Women’s Rights in Practice: Constraints to Accessing Justice

Enshrining rights in laws and constitutions is an important first step, as chapter 2 showed. But having them on the books is not sufficient to ensure that they are actually enjoyed in practice.

This chapter examines the gaps between de jure and de facto economic rights for women in Sub-Saharan Africa. It focuses on how the judicial and customary legal systems play out in practice and how easy (or hard) it is for women to access justice. At issue is how the formal judicial or customary systems support de jure rights, whether based in statutory or formal customary law. Issues of custom, tradition, and informal dispute resolution mechanisms enter in only insofar as they affect the likely access to formal customary law proceedings or judicial courts.

The plurality of laws offers choice, but in practice nearly all legal systems treat women and men differently, and women’s access to equitable justice remains a challenge (box 4.1). Some factors affecting access are gender specific, such as the greater social pressure women face not to bring disputes into the judicial system, differences in access resulting from women having less mobility and time than men, and the discriminatory outcomes and lack of gender sensitization in both formal and customary legal systems. Other factors, such as affordability of justice or lack of awareness of legal rights, are common to men and women from the poorer sectors of society, but they can take longer to rectify for women, who may be marginalized in their own communities.

The chapter begins with formal judicial systems before turning to customary systems of justice. Judicial systems can be undermined through lack of resources, popular concerns about legitimacy, and restriction of access to the urban elite. Customary systems, in theory more accessible, may not offer the same opportunities for justice to women as to men, and they, too, may be captured by the local elite.
Formal Judicial Systems in Practice

Many formal judicial systems in Sub-Saharan Africa suffer from a severe lack of resources, rendering them unable to enforce the laws on the books. State funding of court systems can represent less than 1 percent of the government budget. The number of judges is often as low as 1 per 100,000 people (by contrast, New Zealand has 250 lawyers per 100,000 people, Spain has 445, and Brazil has almost 500). Kenya has a backlog of about 1 million cases, 300,000 of them before the High Court in Nairobi (Machuhi 2007; Muriuki 2007).

Even if a woman secures a favorable judgment, enforcement mechanisms are often weak, suffer from bureaucratic delays, and are prone to tactical blocking strategies by the opposing party (box 4.2). These problems reinforce a general lack of trust in the system that leaves many women reluctant to start a process that, even if successful, may not deliver practical results. But weak enforcement may also work to women’s disadvantage in some cases, as discriminatory laws are similarly undermined if they are not implemented.

Institutional Shortcomings

Too few women and a lack of gender sensitivity. Africa’s legal systems suffer from several shortcomings. One is the challenges women face in accessing the
WOMEN’S RIGHTS IN PRACTICE: CONSTRAINTS TO ACCESSING JUSTICE

law and legal precedents, without which they may not be aware of their formal economic rights. But in many countries, there is a more fundamental problem: legal professionals, including lawyers and judges themselves, may not be aware of the law or of the rights contained in their country’s constitution. There is limited publication and dissemination of laws—evident in the efforts needed to collect the data for Women–LEED–Africa. The availability of case law to the legal profession is also shockingly limited. These problems stem partly from the weak communication infrastructure between provincial courts and courts in urban centers as well as from inadequate training.

Other problems include the dearth of women in the legal system and the lack of gender sensitivity. The number of female judges and other senior legal officers is low nearly everywhere in Sub-Saharan Africa (table 4.1). Female judges are not necessarily more sensitive to gender-based discrimination, though it may be significant that the landmark case of Mary-Joyce Doo Aphane in 2010, which overturned decades of barriers to land registration by women married in community of property, was decided by the only appointed female High Court judge in Swaziland. (The case is discussed in chapter 3.)

In many countries, the judiciary is male dominated and patriarchal (box 4.3 illustrates some notable exceptions). Women may be reluctant to access the formal system if they believe that the prospect of an impartial hearing is remote, especially if they regard the system as corrupt and inefficient. Gender insensitivity can extend to court employees such as clerks and ushers, who influence court procedure (table 4.2).

