

Chapter 11

Access to Justice in Kenya in the Context of Sustainable Development Goals (SDG) 16.3 on the Rule of Law: Lessons for the upcoming 2020 Voluntary National Review Report

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Abstract

Kenya was among the various countries that presented a Voluntary National Review Report in 2017. In the context of the Sustainable Development Goal 16.3, a close reading of the 2017 Report shows some strong and weak points. Kenya is preparing its second Voluntary National Review Report at the next High-Level Political Forum in 2020. This contribution argues that Kenya can take lessons from its 2017 Report to comprehensively engage issues that speak to Access to Justice under SDG 16.3. First, the contribution contextualizes Sustainable Development Goal 16.3 in Kenya's context. Secondly, it evaluates and juxtaposes the requirements for the Voluntary National Review Report under the 2020 and the 2017 Guidelines. Thirdly, it evaluates the extent to which the 2017 Voluntary National Review Report ascribed to its guidelines and where the emphasis for the 2020 Report should be. The fifth step is a hint on the way forward; followed by a conclusion. The authors adopt a desktop approach that evaluates available literature, legislation, case law and similar sources. The findings show that until May 2020, the SDG 16.3 did not deal with access to civil justice. Literature has identified the need to engage both formal and informal courts to deal with various societal issues like entrenched inequalities, discrimination and the independence of the judiciary. This study finds that a point of departure from Kenya's 2017 VNR Report requires that data should be desegregated according to the requirements of SDG 16.3, with a more nuanced approach that links the challenges to access to justice.

Keywords: Access to Justice, Kenya, legal aid, SDG 16.3, VNR.

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Introduction

Various lessons can be identified from Kenya's Voluntary National Review (VNR) Report of 2017. It is, however, important that the concepts of access to justice as relayed in Sustainable Development Goal (SDG) 16.3 and as a general concept is evaluated. This is critical at such a time when Kenya is preparing its second VNR Report. Following the background above, this contribution contextualizes Sustainable Development Goal 16.3 in Kenya's context. It evaluates and juxtaposes the requirements for the VNR Report under the 2020 and the 2017 Guidelines. The evaluation extends to the extent to which the 2017 VNR may be used to improve the 2020 Report. The hints on the way forward are followed by a conclusion.

Statement of the Problem

Following the adoption of the SDG Agenda by the Kenya government, there remains a disconnect between the actual and practical problems facing access to justice and the requirements for reporting on SDG 16.3. While the VNR Report is expected to offer insights on the national steps in engaging the SDG Agenda, the findings reflect a need for deeper engagement on issues of access to justice like entrenched inequalities, discrimination and other instructive initiatives like budgetary commitments and the use community based paralegals. This contribution offers a chance for the stakeholders involved in the drafting of the 2020 VNR Report to have an introspection on the matters identified here. If the stakeholders do not engage these aspects, the submission of VNR Reports will not be reflective of a process that seeks to ensure that no one is left behind.

Setting the scene: The Sustainable Development Goal 16.3

The SDG 16 speaks to the promotion of peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (SDG16, 2020). This forms part of the 17 Sustainable Development Goals (SDGs) that were adopted by the international community in September 2015 (SDG16, 2020). Before the chapter delves into these details, it is prudent to underscore the overview of the state of access to justice in Kenya. This chapter identifies four major challenges to access to justice in Kenya, thus, entrenched inequalities, the concept of access to justice, discrimination and independence of the judiciary. This is in line with the recently held global conference on SDG 16.3 that identifies similar challenges like entrenched inequalities, judicial independence, building trust in institutions and financing the judiciary and using new technology (IDLO, 2019).

