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THE ROLE OF ACCESS TO JUSTICE IN THE DEVELOPMENT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

(DRAFT)

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1. Introduction

The Bill of Rights of the South African Constitution guarantees various social and economic rights, alongside civil and political rights. These include the rights to property,[1] access to adequate housing; [2] and access to health care services, sufficient food and water, and social security.[3] In addition, other rights that have a bearing on the realisation of socio-economic rights are protected in the Constitution. The enjoyment of socio-economic rights requires that other ancillary rights are also realised since there is a close correlation between constitutional rights and values. As the Constitutional Court held the *Grootboom* case, the rights in the Bill of Rights are interrelated, interdependent and mutually supporting.[4] Together, the rights have a significant impact on the dignity of people and their quality of life.[5] They must thus be read together in the setting of the Constitution as a whole, and their interconnectedness needs to be taken into account in realising any one of them.

Due to the interconnectedness of constitutional rights, the realisation of socio-economic rights has been facilitated in part by the claimants' enjoyment of the right of access to justice.[6] The vast number of socio-economic rights cases dealt by South African courts since the adoption of the Constitution point to the role of the right of access to justice in realising social and economic rights. This entails that efforts to give effect to socio-economic rights must be accompanied by the promotion of the right of access to justice. Access to justice is related to all the other rights in the Bill of Rights, as it is considered a "leverage right" through which a person can enforce other rights. It is therefore a constitutional tool for the enforcement of all the other rights in the Bill of Rights.[7] Giving effect to the right of access to justice is thus fundamental to realising the socio-economic rights protected in the Constitution.

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[1] Section 25 of the Constitution.
[2] Section 26 of the Constitution.
[3] Section 27 of the Constitution.
[4] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 24.
[5] *Grootboom*, para 53.
[6] Section 34.
[7] See Brickhill J and Friedman A "Access to courts" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-3.

2. The concept of access to justice

The concept of access to justice has evolved over the years from a narrow definition that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate) to a broader definition that includes social justice, economic justice and environmental justice.[8] The evolution of the definition of the concept of access to justice indicates that earlier approaches to the concept failed to take into account the impact of social and economic conditions on the ability of claimants to use dispute resolution institutions and processes. The concept of access to justice must go beyond the functioning of institutions that resolve disputes and legal processes and should be defined within the context of the social and economic conditions of prospective users of the justice system. Conditions such as poverty, illiteracy, geographical location etc. have an inevitable impact on the ability to utilise the legal system. Defined as such, any measures adopted to enhance access to justice will include measures aimed at empowering users in using the established systems.[9] Therefore, the modern concept must be defined in a manner that also considers the number of ways in which access is denied either through spatial, temporal, linguistic, social or symbolic barriers.[10] The concept is also about breaking down the barriers that prevent the poor and indigent from accessing justice.

3. The right of access to courts

3.1 Context of the right

In order to ascertain the role of access to justice plays in the development of other rights in the Bill of Rights requires an appraisal of its context. In *S v Zuma*,[11] the Constitutional Court held that the approach to be adopted in interpreting the Constitution is an approach which, whilst paying due regard to the language that has been used, is generous and purposive and gives expression to the underlying values of the Constitution. Therefore, a right must be interpreted in a manner that seeks to realise the objectives of the right. The Court held that:

> "the meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be… a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."[12]

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[8] See Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5; Kollapen J "Access to Justice within the South African context" Keynote Address to Open Society Foundation for South Africa Access to Justice Round-Table Discussion (see Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5); Murlidhar S *Law, Poverty and Legal Aid: Access to Criminal Justice* (Lexis Nexis, 2004) 1; Bowd R *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* Institute of Security Studies Policy Brief Nr 13 (October 2009) 1.

[9] Nyenti M "Access to justice in the South African social security system: Towards a conceptual approach" 2013 *De Jure* 46(4) 901-916.

[10] Baxi P "Access to justice and rule-of- [good] law: the cunning of judicial reform in India" Working Paper Commissioned by the Institute of Human Development, New Delhi on behalf of the UN Commission on the Legal Empowerment of the Poor (May 2007) 4.

[11] *S v Zuma* 1995 4 BCLR 401 (CC); 1995 2 SA 642 (CC).

[12] *S v Zuma* para 15.

Access to justice must also be seen in the context within which the right was enacted.[13] This requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting (which means a consideration of Chapter 2 and the Constitution as a whole), and, on the other hand, they must also be understood in their social and historical context.

In relation to the history and background to the adoption of the right of access to courts, the right needs to be interpreted with regard to history of deliberate denial of access by the State. Before the adoption of the Constitution, the State used various mechanisms to eliminate the jurisdiction of the courts. These include the prohibition of legal proceedings against the State; the use of "ouster clauses" and restrictive time limit and notice requirements.[14]

The outright prohibition against the bringing of legal proceedings against the State was one of the mechanisms that restricted access to justice. An example of this was the Ciskei Definition of State Liability Decree.[15] The Decree provided that "no legal proceedings may be brought against the State in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990".[16] Such provisions automatically eliminated access to justice since a litigant could not institute legal proceedings, irrespective of the correctness of the claim. They would therefore be in contravention of the right of access to justice.[17]

The right of access to justice was also restricted through the use of the so-called "ouster clauses". These clauses, which have the effect of ousting the jurisdictions of courts to review state conduct, ensured that apartheid-era state conduct was beyond judicial scrutiny.[18] Access to court was also restricted by interfering in the independence of the judiciary. This was achieved by appointing executive-minded judges into the judiciary and making political appointments of judges.[19] The right of access to justice must therefore be interpreted with regards to the historical denial of the right and the Constitution's aim to prevent the recurrence of this.

