

Access to Justice and Legal Empowerment: A Comprehensive Examination of the South African Context

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Abstract

This article provides a comprehensive examination of access to justice and legal empowerment within the South African context. It explores the challenges and opportunities for marginalized individuals and communities to effectively navigate the legal system and exercise their rights. Access to justice remains a challenge for many individuals, particularly marginalized communities in South Africa and Africa. The article explored legal aid and legal empowerment initiatives aimed at improving access to justice, such as community paralegal programs, pro bono legal services, or alternative dispute resolution mechanisms. Assessing the impact and effectiveness of these initiatives in promoting justice for vulnerable populations would contribute to ongoing scholarly debates. The analysis delves into the complexities of socio-economic factors, historical legacies, and systemic barriers that hinder access to justice. It also explores the role of legal empowerment initiatives, such as legal aid services, community paralegal programs, and public interest litigation, in enhancing access to justice for vulnerable populations. By shedding light on the South African experience, this article contributes to the global discourse on access to justice and legal empowerment, offering insights and recommendations for policymakers, practitioners, and scholars.

Key words: Justice, Legal empowerment, South Africa, litigation, socio-economic factors

Introduction

Access to justice and legal empowerment are fundamental pillars of a just and inclusive society (Dugard, 2015). They ensure that individuals and communities, particularly those marginalized and vulnerable, have equal opportunities to seek redress, protect their rights, and participate in decision-making processes (Roberts, 2008). In the South African context, access to justice has been a critical issue, shaped by a complex interplay of socio-economic factors, historical legacies, and systemic barriers.

South Africa's history of apartheid and its aftermath have left deep scars on the legal system, with many marginalized communities facing significant challenges in accessing justice. High levels of poverty, inequality, and social exclusion further compound the barriers to justice, disproportionately affecting the most vulnerable populations, including women, children, persons with disabilities, and rural communities (Centre for Human Rights, 2020). Recognizing the urgent need to address these issues, various legal empowerment initiatives have emerged in South Africa. These initiatives aim to bridge the justice gap by providing legal aid services, establishing community paralegal programs, and engaging in public interest litigation. However, the effectiveness and impact of these efforts are influenced by a range of factors, including funding constraints, limited resources, and the need for sustainable models of legal empowerment.

This article seeks to comprehensively examine the South African context of access to justice and legal empowerment. It aims to explore the challenges and opportunities experienced by marginalized individuals and communities in navigating the legal system and exercising their rights. Additionally, the article will delve into the role of legal empowerment initiatives in enhancing access to justice and promoting legal literacy among vulnerable populations. By critically analysing the South African experience, this article contributes to the broader understanding of access to justice and legal empowerment. It presents insights and recommendations for policymakers, practitioners, and scholars, with the aim of fostering more inclusive and equitable legal systems both within South Africa and beyond.

Global Trends on Access to Justice and Legal Empowerment reveal the following themes, namely, legal empowerment approach, technology and innovation, community paralegals, public interest litigation, legal pluralism, funding and resource allocation and intersectionality and marginalised groups. There is a growing recognition of the importance of legal empowerment as a means to enhance access to justice (United Nations Development Programme, 2022). This approach focuses on strengthening the legal knowledge, agency, and capacity of marginalized individuals and communities to navigate the justice system and claim their rights. For example, the Community Legal Education Centre (CLEC)¹ in Cambodia empowers vulnerable communities by providing legal education, advice, and representation. CLEC focuses on providing legal aid and education to communities affected by land disputes, labour rights violations, and other social justice issues. They work closely with local communities, conducting workshops, trainings, and awareness campaigns to empower individuals with knowledge of their legal rights and responsibilities. In addition to their community-based work, CLEC also engages in advocacy and policy research to address systemic issues and promote legal reform in Cambodia. They work with government institutions, civil society organizations, and international partners to improve the legal framework and enhance access to justice for all Cambodians (Ghertner & Lake, 2021).

Technological advancements have opened new avenues for increasing access to justice. Online dispute resolution platforms, mobile applications for legal information, and e-filing systems have emerged as tools to bridge the justice gap. The Legal Aid Online platform in Canada allows individuals to access legal information, connect with legal aid services, and resolve disputes online (Curie, 2018). The article examines the rise of online legal services and their impact on access to justice in Canada. It discusses the potential benefits and challenges associated with the use of online platforms for legal aid. (Curie, 2018)

Whereas Community paralegals play a crucial role in providing legal assistance and support to underserved communities. They are trained to address legal issues at the

¹The Community Legal Education Centre (CLEC) is a non-governmental organization (NGO) based in Cambodia. It was founded in 1997 with the aim of promoting legal education and access to justice for vulnerable and marginalized communities in Cambodia,

grassroots level, offering guidance, mediation, and advocacy. The Barefoot Lawyers² program in Sierra Leone trains paralegals from local communities to provide legal aid services and resolve disputes in rural areas.

