



**FAIR TRIAL AND ACCESS TO JUSTICE IN**  
**SOUTH AFRICA: HOW TRADITIONAL**  
**TRIBUNALS CATER TO THE NEEDS OF RURAL**  
**FEMALE LITIGANTS**

by

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**Declaration**

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted for a degree at this or any other University, that it is my original work, and that all the materials contained herein have been duly acknowledged.

Signed by candidate

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## **Abstract**

European and North American jurisprudence imbued the concepts of fair trial and access to justice in Western culture. The United Nations later proclaimed these foreign principles ‘universal human rights’, seemingly oblivious of the marginal role played by African states during conceptualisation. African governments, mindful of their minimal contribution to the content of individual rights, however, introduced communal rights and duties in the African Charter on Human and Peoples’ Rights. This was the situation internationally, and in the region of Africa.

On the domestic scene, South Africa ratified both international and African human rights conventions; hence, its Constitution incorporated the rights of access to justice, fair trial, equality and culture. These rights, however, create conflict during dispute resolution. This is evident with the country’s multiple legal systems, allowing urban and rural litigants to engage in forum shopping, by approaching formal courts or traditional tribunals in civil and criminal contexts.

In the formal courts, rural litigants (especially women, as lower income earners) encounter exorbitantly high costs of litigation, long travel distances to court, alien laws and procedures and, all too often, a foreign language in court, making these forums inaccessible. Conversely, traditional tribunals guarantee easier access to justice because they provide affordable and comprehensible procedures, and are usually located in close proximity to parties.

African tribunals, however, hinder equal standards between men and women during conflict resolution, by violating the right to gender equality — a right implicit in fair trial. Usually, traditional judicial officers accept women as complainants, witnesses or accused persons, but rarely encourage or recognise the female demographic as participants in a judicial capacity (in some cases they do not even permit them to attend judicial proceedings). In spite of these shortcomings, traditional methods advance flexible, communal and harmonious procedures, in accordance with the African culture.

While these characteristics of traditional tribunals guarantee the protection of cultural equality, human rights activists are fixated with the argument that these African structures discriminate against women, and often ignore their benefits. More importantly, the proponents of human rights fail to investigate the inequalities that

plague the formal justice system. Well aware of the limited research in both regards, this thesis conducts a broad critique of the South African justice system, comparing the formal with the traditional. Based on its findings, the study argues in favour of traditional tribunals, which guarantee cultural rights as well as access to justice for poorer litigants.

Further, the research discusses conflicts evident between the rights to culture and gender equality in the traditional context, which frequently jeopardise the enforcement of a fair trial for female litigants. With the aim of enforcing women's rights, the thesis advocates for balancing the right to a fair trial with that of access in civil disputes, since traditional tribunals judge mainly civil issues, which hardly ever require the strict application of fair trial guarantees.

The thesis concludes that traditional systems are crucial to the implementation of the right of access to justice for rural women, and therefore recommends better state engagement with them. The study also recommends the expansion of state budget for traditional justice mechanisms, to help strengthen them, and even expand their reach from rural to urban areas.

## **Dedication**

I would like to dedicate this thesis to Almighty God for seeing me through the most laborious but, ultimately, rewarding experience of my life. I would also like to dedicate this work to my mother, who stood by me through it all. I love you, Mum, more than words could possibly express.

University of Cape Town

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I am grateful to the former Director of SAIFAC, Professor Theunis Roux, and to the entire staff of the organisation for allowing me to conduct some of my research at the Constitutional Court. It was a very important and worthwhile endeavour in my journey towards the completion of this thesis.

I have so many individuals to thank for supporting me over the past few years. My siblings, who have held me together whenever I felt as though I was at my breaking point. Most especially my elder sister, Mrs Oluwatoyin Edun, for her generosity in times of financial crisis. I love you all so much and could not have done this without any of you.

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**List of Abbreviations**

ACHR	American Convention on Human Rights
AFRICAN CHARTER	African Charter on Human and Peoples' Rights
AFRICAN COMMISSION	African Commission on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
BAA	Black Administration Act
CALS	Centre for Applied Legal Studies
CCMA	Commission for Conciliation, Mediation and Arbitration
CEDAW	Convention on the Elimination of Discrimination against Women
CGE	Commission on Gender Equality
CODESA	Conference for a Democratic South Africa
CoGTA	Cooperative Governance and Traditional Affairs
CONTRALESA	Congress of Traditional Leaders of South Africa
COSATU	Congress of South African Trade Unions
CRC	Convention of the Rights of the Child
CSW	Commission on the Status of Women
DTA	Department of Traditional Affairs

## List of Abbreviations

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ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFP	Inkatha Freedom Party
LASA	Legal Aid South Africa
LRC	Legal Resource Centre
MPNP	Multi-Party Negotiation Process
NEPAD	New Partnership for Africa's Development
NLC	National Land Committee
OAU	Organisation of African Unity
PAP	Pan-African Parliament
RWM	Rural Women's Movement
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALC	South African Law Commission
THE ACT	Traditional Leadership and Governance Framework Act 2003
THE BILL	Traditional Courts Bill 2008/12
THE UNIT	The Parliamentary Research Unit
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme

## List of Abbreviations

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UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	United States of America
WNC	Women's National Coalition

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## **CHAPTER I**

### **PROBLEM OF ACCESS TO JUSTICE AND FAIR TRIAL FOR RURAL FEMALE LITIGANTS IN SOUTH AFRICA**

#### **1. Description of the problem**

Fundiswa is a widow who lives in Khayelitsha with her aged mother and three children. She works as a domestic cleaner for a white couple in Newlands, Cape Town and earns R120.00 a week. Fundi (as she is fondly called) seeks to file a claim for her late husband's property at the magistrate court, which forms part of the formal legal system in South Africa.

Fundi tries to institute a civil action and visits the University of Cape Town legal aid clinic for assistance, because she requires legal representation to have a fair civil trial in formal courts. She, however, does not fully understand English, the language used by the law students in their communication with her (senior law students usually work at the legal aid clinic as part of their practical training). She cannot also afford the cost of trips to the clinic. Fundi, therefore, decides to take her complaint through a hierarchy (or chain) of traditional procedures, which are more accessible to her.

Fundi approaches her late husband's family in the Transkei to resolve the problem, but the family says that the property in question belongs to them, not to Fundi and her female children. They refer the matter to the headman, who later refers it to the traditional leader. At the traditional tribunal, Fundi is asked to choose a male relative to represent her in the matter, because a woman may not speak before male elders. Since she does not have any close male relatives and has not been

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granted legal representation, as is customary in traditional tribunals, she opts out of the proceedings and decides to raise her children solely on her income as a domestic worker.

The above example, though fictional, illustrates the issues that are explored in this thesis. Typically, rural women find access to the South African courts and to a fair hearing extraordinarily difficult to achieve. In formal courts, she encounters so many logistical difficulties that she is unlikely ever to enter a courtroom. These challenges may be financial, geographic, linguistic or cultural. In traditional tribunals, she is considered inferior to men, and as such, cannot expect equal treatment.<sup>1</sup>

The subsequent sections will elaborate on the barriers to formal justice and the problem of fair trial in traditional tribunals, highlighted in Fundiswa's story. Furthermore, this chapter will discuss the conceptual issues originating from the international development of the rights of access to justice and fair trial, thereby revealing the critical contest evident between human rights and traditional justice in the South African context.

#### a) Barriers to formal justice

The problem of access to justice is widespread.<sup>2</sup> The United Nations Development Programme (hereafter UNDP) reports that around four billion people have been excluded from accessing fair dispute resolution mechanisms because of poverty.<sup>3</sup>

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<sup>1</sup> In this study 'formal courts' represent state courts, which are administered by judicial officers, while 'traditional tribunals' represent informal dispute resolution systems recognised by the state, including family councils and headmen's courts.

<sup>2</sup> 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* (1978) vol 1 at 10.

<sup>3</sup> *Making the Law Work for Everyone* vol 1, Report of the Commission on Legal Empowerment of the Poor, United Nations Development Programme (UNDP), New York 2008. Presentation to the United Nations Committee of Experts and Public Administration Seventh Session, New York, 14 April, which is available at <http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/reports-of-the-commission-on-legal-empowerment-of-the-poor/making-the-law-work->

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The report shows that the group most affected by this crisis is women — usually the poorest members of any society — with the result that formal justice is both inaccessible and *de facto* discriminatory.<sup>4</sup>

In the context of South Africa, factors such as poverty, urban/rural living, and differences in culture and language create major difficulties in accessing formal justice.<sup>5</sup> Rural litigants are the most vulnerable in the face of these barriers.

In the rural areas, however, women head the poorest homes.<sup>6</sup> These have a poverty rate 50 per cent higher than male-headed households.<sup>7</sup> The same women, however, are expected to raise 46 per cent of African children, unaided.<sup>8</sup> In addition, unlike their male counterparts, they do not culturally own land, and generally have no access to basic services such as electricity, water, fuel, private health services and medical aid.<sup>9</sup> With so many financial challenges, it is not surprising that they are unable to afford the expenses involved in approaching formal courts for dispute resolution. The problem of access to justice is not merely of a social or economic kind, but apparently also in the form of gender discrimination.<sup>10</sup>

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for-everyone---vol-i---english/Making\_the\_Law\_Work\_for\_Everyone.pdf at 1, and last accessed on 13 February 2013.

<sup>4</sup> *Making the Law Work for Everyone* (2008) op cit at 1-2. Only about 55 per cent of African women are educated, and they earn about half of what the men are paid. Although women produce 60 to 80 per cent of the food in developing countries, they own less than 10 per cent of land; they are also increasingly responsible for rural households. See C Clarke 'Women's Rights as Human Rights in Africa' in J Akokpari & DS Zimble (eds) *Africa's Human Rights Architecture* (2008) at 107.

<sup>5</sup> See J Stevens *Access to Justice in sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* Penal Reform International (2000) at 6.

<sup>6</sup> SE Motara *Improving Women's Access to Justice: A Gender Critique of the Problems Experienced by Women in the Maintenance System* Research Report no 1 (1999) at 1.

<sup>7</sup> See A Adelzadeh 'South African Human Development Report 2003 – The Challenge of Sustainable Development in South Africa: Unlocking People's Creativity' at 41 in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) at 7. See also L Artz *Access to Justice for Rural Women: Special Focus on Violence against Women* Report prepared by BlackSash (1997) at 8–9.

<sup>8</sup> D Budlender 'Women and Men in South Africa Figure 7 (1998 Central Statistics)' in Bonthuys & Albertyn (eds) (2007) op cit at 8.

<sup>9</sup> Motara (1999) op cit at 10. See also D Budlender, S Mgwba, K Motsepe & L Willams of Community Agency for Social Enquiry *Women, Land and Customary Law* (2011) at 9–10.

<sup>10</sup> Bonthuys & Albertyn (eds) (2007) op cit at 7. See also 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* Research Report no 133 (2000) at 8.

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#### b) The solution: traditional tribunals?

Limited research carried out by the South African Law Commission (hereafter SALC) reveals that traditional tribunals are more accessible to people living in rural communities than the formal courts.<sup>11</sup> People in these environments favour traditional justice,<sup>12</sup> because the processes are quicker, cheaper, and more compatible with their cultural ideologies, which are founded on community acceptance.<sup>13</sup> Therefore, in the rural areas — where about 40 per cent of South Africans live — informal tribunals offer more effective means of conflict resolution.<sup>14</sup>

Although traditional tribunals play a significant role in enforcing social order and in exercising authority over a considerable segment of the population in accordance with customary law,<sup>15</sup> they have been criticised for not adhering to international fair

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<sup>11</sup> South African Law Commission Project 90 Customary Law Report on *Traditional Courts and the Judicial Function of Traditional Leaders* presented to Parliament by Dr P Maduna, former Minister of Justice, in January 2003, which is available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/salc\\_report\\_trad\\_courts.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/salc_report_trad_courts.pdf) at 1, and last accessed on 13 February 2013.

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

<sup>13</sup> The incompatibility of the formal justice system with culture is based on various reasons, including: a mistrust of the common law; a lack of understanding of legal principles; illiteracy; lack of familiarity with formal procedures, and unequal power relations. Some litigants consider formal courts as culturally ‘uncomfortable’ and lacking in legitimacy. See Wojkowska (2006) op cit at 13.

<sup>14</sup> South African Law Commission stated that: ‘The administration of justice in rural south Africa is predominantly carried out by Chiefs’ courts, which administer justice largely on the basis of customary law’ in *Traditional Courts and the Judicial Function of Traditional Leaders* (2003) op cit at 1. See also TW Bennett *Customary Law in South Africa* (2004) at 111. Fombad states (in relation to the contribution of customary courts to guaranteeing access to justice in Botswana): ‘In spite of misgivings at some stage, customary courts in Botswana have not only survived but, in the last two decades, their role in the settlement of disputes has come to surpass even that of the modern courts that apply Roman-Dutch and English Law’. See CM Fombad ‘Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspectives’ (2004) 15 *Stellenbosch Law Review* at 167.

<sup>15</sup> The term ‘customary law’ in this thesis embodies the customs and practices governing indigenous dispute resolution systems in South Africa. This may be differentiated from ‘common law’, which represents received laws in the country, including Roman-Dutch and English Common Law. Section 211 of the 1996 South African Constitution provides for the application of customary law, and section 211(3) goes on to state that: ‘The courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

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trial standards.<sup>16</sup> Many human rights activists object to three aspects of the customary system. The latter does not apply due process in civil matters; it does not uphold the procedural guarantees required in criminal cases; and it discriminates against women.<sup>17</sup>

With regard to due process or upholding procedural guarantees, traditional leaders place more emphasis on how disputing parties reach a decision rather than on how proceedings are conducted.<sup>18</sup> Hence, while the minimum guarantees for fairness in the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) include the rights to an impartial and independent tribunal — and legal representation in criminal cases<sup>19</sup> — traditional tribunals apply the *audi alterem partem* and the *nemo iudex in propria causa* principles (hear the other side, and no one shall be a judge in his or her own cause), and not ‘equality before the law’ as provided for in international law.<sup>20</sup>

Furthermore, in African customary law,<sup>21</sup> the principles of natural justice lie at the foundation of fairness as opposed to the constitutional requirements of separation of powers and the rule of law, which originated in Western jurisprudence. Thus,

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<sup>16</sup> See Wojokwoska (2006) op cit at 21.

<sup>17</sup> TW Bennett ‘Access to Justice and Human Rights in the Traditional Courts of sub-Saharan Africa’ in T Bennett, E Brems, G Corradi, L Nijzink & M Schotsmans (eds) *African Perspectives on Tradition and Justice* (2012) at 21–29.

<sup>18</sup> Section 166(e) of the 1996 Constitution provides for the institution of traditional leadership and promotes the role of traditional tribunals. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 4.

<sup>19</sup> See sections 34 and 35(3) of the 1996 Constitution.

<sup>20</sup> See articles 9(2)(b)(i) and (ii) Traditional Courts Bill 2012. See also Bennett (2004) at op cit 168–9.

<sup>21</sup> There is a fundamental distinction between living and official customary law in academic literature. ‘Living customary law can be relied upon, since it refers to the law actually observed by African communities; official customary law, the corpus of rules used by the legal profession, must be treated with circumspection, for it may have no genuine social basis’. See Bennett (1995) op cit at 60. To determine what the living customary law is at a particular time, the court must inquire into the existing social practice based on what is actually happening within a given community. See T Bennett ‘“Official” vs “Living” Customary Law: Dilemmas of Description and Recognition’ in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) at 138. See also B Oomen ‘Legal Syncretism in Sekhukune, South Africa’ in W van Binsbergen (ed) *The Dynamics of Power and the Rule of Law: Essays on Africa and Beyond* (2003) at 169. G Woodman distinguishes between official and living customary law, stating that ‘the “lawyers’ customary law” developed by the courts can be contrasted with “popular customary law” which is found to exist outside the courts by social scientific research’ in ‘Legal Pluralism and the Search for Justice’ (1996) 40(2) *Journal of African Law* at 159.

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fairness in the traditional context sometimes differs from the provisions of the South African Constitution, although, in both cases, the concept seems to be aimed at achieving human dignity.<sup>22</sup> Gluckman made this argument when he described pre-colonial justice as involving due process and judicial accountability to the community.<sup>23</sup> This system ensured that the traditional leader did not act against the wishes of the people, and if he did, he could be removed. This suggests that African human rights were not arbitrary, but provided thorough dispute resolution processes.

In post-colonial African communities, scholars have suggested that the procedures in African tribunals probably guarantee individuals a fairer hearing than those in Western courts, because disputes are heard expeditiously, and may be extensively debated by members of the community, thereby arriving at a solidly grounded decision.<sup>24</sup> In other words, this judicial system seeks a consensual outcome. Holomisa, for instance, contends that traditional leadership operates on the principles of ‘community participation, consultation, consensus, an acceptable level of transparency through the village council or open, consultative meetings’.<sup>25</sup> He further defines the process as being participatory, with the presiding officers at the helm of affairs, and members of the community arriving at decisions in a collective manner.<sup>26</sup> In so doing, he proclaims that traditional tribunals focus on the restoration of amicable relationships within the community, as well as on reforming offenders.

Holomisa maintains, further, that ‘the flexible approach of the [traditional] courts makes them transparent and democratic’.<sup>27</sup> He argues that the need for legal representatives, often cited as one of the main problems of traditional tribunals,

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<sup>22</sup> Bennett (1995) op cit at 4.

<sup>23</sup> M Gluckman ‘Natural Justice in Africa’ (1964) 9 *Natural LJ* at 25. See also SKB Asante ‘Nation Building and Human Rights in Emergent African Nations’ (1969) 2 *Cornell ILJ* at 73–4.

<sup>24</sup> See Bennett (2004) op cit at 169. See also Bennett (1995) op cit at 4. Some other scholars have argued that, in their original form, traditional dispute resolution mechanisms were compatible with human rights norms. See NP Holomisa *According to Tradition* (2009) at 148—stating that ‘African culture does not sanction or condone these acts against women and children’.

<sup>25</sup> See Holomisa (2009) op cit at 136. Hence, it appears that there are certain similarities between Western and African systems of justice in which both promote the concept of human dignity. See also Bennett (1995) op cit at 4.

<sup>26</sup> Holomisa (2009) op cit at 136.

<sup>27</sup> Holomisa (2009) op cit at 136.

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‘would distort the process, since traditional tribunals are not courts of law but courts of *justice* [emphasis added].’<sup>28</sup> The latter statement highlights the aims of traditional tribunals: contextual application of rules and a substantively (not merely formal) fair decision for the parties.

#### c) The further problem: fair trial

In spite of the arguments in support of traditional justice, many human rights proponents continue to criticise these systems for being outdated, uncivilised and, more recently, incompatible with human rights.<sup>29</sup> Critics claim that traditional tribunals promote unfair discrimination against women, which violates the requirement for fairness.<sup>30</sup>

Holomisa, a staunch defender of the traditional justice system, denounces the perception that African customs are ‘inherently undemocratic, oppressive and discriminatory of women and children’.<sup>31</sup> Although he maintains that traditional tribunals do not jeopardise the rights of women, it is an incontrovertible fact that rural women are often denied the right to speak out, to prosecute, or to defend their cases while appearing in customary tribunals. Instead, they have to rely on the men

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<sup>28</sup> Ibid.

<sup>29</sup> In the Privy Council case of *Re Southern Rhodesia*, the court stated: ‘Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutional or the legal ideas of civilised society’. (1919) AC 211 at 233–4; See also G van Niekerk who wrote ‘Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed with one or two exceptions, to recognise Native law at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the law courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape Province has similarly withheld all recognition of Native Law’ in *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* LLD Thesis University of South Africa (UNISA) 1995 at 67.

<sup>30</sup> See, among others, W Lehnert ‘The Role of the Courts in the Conflict between African Customary Law and Human Rights’ (2005) 21 *SAJHR* at 241; see also M Mamashela ‘New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act’ (2004) 20 *SAJHR* at 620.

<sup>31</sup> Holomisa (2009) op cit at 147. See also M Pieterse ‘It’s a Black Thing: Upholding Culture and Customary Law in a Society founded on Non-racialism’ (2001) 17 *SAJHR* at 364 — this, while arguing that it could be possible to reconcile customary law and the Constitution, notes the patriarchal cultural values and practices problematic in this system.

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to provide legal assistance,<sup>32</sup> a procedure that inevitably undermines the principles of fairness and equality demanded by the Constitution.<sup>33</sup>

## 2. Key concepts

In modern jurisprudence, the right to a fair trial was, historically, given expression before the right of access to justice. Mindful of that fact, this thesis reviews, in chapters two and three, international and constitutional developments of fair trial before access. In this section, however, the concept of access to justice is discussed first since it is the primary focus of this thesis.

### a) Access to justice

Section 34 of the South African Constitution provides for the rights of access to courts and for a fair hearing in civil disputes as follows: ‘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’.

Cappelletti, one of the foremost writers on access to justice, defines the right as that of every individual to require the state to provide a means of dispute resolution that is equally accessible and socially just.<sup>34</sup> This definition suggests that access encompasses the form and content of justice, which requires the need for affordable and comprehensible procedures.<sup>35</sup> He argues that even formal adjudicators ought to administer the law based on principles of fairness rather than on strict rules, with

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<sup>32</sup> Bennett (2004) op cit at 166.

<sup>33</sup> M Mukhopadhyay *Gender and Access to Justice in sub-Saharan Africa*, Report on KIT-CALS Conference 29–30 October 2008 Johannesburg, South Africa at 8.

<sup>34</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 6.

<sup>35</sup> Ibid.

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more emphasis on the impact of such standards on the disadvantaged and with a greater sensitivity to their legal needs.<sup>36</sup>

One can infer from Cappelletti's broad definition that access is based on the primary right to place a case before an independent court or tribunal.<sup>37</sup> Real access to justice, therefore means having the right to approach a court, and, once there, to receive a fair hearing.<sup>38</sup> Conversely, the same right presumes the existence of courts available to all citizens and foreigners, irrespective of gender, race, religion, age, class or creed.<sup>39</sup> It also implies the existence of an independent and impartial administration of justice.<sup>40</sup>

Budlender further explains that access to justice for the poor means that a party must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims.<sup>41</sup> This suggests that the enforcement of access in both civil and criminal cases requires state responsibility to promote and protect the rights of all individuals by providing legal services that do not discriminate against individuals for reasons based on their racial, gender, class, geographic, religious, cultural or economic contexts.<sup>42</sup>

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<sup>36</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 85. See also J Bass, WA Bogart & FH Zemans (eds) *Access to Justice for a new Century: The Way Forward* (2005) at 3.

<sup>37</sup> See also Stevens (2000) op cit at 10.

<sup>38</sup> G Budlender 'Access to Courts' (2004) 121 *SALJ* at 339.

<sup>39</sup> *Access to Justice Practice Note 9/3/2004 UNDP*, which is available at [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) at 3, and last accessed 14 February 2013.

<sup>40</sup> While access requires courts to be available in terms of their cultural, financial, geographic and linguistic complexion, due process guarantees an impartial tribunal and process. See R Clayton & H Tomlinson *Fair Trial Rights* (2010) at 8. Access to justice thus embodies the right of access to the machinery of justice and the right to equitable procedures. See E Storskrubb and J Ziller 'Access to Justice in European Comparative Law' in F Francioni (ed) *Access to Justice as a Human Right* (2007) at 187–8.

<sup>41</sup> Budlender (2004) op cit at 341. Budlender also notes that this right includes the right to be heard by an impartial judge and also includes other elements of fairness which depend on the circumstances of the case. In civil matters, this may include the right to a fair public hearing; in criminal cases, he makes the argument for 'equality of arms' providing for legal representation at state expense.

<sup>42</sup> This can be inferred from the provisions of section 9(3) of the 1996 Constitution.

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#### b) Fair trial

Section 35(3) of the Constitution provides a host of fair trial rights in criminal cases, including the right to legal representation. The provision on criminal proceedings ‘entrenches basic norms of criminal procedure and provides for the right of an accused person to a fair trial’.<sup>43</sup> Since the right to a fair trial is central to the rule of law,<sup>44</sup> it requires criminal trials to be conducted in accordance with the ‘notions of fairness and justice’.<sup>45</sup> These principles require a separation of powers between legislative, executive and judicial officers of the state, which ensures the equal protection of other human rights, including the right of access to courts.<sup>46</sup>

Section 34 provides for a fair civil trial, which requires independence and impartiality of the courts, and guarantees fair and public hearings. Implicit in both the criminal and civil aspects of fair trial is the principle of equality, which requires a ‘fair balance’ between disputing parties.<sup>47</sup> This right is expressly protected by section 9 of the Constitution.

It is clear from the above definitions of the rights of access to justice and fair trial that they overlap, although the Constitution seems to ignore this connection. This, however, is a critical issue. First, section 34, which provides for access to courts and a fair civil trial, does not mention the right to legal representation, as in section 35(3). This omission makes it particularly difficult for rural women to pay for legal counsel, since as litigants, they are mostly involved in civil claims such as divorces and maintenance matters, with no assurances of legal aid.<sup>48</sup> Secondly, the same

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<sup>43</sup> See I Currie, J de Waal & G Erasmus *The Bill of Rights Handbook* (2001) at 585.

<sup>44</sup> See Clayton & Tomlinson (2010) op cit at 2.

<sup>45</sup> See the application of this principle in *S v Zuma & others* 1995 (2) SA 642 (CC) at para 16 per Kentridge AJ.

<sup>46</sup> See Clayton & Tomlinson (2010) op cit at 2–10.

<sup>47</sup> See Budlender (2004) op cit at 344. See also *Bernstein & others v Bester NO & others* 1996 (4) BCLR 449 (CC) para 151. See also Human Rights Committee, General Comment no 32, article 14: Right to Equality before Courts and Tribunals and to a Fair Trial UN Doc CCPR/C/GC/32 (2007), which is available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html> at II, and last accessed 14 February 2013.

<sup>48</sup> See J Allen ‘Focusing Legal Aid on Criminal Defence Marginalises Women’s Legal Service Needs: Cases and Comments’ (1995) 11 *SAJHR* 143–9.

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section, which provides for a fair criminal trial, requires strict procedural rules that appear inapplicable in traditional tribunals, especially the right to equality, which affects the treatment of women.

To expound upon the conceptual framework of the rights of access to justice and fair trial, it is useful to examine their international origins.

### 3. The origins of fair trial and access to justice in international law

Historically, the right to a fair trial long preceded the right of access to justice. The development of fair trial and access to justice into international legal norms, however, had its origins in European and North American public law.<sup>49</sup> When the international community commenced discussions on entrenching these concepts as human rights, most African countries were still subjects of Western colonial rule.<sup>50</sup> As decolonisation began, these rights were slowly introduced to Africa.<sup>51</sup> Only after the end of apartheid in the early 1990s, did South Africa embrace a culture of human rights.<sup>52</sup>

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<sup>49</sup> In English common law, the right to a fair trial was first provided for in the English notion of the rule of law, and has become ‘...a norm of international human rights designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms’. See *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* 1 March 2000 Lawyers Committee for Human Rights at [http://www.humanrightsfirst.org/pubs/descriptions/fair\\_trial.pdf](http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf) at 1, and last accessed 14 February 2013. In the 1960s and 1970s, North American realists began the Access to Justice Movement as a result of existing difficulties involved in dispute resolution processes in Western countries. See S Roberts & M Palmer *Dispute Processes: ADR and the Primary Forms of Decision-making* (2005) at 18.

<sup>50</sup> For analytical purposes, the term ‘Western’ is used to distinguish a notionally different cultural repertoire from that of the African. Western countries are loosely described as ‘many countries of Europe, as well as many countries of European colonial origin in the Americas and Oceania, such as the United States of America, Canada, Australia, New Zealand, Argentina, Brazil, Chile, Uruguay etc’. See [http://en.wikipedia.org/wiki/Western\\_world](http://en.wikipedia.org/wiki/Western_world), last accessed 12 October 2012. While the term ‘African’ cannot hope to describe the many cultural groupings of the continent, it does, however, signify sub-Saharan Africa (including North African countries with Arab descendants).

<sup>51</sup> See HJ Steiner, P Alston & R Goodman 3ed *International Human Rights in Context: Law, Politics, Morals: Texts and Materials* (2008) at 504.

<sup>52</sup> The Constitution of the Republic of South Africa, Act 200 of 1993 incorporated certain elements of fundamental human rights, and the 1996 Constitution gave even more force to these rights.

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Fair trial and access to justice are provided for in various international and regional human rights conventions.<sup>53</sup> The most relevant of these treaties are the International Covenant on Civil and Political Rights (hereafter ICCPR),<sup>54</sup> the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW),<sup>55</sup> the Convention on the Rights of the Child (hereafter CRC – this provides for the rights of the girl child)<sup>56</sup> and the African Charter on Human and Peoples' Rights (hereafter African Charter).<sup>57</sup> The CEDAW and CRC promote the rights of women and children. This thesis, however, does not address the rights of children, a problem that clearly demands a separate dissertation.

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<sup>53</sup> The rights are provided for in articles 8, 10 and 11 of the UDHR; articles 2(3), 14 and 15 of the ICCPR; articles 2 and 3 of the ICESCR; articles 2 and 15(2) of the CEDAW and article 12(2) of the CRC. Article 8 of the UDHR provides that: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. Article 10 of the UDHR provides that: 'Everyone is entitled in full equality to a fair trial and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him'. Article 11 of the UDHR provides for 'the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'

<sup>54</sup> GA Res. 2200A (XXI), 21 UN GAOR Supp (no 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force on 23 March 1976.

<sup>55</sup> GA Res. 34/180, UN GAOR, 34th Sess, Supp No 46, UN Doc A/34/46 (1980).

Other conventions on the rights of women are: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Declaration on the Protection of Women and Children in Emergency and Armed Conflict, and Declaration on the Elimination of Violence against Women.

<sup>56</sup> Other conventions on the rights of children are as follows: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; Minimum Age Convention 1973, and Worst Forms of Child Labour Convention 1999.

<sup>57</sup> In 1992, the African Commission adopted a resolution on the Right to Recourse Procedure and Fair Trial, which elaborates on the right to a fair trial. See The African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

The following regional treaties provide for the rights of fair trial and access to justice in articles 6 and 13 of the European Convention on Human Rights (hereafter ECHR), article 25 of the Inter-American Convention. Article 6(1) of the ECHR provides that: 'In the determination of his civil rights or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', in the European Convention of Human Rights and Fundamental Freedoms, 1950 (CETS No 005). Article 25 of the American Convention provides that: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned by this convention, even though such violation may have been committed by persons acting in the course of their official duties' — in American Convention on Human Rights 1969 (1144 UNTS 123).

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South Africa incorporated the rights of fair trial and access to justice as documented in the already mentioned international and regional human rights conventions, and is now obliged to apply them uniformly in urban and rural parts of the country. As will become evident below, however, fair trial rights often clash with African cultural practices. Manifestation of this situation is apparent even in the provisions of the Constitution itself, which provides for fair trial, as derived from Western culture, but also strives to protect African cultures and languages.

#### **4. Differences between Western rights and traditional styles of justice in the South African Constitution**

Due to the Western origins of the international human rights constructs of fair trial and access to justice, the problem of reconciling Western rights with African cultures arises. This is an enduring challenge that has been present since colonial times. If this thesis argues in favour of traditional tribunals, the argument would also promote African cultures and languages. As it happens, international law and the South African Constitution guarantee these entitlements.

The word ‘culture’ has many definitions, but, for the purposes of this thesis, it can be taken to mean the freedom to live and express ‘a people’s store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society’.<sup>58</sup> In particular, culture denotes the special qualities of a group of people that serve to distinguish them from other groups.<sup>59</sup>

The right to culture is an aspect of the rights to minority protection, and self-determination as well as aboriginal rights.<sup>60</sup> In 1966, it appeared in article 27 of the ICCPR, which provides that:

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<sup>58</sup> See Bennett (2004) op cit at 79.

<sup>59</sup> Ibid.

<sup>60</sup> Bennett (1995) op cit at 11–8.

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in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This provision guarantees the rights of individuals as well as those of the group.<sup>61</sup> In order to promote individual and group rights, South Africa, as a party to the ICCPR was obliged to apply the rights to culture and language in accordance with public international law, which is considered part of national law.<sup>62</sup>

The 1996 Constitution therefore included the rights to culture and language in sections 30 and 31, but restricted their application by stating that they ‘...may not be exercised in a manner inconsistent with any provisions of the Bill of Rights’.<sup>63</sup> Hence, South African courts are required to apply the rights to culture and language in line with the provisions of the Constitution, which is the supreme law of the land.<sup>64</sup>

Section 30 protects the right to cultural life: ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’. Section 31 provides that:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
  - (a) to enjoy their culture, practise their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

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<sup>61</sup> See G Alfredsson & A de Zayas ‘Minority Rights: Protection by the UN’ (1993) 14 *Human Rights LJ* at 3. See also Bennett (1995) op cit at 11.

<sup>62</sup> As provided for in sections 231(4) and 232 of the Constitution.

<sup>63</sup> Constitution of South Africa section 31(2).

<sup>64</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para 26.

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From the wording of these sections, it is apparent that section 30 provides for individual rights, whereas section 31 provides for individual and communal rights.<sup>65</sup>

Where there are conflicts between a group and an individual right, as between the rights to culture and equality, section 39(2) provides that courts ‘must promote the spirit, purport and objects of the Bill of Rights’. Therefore, it is argued that, in effect, this provision results in traditional principles being made subservient to Western human rights, and being defined in terms of these rights.<sup>66</sup> The awkward co-existence of constitutional and cultural rights began, as scholars have found, with the introduction of Western law to South Africa.<sup>67</sup> This is a key research field and in the next section the parameters of this research are defined.

#### **5. Statement of the problem and methodology**

This study is undertaken to address the analytical gap in the problem of access to justice and fair trial in South Africa. Access to formal state courts is severely limited, especially for rural litigants. A solution exists in the form of traditional courts, and, if access to these courts were to be promoted, the state would fulfil its constitutional duty to protect indigenous culture and law. But these same courts discriminate against women, thereby infringing the right to fair trial. With this matter in mind, the researcher uses rural women as a demographic category to illustrate the problems that arise in balancing one right against the other.

The research does not intend to replicate earlier works conducted around the concern of access and fair trial in relation to rural women, but seeks to identify the impact of the problem on this group within the community. Whereas this discussion

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<sup>65</sup> See Bennett (2004) op cit at 87.

<sup>66</sup> L Chirayath, C Sage & M Woolcock *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*. Prepared as a background paper for the World Development Report 2006: Equity and Development July 2005, which is available at [http://www.openknowledge.worldbank.org/bitstream/handle/10986/9075/WDR2006\\_0006.pdf?sequence=1](http://www.openknowledge.worldbank.org/bitstream/handle/10986/9075/WDR2006_0006.pdf?sequence=1) at 9, and last accessed 14 February 2013.

<sup>67</sup> See Bennett (1995) op cit at 1.

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takes cognisance of the fact that children are equally vulnerable to the failure of enforcement of civil and political rights, it does not engage in an in-depth review of the issue.

While a limitation of this thesis is the fact that the author did not undertake empirical research, this absence is not considered a disadvantage considering the fair amount of fieldwork that has already been conducted on this subject. The purpose of this thesis, therefore, is not to repeat such efforts but to reflect on the issues evident in existing empirical research that highlight the plight of vulnerable disputants in traditional tribunals. Consequently, this thesis draws on ethnographic accounts and qualitative materials produced by reputable NGOs, as well as by government institutions. The researcher is also mindful of the problem of essentialising concepts, but considers this inevitable for the purpose of analysis and legal argument especially when dealt with in highly generalised form.

With the scarcity of published research materials providing current full descriptions of traditional dispute resolution processes, and financial constraints on the researcher to conduct any empirical work, the inferences drawn in this thesis are premised on studies conducted by academics and other researchers, based on the lived realities in certain communities. These accounts are compared with ethnographic studies, as well as with reports of commissions working on the issue of traditional justice, such as the SALC. Recent cases, legislative quandary and voices of members of various communities on the present discourse also give an insight into the present state of traditional justice in South Africa.

In addressing the scope of this research, the study compares both formal and traditional justice systems, highlighting how the two structures both contravene and advance access and fair trial rights for rural women. This is considered the better methodology, since South Africa operates a plural system of law, requiring holistic and practicable recommendations.

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#### **6. Importance of research**

This research is important for at least four reasons. First, it describes the fundamental challenges to enjoying access to justice and a fair trial for rural women as being mainly challenges of a financial, gender and prejudicial nature in formal courts and traditional tribunals.<sup>68</sup>

Secondly, the research discusses the problem of access to justice and fair trial in civil and criminal contexts. It engages with critical issues affecting the implementation of these rights in formal courts, as well as in traditional tribunals.<sup>69</sup>

Thirdly, the thesis reviews contextual understandings of the concept of fairness in Western and African courts. Whilst Western rights promote equality, traditional systems tend to promote the right to culture over the imperative of equality. In light of this, it examines the compatibility between constitutional provisions and traditional procedures.<sup>70</sup>

Fourthly, this research investigates the institutional capacity of traditional tribunals in the country. Being mindful of the fact that South Africa is a pluralistic nation, requiring multiple dispute resolution mechanisms to promote access to justice, the researcher queries the state's financial commitment to African structures.<sup>71</sup>

Given the objectives of this thesis, the following chapter conducts an extensive review of the origins of the rights of fair trial and access to justice.

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<sup>68</sup> This discussion can be found in chapters three and four of the thesis.

<sup>69</sup> See chapters three and four of the thesis.

<sup>70</sup> See chapter five of the thesis.

<sup>71</sup> See chapter six of the thesis.

## **CHAPTER II**

### **DEVELOPMENT OF THE RIGHTS TO FAIR TRIAL AND ACCESS TO JUSTICE**

#### **1. The development of fair trial and access to justice in Western jurisprudence**

While the preceding chapter introduced the problem of access to justice and fair trial for rural female litigants, this chapter outlines Western and African origins of fair trial and access rights. It reviews international and regional documentation of these rights, and makes evident their conceptual framework. The chapter commences with a description of the development of the rights in Western jurisprudence, explains their permeation into international human rights law and evaluates African interpretation of the rights. It also discusses the protection of women's rights, and the incorporation of these rights into the South African Constitution. The chapter further discusses how the principle of equality is linked with the rights to a fair trial and access to justice, and thus considers the issues of gender equality and equality of arms in the development of these rights.

##### **a) 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.

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For many years, substantive equality, which sought to remedy political and social injustices for particular vulnerable groups in society, was neglected.<sup>1</sup>

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.<sup>2</sup> Thereafter, the right appeared in two separate documents from the Middle Ages: the English Magna Carta of 1215<sup>3</sup> and the Scottish Treaty of Arbroath (Declaration of Scottish Independence) of 1320.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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, their powers. In other words, they should be independent from the state system, thereby ensuring the separation of

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<sup>1</sup> M Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) at 459.

<sup>2</sup> Respectively, Table 2, Law 1; Table 9, Law 1 and Table 9, Law 3.

<sup>3</sup> S Trechsel *Human Rights in Criminal Proceedings* (2005) at 82.

<sup>4</sup> R Mitchison *A History of Scotland* 3ed (2002) at 38–55.

<sup>5</sup> The Sixth Amendment to the United States Constitution. See also the case of *Barker v Wingo* 1972 (407) US 514 at 515.

<sup>6</sup> Article 9 of the French Declaration of 1789.

<sup>7</sup> B Beinart in 'The Rule of Law' (1962) 99 *Acta Juridica* at 108.

