

## Some Challenges Faced by Rural Women in Accessing Justice in South Africa

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**Abstract:** Access to justice involves individuals recognizing their legal entitlements and having access to institutions that provide remedies to disputes. Rural women come across more hurdles when accessing justice than urban women. The objective of the study was to identify and highlight the challenges that rural women face when accessing justice in South Africa. The researchers employed a qualitative research method in this study. The data was collected from various secondary sources such as journal articles, internet, government and non-government organization reports as well as books. The study found that accessing justice for rural women was complicated by, among others, factors such as living under conditions of both customary and common law, poverty, lack of educational attainment and the location of institutions dispensing justice. The study also explored a number of strategies which can be put in place to enhance rural women's access to justice in South Africa.

**Key words:** Access to justice, women, gender equality, social justice, living condition, justice

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### INTRODUCTION

The concept of access to justice involves individuals being able to recognize and understand legal their entitlements and having access to institutions that enable the realisation of adequate adjudication and remedying disputes.

In the context of this study, the concern was on legal justice which means justice in the context of the law. This raises important questions of what and how is effective justice remedy is constituted? In this regard, what can be regarded as fair? And does that fairness apply to both men and women to ensure gender equality? That is to say is equality between sexes a component of social justice? Equally, improving how rural women access justice may absolutely influence social and economic justice. Therefore, negative gender attitudes and mistreatment of women by men can serve as denial of social justice for women. The focus of this study is particularly on access to legal justice for rural women.

Qualitative research method was employed in this study. The data was collected from various secondary sources such as journal articles, internet, government and non-government organization reports and books. Secondary research is based on secondary resources that are already in existence. This method made it possible for the researchers to explore the issue of rural women's access to justice, challenges and strategies that can be used to enhance rural women's access to justice.

The idea of ensuring women's access to justice calls for women enjoying their right to equality before the law and have effective access to remedies when their rights have been violated. The rights of women are provided for in international instruments such as The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Beijing, platform for Action and also Articles 2.3 and 2.6 of the International Convention on Civil and Political Rights which emphasize the right to remedy and the right to equality before the law, respectively. It should be noted that the right to remedy is a prerequisite in terms of enjoying and enforcing all other rights without discrimination on the basis of sex and gender.

The ideals of a democratic South Africa after apartheid was to heal the divisions of the past to establish a society based on democratic values, social justice and basic human rights in a bid to improve the quality of life with no racial and gender disparities. The Constitution of South Africa embodies a provision that warrants everyone to have access to social security this also includes social assistance. Furthermore, the Constitution of South Africa mandates the state to take reasonable and legislative measures to achieve the realisation of the right to social security. This right ensures due process with a system that enables users to enforce their rights in an efficient system. This kind of a system gives right of access to courts which is embodied in the constitution (Section 37). In the case of the Government of the

Republic of South Africa v Grootboom, the constitutional court held that the concept of rights must be interpreted with regards to the circumstances within which the right was enacted. The judges held that rights must be understood within their textual setting as well as in social and historical context. Nyenti (2013) is of the view that the context of the basic right to access justice alone will indicate the nature and scope of the concept imagined by the constitution.

The legal dimension of access to justice entails legal rights of individuals, processes and procedures. It posits a situation wherein everyone is ensured to be able to institute legal processes for legal redress regardless of economic capacity (Chopra and Isser, 2012). This ideal concept is based on a line of reasoning that the justice system should be structured and administered in such a manner that it becomes affordable and easily accessible to institute proceedings to protect individual rights. According to Baxi (2007), any measures put in place to enhance access to justice will include measures aimed at empowering the users to use the justice system. The question that is often posed is how is this done? This can be done by breaking down the barriers that inhibit access to justice to the poor. Securing access to justice for rural women involves a process of ensuring that justice is accessible to both genders. Real is of the notion that the right to equality guaranteed by the constitution of South Africa is the source of authority for effective judicial review of legislative action which empowers women to enforce their right to equality through judicial proceedings.

### **PROMOTION OF SOCIAL JUSTICE**

It is very important to question what constitutes social justice in modern-day society. It is even more important to focus on how people view the issues of social justice and injustice and it is particularly important for people living in utter poverty who have their choices of action limited. Social justice is defined as a condition in which benefits and burdens in society are distributed according to some allocation principle. The promotion of social justice requires that geographical, sociological, political and cultural structures within which the relations between people in a society can be evaluated and determined whether they are just or unjust.

At the theoretical level, there are debates on social justice and feminism. The common theme that the feminist school of thought adopts in advocating for access to justice framework for women is that there is a need to strengthen legal challenges for equal rights while at the same time not narrowing the vision of the conception of

rights. The ideal framework should encompass all the elements of access to justice and an environment where justice can be accessed by women should exist. Gedin (2009) states that, radical feminism maintains that the main problem is that women as a class are subjected to male domination. In terms of the cultural feminism, men and women are not only to be treated equally but differently. However, it describes theories that commend men and women as different being. Liberal feminists according to Kramer and Kramarae (2000), female subordination is rooted in a set of customary and legal constraints that blocks women's participation to and success in public sphere. Furthermore, the researchers posit that they strive for sexual equality via. political and legal reform. Liberal feminism puts forward that men and women should be treated equally. The theories seek to promote women rights to access justice, since, women are in the subordinate position to men in society by calling for change in structures of oppression.

