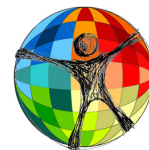


VOL. 11 | NO. 1 | SUMMER 2022

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

Noémie Richard

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



McGill FACULTY OF
Law

ABOUT CHRLP

Established in September 2005, the Centre for Human Rights and Legal Pluralism (CHRLP) was formed to provide students, professors and the larger community with a locus of intellectual and physical resources for engaging critically with the ways in which law affects some of the most compelling social problems of our modern era, most notably human rights issues. Since then, the Centre has distinguished itself by its innovative legal and interdisciplinary approach, and its diverse and vibrant community of scholars, students and practitioners working at the intersection of human rights and legal pluralism.

CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. The Centre's mission is to provide students, professors and the wider community with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era.

A key objective of the Centre is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. The current Centre initiative builds upon the human rights legacy and enormous scholarly engagement found in the Universal Declaration of Human Rights.

ABOUT THE SERIES

The Centre for Human Rights and Legal Pluralism (CHRLP) Working Paper Series enables the dissemination of papers by students who have participated in the Centre's International Human Rights Internship Program (IHRIP). Through the program, students complete placements with NGOs, government institutions, and tribunals where they gain practical work experience in human rights investigation, monitoring, and reporting. Students then write a research paper, supported by a peer review process, while participating in a seminar that critically engages with human rights discourses. In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. Therefore, papers in this series may be published in either language.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s).

The WPS aims to meaningfully contribute to human rights discourses and encourage debate on important public policy challenges. To connect with the authors or to provide feedback, please contact human.rights@mcgill.ca.

ABSTRACT

This paper explores the intersection of access to justice in rural settings, land tenure security, and small-scale farmers' standard of living, as a means to fulfill the human right to an adequate standard of living. The article highlights the fact that small-scale farmers, who constitute a significant portion of the world's poorest population, require land security to improve their well-being. The paper argues that access to justice for the poor can help them achieve their right to an adequate standard of living. The paper analyzes the impact of land tenure security on the economic development and living standards of poor rural small-scale farmers. It also assesses the barriers faced by poor, rural small-scale farmers in accessing justice and legal information. The article concludes with a case study from a legal clinic in Kenya, showcasing the effects of access to justice initiatives focused on land tenure security and the standard of living of small-scale farmers.

CONTENTS

I. INTRODUCTION	6
II. ACCESS TO JUSTICE	8
III. LAND TENURE SECURITY, ACCESS TO JUSTICE, AND THE LIVING STANDARDS OF POOR RURAL FARMERS	13
IV. A CASE STUDY FROM KENYA	24
V. CONCLUSION	32
BIBLIOGRAPHY	35

I. Introduction

Article 25 of *The Universal Declaration of Human Rights* guarantees that everyone has the right to an adequate standard of living for their health and well-being. The article includes food, clothing, housing, medical care, and necessary social services as part of an adequate standard of living.¹ Poverty, or a lack of the means necessary to meet one's basic needs, is one of the main barriers to the fulfilment of such right. Poverty is not limited to lack of income, but also includes lack of access to basic services and social exclusion.²

Small-scale farmers are some of the world's poorest, most isolated, and for which attaining land security is vital for their wellbeing. More than 700 million people live in extreme poverty (below 2.15USD a day),³ of which almost 80% are found in rural areas,⁴ the majority deriving their livelihood from agriculture.⁵ This means that the estimated 500 million rural small-scale farming households globally—more than 2 billion people—amount for a large proportion of the world's poorest.⁶

There is a strong link between land and human rights; access to land, in the form of tenure security, is a driving factor in the

¹ See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 25 [UDHR].

² See Office of the High Commissioner for Human Rights, "Universal declaration of human rights at 70: 30 articles on 30 articles - Article 25" (4 December 2018), online: *United Nations* <ohchr.org/en/press-releases/2018/12/universal-declaration-human-rights-70-30-articles-30-articles-article-25> .

³ See United Nations Global Impact, "Poverty" (last visited 28 June 2023), online: *United Nations* <unglobalcompact.org/what-is-gc/our-work/social/poverty>.

⁴ See IFPRI, *Global Food Policy Report 2019*, (Washington D.C.: International Food Policy Research Institute, 2019) at 7.

⁵ Robert F Townsend, *Ending Poverty and Hunger by 2030: An Agenda for the Global Food System*, 2nd ed (Washington DC: World Bank Group, 2015) at 6.

⁶ The World Bank, "A year in the lives of Smallholder Farmers" (25 February 2016), online: *The World Bank* <worldbank.org/en/news/feature/2016/02/25/a-year-in-the-lives-of-smallholder-farming-families>.

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

achievement of the human right to an adequate standard of living for the majority of the world's poorest population. This paper will explore the relationship between access to justice in rural settings, as access to legal information and legal services, and land tenure security and its impact on small-scale farmers' standard of living. This paper will argue that improving access to justice for poor, rural small-scale farmers can help fulfill their right to an adequate standard of living.

Section II will discuss the concept of access to justice. It will first define access to justice and its two approaches to fairness: procedural and substantive. Then, it will locate the term on the international stage.

Section III will focus on the context of poor, rural small-scale farmers. It will start by discussing access to justice in poor rural contexts, and the particular barriers faced by poor, rural small-scale farmers. Then, it will provide a review of the current literature on the impacts of land tenure security in rural contexts by focusing on two aspects. First, it will explore whether and how secured land tenure can have an impact on economic development in poor rural settings. The legal regime of property rights, or land tenure, formalizes one's ownership over land by establishing their legal right to use it, the majority of the times through the granting of a land title by way of a registration system. Land tenure security, on the other hand, represents the degree of confidence enjoyed toward "the recognition and protection of a person's right to land, especially in the event of specific challenges."⁷

Second, it will evaluate its impact on rural farmers' living standard. While the list of factors that fall under article 25's right to an adequate standard of living is much longer, this paper will focus on the two most relevant in the context of small-scale farming: food security and financial security through economic participation. Indeed, impeding access to land jeopardizes poor small-scale farmers' ability to achieve both food and financial security because for most poor, rural small-scale farmers, land is both used for subsistence purposes as well as an ability to earn income. As the subsistence and productive activities carried out

⁷ United Nations Human Rights Office of the High Commissioner, *Land and Human Rights: Standards and Applications*, HR/PUB/15/5/Add.1 (United Nations, 2015) at 6-7.

on land are the main source of livelihood, depriving access to such land without adequate compensation would be a violation of the human right to an adequate standard of living of small-scale farmers.⁸

To prevent their right to an adequate standard of living from being violated, small-scale farmers' right to access and use land must be guaranteed. This issue is more relevant than ever: scarcity of land and competition over its ownership is ever growing due to population growth, land degradation, large-scale land grabbing by governments or private investors, and climate change. These have direct impacts on the access, use, and ability to claim ownership over land by poor rural farmers, who are most vulnerable to the abuses of private individuals, corporations, and governments.⁹ Given that to hold title does not equate to land tenure security, access to justice through legal information and services is key to enforce small-scale farmers' property rights and achieve an adequate standard of living.

Finally, section IV will focus on solutions to address access to justice barriers in rural contexts. A case study from a legal clinic in Kenya will be used to assess the effects of access to justice initiatives focused on land tenure security and the standard of living for small-scale farmers.

II. Access to Justice

This section will discuss the concept of access to justice. Equality before the law is an essential element of the rule of law but cannot be achieved without equal access to justice.¹⁰ Judicial institutions enable people to have their rights recognized and enforced against those who violate them.¹¹ This section will first

⁸ See *ibid* at 19.

⁹ See *ibid*.

¹⁰ See United Nations, "Access to Justice" (last visited 28 June 2023), online: *United Nations and the Rule of Law* <un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.

¹¹ See Christine Nkonge et al, *Alternative Approaches to Access to Justice in Kenya: A Cost-benefit Analysis* (Katiba Institute & University of Nairobi, 2021) at 13.

define access to justice conceptually by distinguishing between a thinner and thicker notion of justice. It will then locate access to justice in various international instruments.

A. *Defining Access to Justice*

Access to justice is defined as the “ability of people to seek and obtain a remedy through formal or informal institutions of justice.”¹² Access is defined by both the “physical availability of resources” and the “opportunity... to actively engage with the system.”¹³ Justice is the attainment of fairness.¹⁴ There exist two approaches to the conceptual understanding of fairness and how it can be achieved: a “thin” conception and the “thicker” approach.

i) *Procedural Fairness: A “Thin” Approach*

The “thin” conception is also called the “lawyers-and-courtrooms” approach to access to justice because it understands fairness through procedural access to justice. It is equated to access to law and the system of justice.¹⁵ Justice has been served when one’s legal issue has been given “all that the law allows”,¹⁶ “regardless of the actual outcome or the litigant’s perception of the “fairness” of the justice system.”¹⁷ The notion of justice is operationally defined: “whatever the “system of justice” and our laws... deliver is justice.”¹⁸ This view relies on an assumption that

¹² Eileen Skinnider & Ruth Montgomery, *Enhancing Access to Justice for Women Living in Rural and Remote Areas of British Columbia: Reviewing Practices from Canada and Abroad to Improve Our Response* (Vancouver, BC: The Int’l Centre for Crim Law Reform and Crim Justice Policy, 2017) at 14.

