

Legal empowerment as a tool for engendering access to justice in South Africa

International Journal of
Discrimination and the Law
2020, Vol. 20(4) 224–244
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DOI: 10.1177/1358229120969602
journals.sagepub.com/home/jdi



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Abstract

This article examines the concept of access to justice and the challenges vulnerable and marginalised groups encounter in accessing justice. The article further discusses the recognition of access to justice as human rights imperative under international and regional human rights instrument. It then discusses barriers to access to justice for women. It argues that while access to justice remains a challenge for many vulnerable and marginalised groups, women particularly encounter serious barriers to access to justice in society. Furthermore, it discusses the notion of legal empowerment and the significance of this for the realisation of access to justice for vulnerable groups, especially women in disadvantaged communities. This is followed by the discussion on the experience of the Dullah Omar Institute in providing legal empowerment training for women in informal settlements in Cape Town and some of the, important lessons from this process. It concludes by making useful recommendations in ensuring access to justice for vulnerable women in informal settlements.

Keywords

Access to justice, legal empowerment, women, South Africa, informal settlements

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Introduction

Daily, people around the world experience different forms of justice problems ranging from housing disputes to insurance claims and accessing education and healthcare. Current estimates are that 1.4 billion people are denied access to justice in civil and administrative justice needs worldwide (World Justice Forum, 2019).

It has been proven that there is a positive relationship between the ability of people to access justice and socio-economic development of societies (Durojaye et al., 2018). In this vein, the Organisation for Economic Cooperation and Development (OECD) (2016) noted that the ‘inability to resolve legal problems diminishes access to economic opportunity, reinforces the poverty trap, and undermines human potential and inclusive growth’. This reality is amplified for many marginalised groups including – women, children, persons with disabilities, indigent persons and the youth (Pascoe, 2016). The contradiction is that although the denial of access to justice is most amplified in circumstances of marginalisation, marginalised persons are the ones who experience the greatest burden of barriers of access to justice. In this vein, Marou Amadou, the then Minister of Justice of Niger noted

Just as one cannot let people suffer from hunger or thirst, one cannot let them suffer from injustice or arbitrary power just because legal aid might prove costly. People’s aspirations for democracy and development require a ‘true’ rule of law, which is impossible if justice is not accessible to all [. . .] [A]s another saying puts it so well, ‘in these conditions, it is often better to be rich and guilty than poor and innocent’, and lose all your rights [. . .] You are poor not only because you don’t have money, but also because you cannot read the civil procedure code, or the penal code, or you don’t know what action to take in the face of injustice. You are poor when, instead of seeing the judge as someone who is going to protect you, you fear him and dread his judgment. Yes, when you are poor, you are also afraid. Poverty has many faces, and legal aid can help address many of them. (UNDP, 2016, p. 5)

In many climes and mostly in developing countries, women seeking justice face challenges navigating through complex and most times patriarchal and hostile legal systems and institutions. Beyond the barriers to accessing justice that everyday people face, women have (an) added layer(s) of barriers, specific to their circumstances as women, which they confront in addressing peculiar legal needs. Thus, to address the barriers of access to justice for women, a nuanced and multifaceted approach is required. This should include – creating an enabling environment for women to access justice; creating effective, accountable and gender responsive institutions to foster and promote women’s access to justice, and empowering women with the knowledge and tools to know and assert their rights (UN Women, 2018).

The commitments to addressing barriers to access to justice for all is re-echoed in many regional and international instruments, but most substantially given practical focus through its placement within the context of the United Nations Sustainable Development Goals (SDG 2030). Specifically, goal 16.3 commits to ‘promote the rule of law at the national and international levels, and ensure equal access to justice for all’.¹ One of the proposed indicators for goal 16.3 seems to be gender sensitive, especially as regards violence against women. This indicator measures the attainment of goal 16.3 via ‘the

proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms' (Sustainable Development Goal Knowledge Platform, 2019).

Against the backdrop, the paper examines the concept of justice and the challenges vulnerable and marginalised groups encounter in accessing justice. The article further discusses the recognition of access to justice as human rights imperative under international and regional human rights instruments. It then discusses barriers to access to justice for women. Furthermore, it discusses the notion of empowerment and the significance of this for the realisation of access to justice for vulnerable groups, especially women in disadvantaged communities. The paper then discusses the experience of the Dullah Omar Institute in providing legal empowerment training for women in informal settlements in Cape Town and some of the important lessons from this process. It concludes by making useful recommendations in ensuring access to justice for vulnerable women in informal settlements.

Concept of access to justice

Access to justice may assume different connotations to different people in different circumstances. In its narrowest interpretation, it is the ability of any individual to seek redress and receive remedy over a perceived wrong either through formal or informal justice systems (UNDP, 2004). Access to justice remains one of the fundamental principles of the rule of law in any society. Without access to justice, people are unable to have their voices heard or their grievances addressed (UNDP, 2004, p. 5). Failure to ensure access to justice breeds an environment where tyranny and oppression thrive.