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powers.<sup>8</sup> Along with the proposition on the separation of powers in modern European legal systems, Dicey founded his theory of the rule of law on three premises: first, that no person is above the law; second, that every person is equal before the law, and third, that the general principles of the British constitution governing the liberties of an individual are derivable from the judicial confirmations of common law.<sup>9</sup> Dicey's theory was thus centered on the three principles of separation of powers, judicial independence and the primacy of law. The theory had inherent limitations, however. Although Western systems guaranteed procedural fairness, they were unable to secure equal access to justice for many litigants.<sup>10</sup>

#### b) Access to justice

With the emphasis on fair trial, Western courts were more concerned with the need to enforce strict rules and procedures. This approach, however, made dispute resolution expensive, complicated and, ultimately, fair only for the privileged few who could afford to pay for legal representation.<sup>11</sup> 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.<sup>12</sup> Between the nineteenth and twentieth centuries, there were five waves of the movement. (It is

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<sup>8</sup> 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*, which is available at <http://www.plato.stanford.edu/entries/montesquieu>, and last accessed 14 February 2013.

<sup>9</sup> As cited in G Carpenter *Introduction to South African Constitutional Law* (1987) at 85. Based on these premises, some scholars have argued that Dicey was not proposing a universal construct but was merely describing nineteenth-century English law. See JD van der Vyver *Seven Lectures on Human Rights* (1976) at 108.

<sup>10</sup> 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.

<sup>11</sup> For a more detailed discussion on the history of this right, see RL Abel 'The Contradictions of Informal Justice' in RL Abel (ed) *The Politics of Informal Justice, Volume 1: The American Experience* (1982) at 295–6, 297–8. See also S Roberts & M Palmer *Dispute Processes: ADR and the Primary Forms of Decision-making* (2005) at 53–4.

<sup>12</sup> 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.

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important to note that these waves were not immediately concerned with gender: they factored in the rights of women only in the twentieth century.)

During the first wave in the 1960s, access to justice was described as access to courts and lawyers.<sup>13</sup> 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. If the state did not provide legal assistance for the needy, justice became an issue of cost. 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.<sup>14</sup>

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.<sup>15</sup> As a result, Western governments devised various legal aid programmes to facilitate access for the poor.<sup>16</sup> Despite these efforts, however, access to justice remained elusive for the poorer members of society due, in large part, to the stringent eligibility criteria governing the award of legal aid to needy individuals.<sup>17</sup>

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

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<sup>13</sup> Bass *et al* (eds) (2005) op cit at 2.

<sup>14</sup> Roberts & Palmer (2005) op cit at 47.

<sup>15</sup> 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.

<sup>16</sup> These programmes include the Judicare system. This system provided legal aid as a legal right for all persons eligible under the statutory terms, with the State paying the private lawyer who provided services. Also, this system provided representation for low-income litigants that they could have if they were able to afford a lawyer. Judicare was criticised because it did not eradicate the other barriers to access, such as the geographical and cultural barriers. The Public Salaried Attorney Model was considered more effective but there were not enough attorneys for the number of poor people. It was also discovered that legal aid could not adequately provide for small claims matters. 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.

<sup>17</sup> Macdonald in Bass *et al* (eds) (2005) op cit at 20.

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available judgments, with procedural informality as its hallmark.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

These failings predicated the arrival of the third wave in the 1980s, when the issue was seen as inequality before existing courts and tribunals.<sup>22</sup> 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.<sup>23</sup> This situation led to the promotion of informal dispute resolution systems.<sup>24</sup>

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

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<sup>18</sup> Roberts & Palmer (2005) *op cit* at 45.

<sup>19</sup> 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.

<sup>20</sup> Macdonald in Bass *et al* (eds) (2005) *op cit* at 21.

<sup>21</sup> 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.

<sup>22</sup> Macdonald in Bass *et al* (eds) (2005) *op cit* at 21.

<sup>23</sup> Macdonald in Bass *et al* (eds) (2005) *op cit* at 22.

<sup>24</sup> Abel (1982) *op cit* at 295–6; 297–8. See also Roberts & Palmer (2005) *op cit* at 53–4.

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adversarial nature of the formal courts provided challenges to small claimants because of their complicated procedures.<sup>25</sup> 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’.<sup>26</sup> It sought to provide genuine access which would cover ‘multiple non-dispute resolution dimensions’, including formal and informal justice mechanisms.<sup>27</sup> The latter referred to neighbourhood justice centres, institutions of avoidance and street committees.<sup>28</sup>

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.<sup>29</sup> 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’.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

This is how access to justice developed — from being an individual right in developed states to one requiring the enforcement of the rights of communities, associations and the poor.<sup>33</sup> Access to justice entailed a move from procedural to substantive issues, and an extension of human rights to include social and economic

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<sup>25</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1978) vol 1 op cit at 67.

<sup>26</sup> 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.

<sup>27</sup> Macdonald in Bass *et al* (eds) (2005) op cit at 22.

<sup>28</sup> Macdonald in Bass *et al* (eds) (2005) op cit at 23.

<sup>29</sup> Bass, Bogart & Zemans (eds) (2005) op cit at 3.

<sup>30</sup> Macdonald in Bass, Bogart & Zemans (eds) (2005) op cit at 23.

<sup>31</sup> *Ibid.*

<sup>32</sup> Macdonald in Bass *et al* (eds) (2005) op cit at 23.

<sup>33</sup> See Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 6-8.

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rights.<sup>34</sup> From a welfare perspective, the concept of access to justice thus centres on the need for effective access to justice for all.<sup>35</sup> Accordingly, Cappelletti argues that:

Scholars must now recognise that procedural techniques serve social functions, that courts are not the only means of dispute resolution that must be considered, and that every procedural regulation, including the creation or encouragement of alternatives to the formal court system, has a pronounced effect on how the substantive law operates — how often it is enforced, in whose benefit, and with what social impact.<sup>36</sup>

This broader interpretation of the meaning of access to justice suggests that the West now has the willingness to ‘learn from other cultures’ and should be ready to ease its near fixation with a strictly formal — court-based, rule-bound — system of justice.<sup>37</sup>

International experts later articulated the rights of fair trial and access to justice in human rights treaties.

## 2. Encoding the rights in conventional law

### a) The drafting process

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 and cultural differences across the globe.<sup>38</sup> These rights were claimed to be uniform,

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<sup>34</sup> The Preamble of the French Revolution of 1793 was the first to incorporate human rights principles. Then followed article 3 para 2 of the Italian Constitution of 1948, and articles 20, 28 of the Fundamental Law of the Federal Republic of Germany (*Grundgesetz*). See Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 8.

<sup>35</sup> This was provided for in the Australian Code of 1895. See M Cappelletti ‘Social and Political Aspects of Civil Procedure — Reforms and Trends in Western and Eastern Europe’ (1971) 69 *Mich L Rev* at 847, 854–55 & n38 in Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 8.

<sup>36</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 9.

<sup>37</sup> *Ibid.*

<sup>38</sup> 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

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but there is now a sense that they could not have been, because, following the Second World War, when experts met to discuss human rights, Africa had no real voice on the negotiating and drafting committees.

When provisions of the UDHR were being debated, the only African members of the UN were Ethiopia, Egypt, South Africa and Liberia.<sup>39</sup> 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.<sup>40</sup> (With regard to South Africa, one must question its level of commitment to African ideals, considering the fact that it was not a democratic state at that time).<sup>41</sup>

Thus, with no strong African presence, provisions of the UDHR<sup>42</sup> were greatly influenced by the West's interpretation of the rights of fair trial and access.<sup>43</sup> To buttress this point, the General Assembly agreed to draft two separate Covenants 'under pressure from the Western-dominated Commission'.<sup>44</sup> As a result, the drafting Committee recommended the adoption of two separate Conventions.<sup>45</sup>

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respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

<sup>39</sup> 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.

<sup>40</sup> GW Mugwanya *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (2003) at 26.

<sup>41</sup> At the time, the UDHR, as a Declaration adopted by the General Assembly, lacked the formal authority of a treaty that could bind its parties under international law, but it is now considered customary international law and binding on all states.

<sup>42</sup> The UDHR was the first international instrument to document civil and political rights such as the right to a fair trial.

<sup>43</sup> 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.

<sup>44</sup> See article 9 of the Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc A/2929 (1955). See also HJ Steiner, P Alston & R Goodman 3ed *International Human Rights in Context: Law, Politics, Morals: Texts and Materials* (2008) at 271.

<sup>45</sup> Ibid. The provisions of the UDHR were thus translated into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both adopted by the General Assembly and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966: entered into force on 23 March 1976 in accordance with Article 49. Available at <http://www2.ohchr.org/english/law/ccpr.html>, last accessed on 26 May 2011. South Africa became

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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).<sup>46</sup> 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.<sup>47</sup>

The US was particularly vocal during debates around article 14(1) of the ICCPR, which provides for due process — a strong component of their constitutional history.<sup>48</sup> While the debates were ongoing,<sup>49</sup> India proposed an inclusion of the right

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party to both treaties on 10 December 1998. But the country is yet to ratify the ICESCR. See General Assembly Resolution (GAR) 421 (V) of 4 December 1950.

<sup>46</sup> 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). Some scholars have referred to the civil and political rights in the ICCPR as negative rights (such as the right to a fair trial). These require no positive duties for the state. The economic, social and cultural rights in the ICESCR, on the other hand, are positive rights demanding state intervention. Other scholars argue that this distinction is oblivious of the negative and positive elements of rights. Indeed, the indivisibility of human rights negates any separation into negative and positive, ie economic, social and cultural rights actually give effect to the civil and political rights and encourage their implementation. See W Wallace 'International Law' in M Ssenyonjo (ed) *Economic, Social and Cultural Rights in International Law* (2009) at 9.

<sup>47</sup> See UN Doc E/CN.4/21 at 3–4 (1 July 1947) in Weissbrodt (2001) op cit at 36.

<sup>48</sup> The adoption of the ICCPR and ICESCR was delayed as a result of US opposition to the scope and complexity of the proposed obligations. The US contended that, while civil and political rights are immediately available, economic and social rights could only be progressively realised. It argued also that civil and political rights are individual rights against any unlawful and unjust action of the state, whereas the state would have to take positive action in order to promote economic and social rights. On the question of implementation, the US considered civil and political rights to be legal rights which require the creation of a good offices committee, while economic, social and cultural rights are programmatic rights, which require only periodic reports. Steiner *et al* (eds) (2008) op cit at 272.

<sup>49</sup> Similarly, during the debates about which economic, social and cultural rights to include in the UDHR, there was minimal participation on the part of the Africans. The United States, Egypt and several Latin American states all advocated for these rights. The presence of Egypt indicates some African presence during this debate, but African participation was restricted to the influence of Egyptian representatives during the debates. It is important to note, however, that the South African government made the following statement at some stage in the meetings: 'A condition of existence does not constitute a fundamental human right merely because it is eminently desirable for the fullest realisation of all human potentialities'. The South African delegates suggested that, in order to realise economic and social rights, it would 'be necessary to resort to more or less totalitarian control of the economic life of the country'. See UN Doc E/CN.4/82/Add.4 (1948) 11, 13. See also Steiner *et al* (eds) (2008) op cit at 271.

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to equality, and the US suggested an article providing for equal protection under the law, whereas France and Australia advocated for protection against discrimination.<sup>50</sup>

In 1952, Yugoslavia sought to include an enforceable prohibition on discrimination by introducing a state duty to institute positive measures that would guard against discrimination.<sup>51</sup> The Soviet Union suggested adding the principle of equality before the law.<sup>52</sup> India, however, sought a substitution of the right to equality before the law with the right to equal protection of the law.<sup>53</sup> With regards to the provision on equality, the South American countries, Argentina and Chile, requested addition of the words ‘without any discrimination’, taken from article 7 of the UDHR.<sup>54</sup>

There were further lengthy debates on equality between states of the West and the Eastern Bloc, while the Third World states did not take a real stance. During the proceedings, the Polish delegate contended that formal equality was not sufficient to guarantee real equality, since South Africa, which was under an apartheid government, could not measure up to such real standards.<sup>55</sup>

Ultimately, representatives of Chile were responsible for submitting a draft of article 3 on gender equality to the Human Rights Commission.<sup>56</sup> The Ukrainian and the Philippine delegates suggested an extension of this right to include all civil and political rights, and this influenced a revision of the draft.<sup>57</sup> The provision was, however, criticised by countries such as Australia, which argued that cultural and religious practices would not automatically change because of this provision.<sup>58</sup> In

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<sup>50</sup> E/CN.4/11, 37; E/CN.4/SR.35, 11.

<sup>51</sup> E/1992, Annex III, section A.

<sup>52</sup> E/CN.4/253; E/CN.4/L.124; E/CN.4/SR.109, 11; E/CN.4/SR.323, 13.

<sup>53</sup> A/C.3/L.945.

<sup>54</sup> A/C.3/L.948.

<sup>55</sup> A/C.3/SR.1101, 15-21.

<sup>56</sup> E/CN.4/L.135.Cf BOSSUYT 75 ff.

<sup>57</sup> E/CN.4/L.135/Rev.1.

<sup>58</sup> E/CN.4/SR.372, 9.

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support, the Swedish advocated its sole application to rights in the ICCPR, which led to narrowing the focus of the article.<sup>59</sup>

After receiving all submissions on the scope of equality, the Human Rights Committee accepted recommendations on the following: equality before the law, equal protection of the law and prohibition against discrimination.<sup>60</sup> Subsequently, civil and political rights were agreed upon and considered critical to guaranteeing equality during court proceedings. With regard to participants at the debates, it would seem that Western interpretations were accepted, and African values, such as communal rights and duties, went unheard.

Without giving due attention to the divergence between Western and African values, post-colonial African governments, including the South African government, have committed themselves to respecting, fulfilling and protecting the rights of fair trial and access to justice by ratifying the ICCPR.<sup>61</sup> Thus far, 167 nations have ratified the ICCPR, 48 of which are African.<sup>62</sup>

#### **b) The conceptual framework**

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

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<sup>59</sup> E/CN.4/L.263, E/CN.4/SR.372, 14.

<sup>60</sup> See Nowak (1993) op cit at 462.

<sup>61</sup> Nowak (2003) op cit at 27.

<sup>62</sup> In March 1976 states ratified an Optional Protocol to the ICCPR. See Optional Protocol to the International Covenant on Civil and Political Rights GA Res. 2200A (XXI), 21 UN GAOR Supp. (no 16) at 59, UN Doc A/6316 (1966), 999 UNTS 302. The Protocol entered into force on 23 March 1976. This Protocol gave effect to the Committee on the ICCPR. The General Assembly adopted a Second Protocol to the ICCPR on 15 December 1989, which came into force on 11 July 1991, after its tenth ratification. See GA Res. 2200A (XXI), 21 UN GAOR Supp. (No 16) at 59, UN Doc A/6316 (1966), 999 UNTS 302. The second Protocol entered into force 23 March 1976. By 5 January 2011, 150 states had adopted the ICESCR, 45 of them African (42 of the 150 parties to the ICESCR have made reservations and declarations to some of its provisions). Eight states objected to these reservations as being incompatible with the object and purpose of the covenant. On 18 June 2008, the UN Human Rights Council adopted a Protocol to the ICESCR and recommended that the General Assembly adopt it. It was adopted and proclaimed by General Assembly Resolution 44/128 on 10 December 2008. See Optional Protocol to the ICESCR, GA Res A/RES/63/117 (10 December 2008).

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equality before courts and tribunals, as well as to fair and public hearing by competent, independent and impartial tribunals established by law.<sup>63</sup> Article 14(1) of the ICCPR provides for the right to a fair trial as follows:

#### Article 14 (1) ICCPR

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.<sup>64</sup>

To give effect to these rights, article 14(1) guarantees the right to equality.<sup>65</sup> The European Court of Human Rights drew a link between the principle of ‘equality of arms’ and fair trial in *Dombo Beheer BV v The Netherlands*,<sup>66</sup> where it held that equality is generally considered an essential element of a fair trial. Equality ensures the protection of every individual regardless of nationality, race or gender,<sup>67</sup> and requires positive state action to set up independent and impartial courts and tribunals, with proper institutional and financial resources to oversee equal access to courts.<sup>68</sup>

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<sup>63</sup>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.

<sup>64</sup>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’.

<sup>65</sup>‘The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, par 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination’. See Human Rights Committee, General Comment No 32, article 14: Right to Equality before Courts and Tribunals and to a Fair Trial. UN Doc CCPR/C/GC/32 (2007), available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>, and last accessed 15 February 2013.

<sup>66</sup> 18 EHRR 213 at 230. Further, the Human Rights Committee in *Ato del Avellanal v Peru*, Communication No. 202/1986, UN Doc Supp No. 40 (A/44/40) at 196 (1988) at para 10.2, held that article 168 of the Peruvian Civil Code was in violation of articles 3 and 26 of the ICCPR (which provide for the right to equality and non-discrimination), by providing that between married couples, only the husband could represent matrimonial property before the courts, which is available at <http://www1.umn.edu/humanrts/undocs/session44/202-1986.htm>, and last accessed 15 February 2012.

<sup>67</sup> Thus a state is conferred with the duty to guarantee the right of access to courts *de jure* and *de facto*. See A Conte & R Burchill *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2009) at 160.

<sup>68</sup> 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), available at <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>, and last accessed on 15 February 2013. See also Nowak (1993) op cit at 238.

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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 as follows:

- 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.
- 3 The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.
- 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>69</sup>

Equality before the law requires equal treatment of all individuals, without any arbitrariness.<sup>70</sup> Equal protection before the law requires legislative action and inaction, i.e. the legislature is expected to avoid discriminatory laws and to provide prohibitive laws.<sup>71</sup> Prohibition of discrimination means the right to equal and effective protection against discrimination. Cumulatively, these rights guarantee both formal and substantive equality, requiring positive measures to protect the rights of specific groups that have been discriminated against by state institutions or private parties.<sup>72</sup> For this reason, the Human Rights Committee provides that:

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<sup>69</sup> See articles 2 and 7 UDHR. See also Human Rights Committee, General Comment no 28, article 3: Equality of Rights between Men and Women UN Doc CCPR/2/21/Rev1/Add10 (2000) which provides, in particular, that: 'Inequality in the enjoyment of rights by women throughout the world is embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal selection and abortion of female fetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights ...', which is available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>, and last accessed on 15 February 2013.

<sup>70</sup> See Nowak (1993) op cit at 466.

<sup>71</sup> Nowak (1993) op cit at 467–9.

<sup>72</sup> Nowak (1993) op cit at 469–76. See the following substantive cases for the application of these principles: *Sandra Lovelace v Canada* Communication No. R.6/24, UN Doc Supp. No. 40 (A/36/40) at 166 (1981) at 18, available at <http://www1.umn.edu/humanrts/undocs/session36/6-24.htm>, and last accessed on 15 February 2013). See also *Ato del Avellanal v Peru* supra at para 2.1, available at

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Firstly, article 3, as articles 2(1) and 26 in so far as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws.<sup>73</sup>

States parties are, therefore, required to report on the protection of women's rights, and whether they initiated measures to enable these rights.<sup>74</sup>

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.<sup>75</sup> This provision is glaringly absent in relation to civil matters, thereby raising the question as to whether or not there is equal access for litigants who cannot afford legal counsel.

With more specific reference to the issue of access to justice, article 2(3) of the ICCPR provides that:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms are herein recognized are violated shall have an *effective* remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

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<http://www1.umn.edu/humanrts/undocs/session44/202-1986.htm>, and last accessed on 15 February 2013.

<sup>73</sup> See Human Rights Committee General Comment no 4, article 3 (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev.1 at 4 (1994), which is available at <http://www1.umn.edu/humanrts/gencomm/hrcom4.htm>, and last accessed on 15 February 2013.

<sup>74</sup> See Nowak (1993) op cit at 70.

<sup>75</sup> 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.

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- (b) To ensure that any person claiming such a remedy shall have *his* right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted [emphasis added].

This provision requires positive state action to ensure equal access to justice for civil and criminal litigants. 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’.<sup>76</sup> It requires that states treat citizens equally, respect the human dignity and worth of citizens, and not to impair their declared rights, including the rights to courts and a fair trial. This means that states ought not to adopt laws or other measures that do not conform to the rights protected by human rights conventions, so as to safeguard vulnerable or disadvantaged people.<sup>77</sup>

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<sup>76</sup>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 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’.

<sup>77</sup>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’. In order to ensure equality between men and women, this requires measures and programmes which can help transform institutions and systems with ‘historically determined male paradigms of power and life patterns, particularly in rural areas’. ‘Where necessary, such measures should be directed at women subjected to multiple discrimination, including rural women’. 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), available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> or <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>, and last accessed 15 February 2013.

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#### 3. African variations on the theme

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.<sup>78</sup> 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'.<sup>79</sup> In 1981, the Assembly of African Heads of States and Governments of the Organisation of African Unity (hereafter OAU) adopted the African Charter.<sup>80</sup> This instrument provides a template for municipal systems of law in Africa.<sup>81</sup>

Somewhat surprisingly, African leaders embraced the principles of international human rights in the African Charter without amendments. In the Constitutive Act of the African Union (hereafter AU), the Heads of States committed their nations to 'promote and protect human and peoples' rights, consolidate democratic institutions

<sup>78</sup> 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. The European Commission on Human Rights and the European Court of Human Rights were later created in France as judicial organs to administer justice. In 1951 the Charter of the Organisation of American States (OAS) entered into force. In 1969 this Convention came into force as a part of the Organisation of American States. The Inter-American Court of Human Rights was later set up. On 18 July 1978, the Inter-American Convention on Human Rights came into force, as a part of the Organisation of American States — it has since been ratified by 25 nations. This Convention, unlike its European counterpart, guarantees civil and political rights, as well as economic and social rights. In 1959 the Inter-American Commission on Human Rights was established, and the Inter-American Court on Human Rights was established in 1979.

<sup>79</sup> 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.

<sup>80</sup> 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.

<sup>81</sup> 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. Articles 2–13 provide for civil and political rights, articles 14–26 for economic, social and cultural rights. Thus the African Charter imposes civil, political, economic, social, cultural, and collective obligations on all states parties. These obligations must be performed in good faith, irrespective of any conflicting domestic laws. 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.

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and culture, and to ensure good governance and the rule of law ...'.<sup>82</sup> 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 and standards.<sup>83</sup>

The move to initiate an African human rights framework suggests divergence from the UDHR and the ICCPR, but, as it happened, the African Charter replicates the same principles.<sup>84</sup> The Charter's provisions on the rights of fair trial and access to justice are almost identical to the ones in the ICCPR. 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.

A strict interpretation of this provision would suggest that it promotes the right to legal representation in criminal trials to the exclusion of civil matters, because it adopts the word 'defense' to the exclusion of 'representation'. This interpretation may also be inferred from the dictum of the African Commission in the case of *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*, where it stated that:

The Commission recalls that the right to a fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the

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<sup>82</sup> The Constitutive Act is available at [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm#Article3](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm#Article3), and was last accessed on 15 February 2013.

<sup>83</sup> 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.

<sup>84</sup> See article 60 of the African Charter.

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obligation on the parts of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.<sup>85</sup>

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.<sup>86</sup> Thus, the claim can be made that the drafters of the Charter did not ‘wish to consecrate all of the customs within Africa and wanted to ensure that only those customs as were retained by the Commission were consistent with internationally recognised standards of human rights’.<sup>87</sup>

Further reflection on the provisions of the African Charter indicates that it is, in fact, committed to the promotion of the right to equality. 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. In *Legal Resources Foundation v Zambia*,<sup>88</sup> the African Commission held that the right to equality is critical to the enforcement of other human rights. Article 8 of the Protocol to the African Charter on Women’s Rights also provides that ‘Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid...’.<sup>89</sup>

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<sup>85</sup> (2000) AHRLR 48 at para 26.

<sup>86</sup> Ssenyonjo (ed) (2009) op cit at 251.

<sup>87</sup> See also Mugwanya (2003) op cit at 190.

<sup>88</sup> Communication No. 211/98 para 63, (2001) AHRLR 84 (14th Annual Activity Report); Human Rights Committee, General Comment no 18, article: Non-Discrimination (37th Session, 1989) UN Doc HRI/GEN/1/Rev1 (1994) 26.

<sup>89</sup> The Protocol prohibits discrimination against women and guarantees their right to human dignity in article 3(1), where it provides that: ‘Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights’. Article 2(2) provides that states parties should eliminate cultural and traditional practices, which are based on ‘the idea of the inferiority of either of the sexes (yet the Protocol recognises polygamy in s 6 (c), or on the stereotyped roles of women and men’). The section provides that: ‘States parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact

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African states will clearly have difficulty in implementing the gender equality requirements in the Charter for the reason that it proclaims theoretically universal sociocultural values, but also seeks to promote 'African culturalism' by advancing distinctively African concepts. During the drafting of the Charter, states maintained 'Africanist' philosophy and resolved to 'reflect historical and traditional values of African civilisation'. The authors declared that 'the Charter must reflect an African conception of human rights and duties; in other words, to promote the respect an African has for individuals as well as peoples'.<sup>90</sup> Because African cultures value the group and promote social ideals,<sup>91</sup> the individual has a duty towards his or her family, society, the state and the international community.<sup>92</sup> This African value derives from the fact that for every right an individual enjoys there is a corresponding duty which he or she must perform in his or her community.<sup>93</sup>

The Charter focuses on the family as the heart of the African social system.<sup>94</sup> This philosophy was restated at the Nairobi proceedings, when African states adopted the African Charter, and where the following statement was made:

All that could be said about this document [the Charter] is that it strives to secure certain flexibility, equilibrium and emphasises certain principles and guidelines of our organization [the OAU] as well as the aspirations of the African peoples. It seeks not to isolate man from society but as well as that society must not swallow the individual. Such is the wisdom that was to be recalled from the very beginning of the proceedings.<sup>95</sup>

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appropriate national legislative measures to guarantee that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationships, are promoted and protected'. The Human Rights Committee in the case of Morocco said that: 'polygamy is a violation of a woman's dignity and constitutes discrimination against women'. See CESCR, Concluding Observations: Morocco, UN Doc E/C.12/MAR/CO/3 (2006) para 15. The Protocol fundamentally protects the equal enjoyment of the rights of men and women. The Protocol was adopted on 11 July 2003, during the Second Ordinary Session of the Authority Heads of State and Government Summit held in Maputo, Mozambique. The Protocol came into force on 25 November 2005 with 15 ratifications. To date, only 21 states have ratified the Protocol, which raises the question of the commitment of African states to the rights of women on the continent.

<sup>90</sup> Preamble to the African Charter OAU Doc CM/112/Part 1 Nairobi at 31 (June 1981).

<sup>91</sup> Steiner *et al* (2008) *op cit* at 506.

<sup>92</sup> Article 27(1) of the Charter. See also Mugwanya (2003) *op cit* at 228.

<sup>93</sup> See B Ibhawoh *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2007) at 23.

<sup>94</sup> TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 6.

<sup>95</sup> OAU Doc AHGS/102/XVII, Nairobi, at 22 (June 1981).

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The Charter also promotes individual duties owed to the broader community, based on the principle of ‘communitarianism’ which recognises both individual and group rights.<sup>96</sup> Among the duties owed by individuals to their communities are those in article 29(7) and (8):

to preserve and strengthen positive African cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of ‘society’ and ‘to’ contribute to the best of their abilities, at all times, and at all levels, to the promotion and achievement of African unity.<sup>97</sup>

A superficial reading of the Charter would therefore suggest that the interests of the family and community are more important than individual rights, such as the right to equality, which affects women.

#### 4. The forgotten rights of women

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’.<sup>98</sup> The women who participated in this movement were from the Western world: African women were not consulted.<sup>99</sup>

In 1946, the Commission on the Status of Women (CSW) was created to promote specific rights for women through the adoption of international instruments. Subsequently, several treaties sprang up to address the role of women in society, such as the Convention on the Political Rights of Women,<sup>100</sup> the Convention on the

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<sup>96</sup> Mugwanya (2003) op cit at 213.

<sup>97</sup> Article 29(7) and (8) of the African Charter. Also see article 27(2) of the African Charter which provides that: ‘All the rights and freedoms of each individual shall be exercised with due regard to the rights of others’.

<sup>98</sup> 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.

<sup>99</sup> Bonthuys & Domingo in Bonthuys & Albertyn (eds) (2007) op cit at 58.

<sup>100</sup> UST 1909 TIAS No. 8289, 193 UNTS 135 GA Res 640 (VII) of 20 December 1952, which was entered into force in July 1954.

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Nationality of Married Women<sup>101</sup> and the Convention on the Consent to Marriage, Minimum Age for Marriage and the Registration of Marriages,<sup>102</sup> International Labour Organisation Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value,<sup>103</sup> International Labour Organisation Convention No. 111 concerning Discrimination in Respect of Employment and Occupation,<sup>104</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against Discrimination in Education<sup>105</sup> and the Declaration on the Elimination of Discrimination against Women.<sup>106</sup>

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.<sup>107</sup> Thereafter, in 1980, the World Conference of the United Nations Decade for Women was held in Copenhagen to review women's rights.<sup>108</sup> In 1985, another World Conference, this time in Nairobi, reviewed and appraised the achievements of the United Nations Decade for Women.<sup>109</sup> 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 (CEDAW).<sup>110</sup> CEDAW thereafter became the first international convention to address women's rights comprehensively.<sup>111</sup> By October 2006, 185 states had

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<sup>101</sup> 309 UNTS 65 GA Res 1040 (XI) of 29 January 1957, which was entered into force in August 1958.

<sup>102</sup> 521 UNTS 231 GA Res 1763 A (XVII) of 7 November 1962, which was entered into force in December 1964.

<sup>103</sup> This was adopted in 1951 and was entered into force in 1953.

<sup>104</sup> It was adopted in 1958 and was entered into force in 1960.

<sup>105</sup> It was adopted in 1960 and was entered into force in 1962.

<sup>106</sup> 1967. South Africa acceded to the first four on 29 January 1993. The country signed the CEDAW in 1993, and it was ratified in 1998.

<sup>107</sup> Between 19 June and 2 July in Mexico City.

<sup>108</sup> This took place between 14 and 30 July 1980.

<sup>109</sup> Between 15 and 26 July in Nairobi.

<sup>110</sup> GA Res. 34/180, UN GAOR, 34th Sess, Supp No 46, UN Doc A/34/46 (1980).

<sup>111</sup> In 1999 the General Assembly adopted the Optional Protocol to the Convention on the Elimination and Discrimination against Women. 54<sup>th</sup> Sess 15 October 1999, A/RES/54/4. Article 2 of the Protocol

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accepted it, and it has become one of the most widely ratified human rights treaties.<sup>112</sup> The greatest challenge to the CEDAW, however, is the large number of reservations to its provisions.<sup>113</sup>

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'. This provision promotes the right to equality in general. It further provides that:

States Parties shall take all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 15(1) and (2) provide for equal access to civil litigation:

States Parties shall accord to women equality with men before the law.

States parties shall accord women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

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...'. Traditional tribunals are more accessible to rural women than formal courts.

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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 Bonthuis & Domingo in Bonthuis & Albertyn (eds) (2007) op cit at 63-4.

<sup>112</sup> It has been ratified by all African States besides Somalia and Sudan.

<sup>113</sup> 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 Bonthuis & Domingo in Bonthuis & Albertyn (eds) (2007) op cit at 63.

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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 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.

### **5. Incorporation of the rights in the South African Constitution**

In 1945, South Africa became a party to the UN Charter and was, therefore, obliged to respect and observe human rights.<sup>114</sup> 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 apartheid era, white segregationist court structures were promoted. Formal courts adjudicated major disputes and crimes, while traditional authorities were maintained for litigating civil and minor criminal matters. Given its racial bias, the South African government obviously had little interest in the core African values reflected in the African Charter. So, while human rights negotiations were in process, South African representatives were more concerned with formal court structures than with traditional tribunals.<sup>115</sup>

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.<sup>116</sup> It was only in the 1990s that the new democratic government indicated its willingness to adopt the international code of human rights.<sup>117</sup> Thus, South Africa’s post-apartheid government stated that

it accepts the principle of the recognition and protection of fundamental individual rights which form the Constitutional basis of most Western democracies. We acknowledge, too, that the most practical way of protecting these rights is vested in

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<sup>114</sup> See article 1 (3) and 55 (3) of the UN Charter at Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>115</sup> The apartheid policy was formally institutionalised in 1948, even though discriminatory laws existed prior to that time in South Africa. This system of oppression commenced in 1913 with the Natives Land Act legislation, and was solidified in 1951 when the Bantu Authorities Act was passed. See I Schapera & JL Comaroff *The Tswana Revised Edition* (1991) at 65.

<sup>116</sup> 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.

<sup>117</sup> 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.

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a declaration of rights justiciable by an independent judiciary.<sup>118</sup>

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.<sup>119</sup>

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.<sup>120</sup> Shortly 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.<sup>121</sup> 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.<sup>122</sup>

Following the ratification of the ICCPR, CEDAW and the African Charter,<sup>123</sup> however, South Africa sought to incorporate the principles in those documents into the Constitution.<sup>124</sup> As we have seen, many of the provisions are of Western origin, with little immediate relevance to an African setting. Hence, drafters of the

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<sup>118</sup> In 1991 at the Convention for a Democratic South Africa (CODESA), 17 of the 19 political parties and organisations, the two major parties viz the SA government and the African National Congress included, committed themselves to a 'united, nonracial and nonsexist' South Africa, a multiparty democracy and regular elections on the basis of universal adult suffrage on a common voters' roll, and also to an entrenched and justiciable Bill of Rights'. See Titus (1993) op cit at 37. See also CODESA Declaration of Intent. See J Dugard 'Editorial Comment – The State President and Human Rights' 6 *SAJHR* (1990) at v.

<sup>119</sup> See the CODESA Declaration of Intent and the United Nations Centre against Apartheid Notes and Comments 1/92 at 3-4.

<sup>120</sup> 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 United Nations Treaty Collection at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>121</sup> 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.

<sup>122</sup> Ibid.

<sup>123</sup> South Africa became party to the African Charter on Human and Peoples' Rights on the 9 July 1996.

<sup>124</sup> 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 February 1997. See The White Paper on Traditional Leadership and Governance published on 30 September 2003.

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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).<sup>125</sup>

Sections 35(3) and 34 of the Constitution provide for fair trial guarantees and access to justice, while section 9 contains the right to equality. These provisions will be discussed in chapters three and four.

#### 6. Overview of the International and African human rights framework

Article 14(1) of the ICCPR provides for the right to a fair trial and, implicitly, the right of access to justice. Fair trial requires gender equality, which is guaranteed in the ICCPR, the African Charter, as well as in the CEDAW. It is highly doubtful, however, whether this right is amenable to application in traditional tribunals, where women are not treated as being equal to men.<sup>126</sup> This, therefore, raises the question as to whether the drafters of the human rights treaties considered the role of traditional tribunals at all.

Access to justice requires equality of arms before courts and tribunals, but many rural women cannot afford the cost of litigation in formal courts. Even though the international treaties require states parties to set up independent, impartial courts, the right to legal representation that enables enforcement of access in civil cases was not encoded.

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<sup>125</sup> 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.

<sup>126</sup> It is often claimed that human rights represent a universal, and therefore a culturally neutral, value system, they betray at every turn their origins in western law and philosophy'. See Bennett (1995) op cit at 1.

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The African Charter provides for the rights of access and legal representation, in concert, suggesting an overlap between fair trial and access rights (which, of course, would equalise the position of both parties to a civil dispute), but limits the scope of article 7 to criminal trials — to the disadvantage of rural female litigants appearing in civil matters.<sup>127</sup> Surprisingly, the CEDAW, which is expected to protect women's rights, merely provides general guidelines for doing so.<sup>128</sup>

While the exact phrase 'access to justice' is not used in the ICCPR - or any of the international or regional conventions - these instruments provide for the right to an 'effective remedy' before competent courts and tribunals, which implicitly requires the state to provide appropriate enforcement mechanisms.<sup>129</sup>

It is thus evident that, in international law, the right of access to justice has both narrow and broad meanings.<sup>130</sup> In the narrow sense, it means the right of an indigent person to legal aid and to adequate legal assistance or representation. In the broader sense, it is the right of an individual to bring a claim to court and to have his or her case heard and tried on the basis of substantive standards of fairness.<sup>131</sup>

The next chapter will consider the applicability of a fair trial in traditional contexts.

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<sup>127</sup> In *Airey v Ireland*, the European Court of Justice held that, to guarantee access to justice, there had to be a right to legal representation, even in civil cases: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective .... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... . It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively...'. See *Airey v Ireland* (1979) 2 EHRR 305 para 24.

<sup>128</sup> See sections 2 and 14(1) CEDAW.

<sup>129</sup> See section 2(3) of the ICCPR. F Francioni 'The Right of Access to Justice under Customary International Law' in Francioni (ed) (2007) op cit at 24-5.

<sup>130</sup> Francioni in Francioni (ed) (2007) op cit at 1.

<sup>131</sup> Ibid.

## **CHAPTER III**

### **FAIR TRIAL FOR RURAL WOMEN**

#### **1. Application of fair trial guarantees**

Chapter two examined whether the Western and African human rights frameworks on fair trial and access to justice adequately guard the interests of rural women. This chapter considers whether the South African Constitution guarantees fair justice for rural women, who primarily approach traditional tribunals for dispute resolution. The chapter shows that sections 34 and 35(3) enforce technical principles of law derivable from the Western concept of the rule of law, which often conflicts with African procedures, leading to gender discrimination. Traditional justice methods will be discussed in more detail in Chapter Five.

##### **a) General fair trial guarantees**

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.

##### **i) Independence and impartiality of the tribunal or forum**

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 impartial tribunal or forum’

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[emphasis added].<sup>1</sup> Reference to ‘disputes’ suggests these may be of a civil nature only, and may not extend to criminal cases.<sup>2</sup> This right of access to courts requires both the freedom and impartiality of those administering justice, which, in turn, requires a separation of powers between the judiciary and other arms of government.<sup>3</sup>

The judicial principles of independence and impartiality are essential to enforcing the rule of law.<sup>4</sup> This concept, as propounded by Dicey, aims to protect and put into effect fair trial according to the laws of the land.<sup>5</sup> To elucidate the importance of this principle for civil litigants, the Constitutional Court in *Re Certification of the Constitution of the Republic of South Africa*<sup>6</sup> held that:

an essential part of the separation of powers is that there be an independent judiciary... what is crucial to the doctrine of separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and executive.<sup>7</sup>

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.<sup>8</sup> Judges, however, are presumed to be independent or impartial, while contending applicants have the

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<sup>1</sup> See section 34 of the Constitution.

<sup>2</sup> See *S v Pennington* 1997 (4) SA 1076 (CC).

<sup>3</sup> See the decision in *South African Association of Personal Injury Lawyers v Health* 2001 (1) SA 883 (CC) paras 25–6.

<sup>4</sup> 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.

<sup>5</sup> See AV Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959) xxxiv at xcvi–cli.

<sup>6</sup> *First Certification judgment* 1996 (4) SA 744 (CC). This case involved the composition of the JSC, the body entrusted with the appointment of judges. It was argued that the President seemed to have too strong a hand in the appointment of judges.

<sup>7</sup> *First Certification judgment* supra at para 13. See also the decision of the Constitutional Court in the case of *United Democratic Movement v President of the Republic of South Africa* (No 2) 2003 (1) SA 495 (CC) para 26.

<sup>8</sup> *South African Rugby Football Union v Commissioner for the South African Revenue Services* 1999 (7) BCLR 725 (CC).

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burden of proving otherwise in accordance with the test of reasonableness.<sup>9</sup> In *President v South African Rugby Football Union SARFU*, a leading case on this question, the Constitutional Court stated the need for the impartiality of judges, and laid down the test thus:

the reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.<sup>10</sup>

From the above dictum one can infer that impartiality has two aspects, viz: the court or tribunal must be subjectively free of personal prejudice or bias, and it must offer sufficient guarantees to exclude any legitimate doubt in this respect.<sup>11</sup> In other words, lack of bias by a judge is critical to the meaningful exercise of access to courts, and this right would be breached where the independence and the impartiality of courts were not guaranteed or secured by the state.<sup>12</sup>

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<sup>9</sup> See the 1999 (4) SA 147 (CC) (*SARFU II*) at para 48.

<sup>10</sup> *Supra* at para 48.

<sup>11</sup> NJ Udombana 'The African Commission on Human and People' Rights and the Development of Fair Trial Norms in Africa' (2006) 6 *African Human Rights Law Journal* at 326–327.

