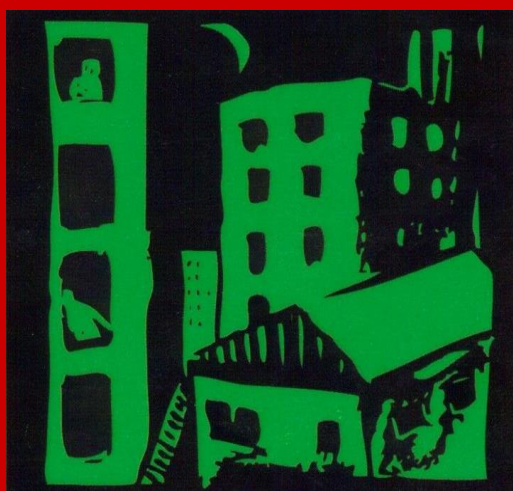
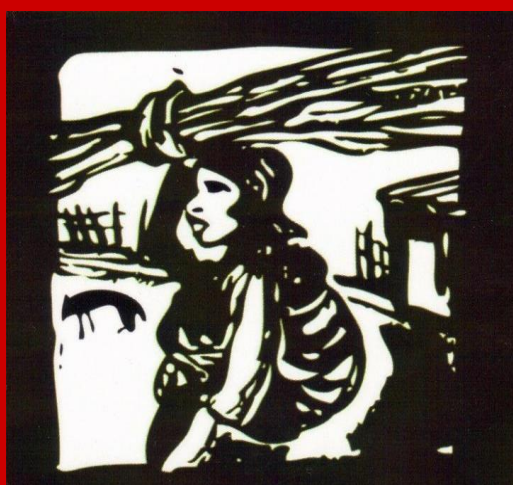


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## Engendering access to justice for development in Sub- Saharan Africa: a study of policy, programming and implementation

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## ABSTRACT

*Building on the book “Gender, poverty and access to justice: policy implementation in Sub-Saharan Africa” (Lawson, Dubin and Mwambene (eds) (2020), this special volume of essays is the result of the Conference in Cape Town (October 2019), whose main objective was to investigate the intersection of gendered access to justice, poverty and disempowerment across Sub-Saharan Africa (SSA), and provide field-based research and discussions on what does and does not work to improve justice for women and girls in the region. Authors’ contributions are designed to be practice and action oriented, drawing on lessons and experiences from programmes and policies that work, and show real potential for their sustainable scalability. In this regard, the essays in this volume reflect a broad spectrum of multi-disciplinary contributions, including from policy makers and development practitioners, as well as representatives from local and international civil society organizations, the private sector, academe and the general public. These contributions are structured around the following five key areas: Integrating Justice Programming into the Sustainable Developmental Goals (SDGs); Informal Institutions, Rights and Laws in Sub-Saharan Africa; Women, Children and Access to Justice for Sustainable Development; Policies and Practices for Engendering Justice and Empowerment for Poverty Reduction; and Gender, and Poverty and Justice Policies in SSA: Lessons from the Field? The central objective of all the contributions, however, is to profile recent developments and experiences in furthering gendered access to justice in the SSA context, and to distil from them future trends for SSA’s access to justice, and the specific role stakeholders can play therein.*

**Keywords:** Poverty, Sub-Saharan Africa, access to justice, gender .

## 1 INTRODUCTION<sup>1</sup>

Globally, over a billion people, many in Sub-Saharan Africa (SSA), lack some form of access to justice to enforce basic rights in an effort to eliminate deprivations and improve wellbeing.<sup>2</sup> The term “access to justice” is generally accepted as referring to the institutions, procedural rules, and substantive laws that empower individuals to

<sup>1</sup> We thank the Editors (LDD) and anonymous referees for their comments which improved this paper. We are also extremely grateful to the Nordic Africa Institute, University of Manchester, the University of the Western Cape, and Comillas Universidad Pontificia for funding received for the 2019 conference “Engendering Access to Justice for Development in Sub Saharan Africa”, from which papers in this special edition evolve”.

<sup>2</sup> See Lawson D, Dubin A & Mwambene L “Ensuring Women’s Access to Justice: Engendering Rights for Poverty Reduction in SSA” *Nordic African Institute Policy Note* (2019) available at <https://nai.uu.se/news-and-events/events/2019-10-28-engendering-access-to-justice-for-development-in-sub-saharan-africa.html> (accessed 12 March 2021).

pursue and obtain justice.<sup>3</sup> It is a fundamental right, guaranteed under a wide body of international, regional, domestic and customary laws, that is an enabler of other rights, and an essential component of policy and programs aimed at achieving the Sustainable Development Goals (SDGs) and improvements in wellbeing.<sup>4</sup>

As observed elsewhere, the impact of not being able to seek or obtain justice goes beyond being merely a rights deprivation.<sup>5</sup> This form of disempowerment can commonly be gendered and is correlated with causing and perpetuating a chronic state of poverty and marginalisation. The poorest are less likely to enforce rights, such as, access to schools and clean water, or seek assistance with gender based violence, further intensifying their poverty and perpetuating gender inequality.<sup>6</sup> As previously observed, in SSA, where nearly half the population remains chronically poor, much of the population is deprived of access to justice, which is complicated by factors, such as, geographic distances, societal mores and ineffective institutions.<sup>7</sup> Women and girls are disproportionately impacted by this deprivation, leading to a greater likelihood of poverty, asset deprivation and increases in violations of basic human rights.<sup>8</sup>

