Equality Courts in South Africa: Legal Access for the Poor

By Dana Kaersvang

Equality access to courts is recognized as a fundamental human right in a plethora of human rights treaties. This right is critical because it facilitates access to and design of a post-apartheid social system based on equality. The courts play a critical role by protecting and interpreting those constitutional rights. However, in spite of South Africa’s emphasis on equality, it has not escaped the common problem of difficulties accessing the courts. As a result, inequality is often hidden from judicial review. In order to address this problem, South Africa created Equality Courts under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUL DA). The designers of the Equality Courts identified several major barriers to litigation that could be addressed through an alternative court system. These barriers were costs, informational deficits related to navigating the legal system, the intimidating nature of the courts, and the long time needed for litigation.

Equality Courts are meant to be very inexpensive for litigants to use. Lawyers are not needed in Equality Courts, which regularly litigates before Equality Courts, are located. Even the South African Human Rights Commission, which regularly litigates before Equality Courts, has not been able to provide a list of the locations of currently functioning courts. In some cases, such as when a person is the target of a racial slur, a simple apology might be the correct remedy. In other cases, monetary damages or sweeping injunctions can be ordered. In order to protect due process, decisions can be appealed to the same appellate courts that hear appeals from Magistrate Courts.

Current Functioning of Equality Courts

Since the first Equality Courts were opened in 2003, they have been the site of some notable human rights victories. For example, Equality Court cases have led to the provision of wheelchair access in courtrooms and government offices. However, in spite of the carefully designed system, Equality Courts have yet to dramatically improve access to courts. This failing stems from problems with the flow of information, both in the public sector and among court staff. The greatest challenge faced by Equality Courts is that they remain relatively unknown. This is due, in part, to the government’s failure to promulgate regulations governing the appointment of Equality Courts, as required by PEPULDA. Although several institutions have undertaken awareness-raising programs, and articles about Equality Courts have appeared in the news, many poor South Africans have not heard of them. Even for those who are aware of the courts, finding them can be difficult. Equality Courts have not developed the expertise envisioned in the legislation, and some courts in rural provinces have heard no cases.

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The South African Equality Court model has tremendous potential to revolutionize judicial access, but its potential has not been realized—primarily due to lack of awareness about the courts. This, in turn, means that fewer cases are filed. Because litigants who attempt to file complaints are often unable to do so, awareness-raising work done by governmental and non-governmental organizations does not necessarily lead to an increase in the number of cases filed. Rather, it may create frustration and disillusionment with the government in individuals who attempt to file complaints. The government is exacerbating these problems by de-commissioning Equality Courts in which few cases have been filed. This decommissioning is done without informing potential litigants or local governments and so creates further confusion about where Equality Courts are located. Decommissioning may also have an unfortunate impact on the rural poor because rural provinces have brought the fewest cases.

Equality Courts have also failed in their promise of financial accessibility. Respondents, who often possess far greater power and resources than complainants, hire lawyers to represent them. Their lawyers are often able to overpower the undereducated complainants. Even when a plaintiff is able to provide a list of the locations of currently functioning courts, the Institute for Democracy in South Africa was able to locate only 13 of the 230 designated Equality Courts when it did a study on the functioning of Equality Courts in October 2004. Inaccurate information about court locations on government and NGO websites common.

This lack of information has led to severe underutilization of Equality Courts. Fewer than 700 Equality Court cases were filed between 2003, when the courts began functioning, and October 2006. More than half of these cases have been in the three provinces with the largest urban areas (KwaZulu-Natal, Gauteng, Western Cape) and some courts in rural provinces have heard no cases.

There are also problems related to the lack of information possessed by Equality Court staff. Equality clerks have not developed the expertise envisioned in the legislation. Many clerks received only two or three hours of training, which they did not adequately prepare them to handle complaints. After completing training, the low case load meant that they lacked enough Equality Court work to keep busy and were assigned other tasks. At this point, many do not even remember their Equality Act training well enough to provide competent assistance to complainants. Some are not even aware that they are Equality clerks. These two informational problems interact, creating further access problems. When people do hear of the courts and attempt to file a complaint, the court staff may incorrectly tell them that there is no Equality clerk in the building.
Antiretroviral Treatment Knowledge in Rural South Africa

Till Bärnighausen (Africa Centre for Health and Population Studies, University of KwaZulu-Natal) presented data from rural South Africa highlighting that even in high endemic settings where antiretroviral treatment (ART) is available, knowledge about ART is far from universal. Drawing from a 2006 survey in KwaZulu-Natal where 74% of adults, and where a government-PEPFAR program has been providing ART since September 2004, 68% of all HIV+ respondents had heard of ART, 34% had heard of ART and believed it to be effective, but only 34% had heard of ART, believed it to be effective, and knew where such treatment could be accessed. Controlling for age, educational attainment, household wealth (using an assets index), and distance from the household to the nearest road, women were significantly more likely to know about ART than men, and HIV+ individuals were significantly more likely than HIV- individuals, to know about ART. Knowledge of ART increased significantly with age, education, and wealth. Distance from the individual’s household to the nearest road did not significantly affect ART knowledge. Interventions are needed to ensure that ART knowledge is increased, in particular among men and people of relatively low educational attainment and wealth.