Restrictive time limits and notice requirements pose barriers to access to justice. Time limits and/or notice periods for the institution of a case are stipulated in various statutes.[20] Time limits and notice periods are necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication (which is central to the rule of law).[21] However, where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the expiry of the time limit. The negative effect of time limits and notice requirements on the right of access to court has been described in many cases. Such requirements have been

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[13] See the Constitutional Court's pronouncement in this regard in the *Grootboom* judgment (paras 21-22).
[14] See Brickhill J and Friedman A "Access to courts" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) (Cape Town, Juta) 59-1 and 59-2.
[15] Definition of State Liability Decree 34 of 1990 (Ck).
[16] Section 2(1) of the Ciskei Definition of State Liability Decree.
[17] *Ntenteni v Chairman, Ciskei Council of State and Another* 1993 (4) SA 546 (Ck); 1994 (1) BCLR 168 (Ck).
[18] See Brickhill J and Friedman A "Access to courts" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) (Cape Town, Juta) 59-1 and 59-2.
[19] *Ibid*, 59-2.
[20] See for example the Road Accident Fund Act 56 of 1996.
[21] See *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) para 8.

described as "conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law";[22] as "a very drastic provision" and "a very serious infringement of the rights of individuals".[23] Such requirements have the effect of "hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts".[24]

In *Brümmer v Minister for Social Development and Others*, the Constitutional Court held that:

> "time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. The "enquiry turns wholly on estimations of degree." Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive."[25]

In evaluating the appropriateness of a time-bar or notice requirement, the Constitutional Court has held that:

> "what counts … is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one."[26]

Therefore, adequate time must be given to institute a claim and the practical possibility and genuine opportunity to do so is important.

This right also needs to be interpreted and understood in its social context. In relation to the social, economic and historical context of persons in need of access to courts in general, it was remarked that South Africa is:

> "a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."[27]

The social context reflective of aggrieved socio-economic rights claimants has been explained in numerous cases. In *Soobramoney v Minister of Health (KwaZulu Natal),*[28] the

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[22] See *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185.
[23] *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200.
[24] See *Avex Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A) at 621F-G and *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 764E.
[25] See *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) para 51.
[26] See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 12.
[27] Didcott J in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.
[28] *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) para 8.

court highlighted the social, economic and historical conditions prevailing in South Africa when it remarked that:

> "we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

3.2 Importance and purpose of the right

In assessing the role of access to justice in the development of socio-economic rights, the importance and purpose of the right must be considered. The right to have access to justice is vital for various reasons. Firstly, the right is important due to the historical context of access to courts. The right is guaranteed due to the significant obstacles that stood in the way of an unqualified access to courts in the past, which made it difficult for aggrieved persons to seek redress. Courts were also prohibited from dispensing justice independently and impartially[29] to all. Access to courts is fundamental to a viable and dynamic legal system that is based on justiciable human rights; the substantive rights in the Bill of Rights would be inaccessible and therefore meaningless to the ordinary person if there was no right of access to courts. The absence of access to courts would make fundamental rights elitist and negate the principle of equality.[30]

The realisation of the right of access to courts is vital due to its relationship with all the other rights in the Bill of Rights. The Constitution has made it clear that the rights in the Bill of Rights are interrelated, interdependent and mutually supporting.[31] It is therefore impossible to define the scope and content of a right in isolation. The rights must be read together and their inter-relatedness must be considered when delineating the scope of each right. When considered together, the rights have a significant impact on the dignity of people and their quality of life. Therefore, the right of access to courts is an integral component of socio-economic rights. These rights would be incomplete without a realisation of the right of access to justice.

This is because access to justice is essential for the success of an operative Bill of Rights and the promotion of human rights. It is the core of social and economic rights and of making law and justice accessible to all. The right is considered to be of cardinal importance for the adjudication of justiciable disputes, and due to the nature of the right, there can surely be no dispute that the right of access to justice is by nature a right that requires active protection.[32] It is thus the core of constitutional rights and in making law and justice accessible to all. The Constitutional Court is of the opinion that "untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of the rights

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[29] Devenish GE *A Commentary on the South African Bill of Rights* Durban, Butterworths (1999) 485.
[30] *Ibid*, 486.
[31] *Grootboom* para 53.
[32] *Beinash & Another v Ernst and Young & Others* 1999 (2) SA 91; 1999 (2) BCLR 125 para 17.

enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory".[33]

In *Napier v Barkhuizen*, the Constitutional Court stressed that South Africa's democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like South Africa, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.[34] In addition, the Court held that "section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts".[35] The Court concluded that access to courts not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.[36]

The realisation of the right to access to courts is also necessary for the judiciary to properly execute its constitutional duties. In this respect, it is argued that unless the need for justice and remedies for injustice are effectively met by the courts and the law, there will be negative consequences for the popular legitimacy of the courts and indeed the Constitution itself. This creates a political imperative to improve access to justice.[37] Therefore, the need for access to justice should be a core concern of the courts, for it goes to the very essence of their function. If people in need are not able to bring their cases to court and present them effectively, then the courts cannot satisfactorily perform the function entrusted to them by the Constitution.[38]

In another instance, the Court stated that section 34, and the access to courts it guarantees for the adjudication of disputes, is a manifestation of a deeper principle, one that underlies our democratic order.[39] The court further remarked that:

> "the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes.... Construed in this context of the rule of law ... access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[40]

