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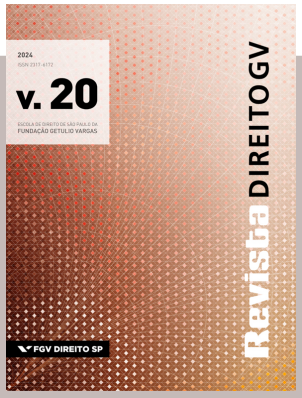

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BARREIRAS SISTÊMICAS E INJUSTIÇA: ACESSO À JUSTIÇA NO ZIMBÁBUE E ALÉM

BARRERAS SISTÉMICAS E INJUSTICIA: ACCESO A LA JUSTICIA EN ZIMBABUE Y MÁS ALLÁ

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Barreras sistémicas e injusticia: acceso a la justicia en Zimbabue y más allá

ABSTRACT

Citizens in plural legal and cultural former colonies like Zimbabwe do not have effective access to justice. This is because the formal justice system is marred with obstacles that either prevent people from entering and navigating the system or impede them from obtaining outcomes that are aligned with their normative conceptions of justice. Post-independence justice reform efforts have failed because they attempt to resolve obstacles in isolation of each other, and the obstacles are almost never analysed as inherent within the formal justice system itself i.e., systemic problem. That every justice system has risks for the intended users is uncontroverted, and this article specifically focuses only on systemic obstacles to access to justice. I demonstrate inherent and unacceptable risk of unfairness in the formal justice system by discussing four examples from the demand and supply sides. The article uses a multi-pronged research approach, involving a comprehensive literature review, media reports and my experience and observations within the Zimbabwean justice system. Furthermore, case law examples are also utilised, but going beyond erroneous individual cases, and unpacking the under-theorised, yet broader social consequences of the cases on citizens and the formal justice system.

Keywords: access to justice, justice delivery, legal system, law reform, inherent unfairness

RESUMO

Os cidadãos de ex-colônias com sistemas jurídicos e culturais plurais como o Zimbábue não têm acesso efetivo à justiça. Isto ocorre porque o sistema de justiça formal está marcado por obstáculos que impedem as pessoas de entrar e navegar no sistema ou de obter resultados que estejam alinhados com as suas concepções normativas de justiça. Os esforços de reforma da justiça pós-independência falharam porque tentam resolver os obstáculos isoladamente uns dos outros, e os obstáculos quase nunca são analisados como inerentes ao próprio sistema de justiça formal, ou seja, como problemas sistêmicos. É incontestável que todo sistema judicial apresenta riscos para os utilizadores pretendidos, e este artigo centra-se especificamente nos obstáculos sistêmicos ao acesso à justiça. Demonstro riscos inerentes e inaceitáveis de injustiça no sistema

de justiça formal, discutindo quatro exemplos da perspectiva da oferta e da demanda. O artigo utiliza uma abordagem de investigação multifacetada, envolvendo uma revisão abrangente da literatura, relatos dos meios de comunicação social e a minha experiência e observações no sistema de justiça do Zimbábue. Além disso, também são utilizados exemplos de jurisprudência, mas indo além dos casos individuais errôneos, e desvendando as consequências sociais pouco teorizadas, ainda que mais amplas, dos casos para os cidadãos e para o sistema de justiça formal.

Palavras-chave: acesso à justiça, prestação de justiça, sistema jurídico, reforma legislativa, injustiça inerente

RESUMEN

Los ciudadanos de antiguas colonias con sistemas legales y culturales plurales, como Zimbabue, no tienen acceso efectivo a la justicia. Esto se debe a que el sistema de justicia formal está marcado por obstáculos que impiden que las personas ingresen y naveguen en el sistema u obtengan resultados alineados con sus concepciones normativas de justicia. Los esfuerzos de reforma de la justicia posteriores a la independencia han fracasado porque intentan resolver los obstáculos de forma aislada unos de otros, y los obstáculos casi nunca se analizan como inherentes al propio sistema de justicia formal, es decir, como problemas sistémicos. Es indiscutible que todo sistema judicial presenta riesgos para sus usuarios previstos, y este artículo se centra específicamente en los obstáculos sistémicos al acceso a la justicia. Demuestro riesgos inherentes e inaceptables de injusticia en el sistema de justicia formal analizando cuatro ejemplos desde una perspectiva de oferta y demanda. El artículo utiliza un enfoque de investigación multifacético, que incluye una revisión exhaustiva de la literatura, informes de los medios y mi experiencia y observaciones en el sistema de justicia de Zimbabue. Además, también se utilizan ejemplos de jurisprudencia, pero yendo más allá de casos individuales erróneos, y revelando las consecuencias sociales poco teorizadas, aunque más amplias, de los casos para los ciudadanos y el sistema de justicia formal.

Palabras clave: acceso a la justicia, provisión de justicia, sistema legal, reforma legislativa, injusticia inherente

INTRODUCTION

A constitution regulates the most important activities of the state, such as recognising and upholding citizens' rights, including the right of access to justice, a human right (Constitution of Zimbabwe Amendment No. 20 Act 2013, s 69(3), from hereon after referred to as "the Constitution"). But, what purpose does it serve to enshrine rights within a constitution if large sections of the population cannot vindicate them? This concern leads to a further enquiry: Can a formal justice system dominated by legal positivism truly provide access to justice and deliver outcomes that align with citizens' normative conceptions of justice and fairness? These questions lie at the heart of socio-legal discourse, urging us to scrutinise the efficacy of legal frameworks in ensuring equitable access to justice.

Access to justice, the ability for citizens to vindicate their rights through a normatively fair and functional legal system (UNDP 2015). This understanding emphasises procedural fairness (ensuring a just process) and material fairness (substantive outcomes and social justice implications) (Galanter 1981). Significantly, ensuring equal and effective access to justice is a fundamental tenet of a functioning democracy. Nevertheless, the concept itself is multifaceted and contested (Smith 2010). While some define it solely as access to general law courts (Constitution, s 69(3)), a broader perspective recognises the importance of both formal and informal institutions in achieving a sense of justice (UNDP 2015).