Access to justice is often interpreted restrictively to mean people's access to courts. However, this view is often problematic in the sense that it fails to recognise the nuanced connotations of the word justice as well as the various procedural aspects of access to justice, which do not include the courts. While the formal court system is an integral part of realising access to justice, it should not be construed as the only recognised means of ensuring access to justice for disadvantaged groups. What is understood to be justice is all-encompassing and the courts are not the only means through which people may access justice. In fact, for many traditional societies within Asia and Africa for instance, courts represent a barrier to accessing justice, as against a solution to accessing justice (Penal Reform International, 2000, p. 6). Access to justice 'refers to the various elements leading to appropriate redress against the violation of a right' (Parliamentary Assembly of the Council of Europe, 2015). From the foregoing, it is important to note that a definition of access to justice must be as broad as possible including both formal and informal justice systems as well as any other means that enable marginalised and disadvantaged groups seek redress for the violation of their rights. Such a definition must not focus on the form but rather on the outcome. While the courts and other formal mechanisms remain important elements of access to justice, they should not be the yardstick for measuring access to justice in any society. According to the UNDP (2013, p. 6), 'access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight'. Echoing this position, it has been noted that:

Access to justice goes beyond physical admittance into the formal or informal justice systems and legal processes. It includes legal empowerment, counselling and representation. Realising access to justice for vulnerable and marginalised groups is crucial in addressing societal inequalities, poverty and social injustices, which in turn serves as a catalyst for socio-economic and cultural development'. (Durojaye et al., 2018, p. 49)

Some of the essential ingredients of access to justice include the quality of justice delivered; the time it takes for the delivery of justice; the moral quality of the dispenser of justice; the observance of the general principles of the rule of law; the affordability of the cost of seeking justice in terms of time and money; the quality of the legal advisers that assist litigants; and the incorruptibility and impartiality of operators of the system (Gwangudi, 2002).

For the purpose of this paper, the term access to justice, is construed broadly not only to include the formal justice system, but also other initiatives and mechanisms that enable marginalised and disadvantaged groups seek redress for the violations of their rights. Thus, race, age, creed, colour, class, gender or sexual orientation should not be the determining factor in ensuring that justice is guaranteed to all.

Commitments to realise access to justice under international and regional human rights law

Various international and regional human rights instruments contain provisions that directly or indirectly recognise access to justice as a human rights issue. Many African countries have made commitments under these international and regional instruments towards realising access to justice for all, including women. The first human rights document adopted by the United Nations in 1948, the Universal Declaration of Human Rights (UDHR) (United Nations, 1948) guarantees the right of all persons to 'equal protection of the law'.² It also provides for the 'right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him [or her] by the constitution or the law',³ and the right 'in full equality to a fair and public hearing by an independent and impartial tribunal . . .'.⁴ The UDHR generally encourages member states to strengthen their justice systems and ensure the realisation of the rights for all.

The provisions of the UDHR have been translated into a binding instrument through the adoption by the UN in 1996 of two binding instruments-the International Covenant on Civil and Political Rights (ICCPR) (United Nations, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations, 1966). On one hand, the ICCPR focuses extensively on state obligation to ensure redress where a violation of rights has occurred. It emphasises the equality of all and freedom from discrimination of all before the law.⁵ On the other hand, the ICESCR reiterates the obligation of states to uphold rights in a non-discriminatory form.⁶ This will require that states put in place mechanism that will enable everyone, including disadvantaged groups to seek redress for the violations of their rights.

The United Nations has adopted some human rights instruments addressing access to justice needs of specific categories of people. These include the Convention on the

Elimination of All forms of Discrimination against Women (CEDAW)⁷ and the Convention on the Rights of Persons with Disabilities (CRPD) (2006).⁸ CEDAW is the hallmark instrument in international law, which generally promotes the right of women and more specifically their freedom from discrimination and access to justice. Furthermore, the CEDAW Committee (2015) issued General Recommendation 33 on Women's Access to Justice, which 'includes guidelines on strengthening access to legal aid services for women, including promoting gender-sensitive services, improving accountability and legal awareness'. The General Recommendation remains a very important clarification of states' obligation in ensuring access to justice to women in a non-discriminatory manner. It affirms the notion of substantive equality towards the realisation of access to justice to women.

The CRPD makes concrete provisions for the realisation of access to justice for persons with disabilities and requires that 'States parties provide reasonable accommodation as may be necessary to ensure that persons with disabilities deprived of their liberty are entitled to guarantees in accordance with international human rights law'.⁹

In addition, to the above binding human rights instruments, the United Nations General Assembly (2012) adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, the first international instrument on the right to legal aid. The UN Principles and Guidelines established minimum standards for the right to legal aid in criminal justice systems and provides practical guidance on how to ensure access to effective criminal legal aid services.¹⁰ The Guidelines contain a number of very useful provisions relating to access to justice. These include the recognition of legal aid as an essential element of access to justice, the responsibility of the state in providing legal aid for vulnerable groups, the need to provide legal aid to children, the need to recognise the important role of paralegals, the need for research and data collection in order to improve access to justice.