**BOX 4.2**

**Delaying and Denying Justice in Ghana**

Once a case gets to court, the backlog of cases may mean that it takes years to resolve. These backlogs delay—and often deny—justice, as the case of Rita Charlotte Eshon in Ghana reveals.

After her husband died, Eshon applied for a grant of letters of administration, to which the husband’s family objected. After seven years in court, she finally obtained a judgment in her favor. In the meantime, however, the family had harvested the coconuts from the farm, which was no longer productive. It had also been collecting rent for the house and defied a court order to pay the rent to the court for Eshon’s benefit. The family appealed the decision to the High Court, further delaying the case.

*Source: Fenrich and Higgins 2002.*
**Table 4.1** Number of Male and Female Judges in Kenya, 2009

<table>
<thead>
<tr>
<th>Court</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>51</td>
<td>32</td>
<td>19</td>
</tr>
<tr>
<td>Court of Appeal</td>
<td>12</td>
<td>12</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: Kamangu 2010.

Note: Data are as of June 2010. In April 2010, the only female Court of Appeal Judge, Lady Justice Joyce Aluoch, was appointed to the International Criminal Court at The Hague.

**Table 4.2** Number of Male and Female Magistrates and Court Officers in Cameroon, 2009

<table>
<thead>
<tr>
<th>Type of court or judicial officer</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ court</td>
<td>826</td>
<td>642</td>
<td>184</td>
</tr>
<tr>
<td>Bailiffs and process servers</td>
<td>319</td>
<td>257</td>
<td>62</td>
</tr>
</tbody>
</table>

Source: Lobti 2010.

**Box 4.3**

Women Are Participating at Senior Levels of the Legal Profession in Several Countries

A significant number of women were heading legal institutions in several countries in Africa in 2009. In Botswana, the Attorney-General, Dr. Athaliah Molokomme, was the founding head of the Gender Unit at the Secretariat of the Southern African Development Community. In Ghana, the Chief Justice, the Acting Inspector General of Police, the Director of Immigration, and the Attorney General/Minister of Justice of Ghana were all women. In Liberia, Professor Christiana Tah was the Minister of Justice and Attorney General.

The Southern African Development Community (SADC) Protocol on Gender and Development set a target of 50 percent representation of women in politics and decision-making positions at all levels by 2015. Statistics from SADC countries show some advancement toward that goal, with more progress at lower levels of courts than at higher levels. In 2009, 67 percent of regional court presidents in Mauritius, 44 percent of regional court judges in South Africa, and 43 percent of judges of industrial courts in Botswana were women. Zimbabwe had achieved gender parity at the level of labor court presidents, and Tanzania and Mauritius had attained parity at the magistrate level, where the share of women was 49 percent in Botswana, 43 percent in Namibia, 42 percent in Lesotho, 41 percent in Zimbabwe, and 30 percent in South Africa. In Tanzania, 56 percent of judges on both the Court of Appeal and the High Court were women.

Source: SADC 2009.
Challenges to Access
A range of constraints limit women’s access to the legal system in Africa including lack of affordability, lack of awareness of legal rights, and discouragement by social pressure.

Lack of affordability. Filing a claim entails many costs, such as court fees, which act as a financial barrier. Some countries charge a range of administrative fees, including charges for investigative work and the paper used for depositions. Bribes may also be needed to have a claim heard (Isser, Lubkemann, and N’Tow 2009).

The ratio of lawyers to the general population is generally low, reflecting capacity constraints and the inadequate system of legal education. Malawi has 77 lawyers for its population of 11 million people (USAID 2009). Sierra Leone has about 100 practicing lawyers for its population of 5.5 million people, and 90 of them are based in Freetown (Maru 2006). Most lawyers are based in cities, and their fees are prohibitive for the rural poor, particularly women. Legal aid schemes are rare. And even where nongovernmental organizations are operating, women’s lack of awareness may prevent them from approaching them.

A 2009 study in Ethiopia found that in civil cases in the Federal Courts of First Instance, particularly family law cases, women were more likely than men to file suits (figure 4.1). Women were able to access the legal system because of reforms that improved the efficiency of the court system and dramatically reduced costs by no longer requiring a party to be represented by a lawyer (a reform based partly on the dearth of lawyers) and reducing the costs of filing (Hammergren and Mitiku 2010). The impact of these reforms can be seen in the striking increase in the use of these courts over time. Progress still has to be made in narrowing the gender gaps in non–family law cases, particularly in relation to the low number of cases taken to the higher and superior courts.