This article makes a unique contribution to the socio-legal discourse by shifting the focus from individual barriers to a systemic examination of access to justice in countries with plural legal justice systems, such as Zimbabwe. This is a crucial yet understudied aspect of socio-legal dynamics. Previous reforms attempting to improve access to justice within the context of legal pluralism in Zimbabwe, such as the Legal Aid Act, 1997, the pre-trial conference (Order 26 r 182 of the High Court Rules 1971) and the Arbitration Act, 1996, have been insufficient because they fail to address the inherent incompatibility between the colonial-based formal system and the customary law and living customary law practices of culturally distinct groups (Brinks 2019; Tamale 2020). This gap highlights the need for a more holistic approach that tackles systemic deficiencies and integrates the strengths of both formal and informal justice mechanisms. Failure to evaluate the combined effect of obstacles inherent within the makeup of the justice system has resulted in the failure of the reform efforts to extend access to justice for the majority of the populace (Sibanda 2019).

It is crucial to acknowledge Zimbabwe's significant transition with adopting its 2013 Constitution, replacing the Lancaster House Constitution of 1979. However, a critical gap

remains – a dearth of legal literature specifically addressing access to justice at the system level in Zimbabwe. Such scholarship is essential to inform policymakers, law students, and the public, enabling comprehensive justice system reviews and reforms that transcend individual barriers. This paper addresses an analytical and theoretical gap in the literature and aims to inspire a fresh wave of access to justice reforms. It does so by highlighting the systemic or institutional biases and injustices pervading the formal justice system, using the unacceptable risk of unfairness analytical framework. This framework explores situations where inherent risks within the justice system design could render valid claims futile or pointless.

Although valuable contributions from previous research by Sithole (1997), Tsanga (2003), Stewart (2000), and Moyo (2018) highlight specific challenges to the justice system, they fail to fully address the interconnected and holistic nature of systemic barriers that prevent citizens from effectively navigating the justice system. This article builds upon these contributions by examining how these various limitations – from the exclusion of customary law to procedural inefficiencies – collectively create a system that is inherently inaccessible for many citizens. By transcending individual barriers, this article illuminates the systemic obstacles preventing citizens from gaining access into and achieving a meaningful sense of justice even if they obtain access.

Zimbabwe is selected because it is a former colony with coexisting legal traditions, exemplifying the systemic inequalities within plural cultural and legal systems. Thus, Zimbabwe becomes a springboard for a broader discussion on access to justice within plural cultural and legal countries, particularly former colonies. By examining its specific challenges, a more universal struggle for fairness across the developing world is illuminated. This emphasis on generalisability highlights a critical global issue, not simply a challenge unique to Zimbabwe. Similar patterns are observed elsewhere, as this analysis and earlier chapters of this Special Issue demonstrate. A review of legal, sociological, political, and anthropological literature across former colonies reveals a pattern: countries with plural cultural and legal traditions often struggle to ensure equitable access to justice (Brinks 2019; Tamale 2020; Braconnier De León 2015; Helbling, Kälin, and Nobirabo 2015; Sibanda 2019).

To achieve the article's objectives, I employ a multi-pronged research approach. First, I conduct a comprehensive review of relevant academic literature, case law, and media coverage to illuminate existing scholarship and analyse how the justice system is portrayed in public discourse. Second, by drawing on my experience and observations within the Zimbabwean

justice system, I aim to provide a nuanced understanding of citizens' practical challenges. This research design offers a valuable combination of theoretical grounding and practical insights.

The subsequent sections provide an overview of the Zimbabwean justice system before delineating the concept of access to justice as theorised globally and how it finds local expression in Zimbabwe. In Section 4, I present the analytical framework supporting my central argument on Zimbabwe's lack of access to justice as a systemic problem from both the demand and supply sides. In Sections 5 and 6, I demonstrate how the obstacles to access to justice are deeply entrenched in the justice system by selecting and discussing four (among many) barriers to access to justice. From the demand side (Section 5), I proffer that the obstacles manifest within a formal justice system that is (i) dominated by legal positivism and, therefore, not designed according to people's way of life and (ii) lacks pluralistic equality. From the supply side (Section 6), I submit that the obstacles emanate from (i) the rigid and complex rules of procedure and (ii) the cost of litigation in general law courts. The obstacles prevent entry into the system and impede citizens from obtaining outcomes meeting their normative visions of justice.

Lastly, in Section 7, I conclude by analysing the challenge of access to justice within the socio-economic environment in Zimbabwe, where 38.2 per cent of the population is below the poverty line, translating to a purchasing power parity of US$1.90 per person per day and a Gini coefficient of 50.3 per cent (World Bank 2022).

1. Brief Overview of The Justice System in Zimbabwe

Zimbabwe's justice system comprises a multifaceted framework of state and non-state institutions, with the judiciary playing a central role. The Constitutional Court, the highest court, and the Supreme Court, the final appellate court except for matters under the Constitutional Court, form the apex of the judicial hierarchy (Constitution, s 166(i), s 168). The High Court, overseeing civil and criminal cases, supervises magistrates' courts and handles extraterritorial crimes affecting Zimbabwe (*S v Mharapara* 2017). Magistrates' courts, the lowest tier, determine jurisdiction based on location, crime type, and potential penalties (Magistrates Court Act, 1931 s 49 (1)(*a*)(*b*)(*c*); Madhuku 2010, 62–63). Attorneys and advocates constitute the legal profession, regulated by the Law Society of Zimbabwe under the Legal Practitioners Act, 1981. Alternative dispute resolution mechanisms such as mediation, conciliation, and arbitration (Arbitration Act, 1996; Labour Act, 1985) supplement the formal justice system, particularly in commercial and labour matters.

The Constitution recognises customary law courts (Constitution, s 162(*g*); s 174), governed by local leaders appointed by the Minister of Justice. Established to offer justice in rural areas according to African customs, these courts have limited jurisdiction, requiring the defendant's consent. They primarily handle civil disputes involving customary law, with monetary restrictions (Customary Law and Local Courts Act, 1990 s 16(*b*)(1). Legal representation is prohibited, and judgments are enforced through registration with magistrates' courts. Appeals progress from local to community courts, then to magistrates' courts, and finally to the Supreme Court (Ncube 1989; Coldham 1990, 163–65). Below is a simplified court hierarchy diagram for Zimbabwe.

