

Access to justice in the South African social security system: Towards a conceptual approach

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OPSOMMING

Toegang tot Regspleging in die Suid-Afrikaanse Sosiale Sekerheidstelsel: Op Pad na 'n Konseptuele Benadering

Die Grondwet waarborg aan elkeen die reg op toegang tot sosiale sekerheid. Dit verplig die staat verder om redelike wetgewende en ander maatreëls, binne die perke van beskikbare middele, te neem om die toenemende verwesenliking van die reg op toegang tot sosiale sekerheid te bewerkstellig. 'n Stelsel wat deur die staat ingestel is om die reg op toegang tot sosiale sekerheid te verwesenlik, sou onvolledig wees sonder 'n doeltreffende en uitvoerbare stelsel wat gebruikers van die stelsel in staat stel om geskille wat mag ontstaan, te besleg. So 'n stelsel sou gevolg moes gee aan die reg op toegang tot die howe (regspleging). Gevolglik moet 'n sosiale sekerheids-geskilbeslegtingstelsel bestaanbaar wees met die begrip van toegang tot regspleging, soos beoog in die Grondwet. Alhoewel die Grondwet nie toegang tot regspleging omskryf nie, dui dit die benadering wat by die uitleg van die regte in die Handves van Regte gevolg moet word, aan. Hierdie artikel poog om die begrip van toegang tot regspleging te ontwikkel vir sover dit van toepassing is op ontvangers van sosiale sekerheid. Dit beveel 'n breë benadering tot die begrip aan, wat voorsiening maak vir die instelling van 'n geskilbeslegtingstelsel; en die aanname van maatreëls gerig op die bemagtiging van ontvangers.

1 Introduction

The Constitution guarantees everyone the right to have access to social security (including social assistance).¹ It further enjoins the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security.² According to the International Labour Organisation (ILO), the right to lodge a complaint and the right of appeal in social security matters ensure compliance with and the effective implementation of the rights of insured persons and of due process.³ Therefore, a system set up

1 S 27(1)(c) Constitution.

2 S 27(2) Constitution.

3 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) par 403.

by the state to realise the right of access to social security would be incomplete without an effective and efficient system that enables users of the system to resolve any disputes that might arise. Such a system would give effect to the right of access to courts (justice) which is also protected in the Constitution.⁴

One of the three components of section 34 is the guarantee of everyone with a dispute to be able to bring the dispute to a court or tribunal to seek redress (right of access to justice).⁵ This is to ensure protection against actions by the state and other persons which deny access to courts or other fora.⁶ Therefore, a social security dispute resolution system established to give effect to the right of access to justice in terms of section 34 must be consistent with the concept of access to justice as envisaged by the Constitution.

2 Evolution of 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 one that includes social justice, economic justice and environmental justice.⁷ This broadening of concept was due to the belief that its confinement to the courts or tribunals that adjudicate or mediate was considered to be too narrow a definition, although courts or tribunals that adjudicate or mediate were a very important component of access to justice. It is argued that (in the case of South Africa):

[J]ustice is not the exclusive preserve of the courts. The Constitution ... is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts.⁸

However, social security dispute resolution systems, as required by the right (of access) to social security, are concerned with the resolution of disputes in a fair public hearing by a court or another independent and impartial tribunal or forum. In this instance, the concept thus relates to access to justice in the sense of access to the courts or tribunals that adjudicate or mediate social security disputes.

4 S 34 Constitution states 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.

5 The other components of the right are for courts, tribunals or forums that resolve disputes to be independent and impartial in the execution of their duties; and for disputes to be resolved in a fair and public hearing.

6 Currie & De Waal *The Bill of Rights Handbook* Cape Town (2005) 704.

7 Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg 2003-07-22) 5.

8 Kollapen "Access to Justice within the South African context" Keynote Address to *Access to Justice Round-Table Discussion* 5.