At the regional level, the African Charter on Human and People's Rights (African Charter) (1986) and The Protocol to the Charter on the Rights of Women in Africa (Maputo Protocol) (2003) – both stress principles of equal protection of all before the law and non-discrimination. The Protocol specifically requires that States ensure 'effective access by women to judicial and legal services, including legal aid'.¹¹ The African Commission on Human and Peoples' Rights have adopted a number of norms and standards on access to justice in the region. These include the Resolution on the Right to Recourse and Fair Trial in Africa (African Commission, 1992),¹² Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the Dakar Declaration and Recommendations).¹³ Other norms include the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and Plan of Action¹⁴ and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action.¹⁵

In addition to these binding instruments, there are some declarations or consensus statements many African countries have committed to on access to justice. These include goal 16.3 of the Sustainable Development Goals (SDGs) adopted by the UN in 2015,¹⁶ which emphasises access to justice and rule of law as priority areas and the African Union Agenda 2063 (2015) that recognises the need for rule of law, human rights and democracy.

Barriers to access to justice for women

There is a nexus between inequality and access to justice, especially with regard to marginalised groups in society. Discrimination and inequality may undermine the ability to seek redress for human rights violation. Conversely, lack of access to justice may exacerbate poverty and inequality. According to the UN Special Rapporteur on extreme poverty and human rights (2012),

Access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability, for several reasons. First, owing to their vulnerability, persons living in poverty are more likely to fall victim to criminal or illegal acts, including sexual or economic exploitation, violence, torture and murder. Second, access to justice is important because justice systems can be tools to overcome deprivation, for example, by developing jurisprudence on social and economic rights. Third, when vulnerable persons cannot access justice systems, they are sometimes forced to take justice into their own hands through illegal or violent means, or to accept unjust settlements. Fourth, the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights. In turn, their increased vulnerability and exclusion further hamper their ability to use justice systems. This vicious circle impairs the enjoyment of several human rights.

Arising from the above, states are obligated to ensure equality in access to justice for all. In this regard, states are expected to remove all barriers to access to marginalised groups.

As a marginalised group, women face many barriers to accessing justice. The CEDAW (2015) in its General Recommendation 33, identified a host of issues that continue to stand as barriers to women's access to justice. These include – non-availability of courts and quasi-judicial bodies in rural/remote areas, time and money constraints, complexity of proceedings, physical barriers for women with disabilities, lack of quality and gender sensitive justice system including legal aid services. The Human Rights Committee (2007) in its General Comment 32 has noted that:

The principle of equality and non-discrimination obliges States to take measures to ensure that all individuals are entitled to equal access to judicial and adjudicatory mechanisms without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that all parties in judicial or legal proceedings are treated without any discrimination. The principle of equality and non-discrimination extends to prevent discrimination on the basis of social and economic status, as implied in the phrase “other status”

It is necessary to reiterate that women face (an) added layer(s) of barriers to accessing justice than the ordinary person. Some of the more peculiar barriers to women accessing justice as highlighted above, include regulatory framework, policies and practices, alienating policing system and allocation of resources,

Regulatory framework, policies and practices

For many countries the world over, gender equality is still only an aspiration, this status quo is peculiarly reflective of many African countries where patriarchal norms and practices still remain pervasive. Despite ratification by countries of major international and regional human rights instruments, gender inequality stubbornly persists ranging from work place discrimination, to female genital mutilation. Beyond commitments in these instruments, many countries still do not have concrete anti-discrimination laws, specifically prohibiting discriminatory practices against minorities, including women (European Union, 2016). Even for the seemingly progressive countries, the rate at which laws and policies transform to be inclusive and gender sensitive is yet to be at par with what is necessary in practise to achieve gender equality. This has continued to pose a severe barrier to many women accessing justice. For instance, women who are victims of sexual crimes such as rape in many countries, while seeking redress in courts, have been subjected to secondary trauma based on the approach of the criminal justice system and statutory provisions in law, which are neither gender-sensitive nor victim centred (Resick, 1984).

Many countries (especially developing countries) still have laws, policies and administrative practices, which continue to pose a problem to many women seeking to assert their rights. Land ownership and inheritance legislation in many countries in the Middle East and North Africa (MENA) are skewed in favour of men and continue to disadvantage women even when they should ordinarily have a rightful claim (Almodóvar-Regtegis, 2019).

Alienating policing systems

For many women and more specifically victims of gender-based violence within developing countries, the policing system proves to be a clog in the wheels of justice more often than an actual help. From lack of interventions in physically violent situations, to lack-lustre investigation of domestic abuse, women suffer the double burden of gender based violence and barriers in accessing justice for the violence meted out on them (UN Women, 2011).

