

The Justice Gap: A GLOBAL CRISIS IN ACCESS TO JUSTICE

Access to justice has long been recognised as a fundamental human right but there is a universal failure to deliver on this commitment. The Universal Declaration of Human Rights highlighted the importance of access to justice and making provision for access to justice for all people without discrimination. Access to justice has been enshrined in both national and international law for decades with states assuming express obligations to respect this right since 1948.¹

In 1999, the World Bank's influential study '*Voices of the Poor*' found that insecurity and injustice are major concerns for poor people, of equal importance to hunger, unemployment and the lack of safe drinking water.² And yet there is **a huge global justice gap** and a crying need for both change and investment. The data available in 2019 reveals an alarming picture. Worldwide 5.1 billion people (two thirds of the world's population) are deprived of justice: 4.5 billion are excluded from the social, economic and political opportunities that the law provides; 1.5 billion who cannot resolve their justice problems (they don't know where to seek justice, justice is too slow, expensive or unfair and the problem is not resolved); and 253 million live in extreme conditions of injustice, without any meaningful legal protections. Injustice and inequality go hand in hand. Vulnerable groups including women, children, minority groups and people with disabilities find it hardest to access justice (UN Women et al. (2019).

In 2015 the United Nations made a commitment to "eradicate extreme poverty" by 2030. They agreed the Sustainable Development Goals (the SDGs) based on a vision of "*a just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met*". Justice is a key thread running through all 17 goals and is specifically covered in SDG 16 which seeks to "*Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*".

For the first time, the international community agreed targets for justice to provide a framework for addressing the "*complex relationship between rights, inequality and development...*"³ with SDG 16.3 requiring states to "*Promote the rule of law at the national and international levels and ensure equal access to justice for all*"⁴

In 2019, the **UN Task Force on Justice** (consisting of UN member states, civil society, international organisations and private sector) met to review progress against SDG 16.3. After carrying out an extensive review of the data, the Task Force identified a significant global justice gap and committed to supporting accelerated action in all countries so as to make the promise of justice for all a reality.⁵

The cost of injustice: It is well recognised that without justice, people will fail to reach their full potential and all other development efforts will be undermined. The Organisation for Economic Co-operation and Development ("**OECD**") stated that "*Justice delayed for some is sustainable growth denied for all*"⁶ and it is understood "*without increased justice, it will be impossible to deliver the 2030 Agenda for people, planet, prosperity and peace*"⁷; "*without justice, people and societies fail to reach their full potential*"⁸

The risk of injustice to the stability of society as a whole is clear. Injustice results in lost income and damaged health and the cost of redress is costly to both individuals and the state and fuels resentment and distrust amongst citizens. On top of that, the risk of instability and violent conflict is further exacerbated by the COVID-19 pandemic and its consequences.

The cost of injustice falls first on individuals and their communities. They cannot afford legal advice or representation, face negative economic impact, risk their health (both physical and mental) which, in turn, undermines civic trust. It means, for instance, that they cannot obtain legal advice and representation. This is a clear breach of human rights law which must be addressed. As Andrew Walker, QC (former chair of the UK Bar Council) states, *“We do not leave the ill to treat themselves without expert medical help, so nor should we expect people to deal with legal problems and disputes without legal help if they cannot afford it...”*⁹

The benefits of investing in justice: There is a growing body of evidence which showed that *“people-centred justice can deliver a high return on investment.”* Every dollar invested in justice returns benefits by reducing the risk of conflict and instability, saving costs to the criminal justice system, improves health outcomes and increases earnings.