The fundamental right of access to courts is protected in the Constitution because the right is essential for constitutional democracy under the rule of law; and in order to enforce one's rights under the Constitution, legislation and the common law everyone must be able to have a dispute, that can be resolved by the application of law, decided by a court.[41] The right of access to court under section 34 of the Constitution is of fundamental importance to ensure that concrete expression is given to the foundational value of the rule of law.[42] It is a

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[33] *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) para 23.
[34] *Napier v Barkhuizen* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) para 31.
[35] *Napier v Barkhuizen*, para 32.
[36] *Napier v Barkhuizen*, para 33.
[37] Heywood M and Hassim A "Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice" (2008) 24 *SAJHR* 280.
[38] Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 at 355.
[39] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) para 16.
[40] *Chief Lesapo v North West Agricultural Bank and Another* para 22.
[41] *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) para 1.
[42] *Road Accident Fund and Another v Mdeyide* para 138.

provision that is fundamental to the upholding of the rule of law, the constitutional state and the *regstaatidee*.[43] In a constitutional state and a rules-based society, people should "be able to use the rules when needed in order advance the objectives of the Constitution and ultimately have proper, substantive and meaningful access to the various institutions that interpret the rules and deal with the various contestations that inevitably arise".[44]

3.3 Nature and scope of the right

Access to justice, as expressed in section 34 of the Constitution has three components. In the first instance is the right to bring a dispute to court: accessibility to the adjudication institutions must be ensured. This means everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress, taking into account the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice.[45] It also ensures protection against actions by the State and other persons which deny access to courts and other forum and the elimination of obstacles in the way of access to courts. Secondly, access to justice entails that effective dispute resolution institutions and mechanisms must be in place: establishment of a court or another independent and impartial tribunal or forum.[46] Finally, in order to ensure access to court, section 34 guarantees the right to procedural fairness: disputes resolved in a fair and public hearing.[47]

3.3.1 The right to bring a dispute to court (access to justice)

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The right to have any dispute that can be resolved by the application of law decided before a court or another independent and impartial tribunal or forum seeks to ensure access to the institutions and mechanisms to resolve disputes. It thus ensures access to justice for socio-economic rights claimants.

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[43] *Bernstein and Others v Bester NO and Others* 1996 (4) *BCLR* 449 (CC) para 105.

[44] Kollapen J "Access to Justice within the South African context" keynote address presented at the Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* Parktonian Hotel, Johannesburg, 22 July 2003.

[45] See Currie & De Waal The Bill of Rights Handbook Cape Town (2005); Department of Justice and Constitutional Development "HIV/AIDS, Human Rights and Access to Justice" (Draft Discussion Paper)(May 2009); Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247; Foundation for Human Rights "Civil Society priorities in the access of justice and promotion of constitutional rights programme of the Department of Justice and Constitutional Development (DOJ&CD)" (March 2009); Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Sussex, Institute of Development Studies (February 2003); Nyenti MAT "Dispute resolution in the South African social security system: the need for more appropriate approaches" 2012 *Obiter* vol. 33(1) 27-46; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

[46] *Carephone (Pty) Ltd v Marcus and Others*; Currie & De Waal, 2005; Bosch, Molahlehi & Everett, 2004.

[47] See Currie & De Waal The Bill of Rights Handbook Cape Town (2005); *De Beer NO v North-Central Local Council and South-Central Local Council*; *Mbebe and Others v Chairman, White Commission and Others*; *Bongoza v Minister of Correctional Services and Others*; and Woolman S, Roux T & Bishop M (eds)(2008) *Constitutional Law of South Africa* (2nd Edition Original Service) 2008.

As discussed earlier, the concept of access to justice is defined both narrowly and broadly. The narrow (traditional) definition of the concept of "access" to "justice" is the situation where state legal systems ensure that every person is able to utilise the legal processes for legal redress irrespective of their social or economic capacity and where every person receives a just and fair treatment within the legal system. The traditional definition 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 through which to claim and protect their rights.

The traditional definition of the concept of access to justice, which is understood in terms of legal rights, processes and procedure,[48] fails to take into account the impact of the social and economic conditions (such as poverty, literacy, geographical location etc.) on the ability of claimants to use the adjudication system. A broad approach to the concept of access to justice goes beyond access to the institutions that resolve disputes and to legal services. The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and the marginalised to utilise the legal system. Therefore, the concept of access to justice is defined in a manner that also considers the number of barriers to the ability to utilise the legal processes to receive a just and fair treatment. Such ability is hampered through various barriers (geographical, time-related, linguistic, cultural, social or legal etc.).

It is accepted that in South Africa in particular, the impact of the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice.[49]

Access to justice, as expressed in section 34 of the Constitution (the ability of a person to utilise the legal system to receive a just and fair treatment), has three components. In the first instance, access to justice requires that accessibility to the adjudication institutions must be ensured. This means everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress. Secondly, access to justice entails that effective dispute resolution institutions and mechanisms must be in place. Effectiveness requires, amongst others, that courts, tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. Finally, in order to ensure access to court, section 34 guarantees the right to have disputes resolved in a fair and public hearing.

Accessibility of adjudication institutions requires that law or conduct should not deny the ability and opportunity to access dispute resolution institutions; and that all obstacles in the way of access to courts must be eliminated. It thus encompasses a number of different aspects. It includes the ability of the users of the adjudication system to be able to bring a dispute to a court and the right to have their dispute heard. It also encompasses issues such as the fairness with which they are treated; the justness of results delivered; the speed with which cases are processed; the responsiveness of the system to those who use it; and the ability of the adjudication institutions to ensure equal treatment of persons from different backgrounds (including socio-economic backgrounds).[50]

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[48] Murlidhar S *Law, Poverty and Legal Aid: Access to Criminal Justice* (Lexis Nexis, 2004) 1.