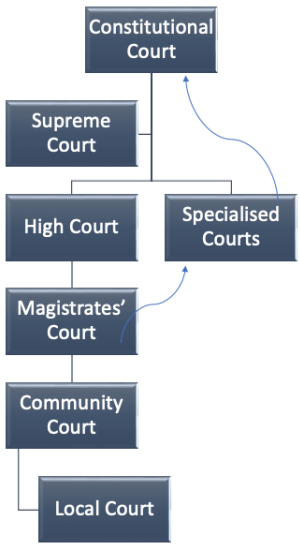

Figure 1.

During colonial rule (1889-1980), Zimbabwean communities maintained traditional dispute resolution practices alongside the imposed common law system. Despite this, customary practices remained informal, thus not recognised within the official state's jurisprudence. Over time, Zimbabwe integrated 'modified' customary law into the formal system, albeit with limited jurisdiction and authority, mostly ceremonial. For example, local courts are reduced to cases of witchcraft. It is important to distinguish between colonial-era legislated customary law, subject to the repugnancy test, and living customary law (Tamale 2020), which has evolved organically over time. The repugnancy test assessed if a law contradicted *higher* colonial legal principles (Mikano 2015).

Alongside formal and customary legal institutions, the justice system comprises law enforcement agencies like the Zimbabwe Republic Police (ZRP), ensuring public order and conducting criminal investigations. The National Prosecuting Authority (NPA) represents the state in criminal proceedings, handling evidence presentation. The Legal Aid Directorate, part

of the Ministry of Justice, Legal, and Parliamentary Affairs, offers legal aid and advice to the indigent, ensuring access to justice. The Zimbabwe Prisons and Correctional Services (ZPS) focuses on custody, rehabilitation, and reintegration. Following this overview, the subsequent section discusses access to justice, both generally and within Zimbabwe's context.

2. Situating Access to Justice Within a Global and Local Perspective

There is no single, universally accepted definition of the concept of access to justice because like 'justice' its definition is widely accepted as fluid, with different people attaching different meanings to the concept (Smith 2010, 8–9). The debate on access to justice has divergent aspects, first appearing as a phrase in the nineteenth century (Paterson 2011, 60). As a concept though, access to justice gained more prominence in the 1970s through various initiatives by diverse stakeholders who discussed it in books, articles, and reform reports (Cappelletti and Garth 1977, 6, 64, 68–69). Much of the access to justice literature addressed state-sanctioned dispute resolution processes, the measurement of justiciable problems and how people react to them, and the challenges associated with the provision of legal aid to the indigent (ibid). Progressively, new aspects of the access to justice debate emerge consistently, although in certain cases, old conceptions are presented as new ones (Paterson 2011, 61). The new debates manifest as three issues, centred on geographic access, legal education, and simplification of laws (ibid).

Notwithstanding the lack of consensus on the precise definition of access to justice, I agree with Cornford (2016) that we simply cannot accept such an important concept to maintain a nebulous characterisation (Cornford 2016). Therefore, in this article, access to justice is accepted as an interpretive concept. Dworkin's interpreters take interpretation and interpretive concepts to be central to his work (Guest 2012, 66, 76). Cornford defines it as such, '[a]n interpretive concept is something assumed to be desirable but whose exact nature is in dispute, the proponents of different interpretations being activated by competing moral, aesthetic or political outlooks' (Cornford 2016, 27). In this article, access to justice as an interpretive concept is derived from the normative definitions that the people using it bestow upon it.

The growing body of academic work from various jurisdictions, including India, Canada, Australia, and Ethiopia among others, demonstrate the interpretive and contextual nature attached to access to justice (UNDP 2015; Kohlhagen 2016; Akin Ojelabi 2010; Roberge 2013). The working definition of access to justice in this article is thus, 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity

with human rights standards' (UNDP 2015). Within the broad definition of access to justice is the recognition of formal and informal justice institutions as important mechanisms providing people with a sense of justice depending on their unique context. This definition builds on the idea that access to justice should not be limited to general law courts and litigation because 'ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged' (Galanter 1981, 161–62).

The definition above implies that for access to justice to conform with human rights standards, it must include elements of social justice, going beyond the provision of legal services to citizens. Therefore, the justice system user should be the central focus around which the justice system revolves, a position accepted by Hamnett (1975) as such, '[T]he ultimate test is not, "what does this judge say?" but rather 'what do the participants in the law regard as the rights and duties that apply to them?'(Hamnett 1975, 10). This means that citizens ought to be provided with a sense of normative justice i.e., satisfaction with the path to, and outcomes from processes they participate in, either when they bring or defend meritorious claims.

Significantly, 'normative justice' means that citizens ought to be satisfied with the processes when entering the justice system and while interacting with others within the system. It also means that citizens must be satisfied with the outcomes generated through participation in the justice system, even when the verdict is against them. My contention is that satisfaction with the process may be achieved if they are aligned with local people's norms and customs. There is a general acceptance in the academy that there are aspects of justice and other goods that are worth having but cannot be attained by merely granting people legal rights. Therefore, the legal system must be used as a means of redistributive change (Galanter 1974). Interestingly, this is the case in the United States, where the law recognises poverty as a classification like race (*Goldberg v John Kelly* 1970). Expanding on the global access to justice discussion, the subsequent section delves into its local manifestation in Zimbabwe.

Access to justice in the Zimbabwean context

Zimbabwe has a restricted definition of access to justice. In s 69(3) it says, 'Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.' By limiting dispute resolution platforms to only those established by law, the Constitution effectively dismisses over 80 per cent of the population that relies on living customary law institutions (Sibanda 2019). Although Zimbabwe is

signatory to the 1948 Universal Declaration of Human Rights (Universal Declaration of Human Rights, Art 8 (1948) and the African Charter on Human and Peoples' Rights (African Charter on Human and Peoples' Rights, 1981 ((1982) 21 ILM 58)), which have access to justice as a human right, the concept does not find full expression in the country because it is equated to access to court. The UN Declaration of the High-level Meeting on Rule of Law at paragraphs 14 and 15 also supports efforts to ensure access to justice as a core component of rule of law ('A/RES/67/1' 2023). Evidently, Zimbabwe needs a broader meaning of access to justice, so that it can be inclusive of all those remedies offered by other bodies, which are not courts of law, but can perform a dispute resolution function (Francioni 2007, 68).