Magistrates’ courts can be more accessible to the general population than higher courts, because they extend outside capital cities. The law usually limits their jurisdiction to a monetary ceiling, however, which land claims can exceed. A plaintiff who initiates a claim in a magistrates’ court risks a decision in which the court rules that it has no jurisdiction to hear the claim, which must instead be heard in the High Court. Having already wasted time and money, plaintiffs—particularly women—may find that starting anew in a court that may be far from home is both intimidating and financially onerous.
Lack of awareness of legal rights. Many women are unaware of statutory rights they may have under divorce, inheritance, or land laws. Especially in rural areas, many women are not educated and have never interacted with any part of the formal legal system. In addition, the language of the statutes and court procedures—English, French, Portuguese, or Spanish—is rarely their mother tongue.

Botswana attempted to rectify this situation by simplifying and translating laws affecting women into local languages and circulating a handbook. Standard court forms in English were translated into Setswana and included in the appendix. The handbook was distributed free to social workers, educators, and women's groups (Molokomme 1990). Distribution of the handbook represents a step in the right direction. It needs to be accompanied by parallel services, such as the provision of legal aid to poor women.

Lack of familiarity with court processes, common to all new court users, is a disadvantage. Women may not know that it can be advantageous to appear in person, for example, rather than submit written depositions.

Social pressure. Immediate family members, in-laws, and the wider local community often discourage women from pursuing claims in court. As Unity
Dow, who successfully challenged Botswana’s discriminatory nationality laws, said, “The Traditionalists charged that I was influenced by foreign ideas and that I was seeking to change their culture. Many women distanced themselves from me” (Dow 2001, 326–27) (see box 3.2 in chapter 3). Women may come under heavy social pressure not to disturb the status quo; if they do, they and their children may be ostracized, harassed, stigmatized, or subjected to violence (Harrington and Chopra 2010).

**Customary Systems in Practice**

Women in Africa face multiple constraints in accessing justice in customary legal systems. Although customary law may be geographically and culturally more accessible to women, their experience in customary institutions still differs greatly from that of men, in both customary tribunals and informal traditional practices.

**Institutional Shortcomings**

Customary systems in Africa suffer from many shortcomings. Problems include the small number of women decision makers in customary courts, the weak autonomy of some customary courts, corruption and favoritism, and the fact that some customary courts have failed to keep up with evolving customary practices.

*Dearth of women decision makers in customary courts.* Women have traditionally been excluded from adjudicating matters of customary law. They are therefore unable to influence its evolution (Ayuko and Chopra 2008).

A 2007 analysis of Sierra Leone’s local court system—an institution that has legal authority to adjudicate cases of customary law—revealed the small number of women working in and using the system (Koroma 2007). Court members were appointed from each chiefdom: of 123 members surveyed, only 7 were women. Of 30 court clerks, only 1 was a woman. And most parties to the cases were men.

Some countries have attempted to redress the imbalance through state legislation, which may set a minimum quota for female representation on bodies such as local council courts (box 4.4). But it is unclear how—or whether—these provisions are enforced in practice or whether women in these bodies can really challenge discriminatory practices.

Some customary systems do involve women as leaders. In the Shilubana case in South Africa (2008), the Constitutional Court respected the decision of the traditional authority to break with custom and appoint a female chief for the first time in the history of the traditional Valoyi community in Limpopo. In 2001, Botswana appointed its first female Paramount Chief (box 4.5)
The village chief who serves as the adjudicator in the customary court is often also in charge of many other administrative functions and economic decisions in village life (Gauri 2009). As well as adjudicating disputes, the village chief may also be responsible for making the rules, collecting taxes, and distributing resources. If he is not directly responsible for these activities, members of his family may be. The village chief is generally physically and socially closer to the claimant than a judge in a state or federal court would be and can generally intervene in her daily life and networks with greater ease. Women may be intimidated in approaching a local leader, who can potentially negatively affect their everyday life, to settle their disputes.