The attitudes of the police continue to serve as a deterrent to reporting gender based violence (Jagannath, 2011). The first response many women receive when attempts are made at reporting is a lack of resources and/or manpower to visit crime scenes.¹⁷ The South African Commission on Gender Equality's (2017, p. 7) Policy Brief on Policing Violence against Women: Assessing Local Police Station Interventions, flagged this when it noted

Based on the findings presented in the main research report, it was clear that the most common institutional set-up in most polices stations was the Victim Support Centre (in some cases referred to as victim empowerment). It was clear however, that the mere existence of the VSC was no guarantee of effective institutional capacity for the police station to curb GBV in its jurisdiction. In many instances the VSCs appeared under-staffed (some with only one volunteer staff member), or lacking basic furniture and office equipment.

Furthermore, reported incidences of discriminatory and flagrant sexist attitudes from police officers towards victims of gender-based violence abounds (Jagannath, 2011). This has a dissuasive effect on many women seeking justice for crimes committed against them.

Resource limitations

The provision of legal aid is a key contributor to gender equality and women's empowerment, as survivors of gender-based violence have access to legal representation on issues bordering on property/inheritance and child custody matters (UN Women, 2011). However, in many African countries, a huge deficit in the number of qualified lawyers and insufficient budgetary allocations for legal aid continues to hamper women's access to justice (Danish Institute for Human Rights and East Africa Law Society, 2011). This shortage disproportionately affects the most marginalised in society, including women, who need legal representation at securing justice.

Furthermore, most of the services legal aid provides focus on criminal prosecutions, leaving little to no resources for civil claims. A review of legal aid available across sub-Saharan Africa is indicative of the fact that there is no strong commitment to the provision of legal aid in civil and administrative matters (United Nations Office on Drugs and Crime and United Nations Development Programme, 2016). The Ugandan Constitution provides for legal aid to capital defendants and those accused of serious felonies with a life imprisonment sentence.¹⁸ In Ethiopia, the 1995 Constitution provides for a right to legal representation only 'when justice so requires'.¹⁹ The 1996 South African Constitution is more progressive when it, guarantees legal aid to all defendants.²⁰ This can and do in fact have far reaching consequences for a majority of women, whose final resort for a just remedy is usually the courts in a wide range of cases from inheritance claims to divorce and custody matters, as well as property acquisition.

Resource limitation in the justice sector also disproportionately affects many women in rural or remote communities. Courts and police stations are most times located within urban and peri-urban communities (Carmona and Donald, 2015). The monetary and time costs that many of these women incur is a deterrent to their access to justice (Carmona and Donald, 2015).

Beyond the state, limited economic resources of women can serve as a barrier to their access to justice. In sub-Saharan Africa, women's access to own cash income stands at only 46% a figure considerably lower than their male counterparts of 75% (United Nations Department of Economic and Social Affairs, 2015, p. 98). Furthermore, many women continue to be excluded from economic decision-making within their household. This has far-reaching effects for many women seeking redress. Many women are incapacitated and sometimes stuck in life-threatening situations (such as intimate partner violence), unable to seek redress because they either do not earn any money or have no say in what monies they earn.²¹ These women many times do not have the financial resources for travel to and from police stations, courts or to pay for legal representation where legal aid is not available.

It is therefore crucial that states adopt measures that will address the different challenges women face in accessing justice. In this regard, states would be required to adopt a

substantive equality approach by not only removing barriers to access to justice for women but also creating an enabling legal environment that will respect the right of women and ensure equal access to information and knowledge about their rights.

Concept of legal empowerment

For the purpose of this article, the term 'legal empowerment', first coined by Stephen Golub in 2003, refers to initiatives or efforts aimed at increasing the capacity of the people or individuals to engage with the legal system (Golub, 2003, p. 3). He defines legal empowerment as 'the use of legal services and related development activities to increase disadvantaged populations' control over their lives' (Golub, 2003, p. 5). These may include but not limited to supporting individuals to seek redress for violations of their rights, building capacity to monitor and report human rights violations at the community level and increasing knowledge about rights (Goodwin and Maru, 2017, p. 158). In recent time, legal empowerment has been used to mean efforts aimed at building capacity of individuals to assert their rights and efforts that promote engagement with various justice institutions-both administrative and quasi-judicial- towards ensuring the realisation of access to justice (Golub, 2003).

Golub identifies four attributes of legal empowerment:

- (1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise;
- (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda;
- (3) addressing these priorities frequently involves non-judicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building;
- (4) even more broadly, the use of law is often just part of integrated strategies that include other development activities. (Golub, 2003, p. 4).

Legal empowerment is also defined as the process for enhancing the capacity of disadvantaged groups in order to enable them assert their rights and seek redress for the violations of their rights (UN Secretary General Report, 2009). There are no agreed definitions of empowerment; rather different authors have espoused the meaning of this concept. However, the United Nations High Level Commission on Legal Empowerment has defined legal empowerment as 'a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights as citizens and economic actors' (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 3). The Commission identifies four crucial pillars of legal empowerment to include access to justice and rule of law, property rights, labour rights and business rights. This paper focuses on the first pillar.

