

**CIVIL SOCIETY GUIDE TO THE LAW-MAKING PROCESS IN
SADC COUNTRIES.**

Thematic Area: Institutional Reforms, Good Governance and Civil Society
Participation

by

IRED -

DEVELOPMENT, INNOVATIONS AND NETWORKS

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Introduction

Increasing attention is currently paid to important and interesting issues about the rules, laws and policies that should govern behavior within different countries. In the past the process was centralized and controlled by the few elects.

"During colonial times, traditional political, economic and cultural structures were destroyed. Participation of African people in national decisions was not allowed by the colonial authorities. Although people in African countries hoped that Independence would give them the opportunity to participate fully in major decisions about their countries, in most cases their hopes were disappointed. Liberation movements and nationalist political parties were authoritarian rather than democratic, and independent states they formed continued to have an authoritarian style. Not only in Africa, but all over the world, in large modern states citizens and the state widened, in spite of all the talk of democracy"(Commonwealth Foundation, 2000)

On issues of policy formulation (law making) processes, case studies have confirmed the characteristic top-down approach to policy formulation, which by and large is legendary to the decision-making process of the colonial era. The conventional top-down approach in which the government is the sole player in the process of articulating problems and designing policy solutions persists virtually in all African countries. Although on paper, some governments have made recent attempts to broaden participation and call their process "participatory", this phenomenon is far from reality as most failed due to lack of appropriate methodology, expertise and experience. The failure was also contributed by the fact that most governments were making policy decisions based on macro-economic imperatives and donor pressure. It is also imperative to note that most governments failed to organize for regular consultation all the stakeholders.

Civil society after realizing the implications of various policies on their livelihood, is now standing up to advocate and lobby for the participation in all processes that happen in their respective countries. The challenge faced in different countries is to empower and capacity build the civil society through various means in order to facilitate informed decisions.

The law making process is an import process for civil society to understand and take part in all levels of the process.

Institutional Reforms, Good Governance and Civil Society Participation

The whole concept of institutional reforms, good governance and civil society participation is an important one for livelihoods in our society. These three components constitute the important socio-economic factors/ elements for sustainable development and are also critical in the law making process of any particular country.

Laws keep on changing according to prevailing conditions and circumstances and the civil society is keen to participate and be involved in the decision-making processes in related issues since they also affect them. With the decline in our economies and gaps in the way things are done at all levels, the issues of institutional reforms, governance and civil society participation become much more important.

Institutional reforms are changes in policies and practices within organizations or institutions in different areas of policy and planning decision. Institutional reforms in law making process in Southern Africa involve a lot of processes, which are different in different countries of the region. Some institutional reforms require legislative or administrative action by policy makers and executives of the institutions and these reforms are a necessary foundation for many policies and programs. Policy makers and executives are responsible for institutional reforms, but professional and political/policy advocacy group are important to provide guidance to reforms to be implemented. The institutional reforms are also important in resources allocation. The process may also involve establishing goals, objectives and policies that support the programs in place, budgeting adequate resources and overcoming identified obstacles.

Governance refers to the process whereby elements in society wield power and authority, and influence and enact policies and decisions concerning public life and economic and social development. It is a broader notion than government, whose principal elements include the constitution, legislature, executive and judiciary. Governance involves interaction between these formal institutions and those of civil society. Governance has no automatic normative connotation. However, typical criteria for assessing governance in a particular context might include the degree of legitimacy, representativeness, popular accountability and efficiency with which public affairs are conducted. Governance issues are relevant at all levels within the corporate, public and civil sectors.

The Khartoum Declaration of 1988 defined governance priorities as:

- The promotion of human development;
- Restoration of basic freedoms and human rights;
- Overcoming political instability and intolerance; and
- Curtailing of overcentralisation of power.

The Addis Ababa Declaration of the OAU Heads of States in 1990 also defined it in similar terms constituting the elements of accountability of leadership, consolidation of democratic institutions, popular participation and a developmental model that is self reliant, human centered, sustainable and based on social justice.