An overview of Access to Justice Situation and Challenges in Kenya

First, the problem of entrenched inequalities is evident in various countries. For instance, in South Africa the income inequality has deepened, whereby 1 per cent of the figures from the World Inequality Database, take home 20 per cent of all income in the country, followed by a 10

per cent who take home 65 per cent. It is absurd to note that the remaining 90 per cent only take home 35 per cent of the total national income (Webster, 2019). Similarly, in Kenya, research by Oxfam indicates that the gap between the richest and poorest is high as less than 0.1 per cent of the own more wealth than the other 99.9 per cent of the population. This is an indication that about eight thousand three hundred people own most of the wealth in a country of forty-four million people (Oxfam, 2020). A closer look at these statistics shows the richest people in Kenya (accounting for 10 per cent of the population) earn an average income that is 23 times more than the poorest 10 per cent. Furthermore, a great part of the population suffers from unequal access to healthcare and education, with close to one million primary school-aged children are out of school. The government only spends 6 per cent of its budget on health, something that is way below the desired 15 per cent. , leading to 2.6 million being affected by poverty and ill-health (Oxfam, 2020; Nanima, 2019). This poverty continues to have a female face, where 96 per cent of Kenya's rural women population work on farms, and only 6 per cent have land titles (UNDP, 2016; Africa-Asia HLPF, 2019).

Secondly, the question that arises is whether these social inequalities affect access to justice. It is argued that legal accountability permits local corruption to undermine economies, diverting resources from where they are needed the most (OECD & OSF, 2016). Where parties go to the courts, they are affected by long delays that affect one's inhibition of individual economic activity. Access to justice requires equal access for all, use of both formal and informal methods of justice, enhanced physical access, provision of legal aid and the use of Community-Based Paralegals among other initiatives (USIP, n.d). The resultant convictions and sentencing limit a caregiver's ability to support their families (UNODC, 2013). This is exacerbated where women are discriminated against in the justice systems through legal exclusion (Chipo, 2020). As such addressing legal challenges is key to the use of a human rights approach to ensure their protection.

Thirdly, discrimination affects the realization of access to justice in Kenya (IDLO, 2019). Under Article 27(1) of the Kenyan Constitution of 2010, every person is equal before the law and has the right to equal protection and equal benefit of the law (Constitution, 2010). Clauses (4) and (5) provide that neither the State nor any person shall directly or indirectly discriminate against another on the non-exhaustive grounds like race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Courts have been keen to relate to this provision in recent cases. In *Koki Muia v Samsung Electronics East Africa Limited*, the claimant stated that the dismissal from employment by the respondent was discriminatory and made in bad faith, sexist and racist. The court found in favor of the claimant and stated that 'from the evidence adduced in Court, it seems the Respondent does not permit the ascension of Kenyans to high offices and instead sends incompetent Korean nationals to supervise and oversee more qualified Kenyans. This is clearly discriminatory and not in keeping with international labour standards'.

The Court held that the dismissal of the claimant was unfair and unlawful, she was mistreated in her employment by being subjected to racial and sexual discrimination. It should be recalled that discrimination is intrinsically linked to poverty as a great part of the population is excluded from accessing both criminal and civil justice due to various reasons like gender and ethnicity (HRW, 2013). More often than not, vulnerable populations like women, children and the elderly are usually excluded from accessing justice due to their vulnerable status (Kristin & Jonathan, 2007). This is exacerbated by the limited engagement with legal aid and the use of Community-Based paralegals to provide more access (Abigail, 2018).

Fourthly, the independence of the judiciary is a crucial aspect of access to justice (Boies, 2006). It is important that when both formal and informal systems of adjudication of justice receive complaints, they can hand down judgments without fear of repercussions to their office (Anleu, Mack & Tutton, 2014). To this end, it is prudent that the judicial officers are protected in terms of appointment, tenure and termination of their office (Sibalukhulu, 2013). On another strand, other issues like corruption need to be effectively dealt with such that the confidence in the judiciary is not eroded (CMI, 2016). This calls for the government to deliberately ensure that the emolument of judicial officers and members in the wider justice, law and order sector are sufficient to wade off temptations towards corruption.

Sustainable Development Goal 16.3 in Context

The SDG 16.3 calls for the promotion of the rule of law at the national and international levels and to ensure equal access to justice for all. This target is informed by two indicators. Indicator 16.3.1 calls for an evaluation of the proportion of victims of violence in a previous 12 months before the filing of the report. It is expected that these victims have reported their complaints to competent authorities or other officially recognized conflict resolution mechanisms. Indicator 16.3.2 calls on an evaluation of unsentenced detainees as a proportion of the overall prison population. This is to ensure that the country views the proportion and shows steps it has taken to engage to mitigate or reduce it (SDG16, 2020). A contextualization of SDG 16.3 shows that it is there is no definition of ‘access to justice’.

