



PUBLIC PROTECTOR
SOUTH AFRICA

2023 ANNUAL CONFERENCE OF THE AFRICAN BAR ASSOCIATION

6 -10 August 2023

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***“Access to Justice: Emerging issues and challenges in Justice
Administration in Africa “***

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1. ABSTRACT

This paper analyses some of the emerging issues and challenges in the administration of justice and access to justice in the African context, and specifically, the unique challenges and circumstances faced by individuals and communities across the continent to access inclusive and effective legal systems that provide equal opportunities for all individuals and communities to seek redress, protection of their rights, and resolution of their legal matters.

Access to justice is much more than improving an individual's access to courts, or guaranteeing legal representation, but include the development of capacities to ensure that the rights of all people, including the poor and marginalized, are recognized within, thus giving entitlement to remedies or redress, that are just and equitable. It encompasses not only the ability to enter a court of law but also includes various elements that ensure effective and meaningful participation in the legal process. Access to justice is a fundamental human right and a key component of a fair and just society.

The paper further explores the role of the Ombudsman as an integral part of the broader justice system with a focus on administrative justice and the critical importance of the rule of law and democratic governance to the achievements of the objectives of Constitutional democracy: social justice, inclusion, participation, human dignity and basic social and economic needs.

2. THE CONCEPT OF ACCESS TO JUSTICE – EXTENDING BEYOND THE JUDICIARY

The Institute for Security Studies Africa suggests that the definition for the term 'access to justice' encompasses several different aspects, for example the fairness with which litigants are treated; the justness of results delivered; the speed with which cases are processed; and the responsiveness of the system to those who use it.

Indeed, the accessibility and efficiency of justice services directly affect the way employment and land disputes are resolved, government accountability is promoted, and how businesses make decisions to invest and enter contractual relationships.

More than sixty years ago the United Nations General Assembly observed that a “*balanced and integrated social and economic development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and observance of, and respect for, human rights and fundamental freedoms for all.*”

Access to justice is a fundamental pillar for building a just, free, and fair society in which the rule of law is upheld and democratic principles are followed: Here's why access to justice is crucial in the African context for achieving these ideals:

- a) Upholding Human Rights: Access to justice ensures that individuals' human rights are protected and upheld and allows people to seek redress when their rights are violated.
- b) Equal Protection Under the Law: Access to justice ensures that all members of society, regardless of their background or socioeconomic status, have equal access to legal remedies and protections.
- c) Accountability and Transparency: A robust justice system holds those in power accountable for their actions, thereby promoting transparency, preventing corruption, and fostering a culture of responsibility within society.
- d) Rule of Law: Access to justice ensures that laws are applied consistently and impartially, without favoritism or bias, thus fostering public trust in institutions and contributes to a stable and predictable legal environment.
- e) Conflict Resolution: A functional justice system provides peaceful mechanisms for resolving disputes, contributing to social cohesion and stability - thereby preventing conflicts from escalating into violence.

- f) Protection of Democracy: Access to justice supports democratic principles by allowing citizens to challenge government actions, voice concerns, and seek remedies for violations of their rights. Participation and Inclusion: When people have access to justice, they are empowered to participate fully in civic life and engage in public affairs. This inclusivity is essential for building a democratic society where diverse voices are heard and represented.
- g) Economic Development: A fair and reliable justice system is critical for attracting investments and fostering economic growth. Businesses and individuals need legal certainty and confidence that contracts will be enforced and property rights protected.
- h) Sustainable development and inclusive growth: Legal systems contribute to the development process as they enable the establishment and strengthening of institutions, stimulate confidence in governance, engender an environment of stability and security, and provide a benchmark for social and economic interaction.
- i) Social Cohesion: Access to justice helps bridge divides in society by providing a forum for addressing grievances, resolving disputes, and promoting understanding between different groups.
- i) Strengthening Institutions: A well-functioning justice system strengthens overall governance and institutions and contributes to the professionalism and accountability of legal professionals, judges, and law enforcement agencies.
- j) Preventing Impunity: Access to justice plays a key role in preventing impunity for human rights abuses, including crimes such as corruption, violence, and exploitation. This sends a clear message that violations will not go unpunished.

Overall, access to justice is a foundational element of a just and democratic society. It empowers citizens, upholds human rights, ensures accountability, and contributes to stability and development. Without effective access to justice, the rule of law and

democratic principles can be compromised, hindering progress and undermining the ideals of justice and equality.