¹³ Nicole Aylwin & Lisa Moore, *Rural & Remote Access to Justice A Literature Review*, (Toronto, ON: Can Forum on Civil Justice for the Rural and Remote Access to Justice Boldness Project, 2015) at 23.

¹⁴ See Skinnider & Montgomery, *supra* note 12.

¹⁵ See Stephen L Pepper, “Access to What” (1999) 2 J Inst for Study Leg Ethics 269 at 269–70.

¹⁶ *Ibid* at 270.

¹⁷ Michele Statz, Robert Friday & Jon Bredeson, “‘They Had Access, But They Didn’t Get Justice’: Why Prevailing Access to Justice Initiatives Fail Rural Americans” (2021) 28:3 Geo J on Poverty L & Pol’y 321 at 337.

¹⁸ Pepper, *supra* note 15 at 272.

the justice system is structured through a fair procedural system which administers a set of laws drafted for the common good.

Access to justice understood procedurally is centred on providing access to the “formal justice system (courts, tribunals, lawyers and judges) and its procedures.”¹⁹ The cycle of procedural access to justice starts with justiciability: an individual’s ability to claim rights before a court of law. Then, judicial institutions must be made sufficiently available, accessible, and of good quality. Finally, individuals must be provided with appropriate remedies and accountability for the enforcement of such remedies.²⁰

Barriers to procedural justice are thus centred on costs, as the financial ability to access legal representation; institutional delays, as the efficiency of judicial institutions; and physical access, based on both geography and remoteness of individuals and the financial ability to get to courts. Two approaches can be taken to improve access to procedural justice. The first is to improve the ‘supply side’: “enhance the capacity of the... judicial systems to cope with the demands.”²¹ The second focuses on the ‘demand side’ by facilitating access of use of courts for those with legal issues.²² This includes linguistic accessibility (interpreters to tackle language barriers), economic accessibility (waiving court fees, subsidizing legal representation and transportation costs, legal aid, etc.), and physical or virtual accessibility of courts (technology “as a way to bridge distance between... litigants and courtrooms”²³).²⁴

ii) Substantive Fairness: A “Thicker” Approach

Substantive justice focuses on just outcome. It recognizes that, in practice, procedural “access to law may or may not result

¹⁹ Aylwin & Moore, *supra* note 13.

²⁰ See Skinnider & Montgomery, *supra* note 12 at 22.

²¹ Yash Ghai & Jill Cottrell, eds, *Marginalized Communities and Access to Justice* (Abingdon: Routledge, 2010) at 4.

²² See Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 at 970.

²³ Statz, Friday & Bredeson, *supra* note 17 at 337.

²⁴ See Skinnider & Montgomery, *supra* note 12.

Access to Justice, Land Tenure Security, and Small-Scale
Farming: Fulfilling the Right to an Adequate Standard of Living

in access to substantive justice.”²⁵ While procedural access to justice is limited to access to the law, substantive access to justice adopts a broader meaning of justice that seeks to help achieve a just outcome. It is more than “increasing the number of... courts, and lawyers... rather it is about helping people to achieve the good life.”²⁶ Justice is defined by asking whether it enabled “access to the kind of life...people would like to live... [by] accessing equality, understanding, education, food, housing, security, happiness.”²⁷

Substantive justice understands access to justice as beyond procedural access to include access to legal knowledge, legal expertise, and judicial institutions.²⁸ These services are viewed as “operating on a continuum”, whereas “self-help” services are found at one extremity and “full representation” at the other.²⁹ Self-help services are those focused on the notion that access to justice requires awareness and understanding of rights, obligations, and laws.³⁰ Awareness of laws, rights and obligations will enable individuals to identify whether their rights are being violated, provide them with the knowledge about how to prevent legal issues, and encourage them to become active participants in negotiations to achieve a just outcome.³¹ Understanding legal procedures will provide individuals with knowledge on the correct manner to undertake custom legal procedures (e.g., drafting contracts for the sale of land) as to ensure that their rights are protected in the event of a conflict.³² Self-help services include access to public legal education information and legal guidance. In the middle of the spectrum are services such as legal research,

²⁵ Pepper, *supra* note 15 at 273.

²⁶ Farrow, *supra* note 22 at 971.

²⁷ *Ibid* at 983.

²⁸ See Nkonge, *supra* note 11 at 13.

²⁹ Aylwin & Moore, *supra* note 13 at 25.

³⁰ See *Dry Association Limited v Capital Markets Authority & Anor Nairobi* (2011), High Court of Kenya at Nairobi Constitutional and Human Rights Division, Petition No. 358 at para 110.

³¹ See Aylwin & Moore, *supra* note 13 at 23.

³² See Pepper, *supra* note 15 at 270.

legal advice, and legal document drafting from legal clinics.³³ Full representation includes both ADR mechanisms and judicial proceedings.³⁴

B. Access to Justice on the International Stage

Some international instruments do not explicitly mention access to justice. Instead, the right to access justice derives from the right of equality before the law and equal access to a fair judicial proceeding; indeed, “treatment can hardly be considered equal if an entire segment of the citizenry is effectively denied access to the means to secure and protect their rights.”³⁵ Article 14 of the *International Covenant on Civil and Political Rights*³⁶ guarantees a right, equally to everyone, to a “fair and public hearing by a competent, independent and impartial tribunal.” Additional procedural protections are provided for those charged with criminal offences to ensure that procedural justice remains accessible to all. For example, legal assistance and representation at no cost for individuals who do not have the means to pay for it, access to an interpreter during court proceedings at no charge, and protection against undue delays. Similarly, Article 10 of the *Universal Declaration of Human Rights* enshrines access to justice through a right to equal access to a fair trial. It goes further by guaranteeing a right to an effective remedy as part of the meaning of justice.³⁷ Equal protection of the law and an equal right to have a cause heard is also part of the *African Charter on Human and People’s Rights*.³⁸ This Charter additionally provides a right to an appeal for violations of rights.

³³ See Antti Rissanen, “Legal Aid in Finland” in Ole Hammerslev & Olaf H Ronning, eds, *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave MacMillan, 2017) at 77.

³⁴ See Aylwin & Moore, *supra* note 13 at 25.

³⁵ Pauline Mudeshi Muhanda, *Access to Justice for Persons Living in Poverty: The Legal and Institutional Framework in Kenya* (Masters of Laws, University of Nairobi, 2013) [unpublished] at 38.

³⁶ *International Covenant on Civil and Political Rights*, 19 December 1966, No. 14668 vol. 999 arts 14.1, 3(c)(d)(f) [ICCPR].

³⁷ See *UDHR*, *supra* note 1 arts 8, 10.

³⁸ See *African Charter on Human and People’s Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 arts 3, 7 (entered into force 21 October 1986).

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

Other international instruments explicitly include access to justice. The *Hague Convention on International Access to Justice*³⁹ provides that any nationals or residents of a State Party to the Convention has equal access to justice through access to legal aid and access to legal advice. The *Convention on the Elimination of All forms of Discrimination against Women* (CEDAW) guarantees equality before the law between men and women, both in terms of legal capacity and opportunity to exercise this capacity. While the CEDAW does not explicitly mention access to justice, General Recommendations made by the CEDAW Committee provide guidance for State Parties on a multidimensional approach to access to justice that promotes both legal aid and legal education and awareness of rights.⁴⁰ These recommendations also focus on access to justice for rural women, recognizing the particular barriers these women face.⁴¹ Finally, access to justice is central to the UN Sustainable Development Goal 16.3: “Promote the rule of law at the national and international levels and ensure equal access to justice for all.”⁴² This goal recognizes the inseparability of “access to justice, poverty reduction, and inclusive growth.”⁴³

III. Land Tenure Security, Access to Justice, and the Living Standards of Poor Rural Farmers

Land and the ability to secure one’s right to retain it by accessing legal information and services is of crucial importance for the majority of the population in the developing world. Two-

³⁹ See *Convention on International Access to Justice*, 25 October 1980, No. 26112 vol. 1510 arts 1-2.

⁴⁰ See *Convention on the Elimination of All Forms of Discrimination against Women Committee, General recommendation on women’s access to justice*, CEDAW/C/GC/33, 23 July 2015.