Stewart (2000) conducted an empirical study in Zimbabwe highlighting the predominance of social justice (an expression or concept of fairness in society) in how people found meaning within the concepts of justice and access to justice (Stewart 2000, 5). The concept of social justice advocates for equal access to dignity, wealth, opportunity, health, and other privileges in society. For that reason, acceptance of normative interpretation and consideration of the context in discussing access to justice, thus, presupposes effective access to institutions that make the rights of citizens real instead of symbolic and illusory, whether formal or informal. At the same time, I acknowledge that perfect equality is utopian and differences between parties may never be completely eradicated (Cappelletti and Garth 1977, 186). The question that faces contemporary scholars, policymakers and society is how far to push towards this utopian ideal and how many of the barriers to effective access to justice can and should be tackled at any one point.

As mentioned in the introductory section, my contention is that access to justice debates and reform efforts have been misguided, and, therefore, ineffective because they look at, and attempt to solve barriers in isolation of each other. I contend that the debate lacks collective insight on the impact of these collective barriers, which are intrinsically interconnected. Most importantly, the obstacles are almost never evaluated as a problem inherent in the system, until now. For example, a solution such as legal aid in response to the high cost of obtaining justice while noble, has failed because it is essentially a band-aid solution to a much deeper problem of economic and organisational poverty as well as socio-economic inequality.

Legal aid, particularly in its classic form is impractical and inadequate because lawyers are costly and scarce (Sithole 1997), and crucially they are ill-equipped to deal with plural legal systems that are prevalent in most former colonies (Maru 2010, 83). In Latin America, efforts to include marginalised people in general law institutions and processes have also failed

because even when such efforts are well-meaning like legal aid, they often achieve 'partial justice at best' (Brinks 2019, 348). According to Brinks, the legal framework fails citizens because it is not compatible with the aspirations and normative understandings of those it governs, therefore, the justice system is only a means of social control rather than a source of legal agency (ibid, 352).

Furthermore, in former colonies like Zimbabwe, where the formal justice system was designed as a tool for colonial repression and adopted virtually intact at independence, it traps Indigenous people like a spider web (Ncube 1997). This metaphor aptly captures the system's inherent inaccessibility. The complex procedures, unfamiliar language, and power imbalances leave many citizens feeling entangled and disadvantaged (Matsikidze 2014). Furthermore, the system's failure to recognise customary law practices creates a sense of alienation and reinforces the feeling of being trapped within a web not designed for their needs. Although the law of the land says everyone is equal, most people get stuck in the web for various, interconnected reasons that are embedded within the system itself. The barriers are endemic within the system, which as some commentators have argued (Armstrong and Sandell 2011; Adams-Prassl and Adams-Prassl 2020), makes it pointless for laypersons to even try to access the formal justice system.

3. Inherent and Unacceptable Risk of Unfairness in The Justice System

A Google search of the word 'futility' yields a description of a noun that means, 'pointlessness or uselessness.' The Meriam-Webster online dictionary traces the word to French and Latin etymology, where it means 'serving no purpose' (Merriam Webster 2023). Access to justice is jeopardised when there is a risk that individuals may be unable to bring or defend meritorious claims (Adams-Prassl and Adams-Prassl 2020, 563). However, for a risk to qualify as unacceptable in a justice system, it should have the potential to render claims futile or pointless. Futility in this instance includes loss of liberty and property and self-help (ibid; Helbling, Kälin, and Nobirabo 2015). The cost of futility affects more than the individual claimant but society broadly. Therefore, the risk of futility (localised for the plural cultural and legal system operating in Zimbabwe and used in this article as 'an inherent and unacceptable risk of unfairness') is the central framework for evaluating access to justice (Adams-Prassl and Adams-Prassl 2020, 564). A framework anchoring the analytical foundation of this article.

Futility in 2017 was captured in the United Kingdom Supreme Court in *R v Lord Chancellor*, when the court struck down the Employment Tribunal fees as unlawful because

they infringed on the constitutional right of access to court (*R (UNISON) v Lord Chancellor* 2017). The Fees Order implemented by the Coalition Government in 2013 had, according to the Supreme Court made it irrational or futile for workers to pursue claims because the fees were unaffordable, which, effectively prevented access to court (Bogg 2018, 510).

The implication of the UNISON case goes beyond the United Kingdom because it supports a core principle of justice – *equality*. The case, therefore, serves as a benchmark for evaluating the acceptability of risks and fairness within justice systems across different countries. Thus, it is possible to extrapolate the reasoning in the discussion above and apply it to the discourse on access to justice in Zimbabwe, a former British colony using the English common law system. Jurisprudence from British courts, 'accept[ed] the principle that a system will be unlawful where it carries, inherent within it, an unacceptable risk of illegality' (Armstrong and Sandell 2011, 248). The authors provide a list of cases concerning vulnerable adult protection such as *R (Royal College of Nursing) v Secretary of State for Health 2010* and the DPP's guidance on child prosecutions *R (E) v DPP* 2010. They trace the systemic risk point back to Baroness Hale's speech in *R (Wright) v Secretary of State for Health* 2009. Powell similarly traces cases back to *R (Brooke) v Parole Board* 2008 (Powell 2017, 83).

As I will discuss below, the crucial difference between the British legal system, and thus, the UNISON case with Zimbabwe is legal pluralism in the latter country. That is, common law (Roman-Dutch law and English common law) operating side by side with customary law and living customary law, replete with socially appropriate and normatively accepted plural processes of dispute resolution such as family members. Prior to analysing the inherent and unacceptable risk of unfairness in the Zimbabwe justice system, it is critical to outline the defining features of the framework as a method of evaluating access to justice. The central question being: Can the Zimbabwe justice system as it currently is designed, and functions operate fairly in accordance with citizens' normative visions of justice?

a. Characteristics of Inherent and Unacceptable Risk of Unfairness

The premise for arguing that an unacceptable risk of unfairness in a justice system is unlawful stem from the legal basis that rational decision-makers that are focused on the public good would (perhaps) not adopt an inherently unfair system. Moreover, no democratic system may be designed to be systemically unfair. An inherently unfair justice system is characterised by a high probability of illegalities and prevents justice seekers from accessing the system itself

or obtaining outcomes they consider normatively fair once they have accessed the system (Adams-Prassl and Adams-Prassl 2020, 580).