The legal dimension of the concept of access to justice developed as an element of the fundamental principle that all people should enjoy equality before the law. It proposes (amongst others) that each person should have effective means of protecting his or her rights or entitlements under the substantive law.⁹

The concept of access to justice is understood in terms of legal rights, processes and procedures. It denotes the situation where state legal systems are organised “to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity” and “that every person should receive a just and fair treatment within the legal system.”¹⁰ This view of the concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights. In this case, access to justice refers to “the equity with which those from differing backgrounds are able to gain from the justice delivery system.”¹¹

Such a view of the concept only focuses on the operation of the dispute resolution system. As an example, a review of access to justice in the United Kingdom by Lord Woolf was only concerned with the civil justice system and the problems it faced.¹² The principles laid down were thus

9 Sackville R “Some thoughts on access to justice” paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (Faculty of Law, Victoria University of Wellington, New Zealand: 2003-11-28–29) 1. He further remarks that the concept assumes that access to justice can be achieved by the law and the legal system, and that a just society will be prepared to find the resources required to achieve the goal of access to justice. It also suggests that it is feasible to establish mechanisms that will effectively break down the barriers preventing disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests.

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

11 Bowd *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* Institute of Security Studies Policy Brief Nr 13 (Oct 2009) 1.

12 Lord Woolf MR *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Jul 1996) 2. The problems identified in civil law system at the time were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

aimed at solving these problems and in this way improve access to the system.¹³

The view of the concept by the Law Society of New South Wales (Australia) is also restricted to the functioning of the justice system, placing importance on the system being and being seen to be accessible and affordable, readily easy to understand, fair, efficient and effective.¹⁴ It is contended that this approach

[c]entralises the issue of overcoming the procedural barriers within the court system itself. Such an approach tends to concentrate on issues of overcoming delays within the court process, efficiency, formality and cost of proceedings, and the organisation, structure and administration of courts and tribunals.¹⁵

A slightly wider approach to the concept of access to justice was adopted by the Australian Access to Justice Advisory Committee. It considers access to justice to consist of three key elements: equality of access to legal services (ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests); national equity (ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy); equality before the law (ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services).¹⁶

It has been remarked that

[w]hile this concept of access to justice focuses on the justice system, it is confined neither to the courts nor to services associated with courts. It extends to the structure of the legal services market, improved access to sources of information for consumers (in both the public and private sector), and alternatives to the judicial process for the resolution of complaints or disputes.¹⁷

13 Woolf 2. The Report stated that the civil justice system should be *just* in the results it delivers; be *fair* in the way it treats litigants; offer appropriate procedures at a reasonable *cost*; deal with cases with reasonable *speed*; be *understandable* to those who use it; be *responsive* to the needs of those who use it; provide as much *certainty* as the nature of particular cases allows; and be *effective* (i.e. adequately resourced and organised).

14 Law Society of New South Wales *Access to Justice - Final Report* (Dec 1998) 11.

15 Schetzer, Mullins & Buonamano "Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW" (Background Paper) Aug 2002 65.

16 Access to Justice Advisory Committee (Australia) *Access to Justice: An Action Plan* (1994) 7-9.

17 Sackville "Some thoughts on access to justice" paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (2003-11-28-29) 2.

An even broader approach to the concept of access to justice sees the law as only one means of achieving justice. It is proposed that

a variety of other means of doing justice including alternative dispute resolution, participation in social movement politics, democratic representation, and civic education for the respect of rights must proliferate.¹⁸

This view therefore suggests that justice in the courtroom should give way to justice in many rooms.¹⁹

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 the social and economic conditions on the ability of claimants to use dispute resolution institutions and processes. Therefore, 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. Despite the availability of well-functioning dispute resolution institutions and processes, conditions such as poverty, illiteracy, geographical location, etcetera) 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 systems established.