⁴¹ See *Convention on the Elimination of All Forms of Discrimination against Women Committee, General recommendation No. 34 (2016) on the rights of rural women*, CEDAW/C/GC/34, 7 March 2016.

⁴² United Nations, “Goal 16: Promote just, peaceful and inclusive societies” (last visited 28 June 2023), online: *Sustainable Development Goals* <un.org/sustainabledevelopment/peace-justice/>.

⁴³ See OECD, Open Society Foundations, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All*, Issues Brief (2016) at 3.

thirds of the developing world's population are small-scale farmers.⁴⁴ Small-scale farming is defined as farms with "a low asset base and operating in less than 2 hectares of cropland."⁴⁵ Production means are mainly based on human labour rather than machinery.⁴⁶ Small-scale farming is used for two purposes: subsistence and productive activities. The former means that farming is used to fulfill the nutritional needs of the family, while the latter is used to sell farming outputs in markets. However, small-scale farmers struggle to be competitive in larger market as they have limited access to technology, markets, and financial resources.⁴⁷ For this reason, small-scale farming in developing countries is primarily for subsistence purposes.⁴⁸ Any surplus is sold directly to consumers at local farmers' market.⁴⁹ Small-scale farming is contrasted with productive farming, whereas large-scale production is specialized to mass production of a single or few crops.⁵⁰

For the small-scale farmer, property rights provide much needed stability in order to achieve an adequate standard of living. The following section will first provide an overview of access to justice for the rural poor by discussing three main barriers: (1) shortages in the provision of services; (2) indirect costs incurred in rural contexts; and (3) legal knowledge and access to legal information. Then, it will provide an overview of the current literature on two impacts of secure land tenure in poor rural contexts: (1) tenure security and economic development; and (2) tenure security and farmers' living standards. It will be argued that security in land tenure provides small-scale farmers

⁴⁴ See George Rapsomanikis, *The economic lives of smallholder farmers: An analysis based on household data from nine countries* (Food and Agriculture Organization of the United Nations, 2015) at 1.

⁴⁵ InforMEA, "Small-scale farming" (last visited 28 June 2023), online: InforMEA <informea.org/en/terms/small-scale-farming>.

⁴⁶ See Encyclopædia Britannica, "Subsistence farming" (last visited 28 June 2023), online: *Encyclopædia Britannica* <britannica.com/topic/subsistence-farming>.

⁴⁷ See InforMEA, *supra* note 45.

⁴⁸ See Rapsomanikis, *supra* note 44 at 27.

⁴⁹ See Appropedia, "Small scale agriculture" (last visited 28 June 2023), online: Appropedia <appropedia.org/Small_scale_agriculture>.

⁵⁰ See Rapsomanikis, *supra* note 44.

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

with greater food security, and an ability to participate in the economy.

A. Access to Justice for the Rural Poor

The following will start by discussing the importance of providing access to justice has positive impacts on poor, rural farmers by providing them with the means to protect their rights over their property. However, those living in rural settings face greater barriers to accessing the justice system and legal services. Indeed, the more economically developed an area is, the more justice becomes accessible.⁵¹ Factors which improve access to justice—such as well-maintained roads, access to internet, reliable public transport, etc.—are more commonly found in urban centres. The remaining of this section will focus on discussing these barriers. First, rural areas experience shortages in service delivery, which can be explained by their geographic isolation and economies of scale. This has an impact on both the availability and diversity of legal services. Second, accessing justice in rural areas imposes an additional financial burden due to limited accessibility to free public legal services, as well as distance-related travel and transportation costs. Finally, low access to internet and illiteracy renders access to legal information and the opportunity to undertake self-help services extremely burdensome.

i) Importance of Accessing Justice for Rural Poor

While almost everyone will face a justiciable issue over the course of their lifetime,⁵² vulnerable populations are more susceptible to legal issues.⁵³ Legal problems are “indivisible from other socio-economic and demographical issues”;⁵⁴ indeed, when facing a legal issue, poor individuals are more susceptible to face other non-legal challenges than less vulnerable individuals. Individuals living in rural settings are part of such groups. Many factors explain cycles of poverty in rural settings, such as lower

⁵¹ See Andrii Lapkin, “The problems of access to justice in rural areas (on the example of Ukraine)” (2019) 68 SHS Web of Conferences 1 at 7.

⁵² See CBA Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act*, (Ottawa, ON: Canadian Bar Association, 2013) at 34.

⁵³ See Farrow, *supra* note 22 at 963.

⁵⁴ Aylwin & Moore, *supra* note 13 at 16.

levels of education, fewer job opportunities, where those available are seasonal or particularly susceptible to economic downturns, as well as lower access to health care leading to poorer health in general. The cluster of legal and non-legal problems leads to a decline in productivity and traps individuals in a cycle of poverty.⁵⁵

Access to justice is crucial to improving the standard of living of small-scale farmers. Access to justice is central to implementing SDGs relating to *eradication of poverty and hunger* as it “gives farmers... the tools they need to improve their tenure security” and ensure that contracts are enforced in practice, “leading to more productive investment.”⁵⁶ This is supported by a survey undertaken by the Asian Development Bank (ADB) among farming communities in the Philippines. The ADB collected data from four communities: two which were subject to legal empowerment activities and two without. Legal empowerment initiatives included training “farmer-paralegals” with “basic legal skills and knowledge necessary to utilize the law and the legal system to advance their land rights”, running legal clinics, and assisting land transfers. The results showed that areas with legal empowerment activities experienced higher income, more disposable income, and greater farm investments.⁵⁷

A substantive approach to access to justice is essential in improving the living standards of poor, rural farmers. As mentioned at the onset of this paper, holding title or land tenure does not equate land tenure security, which is the trust one holds towards their ability to retain and enforce land tenure against third parties. Indeed, even if land title is granted, or a court judgment confirming land ownership is issued, it does not mean that it will translate as such in practice. In such cases, the situation of individuals remains unchanged.⁵⁸ Under a substantive justice

⁵⁵ See OECD, *supra* note 43 at 6; Aylwin & Moore, *supra* note 13 at 16.

⁵⁶ OECD, *supra* note 43 at 3.

⁵⁷ See Asian Development Bank, *Law and Policy Reform at the Asian Development Bank: Effective legal systems for sustainable development* (Philippines, 2016), online (pdf): [Asian Development Bank <adb.org/sites/default/files/publication/29683/lpr-adb.pdf>](https://www.adb.org/sites/default/files/publication/29683/lpr-adb.pdf).

⁵⁸ See Muriel Veldman, “Land Disputes, Land Tenure Registration and Access to Justice in Fragile and Conflict Affected States: Questioning our Assumptions” (28 August 2020), online: *Knowledge Platform Security & Rule of Law*

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

perspective, justice is not served. To achieve land tenure security, small-scale farmers need to believe that access to justice will lead to a better outcome and an improved situation. Simply providing access to procedural justice is not enough. To do so, there must be consistent and reliable access to justice for small-scale farmers aimed at achieving *just-outcomes*.

ii) Barriers

a. Geography & Shortages in Service Delivery

The *availability* and *diversity* of legal services in rural areas is significantly inferior compared to urban centres. This is explained by economies of scale: providing services in low populated areas costs more to deliver less. This results in a shortage in service delivery, whereas physical service points of both public institutions—judicial and administrative—and private legal services, such as lawyers, legal clinics, etc., are more scattered. Therefore, individuals in rural settings have fewer lawyers to choose from, must travel greater distances to reach them, and have limited to no access to specialized legal services, which are often concentrated in urban centres where there is greater demand. The limited number of lawyers practicing in rural areas partly stems from a retention issue as young lawyers tend to agglomerate in urban centres where there is greater opportunity for professional growth and practice specialization. Rural lawyers tend to have a more generalized practice to serve a wide range of issues, often due to being part of the few, if not the only, lawyer in a region. Barriers both in availability and diversity of legal services can lead to legal issues being inadequately attended to or not addressed at all, increasing one's vulnerability to further legal trouble.⁵⁹

b. Costs

Costs of accessing justice include both direct costs, such as obtaining legal representation, court fees, lawyer fees, bureaucratic fees, etc. but also indirect costs, such as opportunity costs, childcare, and those related to shortages in service delivery. The latter are of particular relevance to the situation of individuals living in rural settings. Shortages in service delivery impose two

[<kpsrl.org/publication/land-disputes-land-tenure-registration-and-access-to-justice-in-fragile-and-conflict-affected-states-questioning-our-assumptions#>](https://kpsrl.org/publication/land-disputes-land-tenure-registration-and-access-to-justice-in-fragile-and-conflict-affected-states-questioning-our-assumptions#>).