It is believed that "good governance" ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of development resources.

The whole question of governance in Africa was debated by Africans and Europeans at a recent academic conference held at the Limburg University in Maastricht, the Netherlands. "Good governance" entered the vocabulary of development in the 1980's and under the influence of powerful institutions like the World Bank and bilateral donor agencies, it is now one of the cornerstones of development cooperation. Concretely, it most often appears as conditionalities intended to promote accountable government and democratization in aid-receiving countries. However, it is still debatable as to whose governance is actually in question, and whose yardsticks are being used to measure its attainment.

The notion of good governance cannot be captured in a commonly agreed objective definition, because of its moral basis. Governance is also always historically contingent. Therefore the notion of governance should be separated from the notion of goodness. The current notion of governance is at best a strictly political or ideological notion. Governance is based on a notion of rights as inherently comprising duties, and it would show that in many cases the rulers are strictly bound by generally accepted norms and controlled by institutions to enforce those.

Current governance systems, often imposed by donors as conditionalities to aid, ignore African conditions and bypass past and present traditions to the extent that they are not embedded in African values. Application is a continuation of outside influences, which has not contributed to African development.

Africa had a western style of democracy, which brought a one model of democracy thus an outside-imposed model. The African countries are now at various stages of social, economic, political and cultural reforms, factors that are shaping a new governance paradigm. The change process has ushered in changes in relations between the state and society throughout the region, in an attempt to decentralize governance. This democratization process has in the most cases been used as conditionality for aid and has introduced ideals such as transparency, accountability, participatory planning, decision-making, good governance and replacement of corrupt systems and processes.

A quotation in the UNDP 2000 Report says, " Governance and Human Development - the two are indivisible. Human development cannot be sustained without good governance. Governance cannot be sound unless it sustains human development. Therefore, governance issues cannot work without development of the people responsible for passing on policies and involvement of the civil society and this needs their empowerment and development.

Civil society participation refers to the involvement and consultation of the civil society in any particular process and also in the decision making process. The law making process results in policies/laws that are effected in the development process, and for sustainability there is need for the civil society to own and manage all the processes that affect their livelihood and the economy of their countries. Looking at

Agenda 21, integrating environment and development in decision-making is the subject of Chapter 8. It notes that the prevailing systems for decision making in many countries tend to separate economic, social and environmental factors at the policy, planning and management levels, influencing the activities and actions of all groups in society and affecting the efficiency and sustainability of development. It goes on to state that an adjustment or even a fundamental reshaping of decision making may be necessary in order to put environment and development at the center of economic and political decision making. It only needs an informed, proactive and empowered civil society to be in a position to advocate and lobby for inclusion of their views and contribution to the policies, which are passed in the form of laws.

Context of the Study

Most of the countries in the SADC region are enjoying relative peace (peace referring to the absence of war), a factor that is an important pre-requisite to tolerance of an alternative view. Almost all the SADC governments claim to have democratic systems of governance. The governments describe themselves through their constitutions either as democratic republics, parliamentary democracies or “a monarchy” in a democratic system. All description intends to give a flare of tolerance, people’s participation, accountability and accessibility.

Legally and resulting from the shared colonial history, most of the countries share some common elements in their legal systems. The influence of English law is pervasive whilst Roman Dutch law is shared with Zimbabwe, South Africa and to a certain extent Namibia. Most of the countries therefore have a Westminster type of Constitution, which is found in most Commonwealth countries.

Why Civil Society Engage In Policy Advocacy (And In Law Making Process)?

Policy advocacy is part of the democratic process, which different interest groups in civil society seek to influence public decisions and decision-making processes for the good of society. These policies appear in the form of development plans, presidential decrees and acts of parliament. The majority of the policies appear as acts of parliament and therefore are part of the law.