More generally, for Countries such as South Africa and many other Countries on the Continent, **access to justice refers to the equity with which those from differing backgrounds are able to gain from the justice delivery system and enjoy equality before the law.** It proposes (amongst others) that each person should have effective means of protecting his or her rights or entitlements under the substantive law. This view of the concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures irrespective of social or economic capacity.¹

A citizen-oriented access to justice framework shifts attention away from an emphasis on courts and formal dispute resolution towards a citizen-based focus on everyday legal and justice problems, their connection with other problems, common paths for advice and to resolution and to outcomes measured from the individual's perspective.² The concept of access to justice adopted internationally therefore includes the ability to obtain legal information, advice and assistance; access courts, tribunals and alternative dispute resolution mechanisms, obtain non-legal advocacy and support, and participate effectively in law reform processes.

In many respects the barriers for the poor in accessing law constitute, therefore, not just a legal crisis, but rather a political, economic and moral question.

The drafters of our Constitution and other Constitutions in Africa realized that this problem cannot be resolved successfully unless law is used wisely to restore balance to the economic structures and remove the causes of economic inequality. The Constitution has attempted to respond to this situation by proposing mechanisms that

¹ Murlidhar Law, *Poverty and Legal Aid: Access to Criminal Justice* (2004) 1.

² Understanding Effective Access to Justice. 3-4 November 2016. OECD Conference Centre, Paris. WORKSHOP BACKGROUND PAPER. INTRODUCTION.

can support access to justice, fair hearing, fair administrative actions, and ensuring rule of law is upheld as well as equal rights between the rich and the poor.

While, it is mainly through judicial enforcement that the realisation and enjoyment of socio-economic rights takes place, the protection and enforcement of human rights generally and socio-economic rights particularly are however, not confined to the legislature, the executive and judiciary.

There is general consensus that everybody whose rights are adversely affected might not always be in the position to seek a remedy through litigation. International research has found consistently that disadvantaged and vulnerable members of the community experience more barriers to access to justice than others.³ The capacity of an individual to seek justice through any number of forums will vary, for example, according to their level of literacy, age, level of education, awareness and financial means.

In this regard Ombudsman schemes have become a significant and permanent feature of legal systems across the world in recent decades, with the model developing from a constitutional accountability tool to an independent complaints mechanism widely used in the private sector, particularly significant in the protection and enforcement of socio-economic rights, with distinct mandates in order to ensure that particular rights are focused on and maintained⁴.

³ Christine Coumeralous et al, Law and Justice Foundation, Legal Australia-Wide Survey: Legal Need in Australia Law (2012) 5-6, 16; Pascoe Pleasence et al, Legal Services Research Centre, Causes of Action: Civil Law and Social Justice (Legal Services Research Centre, 2nd ed, 2006) 4; Alexy Buck et al, 'Social Exclusion and Civil Law: Experience of Civil justice Problems among Vulnerable Groups' (2005) 39 (3) Social Policy and Administration 302.

⁴ CRL Commission Submission

3. EMERGING ISSUES AND CHALLENGES IN ACCESS TO THE JUSTICE ADMINISTRATION

3.1 Key challenges

In the last decade, there has been a shift to a broader understanding of the interpretation of the rule of law and access to justice concepts, in which the focus is placed on enhancing equal access to opportunities and on the role of the legal systems in enhancing access to sustainable development. Key factors for this shift have included:

- a) the changing African governance architecture with a specific quest for shared African values as shown in the African Peer Review mechanism;
- b) the vision of building capable, democratic, developmental states in Africa focussed on public service delivery, accountability, human rights protection and promotion, and
- c) increased focus on the relationship between justice and development with more emphasis on the MDGs, economic justice and inclusive growth.

These shifts have delivered progress in some cases. However, in others, progress has been relatively slow and in some cases retrogression witnessed, especially where crises such as war and conflict or the effects of climate change have befallen communities and states. In addition, in some instances the impact of reform has not been sustained while within the justice systems, serious obstacles and challenges still exist to limit the realization of people's right to access justice. Some of the key emerging issues and challenges include:

- a). Legal Pluralism: Many African countries have a combination of formal state legal systems and traditional/customary legal systems. The coexistence of these systems can lead to conflicts and inconsistencies in legal outcomes, making it difficult for individuals, especially marginalized groups, to navigate and access justice effectively.