Such an expanded view of the concept of access to justice was recognised as early as the 1960s and 1970s. This recognition engendered the idea that an aggrieved individual's formal right to litigate or defend a claim must be transformed into a right of effective access to the legal system.²⁰ This implied that affirmative steps had to be taken to give practical content to the law's guarantee of formal equality before the law. It was thus "necessary to overcome, or at least ameliorate, the barriers inhibiting access."²¹ This was because it was

[n]o longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced.²²

18 Parker *Just Lawyers: Regulation and Access to Justice* (1999) 56.

19 *Idem* 207. See generally Galanter "Justice in Many Rooms" in *Access to Justice and the Welfare State* (ed Cappelletti) (1981) 147-181.

20 Cappelletti & Garth (eds) *Access to Justice: A World Survey* (Vol. 1) (1978) 6-10.

21 Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable: Proceedings of a Workshop on July 2002* (Apr 2003) 20.

22 Scarman *English Law - The New Dimensions* (1974) 28-29; as quoted in Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable Proceedings of a Workshop July 2002* (April 2003) 20.

Therefore, the modern concept of access to justice 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.²³ The concept is also about empowering the users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent. This view of the concept of access to justice is supported in the South African context, as the Constitution guarantees a right of “access to” justice.

3 The Right of Access to Court (Justice)

The right of access to justices must be interpreted in accordance with approach for the interpretation of the rights in the Bill of Rights. In terms of the Constitution, any interpretation of the rights in the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.²⁴ It must also promote the spirit, purport and objects of the Bill of Rights.²⁵ In the case of *S v Zuma*,²⁶ the Constitutional Court also laid down the approach to be adopted in the interpretation of a fundamental right in the Constitution. The Court proposed that a right must be interpreted in a manner that seeks to realise the objectives of the right. It 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.²⁷

The character and larger objects of the Bill of Rights and the Constitution can be ascertained by considering its aims. The preamble to the Constitution stipulates what was hoped to be achieved through the enactment of a Constitution as the supreme law of the Republic. The aims reflect the spirit and purpose of the Constitution, and must be taken into consideration when constitutional rights and obligations are to be

23 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.

24 S 39(1)(a)-(c) Constitution.

25 S 39(2) Constitution.

26 *S v Zuma* 1995 2 SA 642 (CC).

27 *Idem* par 15.

interpreted, and when the rights are to be limited. It has been declared that the preamble should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value, as it connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and to indicate its fundamental purposes.²⁸

Some of the aims of the Constitution are to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.²⁹ Therefore, the Constitution was adopted and a bill of fundamental rights was entrenched not only to avoid a repetition of and to redress South Africa's past injustices, but in order to establish a new society based on mutual respect, equality and freedoms.³⁰ The Constitution's aims to heal the divisions of the past and to improve the quality of life of all citizens further indicates that it seeks to eradicate social and economic disadvantages (such as inequality, poverty and lack of access to basic human rights). This has been confirmed by the Constitutional Court, when it stated that

[w]e 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 ... This commitment is also reflected in various provisions of the bill of rights and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.³¹

In *Government of the Republic of South Africa v Grootboom*,³² the Constitutional Court held that rights must further be interpreted with regard to the context within which the right was enacted.³³ The Court stated that interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting (which requires a consideration of Chapter 2 and the Constitution as a whole). On the other hand, rights must also be understood in their social and historical context. The context of the right of access to justice will indicate the nature and scope of the concept envisaged by the Constitution.

28 *S v Mlungu* 1995 3 SA 867 (CC) par 112.

29 Preamble to the Constitution.

30 Olivier *et al* "Constitutional issues" in *Social Security: A Legal Analysis* (ed Olivier) (2003) 52.

31 *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) par 8-9.

32 *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 21-22.