Building on the book *Gender, poverty and access to justice: policy implementation in Sub-Saharan Africa* (Lawson D, Dubin A & Mwambene L (eds) (2020), this special volume of essays is the result of the Conference proceedings (Cape Town, October 2019), whose main objective was to investigate the intersection of gendered access to justice, poverty and disempowerment across SSA, and to provide field-based research and discussions on what does and does not work to improve justice for women and girls in the region.<sup>9</sup> Authors' contributions are designed to be practice and action oriented, drawing on lessons and experiences from programmes and policies that work, and show real potential for their sustainable scalability. In this regard, the essays reflect a broad spectrum of multi-disciplinary contributions, including policy makers and development practitioners, as well as representatives from local and international civil society organisations, the private sector, academe and the general public.

These contributions are structured around the following five key areas: Integrating Justice Programming into the SDGs; Informal Institutions, Rights and Laws in SSA; Women, Children and Access to Justice for Sustainable Development; Policies and

<sup>3</sup> See Lawson, Dubin & Mwambene (2019).

<sup>4</sup> See, for example: Art 14 International Covenant on Civil and Political Rights; Arts 2 & 3 International Covenant on Economic, Social and Cultural Rights; Art 18 International Convention on the Protection of the Rights of All Migrant Workers and Members of Families; and Arts 9 & 27 Convention on the Rights of the Child, African Charter on Human and People's Rights.

<sup>5</sup> See Lawson, Dubin & Mwambene (2019).

<sup>6</sup> Lawson D, Dubin A & Mwambene L (eds) *Gender, poverty and access to justice: policy implementation in Sub-Saharan Africa* London : Routledge (2020).

<sup>7</sup> See Lawson, Dubin & Mwambene (2020).

<sup>8</sup> See Lawson, Dubin & Mwambene (2019).

<sup>9</sup> The Conference was arranged by the Nordic Africa Institute (Sweden), in co-operation with the University of the Western Cape (South Africa), Comillas Pontifical University and Global Development Institute (Spain), and the University of Manchester (United Kingdom).

Practices for Engendering Justice and Empowerment for Poverty Reduction; and Gender, Poverty and Justice Policies in SSA: Lessons from the Field? The central objective of all the contributions, however, is to profile recent developments and experiences in furthering gendered access to justice in the SSA context, and to distil from these future trends for SSA's access to justice, and the specific role stakeholders can play in this. The following part, however, will first provide the international legal context of access to justice in SSA.

## 2 INTERNATIONAL LEGAL FRAMEWORK AND ACCESS TO JUSTICE

Access to justice is recognised as an integral right for the achievement of all Millennium and Sustainable Development Goals and towards the success of anti-poverty policies. The poor are disproportionately affected by the denial of access to justice. From accessing clean water to ending stunting and wasting, justice is central to poverty reduction. The United Nations, and other international and domestic organisations, have increasingly developed new policies and programming to broaden access to justice and increase empowerment as a poverty reduction tool. This recognises the central role access to justice has towards realising other human rights and combatting chronic poverty, as well as helping countries progress towards achieving the SDGs.

SDG 16 specifically recognises justice as one of the goals, something that the Millennium Development Goals had not done.<sup>10</sup> Recognising the essentiality of justice towards achieving the SDGs and reducing gender inequality, the UN Assistant Secretary-General and Deputy Executive Director of UN Women noted :

*“Accessing and securing justice—a critical component of SDG 16—is not only a goal by itself but also a means to realizing the rights of women and girls. Effective justice systems based on the rule of law are central to enabling women to become equal partners in decision-making and development. And yet much is to be done. Evidence shows that over 150 countries have at least one law that discriminates against women and girls. Ineffective and unresponsive judicial systems, compounded by gender stereotyping, discriminatory laws, stigma, intersecting discrimination and varying levels of socio-economic barriers are serious obstacles in the provision of justice for women.”<sup>11</sup>*

As widely observed, access to justice is the only right codified in every human rights treaty, both at international and regional levels, demonstrating its intersectionality with all other rights.<sup>12</sup> Indeed, access to justice has a unique interdependency with other

<sup>10</sup> See United Nations SDG 16.

<sup>11</sup> See Régner A Speech: *Achieving Access to Justice for all through the SDGs* (2018) available at <https://www.unwomen.org/en/news/stories/2018/6/speech-ded-rener-2018-undp-annual-meeting> (accessed 5 January 2021)

<sup>12</sup> For example: Arts 7, 8, 9, 10 & 11 Universal Declaration of Human Rights; Art 14 International Covenant on Civil and Political Rights; Arts 2 & 3 International Covenant on Economic, Social and Cultural Rights; Art 18 International Convention on the Protection of the Rights of All Migrant Workers and Members of Families; Arts 2 & 15 Convention on the Elimination of Discrimination Against

rights in that without justice the other rights contained in these conventions often cannot be enforced and exercised. In fact, the United Nations notes that in adopting SDG 16, Member States “recognised the interdependence of justice, peace and development”.<sup>13</sup> Moreover, the right to access justice is not one right, but an amalgamation of rights that ensures essential elements of justice, from the right to a fair, independent trial to the right to an effective remedy and the equality of laws.<sup>14</sup>