It is important for civil society to participate in the law making process since the laws that are promulgated by parliament affect the people in their everyday lives, and therefore they should give an input in the formulation of these laws. This participation further ensures the accountability of parliamentarians who in most instances access those positions through the people’s vote. It also strengthens the governance structures and systems since the various interest groups and the public will not be taken for granted by both the government and the legislature. However, such active participation of civil society in the law making process is premised upon the availability of information, and the building up of advocacy through shared experiences, hence this Guide.

Scope of the Law Making Process

The law making processes under discussion refers to the formal law, which is promulgated by Parliament. This could either be a totally new or an amendment to an existing law. In describing the law making process, it is important to note that the information provided below relates to a public bill, which is the most common, most used and known way. It is also noteworthy that there may be slight variations from country to country.

Most of the discussion in this Guide refers to the public bill. This does not preclude the opportunities for advocacy work around private bills. A public bill, which is subject of this Guide, is one that is in the public interest and is sponsored by government. A private bill on the other hand is one, which is introduced by an interest group where there is a motivation that a certain law has to be passed in an area affecting that section of society. This private members bill goes through the process described below for the public bill except for its origin. A backbencher within Parliament will have to introduce the bill and not an ordinary citizen.

This therefore is an opportunity which civil society can mobilize around if there are areas which the need for a new law is felt and the government is not introducing the bill. The main hindrance to the private members' bill is the cost implications.

However, the Civil Society input into the law making process in the SADC countries is part of democratic participation in governance. For effective input into the law making process, it is important to have an understanding of the milestones in the process itself.

Background

IRED - ESA has a policy analysis and advocacy programme which is done in response to the need to strengthen the role of NGOs in civil society to participate in the democratization process and to advocate for an enabling environment for poverty reduction which have the following objectives:

- To train Non Governmental Organisations and Peoples Organizations staff in policy research analysis and advocacy
- To analyses key policies that affect people in the region and repackage them for better understanding and to enable partners to take advantage of the opportunities there in
- To provide technical backup and accompaniment to groups that are carrying out advocacy campaigns.
- To organize activities that give partners the opportunity to create coalitions and consensus on policy issues,

Through the policy analysis workshops that IRED organized in Mozambique, Malawi, Botswana, Zimbabwe and Eastern and Southern Africa, the need to develop the civil society guide to the law making process in SADC countries arose. Out of these workshops, lack of awareness in the law making process came up as a major stumbling block to Policy Advocacy for the civil society.

Objectives

The main objectives of the case study were to produce a guide as a tool for: -

1. Increasing the awareness of the civil society organizations to the law making process to increase their capacities in policy advocacy;
2. Creating a potential of community building through regional sharing of information;
3. Facilitating the engagement of civil society in policy processes particularly in the field of law making; and
4. Enhancing policy law reform in Southern Africa.

To achieve the above objectives, IRED engaged in an intensive research focusing on country specific processes and advocacy for law reform case studies. The research/consultation involved some civil society organizations, NGOs and donors for the support of the process to produce the guide. Various cases were looked at which involve most sectors of the economy that affect the livelihood of the society in terms of law making and advocacy with the following which encompass the environmental laws i.e. revision of land law in Mozambique and the Environmental Bill in Lesotho.

It has been identified that there are many barriers to civil society participation in the law making process that permeates through different countries and contexts and at the same time despite the barriers to people's participation, there are also positive and facilitating factors.

Law-making Process

The law making process is part of the policy making process in any country. Economic policies of individual countries and international economic relations both have great relevance to sustainable development. The reactivation and acceleration and development require dynamic and supportive environment and determined policies at all levels of the economy. Policies are mostly passed in the form of law and the law making process becomes very vital in the development of a country. The process forms part of the macro-economic policies which should be conducive to the environment and development since some laws encompass environmental laws which govern the usage and protection of the environment e.g. in natural resources management, emission of gases, industrial effluent disposal regulations. Some laws might not be directly environmental laws but contribute and play a part in sustainable development.

Experience has shown that sustainable development requires a commitment to sound economic laws and policies and management, an effective and predictable public administration, then integration of the environmental concerns into decision making progress towards democratic government, which allows for full participation of all parties concerned.