It is also important to adopt a working definition to access to justice. It may be referred to as the ability of an individual who seeks justice to access legal information, legal advice, legal assistance and legal representation (Dereymaeker, 2016). This has been illustrated in a legal pyramid that inculcates use of knowledge to empower people about their rights under the law, how to exercise them and how to solve the legal problems in a cost-effective manner (Dereymaeker, 2016). Recent research widens the scope of the legal pyramid. This includes formal legal representation in court, legal assistance, legal advice, legal education and information, and mechanisms for alternative dispute resolution and restorative justice processes (UNGA, 2012). Research indicates that access to justice is informed by two elements: the formal aspect being the legal and de facto access to courts on the one hand, and other aspects being the traditional or non-formal mechanisms of conflict resolution (Bedner & Vel 2010). This position has been confirmed by Helbling et al (2015) research in the Rift Valley province of Kenya stating that substantively, institutions must be accessible in both a formal and non-formal sense that effectively provides redress to injustices with the aid of state, religious or customary law. The second definition (UNGA, 2012) is preferred as it is attuned to both the criminal and civil aspects of access to justice (Bedner & Vel, 2010; Helbling et al., 2015). The question as to whether this is captured in SDG 16.3 and Kenya’s context, the authors now turn.

The SDG 16 does not define ‘access to justice’. It should be recalled that it uses targets and indicators to inform the measurement of the extent to which access to justice is realized in a given country within a particular period (SDG, 2016). It is not surprising as such, for one to assert that the identified challenge in the measuring of access to justice indicators lies in the focus on criminal issues without a corresponding reflection on the other aspects that may inform the accessibility of justice in both criminal and civil cases (WJP, 2019). It is worth noting that the recent addition of target 16.3.3 to deal with access to justice in civil matters is not only critical but timely to the lacuna that was evident in the development of stronger institutions in domestic jurisdictions () A clear picture of this requires a look at some structural problems.

These are many and varied in a non-conclusive list of poverty, gender inequality, and discrimination. An evaluation of these challenges, before engaging SDG 16.3 is important in situating the societal problems. This evaluation also seeks to establish if SDG 16.3 provides solutions.

Requirements for Voluntary National Review Reports under the 2020 and 2017 Guidelines

An evaluation of the current approach to the preparation of VNR Reports needs taking a step backwards to the procedure before the 2020 Guidelines. A further step is taken to hint on the High-Level Political Forum (HLPF). To this end, the HLPF offers a platform where countries present a report on the steps that they have taken to towards the preparation and presentation of the VNR Report. It is also used to evaluate the extent to which the SDGs are being realized. For instance, at the last HLPF (2019) 47 countries presented their reports. At the subsequent High-Level Political Forum in 2020, it is expected that another 47 countries will present their reports (SDG Knowledge Platform, 2020). Kenya is expected to present its second VNR Report (SDG Knowledge Platform, 2020). The emphasis for this year is The theme will be "*Accelerated action and transformative pathways: realizing the decade of action and delivery for sustainable development* " (SDG Knowledge Platform, 2020). It is expected that the participants will debate the current state of the SDGs in light of the impact of the COVID-19 pandemic.

This section by design deviates from a look at the required sections of the report and opts to engage the principles that were expected to underscore the VNR Reports in 2016. This is because it is possible to present the same information using different heading and wording in the text. To this end, some principles were highlighted in 2016 to inform the 2017 reporting. It was expected that the reporting countries would apply five core principles in the realization of the SDG Agenda thus; national ownership, *universality*, leaving no one behind, integration and indivisibility, and a *human rights approach* (UNDG, 2016). National ownership required that the preparation of the VNR process is Country-led, broadly participatory, involving national and local authorities, civil society and the private sector. Universality required that the process inculcates the different national realities, capacities and levels of development and respecting national policies and priorities. The concept of leaving no one behind required that the SDG targets were engaged to benefit all nationals and peoples and for all segments of society to reach the furthest behind first (UNDG, 2016). This meant that the realization of the SDG Agenda engages human rights and gender equality. Besides, the use of integration and indivisibility called for countries to advance an understanding of links across the goals and targets (UNDG, 2016).