Although early codification of justice in contemporary human rights documents can be first traced to the regional American Declaration of the Rights of Man,<sup>15</sup> which entered into force just before the Universal Declaration of Human Rights, as earlier pointed out, the right to access to justice is recognised in many historical rights documents, such as, the United States Bill of Rights and the French Declaration of the Rights of Man. While the core UN human rights frameworks provide for access to justice, the most important advances towards supporting women’s and girls’ access to justice have been the Beijing Declaration and Platform for Action, and the Convention on the Elimination of Discrimination Against Women (CEDAW) and its General Recommendation 33.<sup>16</sup> These instruments obligate States to eliminate discrimination against women seeking to enforce their rights and put in place the necessary mechanisms and laws to do so.<sup>17</sup>

In addition, the human rights framework at the African regional level provides for comprehensive justice protections, particularly for women and girls, in the Maputo Protocol and the African Charter on the Rights and Welfare of the Child, along with soft law documents, such as, the ACHPR’s Resolution on Women’s Right to Land and Productive Resources<sup>18</sup> and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>19</sup> However, in SSA, as discussed later in this special edition issue, a multitude of factors, many linked to socio-economic challenges, discrimination, rural isolation, and limited access to legal aid, intersect with gender to

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Women; Arts 3 & 18 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Arts 9, 12, 13 & 14 Convention Against Torture and other Cruel, Inhumane, or Degrading Treatment or Punishment; Arts 9 & 27 Convention the Rights of the Child, African Charter on Human and Peoples’ Rights .

<sup>13</sup> Keuleers P “Access to Justice for All: An Enabler of the 2030 Agenda and Essential for Leaving No One Behind, UNDP” (2018) available at <https://www.undp.org/content/undp/en/home/blog/2018/access-to-justice-for-all.html> (accessed 5 January 2021)

<sup>14</sup> See Keuleers (2018) at 14

<sup>15</sup> American Declaration of the Rights and Duties of Man (1948), Organization of American States, adopted by the Ninth International Conference of American States (Bogota, Colombia).

<sup>16</sup> See *General Recommendation 33 on Women’s Access to Justice* Committee on the Elimination of Discrimination Against Wome, CEDAW/C/GC/33 (2015).

<sup>17</sup> General Recommendation on Women’s Access to Justice, Committee on the Elimination of Discrimination Against Women no 33 (2015).

<sup>18</sup> See 262 Resolution on Women’s Right to Land and Productive Resources - ACHPR/Res 262(LIV)2013 African Commission.

<sup>19</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003.



limit access to justice towards the realisation of other human rights.<sup>20</sup> Furthermore, limited public sector investment and political will only intensify the challenges of accessing justice within African countries.

In SSA, this is further compounded by the fact that unlike the other regional human rights mechanisms, namely, the European Court of Human Rights and the Inter-American Commission and Court, which have developed important precedents for providing access to justice for women and girls and advancing socio-economic rights, the African Commission and Court have been far less active and impactful in advancing women's rights and ruling on cases involving socio-economic justice. The African Commission's Special Rapporteur for Women, for example, has only undertaken six official missions since 1999.<sup>21</sup> The Commission has passed a handful of Resolutions on women's rights<sup>22</sup>, but as many of the contributions in this issue highlight, implementation by States is frequently missing. Furthermore, the Commission's complaint mechanism, arguably the most important mechanism for State accountability, has only considered on the merits a small number of Communications generally, and fewer involving the rights of women and girls.<sup>23</sup> In 2000, for instance, the Commission ruled against Sudan in a case involving the public lashing of women who were caught acting with men in an "immoral" manner. The Commission found Sudan in breach of Article 5 on torture.<sup>24</sup> In another case, currently pending in the Commission against Nigeria, the Commission is preparing to release its first ever decision on maternal mortality in Africa.

<sup>20</sup> See also Lawson, Dubin & Mwambene (2020).

<sup>21</sup> See African Commission Special Mechanisms available at <https://www.achpr.org/specialmechanisms> (accessed 8 January 2021).

<sup>22</sup> For example: 66: Resolution on the Situation of Women and Children In Africa; 110: Resolution on the Health and Reproductive Rights of Women in Africa; 111: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence; 165: Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament; 230: Resolution on the need for a study on the situation of women human rights defenders in Africa; 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services; 262: Resolution on Women's Right to Land and Productive Resources; 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity; 283: Resolution on the Situation of Women and Children in Armed Conflict; 284: Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo; 288: Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt; 335: Resolution on the Situation of Internally Displaced Persons in Africa – ACHPR/Res 335 (EXT.OS/XIX) 2016; 336: Resolution on Measures to Protect and Promote the Work of Women Human Rights Defenders – ACHPR/Res 336 (EXT.OS/XIX) 2016; 344: Resolution on the fight against impunity in Africa – ACHPR/Res 344(LVIII) 2016; 347: Resolution on the Human Rights issues affecting the African Youth – ACHPR/Res 347(LVIII) 2016

<sup>23</sup> See *Promoting Justice for Women and Children (PROJUST) v Democratic Republic of the Congo* (2012) February 2012, ACHPR, 278/03, 11th Extra-ordinary Session; *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* December 2011, ACHPR, 323/06, 10th Extra-ordinary Session; *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v. Kenya* 5 November 2011, ACHPR, 375/09, 50th Ordinary Session.

<sup>24</sup> See *Curtis Francis Doebbler v. Sudan*, ACHPR 236/2000.