Utilitarian approach, social justice and asset of capabilities theories are some of the theories that spark contemporary debate on the issue of promotion of social justice. Taylor is of the notion that these above stated theories continue to inform our understanding of the concept of matters related to social justice and its principles that are consistent with human rights. Sen's theory was built based on Rawl's theory of social justice. According to Martins (2012), the recurring characteristic of all the approaches to ethics within a society that have stood the test of time is the desire for equality that holds an important place in the theory. The central tenet of Sen's theory is the link between various freedoms and the important role they play in the development of human beings. Bridgman (2007) posits that Sen puts forward a list of capabilities that are seen as a minimum prerequisite for every social arrangement and he identifies five freedoms which he feels contributes to the overall freedom which all people should have. Freedom in the view of Sen includes social development which works in conjunction with economic development, political development and legal development. These are seen together not in isolation. This is important because with every right there must be a mandated duty on others to assist in the realisation of the freedom of others (Taherzadeh, 2012). This therefore, means that efforts must be made through the promotion of social justice to realise these freedoms.

In order for women to access justice the sameness approach is generated in formal equality and the principle of non-discrimination. This means that this approach advocates for equal treatment of all people. According to Fredman (2016), formal equality requires that classification that is irrelevant on the grounds of sex and race be

removed, the aim being that each individual be treated on merit. It is considered as the first step that is also necessary and adequate against prevention of arbitrary action by the state (Gerapetritis, 2015). The pivot of formal equality is equality in treatment and forbidding any discrimination. On the other hand, substantive equality aims at recognizing how gender works in a social construct. Substantive equality enables a deeper understanding of deep rooted inequalities and demerits that move beyond the concept of equal rights for men and women. The main issue is that women are subjected to discrimination due to their gender. Netkova (2016) puts it that substantive equality requires that there be better opportunities for women. However, an investigation of the extent of the prohibition of discrimination aids substantive equality.

### **CHALLENGES FACING RURAL WOMEN**

Rural women face a number of barriers when it comes to accessing justice. Their access to justice and equitable enjoyment of rights and entitlements remain inadequate due to discrimination, lack of information and socio-cultural obstacles (FAO., 2010). Belonging to an indigenous or ethnic group, being disabled women, migrant female workers or women living with HIV/AIDS adds to the list of multiple forms of discrimination that impede women's access to justice and equitable enjoyment of rights and entitlements.

In some cases, the law itself acts as an obstacle for women to access justice. Mukhopadhyay and Quintero (2008) are of the opinion that gender biases that are incorporated into the law of women having their role as wives and mothers continue to be used as precedents in courts by lawyers and judges. This is clearly seen in countries like Botswana and Tanzania where the two countries are failing to illustrate that rape in marriage is illegal offence. For the two countries, rape is a private matter as occurring within the close doors and between husband and wife (LAC., 2006). The above clearly indicate that women's access to justice is very limited.

When courts are located in urban areas, use English; charge high fees women in the rural areas do not view courts as practical option. Rural women as people possessing fewer resources experience higher levels of frustration, stress and an inability to cope adequately. This might be as a result of poverty and no educational attainment of rural women. According to Hallward-Driemeier and Hasan (2013), few women particularly in regions that are rural possess low levels of educational attainment. This lack of educational attainment can result from poverty which rural women are

subjected to from a young age. Many women living in rural areas are illiterate and this is also another barrier. Literacy includes being able to read, write and interpret. Due to the lack of educational attainment many women in rural areas are not even aware of their rights and available remedies when these rights are infringed (Douglas, 2007). There are common power and control strategies used by those in power that make it difficult for women to access justice. These include putting up high fees; intimidating tactics, using language to humiliate women.

The language of the law is also undoubtedly foreign to them. It is characterised by the use of jargons which proves to be a challenge even to literate people so, does the under-educated rural woman (Nangu, 2015). Literacy is seen as a right and an essential support for development, hence, approaching the issue with gender equality and women empowerment allows for a deeper understanding of how illiteracy affects development in women (Wetheridge, 2016).

Poverty plays a significant role in impeding women's access to justice. In most cases, women are dependent on others for financial support and transport costs. According to the OHCHR (2013) in cases of domestic violence women do not seek justice or the protection it offers them because they are dependent financially on the man who is the perpetrator of the crime. According to Mulaudzi women with lower level of education completely depend on their husband who control all financial resources and spending. As a result, women find it difficult to access financial resources to finance such bills. Women mainly fear the repercussion because they are known by the perpetrator. Poverty also attaches a certain stigma that assumes that women living in poverty are lazy, lack responsibility, dishonest and even engage in criminal activities (Carmona and Donald, 2014). This stigma can even be shown by the police and court staff who may discriminate against the poor people in their decisions. As a result, of this unfair treatment, women living in poverty do not pursue remedies of protection offered by the justice system.