The Department of Economic and Social Affairs (DESA) has passed guidelines for the preparation and presentation of VNRs for 2020 (DESA, 2019). It provides for the five listed principles above, thus, national ownership, universality, leaving no one behind, integration and indivisibility, and the use of a human rights approach (DESA, 2019). There is, however, a call for further detail in engaging these principles as follows. National ownership calls for broader participation from different groups especially women and youth, children, persons with disabilities, people living with HIV/AIDS, older persons, indigenous peoples, refugees and internally displaced persons, migrants and other vulnerable groups (DESA, 2019). Concerning the application of universality, DESA calls on states to draw guidance and inspiration from both within and beyond their territorial boundaries. Countries are advised to look to regional and international mechanisms that are incorporated into national frameworks to support the implementation of SDGs (DESA, 2019). The concept of leaving no one behind extends beyond

the recognition of human rights and gender equality. It extends to realize the translation of these narratives into concrete actions for tackling inequalities and discrimination, as well as efforts to ensure inclusive and effective participation in implementation efforts (DESA, 2019). Through integration and indivisibility, there is a call for countries (in addition to showing the links across the goals and targets) to analyze the progress and initiatives related to the high-level political forum's theme for the year under review (DESA, 2019). For instance, the presentations in 2020 should inculcate the position of the SDG Agenda in the wake of Covid-19. Other principles that a country is expected to engage include; how it has adapted its institutional framework in light of the 2030 Agenda, the relevant structural issues or barriers it has faced in implementing the 2030 Agenda and the mobilized means of implementation that deal with the challenges (DESA, 2019).

In addition to the principles, it is important to look out for the thematic aspects that inform particular SDGs. In the context of SDG 16.3, an earlier evaluation on the key thematic concepts to look out for in the realization of SDG 16.3 shows six indicators (Nanima & Durojaye, 2020). These include: mentioning of access to justice, budgetary allocation to access to justice, recognition of the work of paralegals, political commitments to realizing access to justice, engagement with relevant stakeholders in the preparation of a report and regulatory framework on paralegals (Nanima & Durojaye, 2020).

Concerning the need to account for steps taken to ensure that the process of preparing the report was inclusive at where states on their own accord conduct regular and inclusive reviews of progress at the national and sub-national levels concerning the process on the achievement of the 2030 Agenda on Sustainable Development Goals (SDGs).

A review of Kenya 2017 VNR Report: a Chance at Improvement?

A review of a VNR Report requires an evaluation of the extent to which the principles and the thematic aspects of a particular SDG are engaged in the process of preparation of the VNR as well as the steps taken to realize the SDG Agenda. An evaluation of the VNR on the five principles that formed the checklist indicates that Kenya attended to these details to a great extent.

First, concerning national ownership of the SDG Agenda, the government involved various stakeholders. This involved consultations among government Ministries, Departments, Agencies, sub-national governments; development partners; Civil Society Organizations (CSOs); special groups including youth and persons with disabilities, and the private sector. (Kenya VNR, 2017). Ownership was further seen in the engagement between the government, civil society organizations, the private sector and the United Nations (Kenya VNR, 2017). Good practices are also evident in other countries like Ghana and Sierra Leone in the preparation of their 2019 VNR Reports (Nanima & Durojaye, 2019). Both countries sought the participation of government, civil society, the private sector, parliament, human rights institutions, traditional authorities, children and development partners (Nanima & Durojaye, 2019).