The Court, as well, has adjudicated only a limited number of cases in general compared to its regional counterparts in Europe and the Americas, and few cases have involved the rights of women and girls.<sup>25</sup> The Court itself is handicapped by the limited direct access afforded by African States to individuals and NGOs, since many countries have not made an Article 34(6) Protocol declaration permitting direct access.<sup>26</sup> In addition, the low number of petitioners to both the Commission and the Court speaks to deeper structural challenges within African countries that have seemingly done little to promote the role of these institutions in advancing justice and accountability. Since the Court started operations in 2006, only one case involving women and girls has been adjudicated. In 2018, the Court held Mali's child marriage laws to be in violation of the Banjul Charter and the African Charter on the Rights and Welfare of the Child,<sup>27</sup> its first and only judgement involving women and girls in Africa.

Despite the comprehensiveness of access to justice rights found in treaties both at international and regional levels, some countries have failed to domesticate these guaranteed rights in national legislation. Many countries throughout Africa continue to apply laws in discriminatory form and some countries have failed to take steps to amend pre-existing discriminatory colonial era laws. For example, in Somalia women cannot confer nationality on their children.

### 3 CONTEXTUAL ANALYSIS

The previous part highlights that access to justice is at the very foundation of ensuring the realisation of all other right contained within human rights frameworks. The consequences of not being able to obtain justice can severely impact a person's livelihood in very direct terms and can intensify chronic poverty and other forms of marginalisation. The reasons why justice remain elusive to so many people in SSA is part of what this special issue of *Law, Development and Democracy* seeks to analyse. Certain obstacles repeat themselves throughout the access to justice literature, including, geographic distances, poverty, linguistic challenges, gender inequality and the application of outdated and colonial era laws and norms.<sup>28</sup> This issue attempts to explore these concerns in greater depth and to provide analysis of the policies that do and do not work in providing justice despite these and other challenges.

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<sup>25</sup> In 2019, the European Court of Human Rights received 44 500 application. During this same year, the African Commission of Human and Peoples' Rights received fewer than 300 Communications. Source: European Court of Human Rights and the African Commission on Human and Peoples' Rights (47<sup>th</sup> Activity Report).

<sup>26</sup> Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

<sup>27</sup> See *APDF & IHRDA v Republic of Mali* Application No 046/2016, African Court on Human and Peoples' Rights (2018).

<sup>28</sup> Dias AK & Welch DH (eds) *Justice for the poor: Perspectives on Accelerating Access* New Delhi: Oxford University Press (2009).

In a global survey on access to justice, nearly 66 per cent of the population identified having incurred some sort of hardship as a result of a legal problem.<sup>29</sup> Hardships as a result of not obtaining access to justice range from negative impacts on health and well-being as a result of stress or not having access to health care, to interpersonal problems and on relationships with friends and family. In other cases, severe economic hardships due to the costs involved in obtaining legal assistance or the costs involved in not obtaining legal assistance, such as not being able to enforce a work contract. Individuals who face economic hardships seeking justice oftentimes face a devil's choice, where they have to choose between paying legal fees or paying the educational costs of their children.

In Côte d'Ivoire, for instance, 40% of those surveyed reported incurring hardship as a result of the justice system, with 23% experiencing health related hardship, 25% economic hardship such as loss of income or work, 10% a relationship breakdown, and 1% substance abuse<sup>30</sup>. Particularly in developing countries, which often lack safety nets, individuals who face health, legal and economic shocks are forced to cope in different ways, including selling assets such as livestock or taking loans from family or friends. This is shown to lead to chronic poverty and further intensify socio-economic deprivations.<sup>31</sup>

While broad estimates exist on the number of people who cannot access some form of access to justice, there is a lack of disaggregated data to provide greater understanding of the complexity of the justice challenges faced at country levels. Much of the information about problems with accessing justice and a country's legal system is largely anecdotal or with limited quantitative data. There is limited cross country, desegregated and time lapse data about access to justice, compared to what is available in other surveys on topics, such as, health, water or food access found in, for example, Demographic Household Surveys.

International organizations have written extensively on access to justice challenges and have identified many of the justice obstacles faced by people, but these broad aggregates often fail to tell a much more complete and detailed story of the specific challenges that deprive people of accessing justice.<sup>32</sup> Greater information is needed about rural / urban divides, gender obstacles, and other demographic data in order to

<sup>29</sup> Lawson D., Dubin A., Mwambene L., *Ensuring African Women's Access to Justice : Engendering Access to Justice for Poverty Reduction in Sub Saharan Africa*. Policy Note 2: 2019, Nordic African Institute, Uppsala (Sweden).

<sup>30</sup> Lawson D., Dubin A., Mwambene L., *Ensuring African Women's Access to Justice : Engendering Access to Justice for Poverty Reduction in Sub Saharan Africa*. Policy Note 2: 2019, Nordic African Institute, Uppsala (Sweden).

<sup>31</sup> Lawson D., *The Influence of Ill Health on Chronic and Transient Poverty Evidence from Uganda*, Chronic Poverty Research Centre, University of Manchester, Working Paper 41, available at <https://assets.publishing.service.gov.uk/media/57a08cc4ed915d3cfd0015d4/41Lawson.pdf>. (accessed 12 March 2021).