<sup>12</sup> *Ibid.* An element of bias is a sufficient indicator of the inability of the adjudicator to perform his/her duty without fear or favour. See *What is a Fair Trial?* Paper presented at Access to Justice Round-Table Discussion, Parktonian Hotel, Johannesburg, 22 July 2003 at 14. Independence and impartiality were first provided for under section 22 of the Constitution of the Republic of South Africa, Act 200 of 1993: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum'. Justice Ackermann gave insight into the purpose of that provision in the case of *Bernstein v Bester NO & others* 1996 (2) SA 751 (CC). The Court noted that section 22 was enacted to protect individual rights and warranted courts to be independent and impartial. This was necessary to uphold the rule of law and the *regstaatidee* by making adjudicators accountable to the state. The court held further that section 22 guaranteed access to courts and other tribunals, and required judges to be impartial and independent. It discouraged individuals from employing self-help measures, even when they had no recourse to legal measures. By implication, this interpretation was ascribed to section 34 with similar wording, which promotes the rule of law and prevents arbitrariness in dispute resolution. See Currie & de Waal (2005) *op cit* at 704.

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While interpreting the provisions of section 34, Justice Mokgoro, in the case of *Chief Lesapo v North West Agricultural Bank*,<sup>13</sup> held that the section provides for the principle of natural justice and thus promotes judicial fairness. The court went on to assert that the right of access to court is a foundational principle of the Constitution, which must be upheld to promote the rule of law. Thus, whether it is in arbitration tribunals, or in the magistrates' courts or the High Courts, it appears clear that the Constitution requires the impartiality, independence and fairness of such institutions.<sup>14</sup>

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]. While these principles are applicable within a formal court structure, there is the question of whether all traditional courts and tribunals are subject to the same principles.<sup>15</sup>

Bearing in mind that traditional forums for dispute resolution include family councils, headmen's courts and chiefs' courts, it is questionable whether these forums ought (and can) abide by the same standards as the formal courts. If there is no strict separation between the powers of the legislature, executive and judiciary in the traditional system of government, they would not, on the face of it, be capable of adjudicating impartially and independently.<sup>16</sup>

Although it has been suggested that sections 34 and 165(2) confine the requirement of independence and impartiality to formal courts, which is provided for in the Constitution, the provisions, in fact, apply to traditional tribunals. This may be

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<sup>13</sup> 2000 (1) SA 409 CC at 416.

<sup>14</sup> See Currie & de Waal (2005) op cit at 723.

<sup>15</sup> Because South African courts are overburdened, some of their functions are conducted by other agencies. For instance, the government established the Commission for Conciliation, Mediation and Arbitration (CCMA) to administer labour disputes, and small claims courts were created to resolve civil disputes that, in the normal course of events, would not require the attention of the higher courts. See Currie & de Waal (2005) op cit at 730–1.

<sup>16</sup> This was the argument put forward by Justice Madlanga in *Bangindawo v Head of the Nyanda Regional Authority & another; Hlantlalala v Head of the Western Tembuland Regional Authority & Others* 1998 (3) BCLR 314 (Tk). See TW Bennett and C Murray 'Traditional Leaders' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law in South Africa* (2012) at 26–51.

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gleaned from the provisions of section 166, which specify the courts recognised in the Constitution as follows:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- (d) the Magistrates' Courts;
- (e) and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

In a position contrary to the provision of section 166(e) above, Currie and de Waal suggest that the Constitution does not provide the same conditions for tribunals or other forums as it does for courts. They argue that this distinction is a result of the fact that courts have to abide by the highest standard of judicial independence, because they perform a 'variety of judicial functions'.<sup>17</sup> Accordingly, they make the case that tribunals are not subject to the same measure of independence and impartiality required by section 34, even though the section specifically mentions 'another independent and impartial tribunal or forum'. The authors go further when they suggest that the limitation clause in section 36(1),<sup>18</sup> permits a freer interpretation of independence in the case of specialised tribunals or forums.<sup>19</sup> A similar opinion may be inferred from the decision in *Financial Services v Pepkor Pension Fund*,<sup>20</sup> where Justice Conradie pointed out that the degree of independence required in other tribunals must differ from that applicable in the courts.

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<sup>17</sup> I Currie, J de Waal & G Erasmus *The Bill of Rights Handbook* (2001) at 570.

<sup>18</sup> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>19</sup> Currie & de Waal (2005) op cit at 723–4.

<sup>20</sup> 1998 (11) BCLR 1425 at 1431 H.

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A completely different position was taken by the judges in *SARFU II*,<sup>21</sup> where they maintained that both sections 34 and 165(2) apply to courts, and to tribunals and other forums. They argued that these sections set the same standard for all courts and specialised tribunals in the country. Currie and de Waal, however, contend that section 165(2) alone should apply in matters involving the independence and impartiality of courts.<sup>22</sup>

This thesis argues that, judging from the wording of section 16(1) of Schedule 6, ‘every court, including courts of traditional leaders...’, should apply the standard in section 165(2).<sup>23</sup> This provision, read together with section 211(3)—which provides that traditional tribunals should ‘apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’—suggests that the independence and impartiality of these tribunals should be measured against section 165(2). Although section 166(e),<sup>24</sup> omits specific reference to traditional courts, *Ex parte Chairperson of the Constitutional Assembly: in Re Certification*<sup>25</sup> extends this provision to include them.

Conversely, in the case of *Bangindawo v Head of the Nyanda Regional Authority & another; Hlantlala v Head of the Western Tembuland Regional Authority & others*,<sup>26</sup> Justice Madlanga stated that the standard of judicial independence in traditional tribunals is not the same as in the formal courts. He held that the concept of separation of powers in the Constitution cannot be applied in the former, since the judicial, executive and legislative powers are vested in one individual, the traditional leader.<sup>27</sup>

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<sup>21</sup> 1999 (4) SA 147 (CC) (*SARFU II*) paras 28–30.

<sup>22</sup> See Currie & de Waal (2005) op cit at 724.

<sup>23</sup> *Re Certification* supra at 835 held that section 166(e) recognises traditional tribunals via the Black Administration Act of 1927.

<sup>24</sup> ‘...any other court established and recognised by an Act of Parliament...’.

<sup>25</sup> Supra at para 199.

<sup>26</sup> 1998 (3) BCLR 314 (Tk). Also see the decision in *Mhlekwana v Head of the Western Tembuland Regional Authority & another; Feni v Head of the Western Tembuland Regional Authority & another* 2001 (9) BCLR 979 (Tk).

<sup>27</sup> Supra at 327D.

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In the *Bangidawo* case, the court proceeded to reject the application of the independence and impartiality test to traditional tribunals —as discussed in the *South African Association of Personal Injury Lawyers case*. Justice Madlanga warned against ‘the danger in a wholesale transplant of a concept suited to one legal system unto another legal system’. He concluded by saying that:

there seems, in my view, to be no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting... The believers in and adherents of African customary law believe in the impartiality of the traditional leader when he or she exercises his or her judicial functions. The imposition of anything contrary to this outlook would strike at the heart of the African customary legal system, especially the judicial facet thereof.<sup>28</sup>

The South African Law Commission (hereafter SALC) has criticised the *Bangidawo* dictum for focusing on the fact that, although the *recipients* of traditional justice may consider it fair, in fact the question is whether or not these courts correspond with the requirements for impartiality and independence as provided for in section 166 of the Constitution.<sup>29</sup> In another case, *Mhlekwana v Head of the Western Tembuland Regional Authority & another; Feni v Head of the Western Tembuland Regional Authority & another*,<sup>30</sup> the court ruled that traditional tribunals are neither independent nor impartial, as required by section 165(2) in civil matters, and that in criminal cases, the exercise of judicial, legislative and executive functions by the traditional leaders could be construed as being unfair.<sup>31</sup>

Bennett reasoned that the decisions in *Bangidawo* and *Mhlekwana* were both correct, since the former dealt with a civil matter and the latter criminal. In civil cases, the right to a fair trial must be weighed against the problem of access to justice, which traditional tribunals provide for.<sup>32</sup> In criminal cases, however,

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<sup>28</sup> *Bangidawo v Head of the Nyanda Regional Authority* supra at 326.

<sup>29</sup> *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* South African Law Commission Discussion Paper 82, Project 90 (1999) at 4.1, available at [http://www.justice.gov.za/salrc/dpapers/dp82\\_prj90\\_tradl\\_1999.pdf](http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf), and last accessed 19 August 2013.

<sup>30</sup> 2001 (1) SA 574 (Tk).

<sup>31</sup> *Mhlekwana v Head of the Western Tembuland Regional Authority* supra at 616–7.

<sup>32</sup> See TW Bennett *Customary Law in South Africa* (2004) at 128.

separation of powers is considered more critical to the impartiality of the judicial officers, to prevent them from acting as the complainant, prosecutor and judge.<sup>33</sup>

So, while the Constitution requires application of independence and impartiality in all courts and tribunals in criminal cases, traditional leaders function under a system which assumes, but does not impose, these principles. This state of affairs could affect the case of a rural woman, appearing before a biased forum of men, without the assurance of independence and impartiality.

## ii) Fair and public hearing

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*,<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

In traditional tribunals, matters are resolved in public.<sup>37</sup> They are open, because all adult persons can participate and the traditional leaders are more concerned with

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<sup>33</sup> *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) op cit at para 4.2.

<sup>34</sup> *De Beer NO v North-Central Local Council and South-Central Local Council & others (Umhlatusana Civic Association Intervening)* 2002 (1) SA 429 (CC).

<sup>35</sup> *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.

<sup>36</sup> *Supra* para 11.

<sup>37</sup> See United Nations Report *Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (2012) at 58, which is available at <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice>

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finding solutions than with enforcing rules.<sup>38</sup> Although they have no specific legal training, the presiding officers are guided by their general knowledge of the laws and ways of their people.<sup>39</sup> Since a case is seen as affecting every member of the community, their consent and contribution gives the judgements legitimacy and ensures enforcement.<sup>40</sup>

In the case of *Bangindawo & others v Head of the Nyanda Regional Authority & another*,<sup>41</sup> the applicants argued that they did not get a fair trial before the customary court—but the court held that they had a better chance of getting substantive justice than before the magistrates' courts, since the customary court provides easier access.

The principle of fair and public hearing is, however, only partially applied in traditional tribunals. Although they grant audience to all parties to a dispute, and hold all proceedings in public, they may exclude women from contributing during communal deliberations. Hence, while women may be present, they may only participate in a trial as witnesses, complainants or accused persons, and not as members of the community.<sup>42</sup>

### **b) The special requirements for criminal proceedings**

Following international and regional treaties, the South African Constitution provides more specific rules with regard to criminal proceedings, primarily because of the seriousness of the consequences. Since criminal cases are state related and

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[%20and%20Rule%20of%20Law/Informal-Justic-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf](#), and last accessed 15 February 2013.

<sup>38</sup> CS van der Waal 'Formal and Informal Dispute Resolution in Limpopo Province, South Africa' in MO Hinz & HK Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006) at 153.

<sup>39</sup> K Moul *Justice Served? Exploring Alternative Mechanisms to Address Violence against Women* (2004) at 35.

<sup>40</sup> J Stevens *Access to Justice in sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (2000) at 26.

<sup>41</sup> *Supra* at 279–80; 333.

<sup>42</sup> See JL Comaroff & S Roberts *Rules and Processes* (1977) at 26. Although Van der Waal argues that the position of African women in traditional courts is changing, and that they are more involved in dispute resolution processes. See 'Formal and Informal Dispute Resolution in South Africa' in Hinz & Patemann (eds) (2006) *op cit* at 153.

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nearly always prosecuted through state machinery, the balance of power lies overwhelmingly in favour of the state. Accused persons, therefore, need to be specially safeguarded against abuse of power, which includes the provision of a right to legal representation.

In the Constitution, criminal proceedings are regulated by section 35. Subsection (1) provides rights for arrested persons, subsection (2) for detained persons and subsection (3) for accused persons.<sup>43</sup> Currie and de Waal have suggested that the guarantees provided in section 35(3) are not exhaustive, and merely represent the specified elements of the right to a fair trial.<sup>44</sup>

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.<sup>45</sup> According to the court in *Thebus & another v S*,<sup>46</sup> the main objective of a fair trial is to protect an accused's rights to 'dignity, equality and freedom'.<sup>47</sup> To give proper definition to fair trial guarantees, the court, in the cases of *S v Rudman & another*; *S v Mthwana*, described the aim of section 35(3) as follows:

...does not enquire whether the trial was fair in accordance with 'notions of fairness and justice', or with 'the ideas underlying . . . the concept of justice which are the basis of all civilised systems of criminal administration'. The enquiry is whether there has been an irregularity or illegality, that is, a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.<sup>48</sup>

Conversely, the court in *S v Zuma*<sup>49</sup> held that criminal trials should be conducted in accordance with the 'notions of basic fairness and justice'.<sup>50</sup>

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<sup>43</sup> 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.

<sup>44</sup> Currie, de Waal & Erasmus (2001) op cit at 617.

<sup>45</sup> Currie & de Waal (2005) op cit at 744–5.

<sup>46</sup> (CCT 36/02) [2003] ZACC 12. See P-J Schwikkard 'Instrumental Arguments in Criminal Law: A Mirage of Tensions' (2004) 121 *SALJ* at 290.

<sup>47</sup> *Supra* at para 54.

<sup>48</sup> 1992 (1) SACR 70 (A) at 16–17.

<sup>49</sup> See *S v Zuma & others* 1995 (2) SA 642 (CC).

<sup>50</sup> *Supra* at para 16.

Fair trial rights critical to the criminal cases involving women are discussed next.

**i) Public hearing in an ordinary court**

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’,<sup>51</sup> which seek ‘to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms’.<sup>52</sup>

Section 35(3)(c) requires trials to be held in public in order to protect the rights of an accused and guard against unfairness.<sup>53</sup> 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,<sup>54</sup> also requires criminal proceedings to be conducted in open court. It is, however, not an absolute right and allows for exceptions,<sup>55</sup> for example, cases involving children or others of a sensitive nature.<sup>56</sup>

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.<sup>57</sup> This makes certain that ordinary citizens can constantly assess whether justice is being conducted free from undue influences, whether those be of

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<sup>51</sup> Udombana (2006) op cit at 300.

<sup>52</sup> Udombana (2006) op cit at 301.

<sup>53</sup> This is to protect criminal litigants against arbitrary procedures.

<sup>54</sup> 51 of 1997.

<sup>55</sup> See sections 153, 154 and 335A of the Act.

<sup>56</sup> 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.

<sup>57</sup> See *Klink v Regional Court Magistrate NO & others* 1996 (1) SACR 434 (E); 1996 (3) BCLR 402 (SE) at 414.

the government or by the other party. Indirectly, therefore, the requirement guarantees a fair trial.<sup>58</sup>

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. The Constitutional Court in *De Lange v Smuts NO & others*,<sup>59</sup> gave a majority decision in favour of a judicial officer presiding over matters that could involve incarceration. This judgment stressed that courts given judicial authority to deprive individuals of their freedom and liberty should, alone, hear such cases. This suggests that judicial independence and impartiality, as required by section 165(2), must be enforced to the full. Since this section falls outside the Bill of Rights, it is not subject to the limitation clause.<sup>60</sup>

For this reason, the standard for independence and impartiality in criminal cases is higher than that set in civil matters. To buttress this point, in *Nel v Le Roux NO & others*,<sup>61</sup> the court defined the right not to be detained without trial as follows:

The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards . . . . The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The trial envisaged by this right does not . . . in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity, independent of the executive and the legislature, to act as arbiter between the individual and the state.

For further clarification, in *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van den Berg & another*,<sup>62</sup> the Supreme Court of Appeal laid down a test for determining the bias of a judicial officer in criminal cases, as follows:

1. There must be a suspicion that the judicial officer might, not would, be biased.

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<sup>58</sup> Thus, an ordinary court means one which complies with the requirements of independence and impartiality as provided for in section 165(2).

<sup>59</sup> 1998 (3) SA 785 (CC) at para 74 per Ackermann J, and para 174 per Sachs J.

<sup>60</sup> See Currie & de Waal (2005) op cit at 723.

<sup>61</sup> 1996 (4) BCLR 592 (CC); 1996 SA 562 (CC) at para 14.

<sup>62</sup> [1999] ZASCA 53.

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2. The suspicion must be that of a reasonable person in the position of the accused or litigant.
3. The suspicion must be based on reasonable grounds.
4. The suspicion is one which the reasonable person referred to would, not might, have.<sup>63</sup>

Traditional tribunals would not fall foul of the above test, even though they may be biased. One reason is that they try only minor offences, which do not entail incarceration or deprivation of liberty or freedom, and this may serve as justification for non-compliance by these forums. It may be argued further that the requirements for impartiality need not be strictly applied in minor cases—primarily because legislative limitation allows traditional tribunals to administer less serious offences only, and they may not adjudicate many crimes (including cases of assault, rape, theft of expensive items or murder) which require higher standards of impartiality. Such cases have to be referred to the magistrates' courts.<sup>64</sup>

Furthermore, traditional leaders are usually assisted by advisers, a system which promotes a degree of independence and impartiality. Although the leaders are not legally trained, present are councillors and headmen, who are, in turn, assisted by village committees.<sup>65</sup> Judicial officers, who have a direct financial or personal interest in a particular case, are obviously expected to recuse themselves in accordance with the Rules of Court.<sup>66</sup>

This system nonetheless excludes female participation, hence restricting their rights to having a fair public criminal trial.

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<sup>63</sup> Supra at para 34.

<sup>64</sup> See section 6 and the Schedule in the Traditional Courts Bill of 2012 for provisions on the criminal jurisdiction of traditional tribunals.

<sup>65</sup> Van der Waal in Hinz & Patemann (eds) (2006) at 140–1.

<sup>66</sup> Rule 4 of the Rules of Court R2082 of 1967 and *Amakhosi and Iziphakanyiswa* Civil Court Rules GN 12 of 1992.

**ii) Legal representation**

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.<sup>67</sup>

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.<sup>68</sup> The Constitution provides the highest protection of this right, but it is also entrenched in the Criminal Procedure Act.<sup>69</sup>

Case law dictates that a legal representative must be assigned to an accused at state expense, in situations where the person is indigent, if, without such representation, substantial injustice may be done. As will be discussed in Chapter Four, the state is not obliged to provide legal representation where the accused person does not meet the means test (which determines eligible recipients of legal aid). The possibility of having a fair trial is therefore dependent on the affordability of justice.<sup>70</sup>

Besides the accused's right to counsel, the person chosen as a representative must be given adequate time to prepare the defence.<sup>71</sup> In instances where counsel is appointed by the court on behalf of the accused, the 'appointed person must effectively defend the accused and be able to freely exercise professional judgement

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<sup>67</sup> See Constitution of the Republic of South Africa, section 35(2)(b).

<sup>68</sup> See *S v Gouwe* 1995 (8) BCLR 968 (B). Also see *S v Ramuongiwa* 1997 (2) BCLR 268 (V).

<sup>69</sup> 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.

<sup>70</sup> See S Ellmann 'Weighing and Implementing the Right to Counsel' (2004) 121 *SALJ* at 321.

<sup>71</sup> See Principle 2, *Basic Principles on the Role of Lawyers*, which was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at <http://www2.ohchr.org/english/law/lawyers.htm>, and last accessed on 16 February 2013.

in favour of the accused'.<sup>72</sup> This right is aimed at ensuring access to courts, and it must be available from pre-trial to post-trial stages: upon arrest, detention, trial, conviction, sentencing and appeal.<sup>73</sup> Where the accused is unaware of the right to legal representation, it is the court's duty to inform him or her. In *S v Mabaso & another*,<sup>74</sup> the magistrate had failed to inform the accused of his right to representation. The Appeal Court held that the magistrate's failure to inform the accused did not itself serve as an irregularity, but it must first be proved that the accused person was unaware of this right.

The courts have interpreted section 35(3)(f) to be applicable in all criminal proceedings. Traditional tribunals, however, disregard this right, and, according to the former rules of court, representation is actually prohibited.<sup>75</sup> It is true that family heads may represent parties, but they must generally be senior males, thus raising the question whether or not female subjects of the traditional justice system can be said to have had a fair trial.<sup>76</sup>

*Bangindawo*<sup>77</sup> found the absence of legal representation to be contrary to section 35(3)(f) of the Constitution. In that case, the court held that the provisions of section 7(1) of the Regional Authority Courts Act 13 of 1982 (Tk), which prohibited the right to legal representation in civil and criminal proceedings before regional courts, was in violation of sections 22 and 25(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 guaranteeing the rights of access to court and to fair trial.<sup>78</sup> Nonetheless, scholars have argued in support of the proscription of legal

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<sup>72</sup> *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* 1 March 2000 Lawyers Committee for Human Rights, available at [http://www.humanrightsfirst.org/pubs/descriptions/fair\\_trial.pdf](http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf), and last accessed on 16 February 2013 at 18.

<sup>73</sup> Udombana (2006) op cit at 315.

<sup>74</sup> 1990 (3) SA 185 (AD) at 47–62.

<sup>75</sup> Rule 5 of the Rules of Courts and Headmen No. R2082, Government Gazette of 29 December 1967. See also Stevens (2000) op cit at 32.

<sup>76</sup> Bennett & Murray in Woolman *et al* (eds) (2012) op cit at 26–53.

<sup>77</sup> *Supra*.

<sup>78</sup> See 277 at para J.

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representation in all cases before traditional tribunals.<sup>79</sup> Bennett argues for it in civil cases, primarily to allow litigants access to courts and because there is no constitutional right in such cases. This position suggests an endorsement of simple procedures in customary courts, and supports the assumption that both parties to a civil suit already know the law.<sup>80</sup> While the exclusion of legal representation may be maintained for relatively simple matters, some scholars have argued that, in criminal cases, such exclusion should not be upheld. The general consensus, however, one which this study also supports, is that there is no legislative right to legal representation in traditional tribunals.<sup>81</sup>

The SALC debated the issue of allowing professional legal representation in traditional tribunals, and concluded that the presence of lawyers would alter the nature of these courts contrary to the ethos of customary law, which encourages community participation. The arguments revolved around the simple methods of dispute resolution in accordance with the cultural practices of the people concerned. The SALC Report considered the possibility of informal representation by other parties, inclusive of legal practitioners, but not in their capacity as advocates of the court.<sup>82</sup>

The Commission justified its position on five grounds. First, the presence of lawyers would make justice costly and deny certain parties a fair trial. Secondly, legal representation is not required when the cases involve only minor offences. Thirdly, legalistic language is likely to confuse the parties before these courts. Fourthly, lawyers tend to delay judicial proceedings because they are pre-occupied with the procedural aspects of dispute resolution. Lastly, the presence of lawyers might change the language of the court (to English), which parties may not understand. Thus, the SALC recommended balancing the right to legal

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<sup>79</sup> See *Policy Framework on the Traditional Justice System under the Constitution* by the Department of Justice and Constitutional Development (2008) at 6.7.7.1, available at <http://www.info.gov.za/view/DownloadFileAction?id=97257>, and last accessed on 16 February 2013.

<sup>80</sup> South African Law Commission's Project 90, Customary Law Report on *Traditional Courts and Judicial Function of Traditional Leaders* (2003) at 4.6.

<sup>81</sup> Bennett (2004) op cit at 176.

<sup>82</sup> See *Traditional Courts and Judicial Function of Traditional Leaders* (2003) op cit at 4.6

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representation against the right of access to justice in a manner justifiable under section 36(1) of the Constitution (the limitation clause).<sup>83</sup>

Bennett supports this point by distinguishing between the principles in the cases of *Bangindawo* and *Mhlekwá*. In the case of *Bangindawo*, he opines that, since the right to legal representation is not a constitutional right in civil cases, the right of access to justice was adequately exercised at the lower court. He observes further that the simple nature of the proceedings before these tribunals only serves to make them more accessible.<sup>84</sup>

Conversely, in criminal cases, the right to legal representation is considered essential to a fair trial where substantial injustice might be done. The dilemma here is the question as to what would be categorised as substantial injustice in criminal matters before traditional tribunals. To answer this question, the court in *Bangindawo* held that there was no justification under section 36 of the Constitution for denying the right to legal representation in criminal cases.<sup>85</sup>

Even though that was the court's decision, it is important to observe that parties in African tribunals do not have to argue technical points of law, and may not require legal representation, even in criminal cases.<sup>86</sup> Lawyers are needed in formal courts because the law and procedures are complicated and require expert knowledge in order not to put at risk the chances of the defendant.<sup>87</sup> In a customary law setting, on the other hand, in order to institute an action, a complainant would go to the defendant's family head, accompanied by his advisers and witnesses.<sup>88</sup> Family

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<sup>83</sup> Ibid.

<sup>84</sup> Bennett (2004) op cit at 176.

<sup>85</sup> Thus, the court decided that section 7(1) of the Regional Authority Courts Act violated ss 22 and 5(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 because, without legal representation in criminal cases, the right of access to justice would be rendered nugatory.

<sup>86</sup> *Policy Framework on the Traditional Justice System under the Constitution* (2008) op cit at 6.7.7.2. See also Bennett (2004) op cit at 176.

<sup>87</sup> See the case of *Yates v University of Bophuthatswana & others* 1994 (3) SA 815 (BGD) at 846. See also Bennett (2004) op cit at 175.

<sup>88</sup> See section 22 Proc 140 of 1885 and section 53 (2) Transkei Constitution Act 15 of 1976.

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representation is fundamental to the African mode of dispute resolution, and it is the responsibility of family heads to act for other members of the clan, male or female.<sup>89</sup>

Justice Albie Sachs commented on the question of legal representation in traditional tribunals—and this thesis agrees with him—that:

I am not proposing that community courts in the rural areas, headed by traditional leaders and functioning according to the informal procedures of customary law, be given powers to send people to jail. Nor should they be permitted to impose corporal punishment. If anybody is threatened with loss of liberty, there must be due process of law, defence lawyers, charge sheets, a system of appeal and formal procedures. That is what the Constitution requires. But resolving family and neighbours' disputes and dealing with petty assaults and small thefts requires other techniques and processes.<sup>90</sup>

The Traditional Courts Bill (which is still being debated) seeks to give further legislative impetus to the prohibition of legal representation. This could, unfortunately, endanger equal enjoyment for women, since they are frequently denied the right to self-representation.<sup>91</sup> Consequently, rural women participating in criminal cases before traditional tribunals would be denied representation as required by the Constitution.<sup>92</sup> Alternatively, these litigants should be allowed assisted representation or self-representation, to promote adequate presentation of facts and arguments in favour of both parties to a criminal trial.<sup>93</sup>

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<sup>89</sup> JF Holleman *Issues in African Law* (1974) at 114. This is also the case among the Ndebele, where legal representation is prohibited by section 10 KwaNdebele Act 3 of 1984.

<sup>90</sup> See A Sachs 'Towards the Liberation and Revitalisation of Customary Law' in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) at 312–13.

<sup>91</sup> TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 80.

<sup>92</sup> Article 9(3)(a) Traditional Courts Bill 2012.

<sup>93</sup> The Law Race and Gender Research Unit of the University of Cape Town, South Africa has recommended to the Select Committee on Security and Constitutional Development Parliament, Cape Town that: 'Legislation must explicitly provide women with the right to represent themselves in customary courts. Matters concerning the rights and interests of women must not be heard in the litigant women's absences. Even where women wish to be assisted by family or friends, they must be present and able to speak at all times and, especially, their defences'. See Submission on the Traditional Courts Bill (B1-2012) dated 15 February 2012 at 20, which is available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf), and last accessed on 22 May 2013. See also S Weeks 'Traditional Courts Bill: Access to Justice or Gender Trap?' in T Nhlapo, E Arogundade & H Garuba (eds) *African Culture, Human Rights and Modern Constitutions* (2013) at 29.

**iii) Evidentiary protections**

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.<sup>94</sup>

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. Similarly, in the case of *S v Simxandi*,<sup>95</sup> it was held that, if the accused fails to cross-examine a witness on a material issue, the presiding officer may be required to do so.<sup>96</sup> 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.<sup>97</sup>

In traditional tribunals, the rules of procedure and evidence are flexible because, in close-knit communities, it is assumed that everyone knows the background to the case. Although not all information would be considered in deciding a matter, judges allow lengthy and detailed accounts of the events that led to a dispute.<sup>98</sup> There is no strict rule of relevance, and the court must consider all the factors involved in the dispute, including the nature of the parties' relationship.<sup>99</sup>

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<sup>94</sup> 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.

<sup>95</sup> 1997 (1) SACR 169 (C) at 367. The accused person must be informed of this possibility. See *S v Khomunala* 1998 (1) SACR 362 (V) at 434.

<sup>96</sup> See *S v Younas* 1996 (2) SACR 272 (C); *S v Mbeje* 1996 (2) SACR 252 (N). See also JC Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) op cit at 106.

<sup>97</sup> See Currie, de Waal & Erasmus (2001) op cit at 644.

<sup>98</sup> Stevens (2000) op cit at 30.

<sup>99</sup> See TO Elias *The Nature of African Customary Law* (1956) at 243–56.

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Traditional leaders use their discretion in determining the weight to be attached to any piece of evidence.<sup>100</sup> This can be seen in the following statement:

Although judges listen to all kinds of statements of fact, they do classify evidence as interested and disinterested, and direct or circumstantial hearsay. They prefer disinterested and direct evidence, and may advise parties and witnesses not to repeat hearsay, particularly in cases not involving kinsmen. They look for corroboration, and they weigh evidence by several tests.<sup>101</sup>

Presiding officers (either a magistrate court judge or a traditional leader) also allow witnesses to attest to the veracity of the parties' testimonies.<sup>102</sup> They make use of presumptions in deciding upon matters of fact. For instance, in cases of witchcraft, they may presume that a person is a witch because of previous conduct. Mere association with certain animals or any antisocial behaviour may be treated as abnormal, and thus serve as proof that an individual is, in fact, a witch.<sup>103</sup> Where they cannot establish this, they may consult with an 'oracle'.<sup>104</sup>

The courts' generous approach to evidence allows parties to present their cases fully and effectively. Thereafter, traditional leaders have three distinct duties: first, they have to establish wrongdoing; secondly, they must, in certain cases, declare sanctions on the wrongdoer; and lastly, they must strive to reconcile the parties.<sup>105</sup> They achieve these by collecting and weighing all the evidence, after which they must draw out the important facts from the statements made by their parties and their witnesses. They may separate hearsay from primary evidence, and eye-witness from circumstantial evidence. These are distinctions, which are very important in Western courts, and are not unimportant in traditional tribunals.<sup>106</sup> A traditional leader also decides the weight to attach to any piece of evidence presented.<sup>107</sup>

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<sup>100</sup> TO Elias 'Traditional Forms of Public Participation in Social Defence' (1969) 27 *International Review of Criminal Policy* 18–24.

<sup>101</sup> M Gluckman *The Judicial Process among the Barotse of Northern Rhodesia* (1967) in TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) at 74.

<sup>102</sup> See M Gluckman *Ideas and Procedures in African Customary Law* (1969) at 111.

<sup>103</sup> See Bennett (2004) op cit at 174.

<sup>104</sup> Ibid.

<sup>105</sup> Gluckman (1969) op cit at 24.

<sup>106</sup> Ibid.

<sup>107</sup> Stevens (2000) op cit at 30.

The method of adducing evidence in traditional courts can be distinguished from what is expected by the Constitution. Although there is a systematic pattern in the manner in which parties are questioned in traditional forums, this pattern generally appears to be more inquisitorial than adversarial.<sup>108</sup> Also, women may not be allowed to question witnesses; in most tribunals this role is assigned to adult males in the community. Equal treatment requires, however, the same procedural benefits.

#### **iv) Appeals**

The right to appeal or to judicial review allows courts to overturn erroneous decisions.<sup>109</sup> It also protects ‘consistency and uniformity in the application of the law’.<sup>110</sup> In *S v Twala* the court described the purpose of appeals as follows:

The purpose of s 35 (3) read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and s 35 (3) (o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing any person of a criminal offence would be subject to reconsideration by a higher Court. The provision requires an appropriate reassessment of the findings of law and fact of courts of first instance and is clearly not intended to prescribe, in a technical sense, the nature of the reassessment that will always be appropriate. The reason for this is that the nature of the reassessment that is appropriate will depend on the prevailing circumstances. Section 35 (3) does not provide for specifics. It creates a broad framework within which the lawmaker is afforded flexibility in order to provide for the kind of reassessment mechanism which is both appropriate and fair.<sup>111</sup>

Section 35(3)(o) provides for the right of an accused person to appeal or review.<sup>112</sup> Appeal must be made to a higher court and the decisions of that court must be binding on the lower court.<sup>113</sup> In *S v Ntuli*<sup>114</sup> the Constitutional Court considered the right to appeal against the decision of a lower court. The Court

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<sup>108</sup> See AC Myburgh & MW Prinsloo *Indigenous Public Law in Kwandebele* (1985) at 130.

<sup>109</sup> 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).

<sup>110</sup> See N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (1998) at 275.

<sup>111</sup> *S v Twala* supra at para 9.

<sup>112</sup> See *Mphahlele v First National Bank of South Africa* 1999 (2) SA 667 (CC).

<sup>113</sup> Currie & de Waal (2005) op cit at 789.

<sup>114</sup> 1996 (1) SA 1207 (CC) at para 19.

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examined the requirements of the Criminal Procedure Act for an appellant to apply for a judge's certificate before he or she could appeal such a decision. The Court concluded that this system was 'unsystematic' and could end up stifling the appellate process.<sup>115</sup>

The process for an appeal was laid down in the case of *S v Rens*,<sup>116</sup> where the Constitutional Court considered the provisions of the Criminal Procedure Act that prevent a person tried by a superior court from appealing, as of right, against a conviction or sentence.<sup>117</sup> 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.<sup>118</sup>

An accused person or defendant is granted a right of appeal at two levels of judicial scrutiny.<sup>119</sup> 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.<sup>120</sup> All the minimum procedural guarantees of a fair trial must also be observed during all appellate proceedings.<sup>121</sup>

In traditional courts, appeals usually go from the family to the headman, and then to the chiefs' courts. The Traditional Courts Bill, however, recognises only courts of traditional leaders and provides that appeals from there should proceed to the magistrates' courts, which are formal courts of law. This suggests that, without reforming the provision, there can be no formal appeal system within the traditional structure.<sup>122</sup>

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<sup>115</sup> See also Currie, de Waal & Erasmus (2001) op cit at 652–4.

<sup>116</sup> 1996 (1) SA 1218 (CC).

<sup>117</sup> See sections 315 (4), 316 and 319 of the Criminal Procedure Act 51 of 1977.

<sup>118</sup> Also see *S v Twala* supra at para 9. See also Currie, de Waal & Erasmus (2001) op cit at 650.

<sup>119</sup> *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000) op cit at 21.

<sup>120</sup> *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000) op cit at 22.

<sup>121</sup> Ibid.

<sup>122</sup> Article 13(1) Traditional Courts Bill 2012.

Even though this legislation would not prevent appeals from the family forums to traditional tribunals, it could promote the centralisation of judicial power in chiefs, contrary to ‘living’ customary practices.<sup>123</sup> Failure to recognise an appeal strata within the traditional justice system, may also serve to deny adequate engagement at the customary level before contact with the formal courts. Furthermore, creating an appeal system direct from the traditional tribunals to magistrate courts, without an intra-appeal echelon, would re-invoke the problem of access to formal justice. This would leave rural women at the mercy of traditional leaders even when they are victims of gender discrimination.

## **2. Equality: an implication of fair trial**

As suggested in previous chapters of this thesis, the right to equality is inherent in the right to a fair trial, in both civil and criminal contexts. Equality first gained prominence in the 1993 Constitution of the Republic of South Africa, Act 200 of 1993, which stated, in Principle V, that:

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.<sup>124</sup>

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.<sup>125</sup> This right is seen as a trump right, primarily because apartheid created so egregious a system of inequality.<sup>126</sup>

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<sup>123</sup> See Submission on the Traditional Courts Bill (B1-2012) dated 15 February 2012 at 20 by the Law, Race and Gender Research Unit, University of Cape Town, South Africa.

<sup>124</sup> Act 200 of 1993, Schedule 4.

<sup>125</sup> 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.

<sup>126</sup> 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’.

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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.

(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.

#### a) Equality and equal protection of the law

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 treatment of all persons in law, as well as ensuring equal outcomes to a case.<sup>127</sup> 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’.<sup>128</sup> This kind of equality has been described as ‘remedial or restitutionary’.<sup>129</sup> In the case of *Harksen v Lane NO*,<sup>130</sup> the Constitutional Court laid down a test for equality thus:

Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If

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<sup>127</sup> See Currie, de Waal & Erasmus (2001) op cit at 200.

<sup>128</sup> See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) at para 41.

<sup>129</sup> See *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & others* 1999 (1) SA 6 (CC).

<sup>130</sup> 1998 (1) SA 300 (CC).

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it does not, then there is a violation of section 9 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

This dictum suggests that all forms of discrimination should be condemned, even where it promotes a government agenda. Ackerman J also alluded to the same notion in the case of *Prinsloo v Van der Linde & another*, by stating that:

It [the state] should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.<sup>131</sup>

An example of discrimination based on legitimate government purpose was found in in *S v Ntuli*.<sup>132</sup> The Constitutional Court sought to address the validity of a law that differentiated between two parties to a case. In this particular case, one of the parties had legal representation, while the other had been imprisoned without legal assistance. The court held that this treatment amounted to a violation of the right to equality and equal protection of the law.

Equal treatment requires similar judicial treatment, but traditional tribunals deny women fair attendance and participation during conflict resolution. Hence, while men are permitted to act as complainants, representatives, witnesses, interrogators and as judicial officers, women only have legal capacity to lay complaints and act as witnesses.<sup>133</sup>

#### **b) Equal enjoyment of rights and the prohibition of discrimination**

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'.<sup>134</sup> This section has pride of place in the Constitution because of the past discrimination meted out during

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<sup>131</sup> 1997 (3) SA 1012 (CC) para 25.

<sup>132</sup> Supra at 94.

<sup>133</sup> See the dictum in *Bangindawo* supra and *Mhlekwana* supra.

<sup>134</sup> Mubangizi (2004) op cit at 74.

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.<sup>135</sup>

Section 9(3) prohibits the state from discriminating against anyone. The Constitutional Court in *Prinsloo v Van der Linde*,<sup>136</sup> described ‘discrimination’ as ‘treating people differently in a way which impairs their fundamental dignity as a human being’. In *Harksen v Lane NO & others*,<sup>137</sup> 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.<sup>138</sup> In order to prove unfair discrimination, a party has to prove that there is differentiation on one of a series of listed grounds — notably, for our purposes — sex or gender.

It is quite obvious, even from a cursory survey of the literature, that rural women appearing before traditional tribunals suffer discrimination on the above grounds.<sup>139</sup>

### **c) Unfair discrimination**

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

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<sup>135</sup> See *Motala & Another v University of Natal* 1996 (3) BCLR 374 (D). See also Mubangizi (2004) op cit at 74.

<sup>136</sup> Supra at para 31.

<sup>137</sup> Supra at para 52.

<sup>138</sup> 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.

<sup>139</sup> See Draft Submission for Comment: Traditional Tribunals and the Judicial Function of Chiefs CALS, CGE and NLC November 1999 at 13, which is available at [http://www/lrg.uct/usr/lrg/docs/TCB/2012/cals\\_cge\\_nlc\\_submission\\_salc.pdf](http://www/lrg.uct/usr/lrg/docs/TCB/2012/cals_cge_nlc_submission_salc.pdf), and last accessed on 16 February 2013.

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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. In *S v Khanyile & others*, the court held that:

It is well established in our law that *every person* accused of a crime and able to obtain the services of a lawyer has the right to be defended by one. The exercise of that right is vital to the *fairness* of the proceedings, and the denial of the right therefore makes the ensuing trial *per se* unfair. There is no real difference between an accused able to obtain the services of a lawyer but denied the right to do so, and an accused who, because he or she cannot afford the expense, is unable to obtain the services of a lawyer. The latter's trial is no less unfair.<sup>140</sup> [Emphasis added].