[49] See the remarks of Didcott J in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.

[50] See Currie I and De Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005); Department of Justice and Constitutional Development "HIV/AIDS, Human Rights and Access to Justice" (Draft Discussion Paper)(May 2009) 11-12; Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247; Foundation for Human Rights "Civil Society priorities in the access of justice and promotion of constitutional rights programme of the Department of

The scope of the concept of access to justice in the Constitution is also interpreted in terms of the interrelated, interdependent and mutually-supporting nature of the rights in the Bill of Rights (the interrelationship of the rights of the Constitution are discussed later in this policy). In this case, the concept of access to justice means not only access to the courts, but includes the (collective) rights to equality, human dignity, just administrative action and other matters concerning the administration of justice.[51] The relationship between access to justice and other rights in the Constitution (especially socio-economic rights) requires that access to these other constitutional rights must also be included in the notion of access to justice. Access to socio-economic and other rights is thus necessary for the achievement of access to justice. This is because there can be no access to justice in the face of poverty, unemployment and social inequality.[52]

The Constitution guarantees access to justice for everyone. Therefore, the concept of access to justice must be interpreted within the context of the Constitution's concept of equality. There is a need to adopt a substantive approach to equality in relation to access to justice for socio-economic rights claimants (since it is about breaking down the barriers that prevent the poor and indigent from accessing the justice system). In this case:

> "access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts."[53]

A broad conceptualisation of access to courts in the South African context accords with the Constitution's equality concept. Equality in terms of the Constitution involves both formal and substantive dimensions. Adopting a substantive approach to equality in relation to access to justice for socio-economic rights claimants is about breaking down the barriers that prevent the poor and indigent from accessing the jusice system.

Access to justice for socio-economic rights claimants thus requires that an appropriate justice system needs to be established. Therefore, the necessary legislative, policy, institutional (and other relevant) requirements for the resolution of disputes must be put in place. In addition, it also includes ensuring that prospective users of the dispute resolution system are able to access the system. The adjudication system developed should take into account and/or eliminate possible barriers that (may) prevent users of the system from utilising it. An effective or efficient adjudication system must be sensitive to the social, economic and other relevant contexts of the users of the system. It has been remarked that traditionally, access to

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Justice and Constitutional Development (DOJ&CD)" (March 2009); Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Sussex, Institute of Development Studies (February 2003) 19-20; Nyenti MAT "Dispute resolution in the South African social security system: the need for more appropriate approaches" 2012 Obiter vol. 33(1) 27-46; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

[51] Department of Justice and Constitutional Development "HIV/AIDS, Human Rights and Access to Justice" (Draft Discussion Paper)(May 2009) 11-12.

[52] Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247 at 247.

[53] Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 at 344.

justice is understood in terms of legal rights, processes and procedure, often shadowing the socio-economic element, particularly that of poverty. However, the link between justice and poverty is the inevitable impact on poor and marginalised communities, the majority of whom are women, who are "deprived of choices, opportunities, and access to basic resources".[54]

Due to the particularly vulnerable and desperate status of socio-economic rights claimants, it may be necessary to develop a special dispute resolution system. The situation of socio-economic rights claimants (the very poorest of our society) warrants the consideration of dispute resolution systems or mechanisms that will be more suitable to their peculiar needs and circumstances. This category of persons therefore requires an expeditious, efficient, affordable and easily accessible dispute resolution system.

3.3.2 Establishment of a court or another independent and impartial tribunal or forum

In order to be able to guarantee access to justice, an adjudication institution must be effective. Effectiveness of the adjudication institution entails that the institution must be able to provide claimants with appropriate redress. For an adjudication to be able to do this, it must be able to decide disputes according to the facts and the law, including freedom from improper influence (both internal and external).[55] This means that to be effective, an adjudication institution must be independent and impartial.

The right of access to justice in section 34 requires that a person who has a dispute has the right to have the dispute resolved by a court or where appropriate, another independent and impartial tribunal. Section 34 therefore envisages that there will be circumstances where it may be more appropriate for a tribunal or forum to resolve such disputes. There is thus no right to have a dispute that can be resolved by the application of law decided only by a court of law.[56] Where it is appropriate to do so, legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts.

The right further requires that another forum decides a dispute where it is "appropriate" to do so. The term "appropriate" implies that an adjudication institution should be preferred if it is ideally suited for the type of dispute in question. This implies that where it is appropriate to do so, legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts. Where the selected adjudication forum is ideally suited for the type of dispute in question, the State has an obligation to prefer and establish such a forum. Other adjudication forums and procedures apart from the normal courts could be preferable for a particular type of dispute due to their specialisation, expertise, the need to consider local circumstances, and the need for the adoption of expeditious, informal and inexpensive procedures.[57]

The need for more appropriate avenues for dispute resolution further involves the preferred mechanisms or procedures for dispute resolution. There are various mechanisms or processes

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[54] United Nations Development Programme *Access to Justice* (March 2004).
[55] ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 100th Session, 2011- Report III (Part 1B)) (2011) para 433.
[56] *Carephone (Pty) Ltd v Marcus and Others* 1999 (3) SA 304 (LAC); 1998 (10) BCLR (1326 (LAC) para 33.
[57] Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.

in place for the resolution of disputes, and parties to a dispute should choose the most appropriate mechanism. A dispute resolution mechanism will be appropriate where its procedure, goals and values are suitable to the requirements of the parties' situation.[58] In addition, whether a mechanism is appropriate in each case will depend on the nature of the dispute, the amount of money involved, the remedies sought, the willingness of the parties to resolve the dispute and the nature of the relationship between the parties.[59]