In fact, a rational decision-maker that is focused on the public good and operating in a democratic society may be more concerned with the prevention of potential harm that may occur. Importantly, an inherent and unacceptable risk of unfairness is assessed squarely with the potential consequences associated with such risks and not separately (Armstrong and Sandell 2011, 251). The unacceptability of such risks imports a proportionality test because, 'it may be irrational to take even a low (or moderate) chance of a low (or moderate) level of harm if there is an obvious safeguard [solution] that could easily be deployed' (ibid).

Measuring an inherent and unacceptable risk of unfairness in a justice system, though, is not an exact science. It is nebulous like access to justice, which defies precise definition in the literature. I, therefore, propose that an inherent and unacceptable risk of unfairness may be viewed as having a descriptive as well as a normative aspect. The descriptive aspect relates to the demand-side of the justice system and 'denotes the general subject of the extent to which citizens are able to gain access to the legal services necessary to protect and defend their legal rights' (Cornford 2016, 28). While the normative aspect relates to the supply-side of the justice system and stands for an 'ideal' of equal access, entailing a duty on the state to guarantee equal capacity to each citizen to protect their legal rights (ibid).

Given the definition of access to justice adopted herein, the descriptive and normative aspects go beyond legal rights and requires conformity with international human rights standards that include social justice elements. This is aligned with the ethnographic work conducted in Zimbabwe, where laypersons insisted on social justice in their definitions of justice and access to justice (Stewart 2000). Accordingly, what counts as an inherent and unacceptable risk of unfairness in a justice system is context-specific. So, while many jurisdictions make declarations of equality under the law (Constitution, s 56), evaluating inherent and unacceptable risks of unfairness will differ depending on the specific context.

There are two broad sets of measurements for assessing the risk of unfairness within a justice system (Armstrong and Sandell 2011, 28ff; Adams-Prassl and Adams-Prassl 2020, 574). Firstly, to be unacceptable, the risk must impede the public from defending or pursuing meritorious claims. Secondly, the risk must inhere in the system and exclude human errors as well as individual aberrations. That is to say, the inherent and unacceptable risk must go beyond a single case and should be revealed through a review of the entire justice system and not only individual cases. In other words, the risk should be embedded in the justice system – so that it

goes beyond demonstrating bad decisions e.g., by individual judges and magistrates. Thus, in this article, I am less interested in how huge a risk is or how detestable the decisions or judgments are, no matter how ever-present they may be.

Adams-Prassl and Adams-Prassl make a distinction between a system that is badly managed and one that is inherently bad and unfair (Adams-Prassl and Adams-Prassl 2020, 574). By making this distinction, they demonstrate the existence of laws, policies and institutions driving the risk of unfairness. In subsequent sections 4 and 5, I will use four examples to evidence the inherent and unacceptable risks of unfairness, which have led Zimbabwe to consistently fail to ensure access to justice for citizens, starting with the demand side.

4. Demand Side: Inherent and Unacceptable Risk of Unfairness

The demand side of access to justice focuses on how the justice system is designed and operates with citizens bringing or defending meritorious claims. A wide range of obstacles to accessing justice from the demand side in Zimbabwe exists, collectively leading to negative consequences for justice seekers (Sithole 1997; Stewart 2000; Tsanga 2003; Moyo 2018). Two systemic barriers to access to justice are sufficient to demonstrate the inherent and unacceptable risk of unfairness in the Zimbabwe justice system. As mentioned above, when discussing the analytical framework, the factors identified and utilised herein are not confined to exceptional circumstances because they are systemic. It is, therefore, unnecessary to establish that the system would otherwise operate unlawfully in each case, or even in most cases (Armstrong and Sandell 2011, 251). What should occupy our minds is whether the risk is inherent in the system, acceptable or unacceptable and the consequences of such risks to society (ibid).

Countries that were previously colonised tend to have plural legal systems. Zimbabwe is no exception and is, therefore, a microcosm of postcolonial plural cultural and legal countries. It follows then, that access to justice means that citizens in postcolonial countries should have plural legal choices of fora in which they may bring or defend claims. As a starting point, plurality of mechanisms in the formal justice system is an obvious safeguard that protects society from even low risk of harm they may experience in the current positivist framework. Failure to have effective and practical dispute resolution processes outside of litigation and general law court makes access to justice theoretical and illusory. Two points make this clear (i) the system is rigged from the outset with the dominance of legal positivism in the justice system (ii) the system lacks plural equality and does not reflect the social reality of Zimbabwean society. These two systemic barriers will be discussed in detail in the following subsections,

which outline the exclusionary nature and pluralistic inequality within the current formal justice system.

a. The Legal Positivist Justice System is Exclusionary by Design

In Zimbabwe, the dominant approach in the definition of state law is the positivist view, which is applied when ascertaining what the law says in most situations (Madhuku 2010, 2). Using this narrow legal sense, justice is achieved when the population has the capacity and a fast, effective way to defend or protect their meritorious claims. Emphasis is placed on the fairness and balance of the outcome, that is; the right to be heard and the right to an impartial determination (Chan 2007, 1). Related to this objective of the justice system are two premises; the first is on the ideal of equal access and the second is on the centralised monopoly of the administration of justice by the state to achieve uniformity (Cornford 2016, 28). These are the features that informed the colonial justice system in Rhodesia (now Zimbabwe), which is still in use. The characteristics are exogenous and are not related to Zimbabwean communities' way of life. And we know that disputes are related to a people's way of life (Maraire 2024, forthcoming). The social structure of a society, therefore, determines the types and characteristics of disputes and how they are settled (Ndlovu and Ndlovu 2012, 169; Maraire ibid).

Stewart conducted an ethnographic study in Zimbabwe and many of the research participants were more concerned with social justice elements such as social security, economic security, rights to health, education, and decent homes (Stewart 2000). This is supported by the literature, which connects social rights, social justice, and access to justice (Cappelletti and Garth 1977, 7; Smith 1997, 9). These elements are inextricably linked and resonate with the lived realities in Zimbabwe, despite the existence of legal positivism. Still, sentiments of social rights and social justice contrast the idea of substantive law, procedural fairness and equitable results that dominate the justice discourse in scholarship and in legal practice.