**Weak autonomy of customary courts.** The village chief who serves as the adjudicator in the customary court is often also in charge of many other administrative functions and economic decisions in village life (Gauri 2009). As well as adjudicating disputes, the village chief may also be responsible for making the rules, collecting taxes, and distributing resources. If he is not directly responsible for these activities, members of his family may be. The village chief is generally physically and socially closer to the claimant than a judge in a state or federal court would be and can generally intervene in her daily life and networks with greater ease. Women may be intimidated in approaching a local leader, who can potentially negatively affect their everyday life, to settle their disputes.

**Corruption and favoritism.** When a dispute is unresolved, a claimant may need to access the hierarchy of customary courts or councils. Some claimants have the right to appeal to the formal courts, but the local leader can sometimes block the appeal. In this case, the claimant can do little to force the issue. Women generally have little influence persuading a village chief to submit a dispute to more powerful authorities (box 4.6). And even if a case does go higher, the papers or claim can be fixed (through bribes, for example) to secure the outcome desired by the local chief. In addition, customary law can be applied unfairly, and favoritism or abuse of sanctions, such as excessive use of fines, may be used (Maru 2006).
**BOX 4.5**

**Making History: Botswana’s First Female Paramount Chief**

Botswana achieved a milestone in 2001 when the elders of the Balete people elected Mosadi Seboko the first female Paramount Chief. She was elected following the death of her father and brother, the preceding chiefs. Initially, the elders resisted her appointment, on the grounds that custom dictated that only men could rule. At a meeting of a kgotla (a community council that also functions as a customary law court) attended by hundreds of people, Seboko argued that she should be appointed on the strength of the Botswana constitution, which guarantees freedom from discrimination. Her appointment marked an extraordinary change in a tribe that until relatively recently did not allow women even to attend kgotla meetings.

As one of the eight Paramount Chiefs in Botswana, Seboko presides over community disputes in her 30,000 member tribe. Since being elected, she has highlighted women’s issues, such as domestic violence (she divorced her husband on this basis) and women’s sexual rights.

Three of Botswana’s 15 chiefs are now women. As members of the House of Chiefs, which Seboko once headed, they advise the government on custom and tribal property.

*Source: Matemba 2005.*

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**BOX 4.6**

**Nowhere to Turn: Women’s Complaints of Harassment in Malawi**

Women can be especially vulnerable to pressure from local village chiefs, and they have limited recourse to higher authorities outside the village. They often lack the networks to counter unlawful land-grabbing and other breaches of their rights by local leaders. As one woman commented:

> When my husband chased me [from my land], I knew this was a violation of my rights. Now, the Chief is perpetuating this same violation because he seems to have now grown an interest in my very small piece of land. He is giving me so much pressure that I am now at a loss as to where to take my complaint, since this is the very same Chief who helped me when I complained to him after my husband chased me away.

*Source: NIZA 2009, 33.*
**Failure of customary courts to keep up with evolving customary practices.** Urbanization, the weakened role of communal resources in daily life, and the growth of the market economy are driving change in many villages in Africa. These practices may be evolving more rapidly than customary courts are willing to acknowledge. For example, customary laws in Botswana traditionally excluded women from inheriting property. But a 2009 study of Tlokweng, a peri-urban area adjoining the capital, Gaborone, suggests that married daughters can now claim a share of their parents’ estate and that equal sharing of property between siblings of both genders is common. Community elders’ view of customary practices has not kept up with these changes. If family members contest an estate, the courts in Tlokweng are likely to apply traditional customary law, which gives the bulk of property to the oldest son (Kalabamu 2009).

**Challenges to Access**

**Women too often on the margins.** Traditional justice mechanisms (including religious courts) can marginalize and exclude the landless and women, especially young, unmarried women. Most customary courts are adjudicated by and tend to favor men in their decision making. Marital disputes, including disputes with implications for control over assets, may be settled in ways that stop husbands from losing face, even when they are obviously in the wrong—an approach that is rarely taken with women. Women may be unable to voice their grievances directly, having to rely instead on the male head of the family to decide whether to bring the grievance to the elders’ attention. In addition, a woman may have no right to speak unless directed to do so.3

If a woman is from an outside clan or lineage, her standing in the village may well be diminished even further. And as customary courts are by their very nature localized, they are less equipped to resolve disputes in which the parties are from different ethnic backgrounds.