What are the reasons for this crisis? *“Inefficiencies, high costs and inaccessibility, as well as broken, corrupt and oppressive systems all point to justice systems that are not fit for purpose and the need for major transformation in the conceptualisation and delivery of justice.”*¹⁰ The real failure is not in legislation but a failure to deliver and implement the law. There are many impediments: the backlog of court cases and prolonged trials, excessive cost of legal advice and representation; distances individuals must travel to reach courts or indeed police stations; corruption and discrimination (which undermine trust in the system); the language used in court; the limited number of lawyers; limited use of alternatives to imprisonment and over-reliance on the prison system; low awareness of rights; limited capacity of organisations to provide legal aid services and significant limitations in funding. In 2015, ICAI, the UK aid watchdog in its review of DFID’s work in this field, found that justice services are *“often remote, especially from rural communities. The costs of travel, accommodation, fees (formal or informal) and lawyers can be prohibitive. Formal proceedings conducted in an unfamiliar language can be intimidating, while corruption is often pervasive.”*¹¹

The funding gap: One of the critical failings is how little is spent on justice. The reality is that although SDG16.3 calls for universal access to justice, unlike health and education, there is no assumption that all justice services should be universally free to access. In 2009, the DFID recommended treating justice as a core service on a par with other basic services such as health or education. But donor spend on justice in low-income countries has been limited and in the last five years donors’ overall global funding for justice has fallen by 40%. In April 2019, the ODI reported that over the last 10 years, funding for justice (including police) accounted for less than 2% of all aid flows on average, compared with 13% and 7% for health and education respectively.¹² Experts agree that the justice sector is decades behind both health and education in its thinking on the costs of a large scale service provision,¹³ instead focus has been on donor support which tends to be driven by the priorities of the donors themselves as opposed to the priorities of those they seek to help.¹⁴ This has tended to result in short term programmes which serve a few, instead of supporting sustainable national coverage providing a basic service for many.¹⁵

At institutional levels, the funding gap has resulted in acute capacity and staffing problems which renders the system less able to provide justice. For instance, there are far too few police, judges and prison officers in low-income countries to provide adequate basic justice services. OECD countries typically have five times more judges and three times more prison officers than low-income countries. In Kenya, by way of example, it has been reported that the judiciary only receives an average of half of the resources required to enable it to operate at an optimum level.¹⁶ Marcos Bonturi, Director for Public Governance

at OECD, said the amount needed to improve national judiciaries is often less than the cost of not funding justice: *“Unmet legal needs can cost countries as much as 3 per cent of GDP. And that is a steady cost. If you look at cost of inequality and other issues the figure is likely a lot higher.”*

However, basic justice services need not be costly: The irony is that the cost of ensuring that people’s everyday justice needs are met and resolved in an accessible and affordable way is not estimated to be that high. Ahead of the global review of progress on SDG 16 at the UN High Level Political Forum in July 2019, the Task Force on Justice Commissioned the independent global think tank, the Overseas Development Institute (ODI), to produce a report to estimate what it would cost to deliver SDG16.3. This is the first ever estimate of the annual cost of providing universal access to basic justice services (which are defined as: (a) community level legal advice and empowerment; (b) institutions to provide mechanisms to deliver solutions to everyday legal problems; and (c) institutions in the criminal justice chain). They estimate that in low-income countries, it would cost only \$20 per year to provide each person with these basic justice services compared with \$41 for education and \$76 for health; \$64 in middle-income countries; and \$190 in high-income countries. Formal justice systems account for most of these costs, legal empowerment and non-formal approaches are much less expensive, probably as little as \$1 per person in low-income settings.

Notwithstanding that the cost of a basic justice system is so low, the Task Force and the ODI acknowledge that whilst high-income countries are comfortably able to cover these costs, in reality this would be unaffordable for most low-income countries. Their analysis shows that over 2 billion people live in countries that cannot afford even half the cost of basic justice services (i.e. all 34 low-income countries and 19 of the 47 lower-middle-income countries). This means that solutions have to be found to break the vicious cycle resulting from underspending in this area both nationally and internationally and to help communities who cannot possibly afford to pay for access to justice.

Human rights and the criminal justice system: The state of the criminal justice system provides a telling lens through which to gauge the extent of the problem. It plays an essential role in the provision of justice but it can also be the home of great injustice. In its 2015 policy report, the UN’s Department of Peacekeeping Operations (“**DPKO**”) states that *“justice, police and other law enforcement institutions are essential for the protection of civilians, state-building and broader stabilization efforts”*¹⁷ and recognised the key role played by prison systems in these efforts.