Secondly, Kenya inculcated the universality of the SDG Agenda by aligning it to the Kenya Vision 2030- a national long-term development policy that seeks to transform the country into an industrialized middle-income country with a high quality of life to its citizens in a clean and secure environment by 2030 (Kenya VNR, 2017). While the use of the five-year Medium Term Plan and County Integrated Development Plans was instructive, the wording that limited the transformation to the benefit of the Kenyan citizen presented the exclusion of non-citizens who stay in Kenya (Kenya VNR, 2017). Without prejudice, a similar good practice was evident in Tanzania's 2019 VNR Report that used 5-year thematic models to show political commitment.

To this end, the current theme for the period 2016- 2021 deals with nurturing industrialization as foster economic transformation and human development (Tanzania, 2019).

Thirdly, the concept of leaving no one behind is in the use of a devolved system of government that transfers power from the central to the local government to have greater inclusion of the public in decision-making (Kenya VNR, 2017). A human rights approach is concretized by the earlier adoption of a Constitution in 2010 that has a Bill of Rights with guarantees of gender equality and non-discrimination (Constitution, 2010). This is further evident in the use of the Constitution to move the country towards a more equitable and inclusive future with justifiable socio-economic rights like health, education, freedom from hunger and adequate food and decent livelihoods. Good practices on the use of devolved authority to present the VNR Report can be learned for Ghana that engaged the executive, legislature, judiciary; national and sub-national governments, and cultural institutions (Ghana, 2019). For a thematic evaluation of SDG 16.3, the authors now turn.

A thematic evaluation of the realization of SDG 16.3 evaluates; the mention of access to justice, budgetary allocation to access to justice, recognition of the work of paralegals, political commitments to realizing access to justice, engagement with relevant stakeholders in the preparation of reports and regulatory framework on paralegals (Nanima & Durojaye, 2019). Concerning mention of access to justice, it is expected that the VNR Report speaks to the indicators under SDG 16.3.

SDG 16.3.1 requires a country to report on the number of victims of violence who have reported incidences in the previous 12 months to competent authorities or any other officially recognized conflict resolution mechanisms. The report was silent on this aspect, and hinted on the number of victims of intentional homicide per 100,000 population was 6 by 2014 (Kenya VNR, 2017). SDG 16.3.2 calls for countries to report on the proportion of detainees who have not been sentenced in relation to the overall prison population. The VNR Report indicates that the unsentenced detainees as a proportion of the overall prison population stood at 55.9 per cent in 2014 and increased to 60.5 per cent in 2016. As such, to a balanced extent, there was mention of access to justice in the context of 16.3.2 other than 16.3.1. A look at the details reveals that more information was lacking. A recent report requires that there should a desegregation of this data in terms of the sex of the victims, type of crime, ethnicity, migration background or ethnicity (Nanima & Durojaye, 2019). The failure to provide these details proved to be a challenge by all African countries that submitted VNR Reports in 2019 (Nanima & Durojaye, 2019).

Concerning the extent to which budgetary commitments were reported in realizing access to justice under SDG 16.3, the report is silent. A lot can be learned from South Africa's 2019 VNR Report that made mention of the steps taken to recognize paralegals and the budgetary allocations to the matters on access to justice (South Africa, 2019). In the alternative, there is a mention of political commitment to realizing access to justice. This is seen in the incorporation of the SDG Agenda in the national frameworks to advance the implementation of the SDGs. As mentioned earlier, Kenya has aligned the SDG Agenda to Kenya Vision 2030 to transform the country to an industrialized middle-income country with a high quality of life to its citizens in a clean and secure environment by 2030 (Kenya VNR, 2017). This is also further evident in the use of five-year Medium Term Plan and County Integrated Development Plans (Kenya VNR, 2017). A final aspect is an extent to which the Report mentions the legal recognition or framework for paralegals. The report is quiet on this. As such, one cannot determine the extent to which the governments mentions or engages the recognition of the work of paralegals, in

ensuring access to justice, cooperating with paralegals or providing financial support. This may be explained that it is not explicitly provided for as an aspect to engage in accounting for the realization of SDG 16.3. This is however countered by the wealth of literature on paralegals in Kenya (Bedner, & Vel, 2010; Helbling, Kälin & Nobirabo, 2015).

