

The Africa Discrimination &
Citizenship Audit:
Emerging Issues and the Way
Forward

*Report of a Consultation held in Johannesburg,
South Africa on February 16 – 17, 2005*

April 2004

EXECUTIVE SUMMARY

On February 16–17, 2005, the Open Society Justice Initiative convened a consultative forum entitled *The Africa Discrimination & Citizenship Audit: Emerging Issues and the Way Forward* at the Parktonian Hotel in Johannesburg, South Africa. The meeting was part of the Africa Discrimination & Citizenship Audit, a joint collaboration of the Open Society Initiative for West Africa (OSIWA), the Open Society Kenya Initiative, the Open Society Initiative for Southern Africa (OSISA), the Open Society Foundation for South Africa (OSF-SA), and local partners.¹

The Africa Discrimination and Citizenship Audit (the Audit) will map ethnic, racial, and citizenship-based discrimination in a number of African countries and will look closely at the intersections of these kinds of discrimination, gender discrimination, and access to citizenship. The Audit is a response to the trend among some African governments to use group membership as a basis for political and economic marginalization. It is designed to provide a means to address restrictive citizenship policies that are either *prima facie* discriminatory or require individuals to meet effectively impossible conditions in order to prove their citizenship. In some countries these policies have resulted in mass denationalization and statelessness.

The Audit involves the documentation of legislation, judgments, and policies—in sum, the state of the law in each country—relevant to ethnic discrimination, intra-national discrimination, citizenship-based discrimination, gender-based discrimination in access to citizenship, and ethnic discrimination in access to citizenship.

The meeting brought together partners and other actors to examine the development of the project and to explore future programming. The discussions interrogated the use of external definitions, the narrowness of a state of the law survey, examined the tools used to enforce discrimination, and identified vulnerable groups and protections under international law.

The following programming recommendations were made:

- 1) Promote law reform. Suggestions included:
 - a) Developing guidelines for laws on nationality/citizenship.
 - b) Identifying areas in the law where clarification and additional protection is necessary.
 - c) Advocating for specialized tribunals to review denials and revocations of citizenship.
 - d) Promoting dual citizenship.
- 2) Undertake further research, documentation, and monitoring which may lead to:
 - a) A model methodology for documenting discrimination in practice.
 - b) Further inquiry into the doctrine of acquired rights and discrimination against noncitizens.

¹ Local partners include: Le Campagne pour les Droits de l'Homme au Congo (Democratic Republic of Congo); the Campaign for Good Governance (Sierra Leone); Ditshwanelo (Botswana); the Forced Migration and Refugee Studies Program - American University in Cairo (Egypt); the Platform for Labour Action (Uganda); Timidria (Niger), and Zimbabwe Lawyers for Human Rights (Zimbabwe).

- c) Investigations into the benefits or dangers of federalism as a means of promoting inter-communal coexistence.
 - d) Explorations into developmental policies, political imperatives, and/or sociological factors that lead to discrimination.
 - e) Monitoring the implementation of legislation.
- 3) Engage in advocacy, using the report on the Audit as a tool to:
 - a) Encourage accession to the Convention on the Reduction of Statelessness.
 - b) Lobby for international standards on granting and revoking citizenship.
 - c) Bring attention to national laws and practices that do not conform to internationally-accepted norms.
 - 4) Carry out education campaigns to:
 - a) Inform leadership and interpret policy at the regional and international level.
 - b) Analyze and communicate the benefits of policy change.
 - c) Share information, experiences, and strategies among civil society organizations and policy makers.
 - d) Embark on widespread legal and human rights education.
 - 5) Recognize the importance of attitudinal change by:
 - a) Promoting inter-communal interaction.
 - b) Developing self-assessment tools for administrators.

Challenges to addressing discrimination and barriers to citizenship include weak judiciaries, the lack of a wide lobbying movement, and the political sensitivity of the issues. In light of these obstacles, the Justice Initiative was encouraged to view its work at the international level as strengthening law reform, advocacy, and education efforts occurring at the national level.

As the project develops, the project team was encouraged to consult with other civil society organizations and key policy makers to ensure buy-in, sharing of information, relevant targeting of policies, and broad-based support.