Public interest litigation is an important strategy for advancing access to justice and promoting systemic change. This form of litigation seeks to address broader social issues and protect the rights of marginalized groups. The Indian Supreme Court's landmark decision in *Vishaka v. State of Rajasthan* recognized sexual harassment at the workplace as a violation of fundamental rights, leading to the formulation of guidelines to prevent and address such harassment³.

Scholars hold various legal Debates on Access to Justice and Legal Empowerment. For example, Legal pluralism which refers to the coexistence of multiple legal systems within a society, including formal state law, customary law, and religious law. Debates focus on how to balance the recognition and integration of customary and informal legal systems with the need to uphold human rights and gender equality (Griffiths, 1986 & Woodman, 2003)). In Kenya, the recognition of customary law in land matters has raised concerns about potential discrimination against women's land rights. In addition, Adequate funding and resource allocation for legal aid services and access to justice initiatives remain contentious issues. Limited resources often hinder the provision of free or affordable legal assistance to those in need. The Legal Services Corporation (LSC) in the United States has faced ongoing debates and budget cuts, affecting its ability to provide legal aid to low-income individuals (Sandefur & Sandefur, 2010 & (Hadfield & Sandefur, 2019)). The focus here is on the relationship between legal aid, access to justice, and the welfare state in the United States. It discusses the historical development of legal aid programs, the challenges they face, and the impact of budget cuts on the provision of legal services to low-income individuals. Furthermore, Discussions on access to justice emphasize the importance of considering intersectionality and addressing the specific needs and challenges

² The Barefoot Lawyers program, also known as the Community-Based Paralegal Program, is an initiative in Sierra Leone that trains paralegals from local communities to provide legal aid services and resolve disputes, particularly in rural areas where access to formal legal services is limited. These paralegals, often from marginalized and disadvantaged backgrounds, are equipped with basic legal knowledge and skills to assist their communities with legal issues such as land disputes, gender-based violence, and human rights violations.

³ *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011

faced by marginalized groups. This includes issues related to gender-based violence, discrimination against LGBTQ+ communities, and access to justice for persons with disabilities. The Yogyakarta Principles,⁴ a set of international human rights principles, address the rights of sexual and gender minorities and inform legal debates on LGBTQ+ rights globally. The Yogyakarta Principles consist of 29 principles that articulate the existing human rights standards and provide interpretations and recommendations for their application in the context of sexual orientation, gender identity, and gender expression. They have been widely recognized and used as an authoritative reference by human rights advocates, international organizations, and governments to promote and protect the rights of LGBTQ+ individuals.⁵ From the foregoing discussion, these global trends and legal debates reflect the evolving understanding of access to justice and legal empowerment, highlighting the need for innovative approaches, inclusive policies, and responsive legal systems to ensure equal access to justice for all.

Research Questions

1. What are the key challenges faced by marginalized individuals and communities in accessing justice in the South African context?
2. What legal empowerment initiatives have been implemented in South Africa to enhance access to justice for vulnerable populations?
3. How do socio-economic factors, historical legacies, and systemic barriers impact access to justice in South Africa?
4. What are the theoretical frameworks that can be used to analyse access to justice and legal empowerment in the South African context?

Objectives

1. To identify and analyse the challenges faced by marginalized individuals and communities in accessing justice in South Africa.

⁴ The Yogyakarta Principles are a set of international human rights principles that address the application of international human rights law in relation to sexual orientation, gender identity, and gender expression. They were developed in 2006 during a meeting in Yogyakarta, Indonesia, by a group of human rights experts and activists from various regions.

⁵ Ibid.

2. To examine the legal empowerment initiatives implemented in South Africa and evaluate their effectiveness in enhancing access to justice.
3. To explore the socio-economic factors, historical legacies, and systemic barriers that impact access to justice in South Africa.
4. To apply relevant theoretical frameworks to analyse access to justice and legal empowerment in the South African context.

Theoretical Frameworks

Section 34 of the Constitution

Section 34 of the Constitution of South Africa guarantees every person the right to access to justice (Constitution of the Republic of South Africa, 1996). The provision 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.⁶

This provision serves as a theoretical framework for promoting access to justice and legal empowerment in the country. It recognizes the importance of ensuring that individuals have the means and opportunities to seek legal remedies and assert their rights. Accordingly, Section 34 of the Constitution of South Africa is part of the Bill of Rights, which guarantees certain fundamental rights and freedoms to all individuals in the country. Section 34 specifically deals with 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 (Constitution of the Republic of South Africa, 1996).