In addition to requiring courts to be independent,[60] the Constitution, in section 34, requires tribunals and forums that resolve disputes to be independent and impartial. However, different standards of independence exist between courts and other tribunals and forums. As part of the Bill of Rights, section 34 (and the standard of independence guaranteed therein) may be subject to limitations of a reasonable nature. Such a limitation is not contemplated under section 165.[61] The difference in independence standards between courts and alternative tribunals or forums has been attributed to differences in the judicial functions performed. It is suggested that since courts perform a variety of judicial functions, they must comply with the highest standards of judicial independence.[62] On the other hand, alternative tribunals or forums may depart from a strict standard of independence. In *Financial Services Board v Pepkor Pension Fund*, it was held that:

> "there are undoubtedly degrees of independence. Not every tribunal can be as completely independent as a court of law is expected to be. The independence of courts of law and of administrative tribunals cannot be measured by the same standard."[63]

Judicial authority in the country is vested in the courts. However, the overburdened state of the courts and their inappropriateness to hear certain disputes, due to either a lack of specialised knowledge or experience, means another independent and impartial tribunal or forum may be preferred in a particular type of dispute. Another adjudication institution could be preferable for a particular type of dispute due to its expertise, the need to consider local circumstances, or the need for the adoption of expeditious, informal and inexpensive procedures.[64]

In addition, access to justice requires tribunals and forums that resolve disputes to be independent and impartial. There are various important reasons in support of the establishment of independent and impartial tribunals.[65] These include the fact that a tribunal is able to focus its attention on the issues presented by the parties without being distracted by the broader concerns of the relevant department; when the individual rights and interests in question are so important as to merit the special attention which only a body undistracted by general administrative concerns can give them; the desirability of an impartial decision free from the considerations of policy which departmental officials and ministers propagate but which engender so-called 'departmental bias'; and the desirability of insulating the decision

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[58] Bosch C, Molahleli E and Everett W *The Conciliation and Arbitration Handbook: A comprehensive guide to labour dispute resolution proceedings* LexisNexis (2004) 7.
[59] Sanders D and Morrison P "Mediation: Better Than Arm Wrestling" http://www.roylaw.co.za/ (24 February 2010).
[60] Section 165(2) of the Constitution.
[61] See the discussion on "Constitutional Principles on Courts and Administration of Justice" in paragraph 8 (*infra*).
[62] Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.
[63] *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C) para 174F-G.
[64] Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.
[65] See generally Baxter L *Administrative Law* (Juta, 1984); *Watchenuka & Another v Minister of Home Affairs & Others* 2003 (1) SA 619 (C); *Ruyobeza & Another v Minster of Home Affairs & Others* 2003 (5) SA 51 (C).

concerned from the vicissitudes of parliament and party politics, especially considering the important legal rights and interests are at stake.

The independence of a tribunal or forum has three essential components.[66] These components include security of tenure for the tribunal or forum officials; a basic degree of financial independence for the tribunal; and institutional independence in matters that relate directly to the exercise of the tribunal's judicial function. Institutional independence implies control over the administrative decisions that bear directly and immediately on the exercise of the tribunal's or forum's judicial functions.

Tribunals or forums must also be impartial. The requirement that an adjudication institution must be impartial means that the institution's decisions should be unbiased. The test is not whether the institution (or person) making the decision is in fact biased, but whether it (or he/she) may be perceived as biased by a reasonable member of the public. In *De Lange v Smuts NO and Others*, the Constitutional Court that:

> "although there is obviously a close relationship between 'independence' and 'impartiality', they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' . . . connotes an absence of bias, actual or perceived …. The word 'independent' … embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government that rests on objective conditions or guarantees."[67]

The perception on the part of users of the justice system is thus a further consideration supporting the requirements of independence and impartiality. The word 'impartial' therefore connotes an absence of bias, actual or perceived.

3.3.3 Procedural fairness (including the requirement of a public hearing)

In order to ensure access to justice, the Constitution requires disputes to be decided in a fair public hearing by independent and impartial institutions. As discussed above, the right to a fair trial implies that adjudication institutions are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence.

In *De Beer NO v North-Central Local Council and South-Central Local Council*, the court stated that the hearing itself must also be fair.[68] The need for a fair public hearing is important for the realisation of the right. As the Constitutional Court has remarked:

> "this section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution the courts must interpret legislation and the rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair."[69]

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[66] *De Lange v Smuts NO* 1998 3 SA 785 (CC) para 70.
[67] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 71.
[68] *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 14.
[69] *De Beer NO v North-Central Local Council and South-Central Local Council* para 11.

Section 34 requires that an alternative tribunal or forum must also conduct proceedings in a fair public hearing.[70] However, the proceedings need not be identical to those of a court of law,[71] as the requirements of fairness in terms of section 34 are flexible and depend on different factors. In addition, it would neither be unfair nor unconstitutional for a tribunal or forum to adopt procedures different from those of a court.[72]

The resolution of disputes must also be undertaken in a fair manner. Embedded in the right to a fair trial is also the right to procedural equality.[73] This implies that adjudication institutions should therefore ensure that claimants have reasonable opportunities to assert or defend their rights. This implies, among other things:[74]

- Reasonable notice of the time when the dispute is to be decided should be given to a person concerned.[75] The adjudication institution should also be given the power to condone a failure to comply with any notice requirements.
- Power to determine the appropriate procedures (where a dispute is resolved by a tribunal or another forum, the procedures do not have to be identical to those of a court of law. This is because the requirements of fairness in terms of section 34 are flexible and depend on different factors. Therefore, a tribunal or forum can be empowered to adopt procedures different from those of a court. This would enable a measure of flexibility to be granted to tribunal or forum in deciding disputes.
- Personal appearance and appropriate representation (each party to a dispute should be able to participate in the adjudication of the dispute. Each party should also be guaranteed the right to engage a lawyer or another qualified representative of their choice).[76]
- Equal access to evidence (each party should also have access to the relevant evidence, including documents, expert opinions, etc.)
- Rapid resolution of disputes (disputes must be resolved as expeditiously as possible, especially in socio-economic rights disputes).