THE AFRICA DISCRIMINATION & CITIZENSHIP AUDIT: EMERGING ISSUES AND THE WAY FORWARD

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The meeting brought together partners and other actors to discuss the development of the project and to explore future programming.

THE AUDIT

The Africa Discrimination and Citizenship Audit (the Audit) will map ethnic, racial, and citizenship-based discrimination in a number of African countries and will look closely at the intersections of these kinds of discrimination, gender discrimination, and access to citizenship. The Audit is a response to the trend among some African governments to use group membership as a basis for political and economic marginalization. It is designed to provide a means to address restrictive citizenship policies that are either *prima facie* discriminatory or require individuals to meet effectively impossible conditions in order to prove their citizenship. In some countries these policies have resulted in mass denationalization and statelessness.

The Audit is being implemented in cooperation with local partners in Botswana, Côte d’Ivoire, the Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Mauritania, Morocco, Niger, Nigeria, Sierra Leone, Uganda, Zambia, and Zimbabwe.

The Audit involves the documentation in each country of legislation, judgments, policy statements, and ratified regional and international instruments—in sum, the state of the law—on the following kinds of discrimination:

1. Ethnic discrimination in access to social, political, and economic rights (for example, running for public office, housing, education, and health care).
2. Intra-national discrimination, in which “indigeneity” to a specific state within a federal country—usually correlated with ethnicity—is used to deprive individuals of their political, economic, and social rights in other parts of the country.
3. Citizenship-based discrimination in access to social, political, and economic rights.
4. Gender-based discrimination in access to citizenship (where women are unable to pass on their citizenship to their foreign-born spouses or children from these partnerships).
5. Ethnic discrimination in access to citizenship (when members of certain ethnic groups are deprived of their lawful citizenship, barred from becoming

naturalized citizens, and hindered from obtaining the documentation necessary to prove their citizenship).

Once this state-of-the-law survey is complete, the Justice Initiative will work closely with local partners and other relevant actors to design follow-up programming where possible.

The Audit was developed in response to the Justice Initiative's experiences exploring the protection of noncitizens. Through this work, it emerged that while most noncitizens were migrants, an increasing number had had their citizenship revoked by the state. Further investigation showed that citizenship—the primary means of accessing rights—was being used to disenfranchise individuals, or entire ethnic groups, because of their group membership. While most of these cases have been geared towards barring individuals (and groups) from political participation, they have also been the culmination of state-driven limitations to social and economic rights.

Discrimination and citizenship appear to have become more common with the proliferation of democracy. Indeed, many African countries have changed their citizenship laws and/or the way they treat citizens to disenfranchise specific, identifiable communities. These moves have resulted in suppressing community concerns, barring certain individuals from public office, restricting freedom of movement, reducing access to economic opportunities, and expelling communities from traditional lands or from the state. Clearly discrimination and citizenship are linked and require further scrutiny.

The Justice Initiative embarked on the Audit to explore these links. The process will provide data to direct further research, programming, and advocacy efforts (including litigation) that will lead to social and legal change.

This report highlights the key issues raised at the meeting *Emerging Issues and the Way Forward*. The three sections focus on vulnerable groups, concerns raised by participants, and finally, recommendations.

I. VULNERABLE GROUPS

Group distinction is determined mainly by identity. Race, ethnicity, and religion are shorthand terms for cultural, linguistic, and lineage differences which are both subjective and objective. Groups perceived of as having little political power can be marginalized by other communities or the state. These groups include those that have legal citizenship (cross-border communities, minorities, and indigenous groups) and residents (those who reside in the state but are not legal citizens, such as migrants and refugees). Certain sub-groups within ethnic communities may also be vulnerable when there is competition for resources. This can take the form of unequal government spending, denial of jobs, limits to credit facilities, and expulsion from traditional land. These actions are discriminatory and contrary to international law.

International law provides protection from discrimination through numerous international instruments. In fact, anti-discrimination language is integrated into all

instruments giving testimony to the fact that non-discrimination is a widely accepted and binding standard. The human rights regime apportions rights to individuals regardless of their state ties and gives specific rights to citizens. The International Convention on the Elimination of

“the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

International Convention on the Elimination of All Forms of Racial Discrimination

All Forms of Racial Discrimination (see box) distills the key aspects of discrimination—distinction, exclusion, restriction, and preferences.

