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"Access to Justice and Development for Rural Women in Sub-Saharan Africa"

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Abstract

The presentation argues that rural litigants who are predominantly women cannot afford the high cost of formal justice; are unable to travel long distances for court procedures; do not understand English (the language of most formal courts) and value African customs above foreign legal rules, leading to a preference of traditional dispute resolution systems. The presentation also shows that while traditional courts guarantee quicker and cheaper access to justice in many African countries, human rights organisations criticise them for failing to adhere to international fair trial standards – the rule of law. As such, it examines the path towards ensuring equality and the right to a fair trial for rural women in sub- Saharan Africa. It conducts a review of the funding challenges associated with formal legal aid structures and traditional justice mechanisms within specific national judicial systems in sub-Saharan Africa, in seeking to advocate for good governance, stronger institutions and the protection of socio-economic rights as a means to development for rural women on the continent.

1. Introduction

The legal landscape of many contemporary African countries reflects an interaction between two or more sources or systems of law. Due to a shared colonial heritage of received or imposed laws of foreign origin and retention of diverse customary laws; indigenous and imposed systems operate side-by-side, creating pluralistic legal systems. Scholars in many fields have researched this system of legal pluralism, which they argue evolved during the colonial era, mainly because European administrators preferred the certainty and legality of received laws to the vague and often controversial nature of African customs. Some of these studies have focused on African countries, such as the works of Allott, Woodman and Bennett.

Some authors have also argued that with the introduction of alien laws, legal officers relegated or completely eradicated African methods of dispute resolution and replaced them with formal court systems. Bonthuys and Albertyn contend that the transplantation of foreign systems unto the continent created social, economic, cultural and political challenges for the people of Africa. As a result, rural litigants who are predominantly women cannot afford the high cost of formal justice; are

unable to travel long distances for court procedures; do not understand English (the language of most formal courts) and value African customs above foreign legal rules, leading to a preference of traditional dispute resolution systems. While, traditional courts guarantee quicker and cheaper access to justice in many African countries, human rights organisations criticise them for failing to adhere to international fair trial standards – the rule of law.

The path towards ensuring equal access to justice as well as guaranteeing the right to a fair trial for rural women in sub-Saharan Africa, however, requires a review of the funding challenges associated with formal legal aid structures and traditional justice mechanisms. This paper will thus examine specific national judicial systems and their funding impediments in sub-Saharan African countries, in seeking to advocate for good governance, stronger institutions and the protection of socio-economic rights as a means to further developing the continent.

2. Legal Pluralism

a) Common Law/Roman Dutch Law and Customary Law

In modern times, as a result of the African colonial history, most states maintain dual or even multiple legal systems. Nigeria, for instance, has a legal system based on Customary laws, Islamic law and the English Common Law.[1] In Somalia, traditional structures have developed and changed with the socio-political structures established by the colonial rulers, but the traditional social structures remain vital for the survival and protection of the cultural identity of the Somalis.[2] Traditional justice systems were, however, relegated to the background in countries such as Tanzania and Mozambique.[3]

In general, the dominant laws across the African continent include: Islamic law, Common law, Civil law – specifically Roman-Dutch law in the cases of South Africa

[1] Mwalimu C *The Nigerian legal system* (New York: Peter Lang 2005) 134.
[2] Gundel J *Clans in Somalia* (Vienna: ACCORD 2006) 42– 43.
[3] See United Nations Development Programme (UNDP) "*Informal justice systems: charting a course for human rights-based engagement.* "A study of informal justice systems: access to justice and human rights" (2012) 55. Available at *http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf*. (accessed 1 July 2016).

and Namibia – and international legal instruments. [4] In South Africa, the coming of the British led to a dual judicial system,[5] with the establishment of Magistrates' courts and High courts for the settlers, and traditional courts and courts of native commissioners for Africans.[6] Thus, legal pluralism began, with the formal separation of Western and customary systems of law and courts, through policy and legislative structures.[7] During the early colonial period, State governments sought to remove the powers of traditional rulers,[8] hence they reduced customary principles into formal codes, meeting positivist standards.[9] For instance, Zulu customs were codified in the foreign languages of English and Afrikaans, and also restated in law textbooks. The outcome of this procedure was the creation of a distinction between 'official' customary law that and the living customary law, with the codified customary law being termed 'an invented tradition', and not a true reflection of the African tradition.[10]

Hence, commissioners and traditional leaders administered official customary law, while magistrates and the Supreme Court applied the received English and Roman-Dutch laws, and were subject to the Department of Justice. [11] Later, traditional tribunals were given criminal jurisdiction over minor common law and statutory offences in order to lighten the traffic to the magistrates' courts.[12] Section 20 of the

[4] A Aiyedun & A Ordor 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' *Law, Democracy & Development* Vol 20 (2016) at 159.
[5] K Mann & R Roberts *Law in Colonial Africa* (1991) at 18–23. See also RB Mqeke *Customary Law and the New Millenium* (2003) at 29.
[6] ZN Jobodwana 'Courts of Chiefs and Human Rights: Comparative African Perspectives' (2000) 15 *South African Public Law* at 34.
[7] NJJ Olivier *Indigenous Law* (2000) at 197–8, para 192.
[8] JC Bekker & DS Koyana *The Judicial Process in the Customary Courts of Southern Africa* (1998) University of Transkei Project Report at 256.
[9] See TW Bennett & T Vermeulen 'Codification of Customary Law' (1980) 24 *Journal of African Law* at 260. See TW Bennett *Sourcebook of African Customary Law in Southern Africa* (1991) at 138–9. See also Bennett &Vermeulen (1980) op cit at 219. See also Tom Bennett ''Official' vs 'Living' Customary Law: Dilemmas of Description and Recognition' in A Claasens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) at 140–41. See also B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) at 16–17. See TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 60.
[10] See ML Chanock *Law, Custom and Social Order* (1985) and E Hobsbawm & T Ranger (eds) *The Invention of Tradition* (1983) in M Chanock *Law, State and Culture: Thinking About 'Customary Law' After Apartheid* (1991) 52 *Acta Juridica* at 57. See also TW Bennett 'The Compatibility of African Customary Law and Human Rights' (1991) 18 *Acta Juridica* at 23.
[11] Bennett (1991) op cit at vii.
[12] South African Law Commission's Discussion Paper 82 on *The Harmonisation of the Common Law and Indigenous Law: Traditional Tribunals and the Judicial Function of Traditional Leaders* (1999) Project 90 at 3.3–3.4.

Act made provision for criminal acts, such as theft, common assault, malicious damage to property, land issues, domestic violence, witchcraft, marriage matters and insults, and common disputes (such as damage to crops by stray animals). The commissioners' courts had broad powers to consider nearly all civil matters (except divorces arising out of Civil/Christian marriage), and additional powers over a range of common law and statutory offences—especially the notorious offences created by apartheid legislation. They also served as courts of appeal for the traditional leaders and headman's tribunals, although they had to treat appeal cases *de novo* (from the beginning).[13]

Apartheid did little to change the basic structure of legal pluralism that was established in the colonial era. Customary law continued to be considered incompatible with, and inferior to, the common law—as were the traditional courts. Thus, the apartheid government kept the Black Administration Act (hereafter BAA) in place.[14] Until the 1980s, the traditional tribunals and commissioners' courts had jurisdiction only to decide cases involving Blacks.[15] This system was racist and in serious need of reform. Hence, the Hoexter Commission was formed to inquire into the structure and functioning of the courts with the aim of 'removing the stigma of racism'.[16] In 1988, section 1(1) of the Law of Evidence Amendment Act[17] made customary law applicable *as law* in all the courts of the country, although still subject to its compatibility with natural justice and public policy.[18]

[13] See Section 10 (1) BAA 1927; Section 67 (2) Bophuthatswana Constitution Act 18 of 1977; Section 51 (2) Venda Constitution Act 9 of 1979. See also the case of *Ngqoyi v Da Conciecao* (1946) NAC (T & N) 49. Since the chiefs' and headmen's courts are not courts of record, the Commissioner had to retry the accused person.

[14] The recognition of customary law gave enforcement to the right of self-determination. See Bennett (1991) op cit at vi. See also Seymour (1982) op cit at 7.

[15] Bennett (2004) op cit at 42

[16] Ibid.

[17] Act 45 of 1988.