33 *Ibid.*

3 1 Textual Context of the Right of Access to Justice

The textual setting of the right of access to justice relates to its inclusion in the Bill of Rights together with all other rights. In the case of a social security dispute resolution system, it should be interpreted in consideration of the right of access to social security. In addition, any interpretation must have regard to all the other rights in the Bill that have a bearing on any of these rights. As the Constitutional Court has affirmed, all the rights contained in the Bill of Rights are interrelated and mutually supporting. Together these rights have a significant impact on the dignity of people and their quality of life.³⁴

The interrelatedness would require that the right of access to justice must be in place to enable the realisation of all the other rights in the Bill of Rights, especially socio-economic rights. Whilst the right of access to justice is necessary for the realisation of all the other rights in the Constitution;³⁵ the other rights are also necessary for its realisation. In order for social security claimants to be able to realise their right of access to justice, other rights (especially social economic rights) must be realised. In the opinion of the Constitutional Court

[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.³⁶

Therefore, the right of access to justice and to social security cannot be seen in isolation. There is a close relationship between them and the other socio-economic rights. These rights must all be read together in the setting of the Constitution as a whole.³⁷ The concept of access to justice must be interpreted as including elements of other rights necessary for its attainment.

³⁴ *Idem* par 53.

³⁵ The right of access to courts is considered a “leverage right” through which a person can enforce their other rights. Therefore, it is a constitutional tool for the enforcement of all the other rights in the Bill (See Brickhill & Friedman “Access to courts” in *Constitutional Law of South Africa* (eds Woolman S *et al*) (Original Service 07-06) 59-3). It is fundamental to a viable and dynamic legal system based on justiciable human rights; as 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 to be elitist; and negate the principle of equality (Devenish *A Commentary on the South African Bill of Rights* (1999) 486).

³⁶ *Grootboom* par 23.

³⁷ Constitutional Court in *Grootboom* (par 23) referring to the relation between the right of access to housing.

The broad conceptualisation of access to justice accords with the constitutional concept of equality. Since the Constitution guarantees the right of access to justice to everyone, the right must be interpreted within the context of the Constitution's equality concept.³⁸ Equality involves both formal and substantive dimensions. Formal equality entails the prohibition of unjustified discrimination, in the sense that all persons must be treated in the same manner, irrespective of their circumstances. Equality of access to courts in the formal sense ensures that all persons should have equal access to effective dispute resolution mechanisms necessary to protect their rights and interests. Formal equality requires sameness of treatment, implying that the adjudication system should be open to everybody in the same manner, irrespective of their circumstance.

However, formal equality is insufficient because it ignores economic and social differences between individuals or groups of persons. Where a concept of formal equality is applied in relation to access to a social security adjudication framework, accessibility to dispute resolution institutions may be denied to some claimants due to their social and economic conditions (such as poverty, literacy level, geographical location, etcetera). Formal equality is therefore insufficient to ensure everyone is able to get their disputes resolved since social and economic conditions can influence the ability of a person to be able to utilise the adjudication system to a greater or lesser extent.

Substantive equality aims to promote the attainment of equality, by focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal. In this case, the economic and social conditions of individuals or groups of persons are taken into account in determining the attainment of equality of access to justice. Adopting a substantive approach to equality in relation to access to justice for social security claimants is about the law being loaded in favour of the weak and exposed, and providing them with financial and other support.³⁹ This has the effect of breaking down

38 Section 9 Constitution states as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

39 As proposed by Scarman *op cit*.

the barriers that prevent the poor and indigent from accessing the (social security) adjudication system.

3 2 Historical Context of Access to Justice

The history and background to the adoption of the right of access to justice was one where significant obstacles were placed in the way of an unqualified access to courts in the past. These include the prohibition of legal proceedings against the state; the use of “ouster clauses”; and restrictive time limit and notice requirements.

3 2 1 Prohibition of Legal Proceedings Against the State

Before the adoption of the Constitution, the state used various mechanisms to eliminate the jurisdiction of the courts. One such mechanism was an outright prohibition against the bringing of legal proceedings against the state. The Ciskei Definition of State Liability Decree is an example of this. 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.”⁴⁰ Such provisions automatically eliminated access to courts as a litigant could not institute legal proceedings, irrespective of the correctness of the claim. This would therefore be in contravention of the right of access to courts.⁴¹

3 2 2 Use of “Ouster Clauses”

The right of access to court 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.⁴² Access to court was further 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.⁴³

These made it difficult for aggrieved persons to seek redress. Courts were also prohibited from dispensing justice to all independently and impartially.⁴⁴ 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.