It is important to know the policy making process for the civil society to be proactive and advocate to be integrated in the process to contribute to the promotion and support of laws and policies that aim for economic growth and participate in the process. This will empower the nation to own the process and therefore obliged to abide to the prevailing laws.

Agenda 21 addresses the pressing problem of today and also aims at preparing the world to challenges of the next century. It reflects the global consensus and political commitment at highest level on development and environmental cooperation. Its successful implementation is first and foremost the responsibility of government and national strategy plans, laws, policies and processes are crucial for achieving this. The broadest public participation and the active involvement of civil society and other groups is therefore important in all processes that are part of our economy.

Other principles and elements under the United Nations Conference report on Environment and Development cover some areas that govern the various activities for environmental protection. This, therefore govern as well the laws and policies that produced at national level. The laws and policies should lie within the framework of conditions of the signed treaties/ conventions of the WSSD.

Process

Nine (9) countries namely Zimbabwe, Malawi, Mozambique, Namibia, Lesotho, Botswana, South Africa, Swaziland and Zambia were looked at during the development of the cases to produce the guide for civil society participation in the law making process in Southern Africa.

Barriers in the Process

There are so many barriers to civil society participation in the law making process that permeates through the different countries and contexts. The most quoted barriers and constraints are:

- The levels of functional, legal and political illiteracy in most countries. It was commonly stated that this is one of the major barriers to people participation in the law making process. It is either because the whole processes is in a foreign language and is written in a complicated legal language. These laws are at times highly procedural and technical. This makes them inaccessible to most people.

- Despite most governments' claim of democratic participation it was often quoted that there is no separation between the government and the ruling party. Most of the common people conceive the party to be the government and hence cannot engage in policy advocacy on issues which the party has a position. This separation is critical if people are to engage in influencing the laws, which governs, since they need to determine whether these policy decisions are made within the party structures or within the government structures.
- The principle of the rule of law is not adequately observed in practical terms in some of the countries in the Southern African Development community. This refers to the balance of power between the executive, the legislation and the judiciary. In a country where this is the case, the policy advocates have to target their energies and strategies at the institution which has the controlling power.
- The limited knowledge on issues under discussion by the policy makers at different levels is another barrier to effective policy advocacy. This usually entails raising the understanding of the issue by the policy makers themselves first before they can effectively represent the civil society interests in the law making process. The lack of critical knowledge usually hampers effective lobbies.
- The attitude of government officials on issues in treating public information as confidential was also highlighted. Before the bill is gazetted most of the time the departmental drafts are considered confidential information, even at times when it is not confidential. The critical issue is to establish the basis of the confidentiality of the information.

Facilitating Factors

Despite the above barriers to people's participation in the law making process, there are some identifiable positive and facilitating factors.

- The Constitutional principles. In almost all the countries the values contained in the constitution are all supportive and empowering to people's participation in the legislative process. This is either contained in the definition of state section in the constitution, facilitated by the bill of rights and or specifically contained in the section which deal with the legislative processes. For example the South African constitution has a full article (Article 59) providing for the public's access and involvement in the National Assembly.
- Most parliamentary seats are occupied through an election process, except for some seats where the president makes some appointments, like the 8 seats in Namibia and the 30 seats in Zimbabwe. The presence of an elected Member of Parliament brings in the questions of accountability to the electorate which in

itself is a facilitating factor. It offers a moral and legal grounding for the elected Members of Parliament to listen to people's views.

- The other notable facilitating factor is that interest groups are at time especially appointed into parliament. These appointees should effectively represent the issue for which they are appointed.
- The existence and growth of advocacy organizations is also another positive factor in itself. These organizations are continuously refining their capacities, techniques and strategies for influencing the policy processes. They have also built networks and other formal and informal linkages with the opinion makers, lawmakers and other and hence could be mobilized during the law making process.

Resources and Support

The process was carried out by IRED and consultants from N.G Development Agency P/L who are development consultants in Gender, Policy, Research and Training through data collection and information gathering on the law making process within the nine different countries in Southern Africa.

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