The above decision was predicated upon 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.<sup>141</sup> In other words, there can be no fair trial where there is no equality before the law, and vice versa.<sup>142</sup> 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.<sup>143</sup> In essence, once a skilled lawyer represents only one party, the other party's chance of receiving a favourable judgment is threatened.<sup>144</sup>

Again it is clear that the gender-biased procedures practised by traditional authorities undermine the prohibition of discrimination in section 9.<sup>145</sup>

### 3. Problem of fair trial in traditional tribunals

In criminal cases, the state has a monopoly on power. As a consequence, only the national government can prosecute an accused person and impose punishment.<sup>146</sup>

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<sup>140</sup> 1988 (3) SA 795 (N) at para B.

<sup>141</sup> *S v Khanyile* supra at 810C-D.

<sup>142</sup> See the Black J's instructive statement in the case of *Gideon v Wainwright* (1963) 372 US 335 at 344.

<sup>143</sup> NC Lawrenson *Legal Representation and a Bill of Rights* (1993) at 3.

<sup>144</sup> See Lawrenson (1993) op cit at 2.

<sup>145</sup> See I Schapera *A Handbook of Tswana Law and Custom* (1970) at 27–8.

<sup>146</sup> J Burchell *Principles of Criminal Law* (2006) at 68.

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Because of this power imbalance, various protections must be enforced by all courts and tribunals if accused persons are to have fair trial. Accordingly, laws must be ‘publicly promulgated, equally enforced and independently adjudicated’;<sup>147</sup> crimes be defined and certain (*ius certum*);<sup>148</sup> and the principle of *nullum crimen sine lege* (no crime/penalty without a law) must be enforced. This maxim means that retroactive application of substantive criminal law is prohibited. States are thus obliged to define all criminal offences, and make these crimes publicly known.<sup>149</sup> Similarly, a retroactive penalty may not be imposed if it was not provided for under domestic or international law at the time the crime was committed.<sup>150</sup>

The above principles were derived from the Western human rights system, which has been imported into the South African Constitution in the form of a Bill of Rights. While the fair trial guarantees expounded upon in this chapter augur well within a formal judicial system, they fundamentally clash with the traditional. This informs the argument that the role of traditional tribunals was probably not adequately considered when these fair trial laws were being drafted at the international, regional or national levels. As a result, traditional institutions cannot implement the required standards of fairness. A prime example of this difficulty is the emphasis in the Constitution on the distinction between civil and criminal cases, while the lines are blurred in the traditional context.<sup>151</sup>

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<sup>147</sup> See *In Pursuit of Justice 2011–2012*, Progress of the World’s Women - UN WOMEN (United Nations Entity for Gender Equality and the Empowerment of Women) at 11, which is available at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>, and last accessed on 16 February 2013. See also UN Security Council 2004.

<sup>148</sup> See S Hoctor ‘Rape and the Principle of Legality’ (2007) 1 *SAJ Criminal Justice* 78 and 79, 81.

<sup>149</sup> Justice Mokgoro described it in the case of *President of the Republic of South Africa v Hugo* supra at para 102 thus: ‘The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know the law, and be able to conform his or her conduct to the law’.

<sup>150</sup> *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000) op cit at 21. This right has acquired the status of a non-derogable right since the rule of law will be undermined if laws change with retroactive effect. See Article 4(2) ICCPR.

<sup>151</sup> See S Mancuso ‘An African Concept of Settlement of Disputes’ in Nhlapo *et al* (eds) (2013) op cit at 45. The reasons for the differences between Western and African procedures will be addressed in chapter five of the thesis.

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In view of the fact that traditional tribunals do not promote retribution but rather conciliation,<sup>152</sup> most of the criminal guarantees to a fair trial are irrelevant within the context of minor offences. In the main, tribunals resolve civil matters and some minor criminal cases in rural parts of the country.<sup>153</sup> For this reason, the interpretation of the right to a fair trial in traditional tribunals varies marginally from the provisions set out in the Constitution. By its very nature, African customary law is flexible and changes over time.<sup>154</sup> Hence, it cannot be consistently certain or uniform, as it is the law *lived* by a community, but it often guarantees fair standards.<sup>155</sup>

Owing to the patriarchal nature of traditional leaders and their councils, women are relegated to the background of dispute proceedings, even when they are the claimants. In spite of the constitutional intention and purpose to right the ills of the past by removing all forms of discrimination, the one of gender remains glaring in certain African communities. The concept of equality, however, falls away immediately once one party commands a superior position during dispute resolution—in this instance, men.<sup>156</sup>

Having exposed the problem of fair trial in traditional tribunals, the next chapter considers the issue of access to formal justice.

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<sup>152</sup> AL Epstein 'Injury and Liability in African Customary Law in Zambia' in Gluckman (1969) op cit at 300.

<sup>153</sup> See the proceedings of the conference on *Human Rights and Traditional Informal Justice Systems in Africa* by the UN Office of the High Commissioner for Human Rights 20 June 2007 Windhoek, Namibia.

<sup>154</sup> AN Allott *Future of Law in Africa*. Record of proceedings of the London Conference 1959–1960 (1960) at 36–7.

<sup>155</sup> See CN Himonga & C Bosch 'The Application of the African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' 117 *SALJ* at 330–1. See also M Pieterse 'It's a 'Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-racialism' (2001) 17 *South African J on Human Rights* 364 at 377.

<sup>156</sup> See Bennett (2004) op cit at 32–3.

## CHAPTER IV

### ACCESS TO FORMAL JUSTICE FOR RURAL FEMALE LITIGANTS

#### 1. The conditions necessary for full access

The previous chapter covered the problem of fair trial for rural women in traditional tribunals. This chapter examines whether rural female litigants enjoy equal access to justice as required by the Bill of Rights. It identifies challenges confronted by this group, which hamper access to the formal justice system. This problem necessitates that there be a discussion on access to traditional justice mechanisms in Chapter Five.

As set out in Chapter One, the following are some of the areas that form barriers to formal courts: financial, geographic, linguistic and cultural problems.<sup>1</sup> Poor people who reside in the rural areas are victims of all these factors, as well as certain other institutional difficulties, such as lack of trained personnel to deal with women's issues (for example, rape) and the shortage of formal court structures outside urban areas.<sup>2</sup>

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<sup>1</sup> Factors such as poverty, illiteracy, and differences in language and culture produce major difficulties in accessing formal justice. See J Stevens *Access to Justice in sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (2000) at 6.

<sup>2</sup> A shortage of adequately trained personnel and a lack of essential equipment and facilities create justice systems that are fraught with 'delays, lack of institutional capacity and inefficient systems of law enforcement and congestion'. In India, for example, there are 11 judges to about a million people, with more than 20 million cases pending and some civil cases taking over 20 years to reach court. In the Philippines, a judge has, on average, a backlog of 1,479 cases. In Kenya, there are 300,000 cases before the High Court, 7 million civil cases and 13 million criminal cases, and about 10 million new cases every year. Hence, at the end of each year in Kenya there are still about 20 million cases awaiting trial. See *Making the Law Work for Everyone*—Report of the Commission on Legal Empowerment of the Poor, United Nations Development Programme, New York 2008, vol 1 which is available at [http://www.unrol.org/files/Making\\_the\\_Law\\_Work\\_for\\_Everyone.pdf](http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf), and last accessed on 16 February 2013 at 31–2.

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With regard to financial barriers, rural women are specially affected, because they are generally the poorest sector of the population.<sup>3</sup> This imbalance stems from inequalities fostered by the former apartheid system of administration, which segregated whites and blacks, and empowered men rather than women.<sup>4</sup> 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.<sup>5</sup>

Financial difficulties are directly linked to the geographic barriers in that rural women have difficulty in gaining access from a physical point of view.<sup>6</sup> 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.<sup>7</sup> Legal 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.<sup>8</sup> The distances involved in having to travel from their homes to the urban legal facilities can be considerable, as is the expense involved.

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<sup>3</sup> 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.

<sup>4</sup> ‘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](http://www.fhr.org.za/page.php?p_id=68) which was last accessed on 3 August 2013.

<sup>5</sup> J Steele & J Sergeant *Access to Legal Services: The Contribution of Alternative Approaches* (1999) at 12–13.

<sup>6</sup> 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.

<sup>7</sup> M Cappelletti & B Garth in M Cappelletti & B Garth (eds) *Access to Justice: Emerging Issues and Perspectives* Vol 3 (1979) at 9–10.

<sup>8</sup> 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, WA Bogart & F Zemans (eds) *Access to Justice for a New Century: The Way Forward* (2005) at 28.

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Beside financial and geographic barriers, linguistic diversity poses a real problem for women.<sup>9</sup> 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.<sup>10</sup>

Even if the court provides an interpreter, this does not ensure an accurate understanding of the procedure by the participants. Indeed, use of interpreters also makes access slower, since they translate every utterance of the court.<sup>11</sup> 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,<sup>12</sup> adding to litigants' confusion about the laws and procedures involved.<sup>13</sup> Thus, rural women consider formal justice difficult to understand and so fear the courts.

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

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<sup>9</sup> *Making the Law Work for Everyone* (2008) op cit at 33.

<sup>10</sup> 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.

<sup>11</sup> See Cappelletti & Garth in Cappelletti & Garth (eds) (19789) Vol 3 op cit at 11.

<sup>12</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1979) Vol 3 op cit at 10.

<sup>13</sup> 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.<sup>14</sup> For them, the importance of culture cannot be underestimated since it affects the perceived quality of justice.<sup>15</sup>

For these reasons and others, the formal justice system fails to provide accessible dispute resolution for rural women. In common parlance, however, a civil case can only be described as ‘fair’ where it is between persons of equal means,<sup>16</sup> and a criminal trial can only be fair where both parties possess ‘equality of arms’ — that is, both can afford the cost of effective litigation and enjoy equal opportunities before the court.<sup>17</sup> Therefore, it is crucial for some parties during a civil case, and all parties during a criminal case in the formal courts, to engage legal representation. In light of the ongoing financial constraints of rural women, however, the right of access to court continues to be a difficult requirement for the state to uphold.

## 2. Access to courts

In accordance with the provisions of section 34, there is no clear constitutional obligation to provide legal representation in civil disputes.<sup>18</sup> This proposition is drawn from the fact that this particular section makes no mention of a right to legal representation; hence, does not oblige the state to provide legal aid.<sup>19</sup> Besides this constitutional lacuna, there is also no common law right to legal representation in civil cases, although some statutes recognise the need for legal counsel in such matters.<sup>20</sup>

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<sup>14</sup> 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.

<sup>15</sup> *Ibid.*

<sup>16</sup> Cappelletti & Garth in Cappelletti & Garth (eds) (1979) Vol 3 op cit at 13.

<sup>17</sup> See Cappelletti & Garth in Cappelletti & Garth (eds) (1979) Vol 3 op cit at 12.

<sup>18</sup> See *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza & others* (493/2000) [2001] ZASCA 85.

<sup>19</sup> Despite this, Legal Aid South Africa regards the provision of legal aid an important element in fair litigation. See section 3.3 of the Legal Aid Guide 2009/2012.

<sup>20</sup> See, for instance, Rule 53 of the Magistrates’ Court Act 32 of 1944, Rule 40 of the Supreme Court Act 59 of 1959, and Rule 32 of the Black Administration Act 38 of 1927.

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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*,<sup>21</sup> recognised that civil matters are important and require the same standard of legality as criminal ones. The court emphasised that:

persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act (ESTA) and the Land Reform (Labour Tenants) Act and whose tenure is threatened or has been infringed upon, have a right to legal representation or legal aid at state expense under certain conditions.<sup>22</sup>

The court held further that a right to legal representation is conferred on parties to a civil land claim, failing which, substantial injustice would be done.<sup>23</sup> Hence, the court found that the parties had a right to legal representation at state expense:

There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.<sup>24</sup>

To buttress the point, fairness was described thus:

Labour tenants and occupiers are entitled to a fair trial before they can be evicted, and for the trial to be fair it is necessary that the labour tenant or occupier understands his or her rights under the law and the complexities of a trial. Where he or she does not understand, there is a need for legal representation, or at the very least, an explanation of his or her rights by the judicial officer.<sup>25</sup>

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<sup>21</sup> 2003 (4) SA 266 (CC).

<sup>22</sup> Land Reform (Labour Tenants) Act 3 of 1996. *Nkuzi Development Association* case supra at para 1.

<sup>23</sup> *Nkuzi Development Association* supra at para 12, order at para 1.1. Dugard has mentioned that failure to guarantee legal representation or legal aid in civil matters increases the chance of ‘an adverse outcome’ for poor members of the society, since litigants in formal courts are generally required to have legal representation in both civil and criminal cases, if they are to have equality of arms. He contended that, although there is no explicit right to legal representation at state expense in civil cases, section 34 can be interpreted as implying such a right by extension of the caveat in section 35(3)(g)—‘if substantial injustice would otherwise result’. See J Dugard ‘Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice’ (2008) 24 *SAJHR* at 217–18.

<sup>24</sup> Supra at para 11.

<sup>25</sup> *Nkuzi Development Association* supra at para 6.

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The *Nkuzi* decision has been criticised, however, for extending the wording of the Constitution on criminal cases to include civil matters, even though the court could not conclusively ascertain the intention of the drafters.

Geoff Budlender, while considering the dictum in *Nkuzi*, concluded that the elements of the right to a fair civil trial should be determined on a case-by-case basis, since they are not explicitly laid down in section 34.<sup>26</sup> He argued that, to decide whether a person has obtained the full benefit of his or her right to a fair and public hearing, the key factors should include the consequences of the case for the party concerned; the complexity of the issues; the ability of the party to represent him or herself effectively; the risk of error if a party is not represented; and possibly ‘inequality of arms’, if the other party is likely to be represented.<sup>27</sup> These represent the same standards applied in criminal matters. He also opined that there would be substantial injustice in a civil case where one party could not afford legal representation, which would result in inequality of arms.<sup>28</sup>

In a decision contrary to that of the *Nkuzi* case, the court in *Bernstein & others v Bester NO & others* contrasted section 22 of the Constitution of the Republic of South Africa, Act 200 of 1993 (which provided for ‘the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum’) with Article 6(1) of the European Court of Human Rights (which provides for the right to a ‘fair and public hearing’).<sup>29</sup> In the latter, Justice Ackermann compared sections 22 and 25(3) of the Constitution of the Republic of South Africa, Act 200 of 1993— which provided several procedural guarantees in

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<sup>26</sup> He suggested some of the elements of a fair civil trial as being the right to legal representation or legal aid, and the right to equality of arms (which is implicit in the right to a fair trial): G Budlender ‘Access to Courts’ (2004) 2 *SALJ* 342–4.

<sup>27</sup> See Budlender (2004) op cit at 344.

<sup>28</sup> Budlender (2004) op cit at 342. In general terms, equality of arms presupposes the provision of identical procedural rights accruing during civil and criminal cases, in courts as well as in tribunals. In civil suits, for instance, equality may be guaranteed where there is legal representation for both parties. ‘The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way’. See Human Rights Committee, General Comment no 32, article 14: Right to Equality before the Courts and Tribunals to a Fair Trial. UN Doc CCPR/C/GC/32 (2007). See also *Currie v Jamaica Communications No. 377/1989* at para 13.4.

<sup>29</sup> 1996 (2) SA 751 (CC) para 106.

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criminal cases. He contended that the framers of the Constitution had ‘deliberately omitted’ the right to legal representation in civil matters.

In support of this position, Budlender argued that since section 22 did not replicate Article 6(1)— which provided the right to a ‘fair civil trial’—this means that the drafters did not intend to constitutionalise a right to legal representation in civil matters in the Constitution of the Republic of South Africa, Act 200 of 1993. But given that section 34 explicitly provides for the right to a ‘fair and public hearing’, this suggests that this section constitutionalises the right to legal representation in civil matters.<sup>30</sup> Budlender suggested that the right of access to courts is not limited to the right to appear before an independent and impartial tribunal but also includes the actual ability to appear before a court or tribunal. Therefore, litigants must know their rights, be able to afford to sue or be sued, and, where they do not have the necessary financial means, they should have access to legal aid facilities. He argued further that:

Access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.<sup>31</sup>

Budlender’s statement implies a right to legal representation in civil matters, which is not explicitly stated in section 34.<sup>32</sup> Speaking about the *Richtersveld Community v Alexkor Ltd & Government of the Republic of South Africa* case,<sup>33</sup> Budlender stated that:

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<sup>30</sup> See Budlender (2004) op cit at 342. See also Dugard (2008) op cit at 219.

<sup>31</sup> Budlender (2004) op cit at 341. See also Dugard (2008) op cit at 222.

<sup>32</sup> The Chair of the South African Law Commission, Mr Kollapen, stated that access to justice no longer means only access to courts or tribunals. See *Access to Justice Round-Table Discussion* held at the Parktonian Hotel, Johannesburg, 22 July 2003, available at [http://www.lawfoundation.net.au/ljf/site/articleIDs/52183CCAB00DB476CA25730018E0C8/\\$file/AJ\\_R\\_book.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/52183CCAB00DB476CA25730018E0C8/$file/AJ_R_book.pdf), and which was last accessed on 16 February 2013.

<sup>33</sup> 2002 (2) SA 733 (LCC) para 53 including footnote 26.

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the fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial, does not mean that it is by implication excluded in civil trials... Just as, in a criminal trial, the right to a fair trial is broader than the list of specific rights spelt out in the Constitution.<sup>34</sup>

Dugard has also advocated that there should be a right to legal representation in civil matters that involve:

unequal power relations which directly impact on attempts to advance socio-economic transformation. This would include divorce, custody, maintenance, estates, access to land, access to housing and access to other developmental and socio-economic rights.<sup>35</sup>

In support of Dugard's position, this thesis gathers from an analysis of the work of Legal Aid South Africa (hereafter LASA) that this legal aid mechanism seems to adhere to the guarantee of legal representation when it comes to civil matters, such as divorce.<sup>36</sup> Basically, because rural women are in dire need of legal assistance—as they are socio-economically disempowered within society—LASA applies the same standard in civil as in criminal cases, in accordance with the provision for state responsibility in section 7(2), which confers a duty upon the government to respect, protect, promote and fulfil the rights in the Bill of Rights.

Although this section does not directly provide for the right to legal aid in civil matters, the Legal Aid Guide interprets it as follows:

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<sup>34</sup> *Nkuzi* para 53, including footnote 26. As an attorney in the case, he contended that because of the overlap between the rights of access to courts and fair trial, the provisions in section 35(3) should be extended to section 34. Budlender (2004) op cit 341. Brickhill, in partial support of the *Nkuzi* decision, argued that section 34 of the Constitution provides a duty on the state to make provision for free legal services for the parties to a civil trial, where to do otherwise would result in an unfair trial. He declared that there can be no substantive fairness without equality of arms, which includes access to legal advice and representation. J Brickhill 'The Right to a Fair Civil Trial: Duties of Lawyers and Law Students to act *Pro Bono*' (2005) 21 *Afr. J. on. Hum.* at 295–301. See also *Bernstein v Bester* supra at 751. In discussing what a fair civil trial is, Mequoid-Mason considered the content of the right of access to courts and contended that it requires more than 'Diceyan formal legal equality' between parties, which merely guarantees procedural equality but must provide substantively fair decisions. See A Lester 'Legal Aid in a Democratic Society' in *Legal Aid in South Africa: Proceedings of a Conference held in the Faculty of Law, University of Natal* in Durban from 2 to July 1974 at 1.

<sup>35</sup> See Dugard (2008) op cit at 217.

<sup>36</sup> For instance, the Legal Aid Guide provides that in maintenance and domestic violence cases, the LAB may provide legal aid applicants with a) an initial consultation to advise a possible litigant on his/her rights, the procedure to be followed and the chances of success; (b) legal representation in any court hearing, but only if the legal aid recipient's claims or defences have a chance of success on a balance of probabilities, and the opposing party is represented by an admitted legal practitioner or is an admitted legal practitioner. See the Legal Aid Guide (2009/2012) at 4.9.2.

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Within its available resources, Legal Aid SA may progressively also grant legal aid to persons to implement section 7 of the Constitution that deals with respecting, protecting, promoting and *fulfilling* the rights in the Bill of Rights.<sup>37</sup>

LASA has advocated that this section be read in conjunction with the provisions of the Legal Aid Guide, which provides for the right to legal aid in civil matters, where substantial injustice would be done otherwise. This requirement is, however, qualified as follows:

*A litigant who is indigent in a civil matter will only be granted legal aid if the matter has prospects of success or, on a balance of probabilities. This depends on the availability of resources where substantial injustice would otherwise result.*<sup>38</sup>

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.

A close look at this statement already raises a number of questions regarding the issues of affordability, in particular, and what kind of services LASA provides. These questions will be explored further in the chapter, while the next section considers the issue of access to legal representation in criminal trials.

### 3. Access to legal representation in criminal cases

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.<sup>39</sup> In conjunction with this constitutional

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<sup>37</sup> See the Legal Aid Guide 2009/2012 at 4.1.1. Section 4.9.1. provides that legal aid is not available for the prosecution of a claim that does not exceed the quantitative jurisdiction of small claims by more than 50 per cent.

<sup>38</sup> See the Legal Aid Guide 2012 at 4.1.

<sup>39</sup> These include arrested, detained or sentenced persons under section 35(2)(c) of the Constitution, as

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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.

Prior to the enactment of the 1996 Constitution, numerous cases came before the South African courts that thrashed out the common law and legislative ambits of the provision on legal representation.<sup>40</sup> It was an issue, for example, in the case of *S v Wessels & another*.<sup>41</sup> In this case, the court held that deprivation of the right to legal representation would amount to a miscarriage of justice.<sup>42</sup>

In *R v Mati & others*<sup>43</sup> Schreiner JA explained the importance of this right as follows:

There is no rule of law that a person who is being tried for an offence that may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel. But it is a well-established and most salutary practice that whenever there is a risk that the death sentence may be imposed, either where that sentence is compulsory unless other facts are present, as in the case of murder, or where the death sentence is permissible by law and the circumstances make its imposition a reasonable possibility, the state should provide defence by counsel if the accused has not made his own arrangements in that behalf.<sup>44</sup>

While the learned judge focused on the death sentence, which is no longer part of the post-constitutional order, the severity of criminal sanctions means that legal representation must be taken seriously.<sup>45</sup> Chief Justice Steyn in *S v Heyman*<sup>46</sup>

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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 articles 4.1.1 and 4.4.2 of the Legal Aid Guide 2009/2012.

<sup>40</sup> The right to counsel in criminal cases was provided for in the following statutes: section 65 of Cape Proc of 1819; section 38 Cape Ord 40 of 1828; article 45 Wetboek of 1891 and article 16 of the SAR Thirty Three Articles of 1844.

<sup>41</sup> 1966 (4) SA 89 (C).

<sup>42</sup> *S v Wessels* supra at 95.

<sup>43</sup> 1960 (1) SA 304 (A).

<sup>44</sup> Supra at para 306–7.

<sup>45</sup> See *S v Makwanyane & another* 1995 (6) BCLR 665.

<sup>46</sup> 1966 (4) SA 598 (AD).

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identified cases of a serious nature as ‘cases where the liberty of a person questioned is placed in jeopardy by a possible periodical committal to prison’.<sup>47</sup>

The court, in *Mandela v Minister of Prisons*,<sup>48</sup> described the right of access to legal representation as a corollary of access to courts. It is based on the principle of equality of arms, which implies that parties to a case must be on a par. Thus, denial of this right because of lack of funds is considered a violation of the right of equal protection before the law, because lawyers are, in fact, vital to the success of a criminal case. It is because of this danger of conviction that the state prioritises the rights of accused persons to legal aid.

A similar view of this rule was evident in the pre-constitutional era, as was shown in *S v Radebe; S v Mbonani*.<sup>49</sup> The courts here set out three approaches to the duty on the presiding officer to inform accused persons of their right to legal representation and entitlement to legal aid. The presiding officer was to investigate the inherent simplicity or complexity of the case and give consideration to the personal resources of the accused and the gravity of the case—including the possible consequences of a conviction. The presiding officer concluded that if the cumulative effect of a trial without representation for the accused would amount to being grossly unfair, then he or she should:

inform the accused person in appropriate cases, that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice.<sup>50</sup>

The above case, and a similar one, *S v Khanyile & others*,<sup>51</sup> held that presiding officers should make sure that the rights of accused persons who appeared before them were protected and promoted in meaningful ways. Failure to ensure this could result in ‘substantial injustice’ and, in some cases where this has occurred, it could

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<sup>47</sup> Supra at para 603.

<sup>48</sup> 1983 (1) SA 938 (A) at 957.

<sup>49</sup> 1997 (1) SACR 64 (SCA); 1988 (1) SA 191 (T).

<sup>50</sup> Supra at 196.

<sup>51</sup> 1988 (3) SA 795 (N).

result in the setting aside of a conviction.<sup>52</sup> It is now standard practice for magistrates to ask accused persons if they have legal representation, and if they do not, to allow them to make contact with state-appointed counsel (via the Legal Aid Board).

#### **4. Methods for alleviating access problems**

Legal aid includes provision of legal assistance to people who would otherwise not be able to afford legal advice and representation before courts and tribunals in civil and criminal cases.<sup>53</sup> Zander has described legal aid as:

the recognition that the poor man, the indigent person lacking the means to provide his own suit of armour, is given one with which he can, perhaps, grapple and cope with the legal system which in all countries is complicated and is in many respects, menacing.<sup>54</sup>

The suit of armour in civil and criminal matters consists of: legal advice, representation, education and mechanisms for alternative dispute resolution.<sup>55</sup> Therefore, access to justice and fairness requires that, in all interactions with the legal system, persons must be able to ‘cope’ and to protect their interests, and should not suffer ‘injustice’ in enforcing their rights.

In an attempt to protect the right of access, the South African government has introduced various measures to reduce the cost of justice for disadvantaged individuals and groups. It instituted several legal aid schemes which seek to guarantee free legal assistance to poor litigants.<sup>56</sup> One such measure is the LASA,

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<sup>52</sup> See *S v Vermaas* (1994) 4 BCLR 18 (T). The court relied on section 25 (3) of the Constitution of the Republic of South Africa, Act 200 of 1993, which provided that: ‘Every accused person shall have the right to a fair trial, which shall include the right...to be represented by a legal practitioner of his or her choice, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights’. In reaching a conclusion, the court noted the lack of the availability of legal aid fundamentally mocks the right enshrined in the Constitution.

<sup>53</sup> DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) at 1. See also PH Gross *Legal Aid and its Management* (1976) at 26.

<sup>54</sup> See Lester in *Legal Aid in South Africa* (1974) op cit at 15.

<sup>55</sup> *Legal Aid in South Africa* (1974) op cit at 41.

<sup>56</sup> See the Legal Aid Board website at [www.legalaidboard.co.za](http://www.legalaidboard.co.za).

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which regards the provision of legal aid as an important element in fair litigation.<sup>57</sup> It also created alternative dispute resolution mechanisms (hereafter ADR) such as conciliation, mediation and arbitration tribunals (as per the Conciliation Mediation and Arbitration legislation),<sup>58</sup> and small claims courts for minor suits.<sup>59</sup> Cumulatively, however, these mechanisms have not solved the problem, which is one that affects rural women in particular—primarily because most of these schemes are located in the urban areas and pose language barriers. Traditional tribunals, on the other hand, are within reach and use familiar languages and laws in their procedures.<sup>60</sup>

Surprisingly, the state provides only minimal financial support to traditional courts via the traditional councils.<sup>61</sup> The Traditional Courts Bill has proposed a state budget for the training of presiding officers,<sup>62</sup> but there is every likelihood that it will not be passed into law.

State mechanisms for alleviating access issues form the topic of the next section.

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<sup>57</sup> See section 3.3 of the Legal Aid Guide 2009/2012.

<sup>58</sup> See Labour Relations Act, No 66 of 1995 as amended by Labour Relations Amendment Act, No 42 of 1996, Proclamation, No 66 of 1996; Labour Relations Amendment Act, No 127 of 1998; Labour Relations Amendment Act, No 12 of 2002.

<sup>59</sup> See Small Claims Courts Act 61 of 1984 as amended by Small Claims Courts Amendment Act 92 of 1986; Small Claims Courts Amendment Act 63 of 1989; Small Claims Courts Amendment Act 14 of 1990; Small Claims Courts Amendment Act 139 of 1992.

<sup>60</sup> See discussions on traditional justice mechanisms: chapters five and six of this thesis.

<sup>61</sup> Statistics show that, although 80 per cent of conflicts in most African countries are resolved through informal justice, amazingly, 80 per cent of development assistance to the justice sector is allocated to formal systems. See E Wojkowska Doing Justice: *How Informal Justice Systems Can Contribute*, The United Nations Development Programme (UNDP) Oslo Governance Centre 2006. The Democratic Governance Fellowship Programme, available at <http://www.sitesources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf> at 11, and last accessed 13 February 2013. See also Proceedings of the Conference on *Human Rights and Traditional and Informal Justice Systems in Africa* organised by the UN Office of the High Commissioner for Human Rights, 20 June 2007, Windhoek. And TW Bennett 'Access to Justice and Human Rights in the Traditional Courts of sub-Saharan Africa' in T Bennett, E Brems, G Corradi, L Nijzink & M Schotsmans (eds) *African Perspectives on Tradition and Justice* (2012) at 35 and 38.

<sup>62</sup> See No 3, Memorandum of the Objects of the Traditional Courts Bill 2012.

**a) Assisted representation**

To alleviate the problem of equal access to formal courts, legal representation is available in various forms. These include LASA, representation *pro amico*, *pro deo*, *in forma pauperis*, university law clinics, publicly funded private institutions and community advice centres.

**i) *Pro amico* and *pro deo* representation**

In Roman-Dutch law, there was a provision for legal aid for minors, for physically or mentally retarded persons and for persons precluded from obtaining legal assistance because of poverty.<sup>63</sup> Advocates ‘duly instructed by an attorney at a nominal fee’ provided *pro amico* legal services.<sup>64</sup> In the case of the latter, if an accused requested legal representation, the court appointed a lawyer. Later, leave of court was obtainable to sue *pro deo*.<sup>65</sup> The bar appointed a *pro deo* counsel on the instructions of the state.<sup>66</sup>

In former colonies, *pro deo* assistance was provided in civil matters.<sup>67</sup> It was provided that ‘those unable to pay may be exempted from costs of litigation’.<sup>68</sup> Later, this assistance was provided for in the Magistrates’ Courts Act,<sup>69</sup> and the Black Administration Act of 1927, which has now been repealed. If a *pro deo* litigant was successful in his or her claim, the attorneys were paid out of the costs

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<sup>63</sup> See Voet Commentarius 3.1.11.

<sup>64</sup> See BR Bamford ‘Service in the Gown’ (1970) 87 *SALJ* at 351.

<sup>65</sup> See art 98 SAR Ordinance 5 of 1864.

<sup>66</sup> See *S v Gibson* 1979 (4) SA 115 (D) 123.

<sup>67</sup> See Cap Act 20 of 1856 (Resident Magistrates) r 13; OFS Magistrates’ Court Ordinance 7 of 1902 r 61; Natal Act 22 of 1896 (Magistrates’ Courts) R 89, 90, 91; Transvaal Proc 21 of 1902, R14.

<sup>68</sup> See s 156 of the SAR Grondwet of 1858.

<sup>69</sup> See Magistrates’ Courts Act of 1917 [32 of 1917, Order V] and 1944 [32 of 1944, R 7; R53, GN R 1108 of 21 June 1968 sch par 2]. Also see [R27, Rules of Black Divorce Courts, GN R 2083 of 29 December 1967] and [Rule 32, rules of court in the courts of Black Affairs Commissioners, GN R 2083 of 29 December 1967].

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awarded in their favour.<sup>70</sup> Where the case was lost, the lawyer got nothing.<sup>71</sup> In some cases, the applicant would be liable to pay adverse costs to the other party.<sup>72</sup>

In criminal cases, the courts appointed *pro deo* counsel where the death penalty could be imposed.<sup>73</sup> The applicant was, however, required to submit an affidavit setting out the grounds of his defence and the particulars of his or her means.<sup>74</sup> If the court was satisfied, based upon the affidavit, that the accused did not have sufficient means to pay the costs, the court fees and the messenger's charges, and would not be able to pay such sums within a reasonable time, it could order as follows:

- i. That the court process be issued and served free of charge (other than disbursements to the messenger);
- ii. That an attorney be appointed to act for the applicant; or
- iii. That the clerk of the court, without charge, writes out the required process, affidavits, notices and other documents.<sup>75</sup>

#### ii) *In forma pauperis* proceedings

Formerly, in civil cases, an indigent litigant could apply to the registrar of the court *in forma pauperis* to institute or defend his or her matter.<sup>76</sup> A successful applicant was one who, except for household goods, wearing apparel and tools of trade, did not have property to the amount of R10 000, and would not be able to provide the sums from his or her earnings within a reasonable time.<sup>77</sup>

The registrar was obliged to refer a successful applicant to an attorney, who would enquire into his or her means and the merits of the cause.<sup>78</sup> The attorney

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<sup>70</sup> Rule 53 (f).

<sup>71</sup> Rule 53 (6).

<sup>72</sup> Rule 53 (7) (a).

<sup>73</sup> See *R v Mati & others* 1960 (1) SA 304 (A) 306.

<sup>74</sup> See *Grobler v Potgieter* 1954 (2) SA 188 (O) 190.

<sup>75</sup> See Rule 53(4) of the Magistrates' Courts.

<sup>76</sup> See Rule 40 Uniform Rules of Court GN R48 1965.

<sup>77</sup> See Rule 40 (2) (a) Uniform Rules of Court. See also *Van Zyl v Commercial Union Assur Co of SA Ltd* 1971 (3) SA 480 (E) 482 for the definition of 'within a reasonable time'.

<sup>78</sup> See Rule 40(1)(b).

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would then request that the society of advocates nominate an advocate able to act on behalf of the applicant.<sup>79</sup> Only the court could decide whether an applicant qualified as a pauper.<sup>80</sup> Where a litigant who sued or defended a claim *in forma pauperis* won the case and was awarded costs, the attorney had to pay the registrar, deputy sheriff and himself or herself as a legal representative. The pauper would also be liable for costs awarded against him or her, but would not have to pay the attorney's fees.<sup>81</sup>

As early as 1935, the South African Institute of Race Relations concluded that the *pro deo* and *in forma pauperis* procedures were not sufficient to address the vast problem of access to justice.<sup>82</sup> Once the legal aid scheme was introduced, the relevance of *pro amico*, *pro deo* and *in forma pauperis* mechanisms became limited to cases excluded from the ambit of the Legal Aid Act. Because of the complicated nature of these processes, very few people took advantage of the system, and most of the indigent cases went directly to the Legal Aid Board.<sup>83</sup>

### iii) State Legal Aid

Legal Aid in South Africa is administered through four main channels:

- Legal Aid South Africa;

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<sup>79</sup> Ibid. The court could refuse to grant an application if it was not satisfied with the information provided; where the applicant had slept on his or her rights or where the action would not materially benefit the applicant or where the damages awarded was likely to be nominal. See *Grobler v Potgieter* supra; *Pienaar v Consolidated Main Reef Mines & Estates Ltd* 1913 AD 351-352; *Reed v Reed & Heydenrych* 1911 EDL 63-64; and *Schiltz v Schiltz Patent Process Syndicate Ltd* 1909 TS 270-275.

<sup>80</sup> There were several instances when the court denied such an application — ie there had been a delay which was considered prejudicial to the respondent; the claim was stale; one pauper was suing another; the amount to be recovered was likely to fall within the jurisdiction of the magistrate's court, the costs of similar earlier proceedings remained unpaid; a previous case with similar facts had been unsuccessful or abandoned; there had been a previous adjudication on the same facts; the court disapproved of the applicant's conduct, or where the applicant was awaiting the outcome of a previous case which could award him funds. See *Smith v Lewis* 1947 (2) SA 312 (C) 316f; *Pienaar v Consolidated Main Reef Mines & Estates Ltd* supra; *Lackay v Cyster* 1915 CPD 461-462; *Francis v British & American Boot Co* 1906 TH 85-86; *Goldman v Glass* 1887 5 SC 76-76f; *Mathews v Green* 1910 OPD 87-88f; *Mathews v Green* supra; *Martin v D'Almeida* 1936 AD 129; *Brink v Nederduitsche Gereformeerde Kerk in de Transvaal* 1907 TS 183-184f.

<sup>81</sup> See rules 40(7), 62(1) and 40(5) respectively.

<sup>82</sup> See Gross (1976) op cit at 171.

<sup>83</sup> See Dugard's discussion on *in forma pauperis* proceedings in (2008) op cit at 225.

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- University law clinics;
  - Privately funded public interest organisations and
  - Community advice centres.<sup>84</sup>
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- **Legal Aid South Africa**

LASA was created by legislation and today is based on section 35 of the Constitution. In terms of this provision, every person who is arrested, detained or accused has a right to a fair trial—which includes the right to have a legal practitioner assigned by the state at state expense. LASA is supposed to provide legal aid to those who cannot afford their own legal representation— particularly vulnerable groups such as rural women. LASA does this in an independent and impartial manner, with the intention of enhancing justice and public confidence in the law and the administration of justice.<sup>85</sup>

In 1937, after a conference in Johannesburg, the South African Institute of Race Relations created the first Legal Aid Bureau in the country.<sup>86</sup> At the outset, this Bureau focused solely on criminal matters, but by 1940 it included civil matters.<sup>87</sup>

In civil matters, human rights cases for the needy are dealt with by independent university law clinics, a variety of public interest organisations—including the Legal Resources Centre, Black Sash and lawyers' organisations such as the Black Lawyers' Association, the National Association of Democratic Lawyers and Lawyers for Human Rights. Recently, private law firms have begun to establish *pro bono* units in their practices. In addition, complaints may be laid and advice sought from different chapter 9 institutions, such as the Human Rights Commission and the Public Protector (Ombudsman). In criminal cases, LASA, through referral, usually

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<sup>84</sup> <http://law.gsu.edu/ccunningham/LegalEd/SouthAfrica-McQuoid-Mason-PILI.pdf>, last accessed 3 August 2013.

<sup>85</sup> See 'Mandate and Mission of the Legal Aid Board' at [http://legalaid.onsite.hosting.co.za/services/handbook/hb\\_mandate.htm](http://legalaid.onsite.hosting.co.za/services/handbook/hb_mandate.htm), last accessed 3 August 2013.

<sup>86</sup> The first office was in Johannesburg. See *Legal Aid in South Africa* (1974) op cit at 30.

<sup>87</sup> See N Abramowitz 'Legal Aid in South Africa' (1960) 77 *SALJ* 351 & 473. See also GW Cook 'A History of Legal Aid in South Africa' in *Legal Aid in South Africa* (1974) op cit at 28.

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provides legal representation for poor people through private lawyers, law clinics or through the public defender's office.

LASA operates on a budget of about R1 billion annually.<sup>88</sup> Based on this limited amount, it uses the following means to provide access to courts: justice centres; co-operation agreements, special litigation and any other cost effective and efficient ways of accessing justice.<sup>89</sup>

In 2001, the Board created justice centres, which offer legal assistance for civil and criminal matters, give advice, make referrals and commence litigation on behalf of clients. The centres are staffed with public defenders, paralegals and legal aid officers.<sup>90</sup> By 2004, there were 58 centres, 27 satellite offices and 13 high court units.<sup>91</sup> Generally, the justice centres handle most legal aid cases. In 2004, about 79 per cent of the Legal Aid budget was spent on these centres, and more than 100,000 people were referred to them that year.<sup>92</sup>

Co-operation agreements are made between LASA and non-governmental organisations (NGOs).<sup>93</sup> LASA and these organisations go into partnership agreements in which they both undertake to contribute financially.<sup>94</sup>

Special litigation is considered on a case-by-case basis, but must involve unique constitutional matters that require the legal expertise of special teams of legal representatives. Usually, these are cases involving groups of people taking legal action together. Legal representatives may be drawn from the justice centres or from

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<sup>88</sup> See the Department of Justice and Constitutional Development's annual reports 2011/12 at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 83, which was last accessed on 30 May 2013.