Predictably, the result is that you have a legal system that defines law, justice, and access to justice in one way, and a population that defines and lives differently. This is not unique to Zimbabwe. For example, state law and procedures also do not adequately reflect the moral and cultural values of the members of formerly colonised Indigenous communities in Latin America (Sieder and Flores 2012, 29). Notwithstanding the commonalities, it cannot be said to be justice if it does not stem from the social realities of the population it seeks to serve. Surely, citizens ought to determine what is just and unjust. As mentioned above, access to justice as an

interpretive concept is derived from the normative definitions that the people using it bestow upon it. If we take this to be true and correct, a system that is designed contrary to a people's way of life is, therefore, exclusionary, inherently, and unacceptably unfair. From this perspective, the design of the justice system is itself an example of the unfairness Lord Reed referred to in the UNISON case, which leads to futility.

Importantly, even though initiatives like legal aid, interpreters, and small claims courts among others, are introduced in former colonies characterised by plural legal systems, their implementation is unlikely to fundamentally alter the system (Braconnier De León 2015, 26–29). This is because such initiatives fail to provide Indigenous people with 'legal agency,' which is the capacity to influence or manage the justice system (Brinks 2019, 353). While these initiatives may offer practical support in some instances, they do not empower citizens to actively shape or manage the legal framework. This is a critical challenge facing justice systems in countries like Zimbabwe.

Moreover, focussing on addressing individual barriers to access to justice, rather than tackling the obstacles as a systemic problem fails to equalise the conditions under which citizens can influence the legal framework or contest the outcomes even if they manage to access the system. This is a high risk, with a high level of harm to society broadly as they are forced to continue using an imposed colonial system even after attaining independence. The consequences are alienation from the system because, from an Indigenous people's perspective, the justice system is still being used as a tool for social control and, therefore, fails the proportionality test of enabling self-help (Adams-Prassl and Adams-Prassl 2020, 563; Helbling, Kälin, and Nobirabo 2015). Decolonising the justice system is essential to realign formal legal structures and citizens' lived experiences, thereby supporting the broader decolonial agenda aimed at dismantling colonial legacies that perpetuate marginalisation, ultimately restoring human dignity (Maraire 2024, forthcoming).

b. Lack of Pluralistic Equality

The primary means of obtaining formal justice in Zimbabwe is through the general law court system. For that reason, there is no pluralistic equality in the justice system. An inherent and unacceptable risk of unfairness exists for people who have a colonial system imposed on them, and who subsequently see and experience it as alien (Stewart 2000, Sibanda 2015). In much of the western literature and legal practice, access to justice is equivalent to access to court. This is problematic in Zimbabwe, where most disputes are resolved through traditional African

dispute resolution (TADR) platforms. Resolving disputes within these platforms, for example, the family, local or community court does not have the force of law.

In addition, the Constitution provides, 'every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court' (Constitution, s 69(1)). Currently, the law limits dispute resolution to predominantly general law court through litigation. Courts are, however, creatures of law, meaning judges and magistrates are bound by the law. The net effect is that courts lack initiative, which render futile any attempt to defend or bring meritorious claims. For example, in instances where the law at hand reflects structural injustice. The point is made clear by Ebrahim JA in a dissenting judgment in *Minister of Lands v Commercial Farmers Union*:

> 'During argument, the view was expressed that justice was on the applicants' side, but the law was on the respondent's side. Admittedly law and justice do not always coincide. Examples of oppressive and unjust laws can be found in many countries. But this does not mean that the courts, which are sworn to uphold the law can ever allow their personal, subjective view of what constitutes justice to override the clear provisions of the law. It is not the function of the courts to support the government of the day, or the would-be government of tomorrow. It is not their function to support the state against the individual or the individual against the state. The courts' duty is to the law and to the law alone. Judges, as individuals, have their own political, legal, and social views and opinions. But it is the sworn duty of every judge to apply the law, whatever he or she may think of the law. If a law is patently unjust, the courts can seek to better matters as far as possible, within the law, but they may never subvert the law. The remedy for an unjust law lies, not with the courts, but with the legislature.' *(Minister of Lands v Commercial Farmers Union 2001*, 457 (S):490F-491B).

The legal principle of *stare decisis* cripples instead of empowering the judiciary in some instances and contributes to the inaccessibility of justice by the population. While certainty and predictability are central to rule of law, justice that produces outcomes citizens consider normatively fair should be the goal. After all, an efficient and accessible justice system that is predictable is only a means to an end, and the end itself is the achievement of effective access to, firstly, the system and secondly, outcomes citizens consider fair.

In plural legal countries like Zimbabwe, the formal justice system is rooted in colonial legal positivism. This dominant legal theory emphasises the law as a set of positive rules, distinct from morality or social norms (Hart 1961). However, this clashes with the existing normative conceptions of justice and access to justice held by many citizens (Stewart 2000). This inherent discrepancy renders the system purposefully exclusionary. This is not a theoretical concern. We can see the real-world consequences of this disconnect in historical cases like apartheid South Africa (Dugard 1971), where legal positivism was implicated in the judiciary's inadequate defence of civil liberties. Comparable concerns are observable in Latin America, where numerous studies have shown over 97 per cent dissatisfaction with the formal

justice system (Braconnier De León 2015; Brinks 2019; Gómez 2007). These cases illustrate how legal positivism, with its emphasis on formal rules over social context and customary practices, can perpetuate exclusion and undermine citizens' access to justice.

Moreover, legal structures rooted in a predominantly colonial tradition, incongruent with the people's way of life are presided over by a judiciary that, despite training, continues to exhibit bias against Indigenous people (Braconnier De León 2015, 46). This bias has culminated in citizens losing confidence in the system (Gómez 2007, 19), ultimately avoiding it for the resolution of disputes. Matsikidze (2014) reviewed many court cases in Zimbabwe at the magistrates' court and interviewed several litigants who abandoned their cases because they felt they could not obtain justice. Zimbabwe, akin to other former colonies like Uganda, exemplifies this pattern, with a mere 5 per cent of the population opting to use the formal justice system (Tamale 2020, 139), and over 80 per cent use non-state platforms, which they consider more socially and culturally appropriate (Sibanda 2019, 53). The outcome is a predictable consequence of an intrinsically inequitable system, rendering the pursuit of rights pointless or futile.

The Zimbabwean example serves as a microcosm for other postcolonial nations grappling with similar legal pluralism challenges. A potential remedy lies in amending s 69 of the Constitution to explicitly acknowledge the pluralistic nature of Zimbabwean society and fully incorporate TADR beyond symbolic recognition (Constitution, 69). This is an obvious safeguard against the inherent risk of unfairness posed by the pluralistic inequality in the current system.