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[70] Currie I and de Waal J *The Bill of Rights Handbook*, 723.

[71] See *Mbebe and Others v Chairman, White Commission and Others* 2000 (7) BCLR 754 (Tk) para 776.

[72] See *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (TkH) paras 22-25. See also Brickhill J and Friedman A "Access to courts" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-97 and 59-98.

[73] ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 433.

[74] *Ibid*.

[75] In the case of South Africa, the Constitutional Court has held that the notice must be such that it gives the person an adequate and fair opportunity to seek judicial redress (see *De Beer NO v North-Central Local Council and South-Central Local Council* paras 13 and 14). The reasonableness of the notice to the affected person depends on the circumstances of the case in the light of the purpose of the notice requirement, which is to bring relevant information about the claim and the hearing to the attention of anyone affected by claim. The court further held that the reasonableness of the notice would also depend on the nature of the possible order and the gravity of its consequences.

[76] South African courts have stated that a right to legal representation at a litigant's expense must be construed in the right to a fair public hearing, as to hold otherwise would render the right "entirely nugatory" (*Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) BCLR 314 (Tk) 331D). In terms of the court's view, legal representation is integral to the right and any denial would constitute a limitation on the right. However, such a limitation may be justified if it is to serve a reasonable purpose such as the facilitation of access to courts by saving costs, time and by keeping the procedure simple (See for example *Beinash & Another v Ernst and Young & Others* 1999 (2) SA 91; 1999 (2) BCLR 125).

- Inexpensive adjudication procedures (procedures should be free or costs should be kept at the absolute minimum so as to allow even the poor to be able to resolve disputes).
- Guarantee of an effective remedy (the adjudication institution should be able to make a decision that has to be duly motivated or, in other words, explain the reasoning that led to the decision in the dispute, and be legally enforceable).

Legal assistance to claimants who cannot afford legal assistance should be provided by the State. The right to free legal assistance has also been read into the right to have a fair public hearing in section 34. This is by virtue of the differences in the wording of the right of access to court in both the Constitution and the Interim Constitution;[77] comparative jurisprudence on the right to free legal representation; the constitutional requirement of equality between civil and criminal litigants and emerging South African jurisprudence on the issue.

Proponents of a right to free legal assistance in South Africa point to the differences in the wording of the right of access to court in section 34 of the Constitution and in section 22 of the Interim Constitution. Section 22 of the Interim Constitution guaranteed the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum. In *Bernstein v Bester*,[78] the court contrasted section 22 of the Interim Constitution with article 6(1) of the European Convention on Human Rights (ECHR) which guarantees the right to a fair civil trial by providing for a right to a fair public hearing.[79] It held that:

> "a provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising rules of procedural law and justice is evident from the detailed criminal fair trial provisions in section 25(3). The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section 6 of the European Convention on Human Rights explicitly confers the right to a fair and public hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations ... Nearer home, article 12(1)(a) of the Namibian Constitution expressly provides that "[i]n the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...". In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial."[80]

Therefore, the inclusion of the right to a fair public hearing in section 34 of the Constitution indicates that a right to a fair civil trial is envisaged.[81]

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[77] Constitution of the Republic of South Africa of 1993.
[78] *Bernstein v Bester* 1996 (2) SA 751 (CC).
[79] In *Airey v Ireland* (32 Eur Ct HR Ser A (1979) the European Court of Human Rights (which interprets the European Convention on Human Rights) held that the right of access to a fair civil trial includes the right to be able to place one's case effectively before a court, which in many circumstances will require the assistance of a lawyer. In holding that the applicant had a right to free legal assistance, the court held that :the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective … This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial … It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively" (para 24).
[80] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 106.
[81] See generally Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 and Dugard J "Courts and The Poor in South Africa: A critique of systemic judicial failures to advance transformative justice" (2008) 24 SAJHR 214-238.

A right to free legal assistance is also determined by having regard to the provisions of Constitution on free legal assistance and the equality principle. Section 35(3)(g) of the Constitution provides persons accused of a crime with the right to free legal assistance "if substantial injustice would otherwise result". The clarification of the meaning of the phrase "if substantial injustice would otherwise result" by the Constitutional Court has been interpreted as providing a corollary right to free legal assistance in section 34.[82] In S *v Vermaas; S v Du Plessis*,[83] the Constitutional Court laid down guidelines for the provision of free legal assistance in criminal cases. The court held that "the accused person's aptitude or ineptitude to fend for himself or herself" must be assessed. The court further held that regard must be hard to the:

> "ramifications [of the decision to grant legal representation] and their complexity or simplicity … how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice'."[84]

If the court's guidelines are applied in civil cases, it implies that free legal assistance must be provided if substantial injustice would result.[85] It is proposed that when evaluating whether or not a fair public hearing has been achieved in a civil proceeding, factors to be considered include the consequences of the case for the party concerned; the complexity of the issues; the ability of the party to represent himself or herself effectively; the risk of error if a party is not represented and possible 'inequality of arms' if the other party is likely to be represented.[86] Therefore, in the same way as in a criminal case, the socio-economic rights claimant's aptitude or ineptitude to fend for himself or herself must be assessed, as well as the ramifications of the decision whether or not to provide free legal assistance, the complexity or simplicity of the case, the consequences of a failure to have access to justice (the inability realise all the rights in the Bill of Rights).