<sup>89</sup> See [http://www.mhtml:file://E:/How does the Legal Aid Board work.mht](http://www.mhtml:file://E:/How%20does%20the%20Legal%20Aid%20Board%20work.mht).

<sup>90</sup> Justice centres function like law firms. See [http://www.mhtml:file://E:/How does the Legal Aid Board work.mht](http://www.mhtml:file://E:/How%20does%20the%20Legal%20Aid%20Board%20work.mht).

<sup>91</sup> Ibid. See also DJ McQuoid-Mason in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) at 98.

<sup>92</sup> See Legal Aid South Africa Annual Report for 2009/10 at 10–11.

<sup>93</sup> Legal Aid Guide 2009/2012 at 9.2.1.

<sup>94</sup> Legal Aid Guide 2009/2012 at 9.2.2.3.

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the ranks of private attorneys.<sup>95</sup> LASA is still in pursuit of other methods for providing legal aid and assisting South African communities.<sup>96</sup>

Legal aid caters for civil matters, with the exception of the administration; voluntary surrender or the sequestration of an estate or liquidation of a legal person; actions for damages on the grounds of defamation; breach of an engagement contract; infringement of dignity; infringement of privacy; seduction, adultery or inducing someone to desert or stay away from his or her spouse; actions instituted in the small claims courts; appeal cases, and arbitration, mediation, conciliation or any form of dispute resolution where success is not anticipated. The Board does not provide legal aid in divorce cases where there is a reasonable possibility of reconciliation; where proper and sufficient attention was not given to resolving the dispute; or, considering the circumstances, it does not appear to be a deserving case. This could preclude divorce cases involving rural women. The Board is, however, allowed to provide legal assistance in labour matters.<sup>97</sup>

Moreover, the Board provides legal assistance to children in civil and criminal cases (where substantial injustice would otherwise result); every detained person; every person accused of a crime; those who wish to appeal or review a decision of court in a higher court; women in certain divorces, maintenance and domestic violence cases, and the landless.<sup>98</sup> The Board also provides legal aid in appeal cases.<sup>99</sup>

In order to decide who is in dire need, applicants are subjected to a means test. In civil matters, the Board determines whether an applicant qualifies for legal aid by calculating the joint income and assets of the applicant and his or her spouse, except in divorce matters. The old guide means test provided that an applicant's monthly

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<sup>95</sup> See <http://www.mhtml:file://E:/How does the Legal Aid Board work.mht>.

<sup>96</sup> See <http://www.mhtml:file://E:/How does the Legal Aid Board work.mht>.

<sup>97</sup> See Legal Aid Guide 2009/2012, 4.9.1. and 4.10.1.

<sup>98</sup> See <http://www.mhtml:file://E:/What types of cases are given priority by the Legal Aid Board.mht>. Legal Aid Guide 2012, 4.18.

<sup>99</sup> The Board does not provide aid in cases of drunken driving, driving under the influence of alcohol, and/or drugs, and for dealing in liquor without a license. See <http://www.mhtml:file://E:/What types of cases are given priority by the Legal Aid Board.mht>.

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income should not exceed R1 750 for a single client and R2 500 for a married client (one per couple). In the new guide, the means test requires that an applicant's total net income after tax does not exceed R5 000 for a single client and R5 500 for households. Net assets are not to exceed R75 000 for movable property and R300 000 for immovable property. Discretion could be exercised for applicants with net income over the stipulated amounts where the sum is R1 000 or R2 000 p/m in special cases.<sup>100</sup> Although LASA has a prescribed guideline, it has, however, adopted a more simplified and practical approach to the means test. This test lowers the bar to provide legal assistance to persons with a net income of less than R2 000 per month and property not exceeding R100 000.<sup>101</sup>

In criminal cases, the Board first determines whether applicants are unable to afford their own legal representation. If not, further investigation is conducted to determine whether, in cases where the applicants are likely to be convicted, they would receive a prison sentence. When it is found that— in the event of conviction—a prison sentence will be given, the Board then ensures the provision of legal aid.<sup>102</sup> The Board has a duty to provide any person in need with legal assistance, but, owing to budget constraints, it has resolved to advise and assist those in real need. The concept of 'real need' in criminal cases is in instances where substantial injustice would be done if legal assistance were not given.<sup>103</sup>

In spite of all the efforts being made by LASA to provide access to justice to the poor in South Africa, the number of cases outstanding each year makes it clear that legal aid initiatives are quite unable to provide assistance to most people who require it.<sup>104</sup> Based on the charts below, legal aid schemes take on more criminal cases than civil matters, probably as a result of the unclear wording —on the right of access to legal aid in civil proceedings— of section 34. It also becomes obvious that there are many cases for which these schemes are unable to provide.

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<sup>100</sup> Legal Aid Board February/March 2009 newsletter at <http://www.legal-aid.co.za>.

<sup>101</sup> Ibid.

<sup>102</sup> Legal Aid Board February/March 2009 newsletter at <http://www.legal-aid.co.za>.

<sup>103</sup> The Legal Aid means test is provided for in 5.1.1. of the Legal Aid Guide 2009/2012.

<sup>104</sup> Information generated from the Legal Aid Board website at <http://www.legal-aid.co.za/>.

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Below are tabular and graphic illustrations of LASA's achievements in civil and criminal cases between 2005 and 2010.

*Figure 1*

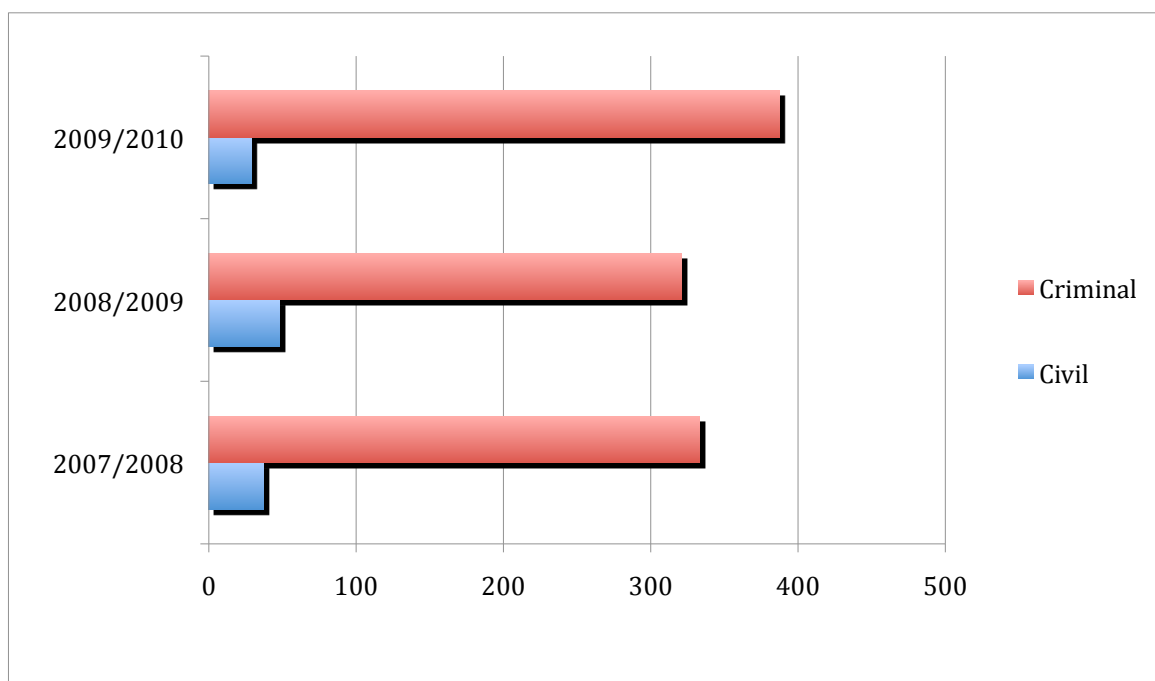
**STATISTICS ON LEGAL AID SOUTH AFRICA**

<b>Legal Aid</b>	<b>2005/2006</b>	<b>2006/2007</b>	<b>2007/2008</b>	<b>2008/2009</b>	<b>2009/2010</b>
<b>Justice cent. matters</b>	<b>291, 457</b>	<b>314, 084</b>	<b>354, 407</b>	<b>395,088</b>	<b>397,788</b>
<b>Judic. matters</b>	<b>42, 787</b>	<b>39, 331</b>	<b>37, 586</b>	<b>35,723</b>	<b>22,011</b>
<b>Co-op matters</b>	<b>6, 000</b>	<b>5, 468</b>	<b>4, 075</b>	<b>4,111</b>	<b>2,921</b>
<b>TOTAL</b>	<b>340, 654</b>	<b>358, 383</b>	<b>396, 068</b>	<b>434,922</b>	<b>422,720</b>

Figure 2

**LEGAL SERVICES DELIVERY: CIVIL AND CRIMINAL (FINALISED MATTERS**

**2007–2010**



Statistics from LASA show that the number of civil cases funded, and thus attended to, are very limited. In proportion to the government budget for legal aid in general, civil matters are not prioritised, because there is no constitutional right in this regard. This lacuna obviously affects the effectiveness of the right of access to justice where both parties do not have equal means.<sup>105</sup>

<sup>105</sup> See Budlender (2004) op cit at 354.

▪ **University law clinics**

In 1975, law clinics were first established at the universities of the Witwatersrand, Cape Town, Durban, Pietermaritzburg, Port Elizabeth, Stellenbosch and then, later, at the University of the Western Cape.<sup>106</sup> In 1994, LASA entered into partnership agreements with the universities as one of the means for combating the problem of access to justice.

With the help of several students every year, the clinics have been able to assist hundreds of litigants.<sup>107</sup> These clinics are supposed to serve as public defenders and thereby help reduce the number of unrepresented indigents. Today, about 21 law schools are involved in this scheme and about 25,000 cases are dealt with yearly.<sup>108</sup> The clinics are usually supported financially by the law societies through the Attorneys' Fidelity Fund.<sup>109</sup>

At the University of Cape Town—to which the researcher had access—although the students are only available for consultations for about six months of the year, they were able to assist 693 clients in 2008.<sup>110</sup> According to the Director of the clinic, not all applicants require litigation and some of them come for legal advice in civil matters. The clinic does not provide legal advice or support in the following instances:

- a) Labour and *criminal cases* are not handled by the students, but are referred to the Legal Aid Board or the Commission for Conciliation Mediation and Arbitration (CCMA);

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<sup>106</sup> See P Ellum *Legal Aid Developments in South Africa July 1973–June 1975* (University of Natal, Durban 1975) at 39 in Gross (1976) op cit at 187.

<sup>107</sup> On a strictly voluntary basis, law students in their final two years of study advise applicants. While the students are not remunerated, they use this opportunity to complete their mandatory internships. Usually, a practising lawyer is employed to supervise about ten articulated clerks (these are graduate students training to become practising lawyers) at each law clinic. South African law graduates are required to complete what is referred to as 'articles of clerkship', the duration being one or two years, depending on the circumstances, before they can be admitted into the profession. Articles of clerkship can be completed at a private law firm or at a legal aid clinic. D Mcquoid-Mason *Legal Aid and Human Rights in South Africa* at <http://pilnet.org/>.

<sup>108</sup> Ibid.

<sup>109</sup> V Ngaleka *Transformation of the Legal Aid System in South Africa* (1999) at 8.

<sup>110</sup> At UCT, students are taken on in February of each year and undergo training until the end of March.

- b) Cases involving the Road Accident Funds;
- c) Cases of marriage, domestic violence or maintenance; and
- d) Dissolution of deceased estates.

The major problem with most of these clinics is that they are situated far from the people who need them, and there are often language barriers between the assistants (students) and the applicants.

▪ **Privately funded public interest organisations**

Foreign donors and the private sector fund these organisations.<sup>111</sup> They operate through advice offices and centres staffed by volunteers and/or paid paralegals, who provide legal advice only.<sup>112</sup> They focus on public-interest matters, such as land rights, housing and labour disputes, administrative abuse and test litigation on various human-rights issues.<sup>113</sup> One such human rights-based organisation is the Legal Resources Centre (hereafter LRC).

The LRC was established in 1979 to assist communities with legal advice and assistance in the promotion of socio-economic development.<sup>114</sup> The LRC uses:

the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and historical circumstances.<sup>115</sup>

It also aims to enable vulnerable and marginalised people to assert and develop their rights, promote racial and gender equality and oppose all forms of unfair discrimination, while contributing to the development of human rights jurisprudence and the transformation of society.<sup>116</sup> Although the centres are located in urban areas

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<sup>111</sup> Ngaleka (1999) op cit at 8.

<sup>112</sup> Ibid.

<sup>113</sup> Ngaleka (1999) op cit at 8.

<sup>114</sup> See <http://www.lrc.org.za>.

<sup>115</sup> <http://www.lrc.org.za/about-us>.

<sup>116</sup> <http://www.lrc.org.za/our-vision-a-mission>.

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(such as Johannesburg, Durban, Grahamstown and Cape Town), they are also well placed in rural communities. Their vision is to enhance substantive equality in the provision of access to justice. The LRC enhances the right of access to courts by conducting impact litigation, instituting law reforms, participating in partnerships and development processes, educating and networking within the country.<sup>117</sup>

Lawyers for Human Rights is an independent human rights organisation that focuses on public interest litigation in South Africa. It provides free legal assistance to marginalised people whose constitutional rights have been violated. It assists South African citizens as well as foreign nationals.<sup>118</sup> The Women's Legal Centre litigates public interest cases that affect women's constitutional rights.<sup>119</sup> Given the policy, however, of these three organisations taking on only class actions, they are of little help to individual litigants who wish to pursue the more mundane claims that pose no major constitutional issues.

The Black Sash, on the other hand, is an independent non-governmental organisation which has been in operation for about 55 years. It is focused on upholding constitutional rights of equality and promoting socio-economic empowerment for vulnerable members of the society. It assists individuals on a serve-as-needed basis. During a period of roughly five years, it provided legal assistance to 60,000 litigants.<sup>120</sup>

Another similar organisation is the Rural Women's Movement, an independent non-profit organisation based in KwaZulu-Natal. It strives to advance women's land and property rights in the rural areas of South Africa. It advocates full and equal participation for women in making legislative, executive and judicial decisions in local governance. The members of this movement include widows, married women, deserted women and underprivileged youth. The movement is comprised of 500 indigenous women's organisations, which are involved in various projects in rural

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<sup>117</sup> Ibid

<sup>118</sup> See <http://www.lhr.org.za>.

<sup>119</sup> See <http://www.wlce.co.za>.

<sup>120</sup> See <http://www.blacksash.org.za>.

communities. These efforts are to liberate women by educating them about their rights and empowering them financially.<sup>121</sup>

- **Community advice centres**

These centres are staffed with volunteers and paid paralegals, and they provide only legal advice.<sup>122</sup> They focus on conflict resolution, lobbying, referrals and demystifying the law.<sup>123</sup> They deal with the following areas of law: welfare claims (such as pensions and disability grants), housing disputes, family violence and labour-related issues.

- b) Small claims courts**

In 1982, the Hoexter Commission recommended the creation of small claims courts to address the problem of access to justice.<sup>124</sup> These courts were established to provide a forum of justice for less privileged litigants.<sup>125</sup> In the case of *De Lange v Smuts NO*,<sup>126</sup> the court said of small claims courts that:

specialisation, expertise, the need to consider local circumstances and the need for the adoption of expeditious, informal and inexpensive procedures justifies the establishment of such bodies by legislation.<sup>127</sup>

The jurisdiction of these courts is restricted to actions not exceeding R12 000—excluding matters such as the dissolution of customary-law marriages, the validity and interpretation of wills, certain claims for specific performance, and actions for

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<sup>121</sup> <http://www.rwmsa.org>. The Office of the Public Defender in Johannesburg deals with about 2, 000 cases yearly. The Legal Aid Board also enters into agreements with Lawyers for Human Rights in rural areas. These offices provide legal advice and refer persons who qualify for legal aid to qualified attorneys. See Mcquoid-Mason *Legal Aid Services and Human Rights in South Africa* at <http://pilnet.org>.

<sup>122</sup> Ngaleka (1999) op cit at 9.

<sup>123</sup> Ibid.

<sup>124</sup> See the Fourth Interim Report RP52 of 1982.

<sup>125</sup> See the Small Claims Courts Act 61 of 1984.

<sup>126</sup> See *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC) at paras 113 and 121.

<sup>127</sup> Ibid.

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damages for seduction, defamation and breach of promise to marry.<sup>128</sup> About 263 small claims courts operate within 384 magisterial districts.<sup>129</sup> They dealt with over 400,000 cases during 2010.<sup>130</sup>

Legal representation is prohibited in small claims courts—except for cases involving minors and persons without *locus standi*.<sup>131</sup> The courts may apply customary law once it can be proved.<sup>132</sup> They can, therefore, apply living customary law as well as the official law (which has been documented and can thus be presented in textual form).<sup>133</sup> The complicated nature of the processes in these courts may, however, necessitate legal assistance which litigants are expected to pay for. The cost of serving requisite summons on the opposing party to a claim may also be exorbitant to indigent claimants.<sup>134</sup>

Another problem plaguing the courts is a shortage of legal practitioners with appropriate experience and willingness to be appointed as commissioners.<sup>135</sup> Presiding officers in small claims courts are usually qualified attorneys or retired magistrates working *pro bono*—without remuneration.<sup>136</sup> So, even though the courts are more accessible than the formal courts— since legal representation is not

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<sup>128</sup> Section 15 Small Claims Courts Act.

<sup>129</sup> See the 2011/12 annual report of the Department of Justice and Constitutional Development South Africa at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 17 (where it acknowledges the existence of 247 courts at the end of March 2012), and last accessed on 30 May 2013. See also <http://www.southafrica.info/services/rights/small-claims-260413.htm>.

<sup>130</sup> See the Address by Mr Andries Nel, Deputy Minister of Justice and Constitutional Development at the Opening of the Small Claims Courts in Alexandria and the Launch of the Guidelines for Small Claims Courts Commissioners and Clerks — held in Alexandria Johannesburg 25 May 2010 at [www.info.gov.za/speeches/2010/10052712251001.htm](http://www.info.gov.za/speeches/2010/10052712251001.htm). See also *Opposition Forces Trying to Use Courts to Co-govern*— Keynote Address by President Jacob Zuma on the Occasion of the 3rd Access Conference, Pretoria, 8 July 2011 at [www.politicsweb/view/politicsweb/en/page71656?oid=244907&sn=detail&pid=71656](http://www.politicsweb/view/politicsweb/en/page71656?oid=244907&sn=detail&pid=71656).

<sup>131</sup> See section 7(2) Small Claims Court Act.

<sup>132</sup> See section 14(3) of the Small Claims Court Act.

<sup>133</sup> See AJ Kerr 'Customary Law in the Small Claims Court: Notes and Comments' (1984) 101 *SALJ* at 726.

<sup>134</sup> See [http://www.northernlaw.co.za/communication.../LSNP\\_small\\_claims\\_court-1.pdf](http://www.northernlaw.co.za/communication.../LSNP_small_claims_court-1.pdf) for the procedure.

<sup>135</sup> Department of Justice and Constitutional Development and Justice annual reports 2011/12 at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 18, which was last accessed on 30 May, 2013).

<sup>136</sup> Department of Justice and Constitutional Development Annual Reports 2011/12 at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 80, and last accessed on 30 May 2013.

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pertinent to obtaining access— lawyers are necessary for the success of the system.<sup>137</sup>

In line with the Department of Justice and Constitutional Development's aim to have a court in all 384 districts in the country,<sup>138</sup> it established 23 additional courts last year. Government extended its reach to the township and rural areas by building two new courts in Ntuzuma and Tsakane, while working on two more in Kagiso and Katlehong.<sup>139</sup> Because of limited resources, however, the courts are not as widespread as they ought to be.

Although the courts were instituted to help give litigants better access to justice, the drafters of the Small Claims Act failed to eliminate the problem of language. The Act provides that 'either of the official languages of the Republic may be used', but where evidence is not given in both parties' languages, an interpreter should be summoned.<sup>140</sup> Provision of interpreters, however, does not necessarily make justice more accessible.

Small claims courts, therefore, present financial, geographic, linguistic and cultural problems of their own.

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<sup>137</sup> The Department on Constitutional Development and Justice, in its pursuit to promote easier access to civil justice, created a Civil Justice Review Programme which seeks to: harmonise and rationalise rules of all courts to simplify complex court processes and procedures, and to institutionalise alternate dispute resolution mechanisms, diversions and mediation. In addition to this initiative, the Rules Board for the Courts of Law came up with court-based mediation rules, which were submitted to the Minister in December of 2011 for promulgation. These rules were devised to guarantee speedy civil dispute resolution by employing out-of-court settlements, in suitable cases. See the annual reports 2011/12 at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 18, which was last accessed on 30 May, 2013.

<sup>138</sup> Annual reports (2011/12) of the Department of Justice and Constitutional Development at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 43, and last accessed on 30 May 2013.

<sup>139</sup> Annual reports (2011/12) at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) at 8, and last accessed on 30 May 2013.

<sup>140</sup> See section 5(1) and (2) of the Small Claims Court Act of 1984.

### **5. Tip of the iceberg: the problem of ‘unmet legal need’**

The right of access to justice requires the existence of the principle of equality of arms, which ensures that parties to a case have equal standing before the court. However, rural litigants in South Africa, especially women, wrestle with multiple issues that hinder the enforcement of this right in formal courts.

The court in *Mohlomi v Minister of Defence* articulated the trouble of access to legal services for the disadvantaged in the country thus:

That disparity must be viewed against the background by the state of affairs prevailing in South Africa, 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 those, and where access to professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.<sup>141</sup>

Rural women are victims of the above-stated issues because of the failure of the Constitution to provide access to legal representation and, thus, legal aid in civil matters. Without a specific provision to this effect in civil matters, one can argue that rural women—who are mostly involved in maintenance, divorce and succession matters—are largely unable to access formal courts. Consequently, they are denied equal access, which requires both the right to appear in court and the right to equal treatment when in court—formal and substantive equality.<sup>142</sup>

The conditions for full access as discussed at the beginning of this chapter, already reveal preliminary obstructions for these women. Therefore, without financial, geographic, linguistic or cultural means, female litigants are impeded from

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<sup>141</sup> (CCT41/95) [1996] ZACC 20 at para 14.

<sup>142</sup> See *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 at para 41. See also Dugard (2008) op cit at 216. Hence, in certain courts, there is a prohibition on legal representation, such as the small claims courts and traditional tribunals. This makes the courts more accessible to ordinary citizens. See The Small Claims Act 61 of 1984 which does not provide for legal representation. It is believed that the presence of representation adds unnecessary costs and leads to delays.

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achieving justice.<sup>143</sup> In addition to these initial factors, among the battery of institutions available to alleviate the problem of access, provision of legal aid is, perhaps, the most important as far as ensuring equal access is concerned,<sup>144</sup> and yet most of the facilities are available in urban areas and are limited to criminal trials.<sup>145</sup>

With the large number of civil matters—which clearly lie beyond the budget of the Legal Aid Board—section 34 of the Constitution ought to be interpreted as guaranteeing the right to legal representation in civil matters without which legal aid will not be made available to the people who need it the most. Since legal representation is critical for obtaining a fair hearing in formal courts, the state has a positive duty to allocate more resources to uphold access rights.

The public commitment to formal legal equality, required by prevailing ideology of liberal legalism, has resulted in substantial efforts to equalise access at the later stages of disputing, where inequality becomes more visible and implicates official institutions; examples include the waiver of court costs, the creation of small claims courts, the movement towards informality, and the provision of legal services. Access to justice is supposed to reduce the unequal distribution of advantages in society; paradoxically, it may amplify these inequalities. The ostensible goal of these reforms is to eliminate bias in the ultimate transformation: disputes into lawsuits. If, however, as we suspect, these very unequal distributions have skewed the earlier stages by which injurious experiences become disputes, then current access to justice efforts will only give additional advantages to those who have already transformed their experiences into disputes. That is, these efforts may accentuate the effects of inequality at the earlier, less visible stages, where it is harder to detect, diagnose, and correct.<sup>146</sup>

Thus, while it is laudable that government has set up various schemes, including small claims courts, to address the lack of equal access to justice, it appears this was done without a clear understanding of the challenges facing rural populations.<sup>147</sup>

Unfortunately, the Small Claims Act proceeded from the viewpoint that formal

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<sup>143</sup> Bekker & Koyana identify the lack of equal access to formal justice in the country in JC Bekker and DS Koyana *The Judicial Process in the Customary Courts of Southern Africa* (1998) University of Transkei Project Report at 227.

<sup>144</sup> See Lester in *Legal Aid in South Africa* (1974) op cit at 1.

<sup>145</sup> It should, however, be noted that the government recently passed the Superior Courts Bill into law, as part of the efforts to enhance equal access to justice in rural areas. The courts are yet to be constructed; hence we can only wait and see the impact of these courts on the access problems of rural women. See [http://www.justice.gov.za/m\\_statements/2013/20130813-supcourts-bill.pdf](http://www.justice.gov.za/m_statements/2013/20130813-supcourts-bill.pdf), last accessed 8 September 2013.

<sup>146</sup> See W Felstiner, R Abel & A Sarat 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980–1) 15 *Law and Society Review* at 637.

<sup>147</sup> See TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) at 106.

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courts alone have judicial powers.<sup>148</sup> It wrongly assumed that, since these courts are overloaded, easier access to formal justice would suffice.<sup>149</sup> They did not realise that litigants who cannot pay for, or understand, the proceedings in formal courts are likely to avoid dispute resolution altogether – the problem of ‘unmet legal need’. Alternatively, the parties may well pursue traditional justice, which is within their reach, and more culturally familiar.<sup>150</sup>

For instance, it has been shown that legal needs cannot be simply quantified in terms of suits denied access to state courts. In all societies there are strong inducements for people to shun dispute. Where the potential gain from suing is too low and the costs of pursuing the matter too high, an aggrieved party may decide to take no further action, ie (colloquially) to ‘lump it’. The issue which gave rise to the grievance is then ignored and the relationship with the offending party is continued. A related tactic is ‘avoidance’, which implies limiting the relationship with an offending party to minimise the repercussions of any grievance.<sup>151</sup>

Since they are not privy to equal opportunities, the majority of rural women are forced to seek justice in traditional tribunals.

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<sup>148</sup> Ibid.

<sup>149</sup> Bennett (1991) op cit at 106.

<sup>150</sup> Ibid.

<sup>151</sup> Bennett (1991) op cit at 106–7.

## Chapter V

### TRADITIONAL JUSTICE

#### 1. Description of traditional justice

Chapter Four covered the problem of access to justice for rural women within the formal justice system. This chapter considers the role of traditional tribunals in providing equal access for rural female litigants. It describes dispute resolution processes in African communities—which allow easy access—but promote gender discrimination. Thus, the chapter compares Western notions of equality with their African counterparts. It depicts the African idea of fairness (which protects the right to culture) and considers its compatibility with the right to a fair trial.

Examples are drawn from the Tswana, Ndebele, Xhosa-speaking peoples of the Eastern Cape, certain groups in Limpopo and other parts of South Africa. Even though there are several hundred traditional communities in the country—and the ethnographic materials are, in some cases, dated—the groups selected seem to be the focus of the most helpful studies. These examples, however, reflect historical and extant analyses of traditional justice systems.

Depending on the language concerned, a traditional leader is known as *inkosi* in the languages spoken by the Xhosa and by the Zulu, *morena* in the language of the Sotho people and *kgosi* in that of the Tswana.<sup>1</sup> During the colonial period, they were officers of their judicial systems, and were referred to as chiefs or headmen, depending on their rank.<sup>2</sup> They were the patriarchal heads of their communities and

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<sup>1</sup> See TW Bennett *Customary Law in South Africa* (2004) at 101. See also I Schapera & JL Comaroff *The Tswana Revised Edition* (1991) at 28.

<sup>2</sup> Among the Swazi, Sotho and Zulu, they are known as kings, while they are known by the Xhosa as ‘chiefs’. See M Gluckman in M Fortes & EE Evans-Pritchard *African Political Systems* (1940) 24ff. See also Bennett (2004) op cit at 101.

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exercised legislative, executive and judicial power over their subjects.<sup>3</sup> These leaders did not rule alone: they ruled in council with the help of ward heads or headmen.<sup>4</sup>

Traditional leaders were determined on the basis of age, gender and birth. Leadership devolved on the most senior member of a tribe according to a principle of primogeniture in the male line.<sup>5</sup> Only the eldest son of a traditional leader could become one, and women could only become rulers as regents—on the death of their husbands.<sup>6</sup>

The traditional leader was regarded as the supreme authority in the community, and ‘he was expected to judge disputes fairly, to govern wisely, to provide for the needy and to tend to the welfare of his people’.<sup>7</sup> Many African communities believed the traditional leader was a direct link to their ancestors and, as such, treated him as a spiritual leader.<sup>8</sup> Nonetheless, because his power was reliant on the support of the people, he could not use it arbitrarily.<sup>9</sup>

Second in rank to the traditional leaders were the headmen. They were usually senior male members of notable families within the community, and they were in charge of areas known as wards.<sup>10</sup> Subordinate to the headmen were the family heads, typically the oldest male members of an extended family unit. They exercised judicial power over family matters.<sup>11</sup>

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<sup>3</sup> See Bennett (2004) op cit at 103–6. See also JC Bekker & DS Koyana *The Judicial Process in the Customary Courts of Southern Africa* (1998) University of Transkei Project Report at 180.

<sup>4</sup> Bennett (2004) op cit at 103.

<sup>5</sup> Bennett (2004) op cit at 101.

<sup>6</sup> The African political system is according to the rule of male primogeniture. See Bennett (2004) op cit at 101–2.

<sup>7</sup> Bennett (2004) op cit at 103. For an extensive discussion see I Schapera *A Handbook on Tswana Law and Custom* (1955) at 68.

<sup>8</sup> See Schapera (1955) op cit at 61–2.

<sup>9</sup> I Schapera *Government and Politics in Tribal Societies* (1956) at 211.

<sup>10</sup> See AJB Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland* (1972) at 102. See E Colson & M Gluckman (eds) *Seven Tribes of Central Africa* (1961) at 367–9. See also Bennett (2004) op cit at 103.

<sup>11</sup> See Schapera (1955) at 280. See also AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) at 111–12. See Bennett (2004) op cit at 103.

**a) The Tswana**

The following is used as a typical example of the functioning of judicial structures in a Tswana community. The data dates from the 1930s. Failing any other update material, Schapera's account of the Tswana dispute resolution methods is considered the 'traditional ideal'. This is, however, compared with a more recent account provided by Roberts and Palmer.

The Tswana (formally known as 'Bechuana') hail from the former Bechuanaland Protectorate and the western and central areas of the province formerly known as the Transvaal.<sup>12</sup> They now live mainly in Botswana but also in Limpopo Province and the North West Province in South Africa.<sup>13</sup>

Within the Tswana culture various modes of dispute resolution, both formal and informal, can be found. Negotiation lies at the most basic level. Here, the disputing parties attempt to resolve their issues without third party intervention. Especially in family matters, parties are encouraged to negotiate mutually acceptable settlements among themselves. If the dispute cannot be settled, mediation ensues. The parties may invite the assistance of third parties, such as members of their senior agnates and matrilineal kin, i.e. fathers, brothers, paternal and maternal uncles.

Most of the Tswana communities recognise different grades of court [in the singular *lekgotla*].<sup>14</sup> All men are allowed to attend the proceedings and they are encouraged to participate in hearings. Each family and each ward has its own court, overseen by the most senior male of the group, and, if that person is not available, he is to be replaced by his next of kin. These figures of authority try cases arising within their groups except when matters are appealed or transferred to a higher tribunal.<sup>15</sup>

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<sup>12</sup> See I Schapera *A Handbook of Tswana Law and Custom* (1970) at 1.

<sup>13</sup> Roberts wrote that '...large numbers of Tswana live in the Republic of South Africa'. See S Roberts *Botswana I: Restatement of African Law, Tswana Family Law* (1972) at 1.

<sup>14</sup> See Schapera (1970) op cit at 279-280.

<sup>15</sup> See Schapera (1970) op cit at 281.

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All disputes within a family should, in the first instance, be settled within the family concerned through negotiation.<sup>16</sup> If need be a family council is called to hear the matter. If members of two families are involved, and the dispute is a 'civil' matter, parties are generally advised to settle out of court. For instance, in the case of an unmarried pregnant girl, the court sends a message to her parents and the man's family. His parents would try to get an admission of guilt and communicate this to the girl's family. The two families then deliberate on the issue and come to an agreement.<sup>17</sup> They may decide to ask the man to marry the girl or demand cattle as damages from his family. If the matter cannot be resolved amicably, then the headman has to hear it.<sup>18</sup>

The headman is the administrative head of between 300 and 600 ward members, usually related along the male line.<sup>19</sup> The plaintiff makes a complaint to the headman through a senior male relative.<sup>20</sup> Women and children, however, are excluded from doing so. They must go through their husbands or fathers, who then report to the headman. The headman in turn invites members of his ward to deliberate upon the matter. Once they have gathered in his *kgotla*, he tells them the nature of the case and asks the aggrieved party to state the facts.<sup>21</sup>

The headman instructs some of the elderly men to approach the defendant's family with the complaint, or he may do so in the company of the plaintiff's

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<sup>16</sup> See Roberts (1972) op cit at 46. See also S Roberts & M Palmer *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2005) at 101.

<sup>17</sup> Robert reports that conflict resolution in modern times encourages parties to a matrimonial dispute to approach the ward courts without an attempt at family settlement. He also says the proceedings in the headman's court may be conducted in the absence of older relatives of the couple being in attendance. See Roberts (1972) op cit at 47.

<sup>18</sup> See Schapera (1970) op cit at 284. See also Roberts & Palmer (2005) op cit at 102.

<sup>19</sup> See Schapera & Comaroff (1991) op cit at 39. Roberts & Palmer (2005) op cit at 99. See also JL Comaroff and S Roberts *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981) op cit at 33.

<sup>20</sup> According to Roberts and Palmer 'ward heads are senior members of the junior branches of the chief's lineage' (2005) op cit at 99. They also gave an example of forty-eight wards in the central village of Mochudi, where the waed heads claim to be descendants of younger brothers of chiefs from Kgafela.

<sup>21</sup> After the headman has heard the case, he may refer it to the court of the traditional leader (or the court of the village or sectional headman). This happens mostly with criminal matters, hence the headman will conduct a preliminary hearing of the evidence, but will not decide the case. The headman can hear minor criminal cases such as insubordination against the leader, sorcery, homicide, abortion and infanticide, bodily assault and rape, even though he cannot give a verdict. Schapera (1970) op cit at 281.

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representative and some of the men. The head of the defendant's ward takes the grievance before his headman.<sup>22</sup> Once the defendant's headman receives the complaint, he will call the defendant and ask him or her to give a response to an accusation. The outcome is reported to the plaintiff's headman and a date is set for a proper hearing.<sup>23</sup>

In the headman's court, proceedings take place in the *kgotla*, where all interested parties gather on the morning of the hearing.<sup>24</sup> The headman and his assessors sit before the group, who sit in a semi-circle facing them. The parties are placed in front of the group, surrounded by their witnesses, families and supporters.<sup>25</sup> Since all matters are conducted in the public, any member of the community may attend - and participate, allowing for flexible processes.<sup>26</sup> According to the data gathered in the 1930s, however, women could not attend the meetings unless they were directly involved in the matter.<sup>27</sup> Today, there would be no such absolute prohibition.<sup>28</sup>

No oath is taken before evidence is given, but the witnesses must speak the truth. Questions are thrown at them to establish that they are being truthful. There is no

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<sup>22</sup> In some cases, however, the matter is taken directly to the defendant's ward by the plaintiff's people.

<sup>23</sup> Schapera (1970) op cit at 282–284.

<sup>24</sup> The case is often heard a few days after the announcement has been made in order to ensure that witnesses duly prepare to appear. The parties then discuss the matter with their families, so as to agree on their demands or defence, depending on whether they are the plaintiff or defendant. If a person takes his case directly to the traditional leader without observing the required procedure, he may be held in contempt of court or [*go nyatsa lekgotla*]. Schapera (1970) op cit at 285.

<sup>25</sup> The proceedings start with the headman saying why they have all come together. He states that it is with regard to a matter brought by the plaintiff [*moeski*] against the defendant [*mosekisiwi*]. The plaintiff's headman or senior relative relays the complaint to the community before he or she is called upon to give a detailed version of the facts. He is then followed by the defendant. The reason for allowing a lengthy hearing is to guarantee that the parties have their say, and thus a fair trial. The headman, his assessors or the audience can then ask the parties questions based on their testimonies before witnesses are examined and cross-examined. Schapera (1970) op cit at 288–9. See also S Seymour *Bantu Law in South Africa* (1970) at 18.

<sup>26</sup> The court prefers eye-witness testimony in tort matters, but allows circumstantial evidence, especially in marital disputes. In such cases, material evidence is also preferred to hearsay testimony. In criminal cases of theft, however, the accused person must be caught in possession of a stolen item to prove guilt. Character evidence is also accepted with regard to the weight placed upon verbal testimonies. Where there is only hearsay evidence, this is not given much weight without direct proof. Schapera (1970) op cit at 288–9. See Seymour (1970) op cit at 18. See Comaroff & Roberts (1981) op cit at 109. See a similar description of the Kgalagari *lekgota* in Adam Kuper *South Africa and the Anthropologist* (1987) 20–30.

<sup>27</sup> See Schapera and Comaroff (1991) op cit at 40. See also Schapera (1970) op cit at 287–8.

<sup>28</sup> See S Roberts in 'The Survival of the Traditional Tswana Courts in the National Legal System of Botswana' (1972) 16 JAL 103 at 121.

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crime of perjury if someone is caught lying, although they may be asked to pay damages for defamation.<sup>29</sup> Corroborative evidence is encouraged, since this establishes truth, as is seen in the saying *setshwarwa ke mpya pedi ga se thata* [what is seized by two dogs has no strength - meaning if two people say the same thing against one person, their testimonies should be considered as truthful]. Women are also allowed to testify against their husbands and great weight is attached to such a testimony.<sup>30</sup>

Appeals are taken to the chief's assistant [*ntona*], who reports the matter to him immediately. A traditional leader ought to hear all appeal cases personally, but he may refuse, if he feels the headman's court had sufficiently dealt with a problem. If he decides to hear the case, he will go ahead to set a date and ask the *ntona* to ensure the attendance of his assessors. This date should be in the near future in order for him to dispose of the case quickly, otherwise he may be blamed by his people. The *ntona* also notifies the appellant and respondent about the hearing date.

The headman and his assessors are required to attend, and in some cases, the headman informs the parties of the appeal date.<sup>31</sup> In some communities, where there are three levels of courts, first appeal goes to the headman from the lower ward court, and final appeal goes to the chief's court.<sup>32</sup>

The traditional court serves as a court of first instance for matters falling outside the jurisdiction of the headman's court. Such matters deal with senior members of the royal family and serious criminal offences.<sup>33</sup>

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<sup>29</sup> Schapera (1970) op cit at 289.

<sup>30</sup> Ibid. Once all the evidence has been given, the headman opens the issue up for a general discussion. The people collectively consider the merits of the case and reach a verdict. The assessors analyse the case, they state the customary law on the subject and refer to precedents in similar cases. They speak in order of seniority. Finally the headman states the facts and law of the case in conjunction with the opinions shared by the assessors and community members. If the headman agrees with the people, he announces a unanimous decision, but if he does not, he would share his opinion and try to get others to agree. He should not give a decision contrary to the popular vote. Where the gathering cannot agree, he must refer the matter to the traditional court for further deliberation. In some instances, he may invite neighbouring headmen to assist him to reach a consensual outcome. Schapera (1970) op cit at 289–90.