- b) Weak Legal Infrastructure: Some African countries face challenges with regards to legal infrastructure, including inadequate court facilities, outdated legal frameworks, and insufficient resources allocated to the justice system. This can result in delays, inefficiencies, and limited access to justice.
- c) Geographical Barriers: Rural and remote areas often lack proper infrastructure and legal services, making it difficult for residents to access courts, legal advice, and representation. This disproportionately affects marginalized communities and exacerbates inequalities in accessing justice.
- d) High Costs: The cost of legal proceedings, including legal representation and court fees, can be prohibitive for many individuals, especially those from low-income backgrounds. This makes it challenging for them to seek justice and can result in unequal access to legal remedies.
- e) Lack of Awareness: Many people, particularly in rural areas, may not be aware of their rights or how to access legal remedies. Lack of legal education and awareness campaigns can hinder individuals' ability to seek justice when needed.
- f) Corruption and Bribery: Corruption within the justice system can erode public trust and hinder access to fair and impartial legal processes. It can also contribute to unequal treatment and outcomes, favoring those with greater resources or connections.
- g) Gender Inequality: Women and girls often face unique barriers to accessing justice, including discriminatory laws, cultural norms, and societal attitudes. Gender-based violence and discrimination can limit their ability to seek legal redress.
- h) Inadequate Legal Aid Services: Access to legal aid is crucial for those who cannot afford legal representation. However, legal aid services are often underfunded and limited in scope, leaving many individuals without the necessary support in legal matters.

- i) Technology and Digital Divide: As technology becomes more integrated into justice administration processes, there's a risk of excluding individuals without access to digital resources. This can further marginalize vulnerable groups in their efforts to access legal information and services.
- j) Political Interference: In some cases, there may be political interference in the judicial system, which undermines its independence and impartiality. This can lead to unfair outcomes and hinder access to justice.

Efforts are being made by various stakeholders, including governments, civil society organizations, and international partners, to address these challenges and improve access to justice in the African context. These efforts often involve legal reforms, capacity-building initiatives, awareness campaigns, and strengthening of legal aid services.

Specifically in the African context, access to justice takes into consideration the unique challenges and circumstances faced by individuals and communities across the continent. This includes recognizing the diversity of legal systems, cultures, languages, and socioeconomic conditions present in African countries. The concept goes beyond simply having physical access to legal institutions and extends to the following elements:

- a) **Affordability**: Ensuring that legal processes are financially accessible to all, regardless of their economic status. This includes addressing issues such as court fees, legal representation costs, and other financial barriers.
- b) **Procedural Fairness**: Ensuring that legal procedures are transparent, non-discriminatory, and conducted in accordance with due process. This includes fair trial rights, the right to be heard, and the right to legal representation.
- c) **Legal Aid**: Providing assistance to those who cannot afford legal representation through legal aid services. These services aim to bridge the gap between individuals with limited resources and the justice system.
- d) **Cultural Sensitivity**: Recognizing and respecting the diversity of cultural norms and traditions within African societies, while also ensuring that human rights are upheld and protected.

- e) **Gender and Vulnerable Groups:** Addressing the specific barriers that women, children, marginalized groups, and vulnerable individuals may face in accessing justice. This includes combating gender-based violence, discrimination, and ensuring equal access to legal remedies. Women may be disproportionately disadvantaged, as they are often less financially independent, or have limited access to financial resources.
- f) **Legal Awareness and Education:** Promoting legal literacy and awareness to empower individuals to understand their rights, responsibilities, and options within the legal system.
- g) **Alternative Dispute Resolution:** Recognizing and integrating alternative methods of resolving disputes, such as mediation and community-based mechanisms, which can be more culturally relevant and accessible.
- h) **Timeliness and Efficiency:** Ensuring that legal processes are efficient and timely, reducing delays that can hinder access to justice.
- i) **Corruption and Accountability:** Combating corruption within the justice system to ensure that legal processes are transparent, fair, and not influenced by bribery or other forms of undue influence.
- j) **Collaboration and Partnerships:** Encouraging collaboration among government institutions, civil society organizations, legal professionals, and other stakeholders to collectively work towards improving access to justice.