More than ten million people are held in prison globally with nearly 30% detained awaiting trial many for unacceptably long periods of time and without any access to legal advice or representation¹⁸. The UN Task Force has concluded that *“All countries must strengthen rights to liberty and security, and to a fair trial based on the presumption of innocence and standards that underpin the presentation of a defence”* and it refers to the plentiful evidence which suggests that alternatives to incarceration are more effective in many cases.

The dwindling provision of justice aid is a stark illustration of the priority of many states – who continue to spend more on keeping people within the confines of the justice system as opposed to addressing the issues in the justice system itself. As matters stand, a disproportionate amount is spent on incarceration. Taking the US as an example, the Bureau of Justice Statistics calculated that the country spends more than \$80 billion each year to keep roughly 2.3 million people behind bars.¹⁹ Less is spent on legal aid. The Legal Services Corporation, which is the largest funder of legal services in the US, had a budget

of \$486.9 million in 2016.²⁰ In the UK, the average direct cost per prisoner in 2018 to 2019 was £26,133 a year, taking into account all resource expenditure, the overall cost per prisoner was £41,136, and the total resource expenditure in 2018 to 2019 was over £3bn.²¹ In contrast, legal aid budgets in the UK have dropped from £2.6 billion in 2010/2011 to £1.6 billion in 2019 to 2020²². Also, the use of alternatives is much cheaper than incarceration. In the UK the daily cost to the public purse of keeping someone in prison is £90 per day *but* the cost of electronic tagging is only £13 per day²³.

The critical role of the criminal justice system is underlined in the two key indicators set by the UN as the means of measuring progress in delivering access to justice pursuant to SDG16.3:

- SDG 16.3.1: cases of victim reporting to competent authorities or other officially recognised conflict resolution mechanisms (this is because most people do not report crime and do not obtain legal advice); and
- SDG 16.3.2: the proportion of unsentenced detainees as a proportion of prison population.

Effectively the second indicator is used as an acid test of the effectiveness of the criminal justice system. Detaining prisoners on remand for a lengthy period of time is a clear violation of human rights law. International law has long recognised that the rights of prisoners should be protected²⁴ (see the Nelson Mandela Rules)²⁵. Pre-trial detention breaches the central presumption of innocence until proven guilty. These prisoners have not yet been convicted of any crime and yet can be held for years without trial. It also breaches the right to freedom from torture, mistreatment and inhumane conditions (as it results in overcrowding of prisons); the right to private and family life (as it disrupts family life and the ability to earn an income); and clearly the right to liberty²⁶. The proportion of those held pending trial is high even in some high income countries but the average rate in low-income countries is twice that of both middle-income countries and high-income countries. If all countries matched the median level of OECD countries (24%), then 915,000 pre-trial detainees worldwide would be released.²⁷

This is an acute reality for many across the world who have been detained on remand awaiting trial for longer than the final sentence they are given by the courts. The European Court of Human Rights has found that periods of pre-trial detentions lasting between two and a half and five years to be excessive;²⁸ yet, in many countries these figures are exceeded. For example, in Kenya, between 2018-2019, 67% of cases were aged between 1-3 years before they went to trial, 22% between 3-5 years, and 12% were over 5 years.²⁹ By the end of 2019, there were 341,056 backlogged cases.³⁰

Local laws often prescribe maximum terms of detainment. In the UK the maximum period for which a prisoner can be detained pre-trial is 6 months and in Uganda the maximum period ranges from 120 days to 360 days subject to court at which the case is triable, but these maximum periods are constantly extended. This extended period of detention burdens the justice system – for example, it has resulted in Kenya's (and no doubt other) prisons holding nearly twice the number of people they were planned for.³¹ In 2018, the unsentenced detainees as a proportion of the overall prison population in Kenya was at 62.5%.³² Overcrowding and the use of detention is also a significant problem in Uganda where the current occupancy level of prisons is over three times the available capacity³³. As at 2019 there were 55,229 people held in prison with 49.8% of prisoners being detained on remand pending trial.^{34,35}