<sup>31</sup> Schapera (1970) op cit at 291.

<sup>32</sup> See Schapera (1970) op cit at 280. See also Roberts (1972) op cit at 6.

<sup>33</sup> Ibid.

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In the traditional court, the proceedings are similar to the ones in the ward court.<sup>34</sup> The men sit facing the leader, his assessors and senior members of the community. The people form a semi-circle in front of them. Before a matter is heard, they stand and greet the chief by raising their hats or arms. There is somewhat more formality in the traditional court than in the headman's ward, hence, anyone addressing the court must do so in a respectful manner. Anyone smoking, quarrelling or chatting during the sessions may be fined or caned. The men stand while they are speaking, while women sit.<sup>35</sup>

People maintain a distinction between the office of the leader and the incumbent. While the traditional leader is in charge of government, people could criticise and evaluate his powers in light of his duties.<sup>36</sup> Although the Tswana have a saying that 'a chief's word is law' [*lentswe la kgosi ke malao*]. A traditional leader needs the support of his people, failing which he loses the legitimacy of office.<sup>37</sup> Thus parties expect their leader to promote fair dispute settlement and require consultation and consensual decisions: 'evidence of wisdom and fairness is always given first priority.'<sup>38</sup>

The system of public participation in disputes is instituted at three levels and serves as a check on the power of the leader vis-à-vis his or her people. Firstly, the leader has advisers or *bagakolodi ba kgosi* [*the chief's remembrancers*] or *banna ba lekgotla* [*men of the court*], who remind the headman of the law and precedent. They are appointed on the basis of trust and influence.<sup>39</sup> This assembly of elders

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<sup>34</sup> See Roberts & Palmer (2005) op cit at 102. Cases are heard in the order in which they are reported. The *ntona* states the facts of the case as reported by the appellant. The chief asks the headman to give a verbal explanation of the proceedings in his *kgotla* or the reason for referring the matter, if it was not already heard. After the chief and the elders have assembled, the appellant is called to give his version of the occurrences. The case is heard afresh based on the incidents heard in the headman's court. Schapera (1970) op cit at 293.

<sup>35</sup> Schapera (1970) op cit at 292. Schapera (1956) op cit at 44.

<sup>36</sup> Schapera (1970) op cit at 282. Amongst the Tswana people, the office of traditional leadership usually devolves on the most senior living member within a ruling agnatic descent group, based on clearly defined genealogical principles JL Comaroff and S Roberts 'Chiefly Decision and the Devolution of Property in a Tswana Chiefdom' (1975) in Comaroff & Roberts (1977) op cit at 25–26.

<sup>37</sup> Ibid.

<sup>38</sup> Comaroff & Roberts (1977) op cit at 25–29.

<sup>39</sup> See Comaroff & Roberts (1977) op cit at 26 for detail.

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usually comprise of his senior male relatives.<sup>40</sup> Secondly, the traditional leader's advisers and ward headmen form a council, which considers policy and administrative affairs.<sup>41</sup> Thirdly, there is a public assembly of all adult males [or *pitso* or *phuthego*] who discuss all matters affecting the chiefdom.<sup>42</sup>

There can be many assessors, including confidential political advisers and the headman in certain cases.<sup>43</sup> They assist the chief with their legal knowledge and help him to decide cases. The headman can also give his opinion on matters before the court and ask questions. If the chief is absent, the assessors may hear the issue and preside over the dispute. Their decision can, however, be overturned on appeal by the chief. He may also assign his assessors to decide a case in his stead, but he can overrule such a finding. Every adult male is allowed to participate at these meetings.<sup>44</sup>

In giving his decision, the chief may confirm, reverse or modify the headman's decision.<sup>45</sup> If judgment is given in favour of the plaintiff the second time around, then the appellant must take the pronouncement of the lower court. He may also be fined for appealing the result of that court. If the chief finds in favour of the appellant, however, this invalidates the ruling of the headman, in which case the ward head may be fined for arriving at a wrong decision.<sup>46</sup>

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<sup>40</sup> For more detail, see Roberts & Palmer (2005) op cit at 98.

<sup>41</sup> Ibid.

<sup>42</sup> Comaroff & Roberts (1977) op cit at 26 for detail

<sup>43</sup> One of the assessors is given a special position to receive complaints on behalf of the ruler, and he must attend all *kgotla* sessions. He performs administrative functions, such as ensuring that fines are paid and supervising other messengers of the court. He is otherwise known as *ntona ya lekgotla* or *moathlhodi* [judge], often a distant relative of the chief's or someone he trusts. Schapera (1970) op cit at 283.

<sup>44</sup> Schapera (1970) op cit at 282-283. Schapera (1956) op cit at 44. See also Roberts & Palmer (2005) op cit at 98.

<sup>45</sup> The chief then asks the respondent to reply to what the appellant has said. The witnesses are called next, followed by those present during the hearing. The headman is asked to say how and why he arrived at his judgment. Afterwards, members of the court are asked to participate in the discussions, and they may examine and cross-examine the witnesses. Then the assessors consider the merits of the case and give their opinions. The chief speaks last by summing up the facts, opinions and law on the matter. He mentions the opinions he agrees with, and gives reasons for doing so. He is expected to be swayed by the views of the majority, and he seldom acts contrary to this. Schapera (1970) op cit at 293. Schapera (1956) op cit at 44.

<sup>46</sup> Schapera (1970) op cit at 292. Schapera (1956) op cit at 44.

The court's verdict is final and must be accepted by the parties. If not, then the plaintiff does not receive any compensation. A dissatisfied party could, however, approach a senior relative of the chief to change his ruling, but he may refuse to do so if he is satisfied with his decision.<sup>47</sup> Otherwise, he might lower a fine or punishment given.<sup>48</sup>

### **b) The Ndebele**

The Ndebele present an example of a quite different culture from that of the Tswana. The data from this group was collected 40 years after that discussed in the account of the Tswana system. Most of the Ndebele originated from KwaZulu-Natal and they form part of the Nguni people. Amongst the Ndebele, some migrated to what is now Emhlangeni close to Randfontein, and later to the Pretoria district in the Northern province of the country.<sup>49</sup> They administer justice at three levels—the family, the ward headman and the traditional leader.

Members of the same family group more often than not start dispute resolution within the family. Families are made up of adult males [*izindaba zekhaya*], and are referred to as *ibandla lomndeni*. They settle spousal conflicts and matters of succession because they know the parties to the dispute, and it is believed that all family matters should be resolved quietly away from the public scrutiny.<sup>50</sup>

In matters involving tort and contracts, where the family cannot reach an agreement, family heads come together to hear the issues. In most cases, the group trying to resolve the issue would set the date and place to discuss the case. The senior members of the families concerned deliberate on the controversy and agree on the way forward. If the guilty party refuses to admit his or her guilt, their family may

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<sup>47</sup> If the decision of the tribunal is not widely accepted by members of the community, the recipient of judgment may not comply. See Roberts & Palmer (2005) op cit at 100.

<sup>48</sup> Schapera (1970) op cit at 294.

<sup>49</sup> See Myburgh & Prinsloo (1985) op cit at 111–112.

<sup>50</sup> Myburgh & Prinsloo (1985) op cit at 112.

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be asked to give a goat to the victim's family. Appeals go from the family to the headman's court.<sup>51</sup>

The headman's court is also described as *ibandla lesigodi*, *ibandla lekosana* or *ibandla lenduna*. The headman, his adult male relatives and heads of the neighbouring homesteads constitute the tribunal. The headman serves as the presiding officer, while the other men act as participants and advisers.<sup>52</sup> Once the hearing has been concluded, they are encouraged to question witnesses and share opinions with the headman. These groups of men are sometimes referred to as the headman's council [*ikomiti* or *isigungu sekosana*]. Every man in the community may also take part during the proceedings.

Hearing begins by the plaintiff (the head of the group representing the offended party) stating the case and evidence. Following this, the defendant (the head of the group representing the offender) presents the defence and leads evidence for that purpose. After this, witnesses are called and examined by adult males present. In addition to giving evidence, they may also give their opinions. The headman's decision must be in concert with the opinion of the majority. Where his opinion differs from that of the majority, he should pass on the matter to the traditional court.<sup>53</sup>

The traditional leader's court [*ibandla lekosi* or *ibandla lendlukulu*] is presided over by the chief in conjunction with family heads [*abanumuzi*] in the community. All men are allowed to participate in the proceedings and to examine witnesses. During decision-making, they can also advise the leader.<sup>54</sup>

The court has concurrent jurisdiction with the headman in civil and criminal cases.<sup>55</sup> It is a court of first instance as well as a court of appeal in matters involving members of the chief's community or the royal family. The traditional leader has

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<sup>51</sup> Ibid.

<sup>52</sup> The headman must recuse himself in matters in which he has personal interest and cannot remain unbiased. Myburgh & Prinsloo (1985) op cit 113.

<sup>53</sup> Myburgh & Prinsloo (1985) op cit 122–3.

<sup>54</sup> Myburgh & Prinsloo (1985) op cit at 115.

<sup>55</sup> This information has also been confirmed by Bekker & Koyana (1998) op cit at 233.

exclusive jurisdiction on matters of murder, rape, witchcraft, serious assault and crimes against the chiefdom.<sup>56</sup>

There is a distinction between civil and criminal cases. In a criminal hearing [*icala- lokujeziswa*], the complainant is called *umlili* and the accused *ummangalelwa*. A penalty or fine is known as *ihlawulo*. In civil actions, the plaintiff is referred to as *ummangali* and the defendant *umvikeli*. Damages are described as *izonakalelo* or *isisulanyembezi* [satisfaction].<sup>57</sup>

The procedure in the chief's court is simple, open to the public and conducted speedily. Females and children are not allowed to appear except as witnesses, complainants or accused persons. There is no legal representation in this court, and family heads represent parties. Families come together to decide upon a claim or defense. The family head also represents women and children. If the case is against women or children, the head of the family must also be summoned.<sup>58</sup>

The complainant's witnesses give evidence first, and then the defendant's. They may be cross-examined by the male members of the court and men in attendance. There are no strict rules of evidence; hence there is no exclusionary rule. Witnesses may be recalled to give further testimony.<sup>59</sup>

In appeal cases, the headman relays the facts and evidence presented and his decision, ahead of the dispute being heard again. When this has been done, the dispute is thrown open for debate by the men. The traditional leader then tries to obtain a consensus on his decision. Finally, he pronounces judgment.<sup>60</sup>

### **c) Xhosa-speaking peoples of the Eastern Cape**

Xhosa speakers dominate the former Ciskei and Transkei areas of South Africa, now a part of the Eastern Cape Province. These former so-called homelands were merged

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<sup>56</sup> Myburgh & Prinsloo (1985) op cit 115–6.

<sup>57</sup> Myburgh & Prinsloo (1985) op cit 121.

<sup>58</sup> Myburgh & Prinsloo (1985) op cit 120–9.

<sup>59</sup> Myburgh & Prinsloo (1985) op cit 130.

<sup>60</sup> Ibid.

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in the new constitutional era to become a province known as the Eastern Cape in a newly constituted state of South Africa. Data for this region was collected around the same period as the Ndebele account.

In the South East, traditional tribunals are stratified in the following manner: *inkundla yekumkani* (court of the paramount chief), *inkundla yenkosi* (court of a chief), *inkundla kasibonda* (headman's court), *inkundla yesibonda somsenge* (court of sub-headman) and *inkundla yemilowo* (family court).

The family court holds at the kraal of the oldest male, in the company of adult male relatives and their nephews (*abatshana*). If a woman is aggrieved with her spouse or fiancé, this group seeks to resolve the dispute, inadvertently subjecting the complainant to a male dominated forum.<sup>61</sup>

The sub-headman's tribunal is where petty matters are heard. All interested men within each ward are allowed to participate in dispute resolution. If the sub-headman does not resolve a matter, it is presented to the headman. This court also admits all adult male, to the exclusion of females. In recent times, however, women now assist the headmen in making decisions. Sub-headmen provide assistance to the headmen who appoint them; they serve as representatives of their neighbourhoods, during dispute resolution. They also ensure that the orders of headmen and traditional leaders are duly executed.

The headmen do not enjoy both civil and criminal jurisdiction, like they did in the past. These forums settle many conflicts presented by kinsmen or the sub-headman. Judicial processes in the headman's fora involve complainants and defendants stating the problem (even females); members of the community cross-examining them through a series of spontaneous questions (this records minimal female participation) before the headman seek to mediate. Often, he refers the disputants back to the family or lineage forum for negotiation, if this is unsuccessful

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<sup>61</sup> See BR Mqeke *Traditional and Modern Law of Procedure and Evidence in the Chief's Courts of the Ciskei* (1986) LLM Thesis at the Rhodes University at 16–17.

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he will pronounce a decision usually consented to by others present. Afterwards, the headman encourages them to restore their ‘interpersonal relations’.<sup>62</sup>

The chief, however, resolves civil and criminal cases, in council with headmen (*amaphakathi*) and other adult men in the area, while courts of paramount chiefs have been phased out of the hierarchical structure of dispute resolution.

Common features of the existing three layers of courts include: public trials, application of rules of natural justice, no legal representation, and female participation (because meetings are no longer held near the cattle kraals – where women are forbidden from going). These women are, however, required to explain the absence of their ‘legal guardians’ during court sittings.<sup>63</sup>

Procedure in the headmen and chiefs’ courts include examination and cross-examination by any man well acquainted with the method of adducing evidence (*Umncwini* also referred to as the interrogator). Evidence is weighed in accordance with the value of such testimony to a case, allowing for flexibility. Members of the community at the gathering also raise questions before a decision is reached.<sup>64</sup>

Bekker and Koyana, based on their empirical work in the area, however, claim the courts of headmen and chiefs are no longer operational in the former Ciskei. While, in their account of traditional justice in the former Transkei, they document that the courts of sub-headmen, headmen and chiefs still exist. Formerly, women could only participate as witnesses and litigants, but they could not speak on behalf of others or examine witnesses.<sup>65</sup>

The sub-headmen are subordinate to headmen, and they resolve matters of trespass, and other minor torts.<sup>66</sup> The headman is the court of first instance for most civil and some criminal cases. In serious criminal litigation, he reports to the police, but mediates civil disputes for reconciliatory purposes. He proceeds with cases such

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<sup>62</sup> See WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) at 140–146; 173–185.

<sup>63</sup> See Mqeke (1986) op cit at 17–22.

<sup>64</sup> See Mqeke (1986) op cit at 20–22. See also a similar discussion of the Cape Nguni by Hammond-Tooke (1975) op cit at 64–70 ‘A chief who dared to go against the wishes of his people ran the risk of losing their support, and perhaps this chieftainship’.

<sup>65</sup> Bekker & Koyana (1998) op cit at 232; 256.

<sup>66</sup> See Bekker & Koyana (1998) op cit at 36–38.

as: claims for damages for seduction and pregnancy, as well as charges of contempt of court. But complainants may only approach the headman in the company of male relatives.<sup>67</sup>

The chief's court represents a third layer of dispute processes, while paramount chiefs and senior chiefs resolve more complicated matters, and hear appeals from the traditional leaders' courts. They hear civil matters such as: family disputes, property claims, contracts and quasi-contracts, delicts, adultery, animal related issues. Criminal cases including: causing bodily injury, disobeying court orders, using abusive language, agricultural and afforestation grievances, accusations of witchcraft and other offences.<sup>68</sup>

The authors also described regional courts as similar to the chiefs' courts, with more formal tendencies, requiring educated councillors.<sup>69</sup> These are courts of record, with a magistrate serving as the secretary. The leader here is known as a presiding officer, and the magistrate advises him. Also, the courts require public prosecutors and interpreters, from English to Xhosa and vice versa. They have concurrent jurisdiction with magistrates, but do not allow legal representation during trials.<sup>70</sup>

#### **d) Communities in Limpopo**

The traditional tribunals surveyed here were also open to all adult persons of the community, and they helped keep traditions alive.<sup>71</sup> The traditional leaders were

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<sup>67</sup> See Bekker & Koyana (1998) op cit at 35.

<sup>68</sup> In a practical case of *Bulelwa Mqhayi v Fikile* in the Umtata District, a member of the court was allowed to question female complainants, without male assistance. Thereafter, members of the public examined her, before the headman could query the accused person. Again, the community interrogated her to their satisfaction. The accused was also given a chance to confront the complainant about her account of events. See Bekker & Koyana (1998) op cit at 54–124.

<sup>69</sup> Section 2(1) of the Regional Authority Courts Act No. 13 of 1982 established the regional authority court.

<sup>70</sup> See Sections 3 and 7 of the Regional Authority Courts Act. See also Bekker & Koyana (1998) op cit at 53.

<sup>71</sup> See CS van der Waal 'Formal and Informal Dispute Resolution' in MO Hinz & K Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006) at 140.

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more concerned with finding solutions than with enforcing rules.<sup>72</sup> Perhaps, more importantly, the cost of appearing before these courts was not high, partly because legal representation was not allowed.

The account that follows is even more up to date than the previous one: it was written up 10 years later than the Eastern Cape account. It describes procedure among the Nkuna, Berlyn, Ntsako, Mokopane, Motletji, Ramokgopa and Sekhukhune communities.

In the Nkuna area, near Tzaneen, the language of the customary courts is Tsonga. Cases commence with the headmen and appeals go to the 'cluster court' of headmen [*tindhuna*]. From the cluster court, a case could be taken to the chief (and from there, of course, to a magistrate's court; alternatively, a case may commence at the magistrate's court).

The traditional tribunals administer only less serious offences. They may not adjudicate cases of assault, rape, theft of expensive items or murder: such cases have to be referred to the police or the magistrate. Otherwise traditional tribunals can hear matters of verbal abuse, desertion, unrepaid loans, minor theft cases, issues of neglect, land matters and accusations of witchcraft. All cases of witchcraft accusation must be referred to the higher courts.<sup>73</sup> Although the traditional leaders are not legally trained, they are assisted by councillors or the headmen, who are in turn assisted by the village committee.<sup>74</sup>

In the Berlyn settlement, the messenger of the court blows his horn and announces the date and time for the commencement of the court [*huvo*] proceedings.<sup>75</sup> The litigant pays R10 to the registrar in order to commence a case, and the loser has to pay R30 to close the case. Because of the low cost of dispute resolution, cases are instituted frequently. At the specified time, men and women usually assemble under a tree outside the headman's house, but in separate groups.

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<sup>72</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 153.

<sup>73</sup> See Van der Waal in Hinz & Patemann (eds) (2006) op cit at 142.

<sup>74</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 140–141.

<sup>75</sup> This made up of mainly Tsonga people and some Sotho-speaking people.

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The village committee decides the date when a case will be heard, and it also assists the headman in deciding the case.

When the headman and his committee enter the court arena, everyone stands up. A prayer is said at the beginning and at the end of the proceedings. The disputants and their witnesses sit in front of the headman, the women on the floor to the left of the headman and the men on stones, poles and low chairs to the right.<sup>76</sup> The complainant is asked to speak first, followed by the defendant, their witnesses, and then members of the community. The court hears cases such as: a husband who leaves his wife for another; outstanding loan payments and verbal abuse. Men are supposed to stand when they speak. It is not clear whether women are granted audience or not. After the parties to the dispute have been heard, someone sums up the matter before the headman gives a decision.<sup>77</sup>

On appeal, the cases from the Berlyn settlement are sent to the cluster court at Ntsako. This court convenes only once a month. Four of the seven headmen must be present in order to form a quorum. To register a case, the complainant must pay R10, while the one who loses the case has to pay R50 to close the case.<sup>78</sup> In Ntsako, court cases are heard in a building or underneath a tree. Both parties must swear an oath before they present their evidence.<sup>79</sup> One headman keeps a record of the proceedings, while another leads the evidence. If a case cannot be resolved here, or if it is outside the jurisdiction of the court, it is sent to the traditional leader with a letter. Cases within the jurisdiction of the cluster court include debt, insult and theft cases.<sup>80</sup>

If the matter is referred to the traditional leader, he deliberates with his advisors in order to resolve the conflict. Traditional leaders listen to complainants on Mondays and try cases on Wednesdays. Generally, the cluster headmen and the people

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<sup>76</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 141.

<sup>77</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 142.

<sup>78</sup> Ibid.

<sup>79</sup> This area also comprises of many Tsonga people and some Sotho-speaking people.

<sup>80</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 144.

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involved in these matters are supposed to attend the proceedings. These courts deal with more serious offences and matters including the dissolution of marriages.<sup>81</sup>

In the areas of Mokopane, Moletji and Ramokgopa, traditional leaders attest to mediating all disputes, including dissolution of customary marriages, but excluding serious ones like rape, murder, serious assault and maintenance cases. Parties usually attempt to resolve spousal conflicts through the family structure, before going to the headman or the chief. Where there is no headman, however, they go straight to the chief.

In these forums, male councillors out-number females, even though women may also ask disputants questions during the process. The court allows men and women to explain their versions of a dispute, then they cross-examine them while standing. The procedure is flexible, extensive and open for discussion by other members of the community. Together, they mediate decisions which are favourable to both parties. If the dispute cannot be conclusively resolved, they may be referred back to the family council.<sup>82</sup>

Sekhukhune is another district in the Limpopo Province, in the North of South Africa. The most common language in this area is Sepedi.

In Mamone, the traditional tribunal convenes under a tree, close to the royal palace of the King. Dispute resolution occurs on Wednesdays, with a council of men and the traditional leader. Even though women are more in number than the men, they only participate as litigants or witnesses during conflicts involving land or family matters, while kneeling to address the court. Male elders, however, discuss disputes before the leader summarises a consensual opinion.<sup>83</sup> Dispute processes

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<sup>81</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 145. Despite the prohibition of this action by the Recognition of Marriages Act, 1998.

<sup>82</sup> B Tshela *Traditional Justice in Practice: A Limpopo Case Study* (2005) ISS Monograph Series No. 115 at 19–25.

<sup>83</sup> In a place called Ga-Matlala, women are now granted full participation under the thorn tree. See B Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) at 21 and 64.

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usually allow flexible debates, and lengthy discussions within a communal atmosphere, leading to acceptable decisions and restored relationships.<sup>84</sup>

Conflict resolution forums include family heads, headmen and traditional leaders. Magistrates in Sekhukune encourage disputants to undergo family negotiation before instituting an action in the traditional tribunals, in matters involving land disputes, family feuds and insults. The magistrate courts resolve mainly criminal cases of assault and theft.<sup>85</sup>

In the traditional tribunals, the procedure is similar to those of the headmen. Parties to a dispute state their case; witnesses present evidence; members of the community ask questions and then the leader seeks a consensual settlement with the help of his councillors or advisors (*bakgomana*). During court sessions, men dress in jackets and can speak while standing, while women must cover their heads and sit down. However, ‘the involvement of women varies as well: in some courts women can only be witnesses or silent listeners, in others they have won the right to present a case themselves or even adjudicate in the role of *kgosigadi* or councilor (regent)’.<sup>86</sup>

Although these accounts come from very different communities and cultures, they give a general, but nonetheless fair, account of the traditional types of tribunal and their methods for resolving disputes.

#### e) Gender discrimination during dispute resolution

Research shows that because of social, political, cultural and economic changes in many parts of the country, rural areas rely less on the leadership of headmen and

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<sup>84</sup> Oomen (2000) op cit at 24.

<sup>85</sup> 42 % of the people interviewed avoid magistrate courts for their: “adversarial character, lengthy procedures, corruptibility, costliness, unintelligibility in terms of language and procedure and the fact that the magistrate is far away, ‘doesn’t look at who you are and where you come from’, has the power to imprison and ‘just decides on his own’.” See B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) at 204–206.

<sup>86</sup> Oomen (2005) op cit at 207.

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chiefs. In this regard, the effect of education, religion, urbanisation and democracy have done much to transform the role of traditional institutions.<sup>87</sup>

In some recent studies conducted across various parts of South Africa, it is shown that customary systems continue to provide access to justice for rural litigants,<sup>88</sup> although some still discriminate against women appearing before them.<sup>89</sup> With state efforts to align traditional processes with the Constitution, however, gender discrimination is gradually being reduced in African tribunals. Females are being recognised in some areas as litigants, as well as active participants during dispute resolution.<sup>90</sup>

Traditional courts, nonetheless, are more likely than not to override the rights of rural women, since women's opinions are usually taken into account only in cases where they are directly involved. Although it is assumed that the head of the family (typically male) speaks on behalf of his clan, thereby guaranteeing female participation, this practice clearly does not conform to constitutional standards.

For this reason, during discussions around the proposed Traditional Courts Bill of 2008 (hereafter the Bill), women's groups convened consultations around the country to decipher the real position of women in traditional tribunals today. The outcome of these meetings provides some insight into the role of men and women

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<sup>87</sup> See Schapera & Comaroff (1991) op cit at 72–83. See also B Oomen “‘Walking in the Middle of the Road’”: People’s Perspectives on the Legitimacy of Traditional Leadership in Sekhukhune, South Africa’ in MO Hinz & FT Gatter (eds) *Global Responsibility – Local Agenda: The Legitimacy of Modern Self-Determination and African Traditional Authority* (2006) at 158–161. For instance, the rural areas of Nobumba and Ndlambe have rejected the institution of traditional leadership in their submission on the Traditional Courts Bill, available at [www.lrg.uct.ac.za/publications/other/](http://www.lrg.uct.ac.za/publications/other/), and last accessed on 18 June 2013.

<sup>88</sup> In the Sekhukhune rural area in South Africa, 80 per cent supports these structures: 97 per cent in Hoepakranz; 82 per cent in Ga-Masha and 73 per cent in Mamone. See Oomen in Hinz & Gatter (eds) (2006) op cit at 131–47.

<sup>89</sup> See A Claassens & S Ngubane ‘Women, Land and Power: The Impact of the Communal Land Rights Act’ in A Claassens & B Cousins *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (2008) at 156. See also Oomen in Hinz & Gatter (eds) (2006) op cit at 127. See also S Weeks ‘Traditional Courts Bill: Access to Justice or Gender Trap?’ in T Nhlapo, E Arogundade & H Garuba *African Culture, Human Rights and Modern Constitutions* (2013) at 25. See S Mnisi ‘The Traditional Courts Bill: Controversy Around Process, Substance and Implications’ (2011) 35 *SA Crime Quarterly* 8 [www.issafrica.org](http://www.issafrica.org). See also E Curran & E Bonthuys ‘Customary Law and Domestic Violence in Rural South African Communities’ (2005) 21 *SAJHR* 632–3. See Bekker & Koyana (1998) op cit at 256.

<sup>90</sup> Van der Waal in Hinz & Patemann (eds) (2006) op cit at 152–3.

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during dispute resolution in the rural areas. Although the examples do not reflect what occurs in all provinces, they at least represent a few scenarios from which we can glean certain information. In summary, female traditional leaders, members of traditional councils and ordinary female litigants describe conflict resolution as that involving families, headmen or ward heads, traditional courts and community members—with limited input from the women population.<sup>91</sup>

Hence, a woman is not permitted to approach the court directly, but must report the matter to a male elder in the family. He then acts as her legal representative and presents her case. In this respect, a 1999 provincial report on the consultation meetings between a joint submission by the Centre for Applied Legal Studies, Commission on Gender Equality, and National Land Committee (hereafter CALS, CGE AND NLC) and rural women provides that:

When a woman has a complaint that she wants to report to traditional court, she first has to report the complaint to one of the male elders in her family. The elder will act as her witness and representative and will report the case to the councillors at the headman's court. During the court proceedings, a woman only talks when talked to or asked questions and is not allowed to give input during the court proceedings. Single women and girls are not allowed to attend a court session. In other instances, after being asked questions, a woman will be told to leave. This means women are not allowed in courts when they are complainants. On the other hand, according to our respondents, men can bring their cases to court without a witness, participate during the court proceedings and ask questions.<sup>92</sup>

In some of these tribunals, women are not allowed to attend proceedings, and, in still others, they are forced to kneel while speaking. Men may also ridicule women when they are addressing the court.<sup>93</sup> The following statement shows how:

when a man does not speak eloquently, he is accused of speaking like a woman. However, when a woman speaks articulately and eloquently, then she is congratulated for speaking like a man.<sup>94</sup>

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<sup>91</sup> See A Claassens 'Who Told Them We Want This Bill? The Traditional Courts Bill and Rural Women' in (2011) 82(23) *Agenda: Empowering Women for Gender Equity* at 10–19.

<sup>92</sup> Draft Submission for Comment: Traditional tribunals and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 13.

<sup>93</sup> Draft Submission for Comment: Traditional tribunals and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 13, available at [http://www.lrg.uct/usr/lrg/docs/TCB/2012/cals\\_cge\\_nlc\\_submission\\_salc.pdf](http://www.lrg.uct/usr/lrg/docs/TCB/2012/cals_cge_nlc_submission_salc.pdf), and last accessed on 16 February 2013.

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In 2008/2009, the Legal Resources Centre (hereafter LRC), Law, Race and Gender (hereafter LRG) at the University of Cape Town, rural NGOs and community-based organisations held consultative meetings with rural women. Lengthy discussions were convened in the rural areas of Qunu (Eastern Cape), Pietermaritzburg, Madikwe (North West) and Nelspruit (Mpumalanga), where researchers asked female participants to share their experiences in traditional tribunals with regard to the provisions of the then proposed Bill. These questions revealed minimal female representation, and women requested a 50 per cent provision for female councillors to promote gender equality in the Bill.<sup>95</sup> Accounts were also given by various women.

For instance, in one village in Limpopo, women are not allowed to bring disputes before the court. In a case directly involving a woman, she would be required to give details of the dispute to a man.<sup>96</sup> Similarly, in some parts of the Eastern Cape, the traditional tribunals are situated right next to the ancestral kraal; hence, women are not allowed to enter. The rationale for this discrimination is that the ancestors prefer to communicate with men, because women are impure and associated with witchcraft.<sup>97</sup> In the event that a woman is involved in court proceedings—either as a disputant or even as a traditional leader—she cannot ask questions and must appoint a man to do so on her behalf.<sup>98</sup> Women are, however, used as witnesses, but can only be questioned by a male member of the community. Even worse, single women and young girls are not permitted in these courts. Consequently, women are marginalised in their own disputes and are not granted the right of equal access.<sup>99</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> See Claassens (2011) op cit at 10–19.

<sup>96</sup> See ‘Traditional Tribunals Bill Workshop in Cedara, KwaZulu-Natal (Pietermaritzburg), organised in conjunction with the Rural Women’s Movement’ 28–30 October 2008 at 1 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas Law, Race and Gender Unit*, University of Cape Town (2009) at 163.

<sup>97</sup> Draft Submission for Comment: Traditional tribunals and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 8.

<sup>98</sup> Ibid.

<sup>99</sup> Draft Submission for Comment: Traditional tribunals and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 8.

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A woman in Madikwe, in the North West province, declared that: ‘For some time we have been fighting tirelessly for the court to level the field as far as gender representation is concerned. There needs to be an equal number of women as compared to men in the court’.<sup>100</sup> In that community, single and widowed women are not allowed in the courts, while single men and widowers are not prohibited.<sup>101</sup>

In Bizana, a district near Qunu in the Eastern Cape, women are not part of the traditional council, nor can they become traditional leaders. The leaders also ridicule them if they report spousal conflicts. Thus, they do not like traditional tribunals because they do not enjoy equal treatment.<sup>102</sup> Also in Mpumalanga, a woman complained: ‘the bad thing about customary courts is that we don’t have female councillors represented. And yet most of the cases handled there involve the problems between man and wife. But in the courts, it’s just men who decide outcomes’.<sup>103</sup>

While this may be true in some communities, not all consider women inferior. For instance, women in the amaHlubi community of KwaZulu-Natal are treated the same way as men. In addition, they have become more involved in debates concerning their communities, and have begun to perpetuate change with regard to equality.<sup>104</sup>

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<sup>100</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Madikwe, North West in conjunction with LAMOS (Land Access Movement of South Africa)’ 25–6 February 2009 at 2 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 192.

<sup>101</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Madikwe, North West in conjunction with LAMOS (Land Access Movement of South Africa)’ 25–6 February 2009 at 3 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 193.

<sup>102</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Qunu, Eastern Cape organised in conjunction with the Transkei Land Services Organisation’ (TRALSO) 13–4 November 2008 at 1 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 171.

<sup>103</sup> See ‘Traditional Tribunals Bill Consultation Meeting convened with TRAC’: Nelspruit, Mpumalanga 3–4 June 2009 at 8 in *The Traditional tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 184.

<sup>104</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Qunu, Eastern Cape, organised in conjunction with the Transkei Land Services Organisation’ (TRALSO) 13–14 November 2008 at 1 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 171.

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In an area in the Eastern Cape, Mqanduli, two women were elected members of the traditional council, which is vital to changing the perceptions about women.<sup>105</sup> Although, women are allowed to participate in court proceedings, men take the final decisions because they do not have a female traditional leader. Without the presence of women within these councils, men may verbally assault the female disputants and make them afraid to approach the courts.<sup>106</sup>

In Qolombana, also in the Eastern Cape, three women were elected to the traditional council in 2007, and they assist the traditional leader with decision-making. In that community, women act as regents for their under-age sons until they can hold their title, and they are also given the opportunity to sit at the kraal, which was considered sacred and only for men.<sup>107</sup> They are also encouraged to speak in court.<sup>108</sup> This reflects that some traditional communities are evolving along the lines of the right to equality.

In another study in the northern part of Sekhukune, a rural woman was quoted as saying this in relation to the institution of traditional leadership: ‘Ha, I would like to see my mother go to the traditional court one day without being represented by my uncle. Or show up there in trousers...’. Another woman said in favour of traditional tribunals: ‘At least here it is not one man who tries you but a whole group. In the *kgoro*, you don’t have to pay the lawyer or the magistrate. Here you are tried according to our culture, in the language you understand’.<sup>109</sup>

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<sup>105</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Qunu, Eastern Cape, organised in conjunction with the Transkei Land Services Organisation’ op cit at 2 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 165–172.

<sup>106</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Qunu, Eastern Cape, organised in conjunction with the Transkei Land Services Organisation’ op cit at 2 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 172.

<sup>107</sup> See ‘Traditional Tribunals Bill Consultation Meeting in Qunu, Eastern Cape, organised in conjunction with the Transkei Land Services Organisation’ op cit at 3 in *The Traditional Tribunals Bill of 2008: Documents to Broaden the Discussion to Rural Areas* op cit at 173.

<sup>108</sup> There are two female councillors in the Madibong Tribal Council in the Sekhukune area. See Oomen (2005) op cit at 213.

<sup>109</sup> Oomen in Hinz & Gatter (eds) (2006) op cit at 127; 134; 156.

## **2. Comparison of Western and African modes of procedure**

The above descriptions of proceedings in selected rural areas indicate that traditional tribunals operate under a simple but effective system.<sup>110</sup> Simplicity of proceedings ensures a lower cost; the distances between the parties and the courts are relatively small, and disputants are, of course, familiar with the language and procedures of the courts.<sup>111</sup> Accordingly, there is likely to be better access to traditional tribunals in South Africa than to formal courts. As explained in the statement made by the President of the Congress of Traditional Leaders (CONTRALESA), Inkosi Patekile Holomisa:

Courts of traditional leaders are spread all over the countryside, particularly in the former homelands. The great majority of what would be considered petty crimes in the cities—common assault and theft of property of low value—are dispensed with as a matter of routine to the general satisfaction of the litigants. The town courts, especially the lower courts, are clogged with such cases to the detriment of speedy justice. Delays are due to several factors, such as litigants' inability to hire lawyers and heavy workloads for lawyers and presiding officers. It is the responsibility of the state to provide protection and justice to its citizens. That value is what informs the administration of justice in the original African judicial system. Why should citizens pay for what is inherently due to them? Modern justice is expensive; the more money you have the more chance of a favourable outcome.<sup>112</sup>

Due to limited financial resources, rural women find traditional methods more affordable, as they cost very little.

Another advantage of African courts is that, since dispute processes involve minor conflicts among neighbours, this often leads to reconciliation. This component of traditional justice distinguishes it from the Western systems, which judge more complicated cases, warranting severe punishment. While highlighting the differences

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<sup>110</sup> This chapter does not attempt to generalise about traditional forms of justice throughout the country, but takes examples from various parts to analyse the meaning of the concept of 'fairness' in an African context.

<sup>111</sup> For instance, in parts of Sekhukune, majority prefer traditional processes for the following reasons: "the fact that cases are usually decided within a day, and are debated by 'many heads' in Sepedi, that the debate is easy to follow and aims to achieve harmony and consensus, and that the case is decided 'by people who know who you are and where you come from.'" Others complained that traditional leaders are sometimes biased and uneducated, hence they don't trust them. See Oomen (2005) *op cit* at 207.

<sup>112</sup> See Draft Submission for Comment: Traditional Courts and the Judicial Function of Chief CALS, CGE and NLC *op cit* at 8.

between these two dichotomies, this section also acknowledges points of convergence. Thus, this section conducts a comparative analysis between African justice systems and the Western model to demonstrate reasons for conflicts evident when traditional tribunals attempt to apply Western principles of law, such as the right to a fair trial.<sup>113</sup> Traditional tribunals apply flexible but methodical processes, making dispute resolution straightforward, yet structured.<sup>114</sup> This important contrast affects the application of Western rights within a traditional African context.

Several authors have analysed modes of conflict resolution in Africa to reveal how they work in relation to their social and cultural contexts.<sup>115</sup> Roberts and Palmer highlighted the difference between purely adjudicatory methods of dispute resolution, promoted by the West, to the consensual methods primarily applied by pre-and post-colonial African communities.<sup>116</sup> Based on the works of these authors and the case studies in the last section, this section identifies the characteristics of traditional tribunals as flexible procedures, the promotion of communal values and the aim of restoring social harmony or *ubuntu*.

#### **a) Flexible procedures**

Roberts and Palmer broadly categorise dispute resolution processes as including: avoidance, self-help and decision-making, through methods such as negotiation, mediation, arbitration or adjudication.<sup>117</sup>

In typical traditional African communities, most families prefer to settle disputes out of court through negotiation, but, on appeal, they are referred to a headman or chief's court—which involves a form of mediation, arbitration or decision-

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<sup>113</sup> The problem of fair trial in traditional tribunals was discussed in chapter three of this thesis.

<sup>114</sup> S Mancuso 'An African Concept of Settlement of Disputes' in T Nhlapo *et al* (eds) (2013) op cit at 47. See also Comaroff & Roberts (1981) op cit at 110.

<sup>115</sup> See Roberts & Palmer (2005) op cit at 1.

<sup>116</sup> See Roberts & Palmer (2005) op cit at 3.

<sup>117</sup> 'Avoidance' means not getting involved in any form of dispute resolution. 'Self-help' means employing private methods of dispute resolution. 'Decision-making' means subjecting a conflict to third party intervention. See Roberts & Palmer (2005) op cit at 81–97. See also Comaroff & Roberts (1981) op cit at 109.

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making.<sup>118</sup> Oomen, while discussing Sekhukune dispute processes, describes the procedure as one of negotiation.<sup>119</sup> In another recent study, Mnisi-Weeks examined the process of negotiation in ward councils and in chiefs' courts in the area of Mbuzini.<sup>120</sup>

To analyse different modes of dispute resolution, Roberts argues that cross-cultural studies should not be premised upon Western legal theory, since different communities have their own normative frameworks.<sup>121</sup> He commences his study by stating that most centralised societies—in which the typical Western courts operate—are quite different from non-centralised or 'acephalous' (face-to-face) societies. In these small-scale communities, he highlights the adaptable structure of procedures.<sup>122</sup>

While centralised societies resolve conflicts by applying specific rules to particular facts to produce win-or-lose results, non-centralised communities work with compromises.<sup>123</sup> A rule-based system has several disadvantages: a lack of flexibility and judicial discretion, where the rule does not match the facts; decisions are imposed and there is little concern for the disputants' opinions thereon; coercive means of enforcement, such as police arrest, and impartial adjudication with no regard to the parties' future relationships.<sup>124</sup>

Conversely, the process-oriented techniques of small-scale communities involve mediatory procedures, which allow the parties to find a solution to their own problems, and help them to achieve this purpose.<sup>125</sup> For example, the Kgatla, among the Tswana, apply a corpus of rules during dispute resolution, which encourages

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<sup>118</sup> See Roberts & Palmer (2005) op cit at 102. See also G van Niekerk *Traditional African Courts Developing Justice Series* (1993) at 7.