⁵⁹ See Aylwin & Moore, *supra* note 13 at 29–30.

major indirect costs on individuals, both of which are a consequence of economies of scale. First, availability of free public legal services is much lower in rural areas. Individuals are thus forced to pay for legal services, which can, depending on their income level, prevent them from accessing such services.⁶⁰

Second, as individuals in rural settings must travel greater distances to access legal services and infrastructure, it imposes on them the increased cost of transportation, a factor that can represent a tremendous challenge for those living in poverty. As public transportation is often unavailable, irregular, or unreliable in rural areas, accessing legal services requires access to private means of transportation (e.g., vehicle, taxi services, etc.), as well as having the means to cover the costs related to such transportation. Additionally, inadequate road maintenance may prevent individuals from using them in poor weather conditions. Both the limited access to free public services and the requirement to travel greater distances are indirect financial burdens which further bar access to justice for those living in rural settings.⁶¹

c. *Legal Information & Knowledge*

Poor, marginalized individuals in rural settings face greater barriers in accessing legal information. Access to justice cannot be achieved without the knowledge of the existence of certain rights and the manner in which such rights can be enforced by the judiciary. In rural settings, low levels of education, illiteracy and the digital divide impede individuals' ability to recognize the legal nature of the issues they face and identify potential legal remedies for such issues. Those who are illiterate cannot read or understand laws even if they are made available to them. Even among those who are literate, lack of access to internet and the digital divide often prevents individuals from educating themselves about their rights, and from accessing information regarding services available to them. Barriers related to transportation, as discussed above, apply equally to the ability of an individual to access other public resources which could facilitate access legal information, such as public computers at local libraries as an example.⁶²

⁶⁰ See *ibid* at 35.

⁶¹ See *ibid* at 31–32.

⁶² See Muhanda, *supra* note 35 at 44; OECD, *supra* note 43 at 7, 8; Aylwin & Moore, *supra* note 13 at 30–31.

B. Impacts of Land Tenure Security in Rural Contexts: A Literature Review

i) Tenure Security & Economic Development

Securing property rights has been shown to have a positive impact on economic development. This is based on the theory of property rights in a market economy. Property rights, which grant the holder the right to do what they please with the land, such as developing, renting, or selling their land, are a pre-condition to all market transactions.⁶³ Land titling increases stability of property rights by formalizing one's ownership of land, facilitates and reduces costs of land transactions by clarifying ownership, and provides a means to enforce such right against any intruding third party.⁶⁴

The literature proposes three main effects explaining the positive impact of land tenure security on economic behaviour of farmers: (1) the security effect (related to investment incentives); (2) the collateral effect (related to access to credit); and (3) the market transaction effect.

First, the literature proposes that land titling creates an effect of security incentivizing poor rural farmers to invest, which improves productivity, consumption expenditure and income.⁶⁵

⁶³ See Will Kenton, "What are property rights and why do they matter?" (22 May 2022), online: *Investopedia* <[investopedia.com/terms/p/property_rights.asp](https://www.investopedia.com/terms/p/property_rights.asp)>.

⁶⁴ See Jianghua Guan et al, "Impact of Confirmation of Farmland Rights on Farmers' Welfare: Based on the Micro-Empirical Investigation of Farmers in China" (2022) 14 Sustainability at 2.

⁶⁵ See Timothy Besley, "Property Rights and Investment Incentives: Theory and Evidence from Ghana" (1995) 103:5 J Pol Econ 903 at 906; Lee J Alston, Gary D Libecap & Robert Schneider, "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier" (1996) 12:1 JL Econ & Org 25 at 35; Steven Lawry et al, "The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: a Systematic Review" (2014) 1 Campbell Systematic Reviews 1; Klaus Deininger & Songqing Jin, "Tenure security and land-related investment: Evidence from Ethiopia" (2006) 50:5 Eur Econ Rev 1245; Klaus Deininger, Daniel A Ali & Tekie Alemu, "Impacts of Land Certification on Tenure Security, Investment, and Land Market Participation: Evidence from Ethiopia" (2011) 87:2 Land Econ 312 at 330; Stein T Holden & Hosaena Ghebru, "Land tenure reforms, tenure security and food security in poor agrarian economies: Causal linkages and research gaps" (2016)

The security effect allows for long-term planning since “investment in land improvements will be made on the basis of expected returns.”⁶⁶ By providing a means to enforce ownership over land, land titles guarantee farmers that they will reap the benefits from their investment.⁶⁷ Insecure land rights “encourage survival strategies with short-term horizons”⁶⁸ as farmers have no incentives to invest if “the fruits of their investments are seized by others.”⁶⁹ Yet, not all studies support this theory, some finding little evidence of the impact of land registration on farm productivity and investments.⁷⁰ Furthermore, productive farm investment has also been associated with tenure insecurity, whereas farmers increasingly invest to reinforce their claim of ownership rights over it.⁷¹ However, this mainly arose in contexts of customary land tenure in Africa, for which tenure is often less clear than systems based on land titling and registration. In any case, conflicts related to land reduces farm productivity. In fact, a study in Kenya found that future dispute concerns reduced land productivity by 9% while ongoing disputes reduced productivity by 13%.⁷² Another study in Uganda found that land conflicts lead to

10 Global Food Sec 21; Ephraim W Chirwa, “Land Tenure, Farm Investments and Food Production in Malawi” (2008) Research Programme Consortium on Improving Institutions for Pro-Poor Growth Working Paper No. 18; Chiara Salvetti et al, “Secure property rights and development: Economic growth and household welfare” (2014) UK Department for International Development, Property Rights Evidence Paper at 71.

⁶⁶ Alston, Libecap & Robert, *ibid* at 23.

⁶⁷ See Lawry et al, *supra* note 65 at 6.

⁶⁸ Milu Muyanga & Raphael Gitau, “Do Land Disputes Affect Smallholder Agricultural Productivity? Evidence from Kenya” (2013) 4:14 J Econ and Sustainable Dev 112 at 112.

⁶⁹ Besley, *supra* note 65.

⁷⁰ See John W Bruce et al, *Searching for land tenure security in Africa*, ed (Washington, DC: The World Bank, 1994).

⁷¹ See Holden & Ghebru, *supra* note 65 at 25; Catherine L Besteman, *Land tenure in the Middle Jubba: Customary tenure and the effect of land registration*, ed (Madison, WI: Land Tenure Center, University of Wisconsin, 1990).

⁷² See Muyanga & Gitau, *supra* note 68 at 119.

“economically highly disruptive consequences” and a loss in productivity of up to 11%.⁷³

Second, the literature on titling and economic development also brought forward the idea of a collateral effect, whereas title can increase accessibility of credit and increase economic growth, capital being a necessary element for investment. Clear title allows farmers to use land as collateral and reduce constraints on accessing investment funding.⁷⁴ However, studies have found little evidence supporting that claim.⁷⁵ A study in Kenya showed that land titles were rarely used as collateral because of the high risk of losing such asset through default. Indeed, poor, rural farmers in Kenya often lack the education and marketable skills for accessing alternate career opportunities. Furthermore, small-scale farmers were reluctant to use credit at all, fearing an inability to repay, which does not support a claim that secure land tenure systems lead to the “development of active rural credit markets.”⁷⁶ Studies show that instead other forms of security for credits were used, such as buildings and proof of off-farm employment.⁷⁷

The final rationale found in the literature explaining the link between economic development and land tenure is that title of land enhances a title holder’s possibility to gain from land transactions, whether this would be by selling or renting it.⁷⁸ Accessibility to the rental market is associated with both increased income and food security.⁷⁹

ii) Tenure Security & Rural Farmers’ Living Standards
a. *Impact on Living Standards: Food Security*

⁷³ Klaus Deininger & Raffaella Castagnini, “Incidence and impact of land conflict in Uganda” (2004) The World Bank Working Paper 3248 at 17.

⁷⁴ See Alston, Libecap & Robert, *supra* note 65 at 24; Besley, *supra* note 65.

⁷⁵ See Holden & Ghebru, *supra* note 65; Salvetti et al, *supra* note 65 at 71-72; Bruce et al, *supra* note 70; Carrie B Kerekes & Claudia R Williamson, “Propertyless in Peru, Even with a Government Land Title” (2010) 69:3 Am J Econ & Soc 1011.

⁷⁶ Bruce et al, *supra* note 70 at 255.

⁷⁷ See *ibid* at 135.

⁷⁸ See Besley, *supra* note 65.

⁷⁹ See Holden & Ghebru, *supra* note 65; Carolyn K Lesorogol, “Privatizing pastoral lands: Economic and normative outcomes in Kenya” (2005) 33:11 World Dev 1959.

