice – right from the Gates through to the reception and the court room.***

7. Conclusions

- 7.1:** The issue of raising voices and empowering the marginalized in the administration of justice boils down to accessing marginalized groups to justice.
- 7.2:** The existent legal and policy framework plus the International Human Rights framework favours or guarantees the rights of the marginalized. Where there are imbalances it provides for affirmative action to redress them.
- 7.2:** In as far as courts are concerned, this can be achieved through the law and legal structures, as well as judicial creativity or activism while maintaining judicial independence and objectivity. Courts should create a favourable environment for the marginalized in the court room, interpret and apply the law judiciously without bias while observing principles of natural justice.
- 7.3:** Some of the aspects of accessing justice to the marginalized are beyond the judiciary and the judicial officers and staff, while others are within their means. We can only raise the voices of the marginalized and empower them by accessing them to justice, even if it involves taking affirmative action measures in their favour within the ambits of the legal and policy frameworks.

THANK YOU FOR LISTENING TO ME