5. Supply-Side: Inherent and Unacceptable Risk of Unfairness

A critical, inherent, and unacceptable risk of unfairness question from the supply-side of justice is concerned with the path to justice. That is, once citizens make the decision to either bring or defend a meritorious claim, can the justice system facilitate the resolution of the dispute in a normatively acceptable manner? Several factors must be considered. Such considerations include opportunity to provide verbal communication in a language one understands, access to legal representation as well as provision of legal aid for those who cannot afford legal and court fees (de Oliveira 2004, 386). The justice system must or ought to allow sufficient and meaningful representation by citizens, regardless of social status or education level. Failure by the system to provide adequate opportunity for self-representation means there is an inherent and unacceptable risk of unfairness (Armstrong and Sandell 2011; Adams-Prassl and Adams-

Prassl 2020). The availability and timing of oral hearings is important to firstly, access the justice system and secondly, to obtain outcomes that have the force of law and meet citizen normative conceptions of justice.

As discussed above, the concept of access to justice is inherently interpretive, evolving based on the normative understanding of justice within a particular context. It has been oftentimes presumed to be synonymous with the achievement of substantive justice, emphasising the ability to obtain a fair and just outcome (Grossman and Sarat 1981, 125). The critical distinction that is often missed in existing scholarship is that access to justice primarily focuses on enhancing the chances of people obtaining substantive justice for themselves. For this to happen, people must first gain access to the justice system, then and only then, can they have a chance of obtaining the justice they seek. Still, once they have accessed the justice system, the barriers, which I accept to exist in every system should not inhere within them a risk that will render bringing or defending meritorious claims futile. Below, I discuss two systemic barriers—the complexity of adjectival law and the expenses associated with obtaining justice—both of which are central to the justice system design, but systematically impede citizens from accessing justice.

a. Rigid and Complex Procedures

General law courts tend to have highly structured and complex adversarial procedures, which are understood and utilised by highly trained lawyers as well as expensive expert witnesses, all of whom serve a vital function within public law litigation (Cappelletti and Garth 1977, 239). Adversarial and complex procedures that are only understood by highly trained lawyers place severe limits on the accessibility of justice for rational claims made by ordinary citizens (ibid). Reason being that it is virtually impossible for self-actors to successfully carry through a motion or defend a meritorious claim. The *Mandava v Chasweka* case illustrates the stringent rules of procedure of the Zimbabwean justice system (*Mandava v Chasweka* 2008). In her judgment, Makarau JP, as she then was, scolded both the clerk and the magistrate for allowing a mixture of procedures, that is, the action procedure and the application/motion procedure, which should be used separately (Magistrates Court Act, 1931; Magistrates Court (Civil) Rules). Makarau JP referred the matter for trial *de novo*, with conditions that the parties should file pleadings in accordance with the rules of the lower courts.

The judge further referred the case to the Chief Magistrate to conscientise magistrates countrywide that flexibility and informality are not permissible and would not be allowed to

stand. While the plaintiff had a genuine case involving property rights, she could not obtain justice because she filed incompetent papers, which deviated from the civil procedure and magistrate's court rules (Statutory Instrument 2021-153 Magistrates Court (Civil) (Amendment) Rules, 2021 (No. 3)). Like the *Magaya v Maga*ya case, which equated the status of women to teenage boys and deprived a female sibling of property, the judges in both cases correctly enunciated the law by deliberately ignoring the issue of whether their interpretation of the law enhanced justice or impeded it (*Magaya v Magaya* 1999). The 2013 Constitution has since rectified the provisions that led to the *Magaya v Magaya* judgment. However, it is necessary to continue referencing the case because it illustrates the long-standing tradition of judges correctly enunciating the law at the expense of impeding justice. Taken from the *Minister of Lands v Commercial Farmers Union* dissenting judgment cited above, it is clear a judge pays no attention to the attainment of justice if they apply the law. Moreover, the judges, and by extension the justice system does not ask the pertinent question: have the parties achieved what they sought to obtain from engaging in the proceedings?

The current justice system in Zimbabwe ignores the principles of orality and simplicity (de Oliveira 2004), which are key to realising justice and facilitating access to justice. Futility is, therefore, in this instance an outcome of the rigid and complex procedures – an inherent and unacceptable risk of unfairness that is at the core of the formal justice system. Needless to say, complex legal procedures are critical to legal practice. That is not the question this paper is seized with, rather, I am moved by the fact that a legal framework designed in such a way deliberately excludes Indigenous people who do not seek the same substantive notions of justice provided by the imposed formal and colonial positivist system. Formerly colonised people seek a different legal framework and justice system, one that closely reflects their normative framework (Brinks 2019, 349).

b. Justice Through the Courts is Expensive

There is no access to justice where the legal system is financially inaccessible, where citizens cannot afford lawyers, nor the fees required to execute decisions made in their favour. Justice is expensive, and NewsDay on 30 July 2015 cited several stories, which cast doubt on the state of justice in Zimbabwe. One of the stories was that of a woman whose water supply the municipality cut off. After successfully receiving legal aid assistance to bring a spoliation application, she did not have the water turned back on because she could not afford the US$10 court fees as well as a further US$70 Messenger of Court service fee (Chinhamo 2015). This

case makes apparent, the reality that the fees charged by lawyers, by the courts, Messenger of Court and Sherriff are anti-poor.

In such circumstances, disputants find that ultimately, the justice trail ends in a piece of paper because they cannot afford to execute the judgment. And even after spending large sums of money, cases are typically decided not on their merits, but on the brilliance of the lawyers. For many, the financial burden factor in the justice system is exemplary of futility. In a country where close to 40 per cent of the population lives below the poverty line (World Bank 2022), it is futile for many to even attempt to access the formal justice system.

The cost barrier is compounded by, for example, the opportunity cost for self-employed people, especially in the informal sector, which makes up over 89 per cent of the economy (Saungweme, Matsvai, and Sakuhuni 2014). This dilemma – choosing between pursuing a case or basic necessities like feeding one's family – exposes a critical access barrier often overlooked in broader discussions. The situation is more dire for self-employed breastfeeding mothers, without help at home because courts are by no means baby-friendly. A breastfeeding mother pursuing a case in court must find a sitter because she cannot bring the child into court, highlighting the intersection of economic hardship and social realities that disproportionately affect marginalised groups.