There are many factors at play behind these figures. These include the capacity issues in the criminal justice system referred to above, the lack of staffing in the courts and the small numbers of lawyers all of which result in a backlog of cases pending trial. In the meantime, those prisoners are detained on remand. Their position is exacerbated by the fact that the majority of prisoners cannot afford lawyers so unless the state is able to provide legal aid (and there are sufficient lawyers willing and able to act pro bono as well as travel the long distances to prisons in areas remote from the capital city) there is no way that prisoners can advance their case or present it well to the court as and when they do obtain a hearing. Without legal representation it can be hard to ensure that there is a fair trial with appropriate sentencing outcomes.

The ICPR stated in 2019, *“Prisoner numbers worldwide have seen unprecedented growth in recent decades. Failure to match these increases with the necessary extra investment in prison staff and infrastructure has, inevitably, brought about overcrowded, inhumane prison conditions. Today, two thirds of all countries worldwide have overcrowded prison systems. The unnecessary use of pre-trial imprisonment is a major, but largely preventable, contributing factor to prison population growth and overcrowding.”*³⁶ Further Penal Reform International and the Thailand Institute of Justice found that in Kenya, issues such as overcrowding, poor sanitary conditions and lack of nutritionally adequate food were *“mainly linked to the limited budgetary allocations to the Kenya Prisons Service”*.³⁷ Yury Fedotov, Executive Director of the UNODC, stated that *“... we must remember that prisoners continue to be a part of society, and must be treated with respect due to their inherent dignity as human beings”*.

Research shows that the socio-economic impact of pre-trial detention is a severe obstacle to the delivery of justice – it impedes the very notion on which justice systems are built i.e. the presumption of innocence until guilt is proven. It wastes human potential which undermines development and affects the ability of suspects to defend themselves.³⁸ The cost of pre-trial detention is high for individuals, their families and the state.³⁹⁴⁰

It is inevitable that those caught up in the prison system and their families are at a severe disadvantage across all the other development goals. The following are all compelling reasons for ensuring that people are not detained in prison for longer than is absolutely necessary:

- **SDG1 (eradicating poverty):** People in prison are overwhelmingly from poor socioeconomic backgrounds⁴¹ - with people being convicted and sentenced effectively as a result of their poverty and marginalisation. The UN Special Rapporteur on extreme poverty and human rights stated *“absurdly, regulations that penalize behaviours associated with poverty and homelessness often impose fines that persons living in poverty are unable to pay.”*⁴² In July 2019, the Kenya Senate recognised the plight of mothers held in prison because they cannot afford to pay even very small fines. They also recognised that the cost of keeping people in prison on remand is more expensive than the bail terms if their cases are ongoing. It is often higher than the fines the individuals must pay.⁴³ These statistics are not unique to Africa. In England and Wales, statistics show that prison is also overused for petty (and consistent) crimes.⁴⁴
- **SDG3 (health):** There is wide recognition that overcrowding in prisons has severe health implications. The impact of COVID-19 has been very serious across the world resulting in prisons becoming a death sentence for individuals who may well be detained on remand awaiting trial for no more than petty crimes. Kenya has, by

way of example, attempted to alleviate the situation by releasing nearly 5,000 inmates and is working hard to curb the spread of the virus in prisons.⁴⁵

- **SDG4 (education):** research shows that a high proportion of individuals who have been in the criminal justice system are and continue to be excluded from this,⁴⁶ leaving them behind national averages and further exacerbating the difficulties with employment upon release.
- **SDG8 (economic growth/employment):** Employment or the lack thereof has long been observed to be a correlate of criminal behaviour. The cycle often persists as following release, prisoners face a number of obstacles to securing employment.⁴⁷ In the UK, only 17% of ex-offenders manage to get a job within a year of release.⁴⁸ Penal Reform International (a non-governmental organisation working to promote criminal justice systems that uphold human rights) note that the cycle of poverty, marginalisation and criminality does not stop when individuals are released.⁴⁹ Prisoners often have limited prospects of employment and are subject to socio-economic exclusion. For example, in Kenya, prisoners often find it difficult to reintegrate into society as they are often unable to retrieve a certificate of good conduct for as long as 20 years after imprisonment.⁵⁰ This certificate has become one of the basic requirements for employment in Kenya.⁵¹