Ultimately, legal empowerment helps in improving access to justice for disadvantaged groups and ensure accountability on the part of duty bearer.

Empowerment theory is understood to mean community-centred conscious and continuous processes that are grounded in mutual respect, empathy and people participation by which marginalised groups, lacking access to resources, are afforded greater access to exert control over the resources. (Zimmerman, 2000). It is a deliberate process, which includes efforts of people or communities to assert power, take charge of their lives and achieve great strides in social services' provision. According to Zimmennan and Zah-niser (1999, p. 189), empowerment involves understanding the process and consequences of efforts made to take charge of decisions that affect one's life, organisational functioning, and community life as a whole.

The empowerment theory becomes a veritable tool for ensuring social action of marginalised groups with a view to realising improved level of social justice in society. In essence, the theory of empowerment aims at promotion of human capacity of marginalised communities to ensure competence and ability to take charge of their resources as well as equip them to understand the social political environment. Zurcher (1970, p. 83) argues that this theory allows people to make crucial decisions that will collectively benefit their communities. Having being empowered, people are bolstered to contextualise social political issues including the capacity to understand those who wield powers, their resources, their connections to matters affecting them and factors that hinder their decision-making. Thus, communities are able to identify causal agents and can intentionally engage those that wield these powers. Consequently, people are able to eschew conflict and can determine when to engage for better results including the ability to identify resources and be able to put them to good use (Sue and Zain, 1980).

The Empowerment theory is founded on the principle of participation, which serves as a tool for the community to acquire some critical skills to enable them engage with relevant stakeholders. It should be noted that empowerment occurs at different levels, including individual, community and organisational. Invariably, a community that is empowered is able to devise means and actions to address the peculiar social challenges facing it. This ultimately provides opportunities for the members of the community to participate in decision-making that may enhance access to resources and improve living conditions. Sue and Zain (1980) have noted that empowerment serves as a catalyst for ensuring access to resources for personal or collective gains. Empowerment serves as an important avenue for dismantling structural inequalities and barriers to development within the community. It further serves as an opportunity to build capacity and sharpen skills that will enable community members to assert their rights and influence in society. Consequently, empowerment will result in changes to the ways social resources are managed and lead to improved social power of marginalised communities (Gibbs et al, 1980, p. 121).

The concept of empowerment is crucial to the realisation of access to justice. As mentioned earlier, ensuring access to justice requires that the rights holders and duty bearers are empowered legally to understand the principles and norms of human rights and when these rights are violated, to ensure that an avenue exists to seek redress. The concept is hinged on the principle that the duty bearers must not be taken unaware and the rights holders must know and understand their responsibilities. There must be community efforts to advocate and meaningfully engage duty bearers in the realisation of access to justice. Women as rights holders in the context of access to justice, deserve

protection from the duty bearers and the assurance that when their rights are violated mechanisms are put in place that will ensure access to seek redress and justice.

Some thoughts on barriers to access to justice in South Africa

Twenty years into democracy, a significant number of South Africans are yet to benefit from its dividends. Experience has shown that vulnerable groups such as women and children that live in informal settlements do not yet enjoy the quality of life that the constitution envisages for all. Although the Constitution guarantees various forms of socio-economic rights including housing, health and social security, however in reality, these rights have become illusory for many of the people (Sekyere et al., 2020). Access to basic social amenities such as housing, health, water and sanitation remains a pipedream for majority of people living in informal settlements. Poverty level remains unacceptably high and millions of people are without jobs (Statistics South Africa, 2019). This has exacerbated the gaps between the haves and have-nots, thereby making South Africa one of the most unequal societies in the world (Oxfam International, 2018, p. 8). This can have implications for access to justice in the country, Indeed, the Transformative Commission notes that some of the barriers to access to justice in the country include long delay, gender bias, lack of legal aid, lack of participation in reform programmes, legal formality, expensive legal procedures and avoidance of the legal system due to economic reasons (Department of Justice, 1999).

As a state party to most of the international and regional human rights instruments discussed above, South Africa is committed to ensuring access to justice for all. In this regard, it has adopted a progressive legal framework to guarantee access to justice. Apart from adopting one of the most progressive constitutions in the world, it has equally enacted laws and adopted programmes, including legal aid, towards realising access to justice for every individuals. Despite these efforts, however, it has been observed that the dearth of qualified lawyers, especially in the rural areas, high cost of securing a counsel and ignorance are some of the barriers to access to criminal and civil justice in the country (Mason, 1999).

The often-touted transformative nature of the Constitution has not translated to positive results for many people living in informal settlements. The essential pillars at the heart of the Constitution include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, the rule of law, democracy, social justice, equity and respect. In addition, section 7 recognises the Bill of Rights as the cornerstone of the Constitution and protects 'the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. It further provides that the state must respect, protect and fulfil the Bill of Rights. More importantly, section 9 of the Constitution guarantees the right to equality of everyone. This section must be read together with section 34, which provides that 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

These affirmations are important with regard to addressing access to justice for women and other vulnerable groups in disadvantaged communities across the country.