Beyond the immediate cost barrier, the examples from Zimbabwe illuminate the inherent and unacceptable risk of unfairness within the justice system itself. The denial of a fundamental right, access to water (Constitution, s 77), to a vulnerable population underscores the limitations of the formal system in protecting those most in need. This specific example demonstrates how access to justice issues are intricately linked to broader social justice concerns. Zimbabwe's situation exemplifies the chilling effect that inherent unfairness can have on access to justice. When citizens perceive (perhaps rightly so) the system as stacked against them, they are less likely to pursue even legitimate claims, further perpetuating a cycle of injustice. These implications transcend Zimbabwe and provide additional understanding of access to justice in other former colonies characterised by diverse cultural and legal systems. By shedding light on the structural barriers to accessing justice, this article has introduced a previously absent theoretical and analytical dimension to the literature on access to justice.

CONCLUSION

In conclusion, this analysis of Zimbabwe's justice system, a microcosm for many postcolonial nations with plural cultural and legal systems, reveals how inherent unfairness

within a system rooted in a singular legal tradition systematically denies access to justice. Futility or pointlessness means that rational people who are focussed on the public good are unable to pursue or defend meritorious claims. The examples highlighted herein represent only a fraction of the barriers to accessing justice, contributing to a theoretical understanding of access to justice within the specific context of plural cultural and legal countries, formerly colonised and imposed with an alien legal framework contrary to their way of life.

From a western perspective, access to justice revolves around two distinct but interdependent factors, substantive justice and procedural justice, as discussed by Cappellettti and Garth (1977), Sithole (1997), and (Chan 2007). Although relevant to Zimbabwe, properly addressing access to justice necessitates a third pillar: the incorporation of cultural norms. A country may boast world-class substantive and procedural justice, however, if dispute resolution fora are limited to foreign, adversarial, elitist systems that are removed from the populace, access to justice remains unattainable. Mere access to court, often equated with access to justice (Galanter 1981; UNDP 2015) from a colonial positivist perspective in Zimbabwe, is at best restricted and at worst nonexistent for segments of society burdened with obstacles such as childcare responsibilities, inability to afford legal representation and associated court fees, and exclusive reliance on general law devoid of cultural norms and values (Stewart 2000).

The comprehensive analysis presented herein demonstrate the glaring disparity between the enshrined right to access to justice in Zimbabwe's Constitution and the lived experiences of many citizens. Despite the acknowledged status of access to justice as a fundamental human right, inherent limitations within the Zimbabwean justice system erect systemic barriers that effectively obstruct access for a significant portion of the population, resulting in 80 per cent of the population relying on non-state platforms for dispute resolution. These barriers encompass complexities within adjectival law, financial hurdles, the dominance of legal positivism, and a failure to reflect the plural equality of Zimbabwean society.

This article significantly contributes to the field by applying the analytical framework of inherent and unacceptable risk of unfairness to the context of access to justice in plural legal systems. Previous scholarship predominantly focused on identifying individual barriers within the system, often within specific legal fields like family law (Moyo 2018; Matsikidze 2014; Stewart 2000; Tsanga 2003; Sithole 1997). By employing a systemic lens, this article fills a theoretical gap on access to justice in Zimbabwe and other countries with plural cultural and legal systems, revealing how the design of the formal justice system itself, rooted in a singular legal tradition, engenders inherent and unacceptable risks of unfairness across all legal matters.

Consequently, citizens perceive the pursuit of even legitimate claims as futile/pointless, perpetuating a cycle of legal marginalisation.

I drew upon a diverse data set comprising case law, legal and sociological literature on access to justice and plural legal systems, media reports documenting specific access to justice challenges, including firsthand observations and experiences within the Zimbabwean justice system. This multi-pronged approach facilitated a nuanced understanding of the systemic limitations contributing to the inherent and unacceptable risk of unfairness within the system. These barriers engulf the entire justice system and transcend a single field of law like family law that previous studies predominantly focused on when identifying challenges to access to justice.

While personal familiarity with Zimbabwe informed the initial selection, a closer examination reveals its broader significance. Similar patterns of inherent and unacceptable risk of unfairness within the justice system emerge upon reviewing case law and literature across former colonies characterised by plural cultural and legal systems, spanning legal, sociological, political, and anthropological realms. I say this to emphasise that I am not under any illusion that these challenges to access to justice are unique to Zimbabwe. In fact, they are pervasive across many countries, as discussed throughout this article and in earlier chapters of this Special Issue.

The choice of analysing and theorising systemic barriers to access to justice in Zimbabwe transcends mere convenience. A single-country analysis facilitates a granular examination of the specific challenges within a particular legal and socio-economic context. Zimbabwe's unique characteristics, such as its extensive informal sector and colonial legacy, provide valuable insights into how these factors intersect and shape access to justice issues. For instance, the denial of a fundamental right such as access to water, serves as a poignant contextual example that illustrates the consequences of systemic barriers, enhancing relatability and bolstering the analytical impact of this article.

Moreover, the Zimbabwean example transcends its immediate context by serving as a microcosm for other developing nations grappling with similar challenges. The prevalence of informality, social justice concerns, and systemic limitations within these nations' legal systems necessitates a comparative lens. By analysing Zimbabwe's landscape, this article identifies these systemic issues and lays the groundwork for further investigations into access to justice challenges within other postcolonial nations with plural legal systems. Thus, the Zimbabwean

experience serves as a cautionary tale, spotlighting how inherent unfairness within the system discourages even legitimate claims, thereby perpetuating injustice.

Finally, it bears mention that it is unrealistic to expect general law courts to be simple, fast, inexpensive, and staffed with active decision-makers, given the complexity of contemporary laws. The question of access to justice does not interrogate the necessity of courts and lawyers in contemporary society per se but rather explores how society can preserve general law courts while creating (by accepting plurality of disputing and settlement processes) or embedding more accessible fora for disputing and settlement within the purview of state jurisprudence. These areas merit further research, promising both theoretical insights and practical impacts on the formal justice system and legal scholarship in Zimbabwe and other former colonies characterised by plural cultural and legal systems.

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