[18] (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice… (4) For the purposes of this section 'indigenous law' means the Black law or customs as applied by the Black tribes in the Republic or in territories, which formerly formed part of the Republic.
Pledging a daughter to discharge a debt was considered sale of a child and contrary to public policy. See Seymour (1982) op cit at 57. See also Bennett (2004) op cit at 67.

b) Constitutionalism

In 1992, towards the beginning of the constitutional negotiations at the Conference for a Democratic South Africa (hereafter CODESA), the Women's National Coalition (hereafter WNC) set up a Negotiations Monitoring Team to represent the interests of rural and urban women. The women, determined to have a democratic process, embarked upon another negotiation process— the Multi-Party Negotiation Process (hereafter MPNP). Once again, the public registered its displeasure, forcing the decision to have a woman on every political delegation to the Negotiating Council, as well as the Technical Committees — this ensured that 50 per cent of the delegates were women. Nevertheless, for political and economic reasons, women were marginalised during the actual process. Some of the political delegations failed to include women, while the ones who attended barely participated.[19]

On the issue of traditional leadership, women's groups argued against discrimination justified in the name of culture and tradition, and called for the exclusion of customary law from the Bill of Rights. They protested against the continuing oppression and marginalisation of rural women as a result of customary law, and demanded an equality trump clause to protect their rights. The heavily contested clause 32 never saw the light of day. [20] Traditional leaders, on the other hand, preferred the exclusion of cultural rights from the Bill of Rights—thus objecting to the subjugation of the right to culture to the equality provision.[21] They sought parallel recognition of the plural legal orders of customary law and received law so as to secure their institution in the new constitutional democracy.[22] Traditional leaders—predictably—argued that customary law should not be subject to the Bill of Rights, but women's lobby groups and civil society protested this argument.[23] A compromise was reached and traditional leaders retained their judicial powers, while customary law was subjected to the new constitutional imperatives.[24]

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[19] Albertyn in Murray (ed) (1994) op cit at 39–60.
[20] See Albertyn in Murray (ed) (1994) op cit at 39–60.
[21] See Mqeke (1997) op cit at 5. See also TW Bennett 'The Equality Clause and Customary Law' (1994) 10 *South African Journal on Human Rights* at 126.
[22] See I Currie 'The Future of Customary Law: Lessons from the Lobolo Debate' in Murray (ed) (1994) op cit at 149.
[23] Bennett (2004) op cit at 77.
[24] At the time of the constitutional negotiations, there were estimated to be 800 chiefs, 13 000 headmen, with about 1 500 courts administering justice to 18 million people: about 40 per cent of the

Following the first democratic elections in 1994, the new government adopted a policy of encouraging traditional leaders to enforce the principles of equality and non-discrimination. [25] In 1996, however, the Constitution stated that application of customary law in all the courts of South Africa is compulsory in terms of section 211(3), while section 166(e) (as read with item 16(1) of Schedule 6) provides for the recognition of traditional tribunals. Hence, the 1996 Constitution recognises traditional tribunals and the application of customary law, but subject to the Bill of Rights.[26]

In 1999, in light of the situation in most traditional tribunals across the country, the South African Law Reform Commission (SALRC) called for their procedures to be harmonised with the provisions of the Constitution. The SALRC complained that the patriarchal attitude of the leaders, which results in gender discrimination, is incompatible with human rights. The Commission observed, however, that in spite of the 'shortcomings in the system, they are not beyond repair but may be made to adapt to changing needs and the requirements of the Bill of Rights'.[27] As a consequence, the SALC provided recommendations and reforms for them including that 'legislation should provide for the representation and participation of women in customary courts'.[28]

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population**.** Konrad Audenauer Foundation *The Role of Traditional Leaders in Local Government in South Africa* 1994 Seminar Report at 29 in Bennett (2004*)* op cit at 111.

[25] *Policy Framework on the Traditional Justice System under the Constitution* (2008) op cit at 1.2.5.

[26] The interim and final Constitutions provide for the application of existing customary legislation until amended or repealed. See section 229 of the Constitution of the Republic of South Africa, Act 200 of 1993 and item 2 of schedule 6 of the Final Constitution.

[27] See Yvonne Mokgoro 'The Role and Place of Lay Participation, Customary and Community Courts in a Restructured Future Judiciary' in *Reshaping the Structures of Justice for a Democratic South Africa*, Papers of Conference. Organised by the National Association of Democratic Lawyers, Pretoria, Oct 1993, at 76 in *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) op cit at 1.

[28] *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) op cit at 7.5.

3. International Law

a) Civil and Political, Socio-Economic and Cultural Rights

i. Fair trial

The concept of fair trial originated in the domestic laws of several European countries, as well as in the United States of America (hereafter US). While English and American jurists first documented the fair trial principle, it was not until the twentieth century that national systems in the West guaranteed formal legal equality. For many years, substantive equality, which sought to remedy political and social injustices for particular vulnerable groups in society, was neglected.[29] The Western foundation of fair trial is derived from Roman codification of individual rights in the XII Tables. Published in 450 BCE, the *Lex Duodecim Tabularum* provided for the right to a fair hearing, the principle of equality and the prohibition against bribery of judicial officials in civil matters.[30] Thereafter, the right appeared in two separate documents from the Middle Ages: the English Magna Carta of 1215[31] and the Scottish Treaty of Arbroath (Declaration of Scottish Independence) of 1320.[32]

Later still, in 1789, the US Bill of Rights made provision for due process, which guaranteed equality for litigants and included provisions on the independence of judges. Thus, in 1791, the US ratified the rights of an individual to public access and fair trial.[33] Similarly, during the French Revolution, the adoption of the Declaration of the Rights of Man and of the Citizen on 26 August 1789 made specific provision for fair trial rights, notably, a presumption of innocence and a prohibition on detention unless determined by law.[34] The concept of a fair trial was also apparent in the German (or Prussian) notion of *Rechtsstaat* (the legal state), and *Rechtsweg* (the right of access to courts), which focused on courts and judges as the guarantors of the law.[35]

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[29] M Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) at 459.
[30] Respectively, Table 2, Law 1; Table 9, Law 1 and Table 9, Law 3.
[31] S Trechsel *Human Rights in Criminal Proceedings* (2005) at 82.
[32] R Mitchison *A History of Scotland* 3ed (2002) at 38–55.
[33] The Sixth Amendment to the United States Constitution. See also the case of *Barker v Wingo* 1972 (407) US 514 at 515.
[34] Article 9 of the French Declaration of 1789.
[35] B Beinart in 'The Rule of Law' (1962) 99 *Acta Juridica* at 108.

The right to fair trial was further defined in English common law by Dicey's principle of 'the rule of law'. Dicey suggested that courts ought to be established by law, without any influence on, or interference with powers, thereby ensuring the separation of powers.[36] Although Western systems guaranteed procedural fairness, they were unable to secure equal access to justice for many litigants.[37]

ii. Access to justice

As a result of difficulties encountered by litigants in Western systems, North American scholars of the realism school of jurisprudence began the Access to Justice Movement.[38] Between the nineteenth and twentieth centuries, there were five waves of the movement. During the first wave in the1960s, access to justice was described as access to courts and lawyers.[39] This implied the individual right to litigate or defend a claim, but it was clear that the right was only available to those who could afford to pay court and legal fees. Barriers to formal justice included the expensive nature of legal representation, the problem of long delays, and the fact that courts were located far from parties to disputes.[40] Because of these challenges, the right to effective access was acknowledged as one of the most basic human rights in a modern, egalitarian legal system, requiring positive state action.[41] As a result, Western governments devised various legal aid programmes to facilitate access for the poor.[42] Despite these efforts, however, access to justice remained elusive for the

[36] AV Dicey *Introduction to the Study of the Law of the Constitution* (1885) in F Francioni *Access to Justice as a Human Right* (ed) (2007) at 178. The French philosopher, Baron de Montesquieu, proposed the separation of state powers between an executive, legislature and judiciary. He followed the British model and recommended that 'the independence of the judiciary [has to] be real, and not apparent merely'. See Baron de Montesquieu, Charles-Louis de Secondat (2003) *Stanford Encyclopaedia of Philosophy*.

[37] See RJ Cook 'Women's International Human Rights Law: The Way Forward' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) at 3.

[38] RA Macdonald 'Access to justice in Canada Today: Scope, Scale and Ambitions' in J Bass, WA Bogart & FH Zemans (eds) *Access to Justice for a new Century: The Way Forward* (2005) at 20.

[39] Bass *et al* (eds) (2005) op cit at 2.

[40] Roberts & Palmer (2005) op cit at 47.

[41] See M Cappelletti & B Garth 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in M Cappelletti & B Garth (eds) *Access to Justice: A World Survey* Vol 1 (1978) at 9.