However, it has been contended that many disadvantaged groups have no legal aid and unable to access court in civil matters thereby making it impossible for them to realise their socio-economic rights (Kamga, 2015). This would seem to imply that the ‘considerable potential of the South African Constitution is not entirely realised and there is still room for significant improvement’ (Kamga, 2015, p. 608). Other commentators such as Dugard (2008) and Balogun (2020) have argued that notwithstanding the progressive nature of the Constitution, the legal system has failed to ensure access to justice to the marginalised and disadvantaged groups, especially in civil matters. Dugard (2008, p. 215) particularly criticises the judiciary for being ‘untransformed to the extent that it remains institutionally unresponsive to the problems of the poor and it fails to advance transformative justice’. She further observes that ‘the post-apartheid judiciary has collectively failed to act as an institutional voice for the poor’. These scathing remarks about the judiciary and the legal system as a whole is a testament to the challenges disadvantaged and marginalised groups face in realising access justice in the country.

Case study of a project on empowering disadvantaged communities in Cape Town

Over the years, the country has witnessed a series of service delivery protests. Almost on a daily basis, the country experiences different forms of service delivery protests in different parts of the country, particularly informal settlements. Some of these protests have turned violent, and in some situations have resulted in loss of life (Alexandra, 2010). More importantly, many of the vulnerable and marginalised groups have struggled to secure access to justice in the wake of flagrant disrespect for their rights. This is so because they lack the means and resources as well as knowledge to challenge these violations.

Affirming this position, Carmona and Donald (2015, p. 254) argue that the complexity associated with the formal judicial system can have disproportionate effects on disadvantaged groups due to lack of information and knowledge about their rights. This in turn can render them invisible to the justice system.

Methodology

The Socio-Economic Rights Project at the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI) at University of the Western Cape (UWC) has been hosting a series of Community Leaders Workshops (2015–2019) with the objective of empowering and raising awareness on human rights and social justice. The DOI is a research institute that engages in practical and multidisciplinary research activities, advocacy and teaching to ensure good governance and respect for human rights. After visits to some informal communities in Cape Town to assess the nature of socio-economic deprivations, it was clear that many of the residents lack understanding about their constitutional rights in general and socio-economic rights in particular. Thus, the Project was initiated in 2015 to provide a series of training programmes for selected leaders of the communities, who will go back to the communities and re-train other members. It started as two-day workshops for about 30 participants, majority of whom

are women, four times in a year. These workshops also offer a platform for various community leaders and community activists with different backgrounds to discuss, network and share their knowledge on human rights and social justice in South Africa.

The workshops focussed on various aspects of human rights including meaning and sources of human rights, characteristics of human rights, types of human rights, the Bill of rights of the South African Constitution, duties and obligations of the state and duties of citizens. The workshops also highlighted mechanisms through which government's obligation to realise human rights are monitored and presented, approaches to holding government officials accountable for human rights violations, including practical steps to take when rights are violated.

Specific attention is paid to particular socio-economic rights such as housing, health, sanitation and social security, succession, preparation of wills and the legal implications of Muslim marriage. Emphasis is placed on participation, role-play and class activities with a view to stimulating the active involvement of participants.

Some of the partners for these workshops include organisations such as Black Sash, Lawyers for Human Rights, Women's Legal Centre, Social Justice Coalition, Legal Resource Centre, Legal Aid Centre (UWC), Community Engagement UWC, Ndifuna Ukwazi, Institute for Social Development (UWC), South African Human Rights Commission and Commission for Gender Equity.

At the end of the training, three different handbills and posters relating to the socio-economic rights of the communities were developed. The handbills and posters address issues such as forced evictions, water and sanitation and participation. About 500 copies were produced and each was translated into Xhosa and Afrikaans. Some of the captions include 'Forced evictions are a violation of human rights', 'open toilet is a violation of your right to dignity' and 'Your right to participation include being involved in decision-making'. As seen from the foregoing, the training programmes focus on providing vital information on constitutional rights to the community leaders. This is based on the premises that information and knowledge on human rights can help in tackling impunity and in redressing human rights violations (Carmona and Donald, 2015, p. 6). The limitation of this Project is that it merely focuses on three informal communities in Cape Town and does not cover other parts of the city or country.

Targeted communities of the project

The capacity building workshops targeted three main informal communities in Cape Town. Blikkiesdorp is an informal settlement of about 20,000 people.²² While originally meant to be a 'temporary relocation area', it has become an enduring feature with communities residing there semi-permanently. Living conditions are deplorable due to congestion, absence of amenities and insecurity.

Mandela Park (Khayelitsha) is a community of about 400,000 informal and backyard dwellers. Unemployment and crime rates are high and life is insecure. Khayelitsha is one of the poorest areas of Cape Town, with a median average income per family of R20,000 a year, compared to the city median of R40,000 (Western Cape Government, 2017, p. 17). Roughly over half of the 118,000 households live in informal dwellings.²³

Seawinds-Muizenberg, an informal community of about 7,000 people of 1,392 households (Census Report, 2011). It is made up of mainly young people and lacks basic amenities as water, sanitation, adequate housing and healthcare services.