Agriculture through small-scale farming “remains a fundamental source of livelihood, subsistence, and food security for rural people...in developing countries” and “secure land tenure for rural people is extremely important.”⁸⁰ Secure property rights improve food security and “act as a safety net in times of hardship.”⁸¹

Food security is defined as “when all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs.”⁸² Food security has four components. First, physical availability of food relies on levels of food production and its supply in a market. Second, economic, and physical access to food relates to the ability to purchase food or to go to where food is being sold. Third, food utilization relates to food preparation practices and one’s ability to maintain a diversified diet. Finally, stability relates to food availability, access, and utilization over time allowing for a continuation of food security. All four components are required for food security to be achieved. Food insecurity, on the other hand, is intertwined with poverty. While poverty often causes food insecurity, hunger, and malnutrition, the reverse is also true: food insecurity leads to poor physical and cognitive development and low levels of productivity resulting in one being caught in this endless cycle of poverty.⁸³

Secure property rights allowing for stable small-scale farming help achieve food availability and accessibility for the rural poor in developing countries. Three kinds of small-scale farmers exist, categorized depending on their participation in the market and level of production. Net sellers are those who produce more than they consume. Net buyers are farmers who produce less than their consumption needs and must purchase it on the market. Self-sufficient farmers break even.⁸⁴ In any case, secure

⁸⁰ UN-HABITAT, *Secure Land Rights for All* (Nairobi, Kenya: United Nations Human Settlements Programme, 2008) at 2.

⁸¹ *Ibid* at 13.

⁸² The World Bank, “What is food security?” (last visited 29 June 2023), online: *The World Bank* <worldbank.org/en/topic/agriculture/brief/food-security-update/what-is-food-security>.

⁸³ See FAO, “An introduction to the basic concepts of food security” (last visited 29 June 2023), online: *FoodSec* <fao.org/3/al936e/al936e00.pdf>.

⁸⁴ See Alain de Janvry & Elisabeth Sadoulet, “Subsistence farming as a safety net for food-price shocks” (2011) 21:4–5 *Dev in Practice* 472 at 476.

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

and stable access to land provides poor small-scale farmers in developing countries some level of food security, whether they are net buyers, net sellers or self-sufficient.⁸⁵ Studies have found that food security is positively impacted through tenure security due to increased farm productivity.⁸⁶ Another study found that tenure insecurity leads to land degradation due to poor land management, which negatively impacts farm productivity and results in food insecurity.⁸⁷ A study in India found that, while small-scale farmers had lower income than landless households, small-scale farmers had greater food sufficiency and better wellbeing index than landless households.⁸⁸

Subsistence farming also serves as a protective mechanism against volatile international food prices. Developing countries do not have the same administrative and financial capacity than some more developed nations to implement sound policy instruments mitigating the impacts of price changes in a globalized economy. In low-income countries, where state capacity is limited, subsistence farming offers a protective mechanism against food insecurity for the rural poor in times of sudden rises in food prices.⁸⁹

It is true that for most small-scale farmers, neither subsistence farming nor income from small-scale farming's surplus is enough to meet a family's basic needs.⁹⁰ Small-scale farmers require a diversified income, from both farm activities and off-farm jobs. However, "access to productive land... provides a supplementary source of food and an important safety net for both the employed and unemployed."⁹¹

b. Impact on Living Standards: Economic Participation & Financial Security

⁸⁵ See Lawry et al, *supra* note 65 at 14.

⁸⁶ See Chirwa, *supra* note 65.

⁸⁷ See Holden & Ghebru, *supra* note 65.

⁸⁸ See Kirit Patel et al, "The interplay between household food security and wellbeing among small-scale farmers in the context of rapid agrarian change in India" (2015) 4:1 *Agric & Food Secur* 16.

⁸⁹ See de Janvry & Sadoulet, *supra* note 84 at 478.

⁹⁰ See Rapsomanikis, *supra* note 44 at 21–23.

⁹¹ UN-HABITAT, *supra* note 80 at 16.

Economic participation refers to an ability to participate in the local or global market economy and benefit from the economic resources and financial security resulting from participation. The financial, social and health benefits arising from economic participation are central to one's wellbeing and attainment of a quality living standard. For the rural poor, choices of economic participation leading to financial independence and security are limited; indeed, low education levels and lack of off-farm well-paid opportunities means that returns to labour are very low.⁹² Where agriculture is the main source of livelihood, secure property rights are a "prerequisite for productive investment."⁹³

Secure land tenure provides a gateway into economic participation for poor rural people in developing countries. The stability offered by land tenure creates incentives for financial and labour investments either to increase farm productivity or increase property value. Title to land provides holders with a "transferable asset which can be sold, rented out, mortgaged, loaned or bequeathed."⁹⁴ The increase in willingness to invest arising from secure land tenure is even greater for those with the least secure land tenure. Indeed, a study found that the positive effect of securing title on increasing investment was even greater for holders with lower initial tenure security.⁹⁵

IV. Solutions: A Case Study from Kenya

The literature review established three broad claims. First, providing greater security in land tenure has a positive impact on economic development. Second, for poor, marginalized small-scale farmers, tenure security improves living standards through better food security and increased opportunity to participate in the economy. Finally, access to justice is the tool required to ensure land tenure security for small-scale farmers. However, title to land does not equate land tenure security, the latter requiring

⁹² See Rapsomanikis, *supra* note 44 at 15.

⁹³ UN-HABITAT, *supra* note 80 at 14.

⁹⁴ UN-HABITAT, *supra* note 80 at 13.

⁹⁵ See R Fort, "The homogenization effect of land titling on investment incentives: Evidence from Peru" (2008) 55:4 NJAS: Wageningen J Life Sci 325.

consistent substantive access to justice focused on just-outcomes to maintain one's trust on their ability to maintain their right to land over time despite risks of future land disputes. Yet, it was established that poor rural farmers face particular barriers that result in greater difficulty accessing legal services and judicial institutions. Indeed, it is inevitable that small-scale farmers will have dealings with legal institutions, whether that be in the context of a legal dispute over land or during legal processes such as land registration, title transfer, land transactions, grants of probate, lease contracts, etc. How can access to justice barriers be addressed to facilitate land tenure security and improve the living standards of small-scale farmers?

This section will focus on solutions. The design of appropriate solutions to local access to justice problems require an understanding of (1) the population's legal needs, and (2) their experiences in accessing justice.⁹⁶ Adopting a substantive approach to justice will ensure that focus is given on ensuring that the "improvement brought about by the resolution of the problem ought to lead to improved welfare of the individual."⁹⁷ The following will use a case study from Kenya to evaluate the applicability to access to justice initiatives in context. It will start by providing an overview of the Kenyan context, the legal framework around access to justice, the legal needs of rural Kenyans, and their experience with accessing justice. Finally, it will discuss a new initiative, the Kenya-Canada-Remote Legal Aid Project, as a potential solution to increasing access to justice, enforce tenure rights and improve rural farmers' living standards.

A. Kenyan Context

Kenya has one of the most extensive land registration systems in Sub Saharan Africa. This is due to colonial policy reforms starting in the 1970s where an agricultural intensification program led to the attribution of land titles and registration to farmers. This policy was continued upon Kenya's independence in 1963.⁹⁸ Today, agriculture is a key driver for economic growth

⁹⁶ See OECD, *supra* note 43 at 9.

⁹⁷ Skinnider & Montgomery, *supra* note 12 at 15.

⁹⁸ See Bruce et al, *supra* note 70 at 119–20.

in Kenya and accounted for a quarter of Kenya's GDP between 2015 and 2020.⁹⁹ Almost three quarters of Kenya's population lives in rural areas,¹⁰⁰ of whom 90% derive their livelihood directly from land.¹⁰¹ With only 30% of Kenya's land having potential for farming, Kenya has one of the highest agricultural population densities.¹⁰² Farm sizes tend to be small which incentivizes farmers to favour intercropping for subsistence purposes rather than specializing in high-value cash crops and relying on the market for subsistence. Land is mainly acquired through the subdivision of inherited land between direct family members. However, with increasing pressures arising from population density, each new generation inherits smaller portions of land than the previous one.¹⁰³ Given the importance of agriculture for the livelihood of small-scale farmers in Kenya, security in land tenure and access to justice is paramount.

B. Legal Framework on Access to Justice

Access to justice is a central tenant of the *Constitution of Kenya*.¹⁰⁴ Article 48 enshrined the duty of the State to guarantee equal access to justice in Kenya. The minimum standards to access to justice are set out in article 159, which states that justice is to be achieved by all, without delay, and that substantive justice should be favoured over procedural technicalities. The right to a fair trial includes the right to a lawyer, and, in the case of accused persons, the right to free legal representation if substantial injustice would otherwise result. The Kenyan Constitution further attempts to minimize procedural barriers to access to justice by ensuring that any fee shall be reasonable as to not impede access to justice (art 48) and forbidding that any fees be charged for

⁹⁹ See The World Bank, *Securing Future Growth: Policies to Support Kenya's Digital Transformation*, Kenya Economic Update, Edition No. 20 (2019) at 3.