3.2 The African Continental Free Trade Agreement (AfCFTA)

The AfCFTA aims to create a single market for goods and services across the African continent, promoting economic integration and trade among African nations. While the agreement does not directly address the rights of citizens or access to justice in the same comprehensive manner as legal frameworks, it does impact citizens' economic opportunities and can have implications for their access to justice. Here's how the AfCFTA might influence citizens' rights and

access to justice, particularly for those who lack means to access formal courts or Alternative Dispute Resolution Mechanisms (ADRM)

- a) Market Access: AfCFTA is designed to provide citizens of member countries with improved access to larger markets, fostering economic growth and job creation.
- b) Job Creation: Increased trade could lead to job creation and economic growth, which can positively impact citizens' livelihoods.
- c) Consumer Rights: Greater trade and competition may lead to a wider variety of products and services, giving citizens more choices and potentially better quality goods.
- d) Non-Discrimination: The agreement promotes non-discrimination among member countries, ensuring that citizens and businesses are treated fairly and equally across borders.
- e) Investment: AfCFTA seeks to encourage foreign direct investment, potentially leading to increased job opportunities and economic development for citizens.

Given that many citizens might not have the means to access traditional courts or Alternative Dispute Resolution Mechanisms (ADRM), addressing their access to justice is critical. It is therefore critical to ensure that policies and programs related to the AfCFTA take into consideration the needs of marginalized citizens and include mechanisms to address their access to justice challenges.

By implementing inclusive and community-focused strategies, African nations can help ensure that the benefits of the AfCFTA are truly felt by all segments of society.

Accountability and access to remedy are fundamental tenets of human rights law. The AfCFTA includes a Dispute Settlement Mechanism under Part VI of the Agreement. The settlement of disputes under the AfCFTA will be governed by the Protocol on Rules and Procedures of the Settlement of Disputes which provides for the establishment of Dispute Settlement Body with authority to establish panels to receive and determine interstate trade disputes. It should be noted that, international law merely requires disputes to be resolved peacefully. It does not

force states to follow certain type of dispute settlement mechanisms among the available options. The ACFTA dispute settlement system has provided different options for dispute settlement such as arbitration, conciliation, good office and mediation, if the states prefer such mechanisms. A formal panel under the DSB will be established if the parties fail to resolve their disagreement using one of the dispute settlement options.

The African Continental Free Trade Area (AfCFTA) and its supplemental Protocol on Rules and Procedures of the Settlement of Disputes (RPSD) emerged at a peculiar time. Multilateralism in general and International Courts (ICs) is in a state of crisis, with states pulling out or threatening to withdraw from international organization and ICs. Indeed, some states have withdrawn from ICs. Brexit is covered in the news daily. Rwanda's withdrawal from proceedings before the African Court of Human and People's rights (African Court) and Burundi's withdrawal from the International Criminal Court (ICC), South Africa's threat of withdrawal from the ICC and Philippine's recent notice of withdrawal from ICC are some examples of resistance against ICs. In other instances, States have changed the provisions of treaties establishing ICs, such as the Treaty Establishing the East African Community, to control or limit the authority of the East African Court of Justice. In extreme cases, States acted and suspended ICs. In Southern Africa, the Southern African Development Community Tribunal (SADCT) emerged from suspension after a new protocol that removed individual access to the Tribunal was introduced. Such actions aside, there is increased negative rhetoric against ICs.

Following the practice in COMESA and other African trade arrangements, the AfCFTA prioritises non-litigious dispute resolution. Where a dispute arises between State Parties, the first recourse is consultation in pursuit of an amicable resolution.

The AfCFTA Agreement specifically provides for good offices, conciliation and mediation to be available on request to State Parties to a dispute. In each instance, the non-litigious stages of dispute settlement are time-bound (for example, consultations are limited to a period of 60 days) to prevent them from being abused

to delay a timely resolution. When alternative methods fail, State Parties may resort to formal litigation through the AfCFTA Dispute Settlement Mechanism

However, individuals do not have direct access to the DSP. Only State Parties have access to dispute settlement under this Protocol. However, most trade transactions involve private entities. Their rights need to be protected to ensure certainty and predictability. The approach adopted here (again replicating the WTO) means that private parties will only be protected if a State Party, able to show that its rights have been violated, would bring a claim. Governments of WTO members frequently do so. Whether African Governments will also do this, needs to be seen.