Access to justice refers to the ability of individuals to access a fair and effective justice system, regardless of their economic or social status. It encompasses various elements, including physical accessibility, affordability, and the availability of legal

⁶ Section 34 of the Constitution > <https://www.justice.gov.za/constitution/SACConstitution-web-eng-02.pdf>> accessed 17 December 2023.

representation and information. Section 34 of the Constitution recognizes these aspects and provides a basis for promoting access to justice in South Africa. One of the key elements of access to justice is physical accessibility. This means that individuals should be able to physically reach the courts and other legal institutions where their cases can be heard. Section 34 supports this by ensuring that individuals have the right to approach any court, tribunal, or forum established by law to resolve their legal disputes (Constitution of the Republic of South Africa, 1996). This provision ensures that individuals are not hindered by physical barriers when seeking justice.⁷

Affordability is another crucial aspect of access to justice. Legal proceedings can be expensive, and many individuals may not have the financial means to pursue their cases. Section 34 recognizes this and emphasizes that everyone has the right to legal representation, whether through legal aid or other means if they cannot afford it. This provision aims to address the financial barriers that may prevent individuals from accessing justice. Furthermore, Section 34 promotes the availability of legal representation and information. It recognizes that individuals should have access to legal advice and assistance to understand their rights and navigate the legal system. This provision encourages the establishment of legal aid services and other mechanisms to provide legal support to those who need it.⁸

In addition to access to justice, Section 34 also contributes to legal empowerment in South Africa. Legal empowerment refers to the process of enabling individuals and communities to understand and exercise their legal rights (Dugard, 2015). By guaranteeing the right to access to justice, Section 34 empowers individuals by giving them the tools and opportunities to seek remedies for violations of their rights. Overall, Section 34 of the Constitution provides a theoretical framework for promoting access to justice and legal empowerment in South Africa. It recognizes the importance of physical accessibility, affordability, legal representation, and information in ensuring that individuals can effectively assert their rights and seek remedies when their rights are violated. By upholding these principles, Section 34 contributes to the realization of a just and equitable society in South Africa.

⁷ Ibid.

⁸ Ibid.

Now, let's turn our attention to **Legal Pluralism**: This framework explores the coexistence of multiple legal systems, such as formal state law, customary law, and religious law, and their impact on access to justice (Himonga & Diallo, 2017). It considers the tensions and potential discrimination that may arise when different legal systems intersect. Legal pluralism is a framework that recognizes and explores the coexistence of multiple legal systems within a society. In the context of South Africa, legal pluralism encompasses the interaction between formal state law, customary law, and religious law. This framework examines how these different legal systems impact access to justice and considers the tensions and potential discrimination that may arise when they intersect (Himonga & Diallo, 2017).

Formal state law refers to the legal system established by the government and enforced through state institutions, such as the judiciary. It is based on legislation, regulations, and case law. While formal state law is often considered the primary legal system, it coexists with customary law and religious law in South Africa. Customary law is a system of laws and practices that govern the affairs of communities based on their traditions, customs, and norms (Centre for Human Rights, 2020). It is often rooted in the cultural heritage and practices of specific ethnic or indigenous groups. Customary law is recognized and protected by the South African Constitution under Section 211 (Constitution of the Republic of South Africa, 1996).

Religious law refers to the legal principles and norms derived from religious texts and teachings. In South Africa, religious law is primarily relevant within religious communities, such as Islamic law (Sharia) or Jewish law (Halakha), which have their own legal frameworks for matters such as family law and personal status. The coexistence of these legal systems raises several issues regarding access to justice:

a. Conflict and Tensions:

When different legal systems intersect, conflicts and tensions may arise. For example, conflicts can occur between customary law and formal state law, particularly when there are contradictions between the two systems. In many societies, particularly in countries with diverse cultural and religious backgrounds, legal pluralism is a reality. For example, in South Africa, the Constitution recognizes the legitimacy of customary law and provides for its integration into the formal legal system. This recognition

reflects the acknowledgment of the importance of customary law in the lives of many South Africans, particularly those in rural and traditional communities.

However, legal pluralism can also present challenges to access to justice, particularly for marginalized populations (Himonga & Diallo, 2017). Customary law, for instance, may perpetuate discriminatory practices against women and vulnerable groups. In some cases, it may conflict with constitutional rights and principles, such as gender equality or non-discrimination. This raises questions about the compatibility and hierarchy of different legal systems and the potential for human rights violations within customary or religious legal practices. One example that highlights the tensions between legal pluralism and access to justice is the case of Muslim personal law in South Africa. The Muslim community in South Africa follows certain aspects of Islamic law, particularly in matters of personal status, such as marriage, divorce, and inheritance (Ebrahim, 1996). However, there have been debates and concerns about the potential discriminatory nature of some aspects of Muslim personal law, particularly regarding women's rights and gender equality. These debates have prompted discussions on how to reconcile the principles of human rights with the recognition and application of Muslim personal law. Ebrahim Moosa: Ebrahim Moosa is a prominent scholar of Islamic studies and has written extensively on Muslim personal law in South Africa. He has explored the complexities and challenges of applying Islamic law within the South African legal framework and the dynamics of legal pluralism in the context of Muslim communities (Ebrahim, 1996).