[42] These programmes include the Judicare system. See Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 24–35. States were also required to establish sufficient courts and to employ and train independent judges and to execute fair and public proceedings. See M Nowak *Introduction to the International Human Rights Regime* (2003) at 50. The performance of courts, their processes and structures also formed part of this development. See Bass, Bogart & Zemans (eds) (2005) op cit at 2.

poorer members of society due, in large part, to the stringent eligibility criteria governing the award of legal aid to needy individuals.[43]

The second wave began in the 1970s — upon the recognition of the general inaccessibility to courts. This wave called for quicker, cheaper, and more readily available judgments, with procedural informality as its hallmark.[44] Activists working in the field brought about an improvement of arrest and pre-trial detention procedures, the speeding up of prosecutions, the humanisation of the penal, probation and parole systems, as well as the creation of small claims courts. The latter courts attempted to limit delays, lower costs, apply simpler procedures and equalise disputants.[45] Some governments also introduced non-judicial institutions, such as criminal compensation tribunals and Human Rights Commissions, which were designed to cater for the judicial needs of the poor.[46] Yet, these mechanisms were not able to provide access to justice for all, and not all parties got a fair trial. Therefore, small claims schemes came under severe criticism as they became almost as expensive, as complex and as slow as the formal courts because of the presence of lawyers and the formal methods applied by the judges.[47]

These failings predicated the arrival of the third wave in the 1980s, when the issue was seen as inequality before existing courts and tribunals.[48] This was not merely a problem of access, however, since it involved the fairness of outcomes. The result was an acceptance of alternative dispute resolution mechanisms — such as mediation and arbitration — as substitutes for litigation. The logic behind these forms of justice was that, since state institutions could not adequately provide fair mechanisms, non-state bodies should be authorised to do so.[49] This situation led to the promotion of informal dispute resolution systems.[50]

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[43] Macdonald in Bass *et al* (eds) (2005) op cit at 20.
[44] Roberts & Palmer (2005) op cit at 45.
[45] Most of these courts prohibited the appearance of legal representatives in order to achieve these objectives. See examples in Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 35–48.
[46] Macdonald in Bass *et al* (eds) (2005) op cit at 21.
[47] The courts also ended up serving creditors more than they did the ordinary debtor. See Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 71.
[48] Macdonald in Bass *et al* (eds) (2005) op cit at 21.
[49] Macdonald in Bass *et al* (eds) (2005) op cit at 22.
[50] Abel (1982) op cit at 295–6; 297–8. See also Roberts & Palmer (2005) op cit at 53–4.

During the fourth wave in the 1990s, scholars discovered that formal court systems, which appeared suitable for public litigation, were grossly inadequate for, and unsuited to, enforcing the rights of ordinary people. Researchers argued that the adversarial nature of the formal courts provided challenges to small claimants because of their complicated procedures.[51] These claims included 'disputes concerning breaches of contract (consumer contracts or otherwise), motor vehicle accidents causing limited damage, eviction from rented premises, and detinue (the unlawful holding of another's goods) involving relatively small amounts of money'.[52] It sought to provide genuine access, which would cover 'multiple non-dispute resolution dimensions', including formal and informal justice mechanisms.[53] The latter referred to neighbourhood justice centres, institutions of avoidance and street committees.[54]

A fifth wave, therefore, emerged. This better captures all the factors affecting access to justice. Scholars declare that 'access' requires attention to the needs of the poor and vulnerable, including women, children and the disabled, while 'justice' involves individual, as well as social, justice.[55] Thus, equal access was designed to guarantee 'substantive justice, procedural fairness and equal access to legal institutions such as legal education, the judiciary, public service, the police, Parliament and other law societies'.[56] This movement has not entirely been successful because of the inequalities that persist between the rich and the poor, thus suggesting the need for a more holistic approach.[57] In short, access to justice requires equal access to all legal institutions (formal and informal) as well as the need for substantive and procedural fairness.[58]

iii. Treaties

In 1945, during the drafting of the Universal Declaration of Human Rights (hereafter UDHR), members of the United Nations (hereafter the UN) undertook to protect the rights of fair trial and access to justice as universal human rights, despite historical

[51] Cappelletti & Garth in Cappelletti & Garth (eds) (1978) vol 1 op cit at 67.
[52] GDS Taylor 'Special procedures governing Small Claims in Australia' at 12 in M Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 70.
[53] Macdonald in Bass *et al* (eds) (2005) op cit at 22.
[54] Macdonald in Bass *et al* (eds) (2005) op cit at 23.
[55] Bass, Bogart & Zemans (eds) (2005) op cit at 3.
[56] Macdonald in Bass, Bogart & Zemans (eds) (2005) op cit at 23.
[57] Ibid.
[58] Macdonald in Bass *et al* (eds) (2005) op cit at 23.

and cultural differences across the globe.[59] When provisions of the UDHR were being debated, the only African members of the UN were Ethiopia, Egypt, South Africa and Liberia.[60] While Egypt participated in the processes, South Africa abstained from voting for the Declaration. Ethiopia and Liberia were simply unable to affect the content because of their limited influence.[61]

Thus, with no strong African presence, provisions of the UDHR[62] were greatly influenced by the West's interpretation of the rights of fair trial and access.[63] Between 1949 and 1951, UN drafting committees worked on articulating principles embedded in the UDHR into provisions of the International Covenant on Civil and Political Rights (hereafter ICCPR) and the International Covenant on Economic Social and Cultural Rights (hereafter ICESCR).[64] The members of the drafting committee were from France, Lebanon and the US, and they formulated a text based on proposals from the United Kingdom and the US.[65]

Thus far, 167 nations have ratified the ICCPR, 48 of which are African.[66] The international provisions on fair trial and access in the ICCPR protect persons who appear in a formal court system operating under a strict separation of powers and under the rule of law paradigm. These provisions provide for the right to equality

[59] Nowak (2003) op cit at 27. After the Second World War, because of the grave atrocities and the mass killings in Europe and Asia, the United Nations Charter affirmed 'faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small'. See the UN Charter Preamble article 1(3), 55 and 56, wherein the Charter obliged all states 'to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging universal respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

[60] Egypt was invited to the UN membership on October 24, 1945, while the Union of South Africa, Liberia and Ethiopia were admitted, respectively, on 7, 12 and 13 November 1945.

[61] GW Mugwanya *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (2003) at 26.

[62] The UDHR was the first international instrument to document civil and political rights such as the right to a fair trial.

[63] An example would be article 10 of the UDHR, which provides for the right to a fair trial and which was drafted when Africa was subject to Western colonial rule. See DS Weissbrodt *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) at 2; 33.

[64] At the end of the drafting sessions, the UDHR recognised two sets of human rights: (i) civil and political rights, and (ii) economic, social and cultural rights. The ICCPR and ICESCR provide for first and second generations of human rights. First generation rights are those documented in the ICCPR (these are the civil and political rights which guarantee individual liberty) and second generation rights are provided for in the ICESCR (these are the socio-economic and cultural rights which provide access to the civil and political rights). See W Wallace 'International Law' in M Ssenyonjo (ed) *Economic, Social and Cultural Rights in International Law* (2009) at 9.

[65] See UN Doc E/CN.4/21 at 3–4 (1 July 1947) in Weissbrodt (2001) op cit at 36.

[66] In March 1976 states ratified an Optional Protocol to the ICCPR.

before courts and tribunals, as well as to fair and public hearing by competent, independent and impartial tribunals established by law.[67] Article 14(1) of the ICCPR provides for the right to a fair trial.[68] The ICCPR in articles 2(1), 3 and 26 provides for rights to equality before the law, equal protection before the law and prohibition of discrimination.[69]

Aside from the joint provisions on fair trial, access and equality in article 14(1) of the ICCPR, articles 14(2)–(7) and 15 provide more rights in the context of criminal cases. No reference is made to civil disputes, suggesting differing standards of fairness. For instance, the article provides for the right to legal representation in criminal litigation, thus promoting access to justice for parties without financial means to pay for a defence.[70] For the true enforcement of the right to an effective remedy, articles 2(1) and (2) of the ICESCR oblige states parties to respect, protect and fulfil socio-economic rights. The treaty requires States not to interfere with the enjoyment of individual rights, directly or indirectly. These obligations include the provision of judicial remedies, such as effective courts and tribunals, which must be 'accessible, affordable, timely and effective'.[71] It requires that states treat citizens equally, respect

[67] Article 9 of the UDHR provides for pre-trial guarantees in criminal cases. Article 11 provides for the presumption of innocence of an accused person and prohibits retroactive laws. Taken together, these provisions guarantee the rights of fair trial and access to justice in civil and criminal cases.