The impact of all the above also takes a toll on society as a whole including the risk of radicalisation and greater instability in society. *“Prisons provide a constantly regenerating pool of potential candidates for recruitment into violent extremist groups”*⁵² This will no doubt be worsened by feelings of injustice, poor living conditions and prison overcrowding. *“Tackling poor conditions in prison should therefore be considered as an integral part of the effort to counter violent extremism in prisons”*.⁵³

What are the solutions to tackling the ongoing failure to provide access to justice?

It is now recognised that justice is at the heart of all sustainable development and that without it inequality will not be tackled. For the first time there is international agreement on the need to take concrete and immediate steps to promote access to justice providing *people-centred justice* which explicitly puts people rather than institutions at the heart of all justice systems. The UN Taskforce on Justice has generated support for a new approach calling on countries to: (i) provide better data on current resource allocation in order to target expenditure to the most basic justice needs and to the people least able to access justice; (ii) direct existing resources towards lower cost approaches which have the potential to deliver justice on a large scale); and (iii) diversify their sources of funding.⁵⁴

It is clear that countries will have to do more than improve their institutional frameworks.⁵⁵ Instead, a multi-faceted approach is needed which tackles all the issues on a collaborative basis across all arms of the state (both formal and informal) in order to put people and their “justice journeys” front and centre. The 2015 UK aid watchdog critical review of DFID’s justice work concluded that *“attempts to build the capacity of central security and justice institutions are not translating into better of more accessible services for the poor”*. *“The assistance is more effective when it focusses on addressing specific security and justice challenges, such as excessive pre-trial detention.”*⁵⁶ The report concluded that the most convincing programmes were those which focussed on finding solutions to specific problems rather than trying to achieve across the board institutional improvement.

When people in need of legal advice cannot afford to pay for it and the government does not, for whatever reason, provide free legal aid, what can be done? One of the best models

for achieving access to justice is known as “legal empowerment”. This involves empowering people through the use of paralegals, pro bono lawyers and other non-state actors who can provide legal aid to vulnerable groups, educate others about their rights, resolve legal problems and challenges and obtain a better understanding of policy constraints and factors affecting vulnerable groups.⁵⁷ The use of these “grassroots defenders” and their associated programmes has helped fill gaps in the formal legal system – this is particularly helpful where lawyers are very expensive or too few to serve the needs of the communities they are in.⁵⁸ It is vital when individuals are faced with criminal charges. The UK aid watchdog report praised DFID’s problem-solving work with paralegals as “a cost-effective way of tackling some of the worst consequences of dysfunctional criminal justice systems”. The OECD report on delivering access to justice⁵⁹ notes that “Without the intervention of paralegals, people would stand a much higher risk of being wrongfully imprisoned, often for extended periods of time, or exposed to ill-treatment by police or to corruption before their case is resolved”.

Without access to the legal advice which can be provided by pro bono paralegals, the delivery of justice is likely to remain stagnant; in particular in relation to criminal justice where it is well recognised that individuals stand a much higher risk of being wrongfully imprisoned, exposed to discrimination and ill-treatment by the police or to corruption before their case is resolved.⁶⁰ The use of paralegals has also been linked to a reduction in excessive pre-trial detention⁶¹ and a better understanding of the penal system – for those who operate in it and live in it.

Conclusion: The evidence clearly shows that the current approach to providing access to justice is not working. It is time for a “new” approach to become the norm in this space - one which seeks to make change from bottom up. Providing people with grassroots legal empowerment will: directly alleviate the population in prisons; place less burden on the system and courts; allow courts and court processes to run more efficiently; be beneficial to family members; and create a more stable and just society as a whole. This is what Justice Defenders are achieving.

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Endnotes

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