40 S 2(1) State Liability Decree 34 of 1990 (Ck).

41 *Ntentei v Chairman, Ciskei Council of State* 1993 4 SA 546 (Ck).

42 See Brickhill & Friedman 59-1, 59-2.

43 *Idem* 59-2.

44 Devenish 485.

3 2 3 Time Limit and Notice Requirements

Restrictive time limit 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.⁴⁵ 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).⁴⁶ 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 described as “conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law”;⁴⁷ as “a very drastic provision” and “a very serious infringement of the rights of individuals”.⁴⁸ Such requirements have the effect of “hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts”.⁴⁹

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.⁵⁰

In evaluating the appropriateness of a time bar or notice requirement, the courts have held that what counts is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the time bar and notice provision leaves open in the beginning for the exercise of the right. The appropriateness of the requirement depends upon the availability of an initial opportunity to exercise the right that amounts, in all the

45 See for example the Road Accident Fund Act 56 of 1996.

46 See *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) par 8.

47 See *Benning v Union Government (Minister of Finance)* 1914 AD 180 185.

48 *Gibbons v Cape Divisional Council* 1928 CPD 198 200.

49 See *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 (A) 621F-G; *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) 764E.

50 See *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC) par 51.

circumstances characterising the class of case in question, to a real and fair one.⁵¹ Therefore, adequate time must be given to institute a claim and the practical possibility and genuine opportunity to do so is important.

3.3 Social Context of Access to Justice

The social context of the right relates to the position of the persons or categories of persons who are (to be) protected by the right. Since a social security dispute resolution system gives effect to the right of access to justice of social security claimants, their social (and economic) context must be taken into account in interpreting the nature and scope of the right. The socio-economic context reflective of social security claimants in particular (and the poor in general) has been explained in numerous cases. In *Soobramoney v Minister of Health (KwaZulu Natal)*,⁵² the court highlighted the socio-economic and historical conditions prevailing in South Africa when it remarked that

[w]e 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.⁵³

The socio-economic and historical conditions of such (categories of) persons affect their ability to bring a case before a court or another independent and impartial tribunal or forum established to resolve disputes (access to justice). In relation to the socio-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.⁵⁴

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

51 See *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 12.

52 *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) par 8.

53 *Ibid.*

54 Didcott J in *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 14.

system. As Baxi proposes, the modern concept of access to justice must be defined in a manner that also considers the number of ways in which such access is denied.⁵⁵ It has been remarked that although traditionally access to justice is understood in terms of legal rights, processes and procedure, (often shadowing the socio-economic element, particularly that of poverty), 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”.⁵⁶ Therefore, the interpretation of the concept should be one which ensures the breaking down of barriers that prevent the poor and indigent from accessing the social security adjudication system.

4 Some Barriers Against Access to Justice

Some of the barriers against access to justice for social security claimants include poverty; geographic location of adjudication institutions; physical inaccessibility of adjudication institutions; lack of knowledge of rights (also due to illiteracy); inappropriate dispute resolution institutions and mechanisms; procedural hurdles; and delay in the resolution of disputes.

4 1 Poverty

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 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.⁵⁷ Where the dispute resolution system fails to take such a barrier into consideration (for example, 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.

4 2 Geographic Location of Adjudication Institutions

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 can be easily accessed by aggrieved social security applicants/beneficiaries. Only the magistrates’ courts are widely spread throughout the country (also in rural and township areas). High courts (which

55 Baxi 4.

56 United Nations Development Programme *Access to Justice* March 2004.

57 AfriMAP & Open Society Foundation of South Africa “South Africa: Justice sector and the rule of law (A discussion paper)” (2005) 29.

adjudicate most constitutional rights cases) are largely limited to urban areas, making them less accessible to the users of these fora.⁵⁸ 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 1999.⁵⁹

4 3 Physical Inaccessibility of Adjudication Institutions

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.⁶⁰ A social security adjudication system must ensure that court structures are accessible to all users, including persons with disabilities.