The provision of free legal assistance is also influenced by the equality principles in the Constitution. The right to equality entails that every litigant should have access to state-provided legal assistance.

Emerging South African jurisprudence has also reinforced the notion of a constitutional right to free legal assistance. In *Nkuzi Development Association v Government of the Republic of South Africa*,[87] the Land Claims Court held that the right to a fair hearing includes the right to legal representation at state expense, in certain circumstances. The Court held that:

> "there is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice."[88]

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[82] See Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 and Dugard J "Courts and The Poor in South Africa: A critique of systemic judicial failures to advance transformative justice" (2008) 24 SAJHR 214-238.
[83] *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC).
[84] *S v Vermaas; S v Du Plessis* para 15.
[85] In *Nkuzi Development Association v Government of the Republic of South Africa* (2002 (2) SA 733 (LCC) para 12) the Land Claims Court interpreted the phrase 'if substantial injustice would otherwise result' in section 35(3)(g) of the Constitution to imply that the right to a fair public hearing guarantees a right to legal representation in certain circumstances.
[86] Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 at 344.
[87] *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC).
[88] *Nkuzi Development Association v Government of the Republic of South Africa* para 11.

The court held that the litigants in the case have a right to free legal assistance, and that the State had an obligation to provide such legal assistance through mechanisms selected by it.[89] The court therefore ordered that the State take all reasonable measures to provide free legal assistance, so that people in all parts of the country who have rights to free legal assistance are able to exercise their rights effectively.

Court or tribunal proceedings must also be held in public. This is due to the need for transparency, giving a proper opportunity for the issues to be decided openly and providing for the presentation of evidence. Where proceedings are to be held in private, these would also constitute a limitation of section 34 and must be justified in terms of the Constitution.

4. Current access to justice framework for socio-economic rights claimants

The historical and present context of access to justice and its role in the development of other constitutional rights necessitate its full realisation. However, there are many obstacles faced in accessing justice, especially by socio-economic rights claimants. Some of the barriers of access to justice for socio-economic rights claimants include poverty;[90] geographic location of adjudication institutions;[91] physical inaccessibility of adjudication institutions;[92] lack of knowledge of rights (also due to illiteracy);[93] inappropriate dispute resolution institutions and

[89] *Nkuzi Development Association v Government of the Republic of South Africa* paras 1.1 and 12.

[90] Poverty poses a significant challenge to access to justice. The principal barrier posed by poverty is the inability to meet the costs of representation (also due the high cost of legal services and challenges in receiving legal assistance from the Legal Aid South Africa). Recent studies indicate that the average South African household would need to save a week's income in order to afford a one-hour consultation with an average attorney. Even worse, for black households (who are mostly poorer than the average) the barrier to access to court is even higher (AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 29). Where the dispute resolution system fails to take such a barrier into consideration (e.g. by simplifying the mechanisms and procedures of the system and reducing or eliminating issues such as rules for the initiation of court proceedings, the payment of court fees and the need for legal representation) there would be an even stronger argument for the availability of state-provided legal assistance for such cases (see generally the discussion on the right to free legal assistance in para 3.3.3 (Procedural fairness (including the requirement of a public hearing))).

[91] One of the factors restricting the right of access to courts in South Africa is the long distances that many people have to travel in order to access the courts and related services. The courts are not located in places that they can be easily accessed by socio-economic rights claimants. Only the Magistrates' Courts are widely spread throughout the country (also in rural and township areas). High Courts (which adjudicate most constitutional rights cases) are largely limited to urban areas, making them less accessible to the users of these forums (AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 109). The Department of Justice and Constitutional Development has taken cognisance of the impact of geography on access to courts, as it identified the establishment of suitable courts in rural and township areas as a priority as far back as 1999 (*Ibid*).

[92] An aspect of access to justice is the ability to walk to and reach the building where justice is administered. However, courts are also not physically accessible to some litigants, such persons with the disabilities (*Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03)). The justice system must ensure that court structures are accessible to all users, including persons with disabilities.

[93] For a person to be able to approach a court or tribunal to seek redress, he or she must have knowledge of his or her rights. Therefore, knowledge of rights is a prerequisite to access to justice. However, many South Africans have little knowledge of the law and human rights (see Mubangizi JC 'Protection of Human Rights in South Africa: Public Awareness and Perceptions' (2004) 29(1) *JJS* 62). An inherent aspect of the positive obligations on the State in relation to constitutional rights is the active education of citizens about their rights (Heywood M & Hassim A "Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice" (2008) 24 *SAJHR* 278). Some statutes recognise the need for education on rights. For example, the Social Assistance Act requires the South African Social Security Agency (SASSA) to publish and distribute to beneficiaries and potential beneficiaries, brochures in all official languages of the Republic setting out in understandable language the rights, duties, obligations, procedures and

mechanisms;[94] procedural hurdles;[95] and delay in the resolution of disputes.[96] However, what is perhaps the most serious challenge is the absence of free legal assistance. Legal Aid South Africa provides services mainly in criminal matters.[97] Although it takes on civil cases that impact on the lives of indigent and vulnerable communities (socio-economic rights issues, women and children's rights and the rights of the disabled), legal assistance is still largely directed at criminal cases. In 2011, Legal Aid South Africa assisted clients in 421 365 matters. Of all the cases dealt with, ninety three per cent (93%) were criminal cases with only seven per cent (7%) being civil cases.[98] This indicates that:

> "... legal assistance for poor persons is lacking in a variety of civil matters, in administrative forums where their rights are routinely overlooked; in government bureaucracies which deny them access to social security, and other socio-economic rights (such as in social security administration and delivery institutions and government departments); and in the general context of upholding their dignity, equality and social justice."[99]

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mechanisms of the Act, as well as contact details of the Agency or anyone acting on its behalf (section 2(4) of the Social Assistance Act 13 of 2004).