¹⁰⁰ See The World Bank, "Rural population (% of total population) - Kenya" (last visited 29 June 2023), online: [Data <data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=KE>](https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=KE).

¹⁰¹ See Dali Mwagore, *Land Use in Kenya: The Case for a National Land Use Policy*, Land Reform vol. 3 (Nakuru, Kenya: Kenya Land Alliance, 2015) at 3.

¹⁰² See Bruce et al, *supra* note 70 at 119.

¹⁰³ See *ibid* at 128.

¹⁰⁴ *Constitution of Kenya*, 2010, 2010.

starting proceedings (art 22). Finally, the Kenyan Constitution encourages the use of alternative dispute resolution mechanisms, such as reconciliation, mediation, arbitration, and traditional dispute resolution (art 159).¹⁰⁵

Legal aid is enshrined in the Kenyan Constitution and further implemented by the *Legal Aid Act*. Legal aid is a state-subsidized legal representation in court for low-income citizens. The correlation between access to justice and access to legal representation in court stems from a procedural understanding of access to justice, which means both access to legal institutions, such as courts, but also to the services of lawyers, whose role is to provide access to law.¹⁰⁶ The principle of equality of access creates an obligation for the state to “provide legal assistance to individuals wishing to make effective use of society’s dispute resolution processes” but that could not otherwise afford it.¹⁰⁷ In Kenya, legal aid is guaranteed constitutionally in criminal cases while the *Legal Aid Act* provides for legal aid in limited areas of civil cases.¹⁰⁸ To have access to such programs, one usually must demonstrate an inability to pay for legal representation.¹⁰⁹ Such program is aimed at ensuring access to justice for poor, marginalized individuals. However, legal aid has been mainly concentrated in urban areas, leaving out most of its target population.¹¹⁰

C. *Understanding Legal Needs in Rural Kenya*

A study from 2017 found that 63% of the Kenyan population dealt with one or several legal issues in the previous four years, with those with lower income and education levels

¹⁰⁵ See *ibid* arts 22, 48, 50, 159.

¹⁰⁶ See Pepper, *supra* note 15 at 274.

¹⁰⁷ Marshall J Breger, “Legal Aid for the Poor: A Conceptual Analysis” (1982) 60:2 NCL Rev 281 at 287.

¹⁰⁸ See Nancy M Baraza & Kennedy Kimani, “Kenya” (last visited 29 June 2023), online: *Global Access to Justice Project* <globalaccesstojustice.com/global-overview-kenya/?tab=5.-legal-aid-system>.

¹⁰⁹ See Don Fleming, “Legal Aid and Human Rights” (delivered at the International Legal Aid Group Conference, Antwerp, 6-8 June 2007) [unpublished] at 3.

¹¹⁰ See Bazara & Kimani, *supra* note 108.

experiencing multiple legal problems more often.¹¹¹ Land disputes are the second most common legal issue in Kenya and are significantly more prevalent among rural inhabitants and those with lower levels of education. Land disputes involve disputes over boundaries, access to land, ownership or use of land, or land grabbing, mainly arising through legal processes such as inheritance and land transactions. However, the study found that only 38% of land disputes had been resolved, 40% remained unresolved, and the remaining had lost hope on achieving justice. Compared with other legal issues, land disputes cost more time and money, and result in more stress and loss of time.¹¹²

D. *Experience Accessing Justice in Rural Kenya*

The following offers an overview of the experience in accessing justice in Kenya through two means: (1) accessing legal information or advice, and (2) taking action to resolve the dispute. First, a quarter of Kenyans do not seek any information or advice when faced with a legal issue. The reasons given were a lack of knowledge of the existence of legal remedies for their issue, a belief that seeking advice would not help, a lack of knowledge about how to seek assistance, and a lack of financial means to afford it. However, for those who do seek legal information and advice, three sources are available: informal (friends, family, elders, etc.), institutional (Chief, police, courts, lawyers), and public sources (internet, radio, newspaper, etc.). Informal sources are the most common, which are even more prevalent for legal issues related to land. Institutional sources closely follow, with low-income rural inhabitants favouring the Chief over courts, lawyers, or police. Public sources were the least used as more than a quarter did not know where to find it.¹¹³

Second, one in five people will not take any action to resolve legal issues.¹¹⁴ The main reasons for inaction were: a belief that acting would not lead to a positive result, a fear of

¹¹¹ See Hiil, *Justice Needs and Satisfaction in Kenya* (The World Bank & Judiciary of Kenya, 2017) at 27.

¹¹² See *ibid* at 30, 36, 100, 102, 105, 116–17.

¹¹³ See *ibid* at 49–58.

¹¹⁴ See Bazara & Kimani, *supra* note 108.

facing a more powerful party, a lack of knowledge on how to proceed, a perceived ineffectiveness of the judicial system, a fear of aggravating relationships, and a lack of financial means.¹¹⁵

Kenyans with higher education levels and wealth are more likely to both seek legal information and advice and to take action to resolve disputes.¹¹⁶ This is the result of greater barriers faced by poor, rural Kenyans in accessing justice. Rural farmers must travel great distances to reach courts or lawyers which imposes greater financial burdens and causes greater delays. Land disputes mostly being in rural areas, difficult access to public registry offices prevents access to essential evidence required for such disputes, such as birth certificates and land titles. Internet based services remain mostly inaccessible with only 17% of the Kenyan rural population using internet weekly.¹¹⁷ Lack of legal aid, especially in rural areas, means that many poor, rural farmers in Kenya are left navigating the judicial system on their own. However, most living in poverty in rural areas speak their local language and are sometimes illiterate. As the judicial system in Kenya is done in English and relies heavily on written submission, this poses great barriers to poor, marginalized farmers in rural Kenya.¹¹⁸

Corruption and bribing practices in the judicial system in Kenya is a major barrier to accessing justice for poor, marginalized groups. Poor parties who cannot afford to pay bribes are faced with greater delays while those with more financial means can ensure greater efficiency.¹¹⁹ When faced with a more powerful party in a legal dispute, poor individuals are more than twice as likely to not take action than high-income groups. Indeed, Kenyans have greater trust in NGOs dedicated to legal aid and traditional justice mechanisms than in public institutions, such as courts, government, and the police. With regards to courts specifically, almost 70% of Kenyans agreed with the statement that courts generally protect the interests of the rich and powerful over others. Corruption, bribing, and the belief that

¹¹⁵ See Hiil, *supra* note 111 at 62–75.

¹¹⁶ See *ibid* at 50, 64.

¹¹⁷ See World Bank Group, *supra* note 99 at 36.

¹¹⁸ See Muhanda, *supra* note 35 at 45–51.

¹¹⁹ See *ibid* at 49.

poorer individuals are disadvantaged at trial explains why Chiefs are more likely to be used by groups of lower income, lower education, and rural inhabitants, especially in the case of land disputes, while courts, police and lawyers are more popular in urban centres.¹²⁰

E. Kenya-Canada Remote Legal Aid Project

It has been established that the legal needs for poor, rural farmers in Kenya are mainly related to land disputes, which is of vital importance given that the vast majority derive their livelihood from the land. When assessing their experience accessing justice, it was established that poor, rural farmers face greater barriers such as limited financial capacity, geographic isolation, language barriers, lack of resources, corruption, and lack of access to internet, all of which impact their ability to identify their issue as a legal one, to access legal information and advice, and to take action to resolve their issue.

Given these circumstances, the KCRLA decided to open a legal information clinic in Kianyaga, a rural area in Kenya with a population mainly composed of small-scale farmers relying on land for agriculture and subsistence purposes.¹²¹ KCRLA seeks to bridge the gap between access to justice and poor rural farmers by providing free legal information services. In parallel, the KCRLA studies the long-term impacts of access to justice on economic development based on the theory that “land disputes, and the associated insecurity of property rights, may significantly dampen the incentives to exert effort, invest and innovate.”¹²² The KCRLA is formed on a partnership between the McGill Faculty of Law and Kenyatta University School of Law (KUSOL). Law students from each school are paired and work together on cases gathered by the local office in Kianyaga.¹²³

¹²⁰ See Hiil, *supra* note 111 at 62–75, 85, 87, 159.

¹²¹ See Adam Aberra & Matthieu Chemin, “Does legal representation increase investment? Evidence from a field experiment in Kenya” (2021) 150 J Dev Econ 1 at 4.