<sup>32</sup> See OECD *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All*. Issue Brief 2016, Open Society Foundation, available at <https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>. (accessed 12 March 2021).



have a more complete picture of access to justice within and across countries. Although broad obstacles are identified in the literature on access to justice, such as, geographic distance and court backlog, more country specific reports need to be generated based on large sample sizes from both the supply (those involved with administering justice) and demand (those seeking justice) sides of justice to help policy makers home in on and develop more specific policy and programming responses to justice challenges that respond to the local particularities that frequently limit the ability of people to seek the enforcement and recognition of their rights.

The World Justice Report 2019 on Global Insights on Access to Justice provides an important attempt to quantify the state of access to justice in specific countries based on a supply side sampling. The Report surveys 101 countries, some of which are in SSA.<sup>33</sup> The Report finds that approximately 61% of people in SSA have experienced a legal problem in the last two years but that only 13% have turned to an authority or third party to help resolve the problem. Of those who did seek help to resolve the problem, only 51% reported that the problem had been resolved, and 65% of those were satisfied with the outcome.<sup>34</sup>

A number of other important statistics are identified in this study, some of which provide surprising results. While cost is often associated as one of the major challenges of accessing justice,<sup>35</sup> interestingly, the survey found that only 16 per cent identified difficulties paying costs to resolve problems versus 15 per cent worldwide. It is difficult from this study to determine whether this statistic accurately reflects the limited nature cost plays in accessing justice for most people, but there might be a number of possible explanations that would lead to the conclusion that cost is more prominent an issue than reported.

First, in many countries around the world, particularly in SSA, people seek justice or legal assistance from informal sources, such as, village elders, family or community councils, which often involve minimal or no cost. Alternatively, in formal justice systems, filing fees and contracting a lawyer have significant costs, which often preclude the poor from seeking justice through formal channels. Jorieman notes that, "...social institutions must be accessible to function well. Courts, mediators or mechanisms that are so far away as to be too costly to reach in terms of money, time or both are ineffective in resolving problems".<sup>36</sup> In Botswana, for example, 52% of those with legal problems sought help from family or friends and only 15% from a government body.

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<sup>33</sup> See World Justice Project (2019). The countries and population totals surveyed in SSA are: Burkina Faso (1 029), Côte d'Ivoire (1 011), Ethiopia (1 037), Madagascar (1 000), Malawi (1 039), Senegal (1 012).

<sup>34</sup> See Lawson, Dubin & Mwambene (2019).

<sup>35</sup> For example, see generally Dagnino F "Expanding access to justice in Africa: experiences and perspectives" in Dias AK & Welch DH (eds) *Justice for the poor: Perspectives on Accelerating Access* New Delhi : Oxford University Press (2009) 419.

<sup>36</sup> See Joireman S "Entrapment or freedom: enforcing customary property rights regimes in common-law Africa" in Fenrich J, Galizzi P & Higgins TE (eds) *The future of African customary law* (2011) 295 at 307.

Similarly, in Burkino Faso, 65% sought assistance from a family or friend and only 12% from a government body.<sup>37</sup>

Therefore, although cost may not have been an obstacle to achieving some form of justice, it does not necessarily mean that they were able to seek justice through formal mechanisms or that the resolution was in accordance with human rights norms and international standards of justice. In both countries, 71% of those who went through a legal process felt that the process was fair and only about 43% felt that the problem had been fully resolved. The second explanation concerning costs is that people may not want to identify cost as a barrier, for concerns about the stigma attached to being poor. Nevertheless, however, it is likely that the financial burdens of accessing at least formal justice continue to remain significant for the poor.

Another obstacle to seeking out legal assistance in much of SSA is the limited availability of lawyers and paralegals in the region in order to take cases and provide legal assistance. For example, in Zambia, the lawyer to population ratio is approximately 1:18181 and in the Democratical Republic of Congo the ratio is 1:20000 people.<sup>38</sup> Furthermore, much of the concentration of lawyers is found in urban settings, which is also where law schools tend to be located, despite the fact that the majority of the SSA population continues to live in rural areas or urban peripheries. To give context to this shortage, in the United States, the ratio of lawyers to population is 1:256 and in Denmark 1:247.<sup>39</sup>

Furthermore, limited access to lawyers is also intensified by the small investment in legal aid programs. While most countries in Africa provide legal aid to defendants in criminal proceedings, at least on paper, legal aid programs are vastly underfunded. In Sierra Leone, for instance, the government only budgets USD 7 500 per year for legal aid, which is only available in capital cases.<sup>40</sup> In Mauritius, the legal aid budget amounts to approximately USD 26 per capita versus USD 1.87 in South Africa.<sup>41</sup> Amongst low developing countries, only 13 per cent of the legal aid budget comes from government, with the remaining amount coming primarily from donor contributions.<sup>42</sup>

<sup>37</sup> See World Justice Project (2019) *Global Insights on Access to Justice* available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> (accessed 12 March 2021).

<sup>38</sup> Kahn-Fogel NA "The troubling shortage of African lawyers: examination of a continental crisis using Zambia as a case study" (2012) 33(3) *University of Pennsylvania Journal of International Law* 719.

<sup>39</sup> See generally Dubin A *A qualitative approach to assessing access to justice for sex workers in Kampala, Uganda* (unpublished PhD thesis, Universidad Complutense de Madrid, 2014).

<sup>40</sup> See UNODC *Access to legal aid in criminal justice systems in Africa. Survey Report* New York : United Nations (2011).

<sup>41</sup> See UNODC *Global Study on Legal Aid. Global Report* (2016) available at [https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid\\_Report01.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf) (accessed 12 March 2021) at 93.