As if this is not enough many women, if they do find the courage to go report a matter to the police are met with some police officers that are unsympathetic and insensitive to a point that they even accuse them of "having asked for it". Combrinck and Meer (2013) concur with the above notion by stating that some of the members of the police force display an apathetic attitude in cases of rape or sexual violence which makes women view the justice system as if there is no place in it for them. The police as the gatekeepers are the first point of contact in the institution of criminal proceedings. These officers make women to decide not even to bother trying

to report such crimes to the police (Anonymous, 2015). This inappropriate attitude by the police sends women away instead of assisting them to enforce their constitutional right of seeking a remedy under the law. The police sometimes go further to pressure victims to reconcile with the offender like in cases of marital rape.

To add on many women in rural areas live under a combination of both customary law and statutory law which is called legal pluralism. In most cases, rural women prefer to have their matters adjudicated in a customary justice system (FAO., 2013). Women in rural areas are also disadvantaged by their obedience to strong customary traditions to the extent that they view formal courts as irrelevant. As a result, rural women remain unaware of the opportunity they can derive by seeking legal recourse in case their rights are violated (Hallward-Driemeier and Hasan, 2013).

This existence of two legal systems makes rural women to continue to seek redress from customary legal systems. This is more affordable than the use of formal courts and may also be easier to access as they are located within the communities. In this case, women do not need to have money for transport. They can just walk to the tribal court to have their case adjudicated. However, these customary courts fall short as most of them are discriminatory and they do not adhere to the standards of equality. In most instances, customary courts and formal courts still have a significant gap between principle and practice. Customary laws are in most cases not applied in a manner that adheres to the Constitutional mandate or the principles of humanity (ICJ., 2013). This is evidenced in the case of Shilubana (2008), the court held that chiefs hold the power to develop the law that enables women to be appointed as chiefs because the customary law that discriminated women from being chiefs was unconstitutional. Mireku (2010) argues that the landmark case of Shilubana equipped the courts with the usage of the male primogeniture to resolve customary dispute that emanates through intestate succession. The rule of male primogeniture discriminates unfairly based on the grounds of age, birth and most of all gender. This case is an example of how customary courts are in some cases discriminatory and can prohibit women from accessing their legal rights.

**Strategies to enhance women's access to justice:**

Improving access to justice can improve the welfare of women and poor people as justice can aid by being a tool in the distribution of power. The state is required to initiate and intensify the implementation of the new and existing poverty reduction programmes. The rationale is

that by improving rural women's basic conditions enhance social and economic conditions that enable women to enforce their rights.

According to Sheldrick (2013), the legal empowerment model is a tool that aid for the greater impartation of legal education of the public so that people are aware of their rights and the legal protection they are entitled to and the alternatives offered by customary law. These empowerment strategies are most likely to impact women's access to justice if they are created based on the local knowledge and community practice. Chopra and Isser (2012) state that, realising the fundamental barrier to women's access to justice in the formal and informal legal systems are largely due to socio-cultural norms and power dynamics in society. Efforts that seek to promote women's access to justice must be those that empower women through positive experience with the legal justice system while seeking and stripping the power dynamics which are deeply embedded in the traditional norms and practices, especially in rural areas. Legal development is itself seen as an end. This, therefore, means that development can only come when people are in possession of knowledge and means of enforcing their rights. Politically the concept of legal empowerment is an important aspect of access to justice which culminates in women being more politically active (Bridgman, 2007). This therefore means that it improves women's participation in all areas in society.

FAO (2013) posits that, conducting training workshops and establishment of paralegals are of paramount importance in order to raise rural women's awareness and knowledge with regards to their rights and the procedures they can use to effectively enforce their rights. The women in rural areas also need to be made aware of the existence of legal aid offices within their communities. Women and the poor should also be provided with legal aid since, this increases their awareness about their rights and access to courts and lawyers. Workshops and community dialogues are also necessary with customary law officials to promote collaboration in ensuring that customary law is not applied in a manner that discriminates against women.

Lastly, women's access to justice can be enhanced by raising awareness about the availability of Equality Courts, especially for women in rural areas. This is a necessary step since many women in rural areas are not aware of these courts due to poverty and poor educational attainment. The equality courts were a strategy that was implemented by the Government of South Africa to address the issue of lack of access to courts. These courts were created through the Promotion

of Equality and Prevention of Unfair Discrimination Act of 2000. These courts are located within magistrate courts and there are no fees required in these courts. Kaersvang (2008) believes equality courts have the potential to transform access to legal justice but its full potential has not yet been realised due to the lack of awareness of this kind of courts.

### CONCLUSION

Access to justice is an important right which facilitates access and enforcement of other fundamental rights. An environment that enables women to access justice will be the one that furthers substantive equality for the enjoyment of the right to access justice as stated in international instruments. Ideal initiatives for women's access to justice should aim at increasing the scale of empowerment from local level to national level in order to achieve the highest attainable enforcement of rights. Governments must be in a position to implement laws that are gender sensitive in order to address the challenges that women, especially, those in rural areas, face in trying to access justice.

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