¹²² *Ibid* at 4.

¹²³ See Elimu, “Research projects” (last visited 29 June 2023), online: *Elimu Impact Evaluation Unit* <elimu.lab.mcgill.ca/projects.html>.

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

The clinic adopts a just-outcome approach to justice. It is not limited to facilitating access to law and the judicial system. Instead, the KCRLA seeks to find solutions which will lead to improved living standards for poor, rural farmers. Each case is individually assessed to find a solution which will bring the best outcome while costing the least stress, money, and time throughout the resolution process. Services include legal research, legal document drafting, collection of official documents (court perusals, land searches, etc.), court application filing, coaching for self-representation in court, attendance to court proceedings, and mediation facilitation.

While still at an early stage, the project has so far yielded positive results. As part of its success cases is one related to a dispute between family members over the division of land as part of an intestate succession process. The division process had been handled by the deceased's surviving son, who divided the land unequally, granting to the female beneficiaries significantly smaller portions of land. KCRLA's clients were part of these women: three daughters of a deceased son of the estate. Since none of KCRLA's clients were married, their father's portion of the estate was the only land they could rely on for subsistence and housing. Without a change in the status quo, these three women would not be provided with a reasonably sized land in order to meet their basic needs.

KCRLA's clients claimed that the grant of probate was fraudulent through the forging of their signatures. The dispute involved was two-fold. First, the client sought assistance regarding an ongoing court application to modify the grant of probate and include other dependants to the estate, a portion which should have been granted to the three women. KCLRA caseworkers gathered evidence, perused court documents, performed land searches, trained the clients for self-representation, accompanied them to court and guided them through procedures. The court ruled in KCRLA's favour and rejected the application for modification. Second, KCRLA's clients sought to be granted their fair share of the estate. KCRLA's caseworkers facilitated a mediation session during which the interests and demands of each party were heard and considered in the reaching of a mutually agreeable solution. The final agreement redistributed the land, which ensured that the women would be granted sufficient land to meet their needs and improve their living standards. By facilitating access to justice, while focusing on just outcomes, the KCRLA provides solutions which improve the welfare of clients.

V. Conclusion

Triangulating property rights, access to justice, and standards of living, the paper posits that access to legal aid has a positive impact on the wellbeing of poor farmers in rural communities. This paper emphasized the link between human rights and land in poor, rural contexts. The right to an adequate standard of living is a human right that should be guaranteed to everyone. However, achieving an adequate standard of living involves different factors in different contexts. This paper focused on the needs of poor, marginalized rural farmers, for whom small-scale farming is too often their only means for subsistence or entry into the local markets. For them, an adequate standard of living is intrinsically linked to securing their ability to retain access to land. This paper demonstrated that the living standards of poor small-scale farmers is improved through land tenure security. Access to justice is the tool small-scale farmers need to improve land tenure security. Solutions aimed at addressing barriers to access to justice in rural contexts require an understanding of the population's legal needs and their current experiences in accessing justice.

Equality before the law is an essential element of the rule of law but cannot be achieved without equal access to justice. The principle of access to justice is well established in human rights law at the international level. Access to justice can be understood through both a 'thin' or 'thick' approach. The former understands justice as purely procedural, and fairness is achieved after access to the institutions of justice (courts, lawyers, etc.) was facilitated. The latter focuses on just outcomes; fairness is achieved if the outcome has improved the situation of the individual. It involves procedural access but includes a much larger spectrum of services.

Land tenure security has an impact on economic development in poor, rural contexts. While the literature does not always agree, the majority of findings do support a positive relation between land tenure security and incentives to invest for small-scale farmers as it allows for long term planning and security of return on such investments. Land disputes, or the fear of future ones, do reduce farm productivity. The literature does not support, however, the proposition of a collateral effect from land tenure

Access to Justice, Land Tenure Security, and Small-Scale Farming: Fulfilling the Right to an Adequate Standard of Living

security. It remains unclear whether formalized title increases accessibility to credit, while farmers tend to avoid using their land as collateral given its importance for the survival of the whole family. Finally, access to land title and clear ownership facilitates economic transactions, while accessibility to rental markets provides an opportunity for additional income for small-scale farmers.

Land tenure security has an impact on the standard of living of poor small-scale farmers. While there exist many more aspects where land is connected to an improved standard of living in rural contexts, this essay focused on its impact on food security and opportunities to participate in the economy. Secure and stable access to land allows individuals living in poverty in rural settings to maintain some level of food security and to be protected against volatile international food prices. Tenure insecurity leads to decreased farm productivity, poor land management, and degradation of land, all of which negatively impact food security for small-scale farmers. Land tenure security is also a gateway into economic participation for poor rural farmers by providing incentives to increase farm productivity and property value, as well as providing the title holders with a transferable asset on a market economy.

Access to justice is thus the tool small-scale farmers need to achieve land tenure security. While land title provides property right in theory, access to justice focused on just-outcomes provides land tenure security in practice, which is the trust one holds with regards to their ability to enforce their property rights over time, especially in the event of challenges to such rights by third parties. However, small-scale farmers are faced with many barriers to accessing justice. Shortages in service delivery due to economies of scale reduce both availability and diversity of legal services in rural areas. Those living in rural settings face both direct and indirect costs to accessing justice, such as lost opportunity to access free public legal services and increased transportation costs. Finally, lower levels of education, higher illiteracy rates, and low access to internet in rural areas limit the ability to identify the legal nature of issues, identify legal remedies to which they are entitled, and access legal information.

The Kenyan context is relevant to the conversation on security of land tenure and access to justice. Indeed, most of its population derives its livelihood from land in rural areas and has

a legal framework constitutionally protecting access to justice. The legal needs of rural Kenyans are mainly related to land disputes. However, their experience with accessing justice has been difficult; many do not seek legal information nor take action to resolve a dispute due to a perception that doing so would not help, either because of corruption within judicial institutions or lack of access to adequate support in navigating complex legal procedures.

The KCRLA is an example of a contextualized approach to human rights focused on the needs and realities of local inhabitants. It identified land as a key factor for attaining an adequate standard of living in poor, rural areas, which is achieved through land tenure security. Access to justice was recognized as the missing piece linking small-scale farmers' ability to maintain land tenure security and achieve better living standards. The KCRLA project provides free, individualized solutions to legal problems that reduce stress, cost, and time required to resolve them. It is focused on providing clients with just-outcomes which will improve their situation. To do so, it remains sensitive to local culture, needs, and practical realities, adopting a flexible approach to its procedures. While its model has the potential to be applied elsewhere, access to justice initiatives in rural settings must be adequately adapted to local contexts and remain responsive to the local population's legal needs and experience with access to justice in order to be successful.

Bibliography

LEGISLATION

African Charter on Human and People's Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force 21 October 1986).

Constitution of Kenya, 2010, 2010.

Convention on International Access to Justice, 25 October 1980, No. 26112 vol. 1510.

International Covenant on Civil and Political Rights, 19 December 1966, No. 14668 vol. 999.

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

JURISPRUDENCE

Dry Association Limited v Capital Markets Authority & Anor Nairobi (2011), High Court of Kenya at Nairobi Constitutional and Human Rights Division, Petition No. 358.

SECONDARY MATERIAL

Aberra, Adam & Matthieu Chemin, "Does legal representation increase investment? Evidence from a field experiment in Kenya" (2021) 150 J Dev Econ 1.

Alston, Lee J, Gary D Libecap & Robert Schneider, "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier" (1996) 12:1 JL Econ & Org 25.

Aylwin, Nicole & Lisa Moore, *Rural & Remote Access to Justice A Literature Review*, (Toronto, ON: Can Forum on Civil Justice for the Rural and Remote Access to Justice Boldness Project, 2015)

- Appropedia, "Small scale agriculture" (last visited 28 June 2023),
online: *Appropedia*
<appropedia.org/Small_scale_agriculture>.
- Asian Development Bank, *Law and Policy Reform at the Asian Development Bank: Effective legal systems for sustainable development* (Philippines, 2016) , online (pdf): *Asian Development Bank*
<adb.org/sites/default/files/publication/29683/lpr-adb.pdf>.
- Baraza, Nancy M & Kennedy Kimani, "Kenya" (last visited 29 June 2023), online: *Global Access to Justice Project*
<globalaccesstojustice.com/global-overview-kenya/?tab=5.-legal-aid-system>.
- Besley, Timothy, "Property Rights and Investment Incentives: Theory and Evidence from Ghana" (1995) 103:5 J Pol Econ 903.
- Besteman, Catherine L, *Land tenure in the Middle Jubba: Customary tenure and the effect of land registration*, ed (Madison, WI: Land Tenure Center, University of Wisconsin, 1990).
- Breger, Marshall J, "Legal Aid for the Poor: A Conceptual Analysis" (1982) 60:2 NCL Rev 281.
- Bruce, John W et al, *Searching for land tenure security in Africa* (Washington, DC: The World Bank, 1994).
- CBA Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act*, (Ottawa, ON: Canadian Bar Association, 2013)
- Chirwa, Ephraim W, "Land Tenure, Farm Investments and Food Production in Malawi" (2008) Research Programme Consortium on Improving Institutions for Pro-Poor Growth Working Paper No. 18.
- Convention on the Elimination of All forms of Discrimination against Women Committee, *General recommendation on women's access to justice*, CEDAW/C/GC/33, 23 July 2015.
- , *General recommendation No. 34 (2016) on the rights of rural women*, CEDAW/C/GC/34, 7 March 2016.