Experts such as Dr Mihreteab Tsighe are of the view that dispute settlement mechanisms are more effective when they provide access to individuals. The regularly functioning dispute settlement mechanism in Africa are those that allow individuals direct access (EAC and ECOWAS). Indeed, litigation has seen significant use in regional international Courts (RICs) in Africa primarily initiated by individuals rather than by states.

While the AfCFTA agreement provides various mechanisms for the resolution of inter-state disputes (including amicable settlement through consultation, conciliation, mediation, the use of Dispute Settlement Bodies, and arbitration), nearly half of all respondents to a survey, also considered that commercial or business intra-African disputes should likewise be resolved using arbitration, as opposed to mediation (40%) or litigation (10%). The results show a significant appetite for consensual non-binding dispute resolution mechanisms such as mediation as a means of dispute resolution of Africa-related disputes. Only in 11% of the time did respondents suggest that litigation should be used.

While the AfCFTA doesn't directly address access to justice barriers, governments, organizations, and the international community can collaborate to create inclusive solutions that ensure citizens, including those without the means to access formal justice systems, can benefit from the trade agreement and have their rights protected. Within this context the relationship within the states between citizens and the government becomes of paramount importance and may present

opportunities to explore the role of the Ombudsman in assisting citizens to hold their governments to account in respect of their commitments in terms of the AfCFTA agreement and protect the rights of private entities.

3.3 Recommendations and solutions

Addressing the emerging issues and challenges hampering access to justice and justice administration in the African context requires a multi-faceted approach involving governments, civil society organizations, legal professionals, international partners, and other stakeholders. Here are some recommendations and solutions that have been proposed:

3.3.1 Legal Reforms and Harmonization:

Synergy between the formal and informal legal systems is important in the development of a legal system that would benefit individuals as well as society in these countries. Despite the existence of a dual system in which formal and informal systems operate in tandem, these separate but intrinsically linked systems do not work as effectively as they could and sometimes undermine each other. It would be beneficial to -

- Institute a review process to update legal frameworks to address inconsistencies between formal state law and traditional/customary law, to determine how these systems could be operated together in order to complement each other and increase access
- Harmonize laws to ensure compatibility with international human rights standards and principles.
- Reform and simplify legal procedures to make them more accessible and understandable.

3.3.2 Legal Aid and Support:

According to the ISS Africa, Legal aid institutions are one of the best methods through which access to justice can be increased. It is crucial that such institutions have access to adequate levels of funding and efficient human resources and have a good geographical presence. Some of the proposed solutions include -

- Explore provisions in legislation or regulations for the waiving or reduction of legal fees for people who would otherwise not be able to make a claim.
- Increase funding for legal aid programs to provide assistance to those who cannot afford legal representation
- Encourage and support the establishment of community-based paralegal services to provide basic legal advice and assistance in rural and underserved areas, and offer basic education of the law, both formal and informal, in ways that can be easily understood
- Partner with NGOs and legal clinics to expand legal aid services and reach marginalized populations.

3.3.3 Technology and Innovation:

Technology and innovation have the potential to play a transformative role in providing access to justice in the African context. By leveraging technology, legal systems can become more efficient, transparent, and accessible to a broader range of individuals and communities.

- Develop digital platforms for legal information dissemination, enabling people to access legal resources online, provide free legal information, resources, and self-help tools for individuals to understand their rights and navigate legal processes..
- Integrate technology into court processes to reduce delays and improve efficiency.

- Use mobile apps and SMS services that provide legal information, procedural guidance, reminders about court dates or legal requirements and educate citizens about their legal rights and procedures.
- Offer online training and professional development courses legal scholars, legal professionals, lawyers and judges to enhance their skills and knowledge.
- encourage collaboration between legal professionals and technology startups to create innovative solutions that address specific access to justice challenges.
- Launch public awareness campaigns to educate citizens about the availability and benefits of technology-based access to justice solutions.

3.3.4 Legal Education and Awareness:

- Implement legal literacy programs in schools and communities to empower people with knowledge of their rights and the legal system.
- Conduct awareness campaigns targeting marginalized and vulnerable groups, focusing on gender equality and women's rights.
- Conduct awareness campaigns to educate citizens about their rights and the legal processes, empowering them to report corruption.
- Educate the public about the negative consequences of corruption on access to justice and society as a whole.