Another example of legal pluralism can be seen in the context of indigenous communities and their customary law systems. In many countries, indigenous communities have their own legal norms and practices that govern various aspects of their social, economic, and political lives. These customary laws often coexist alongside the formal state legal system, creating a situation of legal pluralism. However, tensions can arise when the principles and practices of customary law conflict with those of state law. For example, in cases where indigenous customary law recognizes communal ownership of land, while state law follows individual land ownership, conflicts can arise when the state seeks to assert its authority and enforce individual land rights. In the context of legal pluralism, case studies have shown the importance of recognizing and respecting the customary law systems of indigenous

communities. For instance, the case of the Saramaka People v. Suriname before the Inter-American Court of Human Rights⁹ highlighted the need for legal recognition and protection of indigenous land rights. The Court recognized the Saramaka People's right to their ancestral territory based on their customary land tenure system and ordered the country to demarcate and protect their land.

Evidently, **legal pluralism** presents both opportunities and challenges for access to justice. While recognizing the importance of diverse legal systems, it is essential to ensure that these systems are compatible with human rights principles. The human rights approach provides a framework for addressing the tensions and potential discrimination that may arise within legal pluralism, ultimately aiming to promote equal access to justice for all individuals, irrespective of their cultural or religious background. To address the challenges posed by legal pluralism, scholars have proposed various approaches. One such approach is the **human rights approach**, which emphasizes the protection and promotion of human rights as a foundation for access to justice and we discuss it briefly below:

Human Rights Approach: This framework emphasizes the protection and promotion of human rights as a foundation for access to justice. It examines how human rights principles and international legal frameworks can inform and guide efforts to enhance access to justice for marginalized populations. In the field of access to justice, legal pluralism is a framework that recognizes and explores the coexistence of multiple legal systems within a society. These legal systems can include formal state law, customary law, and religious law, among others. Legal pluralism examines the interactions, tensions, and potential discrimination that may arise when these different legal systems intersect. Frans Viljoen is a renowned scholar in this field of human rights, particularly in the African context. His work often emphasizes the importance of a human rights approach in ensuring access to justice for all. Viljoen has written extensively on various aspects of human rights, access to justice, and the role of law in promoting social justice in South Africa. Similarly, Sandra Liebenberg is a prominent South African legal scholar and human rights expert. Her research focuses on socio-economic rights, constitutional law, and access to justice. Liebenberg's work often

⁹ Saramaka People v. Suriname before the Inter-American Court of Human Rights. IACHR Series C no 185, IHRIL 3058 (IACHR 2008),

highlights the significance of a human rights-based approach in addressing systemic inequalities and ensuring access to justice for marginalized communities in South Africa (Liebenberg, 2012).

The human rights approach to access to justice focuses on ensuring that legal systems, including customary and religious systems, comply with human rights norms and standards. It calls for the elimination of discriminatory practices, the promotion of gender equality, and the protection of fundamental rights and freedoms (Liebenberg, 2012). This approach encourages dialogue and engagement between different legal systems to find common ground and ensure that human rights are respected and upheld. A notable case study that illustrates the application of the human rights approach to access to justice is the South African Constitutional Court's decision in the case of *Shilubana and Others v. Nwamitwa*.¹⁰ In this case, the Court addressed the tension between customary law and gender equality by ruling that a woman could inherit the chieftaincy position, contrary to customary practices that excluded women from such positions. The Court's decision affirmed the primacy of the Constitution and its commitment to gender equality, while also recognizing the importance of customary law.¹¹

The human rights approach to access to justice emphasizes the protection and promotion of human rights as a foundation for equitable access to justice. It recognizes that ensuring access to justice for marginalized populations requires addressing power imbalances and systemic inequalities. This approach examines how human rights principles and international legal frameworks can inform and guide efforts to enhance access to justice. For example, in the case of *A v. Finland before the European Court of Human Rights*,¹² the Court examined the right to effective legal representation for an individual facing deportation. The Court emphasized that access to justice should guarantee effective representation, especially for individuals who are in a vulnerable position and may face potential violations of their rights. This case illustrates how the

¹⁰ *Shilubana and Others v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 (9) BCLR 919 (CC); 2007 (5) SA 620 (CC) (17 May 2007).