Equality Courts in South Africa

Experiences from the past highlight the need to invest heavily in Equality Courts at the outset, particularly in the creation of a dedicated, expert staff. In South Africa, the sharing of Equality clerks with the Magistrate Courts has meant that resources are too easily diverted away from the work of Equality Courts, as well as interfering with the accumulation of expertise. If few Equality Court cases are filed, Equality clerks should be given other work to sharpen their Equality Court expertise, rather than filling their time with Magistrate Court work. This work could include engaging in awareness-raising activities. Additionally, email listserve could be used to create a network of Equality clerks that shares information and ideas relating to cases filed in other courts, thereby improving skills and providing useful advice to complainants.

The South African experience also demonstrates that any country creating a separate court system should plan to fund the courts and keep them open even in the face of relatively little uptake in the early years of the program. Although a variety of government and nongovernmental organizations are using seminars, press releases, radio and television advertising, and brochures to inform the public of the courts, many South Africans remain unaware of them. It is not surprising that five years is insufﬁcient to inform the public, particularly in light of South Africa’s poor, underequated majority and the country’s 11 ofﬁcial languages. However, the South African government’s decision to close some Equality Courts substantially undermines the possibility of long-term success by creating confusion regarding the location of the courts and frustrating those who learn of the courts and attempt to use them.

The South African Context

In view of the cost of creating and maintaining a separate court system, highly skilled staff for many years before the courts become well utilized, the South African experience calls into question the feasibility of a separate court system. There are reasons particularly relevant to the South African context for separating Equality Courts from other courts. Most signiﬁcantly, many black South Africans may distrust Magistrate Courts because of the “perceived association of magistrates’ courts with apartheid justice.” This would make black South Africans particularly unlikely to bring cases of discrimination and hate speech before Magistrate Courts. Additionally, channelling discrimination cases into Magistrate Courts could result in insufﬁcient resources and attention being allocated to these cases, in part because of the high case backlog in Magistrate Courts. In countries where Magistrate Courts operate efﬁciently and have the trust of the population, however, South Africa’s experience suggests that facilitating access to the Magistrate Court system may be preferable to the creation of a separate court system. Almost all barriers to access that Equality Courts are meant to address could be overcome by handling such cases in the regular court system, providing fee waivers and legal aid for poor litigants, and fast-tracking certain types of cases. Leaving cases within the regular court system would also eliminate most of the problems that South Africa has experienced with Equality Courts. Magistrate Courts are already established throughout the country, so physical access would not be an issue. Awareness raising would be less of an issue because most people are already aware of Magistrate Courts. Legal aid would resolve ﬁnancial barriers and inﬁnitive inequalities and eliminate the need to create a staff of highly skilled clerks. Such aid would also resolve issues arising from respondents’ reliance on counsel.

In sum, Equality Courts in South Africa are well designed to remove barriers to judicial access for the poor and are suited to that country’s historical context. However, there are substantial challenges in their implementation, and it is absolutely critical that such courts be staffed with trained personnel who are ready to assist complainants. If the South African government continues on its current track of underfunding and closing Equality Courts because of low levels of use, it will guarantee the failure of the courts and, likewise, fail in its promise to make courts accessible to all.

OpenMRS: An Open Source Electronic Medical Record System for HIV/AIDS Patient and Treatment Management in Developing Countries

As the conference progressed to discussion of new systems for improving the management of patient care. Chris Seebrêgts (Medical Research Council of South Africa) discussed successful implementation of a chronic care model for managing HIV+ patient care. Successful treatment requires that potentially millions of patients in the region will need to be managed for a large part of their lives, calling for innovative new approaches to information management. OpenMRS discussed a relatively new application that has been developed to address this need, and has been implemented successfully in many African countries for HIV/AIDS and TB care. The success of OpenMRS results from several features, e.g., the fact that it is open source provides a considerable cost advantage, and given that it is typically configured and implemented by local developers, it contributes to local capacity development and reduces dependence on foreign companies. OpenMRS is currently being developed by a large international group of open source developers and small donors.