<sup>42</sup> See UNODC *Global Study on Legal Aid. Global Report* (2016) available at [https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid\\_Report01.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf) (accessed 12 March 2021) at 94.

Another important conclusion from this index is the limited legal capability individuals have in terms of legal awareness. Less than 50% of the population in SSA surveyed knew where to seek legal advice in case of a legal problem<sup>43</sup> and fewer probably were aware of the law and their rights.<sup>44</sup> In Senegal, for example, only 47% of those surveyed said that they knew where to find legal advice or information and only 31% said they felt they could receive all the expert legal help they needed.<sup>45</sup>

Oftentimes, lack of legal awareness disproportionately impacts women, who have lower literacy and educational levels in SSA compared to their male counterparts<sup>46</sup> and also less autonomy, as females, concerning decision-making about many facets of their lives<sup>47</sup> including issues involving inheritance, divorce and other legal matters. In Sierra Leone, for example, less than 50 per cent of married women aged 15 to 49 identify participating in decision-making about their own health care, household purchases and visits to family and friends. This statistic demonstrates the lack of empowerment women across the world face, but particularly in developing countries, such as in SSA, and likely translates into minimal participation, know-how and legal awareness about their rights and how to exercise them. Countries and donor governments and agencies often invest significant financial resources instituting digitalisation programs towards justice reforms and case monitoring mechanisms in the judicial system,<sup>48</sup> which are important, but often neglect the basics: access to justice starts when people know their rights and how to enforce them. The UNDP notes that “legal awareness is a prerequisite for promoting access to justice, especially for the disadvantaged and marginalized citizens who are often the least empowered to assert and protect their rights”.<sup>49</sup>

An approach to expand legal aid access in the region, which has only seldom been discussed, is to widen the scope of legal education to support clinical models that allow

<sup>43</sup> See generally Lawson D, Dubin A & Mwambene L *Morocco and Justice Insights* (2019).

<sup>44</sup> See for example, *Legal rights awareness – the first step to stronger rule of law in the Merged Areas*, UNDP Pakistan available at <https://www.pk.undp.org/content/pakistan/en/home/blog/2020/legal-rights-awareness-the-first-step-to-stronger-rule-of-law> (accessed January 18, 2021).

<sup>45</sup> See the World Justice Project *Global Insights into Access to Justice* (2019) available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> (accessed 7 January 2021)

<sup>46</sup> See the World Bank Report *World Bank Data for Literacy in Sub Saharan Africa* available at <https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=ZG> (accessed 7 January 2021).

<sup>47</sup> See Demographic Household Survey for Sierra Leone (2019) available at <https://www.dhsprogram.com/methodology/survey/survey-display-545.cfm> (accessed 12 March 2021).

<sup>48</sup> See Dubin A & Lawson D “Access to justice for the very poorest and marginalized in Uganda” in Hulme D, Ado-Kofi L & Lawson D (eds) *What works for Africa’s poorest? Programms and policies for the extreme poor* UK : Practical Action Publishing (2017) 255.

<sup>49</sup> See UNDP *The Legal Empowerment and Assistance for the Disadvantaged (LEAD)* available at [https://www.id.undp.org/content/indonesia/en/home/operations/projects/democratic\\_governance/the-legal-empowerment-and-assistance-for-the-disadvantaged.html](https://www.id.undp.org/content/indonesia/en/home/operations/projects/democratic_governance/the-legal-empowerment-and-assistance-for-the-disadvantaged.html) (accessed on 10 January 2021).

students to provide some form of legal aid.<sup>50</sup> Many law schools in Africa, particularly outside of South Africa, are steeped in learning methods inherited from colonial times and have been slow to adopt more experiential learning methodologies, such as clinical legal education.

Nevertheless, law schools are beginning to institute legal aid clinics, such as at Makerere University School of Law in Uganda, which conduct outreach to poor communities, assist in preparing cases and undertake legal awareness campaigns. Were this model to be expanded to more law schools in the region, law students, many of whom come from areas outside of the main cities, could be supported to set up legal aid clinics in their towns and villages, provide legal awareness, train the trainers, and conduct exercises and engage in other pro bono work in order to help mediate disputes, all in accordance with international human rights. In New York State, for example, the Court of Appeals in 2012 adopted a requirement that law students seeking admission to the New York State Bar must first complete 50 hours of pro bono legal work.<sup>51</sup>

#### **4 BRIEF OVERVIEW OF RECENT DEVELOPMENTS IN FURTHERING ACCESS TO JUSTICE IN THE SSA CONTEXT**

As pointed out in the Introduction, the contributions summarised below are structured around the following five key areas: Integrating Justice Programming into the SDGs; Informal Institutions, Rights and Laws in SSA; Women, Children and Access to Justice for Sustainable Development; Policies and Practices for Engendering Justice and Empowerment for Poverty Reduction; and Gender, Poverty and Justice Policies in SSA: Lessons from the Field? What Can We Learn?

Jane Diala's article, *"Talk to my father": rethinking social exclusion and access to justice in the context of bridewealth negotiation*, attests to the significance of engendering access to justice within the marriage negotiation processes.<sup>52</sup> Diala explains this by showing how women's exclusion from their own bridewealth negotiation illustrates the interplay of agency and unequal power relations, and how it affects access to justice and policy development. As she rightly observes, "marriage, as an institution, goes beyond mere social interaction. Its impact cuts across all aspects of life ranging from religion, security, social, politics, mental health, psychology, finance, and economics. Since marriage is a life changing experience, the payment of bridewealth is crucial for understanding the trajectory and distribution of justice".<sup>53</sup> Diala recounts,

<sup>50</sup> See McQuoid-Mason D, Ojuwu E & Wachira GM "Clinical legal education in Africa: legal education and community service" in Bloch FS (ed) *The global clinical movement : educating lawyers for social justice* Oxford : Oxford University Press (2010) 23.