[94] At present, disputes relating to entitlement and access to socio-economic rights in South Africa are resolved mainly by resort to litigation in the High Court. Many of the barriers on access to justice (especially issues of cost, delay and travel distances) relate to the use of litigation in the High Court to resolve disputes. This implies that the absence of alternative avenues for dispute resolution has an adverse impact on social and economic rights.

[95] Access to justice involves a process of enabling and empowering those not enjoying rights to claim those rights; which includes eliminating any procedural hurdles that prevent the free exercise of the right (see Vawda "Access to justice: From legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 239-240). Therefore, even where the justice system is accessible in other aspects, it will still be ineffective if (potential) users are restricted from the system due to insurmountable procedural hurdles. Procedural rules give content to substantive rights, and must enable the effective realisation of the rights. It has been declared that "a substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. ... Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effective such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible" (Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Sussex, Institute of Development Studies (February 2003) 15).

[96] A major problem facing dispute resolution in South Africa is the length of time it takes for disputes to be resolved. Recent research points out that it a long time for a civil case to be heard, particularly in the busier courts. For example, in the Cape High Court the ordinary court roll for civil matters is full for up to a year (see AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 118). It is clear that access to justice only becomes complete when one's dispute is settled speedily (African National Congress "Access to justice in a Democratic South Africa" (Lecture by ANC President Jacob Zuma to the Platform for Public Deliberations) University of Johannesburg, 9 September 2008). It was held in the *Mohlomi* case that "inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs" (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11). Delay in finalising adjudication impairs socio-economic rights litigants' rights of access to justice. It further compounds the problems they face, since it is not only their right of access to justice that is infringed but also their other rights.

[97] The Legal Aid South Africa is a statutory organisation that administers the provision of legal assistance. The objective of Legal Aid is to render or make available legal representation to indigent persons at State expense as contemplated in the Constitution (see Legal Aid Board "Legal Aid South Africa Legislative Mandate" accessed at http://www.legal-aid.co.za).

[98] Legal Aid South Africa *Impact litigation "Giving Content To Our Rights"* (Impact litigation Booklet 2012) 3.

[99] Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247 at 239.

This state of affairs has grave consequences for the rights of equality and human dignity of civil cases and for the legitimacy of the Constitution itself. As the contention goes:

> "confining the provision of legal services primarily to criminal matters, and defining access (to justice) so narrowly, has other serious consequences…for example that the focus on criminal defence has implications for gender discrimination. The channelling of limited resources into the provision of representation to accused persons takes away resources from other areas where legal services are required, and as a majority of criminal accused are men, women (and other groups) are underserved by the legal aid system. The areas of law affecting women, children, the disabled and the poor – domestic and family issues, access to facilities, jobs, education and social services – are inadequately catered for in the current delivery models."[100]

5. Conclusions and Recommendations

The role and importance of the right of access to justice in relation to the enjoyment of socio-economic rights in the Constitution; the present and historical contexts of the right; and the position of socio-economic rights claimants indicate an urgent need for measures aimed at realising the right. This is further supported by the State's constitutional obligations to protect particularly vulnerable and desperate persons and groups. The Constitutional Court has stated that the State has to make provision for the most vulnerable and desperate in society.[101] In the case of socio-economic rights claimants, their particularly vulnerable and desperate status is indisputable. Delays in the justice system further mean that before court cases are eventually decided, most litigants will be in a very precarious position. The need for them to pay court and attorney fees if free legal assistance is not provided compounds matters for most litigants.[102] As Anderson asserts, the poor tend to reach court in cases where they are at risk of destitution – both because their margins for error are smaller and because the most fundamental components of livelihood are at stake.[103]

Therefore, due to the vulnerable status of socio-economic rights claimants, it could, in the light of the relevant constitutional provisions and developing jurisprudence, constitutionally be expected of the State to establish a comprehensive adjudication system. It further requires the development of innovative mechanisms to effectively realise their right of access to justice. An example of an instance where innovative mechanisms have been developed to effectively realise their right of access to court is the possibility in terms of the Constitution for a group or class of people to bring a case in court (class actions).[104] In developing the

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[100] *Ibid*, 236.

[101] *Grootboom* (paras 52 and 69) where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by s 26(2) in the Constitution.

[102] In relation to socio-economic rights (specifically social security) litigants' ability to pay legal fees, Wallis AJ in *Cele v the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D) para 2) rightly wondered how people so impoverished that they qualify for social assistance grants can afford to pay fees.

[103] Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178), Sussex, Institute of Development Studies (February 2003) 19-20.

[104] Section 38 of the Constitution on the enforcement of rights states that:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

a. anyone acting in their own interest;
b. anyone acting on behalf of another person who cannot act in their own name;
c. anyone acting as a member of, or in the interest of, a group or class of persons;
d. anyone acting in the public interest; and
e. an association acting in the interest of its members.

common law of standing to make provision for the realisation of the constitutional right to bring a class action, the court in *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*[105] was able to develop an innovative mechanism through which a category of particularly vulnerable and desperate persons (social assistance (disability grant) beneficiaries whose grants had been unlawfully terminated) could have access to court to enforce their right of access to social security.

[105] *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 4 SA 1184 (SCA).