In international law, individuals and groups are protected from discrimination through various instruments.² The Universal Declaration of Human Rights (UDHR), the International Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic, Social and Cultural Rights (ICESCR) provide the indicated protections. Protection against discrimination on the basis of sex, and more explicitly, equality on the basis of gender is also included. The ICCPR provides additional support in that it states that national laws not aligned with its concepts may be challenged under the covenant.

Discrimination carries two elements: equality before the law and equality in fact. Equality before the law means that laws cannot be *prima facie* discriminatory. Equality in fact means that discrimination cannot be a consequence of the law. Some distinctions amount to differences in treatment that seek to address a pre-existing imbalance. If in so doing they are reasonably related to what they attempt to differentiate and proportional to the objective they seek to achieve, they are acceptable. It is on this basis that affirmative action or positive discrimination legislation is justified.

Minority groups—defined as non-dominant national, ethnic, religious, or linguistic groups—are protected in the instruments of general application, as are indigenous groups.³ In addition, both the United Nations and the Africa Commission for Human and Peoples’ Rights (ACHPR) have established working groups to investigate their needs. Both minority and indigenous rights are a challenge to negotiate because they place group claims above state claims.

Others with special protection are migrants (in general) and refugees. However, migrants—non-nationals—do not receive clear protection in international law. Not until early 2004 did the Committee for the Elimination of All Forms of Racial Discrimination release specific guidelines on the protection of non-nationals under its General Recommendation 30.⁴

² For an in-depth analysis of discrimination in international law see *Non-Discrimination in International Law: A Handbook for Practitioners* - www.interights.org.

³ Defined for the purposes of this meeting as those with a distinct way of life and a relationship with their land that is important to their livelihood, such as the Maasai and the San.

⁴ For details of the CERD’s General Recommendation 30 see www.justiceinitiative.org or www.unhchr.ch

Statelessness, which is often a consequence of denationalization, has been recognized as requiring protection as the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness attest.

With respect to gender, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) provides protection for women by refuting stereotypical assumptions and attempting to change cultural attitudes that bring about inequality. In addition to other rights, CEDAW provides the right to transfer nationality, to determine one's surname, to preserve one's nationality, and equality in access to citizenship.

II. CONCERNS

Definitions

At the consultation, there was significant discussion on the usage of standard definitions and the development of continent- and country-specific definitions for the terms “minority” and “indigenous.” Standard definitions for the term “minority” were interrogated and found to be problematic because there is no consensus on whether minority status is determined by relative population size or relative power. The vagueness of the term is also belied by the difficulties in translating it into local languages.

Categorization as a minority is linked to the ability to access resources. According to the socio-political context there exist political, economic, and cultural minorities. It was recognized that weakness (and conversely dominance) in one area does not automatically translate into another. Economically dominant groups may have no political power and vice versa. Access to resources may depend on the relationship that a group has with the government in power and as such is dependent on the election cycle. This results in a fluid labeling of groups depending on their alliance or opposition to the government.

A term that captures the essence of the concern for minorities is “vulnerable groups.” It was agreed that regardless of how they are defined, vulnerable groups require protection from other communities and from the state. Taking this into account, some participants discouraged a focus on definitions and to instead develop a framework (a matrix) to categorize groups based on their relative dominance and weaknesses in different spheres.

Deficiencies

The Audit, once created, will reveal gaps in legal protection of individuals' right to equal treatment and to nationality. Early results indicate that national legislation is not overtly discriminatory, but does not provide active protection for the vulnerable. There are also hints that national case law is not spotlighted at the international level.

It was noted that the paucity of broad movements and organizations targeting protection resulted in a lack of discussion on which groups require additional protection and for what reasons.

Participants also indicated that even without in-depth research, it can be inferred that the existence of non-discrimination legislation does not eliminate

contrary practice. There is evidence that governments exploit unclear laws, override existing laws, or disregard the law altogether. Also, wide administrative discretion provides opportunity for laws to be ignored (intentionally or otherwise) by those charged with administering the law.