The overall objective of this project was to ensure access to justice for vulnerable and marginalised groups in informal settlements by enhancing the skills and knowledge of community leaders in informal settlements with respect to asserting socio-economic rights. Our interactions with community members show that many of the people have little knowledge and understanding about their constitutional rights, and are ignorant about what to do whenever they experience human rights violations.

The main objectives of the training programmes include:

1. to empower the communities about their constitutional rights
2. to empower the communities so that they can become key stakeholders and not passive observers as regards decision-making that affect their daily lives
3. to educate the people about asserting their rights through engaging with relevant government institutions including the South African Human Rights Institutions
4. to empower the people to monitor human rights situations in their communities and take proactive steps to prevent and redress violations

Content and description of the programme

Given the important roles community leaders play in facilitating and realising access to justice for vulnerable and marginalised groups in society, the aim of the workshops is to empower community leaders to provide pivotal human rights support services to the community. The workshops further aimed at ensuring that people are able to assert their rights by seeking redress whenever violations occur.

Lessons learned

Our experience working with people in informal settlements has revealed that, despite the large-scale violation of their socio-economic rights most of them are unable to engage with the relevant government institutions and chapter nine institutions either to assert their rights or to register their complaints. This has further aggravated the poverty situation in informal settlements.

Participants affirmed that the workshops helped them in realising the roles of community leaders, which include engaging with community members to help them understand better their rights and responsibilities. This seems to coincide with the views of other commentators that legal literacy is one of the commonest outcomes of legal empowerment programmes (Goddwin and Maru, 2017).

Another participant noted that the workshops made them understand that people must not allow government officials to over-power them but rather they must be made accountable to their responsibilities. One of the participants further noted that the workshops broadened his understanding of the role and responsibilities of government officials at national, municipal and local government level and how they can utilise national human

rights institutions such as the South African Human Rights Commission (SAHRC) to seek redress for the violations of their rights.

One of the important outcomes of the workshops was that the community leaders were equipped with knowledge on how to engage with government officials. For instance, a follow up meeting to Mandela Park after the workshops revealed that the community wrote a letter to the City of Cape Town, using the knowledge at the workshops, to demand for a meeting to discuss the various housing challenges they encounter in their area. The City of Cape Town did acknowledge receipt of their letter and promised to get back to them soon. According to the community, this was the first time they had received any response from the City officials about their plights. Prior to this time, one of the challenges community members experienced related to their exclusion from decision-making process by the local government officials. This is contrary to the principle of participation recognised under international and national law. Indeed Carmona and Donald (2015) argue that any successful legal empowerment programme must involve the communities that will be affected by its outcome.

A follow up visit to Seawinds showed that some of the community leaders that participated in the workshops organised by the DOI had engaged with Municipal government about irregularities in Council elections. According to the leaders, based on the knowledge acquired during the workshops, they were able to identify irregularities in Council election and wrote to the Council complaining of such irregularities and demanding that they be rectified. The Council then invited them for a meeting to discuss more on this issue. At the meeting, they made it known to the Council their objections to the election, as it did not follow the proper procedures. They were then assured that the Council would investigate this and get back to them.

The fact that some of the communities have been able to redress some of the violations of their rights without necessarily resorting to court attests to the fact that legal empowerment can achieve the desired outcome outside of the formal court system. This process allows for meaningful participation of community members in matters that affect their lives. It is a bottom-up approach rather than the usual top-down approach to realising access to justice, which the formal legal system offers. Golub (2003, p. 4) has argued that the formal justice system allows for a top-down approach to justice not suitable for the needs of vulnerable groups.

Linking the project with international and national commitments to realise access to justice

The need to realise access to justice for vulnerable remains a priority of the international community. Thus, goal 16.3 of the SDG is dedicated to ensuring access to justice for disadvantaged groups. The international community thus made a commitment to eliminate barriers to access to justice for vulnerable and marginalised groups. Two important indicators were developed to monitor states implementation of goal 16.3 (UN Sustainable Development Goals, 2015).

These are:

Indicator 16.3.1: Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms

Indicator 16.3.2: un-sentenced detainees as a proportion of overall prison population

Access to justice is fundamental not only as a human rights principle but also to ensuring sustainable change and development. However, challenges abound on how to measure steps taken by states to realise these important indicators. Unlike other indicators of the SDGs, the two indicators for access to justice are not easily measurable. Moreover, the focus of these indicators are on criminal issues and do not reflect the peculiar challenges Africans face on a daily basis in addressing civil cases. It is gladdening to know that the revised indicators for goal 16.3 now contain some civil matters.