3.3.5 Alternative Dispute Resolution (ADR):

Family group conferences and NGO ADR forums may provide additional options for reconciliation where either traditional or popular justice systems are not operating in a satisfactory manner or do not exist within the particular community, or where the parties themselves are not from the same community but wish, for example, to continue their economic relationship. At a formal level -

- Implement online dispute resolution platforms that facilitate negotiation, mediation, and settlement of disputes in a virtual environment.

- Promote and strengthen community-based mediation and arbitration systems to resolve disputes outside formal courts.
- Train traditional leaders and mediators in ADR techniques, integrating customary practices with modern principles.

3.3.6 Addressing Corruption and Bias:

- Establish or improve safeguards to protect judges and legal professionals from external pressures or influences.
- Establish accessible and independent bodies or ombudsman offices with the authority to receive complaints and reports related to corruption and bias within the justice system.
- Implement mechanisms to ensure transparency in appointments and promotions within the justice sector.
- Provide mechanisms for whistleblowers to report anonymously and without fear of retaliation and protect individuals who report instances of corruption or bias within the justice system.

3.3.7 Gender Mainstreaming and Inclusivity:

Specifically targeting of women and other vulnerable groups by government agencies, civil society and the international community would prioritise these groups in the delivery of legal services that would help increase the access to justice of the most marginalized in the system.

- Develop and enforce laws and policies that promote gender equality and protect women's rights.
- Train legal professionals to handle cases of gender-based violence and discrimination sensitively.
- It may be necessary to adopt special measures in order to ensure the full participation in the legal profession by women, who may face constraints in respect of cultural norms, time and access to information.

3.3.8 Community Outreach and Engagement:

Organize legal education workshops, town hall meetings, and outreach programs to bring justice information to local communities.

Encourage collaboration between legal professionals and community leaders to bridge the gap between formal and customary legal systems.

3.3.9 Strengthening International Partnerships:

Collaborate with international organizations and partners to provide technical assistance and capacity-building support.

Share best practices and lessons learned from other countries' experiences in improving access to justice.

3.3.10 Data Collection and Research:

Conduct research to better understand the specific challenges faced by different communities in accessing justice.

Use data to inform policy decisions and tailor interventions to address specific needs.

3.3.11 Empowerment of Legal Professionals:

Provide ongoing training and professional development opportunities for judges, lawyers, and other legal practitioners to enhance their skills and knowledge.

These recommendations and solutions are not exhaustive, and their effectiveness may vary depending on the specific contexts and challenges within different African countries. Tailoring interventions to the unique circumstances of each country is crucial for achieving sustainable improvements in access to justice and justice administration.

4. THE ROLE OF THE OMBUDSMAN IN PROVIDING ACCESS TO JUSTICE

4.1 Introduction

In this context, the growth of interest in ombudsmen within socio-legal studies has matched the growth of the institution of the ombudsman itself. The rapid expansion of the ombudsman enterprise across the public and private sectors has brought with it a blossoming variety of institutional and jurisdictional arrangements, operational styles and decision-making processes. Although ombudsmen have traditionally received much less research attention than the courts or tribunals, ombudsmen are now also firmly part of the private civil and administrative justice realm.⁵ As such, they perform an important independent complaints-handling function. This positions the ombudsman as a significant alternative dispute resolution pathway, outside of the courts.

What is observable is that the Ombudsman has not just been adopted widely as an investigator and resolver of complaints, but the office itself has changed from its classical formulation to a very different institution today. There is no doubt that the spread of the role of the Ombudsman has paralleled a desire in modern societies, particularly in the latter part of the 20th century, to improve access to justice. Similarly, as concerns about access to justice have grown, so too has enthusiasm for alternative dispute resolution. Ombudsmen have been able to offer various methodologies of dispute resolution that have delivered very timely, highly cost-effective justice. In 2014 the Australian Productivity Commission, in its Access to Justice Arrangements Inquiry,

5 Public sector ombudsmen: Hertogh, M. (2001) Coercion, cooperation, and control: Understanding the policy impact of administrative courts and the ombudsman in the Netherlands. *Law Policy* 23, 47–67; Seneviratne, Mary. (2002) *Ombudsmen: Public Services and Administrative Justice*. London: Butterworths LexisNexis; Buck, Trevor, Richard Kirkham, and Brian Thompson. (2010) *The Ombudsman Enterprise and Administrative Justice*. Burlington, VT: Ashgate Pub.; Gill, Chris. "Right First Time: The Role of Ombudsmen in Influencing Administrative Decision-Making." *Journal of Social Welfare and Family Law* 33, no. 2 (June 2011): 181–92.