As reiterated earlier, another four aspects of entrenched inequalities, social inequalities, discrimination and the independence of the judiciary are crucial to the state of access to justice. The country reported that it has established institutional bodies to fight corruption like the Ethics and Anti-Corruption Commission (EACC), Kenya National Human Rights and Equality Commission and the Kenya National Gender and Equality Commission to deal with issues of corruption and inequalities. But they're nothing more other than this statement in the context of these other concepts of access to justice. Also, while the report related to inequalities instances of discrimination, these were limited to gender inequalities in the context of SDG 5 and health inequalities in the context of SDG 3. The VNR Report was silent on the independence of the judiciary.

Implications for Access to Justice in Kenya

A look at Kenya's 2017 VNR Report reveals that the five major principles of national ownership, universality, leaving no one behind, integration and indivisibility, and a human rights approach (DESA, 2019) were engaged. However, a thematic evaluation shows a slow approach. There is limited mention of access to justice, and silence on the budgetary allocation to access to justice and recognition of the work of paralegals. The Report, however, engages some political commitments through the use of long term commitments like Vision Kenya 2030. All these silent or minimally engaged aspects have to be engaged in the subsequent report. Concerning other aspects that speak to access to justice like entrenched inequalities, social inequalities, discrimination and the independence of the judiciary shows that there is little emphasis on all these aspects in the context of SDG 16.3, other than corruption. It is proposed that the engagement with civil society organizations like the African Centre of Excellence on Access to Justice, Kituo Cha Sheria, Rwanda's Legal Aid Forum and the Dullah Omar Institute that have researched on Access to Justice need to be engaged.

A deliberate study that identifies all the barriers to access to justice is important in developing initiatives to deal with them. This should include a geographical assessment between physical location and how it impacts access to services, improvement of social relations in place to ensure that persons seeking help can get it without shame or stigmatization (OECD & OSF, 2016). The government should adopt alternatives that offset both direct and indirect high cost of access to legal services. This includes the direct costs of legal fees as well as the indirect costs such as transportation, opportunity and childcare costs.

The government should use a broad-based approach to access to justice that is based on the peculiarities of the Kenyan Society. To this end, while the descriptors under SDG 16.3 engage the indicators' use of a human rights' approach, this should not be an end in itself as it points to the simplistic end of preparing a report based on the target. In the alternative in addition to SDG 16.3, Kenya's concept of Access to Justice should entail all matters that speak to both criminal and civil access to justice to ensure that a holistic engagement of this concept is preferred. It should be recalled that the call to introduce other indicators to SDG 16.3 to provide for access to civil justice has been done (UNESCO, 2019). As such the problems of access to civil justice in Kenya can be readily engaged, where there is a measurement of the extent to which

people may redress their grievances, access their rights and entitlements, and realize broader sustainable development (WJP, 2019). The wording of the new target states 'Proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism' (UNESCO, 2019 p. 15).

This should be taken up and engaged by the stakeholder to offer a more holistic approach to all matters (including access to civil justice).

Conclusion and Recommendations

An evaluation of the definition of access to justice shows that before May 2020, the SDG Agenda did not engage other aspects of civil access to justice. The adoption of the changes offers a chance to engage both formal and informal courts and other societal issues like entrenched inequalities, social inequalities, discrimination and the independence of the judiciary. As such a broad-based definition needs to be engaged to inculcate the changes. The requirements in the preparation of the VNR Report for 2020 need a through introspection into the details required. This gives Kenya the chance to present steps it has taken to engage access to justice in its society as a whole. It is as such proposed that the VNR Report should inculcate all the principles (DECA, 2019), the thematic aspects in the context of SDG 16.3 (Nanima & Durojaye, 2019) and the new indicator under SDG 16.3.3. It is further recommended that the Kenyan government should include the input of civil society groups in the preparation of its report. Extensive participation of all stakeholders is one of the requirements for the preparation of the VNR process. More importantly, the VNR process and ensuring access to justice for all. Therefore, the Kenyan government must exhibit political will and commit more resources towards realizing access to justice for all, especially vulnerable and marginalized groups.

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