The UN General Assembly (2012) affirmed that access to justice is a fundamental right of all that deserves the attention of the international community. In July of 2019, at the High Level Political Forum on SDGs, about 30 African countries, including South Africa, submitted their reports under the Voluntary National Review Process (VNR). The voluntary national reviews (VNRs) aim to facilitate the sharing of experiences, including successes, challenges and lessons learned, with a view to accelerating the implementation of the 2030 Agenda. The report by the South African government highlighted major achievements recorded in realising access to justice for disadvantaged groups across the country. These included the existence of the South African Constitution of 1996, which is founded on the principles of equality, justice and fairness to all (Sustainable Development Goals Knowledge Platform, 2019). The Constitution is applauded for its elaborate Bill of Rights, which guarantees both civil and political rights as well as economic, social and cultural rights including rights to life, dignity, equality, liberty, privacy food, health, housing and fair hearing. In addition, the government established Legal Aid and other initiatives to ensure the realisation of access to justice for vulnerable groups.

Despite these positive developments, many civil society groups working on access to justice have expressed concerns with the large number of people, many of them women, who still lack access to justice in informal settlements or rural areas (Nanima and Durojaye, 2019). More importantly, the report by the government did not disaggregate data to indicate gender or rural/urban dimensions of the number of people accessing the justice system. It is not enough for the government to roll out figures of the number of people having access to justice, such figures must indicate the number of women compared to men, children compared to adults and those in urban areas compared to those in rural areas.

Another view is that government needs to allocate more resources to support community-based justice initiatives that augment the efforts of the state in providing access to justice for most women in rural areas (Nanima and Durojaye, 2019). While the government has continued to provide resources to support the Legal Aid, most of the cases resolved by this body relate to criminal laws. Most of the access to justice challenges encountered by disadvantaged groups relate to matters such as property issues, matrimonial, land or labour disputes. Over 90 per cent of these cases are resolved by

community-based paralegals run by civil society groups (Noble, 2018). These community-based paralegals provide training to women and assist them in resolving common disputes and other challenges they face on a daily basis. The DOI experience engaging with different communities on the issue of access to justice would seem to confirm this observation. Our interactions with women from the disadvantaged communities that participated in the workshops clearly indicate the need for more support for civil matters. Hence, it will be important for the government to support the efforts of these civil society groups by making available resources to implement some of their projects (Noble, 2018).

Conclusion

The efforts of the international community to realise access to justice for all cannot be realised unless legal empowerment is taken seriously. Legal empowerment not only provides duty bearers and holders about information relating to their rights and duties, it also ensures that those in need of the justice system are able to navigate their way effortlessly without inhibition. The DOI experience has shown that continued legal empowerment programmes can go a long way in fostering alliances between policy makers and vulnerable groups in need of justice. Moreover, it can serve as preventive measures as human rights abuses can be avoided through capacity building for disadvantaged groups. Ultimately, legal empowerment is a pathway to building confidence of vulnerable group, ensuring agency and gender equality (Carmona and Donald, 2015).

Equally, at the African regional level, a number of norms and standards exist indicating states' commitments to ensure access to justice for vulnerable groups. There is need for political will on the part of the South African government to ensure access to justice for vulnerable groups in informal settlements.


Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Notes

1. See Sustainable Development Solutions Network (SDSN) Indicators and a monitoring framework. Available at: <https://indicators.report/targets/16-3/> (accessed 24 October 2020).
2. Ibid Article 7.
3. Ibid Article 8.
4. Article 10.
5. ICCPR Article 26.

6. ICESCR Article 22.
7. CEDAW General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981.
8. Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, Art. 10, G. A. Res. A/RES/61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/61/6111 (entered into force 3 May 2008) [hereinafter CRPD].
9. CRPD Article 14(2).
10. *Ibid.*
11. Article 8(a)(b).
12. Adopted by the African Commission on Human and Peoples' Rights at the Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992. The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992.
13. Adopted by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session, held in Kigali, Rwanda, from 1 to 15 November 1999.
14. The second pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso, between 18 and 20 September 2002.
15. Adopted at a Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa Lilongwe, Malawi, 22–24 November 2004.
16. The Sustainable Development Goals (SDGs) are a collection of 17 global goals adopted by the United Nations General Assembly on 15 September 2015 designed to be a 'blueprint to achieve a better and more sustainable future for all'.
17. *Ibid.*
18. Uganda, Constitution (1995), Section 28(e).
19. Ethiopia, Constitution (1994), Section 20(5).
20. South Africa, Constitution (1996), Sections 35(2)(c), 35(3)(g).
21. UN Women 'Facts and figures: Ending violence against women'. Available at: <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (accessed 24 October 2020).
22. Blikkiesdorp also known as 'tin-can town' an informal settlement is about 20,000 people created in 2008 created to serve as a temporary relocation area, for some people that were forcefully evicted as part of the government preparation to host the 2010 world cup.
23. 'Handover Statement of the Commissioners of the Commission of Inquiry into Policing in Khayelitsha established in terms of section 206(5) of the Constitution 2014'. Available at: <https://www.westerncape.gov.za/speech/handover-final-report-commission-inquiry-policing-khayelitsha> (accessed 24 October 2020).

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