A 2007 analysis of the local courts in Sierra Leone revealed that most of the cases were civil and a significant number involved women. Many cases involved men’s failure to pay child support or a man having an affair with another man’s wife. In most of these cases, both parties were men, with the affected women not party to the lawsuit.

Most of the female litigants in Botswana who managed to overturn the status quo in customary courts had a wide range of resources, including education, financial stability, social status, and extensive networks (Griffiths 2002). Interviews by anthropologists and sociologists provide evidence from other settings that suggests that these resources are also crucial in gaining acceptance of women as decision makers in traditional communities. Too often women’s relative lack of economic power is reinforced by receiving less favorable
treatment in traditional forums for dispute resolutions (Schärf and others 2002; Ayuko and Chopra 2008).

**Religious courts can expand access—but can be biased.** Religious courts are likely to be gender biased and patriarchal in their decisions, given their all-male composition (there are no female *kadhis* [judges] in Africa).4 Women’s experiences in religious courts vary. In Tanzania, many women are reluctant to take family disputes involving maintenance, custody, or divorce to the BAWAKTA committees, the central arbiters of religious law by the state, which operate as courts of first instance (trial courts).5 Most women view these committees as resisting reform and generally favoring men. They are also reluctant to pursue claims in the secular magistrates’ courts, suggesting that women in Tanzania are marginalized from the justice system (Hirsh 2009).

By contrast, Kenya’s *kadhi* court system, which is under the close supervision of secular courts, is used predominately by women, who win most of the cases. Women view these judges as younger and less traditional than the local elders—and more sympathetic to women. The *kadhis* are civil servants and thus accountable to the state; they come from outside the local community, offering a more neutral forum for dispute settlement than local elders, who are more prone to belittle or prejudge women’s complaints (Hirsh 2009).

The differences in women’s perceptions in Tanzania and Kenya highlight how the application of religious laws varies. It also illustrates the importance of accountability mechanisms. For some women, religious courts may be the sole venue with any legitimacy; any biases in these tribunals may thus completely exclude them from the justice system.

**Conclusion**

In both formal and customary systems, women face challenges in asserting their claims to household assets and land. In formal systems, statutory codes may be discriminatory; they need to be reformed. In addition, problems of legitimacy persist, because of corruption and the weakness of enforcement mechanisms.

Women often perceive customary systems as having greater legitimacy, but they have traditionally been excluded from exerting influence in these systems, resulting in discriminatory outcomes. These outcomes often come to the fore in inheritance disputes, particularly where land is involved. Customary rules of inheritance that favor male heirs and the husband’s family over the wife’s often reinforce the dependency of women on the goodwill of male family members.

One way of establishing a framework of accountability is to empower women to assert their claims in both legal frameworks. Building awareness of their
rights is essential, as is promoting informal and formal networks, such as women’s cooperatives and professional associations. Improved access to justice is possible for women, but it rarely happens without networks, resources, and coordinated advocacy.

**Cases Cited**


*Shilubana and Others v. Nwamitwa* (2008), (CCT 03/07) (2008) ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC), June 4

**Notes**

1. The lower monetary value of claims by women may be explained by women’s lack of confidence in pursuing claims other than family law actions such as child support (Rodríguez 2000).
2. Tanzania’s 1999 Village Land Act established village land councils, in which three of the seven council members had to be women.
3. Studies that substantiate these points include Ayuko and Chopra 2008; Cotula 2007; Das and Maru 2009, who analyze the *shalish* (informal community justice) system in Bangladesh; and Kane, Oluka-Onyango, and Tejan-Cole 2005.
4. Malaysia’s appointment of its first women Sharia court judges in 2010 could pave the way for more women.
5. BAWAKTA was a national Muslim organization that originated in a broad ethnic base in Tanzania.

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