Rhetoric surrounding the war on terror and mass migration (in which Africans are seen as either potential terrorists or illegitimate migrants) has compounded discrimination.

These deficiencies may be a result of African states succumbing to international pressure to institutionalize human rights and democracy without a commitment to the embedded values. This leads to what participants termed “colourless” laws—laws that conform to international norms but do not reflect practice.

Beyond Law Reform

Participants emphasized the need for multifaceted approaches to combating discrimination. Attitudes are impossible to legislate. Participants noted the way that leaders plugged into popular perceptions to demonize certain communities. Rhetoric surrounding the war on terror and mass migration (in which Africans are seen as either potential terrorists or illegitimate migrants) has compounded discrimination. Immigration provides an example of these fears leading to airlines becoming extensions of state authority and treating individuals unfairly because of group membership.

The power of social norms, the history of tradition, popular rhetoric, and competition for scarce resources strongly indicate that promoting active anti-discrimination legislation and comprehensive coverage of vulnerable groups in national, regional, and international instruments is critical but will not eliminate discrimination. Participants encouraged the use of a holistic approach that encapsulated civic education, dialogue, socio-economic development, and strong governance.

Examining Related Jurisprudence

Examination of legislation not dealing directly with equality and citizenship will yield useful data on how discrimination is perpetrated. Mentioned specifically in relation to immigration jurisprudence, it was noted that denationalization—which has been used to disenfranchise individuals and groups—is often followed by the employment of immigration and deportation laws that provide the legal infrastructure to remove noncitizens from the state. Immigration processes allow administrators wide discretion, are subject to limited scrutiny by the courts, and thus make an effective tool for discriminatory practice.

Delineations between first- and second-generation citizens have become increasingly common and have been used in Zambia to challenge Kenneth Kaunda’s citizenship and in Cote d’Ivoire, Alasanne Outtara’s right to contest the presidency. This distinction seeks to reverse colonial citizenship regimes many of which granted citizenship both to indigenous groups and to recent migrants. The burden to prove that one is a second-generation citizen can be heavy—and itself discriminatory—as locating documentation may be impossible even in the absence of administrative obstacles.

Where denationalizations result, statelessness can follow if individuals cannot make claims to citizenship elsewhere.

Challenges

Participants noted that the Audit faced a number of challenges. Firstly, data collection is difficult because many countries do not have consolidated or electronic records of their laws. Secondly, requests for statistics on foreigners are viewed with suspicion in some countries and government officials hesitate to release them. Thirdly, few organizations work on equality and citizenship, resulting in low awareness and an inability to translate the issues into concrete local concerns. And fourthly, the topic is seen as complex, abstract, and therefore inaccessible. Participants urged the project team to reframe the core problematics in accessible language and as a broad issue affecting many, in order to get more attention from civil society organizations and governments.

III. NEXT STEPS AND RECOMMENDATIONS

The group suggested that data collection be accompanied by consultations with civil society organizations and policy makers both nationally and internationally. The participants—many of whom are involved in anti-discrimination advocacy—reminded the Justice Initiative that international law provides a useful framework for advocacy and as such, the Justice Initiative should see itself playing a role lobbying at the international level and through this supporting local work. The Justice Initiative reiterated its desire to facilitate additional programming and to ensure that all follow-up programming was cohesive. The following recommendations were made:

- 1) Law Reform
 - a) Develop guidelines for laws and policies on nationality/citizenship.
 - b) Identify areas in the law where clarification and additional protection is necessary (for example, electoral laws and immigration).
 - c) Advocate for specialized tribunals to review denials and revocations of citizenship.
 - d) Promote dual citizenship.
- 2) Research, Documentation, and Monitoring
 - a) Develop a model methodology for documenting discrimination in practice.
 - b) Conduct further inquiry into the doctrine of acquired rights (that longstanding residents acquire rights equal to those of citizens even if citizenship is not officially granted) and discrimination against noncitizens.
 - c) Investigate the benefits or dangers of federalism as a means of promoting inter-communal coexistence.
 - d) Explore whether there are developmental policies, political imperatives, and/or sociological factors that lead to discrimination.
 - e) Monitor the implementation of legislation.
- 3) Advocacy and Education
 - a) Use the Audit report as an advocacy tool to inform leadership and interpret policy at the regional and international level (specifically with the African Union, the New Partnership for Africa's Development, and UN bodies).
 - b) Analyze and communicate the benefits of policy change.