found that “[i]n the context of the broader civil justice system, ombudsmen and other complaint bodies resolve a large volume of complaints at low cost.”⁶

4.2 Manner in which Ombudsmen provides access to justice

4.2.1 Promoting the Rule of law and social justice

Generally, the criteria for determining whether conduct or actions are proper or not, rest basically on the notion of the rule of law or the requirement that government should act in accordance with both written statutes and with unwritten legal principles and general principles of good governance. If the government action conflicts with these statutes and principles, and does not appear to be justified on other grounds, it cannot in principle be regarded as proper conduct.

Accordingly the Ombudsmen commonly considers the complaints and allegations against the provisions of written law on the one hand, such as those relating to human rights and constitutional rights, to government competence, as well as in terms of procedure and substance of government decisions.

4.2.2 Responsive to the needs of individuals through early resolution

In many instances the Complainants approach the Ombudsman because an in-house complaint-handling procedure has failed to resolve their grievance or dispute. It is important to build into the Ombudsman process, opportunities for early resolution. These are attempts to reach a settlement by mediation or conciliation before investigation begins, or for settlement to be achieved at any stage of an investigation and before it is completed.

6 Productivity Commission, Access to Justice Arrangements, Report No. 72, 5 September 2014 at 324.

These are cases that we call “**bread and butter**” matters that need to be resolved with speed because complainants in such cases are often on the verge of losing their houses or sources of income unless the Ombudsman office steps in to help.

In the case of the PPSA, many of the early resolution cases deal with issue affecting service failures, such as

- undue delay;
- miscommunication between the state and the complainant;
- arbitrary decisions;
- poor services or failure to rectify defective services (housing);
- Non –payment or delayed payment by the State to service providers;
- Unresponsiveness of state institutions, including municipalities to complaints and grievances regarding service delivery;
- Failure by the State to rectify *bona fide* mistakes (eg Home affairs)
- Failure to attend to damages caused by faulty state equipment and infrastructure failure;

Cases that cannot be resolved through early resolution within a specified time frame, as well as more complex matters and disputes, normally form the subject of evidence based investigations.

4.2.3 Providing a remedy/ Taking remedial action

Providing redress for wrongdoing is one of the underpinning principles of public accountability and giving visible meaning to constitutional democracy by ensuring that authorities are “*fair and take responsibility, acknowledge failures and apologise for them, make amends, and use the opportunity to improve their services.*”⁷ The Constitutional Court has made it clear that no member of the public should suffer

⁷ In the words of the Irish Ombudsman, Dr Tom Frawley CBE : *Rights, Responsibilities and Redress: A Framework for Effective Complaint Handling*, November 2009

prejudice or injustice as result of the wrongful actions of an organ of state.⁸ It was emphasized that since the advent of our constitutional dispensation, “*administrative justice has become a constitutional imperative... and that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.*” (own emphasis). The Court noted that ultimately, the purpose of a public remedy is

- “to afford the prejudiced party administrative justice,
- to advance efficient and effective public administration compelled by constitutional precepts; and
- at a broader level, to entrench the rule of law”⁹.

When a member of the public who has suffered injustice and hardship at the hands of the State, approaches the Ombudsman with a complaint, it will mean very little to such a complainant if the outcome of the investigation produces a finding or report that the State has acted improperly, but nothing is done to remedy the consequences of that injustice for the complainant. The underlying principle in the provision of remedial action is to ensure that organs of state restore the complainants’ legal rights or otherwise put them in the position that they would have been in if the maladministration or poor service had not occurred.

The Ombudsman in fulfilling his/her mandate of contributing and supporting a democratic society where social justice prevails, recognises the need to acknowledge victim suffering as a result of improper conduct in state affairs. Providing a remedy and taking remedial Action is intended to go beyond restoring the administration, on measures designed for reparation, by providing redress to the individual, but also to promote reconciliation between the citizen and the State to ensure a continuous sound relationship between the citizen and the State, which is one of the most vital requirements of a stable democracy.

8 Steenkamp v Provincial Tender Board, Eastern Cape 2007(3) SA 121 (CC).

9 supra

4.2.4 Accessibility and outreach

It is imperative that an Ombudsman **is** accessible to all persons and communities.