[68] All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 10 UDHR provides for the right to a fair trial as follows:
'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

[69] 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[70] In criminal cases an accused person is entitled to the following minimum guarantees: to be presumed innocent until proved guilty; to be informed promptly and in detail in a language they understand the nature and cause of the charge against them; have adequate time and facilities for the preparation of a defence and communicate with counsel of their choice; to be tried without undue delay; to be tried in person, and to defend themselves in person or through legal assistance of their own choosing; examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf; have the free assistance of an interpreter if they cannot understand or speak the language used in court; and not be compelled to testify against themselves or to confess guilt. All these rights are provided for in articles 14 and 15 of the ICCPR.

[71] Article 2(1) of the ICESCR provides as follows: 'Each State Party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures'. Article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised

the human dignity and worth of citizens, and not to impair their declared rights, including the rights to courts and a fair trial. [72]

b) The African Charter

In response to the international human rights framework, African states drafted the African Charter on Human and Peoples' Rights (hereafter African Charter) to provide for rights that reflect African values.[73] In 1979, African legal experts devised a document on human rights founded on an African civilisation, which 'should inspire and characterise their reflection on the concept of human and peoples rights'.[74] In 1981, the Assembly of African Heads of States and Governments of the Organisation of African Unity (hereafter OAU) adopted the African Charter.[75] This instrument provides a template for municipal systems of law in Africa.[76]

Somewhat surprisingly, African leaders embraced the principles of international human rights in the African Charter without amendments. Furthermore, the New Partnership for Africa's Development (hereafter NEPAD), as an African policy, has given priority to strengthening democracy, good governance, rule of law and empowering women by promoting adherence to international human rights, norms

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without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

[72] Article 3 of the ICESCR specifically guarantees 'the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant'. See CEDAW, General Recommendation 25, article 4 of the Convention on the Elimination of All Forms of Discrimination against Women on Temporary Special Measures (2004).

[73] The Europeans and Americans were first to regionalise human rights. The European Convention on Human Rights was thus adopted by members of the Council of Europe, and came into force on 3 September 3 1953. The Convention was founded on the International Bill of Rights. In 1969 this Convention came into force as a part of the Organisation of American States. In 1959 the Inter-American Commission on Human Rights was established, and the Inter-American Court on Human Rights was established in 1979.

[74] Preamble to the African (Banjul) Charter on Human and Peoples' Rights. See R Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* at 667–714. See also RT Nhlapo 'International Protection of Human Rights and the Family: African Variations on a Common Theme' (1989) 3 *International Journal of Law, Policy and Family* at 17.

[75] The African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982) entered into force on 21 October 1986.

[76] Upon independence from colonial rule, Africans fought to include the right to self-determination as one of the collective human rights provided for in the Charter. This treaty was the first human rights convention to provide for first-, second- and third-generation rights in one document. See article 26 of the Vienna Convention on the Law of Treaties (1969), which provides that 'every treaty in force is binding upon the parties to it and must be performed in good faith'. See JC Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) at 27. See also Mugwanya (2003) op cit at 233.

and standards.[77] The Charter's provisions on the rights of fair trial and access to justice are almost identical to the ones in the ICCPR. [78]

With regard to the issue of equality, the Charter promotes the preservation of certain African cultural values, which sometimes directly conflict with the rights of women, while fostering communal ties. Africanist authors have argued, however, that the provision in article 29(7) must be interpreted in the light of the overall object and purpose of the Charter, which seeks to preserve and strengthen those positive African values in line with the right to equality and non-discrimination of women.[79] Articles 2 and 3 provide for the rights to equality and non-discrimination, while article 18(3) specifically guarantees the protection of women's rights.

c) CEDAW

Prior to the Second World War, women's rights were not at the forefront of human rights movement. But, in 1945, during the drafting of the UN Charter, women delegates ensured that changes were made in the provisions in the UDHR from 'all men' to 'everyone'.[80] The women who participated in this movement were from the Western world: African women were not consulted.[81]

In 1946, the Commission on the Status of Women (CSW) was created to promote specific rights for women through the adoption of international instruments. In 1975, owing to the fragmented documentation of women's rights, the First World Conference on Women was convened in Mexico City. Here a call was made for a treaty protecting female rights exclusively. [82] Thereafter, in 1980, the World Conference of the United Nations Decade for Women was held in Copenhagen to

[77] NEPAD was adopted by the OAU in 2001 and ratified by the AU in 2002. Information is available at http://www.nepad.org/history last accessed on 15 February 2013.
[78] Section 7 provides as follows:

> Every individual shall have the right to have his cause heard. This comprises:
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
> (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
> (c) the right to defense, including the right to be defended by counsel of his choice;
> (d) the right to be tried within a reasonable time by an impartial court or tribunal.

[79] Ssenyonjo (ed) (2009) op cit at 251.
[80] AS Fraser 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) HRQ at 886–888 in E Bonthuys & W Domingo 'Constitutional and International Law Context' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) at 57.
[81] Bonthuys & Domingo in Bonthuys & Albertyn (eds) (2007) op cit at 58.
[82] Between 19 June and 2 July in Mexico City.

review women's rights.[83] In 1985, another World Conference, this time in Nairobi, reviewed and appraised the achievements of the United Nations Decade for Women.[84] In 1995, the Fourth World Conference was held in Beijing, known as the Beijing Conference and Platform for Action. This produced a Declaration on the advancement of women's rights.

Proceeding from the First World Conference, the General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW).[85] CEDAW thereafter became the first international convention to address women's rights comprehensively.[86] By October 2006, 185 states had accepted it, and it has become one of the most widely ratified human rights treaties.[87] The greatest challenge to the CEDAW, however, is the large number of reservations to its provisions.[88]

For the protection of women's fair trial and access rights, article 2 of the CEDAW provides that: 'Everyone has an equal right to access to the courts, without discrimination'. Article 15(1) and (2) provide for equal access to civil litigation. This article ensures the rights of women to a fair civil trial before courts and tribunals. Since there is no clear explanation of the kind of courts or tribunals, it is an open question as to whether these terms include traditional tribunals. We can infer that they do if we take into account article 14(1) of CEDAW, which states that: 'States parties should take into account the particular problems faced by rural women…'

To enforce fair trial and access to justice for women in courts and tribunals, articles 2(a)–(g) of the CEDAW require all states parties to do the following: incorporate the principle of equality for men and women; abolish all discriminatory laws; establish tribunals and other public institutions to ensure the effective protection of women

[83] This took place between 14 and 30 July 1980.
[84] Between 15 and 26 July in Nairobi.
[85] GA Res. 34/180, UN GAOR, 34th Sess, Supp No 46, UN Doc A/34/46 (1980).
[86] In 1999 the General Assembly adopted the Optional Protocol to the Convention on the Elimination and Discrimination against Women. 54th Sess 15 October 1999, A/RES/54/4. Article 2 of the Protocol provides for individual and group complaints against state violations, allowing women's groups to institute proceedings on behalf of victims. See UA O'Hare 'Realizing Human Rights for Women' (1999) *Human Rights Quarterly* at 389 in Bonthuys & Domingo in Bonthuys & Albertyn (eds) (2007) op cit at 63–4.
[87] It has been ratified by all African States besides Somalia and Sudan.
[88] See RJ Cook 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* at 690 in Bonthuys & Domingo in Bonthuys & Albertyn (eds) (2007) op cit at 63.

against discrimination; ensure the elimination of all forms of discrimination against women; establish legal protection of the rights of women on an equal basis with men; refrain from engaging in any act or practice of discrimination against women; take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women, and repeal all national penal provisions which constitute discrimination against women. In spite of these elaborate provisions, the CEDAW makes no provision for a right to legal representation in civil matters, although this right generally works to enable all the other rights.

4. Formal Justice

a) Recognition of Human Rights in the Bill of Rights

In 1945, South Africa became a party to the UN Charter and was, therefore, obliged to respect and observe human rights.[89] This situation did not last very long: in 1948 the National Party came to power and introduced apartheid as an official aspect of government policy. South Africa thereby became the only 'Western' country to abstain from adopting the provisions of the UDHR.