- c) Bring attention to national laws and practice that do not conform to internationally-accepted norms.
 - d) Use the Audit report to encourage accession to the Convention on the Reduction of Statelessness.
 - e) Lobby for international standards on granting and revoking citizenship.
 - f) Use litigation as a tool to increase awareness of discrimination. (This could be supported by legal aid schemes.)
 - g) Embark on widespread legal and human rights education, targeting marginalized communities, local leaders, police, judges, lawyers, and local leaders.
 - h) Develop briefings to share information, experiences, and strategies among civil society organizations and policy makers.
- 4) Changing attitudes
- a) Promote inter-communal interaction in ways that deepen understanding.
 - b) Develop a self-assessment tool that administrators can use to review their attitudes and decision-making.

In designing actions, the project team was urged to:

- Map key events such as conferences and proposed bills in order to align actions with current events. Fora convened by other actors (such as the Commonwealth and the Southern African Development Cooperation) may be useful.
- Analyze the political environment to ensure well-targeted and successful advocacy efforts.
- Identify political champions who can promote the cause.
- Ensure links between researchers and policymakers (including opposition politicians)
- Use the media to increase awareness, promote empathy, and amass public support.
- Create an institutional framework, such as an organization or movement, to support research and advocacy. This would foster solidarity among victims and advocates and assist in coordinating actions.
- Consider publishing reports nationally and internationally simultaneously (keeping in mind in-country reactions to the Justice Initiative as an outsider organization).
- Ensure that programming after the state of the law survey is united by a common theme.
- View post-conflict reconstruction as an opportune time to catalyze discussions on citizenship and discrimination.

Participants were urged to remember that weak judiciaries could reinforce discriminatory policies by creating bad precedents. Therefore, caution should be taken in strategizing legal action.

In closing, the Justice Initiative stated that it would create opportunities for project partners to share information and continue discussions started at the meeting. It described modifications in its process, specifically that once the survey on the state of the law was completed the Justice Initiative would work with local partners to facilitate in-country or regional (where appropriate) meetings to share results of the report with relevant stakeholders and to discuss possible follow-up programming.

This consultation represented a milestone in the development of the Audit. It not only reaffirmed the importance of conducting a survey on the state of the law on discrimination and citizenship, but highlighted the need to maintain a practical perspective. The project team must continue to ensure the collaborative development of the project and consultations with actors outside the project. The absence of a community of organizations with anti-discrimination on their agenda and the unpopularity of some of the vulnerable groups (such as illegal immigrants and indigenous communities) points to the need to develop a network of existing organizations, to engage with policymakers and local organizations at all stages of the research, and to focus on country-specific reform. In addition, given the potential size of the project and the extent of its goals, the project team must take a long-term view of change.

AGENDA

Wednesday, February 16, 2005

- 0900 Welcome
- 0910 Participant Introductions
- 1010 Audit: Background, Objectives & Activities
- 1030 Coffee Break
- 1045 Dr. Chaloka Beyani: Marginalization and Human Rights
- 1115 Q&A – Discussion
- 1145 Legislation, Policy, and Judgment Compilation: Process, Initial Findings, and Emerging Issues
- 1230 Q&A and discussion
- 1300 Group Lunch
- 1430 Outcomes from the Audit of Legislation
- 1530 Coffee Break
- 1545 Discussion Cont'd
- 1645 Summary of Discussions
- 1700 Close

Thursday, February 17, 2005

- 0900 Recap / Advocacy and Programming: Experiences and Ideas
- 0915 Participant Discussion
- 1100 Coffee Break
- 1115 Discussion of Advocacy Strategies
- 1300 Group Lunch
- 1430 Discussion Cont'd
- 1530 Coffee Break
- 1600 Discussion Cont'd
- 1645 Recap and Next Steps
- 1700 Close

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OPEN SOCIETY
JUSTICE INITIATIVE

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, J. 'Kayode Fayemi, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher, Wiktor Osiatyński, András Sajó, Herman Schwartz and Christopher E. Stone.

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