<sup>119</sup> Oomen (2005) op cit at 208–9.

<sup>120</sup> SM Weeks 'Securing Women's Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and Beyond' (2011) 35 *SA Crime Quarterly* 146–51.

<sup>121</sup> See S Roberts *Order and Dispute* (1979) at 13.

<sup>122</sup> Roberts (1979) op cit at 18.

<sup>123</sup> Roberts (1979) op cit at 20.

<sup>124</sup> Roberts (1979) op cit at 20–23.

<sup>125</sup> *Ibid.*

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flexibility [*mekgwa le melao ya Sekgatla* (Kgatla law and custom)].<sup>126</sup> Similarly, the processes in these traditional tribunals are relatively flexible, allowing men within the society to share their views during dispute resolution, leading to a consensual pronouncement made by the leader.<sup>127</sup> The technique of deducing evidence—as found among the various groups examined in the previous section—also point to the adaptable procedures in such forums.

‘Mediation consists of influencing the parties to come to agreement by appealing to their own interests.’<sup>128</sup> This process can be distinguished from adjudication in the following terms:

The crucial difference between the mediator and the umpire is that the former assists the disputants towards their own solution, whereas the latter reaches a decision for them. Some writers have also suggested that this distinction between mediating and decision-making necessarily implies major differences of technique. Eckhoff, for example, insists that the mediator will be dealing with interests.<sup>129</sup>

The adjudicator is not necessarily concerned with whether the parties find the outcome fair or acceptable. The suit is decided according to set rules, and the court relies on coercion as opposed to voluntary submission.<sup>130</sup> Hence, Roberts argues that Western and African societies have quite different perceptions of law. Western lawyers base the interpretation of law on the principle of legal positivism, which provides that state law must be superior to any other, because social control is the monopoly of the state apparatus.<sup>131</sup>

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<sup>126</sup> See Roberts & Palmer (2005) op cit at 102.

<sup>127</sup> See Roberts & Palmer (2005) op cit at 98.

<sup>128</sup> Roberts (1979) op cit at 73.

<sup>129</sup> Roberts (1979) op cit at 77.

<sup>130</sup> Roberts (1979) op cit at 141.

<sup>131</sup> The doctrine of legal positivism proclaims that all laws emanate from ‘the commands of a sovereign’. See J Griffith ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 4–5 in Bennett (2004) op cit at 29. John Austin defined law as ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over him’. See John Austin ‘Province of Jurisprudence Determined’ in J Austin *Lectures on Jurisprudence or the Philosophy of Positive Law* (1885) vol 1 101ff at 316–17. Salmond defined it as ‘the body of principles recognised and applied by the State in the administration of justice’. See Sir JW Salmond *Jurisprudence* (1946) at 41. These definitions of law, in terms of sovereignty, are rather narrow and would exclude the laws applied in several parts of Africa, because they imply that societies without centralised organs of state have no law. See JC Gray *The Nature and Sources of the Law* (1921) at 82. Later, a leading positivist, HLA Hart, pronounced that less-developed societies had primary rules; only as society became more

The fact that most traditional African societies are small in size means that disputes among members inevitably affect the broader public.<sup>132</sup>

Those concerned will continue at close quarters, participating in the same complex of relationships as existed before the dispute occurred. It will be rare in such a context for trouble to arise out of a single-stranded relationship of the kind that is possible in our society, where disputants may have no further contact with each other after the immediate issues have been resolved. Existing loyalties and hostilities will be tested in the context of each successive dispute, and each one will be closely related to those which precede and follow it, and through them the relationships of people within the community will gradually change over time.<sup>133</sup>

As a result, the African communities favour methods of negotiation (between parties) and, mediation—whereby parties invite a third party to assist them in finding an acceptable solution.<sup>134</sup> Negotiation generally takes place either within or between families, whereas mediation is more likely in the courts of headmen or chiefs. Adjudication is reserved for formal courts.<sup>135</sup>

### **b) Communal values**

Among the indigenous peoples of South Africa,<sup>136</sup> dispute resolution involves the community as a group. Ward heads and headmen advise the leader, but the voice of

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complex did it require secondary rules. Primary rules referred to standards of behaviour, while secondary rules provided the means of ascertaining, applying and developing these standards. See Bennett (2004) op cit at 10. Most of these definitions of law by jurists and anthropologists of the past failed to provide a broad definition that covered justice systems both in Western and non-Western societies. See A Allott & GR Woodman (eds) *People's Law and State Law: The Bellagio Papers* (1985) at 2. Hart and Elias, however, stated that 'the law of a given community is the body of rules which are recognised as obligatory by its members.' TO Elias *The Nature of African Customary Law* (1956) at 55.

<sup>132</sup> Roberts (1979) op cit at 14.

<sup>133</sup> Roberts (1979) op cit at 51.

<sup>134</sup> Roberts discusses dispute resolution techniques such as interpersonal violence; channelling conflict into ritual; shaming; supernatural agencies; ostracism, and talking. Roberts (1979) op cit at 57–79.

<sup>135</sup> 'The crucial distinction then, between adjudication and negotiation is that the former is a process leading to unilateral decision-making by an authoritative third party, whereas the latter is a process leading to joint decision-making by the disputing parties themselves as the culmination of an interactive process of information exchange and learning'. See P Gulliver *Disputes and Negotiations: A Cross-cultural Perspective* (1979) at 7.

<sup>136</sup> Bantu speakers in Southern Africa including the following groups: Xhosa, Zulu, Swazi, Southern Ndebele, Northern Ndebele, Tsonga, South Sotho, Tswana, North Sotho and Venda.

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the people has to be heard to provide a decision. The traditional leader, or ruler, is expected to confer with the populace; otherwise they can oust such judgement.<sup>137</sup>

In comparison to the individualistic Western justice model, traditional tribunals favour communal values, requiring intervention by the group to resolve individual conflicts. The Xhosa speakers convene courts with members of the community as prosecutors and judges. After the hearing, councillors or advisers of the court summarise the findings, then the gathering reaches a compromise settlement promoting restitution.<sup>138</sup>

Masina gives several examples of communal mediation to demonstrate the importance of joint responsibility among the Xhosa. She describes the process of examination and cross-examination as a process of establishing an accused person's crime against the entire community, and not just the victim. Subsequently, the people consider a way of reforming the perpetrator, to re-habilitate and re-integrate him or her back into the fold. She contrasts this with the Western process, where the accused is individually acquitted or convicted by a judge or jury, without social or cultural remedies.<sup>139</sup> She describes the African notion of *ubuntu* in the justice system as a communal value:

*Ubuntu* at the philosophical level seeks to find a balance between self and other, the destructive and creative, good and bad. It moves away from the thinking of social relations in dualistic oppositions, that is, an either/or situation, good versus bad, black versus white, self versus other, in seeking to resolve conflict. The purpose of *ubuntu* is to work toward a situation that acknowledges a mutually beneficial condition. Its emphasis is on cooperation with one another for the common good as opposed to competition that could lead to grave instability within any community. It describes the feeling of the worth of the community and a shared fellowship of men and women.<sup>140</sup>

Mandova argues that the concept of *ubuntu* is similar to that of *unhu* in Shona culture (an indigenous group in Zimbabwe). He contrasts *unhu*, which he describes

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<sup>137</sup> See B Sansom 'Traditional Rulers and their Realms' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (1974) at 267.

<sup>138</sup> N Masina 'Xhosa Practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional Cures for Modern Conflicts* (2000) at 171–2.

<sup>139</sup> Masina in Zartman (ed) (2000) op cit at 173.

<sup>140</sup> Masina in Zartman (ed) (2000) op cit at 181.

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as a communal idea, with the individualistic nature of European culture. He extends this discussion to include dispute resolution, which requires communal decision-making, by the chief and his councillors or advisors – thus encouraging collective participation and a fair hearing.<sup>141</sup>

In a more extensive comparative analysis conducted by Holleman, between the Shona and Western legal systems, he identifies the differences between African and Western justice.<sup>142</sup> He recognises that, even though African and Western systems are not complete opposites, the Western is more likely to be individual-minded, whereas the Shona value the community.<sup>143</sup>

Western man, knowing himself both as a private individual and as a member of the community in which he lives and strives, regards himself in the first place as his individual self, holding and exercising his individual rights and protecting his individual interests, and in the second place he also acknowledges his position as a member of a wider community, accepting (sometimes very reluctantly) his obligations, responsibilities and privileges as such. In Bantu society a man knows himself in the first place as a member of his community (whether small or big) with duties, responsibilities and certain privileges in connection with this communal body, and in the second place he is an individual anxious to protect his individual sphere of interest and to pursue his individual aims.<sup>144</sup>

Holleman claims that both Western and African law are channelled towards resolution of disputes. In the former case, however, this aim involves the promotion of individual interests, while in the latter communal interests are also recognised. Hence the formal court systems are adjudicatory and administered by impartial judges (with no personal interest in the dispute), but in African tribunals the traditional leader is to be a respected member of the community seeking to salvage broken relationships.<sup>145</sup>

The African approach to justice is a realistic one. He knows that the relations between man and his fellowmen are not governed by law alone. Hence, in the

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<sup>141</sup> See E Mandova 'The SHONA Proverb as an Expression of UNHU/UBUNTU' (2013) 2(1) *International Journal of Academic Research in Progressive Education and Development* 100–8.

<sup>142</sup> The Shona people live in east and south west Zimbabwe, north eastern Botswana and southern Mozambique. See also Van der Waal in Hinz & Patemann (eds) (2006) op cit at 154.

<sup>143</sup> Ibid.

<sup>144</sup> See Holleman (1974) op cit at 2. See also S Mancuso 'An African Concept of Settlement of Disputes' in T Nhlapo *et al* (eds) (2013) op cit at 45.

<sup>145</sup> Ibid.

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determination of a lawsuit law is not taken as the only determining factor. The whole social setting and relationship of parties and their position in the community are taken into consideration; and in the interest of justice, 'legal rules' are sometimes thrown overboard.<sup>146</sup>

Holleman observes that Africans approach conflict resolution with less concern of 'right or wrong', but with a concern to arrive at a consensus on the dispute. The traditional leader works with the elders of the court and members of the community and renders a judgment, which is satisfactory to the parties. If they are unhappy, it is the duty of the court to debate the issues until a compromise is achieved.<sup>147</sup> Public interest and participation are critical to the acceptance of such an outcome, and therefore demands public hearings.<sup>148</sup>

Because in the traditional manner he should be personally detached from the process up to the very end, when the case is given to him for his judgment. But he should keep his eyes peeled and ears open wide, to watch and listen to his henchmen conducting the case, to the questions, arguments and interjections from the side of the public, to the behaviour, mood and changing attitude of the parties, as the conflict, with the so often amazingly numerous side issues, is finally laid bare. By the time the chief is supposed to act and 'cut the case' the issue and side issues are clear- and also are the sentiments of the parties and the public. Knowing from which direction the strongest wind blows, he gives his judgment accordingly. He is a good chief when he knows how to listen patiently and watch faithfully. If he can do this long and diligently enough, the initial turmoil and stubbornness may very likely spend themselves, and the solution emerges as the common product of many minds. The chief's decision is then as undramatic and uneventful as a fullstop after a long paragraph. Acting as a representative of the community, he formally pronounces its verdict.<sup>149</sup>

Holleman shows how traditional leaders allow the full participation of community members, and act only as moderators of their views and opinions. Dispute resolution is community-driven, and reflects in jural relationships: for instance, the right to land is not vested in individuals, but in the extended family.<sup>150</sup> The importance of the community is evident in the hearings observed by Holleman.

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<sup>146</sup> See Holleman (1974) op cit at 17.

<sup>147</sup> See Holleman (1974) op cit at 3.

<sup>148</sup> Ibid.

<sup>149</sup> See Holleman (1974) op cit at 4.

<sup>150</sup> See Holleman (1974) op cit at 5–6.

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Witnesses play a relatively unproductive role in a trial: they simply confirm the statements of the disputants. A more important stage in the proceedings is when the case is ‘thrown to the dogs to chew on’ (an idiom used by the Vahera people).<sup>151</sup>

Now comes a vital, lively, if sometimes a bit chaotic, stage, during which court formality are reduced to a minimum and any member of the public who feels that he can ask a question, make a statement or express a sentiment that may help clear up the conflict can have his say. This is the time of cross-examination, of the most researching questions, of asking for further evidence and, especially, of trying to get a clear idea of the background of the case, not so much the legal (which seldom remains obscure for long) as the personal relations between the parties. Although this debate has an informal and sometimes riotous character, it is the most crucial stage of the process, because it is during this stage that the public, having a vital interest in the successful outcome of the case, voices its opinion with the utmost candour.<sup>152</sup>

Afterwards, the case is ‘handed back to the court.’ The leader and assessors summarise the facts, and announce a settlement arrived at by the community at large. The court asks if the parties are content with the consensus: if not, they debate further till they come to an agreement.<sup>153</sup>

Once the dispute has been settled, the offender is expected to provide a goat or fowl for the community members to share. This encourages reconciliation of the parties, because, having eaten together, they are considered to have buried the hatchet.<sup>154</sup> Finally, the tribunal attempt to reconcile parties by sharing food or ‘a piece of each other’s snuff.’ This proves that they are no longer feuding and that they are willing to repair their previous relationship.<sup>155</sup>

Indigenous administration of justice aims at solving the conflict between the parties rather than *deciding* its legal aspects in terms of law. Justice, instead of the rational and impartial application of abstract rules of law, then becomes a process of persuasion with the accent on the reasonable behaviour of all concerned in a spirit of give and take. The rules of law hereby serve as a broad and flexible basis for discussion and consideration but are not inviolate and imperative as we know our

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<sup>151</sup> Ibid.

<sup>152</sup> Holleman (1974) op cit at 19.

<sup>153</sup> Holleman (1974) op cit at 20.

<sup>154</sup> See Holleman (1974) op cit at 11.

<sup>155</sup> Ibid.

laws to be. The successful end of a tribal process is a judgment which both parties formally agree to accept and observe.<sup>156</sup>

**c) Social harmony**

In most African communities, disputing parties are usually neighbours, and frequently family members. Hence they choose informal and reconciliatory methods of conflict resolution, over the divisive adjudicatory process in the interest of restoring social ties among community members.<sup>157</sup> Nhlapo contrasts the Western concept of retribution in criminal cases, with the African concept of restorative justice. He argues that traditional tribunals promote reconciliatory processes, in opposition to technical rules in Western courts, designed for punishment – not social healing.<sup>158</sup> Tshehla, in his study in parts of the Limpopo province, confirms the importance of restored social relations in serious cases, affecting the family and community at large.<sup>159</sup>

In theory, the main objective of traditional tribunals is to encourage *ubuntu* – *umuntu ngumuntu ngabantu/motho ke motho ka batho ba bangwe* (I am because we are),<sup>160</sup> an indigenous African concept, which requires communal harmony and support within the group.<sup>161</sup> ‘The concept carries in it the ideas of humaneness, social justice and fairness...and calls for a balancing of the interest of society against

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<sup>156</sup> Holleman (1974) op cit at 18.

<sup>157</sup> See Van der Waal in Hinz & Patemann (eds) (2006) op cit at 151. See also Oomen (2005) op cit at 208.

<sup>158</sup> See T Nhlapo ‘The Judicial Function of Traditional Leaders: A Contribution to Restorative Justice? Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern African’ Cape Town 14–17 March 2005 at 3; 6 and 17. See also M Schoeman ‘A Philosophical View of Social Transformation through Restorative Justice Teachings: A Case Study of Traditional Leaders in Ixopo, South Africa’ (2012) 13(2) *Phronimon* at 23.

<sup>159</sup> See Tshehla (2005) op cit at 20.

<sup>160</sup> Archbishop Desmond Tutu defined this term in the following words: ‘...the essence of being human. Ubuntu speaks particularly about the fact that you can’t exist as a human being in isolation. It speaks about our interconnectedness’. See Ubuntu Women Institute USA (UWIU) with SSIWEL at <http://www.ssiwel.org/>. See Masina in Zartman (ed) (2000) op cit at 170. See also A Claassens ‘Summary and Analysis of the Traditional Courts Bill B15-2008’ [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/tcb\\_summary\\_analysis.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/tcb_summary_analysis.pdf), last accessed 23 August 2013.

<sup>161</sup> See *Policy Framework on the Traditional Justice System under the Constitution* by the Department of Justice and Constitutional Development (2008) at 6.1.2, available at <http://www.info.gov/view/DownloadFileAction?id=97257>, and last accessed on 16 February 2013.

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those of the individual...'<sup>162</sup> The Constitutional Court in *S v Makwanyane & another* described it in these terms:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity... While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.<sup>163</sup>

Murithi condenses conflict resolution among the Xhosa as involving five stages: fact-finding, repentance, forgiveness, compensation and reconciliation. He explains the motive for dispute settlement as the restoration of social cohesion and harmony – a process of *ubuntu*.<sup>164</sup> Put differently, Mqoke equates African human rights to the concept of *ubuntu*. His study of the Cape Nguni, reveals that the judicial process strives to achieve conciliation and consensus through consultation with litigants, as well as other members of the community.<sup>165</sup> Mokgoro articulates *ubuntu* as an individual right dependent on group existence, by calling for a revival of African jurisprudence in modern day South Africa.<sup>166</sup>

Bennett describes *ubuntu* as 'an African equity'.<sup>167</sup> He compares the formal notion of fairness with the traditional principle of natural justice provided for in the maxim of *audi alteram partem*. He discovers that pre-colonial tribunals focused on providing an opportunity for both parties to be heard in the presence of other community members to ensure that the process was fair by participating in resolving

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<sup>162</sup> See *S v Makwanyane & another* (CCT3/94) [1995] ZACC 3 at para 237 and 250. See also NN Mabovula 'The Erosion of African Communal Values: A Reappraisal of the African Ubuntu Philosophy' (2011) 3(1) *Inkanyiso Journal of Human and Social Sociology* at 40–41.

<sup>163</sup> *Supra* at para 308.

<sup>164</sup> See T Murithi 'Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu' (2006) 1(4) *The Journal of Pan African Studies* at 30–32.

<sup>165</sup> RB Mqoke *Basic Approaches to Problem-solving in Customary Law: A Study of Conciliation and Consensus among the Cape Nguni* (1997) at 10; 60. See also TW Bennett 'The Equality Clause and Customary Law' (1994) 10 *SAJHR* 122 at 123.

<sup>166</sup> See JY Mokgoro 'Ubuntu and the Law in South Africa' (1998) Konrad-Adenauer-Stiftung Report of the First Colloquium Constitution and Law at 1–2. See also J Broodryk *Ubuntu in South Africa* (1997) LLD Thesis UNISA, where he defined *ubuntu* as 'a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct'.

<sup>167</sup> See TW Bennett 'Ubuntu: An African Equity' (2011) 14(4) *Potchefstroom Elec. L.J.* at 34 and 51.

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disputes.<sup>168</sup> This indicates that ‘fairness’ is a concept that can be found in both Western and African justice systems, but it is given different meanings within these systems. In the former, it denotes each party having a hearing before an impartial judge, while in the latter it denotes communal order and harmony.<sup>169</sup>

Gluckman, in his classic research on the Barotse of Zambia, explains the importance of reconciliation in terms of the ‘multiplex relationships’ typical of Barotse society. This term denotes ‘the intricate network of social ties that bind together kin and neighbours.’<sup>170</sup> The connection between families and the community complicates disputes that are better resolved in private, not in public.<sup>171</sup>

The aims of dispute resolution vary, however, depending on the following factors: the types of case in question (for instance, a dispute about theft or performance of kinship duties), the parties’ relationship and the nature of the dispute.<sup>172</sup> In the Barotse type of society, emphasis is on reconciliation while, in societies with ‘simplex’ relationships (as in Western countries) the emphasis is on win-or-lose judgments.<sup>173</sup>

Another classic study that of Bohannan’s account of the differences between the British and the Tiv ideas of justice in Eastern Nigeria endorses this point. He discovered that the objective of the Tiv is resolving disputes as amicably as possible so as to harmonise relationships within a community. In order for a decision to be legitimate, the principles applied have to be accepted by the community and in

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<sup>168</sup> See Bennett (2004) op cit at 169.

<sup>169</sup> See also E Curran & E Bonthuys ‘Customary Law and Domestic Violence in Rural South African Communities’ (2005) 21 *SAJHR* at 632.

<sup>170</sup> See Bennett (2004) op cit at 164.

<sup>171</sup> Bennett (2004) op cit at 165.

<sup>172</sup> JL Comaroff & S Roberts ‘The Tswana Case’ in I Hammett (ed) *Social Anthropology and Law* (1977) at 78 and 83–109.

<sup>173</sup> Multiplex societies reflect communities where parties have multiple relationships, and their political relationships affect the economic and domestic ones, Simplex societies are primarily single interest-oriented with no real connection between legal and social relationships. Hence, multiplex societies require reconciliatory systems of laws, but simplex societies do not. See Bennett (2004) op cit at 164. See also Van Niekerk (1993) op cit at 7. See a similar discussion on the Bantu-speaking peoples of South Africa by WD Hammond-Tooke ‘World-View II: A System of Action’ in Hammond-Tooke (ed) (1974) op cit at 362.

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accordance with its norms.<sup>174</sup> Dispute settlement by the Tiv usually requires the participation of a third party, whose primary role would usually be arbitration or mediation.<sup>175</sup>

By contrast, the aim of Western courts is to accelerate legal settlement by providing a forum for disputants to present or defend their cases without favour or prejudice to either party. This objective collapses in a society where both parties to a case do not have equal access to the machinery of justice.<sup>176</sup> After adjudication (in criminal cases), the offender is usually punished, or (in civil matters) compelled to pay damages by the state.<sup>177</sup> In response to this kind of justice, the relative of a litigant describes a decision in the magistrate's court (as opposed to customary law), as beneficial only to the state, not the victims.<sup>178</sup>

To the Africans, the Western system seems insensitive to the practical effects of a hearing. It seems not to care much about the effect that wrongdoings may have on the broader society and long-term relationships. As a consequence, one can say that the standard of fairness in formal courts is not synonymous with the traditional tribunals.

Kolff argues that there are various external factors that have a bearing on which system litigants resort to when they have a choice. Primary considerations are: the nature of the conflict, the relationship between the parties and the dispute resolution options accessible to the litigant.<sup>179</sup> Based on these determinants, many rural litigants prefer traditional tribunals.

Comaroff and Roberts describe traditional dispute resolution processes as a 'paradigm of argument', involving several levels of fact finding by an arbiter, who

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<sup>174</sup> P Bohannan *Justice and Judgment among the Tiv* (1957) at 64–5.

<sup>175</sup> Most of the disputes are resolved within the community, but where this proves substantially difficult the parties are referred to the formal justice legal system. P Bohannan *Law and Warfare: Studies in the Anthropology of Conflict* (1967) at 44–6. See also Bohannan (1957) op cit at 69.

<sup>176</sup> See J Stevens *Access to Justice in sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (2000) at 4.

<sup>177</sup> Stevens (2000) op cit at 9.

<sup>178</sup> Stevens (2000) op cit at 10.

<sup>179</sup> See MFD'Engelbronner-Kolff in 'Justice in a Legally Pluralistic Society: A Court Tale from Sambuyu' (1998) at 196 in Stevens (2000) op cit at 140.

then pronounces a decision.<sup>180</sup> Hence, the leader is not expected to rely only upon the accounts of the parties, nor is he supposed to determine what the actual facts might be. He is meant to interview witnesses to decide the veracity of such information. In conjunction with his advisers and the community, he then has to decide, ‘not order’ the outcome. This process makes dispute resolution quicker and more effective, as opposed to the tendentious argumentative process in formal courts, which prolongs cases.

African academics’ descriptions of the concept of social harmony explain why traditional tribunals perceive a fair trial differently from the formal system, even though the influence of this principle in post-colonial South Africa is debatable.<sup>181</sup> Traditional systems also make sure that disputes are resolved in a fair manner by allowing participation of most members of the community. The traditional leader’s intimate knowledge of the community helps in finding an acceptable solution. Hence, even if the leader is biased against one or other of the parties, this would not necessarily jeopardise the outcome of the case.

The lengthy account above indicates that fair trial means two very different things in the (notionally) Western and African cultural traditions. In the former, fair trial rights require the application of a fixed set of procedural rules to guarantee fairness, while in the latter social order and harmony is the prime goal.<sup>182</sup> Traditional procedures do not exemplify the requirements of a fair trial in the Constitution; instead, they promote flexibility, communalism and social harmony.

Hence, traditional courts provide, on the face of it, an accessible form of justice for a particular group in the society, one that is not only accessible in geographic and financial terms, but also in linguistic, legal and cultural terms. The major criticism with this style of justice is its bias against the rights of women.

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<sup>180</sup> Comaroff & S Roberts in Hamnett (ed) (1977) op cit at 86–7.

<sup>181</sup> *Policy Framework on the Traditional Justice System under the Constitution* (2008) op cit at 6.1.3.

<sup>182</sup> See RB Mqoke & LP Vorster ‘Procedure and Evidence’ in JC Bekker, JMT Labuschagne & LP Vorster *Introduction to Legal Pluralism in South Africa Part 1: Customary Law* (2002) at 163. See also DS Koyana *Customary Law in a Changing Society* (1980) at 130.

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Chapter V: Traditional Justice

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The next chapter discusses state recognition of traditional forms of justice and legislative attempts at reconciling these systems with constitutional imperatives.

## CHAPTER VI

### TRADITIONAL JUSTICE IN THE SOUTH AFRICAN LEGAL SYSTEM

#### 1. Historical overview of state recognition of traditional forms of justice

The preceding chapter reviewed enforcement of the right of access to justice for rural women in traditional tribunals, and compared Western and African standards of fairness. This chapter covers state recognition of traditional forms of justice, from the colonial/apartheid periods until the birth of the new Constitution. It also considers policy and legislative efforts to align traditional justice with constitutional imperatives—such as the right to equality—thereby reconciling it with culture.

With the coming of the British, a dual judicial system was established in the colonies.<sup>1</sup> Broadly speaking, this was the establishment of magistrates' courts and High courts for the settlers, and traditional courts and courts of native commissioners for Africans.<sup>2</sup> In this way legal pluralism began— that is, the separation between the Western and indigenous systems of law and courts, through policy and legislative structures.<sup>3</sup>

In the early colonial period, state governments sought to remove the powers of traditional rulers. The British considered them a hindrance to their policy of assimilating Africans into the notionally superior British system of government.<sup>4</sup>

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<sup>1</sup> K Mann & R Roberts *Law in Colonial Africa* (1991) at 18–23. See also RB Mqoke *Customary Law and the New Millenium* (2003) at 29.

<sup>2</sup> ZN Jobodwana 'Courts of Chiefs and Human Rights: Comparative African Perspectives' (2000) 15 *South African Public Law* at 34.

<sup>3</sup> NJJ Olivier *Indigenous Law* (2000) at 197–8, para 192.

<sup>4</sup> RB Mqoke *Basic Approaches to Problem Solving in Customary Law: A Study of Conciliation and Consensus among the Cape Nguni* (1997) at 69–70.

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Regarding the province of colonial Natal, however, this policy had to be modified. Here and, later, elsewhere in Africa, the colonial governments were forced to return judicial and administrative powers to traditional leaders. Subsequently, the use of them to maintain order among their own people initiated a general policy of indirect British rule in Anglophone Africa.<sup>5</sup>

The formal justice system was based on the enforcement of Western rules and procedures, set up to ensure a fair and independent method of conflict resolution. By implication, therefore, the African system was less just.<sup>6</sup> The adversarial system of justice was considered the ideal model. The concept of adjudication-which involved segregating opposing sides to a dispute-was a cornerstone of Western common law, and the colonisers considered any other system inferior. Indigenous customary law was allowed only a marginal role in the legal system, although enforced for purposes of family law and delicts in the African population.<sup>7</sup>

Colonial administrations had no hesitation in changing customary law to suit their 'civilising' mission.<sup>8</sup> Legal drafters reduced customary principles into formal codes, meeting positivist standards, while forfeiting the malleable character of African customs.<sup>9</sup> Further, they condemned the patriarchal practices of customary law, such as bridewealth, polygyny and forced marriages.<sup>10</sup> Zulu customs were codified in the foreign languages of English and Afrikaans, or restated in law textbooks, and fixed in judicial decisions. The 'official' customary law that resulted could obviously not

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<sup>5</sup> TW Bennett *Customary Law in South Africa* (2004) at 106–7.

<sup>6</sup> *Ibid.*

<sup>7</sup> S Roberts & M Palmer *Dispute Processes: ADR and the Primary Forms of Decision-making* (2005) at 15.

<sup>8</sup> JC Bekker & DS Koyana *The Judicial Process in the Customary Courts of Southern Africa* (1998) University of Transkei Project Report at 256.

<sup>9</sup> 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.

<sup>10</sup> Forced marriages were prohibited. See Bennett (1995) *op cit* at 81.

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reflect the living customs of existing traditional groups. In other words, codified customary law became ‘an invented tradition’.<sup>11</sup>

Thereafter, the government sought to weaken customary law, by promoting racial segregation. This was achieved with the enactment of discriminatory legislation, such as the Native Administration Act 1927 (later known as the Black Administration Act, hereafter BAA).<sup>12</sup> This Act regulated dispute resolution countrywide and imposed a uniform system of judicial dualism for the whole country.<sup>13</sup> It recognised the courts of traditional leaders and headmen, and gave them power to try civil disputes and minor criminal offences among Africans.<sup>14</sup> It also established commissioners’ courts (staffed by white administrative officials) to provide cheap, simple and familiar legal procedures for Africans.<sup>15</sup>

None of the above courts had jurisdiction over whites, who were subject, exclusively, to the magistrates’ courts and the Supreme Court. Hence, commissioners and traditional leaders administered customary law, while magistrates and the Supreme Court applied the received English and Roman-Dutch laws, and were subject to the Department of Justice.<sup>16</sup>

Section 12 of the BAA provided that:

- (1) The Minister may–
  - (a) authorize any Black chief or headman recognized or appointed under subsection (7) or (8) of section two to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction;
  - (b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before

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<sup>11</sup> 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.

<sup>12</sup> Act 38. See Bennett (2004) op cit at 41.

<sup>13</sup> WM Seymour *Seymour’s Customary Law in Southern Africa* (1982) at 7.

<sup>14</sup> JR du Plessis *An Elementary Introduction to the South African Law: A Guide for Beginners* (1989) at 160.

<sup>15</sup> See RS Suttner ‘Towards Judicial and Legal Integration in South Africa’ (1968) 85 *SALJ* at 439.

<sup>16</sup> Bennett (1991) op cit at vii.

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him by Blacks against Blacks resident within such chief's area of jurisdiction:

Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation out of a marriage.<sup>17</sup>

Later, traditional tribunals were given criminal jurisdiction over minor common law and statutory offences in order to lighten the traffic to the magistrates' courts.<sup>18</sup> Section 20 of the 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, impregnating another man's wife, impregnating a young girl or woman and disputes over lobola payments).

The commissioners' courts were given original jurisdiction in respect of customary law. They 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).<sup>19</sup>

In the Supreme and magistrate courts, customary law could be applied if incorporated into statutes or judicial precedents. If not incorporated, customs had to be treated as a fact and proved by calling witnesses.<sup>20</sup> During this time, customary

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<sup>17</sup> Subsection (1) has been repealed by section 1(3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, with effect from 31 July 2006; or such date at the national legislation to further regulate the matters dealt with in subsection (1) is implemented, whichever occurs first. See Black Administration Act 38 of 1927.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> Section 1(1) and (2) Law of Evidence Amendment Act 1988. See *S v Mcumu* (1918) AD 323. See *Mokhatle v Union Government* (1926) AD 71. Such people could include traditional leaders or assessors of the court. See *Morake v Dubedube* (1928) TPD 625 at 631. The traditional tribunals,

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laws were largely unwritten and informal, although the elders of the community always knew the law.<sup>21</sup>

The BAA also provided for a repugnancy clause according to which customary law could be applied— only if acceptable to the ‘civilised world’. Section 11(1) of the BAA provided that, in commissioner’s courts, customary law could be applied ‘...except in so far as it shall not have been repealed, modified: provided that such Black law shall not be opposed to the principles of public policy or natural justice’. This section was repealed in 2005.<sup>22</sup>

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. On the other hand, the position of traditional leaders was strengthened so that they could take over government of the Bantustans (which later became known as the ‘Homelands’).<sup>23</sup>

Thus, the apartheid government kept the BAA in place.<sup>24</sup> Until the 1980s, the traditional tribunals and commissioners’ courts had jurisdiction only to decide cases involving blacks.<sup>25</sup> 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’.<sup>26</sup>

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commissioners’ courts and the appeal court were also presumed to know the law. See Section 19(1) of the Black Administration Act 1927.

<sup>21</sup> Hence, customary law has been defined as: ‘An established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counselors, their sons and their sons’ sons, until forgotten, or until they became part of the immemorial rules’. See Seymour (1982) op cit at 10–11.

<sup>22</sup> Section 11A inserted by section 1 of Act 90 of 1985, substituted by section 1 of Act 32 of 1987 and repealed by section 1(1) of Act 28 of 2005. See Black Administration Act 38 of 1927.

<sup>23</sup> See detailed history in Bennett (2004) op cit at 34–44.

<sup>24</sup> 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.

<sup>25</sup> Bennett (2004) op cit at 42

<sup>26</sup> Ibid.

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In 1988, section 1(1) of the Law of Evidence Amendment Act<sup>27</sup> 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.<sup>28</sup>

(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.

Another important feature of this Act was that customary law was made applicable to all people in South Africa regardless of race.<sup>29</sup>

In summary, the Law of Evidence Amendment Act allowed all courts to take judicial notice of customary law without seeking any further evidence, subject to the limitations provided for in section 1(1).<sup>30</sup>

## 2. New Constitution

In the early 1990s, during the drafting process of the Constitution of the Republic of South Africa, Act 200 of 1993, politicians did not seriously consider the valuable role of customary law and traditional institutions in the new dispensation.<sup>31</sup> During constitutional debates around the inclusion of a right to culture, there was contention around the issue of the right to equality.<sup>32</sup> Traditional leadership—and, of course,

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<sup>27</sup> Act 45 of 1988.

<sup>28</sup> 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.

<sup>29</sup> The repeal of the Act however led to disempowered traditional tribunals. See Bennett (2004) op cit at 42.

<sup>30</sup> Section 1(1) 'Any court may take judicial notice of the law of a foreign state and or indigenous law in so far as such law can be ascertained readily and with sufficient certainty; [P]rovided that indigenous law shall not be opposed to the principles of public policy and natural justice: [P]rovided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom us repugnant to such principles'.

<sup>31</sup> See the Revised Draft Bill of Rights (1992) at 679–80.

<sup>32</sup> See, for example, AJ Kerr 'The Choice of, and the Application of, Customary Law' (1996) 113 *SALJ* at 408; Chuma N Himonga 'A Legal System in Transition: Cultural Diversity and National

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customary law—were considered to promote the interests of men over women and youths.<sup>33</sup>

On the one hand, critics of chiefly regime objected to the retention of non-democratic forms of rule in the new dispensation, while, on the other, proponents of traditional justice described it as the bedrock of an African democracy.<sup>34</sup> As popular as indigenous justice was with some, it also represented apartheid politics, because the previous government had used the chiefs to implement apartheid policies in the pre-constitutional era.

The more specific objections raised against traditional tribunals included their failure to maintain due process in the administration of justice, their lack of impartiality and judicial independence, as well as their tendency to discriminate against women (and children).<sup>35</sup> In the early debates, it was assumed that the inclusion of both a right to equality and a right to culture in the Bill of Rights would mean that the former would always be the prime right.<sup>36</sup> A close analysis of the South African case law, however, shows that this has not been easy to achieve, and

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Identity in Post-Apartheid South Africa' (1998) 1 *Recht in Afrika (Law in Africa)* at 3–6; C Rautenbach 'A Commentary on the Application of the Bill of Rights to Customary Law' (1999) 20 *Obiter* at 113 and M Pieterse 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; 'Final Nail in the Customary Law Coffin?' (2000) 117 *SALJ* at 627.

<sup>33</sup> See Bennett (2004) op cit at 111.

<sup>34</sup> *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) op cit at 1–2.1.

<sup>35</sup> These objections were identified in section 1(b) of this thesis. See *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) with particular reference to 4.2. In 1986, in order to address the challenges faced by traditional justice, the ANC called for transformation of the institution of hereditary rule in South Africa in 'conformity with the democratic principles embodied in the ANC constitution'. This generated a debate on the means of transformation, in particular, the inequalities between men and women. See *African National Congress Perspectives on the Institution of Traditional Rule in a Future South Africa* Paper presented for discussion at the Conference on the Institution of Hereditary Rule in a Future South Africa, Pretoria 12–13 October 1991.

<sup>36</sup> See, for example, V Bronstein 'Reconceptualising the Customary Law Debate in South Africa' (1998) 14 *SAJHR* at 388 and D Singh 'Women know your rights! The Recognition of African Customary Marriages Act: Traditional Practice and the Right to Equal Treatment' (1999) 32 *De Jure* at 314. Women's liberation in South Africa began with the 1943 Africans' Claims in South Africa; 1954 Women's Charter; 1955 Freedom Charter; 1988 ANC's Constitutional Guidelines for a Democratic South Africa, and the ANC's 1990 draft Bill of Rights. The 1990s saw more discussions on gender issues in the country, seeking the promotion of procedural and substantive equality. For more detail, see C Albertyn 'Women and the Transition to Democracy in South Africa' in C Murray (ed) *Gender and the New South African Legal Order* (1994) at 39–47.

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the recognition of the right to culture in the Constitution requires a more rigorous balancing test.<sup>37</sup>

While constitutional negotiations were in process, fundamental rights and commitments—by which the ‘new South Africa’ would be guided—were discussed. In 1991, the South African Law Commission (hereafter SALC) on human rights recommended the inclusion of a right to culture in the Constitution.<sup>38</sup>

Although the institution of traditional leadership is vital to alleviating the problem of access to justice in rural areas, it remains part of the cultural heritage of the South African people.<sup>39</sup> Moreover, in order to accommodate African cultures, the Constitution of the Republic of South Africa, Act 200 of 1993 provided for the application of customary law.<sup>40</sup> In the Interim Constitution,<sup>41</sup> however, the new South Africa was committed to promoting equality:

to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and *democratic constitutional state* in which there is *equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms*[emphasis added].<sup>42</sup>

Prior to the drafting of the Constitution of the Republic of South Africa, Act 200 of 1993, South African women united against racial and gender oppression, seeking constitutional protection of their rights in a new democracy. The Women’s National Coalition (hereafter WNC) had the mandate to mobilise rural women in order to participate during debates paramount to the drafting of the Constitution. During that time the WNC’s resolve to promote substantive equality—as opposed to procedural equality—contributed to the broadening of the movement in respect of the issues of

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<sup>37</sup> See, for example, *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *SAHRC & another v President of the RSA* 2005 (1) SA 580 (CC) and *Mthembu v Letsela & another* 2000 (3) SA 867 (SCA).

<sup>38</sup> See SA Law Commission *Interim Report on Group and Human Rights* (1991) at 679–80.

<sup>39</sup> *Policy Framework on the Traditional Justice System under the Constitution* (2008), available at <http://www.info.gov.za/view/DownloadFileAction?id=97257>, and last accessed on 17 February 2013 at 1.1.1.

<sup>40</sup> Section 2 of Act 3 of 1994 (amendment to the Constitution of the Republic of South Africa, Act 200 of 1993).

<sup>41</sup> Act 200 of 1993.

<sup>42</sup> See the Preamble.

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social, economic and cultural challenges encountered by females in the pre-constitutional days.