During the 1970s and 1980s, the international community put increasing pressure on the South African Government to uphold human rights standards, but these efforts were resisted.[90] It was only in the 1990s that the new democratic government indicated its willingness to adopt the international code of human rights.[91] As a result, in 1991, South Africa committed itself to becoming a united, non-racial, non-sexist country, and entered into negotiations to establish a new constitution.[92]

With this impetus, and the commitment to human rights, one of the first actions of the new government was to make South Africa a party to the CEDAW.[93] Shortly

[89] See article 1 (3) and 55 (3) of the UN Charter at Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[90] See DJ Titus *The Applicability of the International Human Rights Norms to the South African Legal System: With Specific Reference to the Role of the Judiciary* (1993) at 5.
[91] The South African government unbanned political organisations, released political prisoners, terminated the State of Emergency and abolished other key elements of the apartheid rule such as the Population Registration Act 30 of 1950, the Group Areas Act 36 of 1966, the Natives Land Act of 1913, and the Reservation of Separate Amenities Act 49 of 1953. See Titus (1993) op cit at 5.
[92] See the CODESA Declaration of Intent and the United Nations Centre against Apartheid Notes and Comments 1/92 at 3-4.
[93] South Africa signed the CEDAW on 3 October 1994 and ratified it on 10 December 1998. South Africa became party to the ICESCR on 3 October 1994, but has failed to ratify this treaty. See the

thereafter, South Africa signed the ICCPR. Despite these good intentions, some human rights proponents criticised the country for its failure to accede to certain crucial human rights treaties, or, where it signed, for not proceeding to ratification.[94] For instance, South Africa has not ratified the ICESCR or the Optional Protocol to the CEDAW. In addition, the country's reporting on its adherence to the international human rights treaties to which it is party has been poor.[95]

Following the ratification of the ICCPR, CEDAW and the African Charter, [96] however, South Africa sought to incorporate the principles in those documents into the Constitution.[97] As we have seen, many of the provisions are of Western origin, with little immediate relevance to an African setting. Hence, drafters of the Constitution included the rights of fair trial and access to justice as provided for in the international human rights conventions, paying no particular attention to procedures in traditional tribunals (although these may conflict with the rights of African women).[98]

i. Access to Courts

The fair trial provisions in section 34 of the Constitution protect civil litigants during dispute resolution. This section protects the independence and impartiality of judges, and ensures fair and public hearings. According to the Constitution, '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

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United Nations Treaty Collection at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

[94] See *South Africa: Justice Sector and the Rule of Law* (2004) at 4. The Department of Justice and Constitutional Development (DoJCD) has, however, begun taking steps to ensure that all human rights obligations are domesticated — where found to be compatible with the 1996 Constitution. See DoJCD 2004 report.

[95] Ibid.

[96] South Africa became party to the African Charter on Human and Peoples' Rights on the 9 July 1996.

[97] Three years after the Constitution of the Republic of South Africa, Act 200 of 1993 came into force, President Nelson Mandela, on 16 December 1996, signed into law the Final Constitution that ushered in a new democracy and a fully justiciable Bill of Rights. The Final Constitution came into effect on 4 February1997. See The White Paper on Traditional Leadership and Governance published on 30 September 2003.

[98] It is important to note that, while the international protection of the rights of access to courts and fair trial stem from existing international law instruments (and the African Charter), full enforcement can only come with the incorporation of international laws into domestic legislation. C Heyns & WW Kaguongo 'Constitutional Human Rights Law in Africa: Current Developments' (2006) 22 *SAHJR* at 673. Once enacted into domestic legislation, international agreements can be applied like domestic law.

impartial tribunal or forum' [emphasis added].[99] Reference to 'disputes' suggests these may be of a civil nature only, and may not extend to criminal cases.[100] The judicial principles of independence and impartiality are essential to enforcing the rule of law.[101]

Several decisions have argued the importance of impartiality in civil trials, and they maintain that the test is a 'reasonable person', who, if aware of the facts known to the court, would not be biased in adjudicating the case.[102] Section 165(2) provides that '*courts* are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice' [emphasis added]. With the aim of ensuring fair civil trials, section 34 also requires all disputes before courts, tribunals and other forums to be fair and heard in public. This provision ought to enforce the rule of law and make certain that all matters are resolved fairly, with free accessibility to all. In *De Beer NO v North-Central Local Council and South-Central Local Council,*[103] the court gave meaning to fair hearing and described it as fundamental to the rule of law, requiring judicial officers to interpret the law in an impartial manner.[104] The standard of fairness is based on the common law principle of natural justice or *audi alteram partem,* which affords both parties an opportunity to be heard.[105]

ii. Fair Trial

In the Constitution, criminal proceedings are regulated by section 35. Subsection (1) provides rights for arrested persons, subsection (2) for detained persons and

[99] See section 34 of the Constitution.
[100] See *S v Pennington* 1997 (4) SA 1076 (CC).
[101] The rule of law requires all courts to be impartial and to apply fair procedures. See I Currie & J de Waal *The Bill of Rights Handbook* (2005) op cit at 10–3. Procedurally, this means that government decisions must not be arbitrary; substantially, the government must uphold the basic human rights of all citizens. The rule of law also requires the application of civil and political—as well as social and economic— rights, according to the general principles of law. See B Beinart 'The Rule of Law' (1962) 99 *Acta Juridica* at 108.
[102] *South African Rugby Football Union v Commissioner for the South African Revenue Services* 1999 (7) BCLR 725 (CC).
[103] *De Beer NO v North-Central Local Council and South-Central Local Council & others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC).
[104] Supra at para[s] 10–11. The right to a public hearing entails civil matters to be heard in public, but the law recognises several exceptions to this rule. In cases where children are involved, for example, court proceedings are usually held in private. Also, taxation hearings and certain arbitration proceedings are held behind closed doors.
[105] Supra para 11.

subsection (3) for accused persons.[106] An accused person is one who has been charged to appear in court for committing an offence. Such a charge requires that the person in question be informed that the state intends to prosecute him or her to determine guilt or innocence.[107] In addition to the principles stipulated for civil matters, in criminal suits the right to a fair trial affords special rules and procedures applicable throughout the proceedings in order to ensure there is equivalent standing between the parties. The right implies a state duty to put in place structures 'capable of safeguarding judicial independence and impartiality',[108] which seek 'to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms'.[109]

Section 35(3)(c) requires trials to be held in public in order to protect the rights of an accused and guard against unfairness.[110] Accordingly, courts ought to grant the public, as well as the media, access to criminal hearings. Fair hearing, which is provided for in section 152 of the Criminal Procedure Act,[111] also requires criminal proceedings to be conducted in open court. It is, however, not an absolute right and allows for exceptions,[112] for example, cases involving children or others of a sensitive nature.[113] The requirement for criminal proceedings to be public is based on the principle of transparency, that is, by giving the public enough information to review the fairness of the judgment.[114] Indirectly, therefore, the requirement guarantees, a fair trial.[115] Section 35(3)(c) also requires trial in an ordinary court, which implies that the only appropriate forum for trying criminal offences is a court of law, and no other.[116]

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[106] Section 35 (3) provides for a host of rights, most of which are beyond the scope of this thesis and thus will not be discussed.
[107] Currie & de Waal (2005*)* op cit at 744–5.
[108] Udombana (2006) op cit at 300.
[109] Udombana (2006) op cit at 301.
[110] This is to protect criminal litigants against arbitrary procedures.
[111] 51 of 1997.
[112] See sections 153, 154 and 335A of the Act.
[113] Sections 153 and 154 of the Criminal Procedure Act provide exceptions to this rule. See also Currie & de Waal (2005) op cit at 782. In *S v Pennington*, the Constitutional Court held that an application for leave to appeal does not have to be heard in public. 1997 (4) SA 1076 (CC) at para 51.
[114] See *Klink v Regional Court Magistrate NO & others* 1996 (1) SACR 434 (E); 1996 (3) BCLR 402 (SE) at 414.
[115] Thus, an ordinary court means one which complies with the requirements of independence and impartiality as provided for in section 165(2).
[116] *Nel v Le Roux NO & others* 1998 (3) SA 785 (CC) at para 74 per Ackermann J, and para 174 per Sachs J.

According to the guarantee of equality in criminal proceedings, once an accused person has been charged and is to be brought before a court, he or she must have access to state-appointed legal representation, if needed. Where accused persons can afford representation, it is the State's responsibility to ensure that, from the time of arrest, they are given the opportunity to contact their lawyers.[117] Section 35(3)(f) obliges a presiding officer promptly to inform an accused person of the right to legal representation. Refusal to do so may be considered an irregularity, rendering a trial invalid.[118] The Constitution provides the highest protection of this right, but it is also entrenched in the Criminal Procedure Act.[119]

For criminal trials, the Constitution sets out parameters for the parties' right to adduce evidence. Again, they must be treated equally, particularly with respect to the introduction of evidence by means of interrogation of witnesses. The defendant is granted the same powers as are available to the prosecution of compelling the attendance of witnesses and of examining or cross-examining them.[120] Section 35(3)(i) of the Constitution provides for the right of an accused person or legal representative to cross-examine witnesses. Where the accused is unrepresented, the court must assist him or her to adduce evidence. There is an exception to this rule in section 166(3) of the Criminal Procedure Act, which provides that the court may limit cross-examination time if it constitutes unreasonable delay and if the evidence adduced is not directly relevant to proving or disproving the prosecution's case.[121]