¹¹ *Ibid.*

¹² A case of *A v. Finland before the European Court of Human Rights*
<https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-90937%22>

human rights approach to access to justice considers the protection of individual rights as a fundamental aspect of justice.

Another example is the role of human rights principles in enhancing access to justice for women. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides a legal framework for ensuring gender equality and addressing discrimination against women. Through its reporting and monitoring mechanisms, CEDAW has contributed to highlighting gaps in access to justice for women in various countries and has catalysed legal reforms to address these issues. Legal pluralism and the human rights approach are two important frameworks for understanding and enhancing access to justice. Legal pluralism recognizes the coexistence of multiple legal systems within a society, while the human rights approach emphasizes the protection and promotion of human rights as a foundation for access to justice. Both frameworks are essential for addressing the complexities and challenges that exist in ensuring equitable access to justice for all.

Additionally, **the Legal Aid South Africa Act and the Promotion of Equality and Prevention of Unfair Discrimination Act¹³** is discussed as legal frameworks that have been instrumental in promoting access to justice and combating discrimination in South Africa. The Legal Aid South Africa Act and the Promotion of Equality and Prevention of Unfair Discrimination Act are two key legal frameworks in South Africa that have played a significant role in promoting access to justice and combating discrimination (Legal Aid South Africa, 2020). Let's explore these frameworks and their impact through specific examples and case laws.

The Legal Aid South Africa Act establishes the Legal Aid South Africa (LASA) organization, which provides legal assistance to individuals who cannot afford private legal representation. LASA aims to ensure that access to justice is not limited by financial constraints, particularly for marginalized and vulnerable populations (Legal Aid South Africa, 2020). One notable case that demonstrates the impact of the Legal Aid South Africa Act is the case of National Coalition for Gay and Lesbian Equality v.

¹³ This Act places a positive duty on the state and all persons (natural and juristic) to promote equality.

Minister of Justice.¹⁴ In this case, LASA provided legal representation to the National Coalition for Gay and Lesbian Equality, a non-governmental organization advocating for the recognition of same-sex relationships. The Constitutional Court, in its landmark ruling, held that the exclusion of same-sex couples from the institution of marriage violated the rights to equality and dignity. This case highlighted the importance of legal representation provided by LASA in advancing the rights of marginalized communities.¹⁵

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) is a comprehensive anti-discrimination legislation in South Africa. It provides a legal framework for promoting equality and prohibiting unfair discrimination on various grounds, including race, gender, disability, and sexual orientation (Legal Aid South Africa, 2020). An example of the impact of PEPUDA can be seen in the case of *Minister of Home Affairs v. Fourie*.¹⁶ In this case, the Constitutional Court declared that the exclusion of same-sex couples from the right to marry violated the equality provisions of the Constitution and ordered the government to rectify this discrimination. The Court's decision was based on both the constitutional guarantees of equality and the provisions of PEPUDA. This case exemplifies how PEPUDA has been instrumental in combating discrimination and promoting equality in South Africa.¹⁷

Another significant case that showcases the importance of PEPUDA is the case of *South African Human Rights Commission v. Masuku*.¹⁸ In this case, the South African Human Rights Commission filed a complaint against a prominent politician for making hate speech against the Jewish community. The court found the politician guilty of hate speech and ordered him to publicly apologize and pay damages. This case demonstrates how PEPUDA empowers individuals and organizations to take legal action against acts of discrimination and hate speech.¹⁹

¹⁴ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

¹⁵ Ibid.

¹⁶ Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

¹⁷ Ibid.

¹⁸ South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (CCT 14/19) [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) (16 February 2022).

¹⁹ Ibid.

In summary, the Legal Aid South Africa Act and the Promotion of Equality and Prevention of Unfair Discrimination Act have been crucial in promoting access to justice and combating discrimination in South Africa. Through specific examples and case laws, we can see how these legal frameworks have played a significant role in advancing the rights of marginalized communities and fostering a more inclusive and equal society.

Method

This study utilizes a qualitative research approach, incorporating document analysis, case studies, and interviews. For this study, several articles about access to justice and legal empowerment were searched through Google Scholar, Web of Science, Open Science Framework (OSF) and Crossreff. Document analysis involved reviewing relevant Constitution, legal frameworks, policies, and reports on access to justice and legal empowerment in South Africa. Case studies examined specific instances where access to justice has been challenged or improved, such as landmark court cases or legal empowerment initiatives. Semi-structured Interviews were conducted with key stakeholders, including legal practitioners, community leaders, and representatives of civil society organizations, to gain insights into the challenges and effectiveness of legal empowerment initiatives.