<sup>51</sup> New York State Bar, Pro Bono Requirements (2018) available at [http://www2.nycourts.gov/sites/default/files/document/files/2018-07/FAQsBarAdmission\\_0.pdf](http://www2.nycourts.gov/sites/default/files/document/files/2018-07/FAQsBarAdmission_0.pdf) (accessed 28 January 2021).

<sup>52</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 20 - 46

<sup>53</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 20 - 46

based on her own study and on the scholarship of many others, how individuals with lesser bridewealth negotiating powers may be denied access to resources and accompanying justice.<sup>54</sup> She emphasises that the exclusion of women from participating in the bridewealth decision-making processes has a direct effect on other aspects of their life and continues to be relevant.<sup>55</sup>

Carmine Rustin draws on the results of a qualitative study of South African women, which shows that for the majority of women interviewed, the enactment of legislation has led to a clearer political recognition that women constitute a historically oppressed group on the basis of gender and require particular focus and redress.<sup>56</sup> She explores in her article, titled *What gender legislative reforms have meant for women in South Africa*, what gendered legislative reforms and measures have meant to South African women post-1994.<sup>57</sup> Framed within a feminist epistemological and methodological approach, Rustin uses Fraser's theory of justice which advocates that gender justice and gender equality cannot be achieved without considering the distribution of resources, cultural redress and political representation, the latter considering who can lay claim to gender justice. Rustin points out that one way in which any State gives recognition to different bodies is through citizenship, which is the relationship between individuals and the State, as well as between individuals. Access to rights and justice characterises this relationship.<sup>58</sup> Rustin's study found legislative attempts to address gender equality and gender justice problematic, highlighting participants' views on numerous shortcomings in legislation and challenges that they experienced in their daily lives, including: (1) problems with the implementation of legislation; (2) women's multiple roles and responsibilities, which hinder their full participation in leadership positions; and (3) the disjuncture between rights and the daily realities of women. She concludes by highlighting that legitimising the legislative framework in response to gender injustices might not be a simple matter to address gender equality and gender injustice, even with the best intentions.

Mary Thamari-Odhiambo in her article titled *Embracing risky refuge: women, land laws and livelihood vulnerabilities in rural Kenya*, emphasises that despite Kenya's constitutional provision, which outlaws gender discrimination on matters such as land, the overlapping effects of customary land arrangements, statutory land laws, and widespread vulnerabilities are crucial in understanding the gendered nature of livelihoods in the fishing villages, and in rural Kenya more generally.<sup>59</sup> The article explores land as natural capital, which has material and symbolic value for both women and men.<sup>60</sup> Thamari-Odhiambo reminds us about the context of women's land claims as anchored in their rights as married

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<sup>54</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 20 - 46

<sup>55</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 20 - 46

<sup>56</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 47 - 70

<sup>57</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 47 - 70

<sup>58</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 47 - 70

<sup>59</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 71 - 94

<sup>60</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 71 - 94

women, whether under customary land laws or statutory laws.<sup>61</sup> A crucial point that she highlights, as a tool in addressing the marginalisation of women, the dispossession of widows, and familial disputes over land, are women's land claims and provisions of statutory laws that espouse equality. These provisions, she argues, have the power to destabilise the accepted idea that men control land.<sup>62</sup> Statutory laws that espouse equality have the power to challenge men's self-understandings as sole right owners who can distribute land.

Omololu Fagbadebo, in his article titled *A discourse on the plight of South African Women in the face of abuse and neglect*, engages with qualitative data which is the result of interactions and discussions with some women, who have either witnessed or experienced a measure of gender based violence (GBV), either in their relationships, society or workplace.<sup>63</sup> After surveying recent trends and rates of GBV in South Africa, Fagbadebo argues that while government is making great strides in its commitment to tackling the HIV/AIDS epidemic, it should extend such energy to curbing the scourge of GBV. Whilst acknowledging that there are extant laws that protect the rights of women in South Africa, he points out that these statutes seem not to be effective. He recommends, therefore, a strengthened justice system that incorporates the prescription of a maximum penalty and punishment for perpetrators of GBV that would serve as a deterrent to future occurrence. He further recommends that stakeholders in the South African justice system should consider any form of violence against women as a crime against humanity, and thus, accord it the necessary urgency in apprehending and prosecuting offenders.

Robert Nanima in his article titled, *The right to education of the refugee girl affected by armed conflict in Kenya: insights from the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child* evaluates the extent to which Kenya as a State Party upholds international law and a child based approach to the protection of the refugee girl child's right to education.<sup>64</sup> Drawing on the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child, Nanima finds that Kenya's constitutional and statutory regime underscores the normative framework of the right to education for the refugee girl child as provided in international and regional law. He, however, highlights the existence of the encampment policy that deviates from the constitutional standard of equality before the law of all persons in all spheres of life as a stumbling block in equal enjoyment of the right to education. This policy concretises discrimination by creating a refugee community that is excluded from the rest of Kenyan society. This creates the "Kenyan" and the "other community", where the enjoyment of their rights is informed by their status in terms of the legal regime. As such the constitutional and policy limitations exacerbate the challenges that a refugee girl child continues to face in attempting to enjoy and access the unqualified right to education. He therefore recommends, among others, that the Committee should exercise its mandate to inform the due reform of Kenya's refugee regimes to cater for the holistic enjoyment of the right to education.