The right to appeal or to judicial review allows courts to overturn erroneous decisions.[122] Section 35(3)(o) provides for the right of an accused person to appeal or review.[123] Appeal must be made to a higher court and the decisions of that court must be binding on the lower court.[124] The process for an appeal was laid down in the case

[117] See Constitution of the Republic of South Africa, section 35(2)(b).
[118] See *S v Gouwe* 1995 (8) BCLR 968 (B). Also see *S v Ramuongiwa* 1997 (2) BCLR 268 (V).
[119] See sections 97 and 218 of the Criminal Procedure and Evidence Act 31 of 1917, sections 84 and 158 of the Criminal Procedure Act 56 of 1955, and sections 73 and 166 of Criminal Procedure Act 51 of 1977.
[120] See Human Rights Committee, General Comment no 13, article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 14 (1994), which is available at http://www1.umn.edu/humanrts/gencomm/hrcom13.htm, and last accessed on 15 February 2013.
[121] See Currie, de Waal & Erasmus (2001) op cit at 644.
[122] For this principle see the case of *S v Twala & others* (South African Human Rights Intervening) 1999 (2) SACR 622 (CC); *S v Steyn* 2001 (1) SA 1146 (CC).
[123] See *Mphahlele v First National Bank of South Africa* 1999 (2) SA 667 (CC).
[124] Currie & de Waal (2005) op cit at 789.

of *S v Rens,*[125] where the Constitutional Court considered the provisions of the Criminal Procedure Act[126] that prevent a person tried by a superior court from appealing, as of right, against a conviction or sentence.[127] The court held that, for a person to apply for such an appeal, he or she must first apply for leave to appeal by convincing the court, on a balance of probabilities, about the reasonable prospects. If the court refused to grant this appeal, the appellant could petition the Chief Justice, who must then refer the matter to two judges of the Appellate Division.[128] To give full effect to this right, the court of first instance needs to stay the execution of its judgment pending the outcome of the appeal. An appeal must, however, be genuine and fast.[129] All the minimum procedural guarantees of a fair trial must also be observed during all appellate proceedings.[130]

iii. Equality

Equality first gained prominence in the 1993 Constitution of the Republic of South Africa, Act 200 of 1993, which stated, in Principle V.[131] In light of this principle, it has been argued that equality, or the pursuit of equality, is one of the cornerstones of the present Bill of Rights.[132] This right is seen as a trump right, primarily because apartheid created so egregious a system of inequality.[133] In the 1996 Constitution equality is provided for in section 9, which guarantees equality before the law, equal protection and benefit of the law and prohibits unfair discrimination.

Section 9(1) protects the right to equality before the law and the right to equal protection and benefit of the law. These rights are considered as rights to formal and substantive equality, conferring a duty on all courts and tribunals to ensure the equal

[125] 1996 (1) SA 1218 (CC).
[126] No 56 of 1955.
[127] See sections 315 (4), 316 and 319 of the Criminal Procedure Act No 51 of 1977.
[128] Also see *S v Twala* supra at para 9. See also Currie, de Waal & Erasmus (2001) op cit at 650.
[129] *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000) op cit at 22.
[130] Ibid.
[131] Act 200 of 1993, Schedule 4.
[132] See, for example, El Bonthuys 'The South African Bill of Rights and the Development of Family Law' (2002) 4 *SALJ* at 748 and M Pieterse 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?'(2000) 3 *SALJ* at 627.
[133] Justice Mahomed DP emphasised the importance of this right in *Fraser v Children's Court, Pretoria North & others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20 as follows: 'There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised'.

treatment of all persons in law, as well as ensuring equal outcomes to a case.[134] In some instances it is mandatory to 'understand the impact of the discriminatory action upon the people concerned in order to determine whether such an act was unfair or not'.[135]

Section 9(2) provides for the principle of equality, the equal enjoyment of all rights and freedoms and 'substantive equality by providing for the adequate protection and advancement of persons disadvantaged by unfair discrimination'.[136] This section has pride of place in the Constitution because of the past discrimination meted out during the apartheid period, and it attempts to reverse the inequalities of the past. Thus, the right to equality requires affirmative action on the part of the government, such as the promotion of individual socio-economic rights within the country in order to benefit the poor and previously disadvantaged, such as rural women.[137]

Section 9(3) prohibits the state from discriminating against anyone. The Constitutional Court in *Prinsloo v Van der Linde*,[138] described 'discrimination' as 'treating people differently in a way which impairs their fundamental dignity as a human being'. In *Harksen v Lane NO & others*,[139] the Court laid down the factors that had to be considered in reaching a decision in order to determine whether or not a practice or law was discriminatory; the position of the complainant in society and whether he or she had been a victim of past patterns of discrimination; the nature of the discriminatory law or act and the purpose it sought to achieve; the extent to which the rights of the complainant had been impaired and whether his or her fundamental dignity had been impaired.[140]

Section 9(4) speaks of a right not to be unfairly discriminated against, which suggests that not only must parties have the equal right to appear in court, but they must also be given the same treatment. Where an accused person is not able to obtain justice under the same conditions as his or her opponent, the trial cannot be considered fair.

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[134] See Currie, de Waal & Erasmus (2001) op cit at 200.
[135] See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) at para 41.
[136] Mubangizi (2004) op cit at 74.
[137] See *Motala & Another v University of Natal* 1996 (3) BCLR 374 (D). See also Mubangizi (2004) op cit at 74.
[138] Supra at para 31.
[139] Supra at para 52.
[140] See also Mubangizi (2004) op cit at 76. See *President of the Republic of South Africa v Hugo* supra for the distinction between fair and unfair discrimination.

In *S v Khanyile & others*, the court held that the basic principles of equality and fairness under the law. The principle of equality implies equal protection of the law, while the principle of fairness implies that both parties must be adequately represented in criminal cases.[141] Hence, where accused persons have no legal representation because of their financial status, even though they did not want counsel, this would render the trial unfair.[142] In essence, once a skilled lawyer represents only one party, the other party's chance of receiving a favourable judgment is threatened.[143]

5. Rural Women and the Rule of Law

With regard to financial barriers, rural women are specially affected, because they are generally the poorest sector of the population.[144] This imbalance stems from inequalities fostered by the former apartheid system of administration, which segregated whites and blacks, and empowered men rather than women.[145] In spite of the fact that these women have little chance of gaining access to formal courts, they are required to employ lawyers, pay filing charges, and may also have to pay judgment costs. In essence, the socio-economic status of rural women determines their accessibility choices.[146]

Financial difficulties are directly linked to the geographic barriers in that rural women have difficulty in gaining access from a physical point of view.[147] Besides having to pay legal fees, they have to travel to and from court during trial, an expense that makes it difficult, and often impossible, to prosecute or defend a case.[148] Legal

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[141] *S v Khanyile* supra at 810C-D.
[142] NC Lawrenson *Legal Representation and a Bill of Rights* (1993) at 3.
[143] See Lawrenson (1993) op cit at 2.
[144] E Bonthuys & C Albertyn *Gender, Law and Justice* (eds) (2007) at 7. Indeed, legal proceedings are largely unaffordable to women in general—usually the poorest members of any society, making the pursuit of formal justice both inaccessible and discriminatory. See *Making the Law Work for Everyone* (2008) op cit at 1–2.
[145] 'Poverty, unemployment and inequality are the biggest threats to South Africa's democracy, which further impacts on the challenge of ensuring that poor people know and understand how to access various human rights services.' See http://www.fhr.org.za/page.php?p_id=68 which was last accessed on 3 August 2013.
[146] J Steele & J Sergeant *Access to Legal Services: The Contribution of Alternative Approaches* (1999) at 12–13.
[147] Besides the issue of poverty and the prohibitive cost of accessing formal justice, most litigants must wait for long periods of time before obtaining judgment. See *Making the Law Work for Everyone* (2008) op cit at 32.
[148] M Cappelletti & B Garth in M Cappelletti & B Garth (eds) *Access to Justice: Emerging Issues and Perspectives* Vol 3 (1979) at 9–10.

institutions of every type (courts, legal aid offices, registry offices and other administrative agencies) are situated mainly in the cities and larger towns of South Africa, whereas the women under discussion here are based in regions remote from urban areas.[149] The distances involved in having to travel from their homes to the urban legal facilities can be considerable, as is the expense involved.