4 4 Lack of Knowledge of Rights (also due to Illiteracy)

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.⁶¹ An inherent aspect of the positive obligations on the state in relation to constitutional rights is the active education of citizens (in this case social security applicants/beneficiaries) about their right of access to courts and to social security.⁶² Some social security statutes recognise the need for education on rights. As an 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 of the Act, as well as contact details of the Agency or anyone acting on its behalf.⁶³

4 5 Inappropriate Dispute Resolution Institutions and Mechanisms.

At present, disputes relating to entitlement and access to social security (both social assistance and social insurance) in South Africa are resolved mainly by resort to litigation in the High Court. Many of the barriers against access to justice (especially issues of cost, delay and travel

58 *Idem* (2005) 109.

59 *Ibid.*

60 *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).

61 Mubangizi "Protection of Human Rights in South Africa: Public Awareness and Perceptions" 2004 *JJS* 62.

62 Heywood & Hassim "Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice" 2008 *SAJHR* 263 278.

63 S 2(4) Social Assistance Act 13 of 2004.

distances) relate to the use of litigation in the High Court to resolve social security disputes. This implies that the absence of alternative avenues for dispute resolution in South African social security has an adverse impact on the right of access to social security (their right of access to justice is limited).

4 6 Procedural Hurdles

Access to courts 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.⁶⁴ Therefore, even where a social security adjudication system it 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.⁶⁵

4 7 Delay in the Resolution of Disputes

A major problem facing social security and other adjudication in the South African context is the length of time it takes for disputes to be resolved. Recent research points out that it takes a long time for a civil case to be heard, particularly in the busier courts. As an example, in the Cape High Court the ordinary court roll for civil matters is full for up to a year.⁶⁶ It is clear that access to justice only becomes complete when one's dispute is settled speedily.⁶⁷ 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.⁶⁸

64 Vawda "Access to justice: From legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234 239-240.

65 Anderson "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Institute of Development Studies (Feb 2003) 15.

66 AfriMAP 118.

67 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 2008-09-09.

68 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 11.

Delay in finalising adjudication impairs social security litigants' rights of access to courts. It further compounds the problems they face, since it is not only their right of access to courts that is infringed, but also their right of access to social security.

5 Conclusions

Despite the argument that 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) to a broader one (which includes social justice, economic justice and environmental justice), a reading of the right protected in section 34 of the Constitution (the resolution of disputes in a fair public hearing by a court or another independent and impartial tribunal or forum) suggests access to justice in the sense of access to the courts or tribunals that adjudicate or mediate disputes. The concept of access to justice is thus to be understood in terms of legal rights, processes and procedures.

However, developments on the concept of access to justice envisage the concept to be more than the establishment of a legal system for the resolution of disputes. It must be defined in a manner that also considers the number of ways in which access is denied. Therefore, the concept includes the empowerment of users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent.

This is the approach adopted by the Constitution, since it guarantees everyone a right of "access to" justice. The constitutional notion of equality; and the interrelated and mutually supporting nature of the rights in the Bill of Rights dictate the need for a broad concept of access to justice. The idea of substantive equality requires that for the poor and indigent to have access to justice, the law to be loaded in favour of the weak and exposed, to provide them with financial and other support. In addition, the interrelated and mutually supporting nature of the rights in the Bill of Rights requires that in realising the right of access to justice, other elements that form the basis of other rights (such as socio-economic rights) must be provided.

The historical context of access to justice (characterised by the placing of significant obstacles in the way of an unqualified access to courts) and the social context of social security claimants further support the need for the modern concept of access to justice to 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). Therefore, it may be true that the right of access to justice in section 34 of the Constitution (understood in terms of legal rights, processes and procedures) is a broad one that includes social justice, economic justice and environmental justice.