The Public Protector Strategic Vision 2023 for example, has eight pillars and seeks to expand the reach of the Public Protector to grassroots communities. The aim is the empowerment of local citizens to act as their “own liberators”. The Public Protector has refined its strategies in pursuit of that goal. Rural and farming communities had deliberately been focused into that strategy to enhance access to her Office. It is envisaged this will increase the flow of service which in turn will allow for the more efficient provision of services to those communities whilst simultaneously promoting and sustaining good governance in state affairs through the use of mobile offices.

A particular advantage that the Ombudsman offers complainants in terms of accessibility is that the service available to them is free. This means that people do not need to worry about whether they can afford to have their complaints properly considered, in order to get an independent view of what has happened. Informal dispute resolution processes are available at little or no cost to complainants or beneficiaries of investigations. Complainants generally face no direct costs, with government (taxpayers) meeting the costs of the service. The informal nature of the complaints process is structured so that individuals do not require legal advice or representation and so can avoid private legal fees.

4.2.5 Public as well as private benefits arise when complaints are resolved.

The decisions of the Ombudsman generally extend beyond the object and subjects of investigations and reports, giving rise to public benefits. These findings and remedial action, as well as the outcomes of ADR, provide a framework within which both the public and those involved in public administration determine their rights and responsibilities. For other parties with similar disputes, understanding what is likely to happen through the intervention of the Ombudsman can assist in earlier resolution of disputes and save considerable private and public transaction costs. Public resolutions

(including precedents) also act as a deterrent to unlawful behaviour by demonstrating that the civil justice system is effective in upholding the law.

In this manner the Ombudsman proactively contributes to the improvement of public administration by-

- a) Including a prescription or directive for a review or change of values, behaviours or policies within an institution,
- b) Promoting good administration and reduce the likelihood of repetition, and
- c) Identifying and intervening in deficiencies of a systemic nature.

4.2.6 Holistic, inquisitorial approach

Disadvantaged and vulnerable people may experience legal problems that coexist with other social, economic and health issues. Typical improper conduct such as maladministration and service delivery failures rarely occur in a vacuum and are often triggered by underlying problems; or lead to further problems. Providing services which assist vulnerable groups, requires an appreciation of both the type of services that should be delivered, as well as the method in which they should be delivered. The inquisitorial approach followed by the Ombudsman in terms of which he/ she is enjoined to actively discover the truth to where there are allegations of malfeasance (focus on addressing the range of legal and non-legal issues faced by disadvantaged people, rather than addressing each issue in isolation (the 'silo' approach). Holistic services can 'help to prevent the degeneration of circumstances that can lead to further problems' for users by targeting a number of their problems at once.

5. CONCLUSION

Access to justice for all citizens has long been recognized as a cornerstone of democracy, good governance, and effective and equitable development. Its centrality has been highlighted in the United Nations' Sustainable Development Goal 16

(SDG16), which calls for all societies to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” (United Nations, 2016). The United Nations Development Programme (2004) has even described access to justice as a basic human right.

The provision of justice therefore represents a significant challenge to developing countries in Africa. **Where justice is apparent, and the rule of law upheld, the processes of development and democratisation are supported. Where justice is not evident, these processes are undermined.**

For justice to prevail, everybody should have equal access to the mechanisms of justice. Barriers such as illiteracy, poverty and cumbersome legal mechanisms present long-term challenges to the provision of justice. Such barriers serve to further marginalise social groups such as the indigent, women, children and the disabled.

In this regard we can resonate with the goals and objectives proposed by institutions such as the African Centre of Excellence for Access to Justice - embodying Africa’s pursuit of justice for all. It is therefore hoped that esteemed events such as this conference and our contributions as scholars, educators and practitioners of justice in our unique settings, will lead to real solutions that could-

- Ensure quality and innovative justice service delivery that meets the requirements of all users, especially the poor, marginalised and excluded.
- Encourage African states’ efforts to strengthen capacity for the improvement of justice delivery by promoting linkages, synergies, complementarity and collaboration between service providers of legal education, legal empowerment, legal assistance and legal aid.
- Encourage citizens and users of justice services to actively and effectively advocate for stronger collaboration and synergies between community justice initiatives, the judiciary, and the broader administration of justice processes.
- Promote the ethical values inherent in the activities of public service agents and other service providers to ensure transparent service delivery in the justice sector.