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<sup>61</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 71 - 94

<sup>62</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 71 - 94

<sup>63</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 95 - 118

<sup>64</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 119 - 145



Madikgomo More's article explores the roles and functions of the institution of traditional authority in contributing to access to justice or providing a form of justice through the preservation of customary law to the people of the Okombahe community in the Erongo Region of Namibia.<sup>65</sup> The article investigates the factors that have contributed to the institution's resilience and how this resilience may be tied to the type of justice this customary institution provides and represents. More's study highlights the significance of the institution of traditional authority as a legitimate customary institution originating from the bottom up, and as a system that can be complementary to democracy as opposed to the assumption sometimes held that it is contesting with it. In Okombahe, the institution of traditional authority was found to contribute to providing an accessible justice system option grounded in this community's identity, history and social norms.

Nyemutu Roberts's article interrogates engendering access to environmental justice in Nigeria's oil producing areas, and its connection with poverty and disempowerment of women. His point of departure is that women already suffer from the fact that access to justice for the vast majority of Nigerians is challenging and restrictive, and more particular for women, access to environmental justice is an additional burden on them, and of significant concern to the people in the country's oil producing Niger Delta region. His article provides evidence that suggests that women in oil producing areas suffer a triple jeopardy to access justice due to a myriad of factors, including a combination of institutional, socio-economic and political factors; the State, together with international oil corporations, is complicit in the adverse environmental desiderata in the oil producing regions, of which women bear a disproportionate brunt but occupy an auxiliary position in the struggle; and lastly, where there "is a modicum of policy intervention by way of token environmental remediation or 'cleanup' projects, such interventions hardly face up to the need to engender inclusiveness, meaning that women continue to squirm in substantive environmental injustice".<sup>66</sup>

Using Mukuru Kayaba informal settlement as a case study, Ruth Murumba examines the leveraging and negotiating of the place and status of the local administration to secure access to justice for women and children in Kenya.<sup>67</sup> In this study, the focus is on how the local public administration, specifically the office of the local chief and the assistant chief, serves as an avenue for improving access to justice for women and children in urban informal settlements. The article highlights the fact that all spaces are bounded by vestiges of power and old practices. In order to effectively engender access to justice for women and children, especially at the grassroots level where women and children lack the capacity to seek redress from other sources, Murumba reiterates the need to create an enabling environment that creates basic conditions within a State for women to access justice systems, and justice actors to effectively respond to women's justice needs. In order to achieve an enabling environment, she proposes several factors, including, the application and actual

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<sup>65</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 146 - 166

<sup>66</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 167 – 191.

<sup>67</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 192 – 222.

implementation of international standards, the reformation of national laws, and more importantly, making essential financial services available. Driving the importance of implementation of the reforms laws and policies, she observes that “if this is not carried out, women and children will only have the right to find remedy but will not access civil spaces to exercise these rights”.<sup>68</sup>

In the final article, Ashraf Booley examines from an international relations perspective how the Arab Spring impacted constitutional reform in Morocco. Booley considers the pressures stemming from the events sweeping the Arab world, including street protests in Morocco, as forcing the monarchy to implement reforms towards greater recognition of fundamental rights and modifications to existing provisions to better align them with international human rights.<sup>69</sup> His article argues in cautiously optimistic terms that, as a result of this popular uprising, “[t]he new Morocco now meets some established criteria towards democracy, such as free and fair elections, multiple political party participation representing the people, a separation of powers, individual rights and freedoms”.<sup>70</sup>

## 5 CONCLUSION

To conclude : in this special issue, the discussions in the articles are forward looking, profiling recent developments and experiences in furthering gendered access to justice in the SSA context, and distilling from them future trends for SSA’s access to justice, and the specific role stakeholders can play in this. Although important improvements and advances to access justice have progressed in SSA, much of the population, especially the poor, continue to lack some form of access to justice. Both the progress and the challenges will be discussed in subsequent articles.

To make justice attainable, it is important that access to justice be conceptualized in the broadest possible terms. Court systems are a last resort, and as such justice needs to be understood as starting from the ground up, with a legal awareness campaign, effective policing, local paralegals, and others, who can move the wheels of justice and ensure that everyone is able to seek a remedy for an alleged wrong. In addition, although the substantive (the laws) and procedural arms (the procedures that help to grant justice) of justice need to be addressed, considerable attention needs to be paid to the culture and traditional practices that often impede justice. It is impossible to fully advance the substantive and procedural forms of access to justice unless policy makers target the more indirect barriers and forms of discrimination that continue to leave people out of the systems of justice and perpetuate continued violations of the rights under international, regional and domestic laws.

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<sup>68</sup> See Smith (1998), as cited by Murumba (2021) Vol 25 Spec Ed *LDD* 192 – 222.

<sup>69</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 223 – 241.

<sup>70</sup> (2021) Vol 25 Spec Ed *Law Democracy and Development* 223 – 241.

## Author contributions:

This introductory paper to this journal special edition builds on content from a series of outputs and was produced jointly by the three authors.

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