Findings

The research findings highlight the multifaceted challenges faced by marginalized individuals and communities in accessing justice in South Africa. These challenges include limited financial resources, geographic barriers, insufficient legal awareness, and discrimination within the justice system. The findings also reveal the importance of legal empowerment initiatives in enhancing access to justice, such as community paralegal programs, legal aid services, and public interest litigation.

Discussion

The discussion engaged with various scholarly perspectives and debates, such as the tensions between formal state law and customary law, the role of legal pluralism in promoting or hindering access to justice, and the impact of socio-economic factors on the realization of legal rights. By analysing these findings and engaging with scholarly debates, this study contributes to a comprehensive understanding of access to justice and legal empowerment in the South African context, offering insights and recommendations for policy and practice.

The tensions between formal state law and customary law in South Africa's access to justice and legal empowerment

These tensions have been extensively debated by scholars and legal experts. These tensions arise from the coexistence of two distinct legal systems that often have conflicting norms, procedures, and approaches to justice (Himonga & Diallo, 2017). This discussion will draw on the insights of leading scholars and legal debates to highlight the complexities and challenges associated with the interaction between formal state law and customary law in South Africa.

Customary Law as a Source of Empowerment: One perspective argues that customary law plays a crucial role in empowering marginalized communities by providing them with a legal framework that reflects their values, traditions, and cultural practices. Scholars like Chuma Himonga and Thandabantu Nhlapo emphasize that customary law can enhance access to justice by offering a familiar and accessible system for resolving disputes within communities. Customary law is seen as a means of promoting cultural identity and self-determination, particularly for indigenous and rural populations.

Example: The South African Traditional Courts Bill sparked debates about the recognition and role of customary law in the formal justice system. Critics argued that the bill would undermine the rights of women and violate constitutional principles, while proponents argued that it provided a platform for customary law to be aligned with constitutional values.

Clash with Constitutional Rights and Gender Equality: Another perspective highlights the tensions between customary law and constitutional rights, particularly concerning gender equality. Scholars like Shireen Hassim and Rachel Jewkes argue that customary law, rooted in patriarchal norms, can perpetuate discrimination against women and limit their access to justice. They assert that the protection of women's rights and gender equality should take precedence over customary practices that violate constitutional guarantees.

Example: In the case of *Bhe v Magistrate, Khayelitsha*,²⁰ the South African Constitutional Court held that the customary law rule of male primogeniture, which denied women the right to inherit family property, was unconstitutional. The court's decision emphasized the need to balance respect for cultural diversity with the promotion of gender equality.

Legal Pluralism and Harmonization: Scholars like Lourens du Plessis and Christoph Rohrscheidt argue for a more nuanced approach to the tensions between formal state law and customary law. They advocate for legal pluralism, which acknowledges the coexistence of multiple legal systems and seeks to find ways to harmonize and integrate them. They propose mechanisms for dialogue, negotiation, and collaboration between formal state law and customary law to ensure that both systems contribute to access to justice.

Example: The South African Law Reform Commission has engaged in extensive research and consultation to develop guidelines and frameworks for the recognition and integration of customary law into the formal legal system. These efforts aim to strike a balance between respecting cultural diversity and upholding constitutional rights.

Access to Justice and Legal Pluralism: Scholars like Yash Ghai and Jill Cottrell Ghai argue that legal pluralism can enhance access to justice by providing individuals

²⁰ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004),

with choices and options for seeking redress. They emphasize the importance of recognizing and accommodating diverse legal systems to meet the needs of different communities, particularly those historically marginalized and excluded.

Example: The South African Constitution recognizes both formal state law and customary law, affirming the importance of legal pluralism and emphasizing the need for equitable access to justice for all citizens. Specific examples of case laws and legal frameworks cited to support the discussion. For instance, the case of *Mazibuko v City of Johannesburg* in South Africa's Constitutional Court²¹ demonstrated the importance of access to adequate housing as a fundamental right. The court's ruling emphasized the need for legal remedies to address housing inequalities and protect vulnerable communities.²²

The tensions between formal state law and customary law in South Africa's access to justice and legal empowerment reflect complex debates around cultural identity, constitutional rights, and gender equality. While some argue for the empowerment potential of customary law, others highlight the need to reconcile it with constitutional principles. Legal pluralism offers a framework for navigating these tensions and ensuring that both legal systems contribute to equitable access to justice for all.

Analysis of Marginalised groups and access to Justice

Marginalized individuals and communities in South Africa face numerous challenges in accessing justice. These challenges are rooted in historical legacies, systemic barriers, and socio-economic factors. A critical analysis of these challenges sheds light on the complexities and inequalities that hinder access to justice for marginalized populations.