Beside financial and geographic barriers, linguistic diversity poses a real problem for women.[150] Since the language of the court is usually English or Afrikaans, many litigants cannot fully participate in court hearings, because, for rural women in particular—who generally do not have the advantage of secondary education— the language of the court is their second (or even third) languages. Communication in court therefore becomes very cumbersome.[151] With the way (the) legal language is structured, verbatim translations are almost impossible to reproduce. Lawyers compound the language of the law with the use of complex syntax and arcane terminology, [152] adding to litigants' confusion about the laws and procedures involved.[153]

The problem of access also manifests itself in cultural terms. The culturally diverse nature of South African society means that rural women have a choice of dispute resolution forums. While some litigants may be content with formal courts and the assurance of authority and legal certainty, most rural women prefer the familiar customs and informality, which promises them restoration of long-term

[149] Most centres and university law clinics are located in the urban areas while the majority of people who need these programmes live in the rural areas. See RA Macdonald in J Bass, W A Bogart & F Zemans (eds) *Access to Justice for a New Century: The Way Forward* (2005) at 28.
[150] *Making the Law Work for Everyone* (2008) op cit at 33.
[151] In most African countries, for example, courts are run in English, French, or Portuguese, even though most of the population are only proficient in indigenous (that is, non-European) languages. *Making the Law Work for Everyone* (2008) op cit at 32–3.
[152] Cappelletti & Garth in Cappelletti & Garth (eds) (1979) Vol 3 op cit at 10.
[153] See IH Jacob in 'Access to Justice in England' in M Cappelletti & B Garth (eds) *Access to Justice: A World Survey* (1978) Vol 1 at 434–5. There is a need to demystify the process and make it less formal otherwise, 'if carried to an extreme, the formal dispute process becomes wholly involuted, hermetical, the exclusive domain of specialists, and comprehensible to them (lawyers and judges) alone'. Cappelletti & Garth in Cappelletti & Garth (eds) (1979) Vol 3 op cit at 11.

relationships.[154] For them, the importance of culture cannot be underestimated since it affects the perceived quality of justice.[155]

For these reasons and others, the formal justice system fails to provide accessible dispute resolution for rural women. In accordance with the provisions of section 34, there is no clear constitutional obligation to provide legal representation in civil disputes.[156] Since the Constitution has no provision for legal representation in civil suits, the argument is put forward that, for effective access in civil suits, the state needs to introduce some form of representation, generally via the provision of legal aid. The Land Claims Court, in *Nkuzi Development Association v Government of the Republic of South Africa & another*,[157] recognised that civil matters are important and require the same standard of legality as criminal ones. Basically, because rural women are in dire need of legal assistance—as they are socio-economically disempowered within society—Legal Aid South Africa (LASA) applies the same standard in civil as in criminal cases, in accordance with the provision for state responsibility in section 7(2).

It is clear that a number of factors come into play for LASA in deciding whether to provide assistance or not. First, the applicant has to be indigent; secondly, there has to be a prospect of success. These requirements seem more stringent than that which was focused on by the court in *Nkuzi*. Therefore, if a litigant is not eliminated by their not being poor enough, their case has to be very strong, and even where they are poor enough and have a strong case, if the LASA cannot recover their costs in certain circumstances, the litigants have no recourse.

In criminal cases, the issue of legal representation is covered by section 35(3)(g). This provision guarantees the right to legal aid in criminal matters where substantial injustice may otherwise be done.[158] In conjunction with this constitutional

[154] See South African Law Commission's Project 90, Discussion Paper on *The Harmonisation of the Common Law and Indigenous Law: Traditional Tribunals and the Judicial Function of Traditional Leaders* (1999) at 2.1.1–2.1.5.
[155] Ibid.
[156] See *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza & others* (493/2000) [2001] ZASCA 85.
[157] 2003 (4) SA 266 (CC).
[158] These include arrested, detained or sentenced persons under section 35(2)(c) of the Constitution, as provided for in section 73 of the Criminal Procedure Act 51 of 1977; and accused persons under section 35(3)(g), including the right of appeal to, and review by, a higher court (section 35(3)(o)), as provided for in sections 73, 309, 309B, 309C, 309D and 316 of the Criminal Procedure Act. See

requirement, section 73 of the Criminal Procedure Act also provides for the right of an accused person to legal representation. These provisions indicate that accused persons require legal assistance in order to have a fair trial during criminal proceedings of any seriousness.

6. Right to Culture and Human Rights in Sub-Saharan Africa

The constitutional recognition of the right to culture and the institution of traditional leadership, on the other hand, make traditional tribunals very relevant to accessing justice in rural South Africa. In fact, sections 30 and 31 of the Constitution oblige the state to promote and protect the right to culture. Thus, on the one hand, the state must allow the freedom of culture, but, at the same time, it must secure the right to equality - and it must be remembered that the principle of equal treatment applies to cultural groups as well as individuals.

In *Christian Education South Africa v Minister of Education,*[159] the Constitutional Court held that the state is obliged to preserve group identity through the use of own culture and language.[160] The right to culture, however, is subject to an 'internal' limitation clause. Sections 30 and 31 provide that the right is subject to other rights in the Constitution. By implication, culture – and-customary law – must be brought into alignment with the Bill of Rights. In the case of culture, the identity of the right-bearer is clearly a contentious matter. The Human Rights Committee of the United Nations, for instance, when considering article 27 of the ICCPR in the *Lovelace* case, ruled that the right to culture was an individual right.[161] Bennett contends that individual rights and group rights are in fact 'symbiotic partners'.[162]

When female litigants approach courts and tribunals, the conflict between the right to culture and equality becomes acute. The Constitution attempts to guide the courts by providing that, in interpreting the Bill of Rights, courts must promote the values based on human dignity, equality, and freedom, and these values must be consistent with

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articles 4.1.1 and 4.4.2 of the Legal Aid Guide 2009/2012.
[159] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para 26.
[160] See also Bennett (2004) op cit at 88.
[161] *Sandra Lovelace v Canada* 68 ILR 17.
[162] TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 25.

international law.[163] Courts are also obliged to promote the spirit, purport and objects of the Bill of Rights in order to harmonise domestic legislation with international law principles.[164]

The question of which rule to apply, when there is a clash between African customary law and human rights, has been a major problem of pluralistic legal systems all over the African continent. While some jurists have argued in favour of the precedence of received laws, others contend that indigenous laws should prevail over laws of a European origin on the ground that the imported laws were enacted in another country.[165] According to Banda's categorisation, in South Africa, the Constitutional Court leaned towards a weak cultural relativism or universalism,[166] as seen in *Bhe & others v Khayelitsha Magistrate & others*, [167] and in *Shilubana & others v Nwamitwa.*[168] Justice Sachs in *S v Makwanyane & another*,[169] alongside other jurists has advocated for the need to interpret the Bill of Rights along the lines of culture in the context of the debate on cultural relativism and the universality of human right. [170]

Some have agreed with this, and have argued for a moderate form of relativism, which allows the interpretation of human rights in the context of local customs.[171] This suggests that certain rights may be recognised universally, but that they might also require subjective interpretation. In order to guarantee the constitutionality of a custom, the Constitutional Court has tested it against the conditions in sections 36(1) and (2). For this reason, the Constitution provides for both an internal and external limitation clause. The application of the Bill of Rights is subject to a limitation test because rules and rights are not absolute and other rights determine their scope of application. Hence, if a rule of customary law violates a right, the rule may nonetheless be upheld if it passes test laid down in section 36(1).

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[163] Section 7 of the Constitution.
[164] Section 39(2) of the Constitution.
[165] See K Chanda 'Continuing Legal Pluralism with Gradual Judicial Integration: The Way Forward for Post-Colonial Africa' in MO Hinz & HK Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority: A Southern Perspective* (2006) at 52.
[166] F Banda *Women, Law and Human Rights: An African Perspective* (2005*)* at 34.
[167] *Bhe v Magistrate, Khayelitsha (CGE as Amicus Curiae); Shibi v Sithole; SAHRC v President of the RSA* 2005 (1) SA 580 (CC).
[168] 2009 (2) SA 66 (CC). The traditional court in *Bangindawo & others v Head of the Nyanda Regional Authority & another* went with a strong cultural relativism. 1998 (3) SA 262 (Tk).
[169] 1995 (3) SA 391 (CC).
[170] See J Church, C Schulze & H Strydom *Human Rights from a Comparative and International Law Perspective* (2007) at 67.
[171] Church *et al* (eds) (2007) at 68.

In *Bhe & others v Magistrate, Khayelitsha & others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & others*, the Constitutional Court held that the section violated the rights to human dignity and equality, which are the most valuable rights, and the section was not justifiable in an open and democratic society.[172] (To achieve a different result, however, the court could have sought to develop that rule as provided for in section 39(2)).[173]

7. Enforcement of Socio-Economic Rights through Fiscal Adjustments

Although universalists claim that human rights are the same everywhere, cultural relativists have put forward various arguments to support the difference between Western and African culture, and the need for future recognition of this fact. Gender activists, however, recommend that human rights should be re-negotiated to allow for the expression of all cultures and genders. Legal pluralists concur, and argue that both extremes should evolve and develop, thereby tempering a rigid approach to the application of human rights.[174]

In concert with the pluralists, African scholars have argued that, for human rights norms to be truly universal, they should be seen to reflect global standards in the recognition of all origins.[175] Many have described international human rights conventions as the remnants of Western imperialism, and an attempt to impose Western cultural hegemony on Africans.[176] They contest the universality of the rights

[172] Para 95.