Access to Justice, Land Tenure Security, and Small-Scale
Farming: Fulfilling the Right to an Adequate Standard of Living

- de Janvry, Alain & Elisabeth Sadoulet, "Subsistence farming as a safety net for food-price shocks" (2011) 21:4-5 Dev in Practice 472.
- Deininger, Klaus, Daniel A Ali & Tekie Alemu, "Impacts of Land Certification on Tenure Security, Investment, and Land Market Participation: Evidence from Ethiopia" (2011) 87:2 Land Econ 312.
- Deininger, Klaus & Raffaella Castagnini, "Incidence and impact of land conflict in Uganda" (2004) The World Bank Working Paper 3248.
- Deininger, Klaus & Songqing Jin, "Tenure security and land-related investment: Evidence from Ethiopia" (2006) 50:5 Eur Econ Rev 1245.
- Elimu, "Research projects" (last visited 29 June 2023), online: *Elimu Impact Evaluation Unit* <elimu.lab.mcgill.ca/projects.html>.
- Encyclopædia Britannica, "Subsistence farming" (last visited 28 June 2023), online: *Encyclopædia Britannica* <britannica.com/topic/subsistence-farming>.
- FAO, "An introduction to the basic concepts of food security" (last visited 29 June 2023), online: *FoodSec* <fao.org/3/al936e/al936e00.pdf>.
- Farrow, Trevor C W, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957.
- Fleming, Don, "Legal Aid and Human Rights" (delivered at the International Legal Aid Group Conference, Antwerp, 6-8 June 2007) [unpublished].
- Fort, R, "The homogenization effect of land titling on investment incentives: Evidence from Peru" (2008) 55:4 NJAS: Wageningen J Life Sci 325.
- Ghai, Yash & Jill Cottrell, eds, *Marginalized Communities and Access to Justice*, ed (Abingdon: Routledge, 2010).
- Guan, Jianghua et al, "Impact of Confirmation of Farmland Rights on Farmers' Welfare: Based on the Micro-Empirical Investigation of Farmers in China" (2022) 14 Sustainability.
- Hiil, *Justice Needs and Satisfaction in Kenya* (The World Bank & Judiciary of Kenya, 2017)

- Holden, Stein T & Hosaena Ghebru, "Land tenure reforms, tenure security and food security in poor agrarian economies: Causal linkages and research gaps" (2016) 10 *Global Food Sec* 21.
- IFPRI, *Global Food Policy Report 2019* (Washington D.C.: International Food Policy Research Institute, 2019).
- InforMEA, "Small-scale farming" (last visited 28 June 2023), online: *InforMEA* <informea.o rg/en/terms/small-scale-farming>.
- Kenton, Will, "What are property rights and why do they matter?" (22 May 2022), online: *Investopedia* <investopedia.com/terms/p/property_rights.asp>.
- Kerekes, Carrie B & Claudia R Williamson, "Propertyless in Peru, Even with a Government Land Title" (2010) 69:3 *Am J Econ & Soc* 1011.
- Lapkin, Andrii, "The problems of access to justice in rural areas (on the example of Ukraine)" (2019) 68 *SHS Web of Conferences* 1.
- Lawry, Steven et al, "The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: a Systematic Review" (2014) 1 *Campbell Systematic Reviews* 1.
- Lesorogol, Carolyn K, "Privatizing pastoral lands: Economic and normative outcomes in Kenya" (2005) 33:11 *World Dev* 1959.
- Muhanda, Pauline Mudeshi, *Access to Justice for Persons Living in Poverty: The Legal and Institutional Framework in Kenya* (Masters of Laws, University of Nairobi, 2013) [unpublished].
- Muyanga, Milu & Raphael Gitau, "Do Land Disputes Affect Smallholder Agricultural Productivity? Evidence from Kenya" (2013) 4:14 *J Econ and Sustainable Dev* 112.
- Mwagore, Dali, *Land Use in Kenya: The Case for a National Land Use Policy*, Land Reform vol. 3 (Nakuru, Kenya: Kenya Land Alliance, 2015).
- Nkonge, Christine, et al, *Alternative Approaches to Access to Justice in Kenya: A Cost-benefit Analysis* (Katiba Institute & University of Nairobi, 2021).

Access to Justice, Land Tenure Security, and Small-Scale
Farming: Fulfilling the Right to an Adequate Standard of Living

- OECD, Open Society Foundations, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All*, Issues Brief (2016).
- Office of the High Commissioner for Human Rights, "Universal declaration of human rights at 70: 30 articles on 30 articles - Article 25" (4 December 2018), online: *United Nations* <ohchr.org/en/press-releases/2018/12/universal-declaration-human-rights-70-30-articles-30-articles-article-25>.
- Patel, Kirit et al, "The interplay between household food security and wellbeing among small-scale farmers in the context of rapid agrarian change in India" (2015) 4:1 *Agric & Food Secur* 16.
- Pepper, Stephen L, "Access to What" (1999) 2:23 *J Inst for Study Leg Ethics*.
- Rapsomanikis, George, *The economic lives of smallholder farmers: An analysis based on household data from nine countries* (Food and Agriculture Organization of the United Nations, 2015)
- Rissanen, Antti, "Legal Aid in Finland" in Ole Hammerslev & Olaf H Ronning, eds, *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave MacMillan, 2017).
- Salveti, Chiara et al, "Secure property rights and development: Economic growth and household welfare" (2014) UK Department for International Development, Property Rights Evidence Paper.
- Skinninger, Eileen, & Ruth Montgomery, *Enhancing Access to Justice for Women Living in Rural and Remote Areas of British Columbia: Reviewing Practices from Canada and Abroad to Improve Our Response*, (Vancouver, BC: The Int'l Centre for Crim Law Reform and Crim Justice Policy, 2017).
- Statz, Michele, Robert Friday & Jon Bredeson, "'They Had Access, But They Didn't Get Justice': Why Prevailing Access To Justice Initiatives Fail Rural Americans" (2021) 28:3 *Geo J on Poverty L & Pol'y*.
- Townsend, Robert F, *Ending Poverty and Hunger by 2030: An Agenda for the Global Food System*, 2nd ed (Washington DC: World Bank Group, 2015).

UN-HABITAT, *Secure Land Rights for All* (Nairobi, Kenya: United Nations Human Settlements Programme, 2008).

United Nations Global Impact, "Poverty", online (last visited 28 June 2023): *United Nations* <unglobalcompact.org/what-is-gc/our-work/social/poverty>.

United Nations, "Access to Justice" (last visited 28 June 2023), online: *United Nations and the Rule of Law* <un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.

—, "Goal 16: Promote just, peaceful and inclusive societies" (last visited 28 June 2023), online: *Sustainable Development Goals* <un.org/sustainabledevelopment/peace-justice/>.

United Nations Human Rights Office of the High Commissioner, *Land and Human Rights: Standards and Applications*, HR/PUB/15/5/Add.1 (United Nations, 2015).

The World Bank, "A year in the lives of Smallholder Farmers" (25 February 2016), online: *The World Bank* <worldbank.org/en/news/feature/2016/02/25/a-year-in-the-lives-of-smallholder-farming-families>.

—, "Rural population (% of total population) - Kenya" (last visited 29 June 2023), online: *Data* <data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=KE>.

—, *Securing Future Growth: Policies to Support Kenya's Digital Transformation*, Kenya Economic Update, Edition No. 20 (2019).

—, "What is food security?" (last visited 29 June 2023), online: *The World Bank* <worldbank.org/en/topic/agriculture/brief/food-security-update/what-is-food-security>.

Veldman, Muriel, "Land Disputes, Land Tenure Registration and Access to Justice in Fragile and Conflict Affected States: Questioning our Assumptions" (28 August 2020), online: *Knowledge Platform Security & Rule of Law* <kpsrl.org/publication/land-disputes-land-tenure-registration-and-access-to-justice-in-fragile-and-conflict-affected-states-questioning-our-assumptions#>.