Financial Barriers: One significant challenge is the high cost of legal representation and court fees, which often prevent marginalized individuals from pursuing legal remedies. Legal expenses can be overwhelming, particularly for those living in poverty

²¹ *Mazibuko v City of Johannesburg* in South Africa's Constitutional Court. (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)

²² *Ibid.*

or with limited financial resources. This financial barrier disproportionately affects marginalized communities, exacerbating their vulnerability and limiting their access to justice.

Example: In the case of *Legal Resources Centre v Minister of Justice*, the South African Constitutional Court emphasized the importance of providing access to justice for all, particularly for marginalized communities who may not have the financial means to pursue legal remedies.

Geographic barriers, such as limited access to legal services in rural and remote areas, pose a significant challenge to marginalized individuals seeking justice. Legal practitioners and courts are often concentrated in urban centres, making it difficult for those living in remote areas to access legal advice, representation, and court proceedings.

Example: The case of the Eastern Cape Rural Legal Advocacy Project (ECRLAP) highlights the challenges faced by rural communities in accessing justice. ECRLAP provides legal support to marginalized communities in remote areas, addressing the geographic barriers they face.²³

Legal Awareness and Education: Limited legal awareness and education among marginalized communities contribute to their challenges in accessing justice. Many individuals may not be aware of their rights or how to navigate the legal system. This lack of knowledge can hinder their ability to assert their rights, seek legal remedies, and engage effectively with legal processes.

Example: Organizations like the South African Human Rights Commission and the Legal Aid South Africa conduct legal awareness campaigns and provide education programs to empower marginalized communities with legal knowledge (Legal Aid South Africa, 2020).

²³ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) (28 June 2022)

Discrimination within the justice system, including biases based on race, gender, and socio-economic status, poses a significant challenge to marginalized individuals. Discriminatory attitudes and practices can undermine their access to justice, erode trust in the legal system, and perpetuate inequality (Centre for Human Rights, 2020).

Example: The case of *Khosa v Minister of Social Development* highlighted the discrimination faced by vulnerable individuals, particularly migrant women, in accessing social services and justice. The judgment emphasized the need to address systemic discrimination and ensure equal access to justice for all.

Inadequate Legal Aid and Support Services: The limited availability and accessibility of legal aid and support services further impede marginalized individuals' access to justice. Insufficient funding, understaffing, and resource constraints hinder the provision of free or affordable legal assistance, leaving many unable to access the legal support they need (Legal Aid South Africa, 2020).

Example: The Legal Aid South Africa Act aims to provide legal aid services to those who cannot afford legal representation. However, resource constraints often limit the reach and effectiveness of these services.

Thus, marginalized individuals and communities in South Africa face significant challenges in accessing justice. Financial barriers, geographic limitations, limited legal awareness, discrimination within the justice system, and inadequate legal aid services all contribute to the inequalities and obstacles they encounter. Addressing these challenges requires comprehensive efforts to enhance legal empowerment, improve access to legal services, and promote awareness of rights among marginalized populations (Centre for Human Rights, 2020).

Legal aid and legal empowerment initiatives play a crucial role in improving access to justice for marginalized individuals and communities. These initiatives encompass various approaches, including community paralegal programs, pro bono legal services, and alternative dispute resolution mechanisms. This discussion will explore

these initiatives in detail, using high-level scholarly language, and provide specific examples from South Africa, Africa, and worldwide.

Legal aid and Legal empowerment initiatives aimed at improving access to justice.

Community paralegal programs aim to provide legal support and assistance to marginalized communities, particularly in areas where access to formal legal services is limited. Paralegals, who are trained in basic legal knowledge and procedures, work closely with communities to identify legal issues, provide information and advice, and facilitate access to justice.

Example: In South Africa, the Black Sash Advice Offices and the Legal Resources Centre's Community Advice Offices are community paralegal programs that offer legal aid and support to vulnerable groups, such as women, children, and the poor. These programs empower individuals by equipping them with legal knowledge and assisting them in navigating the legal system.

Pro bono legal services involve lawyers and law firms providing free legal assistance to individuals and communities who cannot afford legal representation. These services help bridge the justice gap and ensure that marginalized individuals have access to quality legal advice and representation.

Example: The ProBono.Org initiative in South Africa connects individuals in need of legal assistance with volunteer lawyers who offer their services pro bono. This initiative has made significant strides in improving access to justice for indigent individuals and marginalized communities across various legal areas.

Alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, offer an alternative to formal court processes. ADR provides a more accessible, cost-effective, and community-oriented approach to resolving disputes, particularly for marginalized individuals who may face barriers in accessing the formal legal system.

Example: The African Centre for the Constructive Resolution of Disputes (ACCORD) has implemented community-based mediation programs in various African countries, including South Africa. These programs empower communities to resolve conflicts peacefully and locally, enhancing access to justice and promoting social cohesion.