[173] 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'.

[174] See Bennett (2004) op cit at 83. See also J Nedelsky 'Reconceiving Rights and Constitutionalism' (2008) 7(2) *J of Human Rights* 143–144.

[175] '…the 53 countries of Africa represent more than a quarter of the countries of the world. As a result, the imperative is not only for African states to take the human rights provisions in their constitutions more seriously, but also for the international community, in formulating international human rights norms, to do likewise'. See M Ssenyonjo 'Strengthening the African Regional Human Rights System' in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2011) at 478.

[176] JS Mbiti restates the African philosophy in the saying 'I am because we are; and since we are, therefore I am'. JS Mbiti *African Religions and Philosophy* (1990) at 141. This rather simplistic adage sums up the essence of the African spirit of community, but directly conflicts with the philosophy of political liberalism and individualism of the West. In other words, the introduction of Western individual human rights into African society requires some compromise on the part of Western and African philosophies. See RT Nhlapo 'International Protection of Human rights and the Family: African Variations on a Common Theme' (1989) 3 *International Journal of Law, Policy and the Family* at 15 argues the same for human rights losing its very essence. Mutua also makes the case that 'the transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa'. M Mutua *Human Rights: A Political and Cultural Critique* (2002) at 71.

contained in the international treaties in the light of their Western philosophies and bourgeois values.[177] For instance, unlike Western societies, it is clear that pre-colonial African societies did not promote individual autonomy above the group, and whatever rights an individual had were limited by the interest of the community.[178]

Bennett notes that pre-colonial African societies differ greatly from the post-colonial, and that the latter may well be in need of bills of rights.[179] Alongside other cultural relativists, Bennett argues that 'traditional Africa' had a human rights culture that was in many ways similar, if not superior, to that of Europe, and the task ahead is merely to search either for conceptual equivalents or for contrasting features.[180] To achieve this, gender experts Classens and Mnisi-Weeks argue for a review of the content of customary law in the context of the equality rights guaranteed in the Constitution of South Africa.[181] They recommend that customary law should be influenced by the voices of rural women who are mostly affected by it.[182] In this manner, the content of living customary law can be developed through re-negotiated power relations in the rural areas,[183] thereby removing sole right of control from traditional leaders to members of the community—who are mostly women.[184] This argument purports to

[177] See, for example, Bennett (1995) op cit at 1–2.
[178] A Pollis & P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) at 9. Legal pluralists have not discounted this claim, but they recognise the overlap between universal and cultural ideals. They claim that both systems must coexist in multi-cultural societies with formal and informal legal systems at the interface between rights and custom. See C Lund 'Development and Rights: Tempering Universalism and Relativism' in C Lund (ed) *Development and Rights: Negotiating Justice in Changing Societies* (1999) at 2. Musembi argues that post-colonial societies exist in a state of legal and cultural pluralism, which requires the acceptance of diverse social ideals. C Nyamu-Musembi 'Towards an Actor-Oriented Perspective on Human Rights' in N Kabeer (ed) *Inclusive Citizenship: Meanings and Expressions* (2005) at 37.
[179] See Bennett (2004) op cit at 83.
[180] Ibid.
[181] A Claassens & S Mnisi 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25 *South African Journal on Human Rights* 491at 494. See also V Bronstein 'Reconceptualising the Customary Law Debate in South Africa' (1998) 14 *SAJHR* 388 at 402–10.
[182] See Classens & Mnisi (2009) op cit at 513.
[183] See Oomen B *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) at 251.
[184] Fredman specifically speaks of the impact of gender in defining and redefining the content of human rights, addressing the role of women in this exchange. She recommends this as the approach to providing substantive equality–as opposed to formal equality–in the application of socio-economic rights, and argues for equality in all human rights, thereby challenging the idea of individual and communal rights. Stating that all human beings are interdependent and so are their rights, she advocates for the fluidity between rights and culture. S Fredman 'Engendering Socio-Economic Rights' (2009) 25 *SAJHR* 410–411, at 422 and 441. Merry states that globalisation and urbanisation have transposed traditions from their unchanging nature into the practices of a people at a particular place and time. In this way, rights and culture have to interact because of changing political, social and economic climates. S Engle Merry 'Changing Rights, Changing Culture' in JK Cowan, M-B Dembour & RA Wilson *Culture and Rights: Anthropological Perspectives* (2001) at 41–2. The South African

align customary practices with constitutional principles, such as the right to equality, which does not necessarily have to remain in opposition to culture.[185]

8. Recommendations and Conclusion

This paper argues that a denial of women's social, economic or cultural rights undermines their civil and political rights.[186] This requires a re-distribution of resources as well as power relations within society.[187] Many arguments within this paper have shown that traditional tribunals are more accessible to rural women than formal courts. Most solutions offered towards the problem of access to justice have focused on formal legal institutions, which tend to concentrate on formal equality, and not the issue of access.[188] The primary focus, however, needs to be the *capacity to access* a dispute resolution forum, with secondary focus on the quality of justice.[189] The issue of quality or the level of fairness administered in traditional tribunals can only be tackled once there is access.[190]

Since the government cannot provide access to legal aid for all civil litigants, the role of traditional tribunals, which was initially subsidiary, is now critical to the enforcement of the right of access to justice. This means that traditional tribunals are not alternative dispute forums—as often perceived—but primary courts of justice, which require as much, if not more, attention by the government than the formal ones.[191] Bearing in mind the statistics on how many people use traditional tribunals

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Constitutional Court has recommended that, because of past discrimination, substantive and not formal equality is required in the country, and that this should be remedial in nature so as to address the socio-economic challenges. See *National Coalition for Gay & Lesbian Equality & another v Minister of Justice* 1999 1 SA 6 (CC).

[185] Classens & Mnisi (2009) op cit at 513.

[186] See the Montreal Principles; Appendix G.

[187] C Albertyn 'Equality' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) at 93–4.

[188] See E Wojkwoska *Doing Justice: How Informal Justice Systems Can Contribute*. The United Nations Development Programme (UNDP) Oslo Governance Centre 2006 at 5. The Democratic Governance Fellowship Programme, available at http://www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf at 12, and last accessed 13 February 2013.

[189] Ibid.

[190] Wojkwoska (2006) op cit at 6.

[191] See L Chirayath, C Sage & M Woolcock *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* July 2005 at 1. Prepared as a background paper for the World Development Report 2006: Equity and Development July. The Legal Resource Centre stated that: 'it is evident from the experiences of our clients that the formal courts are largely inaccessible to a large number of South Africans and that the traditional justice system is therefore the primary form of justice that is practically available to many…they believe that an effective legitimate system of traditional tribunals is a key component for ensuring adequate access to justice for all South Africans'. CRM Dlamini put it best, when he said: 'the decisions of chiefs result in fewer costs; the proceedings are

(about 40 per cent of the South African population), the state ought to provide adequate financial support to these courts. It is, therefore, pertinent that the government provides better funding to improve the quality of traditional justice, which is critical to providing and improving the quality of access more generally. Section 7(2) of the Constitution provides for the state's duty to respect, protect, promote and fulfill the rights in the Bill of Rights. This requires governmental responsibility to adopt legislative, administrative, *budgetary*, judicial, promotional and other measures to discharge its obligations.

In *Government of the Republic of South Africa v Grootboom & others*,[192] stated that these rights are 'inter-related' and mutually supporting.[193] Hence, the right to a fair trial – and the implicit right to equal treatment – must be read in conjunction with what is, in essence, a socio-economic right: that of access to justice.

expedited and there are no endless postponements; the procedure is free, flexible and informal and commends itself to the understanding of an ordinary man; more substantial justice is done…' in *The Role of Chiefs in the Administration of Justice* (1984) December Bulletin of the University of Zululand 5 at 11.

[192] 2000 (11) BCLR 1169 (CC).

[193] This accords with the statement that: 'Legislative reform is unlikely to impact on the lives of the majority of women, unless accompanied by real social and economic reform providing access to both socio-economic and civil and political rights entrenched in the Bill of Rights' in P Govender *The Status of Women Married in Terms of African Customary Law: A Study of Women's Experiences in the Eastern Cape and Western Cape Provinces* (2000) Research Report No 133 at 37.