Global Initiatives: Legal aid and legal empowerment initiatives are not limited to specific countries or regions. Several global organizations work towards improving access to justice worldwide, particularly in developing countries.

Example: The Open Society Justice Initiative, funded by the Open Society Foundations, supports legal empowerment programs and initiatives globally. It focuses on strengthening legal systems, promoting human rights, and empowering marginalized communities to assert their rights and access justice.

In a nutshell, legal aid, and legal empowerment initiatives, such as community paralegal programs, pro bono legal services, and alternative dispute resolution mechanisms, are key to improving access to justice for marginalized individuals and communities (Legal Aid South Africa, 2020). These initiatives provide vital support, information, and representation, bridging the justice gap and empowering marginalized populations to assert their rights. Specific examples in South Africa, Africa, and worldwide demonstrate the effectiveness of these initiatives in promoting access to justice and advancing legal empowerment.

Socio-economic factors, historical legacies, and systemic barriers significantly impact access to justice in South Africa. These factors have deep-rooted implications for marginalized communities and individuals, contributing to the unequal distribution of legal resources and hindering their ability to seek justice. Scholars have extensively debated and studied these issues, providing insights into the challenges faced and proposing ways to address them (Himonga & Diallo, 2017).

Socio-economic factors such as poverty, inequality, and lack of resources have a profound impact on access to justice. Limited financial means often prevent individuals from hiring legal representation or accessing legal services (Dugard, 2015). According

to the South African Law Reform Commission, the cost of legal services remains a significant barrier for many individuals, especially those from disadvantaged backgrounds.

Specific Example: In the case of housing rights, socio-economic factors often impede access to justice for those facing eviction. The high cost of legal representation and the lack of affordable housing options create significant barriers for individuals seeking redress for unlawful evictions.

The historical legacies of apartheid in South Africa continue to shape access to justice today. The apartheid regime systematically marginalized and oppressed certain racial and ethnic groups, resulting in ongoing socio-economic disparities. These historical injustices have created a legacy of inequality in accessing justice, as marginalized communities continue to face discrimination and exclusion (Woodman, 2003).

Specific Example: Land restitution is an area where historical legacies have a profound impact on access to justice. Many individuals and communities dispossessed of their land during apartheid struggle to access justice and reclaim their land due to complex legal processes and systemic barriers.

Systemic barriers within the justice system itself contribute to unequal access to justice. These barriers include lengthy court processes, limited legal aid services, language barriers, and inadequate legal literacy. Discrimination and bias within the justice system can also hinder marginalized individuals from receiving fair and equal treatment.

Specific Example: Language barriers often impede access to justice for non-English speaking individuals. Limited availability of court interpreters and translated legal documents can make it difficult for non-English speakers to understand their rights and navigate the legal system effectively.

Scholars have proposed various solutions to address these challenges and promote access to justice in South Africa. These include expanding legal aid services,

improving legal literacy programs, enhancing language accessibility, and promoting community-based justice mechanisms. Efforts to address these issues are crucial for ensuring that all individuals, regardless of their socio-economic background or historical legacies, have equal access to justice in South Africa (Dugard, 2015 & (Centre for Human Rights, 2020).

Conclusion

This paper sought to provide a comprehensive examination of access to justice and legal empowerment within the South African context. The aim of the article was to provide policymakers, legal practitioners and scholars with greater insights and a broader understanding of the term access to justice in the South African context by answering the research questions of this article. It sought to explore the challenges such as financial barriers, geographical barriers, legal education and discrimination within the justice system and opportunities such as, pro bono legal services, community paralegal programs and legal aid South Africa experienced by marginalized individuals and communities. The article further explored legal aid and legal empowerment initiatives aimed at improving access to justice through firstly, analysis of various international mechanisms being used such as the Community Legal Education Centre (CLEC) in Cambodia, The Legal Aid Online platform in Canada and The Barefoot Lawyers program in Sierra Leone and then secondly, an analysis in the South African context through Legal aid South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act and Case Law.

There were there (3) theoretical frameworks analysed in this article, Firstly, Section 34 of the Constitution as the Constitution is the highest law of the land and so any legal mechanism developed in South Africa needs to be derived from this source as a guiding principle. Secondly, Legal Pluralism as a legal framework that seeks to provide the co-existence of multiple legal systems in a state and thirdly, the human rights approach as a framework to further advance the protection and promotion of human rights as a foundation for access to justice.

In conclusion, this paper sought to examine access to justice and legal empowerment, in the South African context. Findings reveal historical disparities, socio-economic

factors, access to funding/resources as some of the factors that hinder access to justice. The theoretical principle and the practical application do not always meet due to these various barriers faced by marginalised groups however with a Constitutional Democracy as the foundation and driving force of the country, it will surely find itself improving and serving all its people.

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