In 1992, towards the beginning of the constitutional negotiations at the Conference for a Democratic South Africa (hereafter CODESA), the WNC set up a Negotiations Monitoring Team to represent the interests of rural and urban women. When the negotiations began, however, the proportion of female to male delegates was surprisingly low. Hence, female members of the public and political parties lamented the minimal representation of their cause, leading to the victorious creation of a Gender Advisory Committee. Sadly, CODESA was dissolved shortly thereafter.

The women, determined to have a democratic process, embarked upon another negotiation process—the Multi-Party Negotiation Process (hereafter MPNP). This process was not really different from the previous one, since few female delegates were allowed to participate. 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. Ultimately, males dominated.<sup>43</sup>

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. But the heavily contested clause 32 never saw the light of day.<sup>44</sup>

Traditional leaders, on the other hand, preferred the exclusion of cultural rights from the Bill of Rights—thus objecting to the subjugation of the rights to the

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<sup>43</sup> Albertyn in Murray (ed) (1994) op cit at 39–60.

<sup>44</sup> See Albertyn in Murray (ed) (1994) op cit at 39–60.

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equality provision.<sup>45</sup> They argued for the independent role of traditional justice, separate from the formal system, and equal to it.<sup>46</sup> Chiefs 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.<sup>47</sup>

CONTRALESA (hereafter Congress of Traditional Leaders of South Africa) as well as the IFP (hereafter Inkatha Freedom Party) advocated full recognition of customary law,<sup>48</sup> but the majority of people engaged in the negotiations considered traditional leaders corrupt and unsuited to acting as representatives of their peoples.<sup>49</sup> Traditional courts, however, were viewed somewhat differently because of the low cost and simplicity of their procedures, their proximity and their familiar laws and languages. 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.<sup>50</sup> A compromise was reached and traditional leaders retained their judicial powers, while customary law was subjected to the new constitutional imperatives.<sup>51</sup>

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.<sup>52</sup> We have no evidence, however, to determine how successful this policy has been, and fieldwork on this topic would be welcome.

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

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<sup>45</sup> See Mqoke (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.

<sup>46</sup> See Oomen (2005) op cit at 48.

<sup>47</sup> See I Currie ‘The Future of Customary Law: Lessons from the Lobolo Debate’ in Murray (ed) (1994) op cit at 149.

<sup>48</sup> See Bennett (2004) op cit at 111.

<sup>49</sup> See Bennett (2004) op cit at 112.

<sup>50</sup> Bennett (2004) op cit at 77.

<sup>51</sup> 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 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.

<sup>52</sup> *Policy Framework on the Traditional Justice System under the Constitution* (2008) op cit at 1.2.5.

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traditional tribunals. Hence, the 1996 Constitution recognises traditional tribunals and the application of customary law, but subject to the Bill of Rights.<sup>53</sup>

In spite of constitutional protection, patriarchal bias remains a fundamental problem in traditional tribunals.<sup>54</sup> In some traditional tribunals today, it is still widely believed that the giving of lobola give men power over their women, who are considered to have been ‘paid for’.<sup>55</sup> Hence, it is considered acceptable for a married man—but not a married woman—to conduct extra-marital affairs.<sup>56</sup> Moreover, in cases where women want to leave abusive marriages, they are unable do so because their families are unable afford to pay back the bridewealth.<sup>57</sup> Meanwhile, domestic violence is not supposed to be discussed outside the family, and, in many instance, the practice is not even condemned, since a ‘good’ woman should not report her husband to the state.<sup>58</sup> This male-dominated culture keeps women in a subordinate position, as they are unable to challenge the status quo.

Even though traditional tribunals function as an alternative judicial system, commended for providing accessible justice, they are liable to deny women equal treatment.<sup>59</sup> This bias creates friction between constitutional principles and traditional African customs— as seen in the following statement:

the greatest challenge facing the institution of traditional leadership is the alignment of some of the practices of traditional leadership emanating from cultures and

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<sup>53</sup> 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.

<sup>54</sup> See The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247.

<sup>55</sup> In the Transkei, with democracy, women became more relevant during judicial processes. They were recognised as chiefs and headmen. See Bekker & Koyana (1998) op cit at 257. This progress commenced with the passing of the following legislation: the Transkei Constitution Act No 48 of 1963, the Transkei Authorities Act No 4 of 1965 and the Transkei Constitution Act No 15 of 1976.

<sup>56</sup> K Moulton *Justice Served? Exploring Alternative Mechanisms to Address Violence against Women* (2004) at 49.

<sup>57</sup> Moulton (2004) op cit at 50.

<sup>58</sup> Moulton (2004) op cit at 44–8.

<sup>59</sup> See E Wojtkowska *Doing Justice: How Informal Justice Systems can Contribute* at 12; 20–24. The United Nations Development Programme (UNDP) Oslo Governance Centre 2006. The Democratic Governance Fellowship Programme at <http://www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojtkowska.pdf>, which was last accessed on 13 February 2013.

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customs with the values underpinning the Constitution, such as equality and the eradication of unfair discrimination.<sup>60</sup>

The existing state of affairs, however, negates the core principles of the Constitution, which include human dignity, equality and freedom, supremacy of the Constitution and the rule of law.<sup>61</sup> Clearly, the attitudes and practices of traditional leaders must be re-aligned with constitutional principles.

In 1999, in light of the situation in most traditional tribunals across the country, the SALC called for their procedures to be harmonised with the provisions of the Constitution. The SALC 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’.<sup>62</sup> 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’.<sup>63</sup>

### 3. Statutory interventions

The state has sought two important legislative measures—beside post-democratic election policy—to promote the right to gender equality in traditional tribunals, and, thus, to reform customary law in line with the Constitution. These are the Traditional Leadership and Governance Framework Act of 2003 and the Traditional Courts Bill of 2008/2012.

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<sup>60</sup> *Policy Framework on the Traditional Justice System under the Constitution* (2008) op cit at 5.2.4.

<sup>61</sup> See section 7 of the 1996 Constitution.

<sup>62</sup> 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.

<sup>63</sup> *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (1999) op cit at 7.5.

**a) Traditional Leadership and Governance Framework Act 2003**

The government has been active in regulating the position and function of traditional leaders. It commenced with the institution of the six Provincial Houses of Traditional Leaders in the North West, Mpumalanga, Northern Province, Free State, KwaZulu-Natal and the Eastern Cape. The Provincial Houses are empowered to advise the state on matters involving traditional leadership and customary law.<sup>64</sup> These institutions are also involved in governance and the administration of justice.<sup>65</sup> Subsequently, the National Council of Traditional Leaders and the National House of Traditional Leaders also materialised.

In July 2003, a draft White Paper on Traditional Leadership paved the way for the Traditional Leadership and Governance Framework Act (hereafter the Act).<sup>66</sup> This Act was designed to provide a national framework as a model for provincial governments to re-organise the institution of traditional leadership in the country.

The Act recognises 12 kings, 773 senior traditional leaders and 1,640 headmen.<sup>67</sup> In conjunction with the national and district houses of traditional leaders, it also creates a Commission on Traditional Leadership Disputes and Claims to apply appropriate customs to cases arising from the implementation of the Act.<sup>68</sup> In its preamble, it declares that:

**WHEREAS** the State, in accordance with the Constitution, seeks–

- \* to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;
- \* to transform the institution in line with constitutional imperatives; and
- \* to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices;

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<sup>64</sup> See general discussion in Oomen (2005) op cit at 54–9.

<sup>65</sup> See section 20 of the Act.

<sup>66</sup> There was, however, criticism of the policy of the Act, made before it was enacted. The policy was described as seeking to redefine and restructure traditional functions of hereditary leaders, in ways alien to traditional customs. Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>67</sup> Section 8 of the Act.

<sup>68</sup> See section 22 of the Act.

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**AND WHEREAS** the South African indigenous people consist of a diversity of cultural communities;

**AND WHEREAS** the Constitution recognises–

\* the institution, status and role of traditional leadership according to customary; and

\* a traditional authority that observes a system of customary law;

**AND WHEREAS–**

\* the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;

\* the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership;

\* the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that–

- democratic governance and the values of an open and democratic society may be promoted; and

- gender equality within the institution of traditional leadership may progressively be advanced; and

\* the institution of traditional leadership must–

- promote freedom, human dignity and the achievement of equality and non-sexism;

- derive its mandate and primary authority from applicable customary law and practices;

- strive to enhance tradition and culture;

- promote nation building and harmony and peace among people;

- promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and

- promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation ...

The above provisions articulate legislative intent to reconcile patriarchal and undemocratic pre-constitutional practices with human rights and the rule of law. The continuing conflict between customary law and gender rights, however, raises the question of how the Act intends to promote equality and culture *pari pasu*.

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An example of this situation is the provision stating that 40 per cent of the members of a traditional council must be democratically elected, and a third of those must be women.<sup>69</sup> This provision introduces the inclusion of women in decision-making forums, and, indirectly, gives them the right to participate in court proceedings.<sup>70</sup> The Act, however, succeeds in contradicting its objectives by stating, in section 3, that women should be appointed by traditional leaders and are not elected. This provision re-inforces the status of senior men and reduces the influence of other community members. Several women's groups have condemned the provision, arguing that rural women should be given 50 per cent representation in the councils, since they are a majority of the population in rural areas.<sup>71</sup>

In addition, gender activists and civil society groups have launched a sustained attack of the Act for retaining the colonial and apartheid structures.<sup>72</sup> Not only does the Act keep the personnel of the apartheid period in office, but it also retains their councils and their areas of jurisdiction. In effect, the Act endorses the structures of the former homelands.<sup>73</sup> Women's groups in the country have also contested the retention of judicial powers lying strictly with traditional leaders, who remain patriarchal.<sup>74</sup>

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<sup>69</sup> Section 3(2)(b) of the Act. Subsection (d), however, provides that fewer women may be elected members of the traditional council if there is an insufficient number, thereby lowering the numerical advantage the section sought to promote.

<sup>70</sup> The draft White Paper, however, was described as a policy seeking to redefine and restructure traditional functions of hereditary leaders, in ways alien to traditional customs.

<sup>71</sup> See section 20 of the Act. See also Classens & Ngubane in Classens & Cousins (eds) (2008) op cit at 174.

<sup>72</sup> Millions of Africans were relocated to the homelands during apartheid. See L Platzky & C Walker *The Surplus People: Forced Removals in South Africa* (1985) at 11.

<sup>73</sup> See section 28, for instance. This was based on the provisions of the Black Authority Act 68 of 1951. See Submission on the Traditional Courts Bill (B1-2012) by the Law, Race and Gender Research Unit, University of Cape Town 2012, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf), and last accessed on 17 February 2013 at 9.

<sup>74</sup> See A Claassens 'Contested Power and Apartheid Tribal Boundaries: The Implications of "Living" and "Customary Law" for Indigenous Accountability Mechanisms' in H Mostert & TW Bennett (eds) 'Access to Property in Africa: An Introduction Survey' *Pluralism and Development: Studies in Access to Property in Africa* (2012) at 174–5. See also S Weeks & A Claassens 'Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law That Contradict Them' in (2011) 3 *Stellenbosch Law Review* at 833–4.

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In 2009/2010, the Department of Cooperative Governance and Traditional Affairs (hereafter CoGTA) established a Department of Traditional Affairs (hereafter DTA) to strengthen the role of traditional leaders and tribunals in rural areas.<sup>75</sup> By the end of 2011, there were 11 recognised kings (with two court interdicts in Limpopo), 829 senior traditional leaders, leading 830 traditional councils in eight provinces of the country.<sup>76</sup>

State budgets to manage these structures is, however, limited in comparison with that of the formal courts. In 2011/2012, the state allocated over R13 billion to formal justice services,<sup>77</sup> and about R6 billion to traditional institutions in eight provinces, with only R800 plus million earmarked for traditional affairs— thereby indicating a biased fiscal system in the country.

Current initiatives by the state to facilitate access to justice and to make it less costly seem directed to the western community in South Africa and only lip service has been paid to the needs of the indigenous community. The institution of small claims courts and new short process courts bears witness to this. Although the Short Process Courts and Mediation in certain Civil Cases Act, which came into operation in August 1992, might seem to be moving closer towards a simplified non-technical procedure, it is still required that judicial officers be trained and experienced in the practice of western law. Reform seems to be imposed from above and organic reform from grass-roots level, with the unofficial community dispute resolution structures in mind, does not seem to find a place in the state's reform programme.<sup>78</sup>

Moreover, a comparative approach of the budget allocated by CoGTA to the DTA in 2011/2012 reflects that the municipal budgets of eight provinces were apportioned as follows: 77 per cent on salaries and 23 per cent on capital and operational expenditure. This is particularly problematic because the expenditure for the Houses

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<sup>75</sup> See *Report on the Assessment of the State of Governance within the Area of Traditional Affairs* at 7; 15, available at <http://www.dta.gov.za/index.php/publications/documents.html>, and last accessed on 1 June 2013.

<sup>76</sup> The Western Cape had no recognised institution of traditional leadership. See *Report on the Assessment of the State of Governance within the Area of Traditional Affairs* at 12, available at <http://www.dta.gov.za/index.php/publications/documents.html>, and last accessed on 1 June 2013.

<sup>77</sup> See the *Estimates of National Expenditure 2012* at <http://www.treasury.gov.za/documents/national%20budget/2012/ene/FullENE.pdf> at 520.

<sup>78</sup> See G van Niekerk 'People's Courts and People's Justice in South Africa – New Developments in Community Dispute Resolution' (1994) 1 *De Jure* at 29–30.

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of Traditional Leaders is subsumed within the operational expenditure of the DTA.<sup>79</sup> One can, therefore, argue that the institution of traditional leadership receives a minimal portion of national and provincial budgets for dispute resolution.

The skewed budget apportionment also depicts an inconsistent pattern: giving some provinces insufficient funds with regard to their mandate, as well as the number of cases brought before the Committee on Traditional Leadership Claims and Disputes.<sup>80</sup> This bias is depicted in the table and chart below which depicts provincial budgets vis-à-vis the number of traditional leaders and cases resolved in 2011/2012.

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<sup>79</sup> Mpumalanga has separate budget for the Houses of Traditional Leaders. See *Report on the Assessment of the State of Governance within the Area of Traditional Affairs* at 59, which is available at <http://www.dta.gov.za/index.php/publications/documents.html>, last accessed on 1 June 2013).

<sup>80</sup> *Report on the Assessment of the State of Governance within the Area of Traditional Affairs* at 29–52, which is available at <http://www.dta.gov.za/index.php/publications/documents.html>, and last accessed on 1 June 2013.

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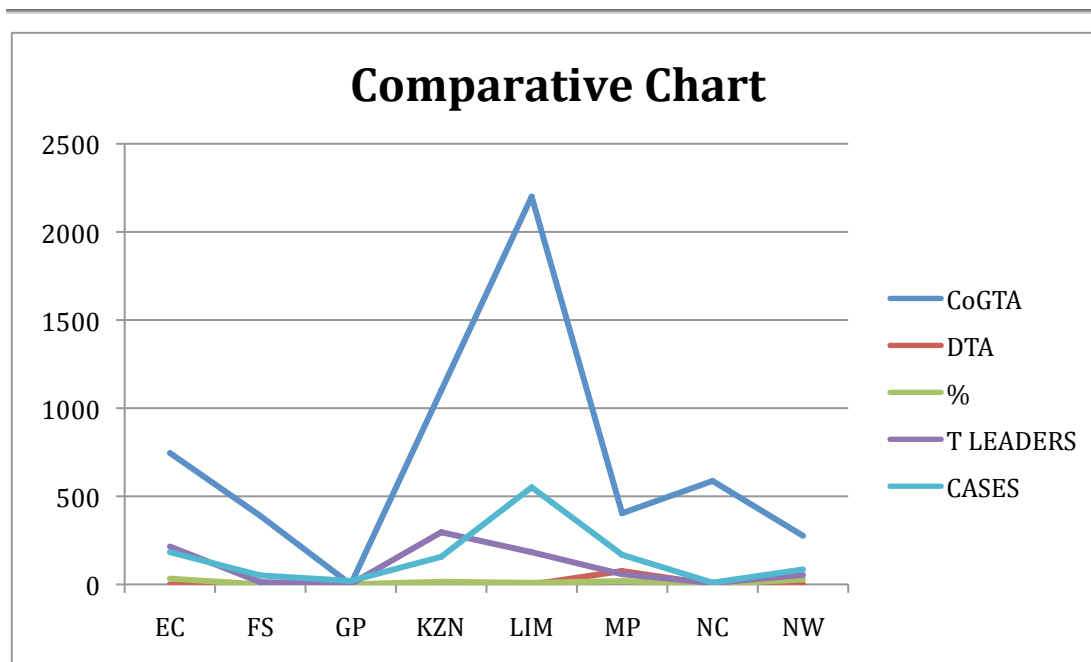
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*Figure 3*

PROVINCE	CoGTA (million)	DTA (million)	%	TRADITIONAL LEADERS	CASES
EC	746	243.1	33	215	183
FS	389	32.8	9.6	13	51
GP	479.7	3.2	1	2	20
KZN	1100	160.2	15	296	157
LIM	2200	204.4	9	183	551
MP	404	76	19	58	168
NC	587	8.5	1	8	10
NW	276	77.4	28	54	85
<b>TOTAL</b>	6181.7	805.6		829	1225

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EC - EASTERN CAPE, FS - FREE STATE, GP - GAUTENG, KZN - KWAZULU-NATAL, LIM - LIMPOPO, MP - MPUMALANGA, NC - NORTHERN CAPE, NW - NORTH WEST

Notwithstanding the Act, legislation was still needed to regulate traditional courts in order to replace the BAA. Hence, the Department of Justice of Constitutional Development produced a Traditional Courts Bill.

#### **b) Traditional Courts Bill**

On 9 April 2008, a Traditional Courts Bill (hereafter the Bill) was proposed—although not fully in line with the recommendations of the SALC—to set uniform standards for traditional tribunals in accordance with constitutional principles. As such, the Bill provides in its preamble that ‘it is necessary to transform the traditional justice system in line with constitutional imperatives and values, including the right

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to human dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>81</sup>

While the Bill seeks to transform traditional tribunals in accordance with the Bill of Rights, it also emphasises the need to preserve traditional African values.<sup>82</sup> Hence, the Bill seeks to 'affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution', with strong emphasis on the role of traditional tribunals in enhancing access to justice.<sup>83</sup>

Provisions of the Bill are meant to replace sections 12 and 20 of the BAA, which were supposed to officially terminate in December 2012.

During the drafting stages of the Bill, members of the Parliamentary Research Unit (hereafter the Unit) noted that this Bill would affect the 21 million people living in the rural areas.<sup>84</sup> The Unit, therefore, recommended that traditional practices be incorporated into modern society, without discarding traditional values.<sup>85</sup> Two issues that are of direct relevance to this thesis were considered: the right to a fair trial for women, and the fact that traditional leadership is still gender-biased, thus denying rural women equal access to justice.<sup>86</sup>

As a result, one of the reasons for drafting the Bill was to remove gender discrimination and to promote full and equal participation by women in traditional tribunals.<sup>87</sup> The provisions of the Bill, however, did not follow through with the intention of the legislation since they failed to provide comprehensive protection for

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<sup>81</sup> There was a media release on 29 November 2012, that the Parliament's Select Committee on Security and Constitutional Development had resolved to withdraw the 2012 Bill, but the Rural Women's Movement and the Law, Race and Gender Research Unit of the University of Cape Town, have contested the veracity of this information. See <http://www.ngopulse.org/press-release/beware-misinformation-campaign-traditional-courts-bill>, and last accessed on 9 September 2013.

<sup>82</sup> See clauses 3(1)(c), (f), (2)(c) and 7(a), (b) and (c) of the Traditional Tribunals Bill 2008.

<sup>83</sup> Clause 2(b)(ii).

<sup>84</sup> See Traditional Tribunals Bill: Parliamentary Research Unit Briefing held on 20 June 2008. <http://www.pmg.org.za/report/20080620-traditional-courts-bill-parliamentary-research-unit-briefing>, and last accessed on 12 August 2013.

<sup>85</sup> Traditional Tribunals Bill briefing 5.

<sup>86</sup> Traditional Tribunals briefing 3.

<sup>87</sup> Bill 15 of 2008.

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women.<sup>88</sup> Indeed, the Bill provoked many objections, which have direct relevance to the rights of fair trial and access to justice for rural women. Academics and women's groups challenged the reinforcement of patriarchal standards by the legislation.

In 2003, after holding consultative workshops with women's groups in KwaZulu-Natal, Limpopo and North West, the SALC drafted a Traditional Courts Bill. In their report on *Traditional Courts and the Judicial Function of Traditional Leaders*, the Commission recommended that the Department of Justice and Constitutional Development adopt the draft bill attached to the report.<sup>89</sup> The Department, however, produced a completely different draft without consulting women's groups, including rural women, who make up a huge percentage of rural inhabitants.<sup>90</sup>

When various groups complained about the non-consultative nature of the Bill, the Portfolio Committee on Justice and Constitutional Development requested submissions on its provisions. Academics, public interest groups and the general public, however, objected to the short period of time allowed for making such submissions as this did not allow for 'meaningful' participation as required by legislation and case law. Professors Nhlapo and Bennett, for instance, argued that section 59(1) of the Constitution and the *Doctors for Life International v Speaker of National Assembly & others* case<sup>91</sup> imposes a duty on Parliament to 'facilitate public

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<sup>88</sup> Submission to the Portfolio Committee on Justice and Constitutional Development by the KwaZulu-Natal Rural Women's Movement 6 May 2008, which is available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/rwm4\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/rwm4_feb2012_ncopsubmission.pdf), and was last accessed on 17 February 2013.

<sup>89</sup> South African Law Commission's Project 90 Report on *Traditional Courts and the Judicial Function of Traditional Leaders* (2003).

<sup>90</sup> See Submission by the Joint Monitoring Committee on the 'Improvement of Quality of Life and Status of Women' to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill [B15-2008], 17 September 2008, which is available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_jointmc\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_jointmc_2008.pdf), and was last accessed on 17 February 2013. See also J Williams (Women's Legal Centre) Submission to the Portfolio Committee on Justice and Constitutional Development Traditional Courts Bill 2008, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_wlc\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_wlc_2008.pdf), and last accessed on 17 February 2013. See Sindiso Weeks 'Traditional Courts Bill: Access to Justice or Gender Trap?' in T Nhlapo, E Arogundade, Garuba H (eds) *African Culture, Human Rights and Modern Constitutions* (2013) at 26.

<sup>91</sup> 2006 (12) BCLR 1399 (CC).

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participation in legislative processes of the Assembly, and that such participation should be meaningful'.<sup>92</sup>

Since the consultation period was so limited, Nhlapo and Bennett concluded that the people most affected by the Bill— that is, rural women—would have been unaware of the process.<sup>93</sup> As members of the SALC Project Committee which had drafted the first Traditional Courts Bill, both professors referred the extensive consultation process engaged in by the Commission.<sup>94</sup> It was clearly evident that the authors of new Bill should have sought wider consultation and public participation.<sup>95</sup>

Consultation and public participation are vital in a constitutional democracy if the fundamental rights of vulnerable members of the society are to be protected.<sup>96</sup> To this end, section 72 of the Constitution requires public involvement in lawmaking. In addition, the Constitutional cases of *Matatiele Municipality & others v President of South Africa*,<sup>97</sup> *Doctors for Life International v Speaker of National Assembly & others*,<sup>98</sup> and *Tongoane & others v Minister of Agriculture and Land Affairs*<sup>99</sup> decided that the legislature must provide for public awareness and participation before and while drafting a piece of legislation that affects ordinary South

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<sup>92</sup> See Prof T Nhlapo and Prof T Bennett, University of Cape Town, Submission in respect of the re Traditional Courts Bill 6 May 2008, which is available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_nhlapo\\_bennett\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_nhlapo_bennett_2008.pdf), and last accessed on 17 February 2013 at 1. See also Williams Submissions to the Portfolio Committee on Justice and Constitutional Development op cit at 2.

<sup>93</sup> See Nhlapo & Bennett, Submission: In re Traditional Courts Bill op cit at 1.

<sup>94</sup> Ibid. Conversely, the South African Law Commission's Report on *Traditional Courts and the Judicial Function of Traditional Leaders* (2003) specifically consulted with rural women before finalising the Draft Traditional Courts Bill.

<sup>95</sup> See Nhlapo & Bennett, Submission in respect of the Traditional Courts Bill op cit at 2.

<sup>96</sup> See Prof C Himonga & Adv R Manjoo, University of Cape Town, Submission to Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_himonga\\_manjoo\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_himonga_manjoo_2008.pdf), and last accessed on 17 February 2013) at 1–2. See also Submission by the Joint Monitoring Committee on the 'Improvement of Quality of Life and Status of Women' to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill (B15-2008) op cit at 3.

<sup>97</sup> 2007 (1) BCLR 47 (CC).

<sup>98</sup> Supra.

<sup>99</sup> 2010 (6) SA 214 (CC).

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Africans.<sup>100</sup> In the latter case, the Constitutional Court laid down the requirements as follows:

The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances.<sup>101</sup>

Surprisingly, the only direct participant during the drafting was the National House of Traditional Leaders, which had a direct interest in the legislation. To date, several factions have opposed the Bill. They have argued that there was no real consultation with the female constituency and neither was there sufficient public participation before the Bill was drafted. In particular, the Congress of South African Trade Unions (hereafter COSATU), civil society and rural residents rejected the Bill, because the drafters did not adequately publicise the Bill and gave only a short period for comment—which would potentially render it unconstitutional if passed.<sup>102</sup>

The SALC Report on Traditional Leaders observed that councillors, as appointed by the chief or headman, usually preside over dispute proceedings.<sup>103</sup> For this reason, the SALC and the Joint Submission of the Centre for Applied Legal Studies (hereafter CALS), the Commission on Gender Equality (hereafter CGE) and National Land Committee (hereafter NLC) recommended that councillors should serve as presiding officers in traditional tribunals.<sup>104</sup> Both documents also recommended that councillor selection should be democratic, providing for a quota

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<sup>100</sup> See Legal Resources Centre's re: Traditional Courts Bill, 15 of 2008 Submissions to the Portfolio Committee on Justice and Constitutional Development, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_lrc\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_lrc_2008.pdf), and last accessed on 17 February 2013 at 2.3.

<sup>101</sup> See paras 129, 137 and 146.

<sup>102</sup> See Submission on the Traditional Courts Bill (B1-2012) 15 February 2012 by the Law, Race and Gender Research Unit, University of Cape Town, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf), and last accessed on 17 February 2013 at 1.

<sup>103</sup> See *Traditional Courts and the Judicial Function of Traditional Leaders* (2003) op cit at 2.4.

<sup>104</sup> See the Draft Submission for Comment: Traditional Courts and the Judicial Function of Chiefs CALS, CGE and NLC November 1999, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/cals\\_cge\\_nlc\\_submission\\_salc.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/cals_cge_nlc_submission_salc.pdf), and last accessed on 16 February 2013 at 6.

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system that enables women to participate during dispute resolution.<sup>105</sup> The SALC, as well as the commissions argued that female participation could transform the patriarchal practices of the courts.<sup>106</sup>

Clause 4 of the Bill, however, provides that senior traditional leaders should preside over matters before the court.<sup>107</sup> This provision restricts the participation of community members in the evolution of living customary law, which goes to the core of the right to culture.<sup>108</sup> As a result, it is argued that the Bill does little to remedy problems of patriarchy, since most traditional leaders are still male, and customary laws adjudicated solely by traditional leaders could hardly be considered valid<sup>109</sup>—a mere replica of conditions during the apartheid era, when traditional leaders were deemed the ‘guardians’ of custom.<sup>110</sup>

The Legal Resource Centre (hereafter LRC), therefore, roundly condemned the Bill for failing to address patriarchy, and argued that the Bill could not be considered since it did not meet the aim of promoting equality, non-sexism and dignity in the Constitution.<sup>111</sup> The only way to achieve these rights would be to look to living customary law, which takes into account the actual values of present-day African communities as they are developing—in line with the provisions of the Constitution. Claassens, for instance, argues that, by allowing traditional leaders to develop customary law, the Bill would remove the actual democratic processes in operation, and, while the Bill was devised as a tool to start the process of reconciling customary

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<sup>105</sup> Draft Submission for Comment: Traditional Courts and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 7.

<sup>106</sup> Draft Submission for Comment: Traditional Courts and the Judicial Function of Chiefs CALS, CGE and NLC op cit at 12.

<sup>107</sup> See section 4 of the Bill.

<sup>108</sup> Submissions to the Portfolio Committee on Justice and Constitutional Development Legal Resources Centre re: Traditional Tribunals Bill 15 of 2008 op cit at 3.7.

<sup>109</sup> Ibid.

<sup>110</sup> K Kleinbooi ‘Special Edition: Reintroducing the Contentious Traditional Courts Bill’ in *Umhlaba Wethu 14: A Bulletin Tracking Land Reform in South Africa*, available at <http://www.plaas.org.za/sites/default/files/publications-pdf/UW%2014.pdf>, and last accessed on 17 February 2013 at 1.

<sup>111</sup> Submissions to the Portfolio Committee on Justice and Constitutional Development Legal Resource Centre: in re Traditional Tribunals Bill 15 of 2008 op cit at 1.12.1.

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law with constitutional values, it may end up forfeiting its proposed agenda of providing equal access to justice for rural women.<sup>112</sup>

Public interest organisations such as the KwaZulu-Natal Rural Women's Movement (hereafter RWM)<sup>113</sup> challenged specific provisions within the Bill—such as clause 2(b).<sup>114</sup> This provides for the enhancement of access to traditional justice, but it does not consider how women can obtain equal access in practice. It is difficult to imagine how patriarchal procedures, which marginalise women, can be aligned with the right to gender equality. In clause 3(1) and (2), the Bill also expects to eliminate non-sexism and unfair discrimination without a change in the customs that perpetuate this.

In addition, clause 9(2)(a)(i) provides for the enforcement of the right to equality by calling for 'full and equal participation in the proceedings', but the LRC has argued that it does not include practical ways of realising substantive equality for women.<sup>115</sup> What is more, clause 9(3)(b) states that: 'A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom'. Consequently, the Bill does not promote the right of women to a fair trial,

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<sup>112</sup> See A Claassens *The Traditional Courts Bill in the Context of Other Laws Dealing with Traditional Leadership* (2009), available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/tcb\\_context\\_other\\_laws.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/tcb_context_other_laws.pdf), and last accessed on 17 February 2013 at 6. Hence, the Democratic Left Front (DLF) opposed the Bill and stated that: 'In our analysis, the Bill embodies the increasingly autocratic and patriarchal approach of government — making it virtually impossible for rural people to be heard in their own rights without the mediation of unaccountable and unelected traditional leaders. In this way, government renders rural women and other rural dwellers essentially voiceless'. See 'The Democratic Left Front Calls for a New Law to Regulate Customary Access to Justice' in *Umdlaba Wethu 14: A Bulletin Tracking Land Reform in South Africa* op cit at 6. See also Weeks & Claassens (2011) op cit at 835.

<sup>113</sup> See re: Traditional Courts Bill, 15 of 2008 Submission to the Portfolio Committee on Justice and Constitutional Development, available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/comm\\_submission\\_rwm\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/comm_submission_rwm_2008.pdf), last accessed on 18 June 2013.

<sup>114</sup> 'The Objects of this Act are to —

(b) affirm the role of the institution of traditional leadership in —

(i) promoting social cohesion, co-existence and peace and harmony in traditional communities;

(ii) enhancing access to justice by providing speedier, less formal and less expensive resolution of disputes; and

(iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values'.

<sup>115</sup> Submissions to the Portfolio Committee on Justice and Constitutional Development Legal Resource Centre: in re Traditional tribunals Bill 15 of 2008 op cit at 4.4.3.

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as ‘the real impact of the circular wording of this section will be to enable the continuing representation of women by male family members’.<sup>116</sup>

Gender writers have thus challenged the Bill, head on, for refusing to tackle the issue of discrimination against women. While the Bill did consider the role of women as litigants, it ignored equal participation as members of the court. What it ought to have done was to make specific provisions protecting the rights of rural women as litigants and participants by promoting female presence in the composition of traditional tribunals as an institution.<sup>117</sup>

Members of various communities have also disagreed with the provisions of the Bill, condemning the concentration of legislative, executive and judicial powers in senior traditional leaders, against true customary practices. They argue for a separation of powers as provided for by the Constitution, and for contending the silence on the role of family, neighbourhood and ward meetings in dispute resolution. A fundamental issue is the marginalisation of women’s rights as litigants or judges in the Bill.<sup>118</sup>

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<sup>116</sup> See the Legal Resource Centre Submission on the Traditional Tribunals Bill at <http://www.lrc.org.za/>. See also Weeks in Nhlapo *et al* (2013) *op cit* at 29.

<sup>117</sup> S Weeks & N Luwaya ‘Courting Unconstitutionality: The Traditional Courts Bill and How it Strips Rural People of their Citizenship’ in *UmhlabaWethu: A Bulletin Tracking Law Reform in South Africa* *op cit* at 3–4. See also Claassens (2009) *op cit* at 5–6.

<sup>118</sup> See Submission on the Traditional Courts Bill (TCB) 2012 by Concerned Residents of Herschel, available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/herschel\\_apr2012\\_provsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/herschel_apr2012_provsubmission.pdf) at 1–4, and last accessed on 18 June 2013. See also Border Rural Committee’s submission (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/brc\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/brc_feb2012_ncopsubmission.pdf) at 1-2, and last accessed on 18 June 2013. See Submission on the Traditional Courts Bill by the Woodlands Residents Association (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/woodlands\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/woodlands_feb2012_ncopsubmission.pdf), and last accessed on 18 June 2013. See Submission on the Traditional Courts Bill by Illizwi Lamafama Farmers’ Union (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/illizwi\\_sept\\_2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/illizwi_sept_2012_ncopsubmission.pdf), and last accessed on 18 June 2013. See Submission on the Traditional Courts Bill by the Ndwayana Community Development Forum (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/ndwayana\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/ndwayana_feb2012_ncopsubmission.pdf), and last accessed on 18 June 2013. See Submission on the Rural People’s Movement to Parliament on the Traditional Courts Bill (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/rpm\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/rpm_feb2012_ncopsubmission.pdf), and last accessed on 18 June 2013. See Submission on the Traditional Courts Bill of 2008 available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/ngubane\\_feb2012\\_ncopsubmissions.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/ngubane_feb2012_ncopsubmissions.pdf), and last accessed on 18 June 2013. See Submission on the Traditional Courts Bill by Mahuntsi Traditional Community (Rotterdam Village – Limpopo Province) 2012, available at

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With these problems in mind, the final chapter summarises the thesis and proffers recommendations towards improving traditional justice for rural female litigants in the hinterland.

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[www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/mahunsi\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/mahunsi_feb2012_ncopsubmission.pdf), and last accessed on 18 June 2013. See also Submission on the Traditional Courts Bill by Moletji Community Property Association (2012), available at [www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/moletji\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/moletji_feb2012_ncopsubmission.pdf), and last accessed on 18 June 2013). See Traditional Courts Bill is Unpopular on the website of the Select Committee on Security and Constitutional Development Parliament, Cape Town (2012), available at [www.parliament.gov.za/live/content.php?item\\_ID+2476&Revision=en/1&searchstart=0](http://www.parliament.gov.za/live/content.php?item_ID+2476&Revision=en/1&searchstart=0), and last accessed on 19 June 2013.

## **CHAPTER VII**

### **CONCLUSION**

#### **1. Summary of the rights to access to justice, fair trial, equality and culture**

This thesis sought to investigate the difficulties facing rural litigants, primarily women, in accessing justice and obtaining a fair trial in South Africa. It has shown that, in formal courts, justice is expensive, complicated, physically out of reach, dispensed in an unfamiliar language and, in many circumstances, culturally inapplicable. Hence, rural litigants have to resort to traditional dispute resolution mechanisms, notably the courts of chiefs and headmen. Although the state's attention is generally focused on the formal justice system, this thesis argues in favour of directing funding and support to traditional tribunals.

Unfortunately, although these tribunals provide easier access to justice, they tend to violate Western notions of the right to fair trial, especially in cases involving women. Therefore, if the state is to fulfil its duty to provide equal access to justice, fair trial must be weighed against access.

A careful consideration of the process of fair trial indicates that breaches of that right in traditional courts may not be as serious as might first appear, for the following reasons:

1. Customary law does not make a clear distinction between civil and criminal trials in the way that common law does.
2. Western courts require impartial trial judges to apply law to facts (without regard to the long-term results of the judgment), whereas the aim of the

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traditional court system is concerned with the ultimate outcome—social harmony.

3. Proceedings before traditional courts have the additional advantage of promoting the right to culture.

In Chapter One, the thesis commenced with the problem of access to justice and fair trial in South Africa. It recognised that these issues are closely linked and that it is impossible to analyse access without reference to fair trial rights. The thesis established that formal courts generally apply the common law and have to be careful to uphold the Constitution, while traditional tribunals deal with only a limited range of cases, and apply customary law. The chapter concluded that both of these courts are fraught with problems and challenges that are unique to their nature and history.

In Chapter Two, the thesis located the origins of the rights of fair trial and access in both the international and the regional systems of human rights law. International treaty provisions were discussed and the jurisprudence on these rights was reviewed. The thesis examined the international regime and emphasised the lack of African participation during the drafting stages of the international conventions. It then described the incorporation of Western-style human rights into the South African legal system. From all indications, none of the authors of the bills of rights had contemplated the application of these rights by traditional courts.

Chapter Three further explored the elements of the right to a fair trial. It considered general and procedural guarantees, which require the independence and impartiality of judicial officers, the right to a fair and public hearing, legal representation, evidentiary protections and appeals. The right to equality is an implicit aspect of the right to a fair trial, and the chapter considered this right, highlighting the importance of gender equality. The thesis has recognised that the Constitution provides for the right to a fair trial in the same manner as the international human rights regime, apparently unmindful of the fact that traditional tribunals settle most of the disputes brought before them with a view to restoring

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parties to a harmonious relationship, which will be accepted by the community at large, and that this process sometimes clashes with the right to equality.

Chapter Four examined the problem of accessing the formal justice system. The chapter observed that the failure to provide for a right to legal representation in civil matters denies many litigants equal access. As a result, large numbers of urban and rural litigants, especially rural women, cannot obtain civil justice. The state's principal remedy for this problem – the provision of legal aid – has proved impossible to extend to all civil litigants. The chapter, therefore, considered the role of other organisations that supplement the efforts of Legal Aid South Africa, including university law clinics, private interest organisations, community advice centres and small claims courts. For lack of adequate resources, however, these institutions are able to assist only a few of the many deserving cases. It follows that the formal justice system is unlikely to resolve the problem of access to justice for rural women by providing them with equality of arms.

Chapter Five described the accessibility of traditional tribunals and argued that there are clear ideological differences between Western and African judicial systems and their respective understandings of fairness. While Western culture promotes procedural fairness and legalistic principles, African systems concentrate on giving both parties a full hearing and the community opportunity to debate the issues so that a solution can be found to which all parties agree. This chapter also showed the advantages of the flexible processes adopted in traditional tribunals.

Chapter Six traced the history of the traditional justice system in South Africa. Traditional rulers and their courts were recognised early in the colonial occupation, because governments appreciated that most people could not access the formal courts. In general, however, traditional courts were relegated to the margins of the colonial and apartheid judicial structures. The chapter also examined statutory interventions, since the coming into force of the new Constitution, and their impact on the alignment of traditional justice and fair trial.

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Chapter Seven suggests balancing the rights of culture and access to justice against that of a Western notion of a fair trial by enforcing the right to equality.

**2. Resolving conflicts between rights**

**a) Balancing the rights and the ‘internal’ limitation clause in ss 30 and 31**

The previous sections in this thesis have analysed the problem of access to justice and fair trial for rural women in South Africa. Based on this analysis, the thesis argues for the important role played by traditional tribunals in guaranteeing the right of access as well as the right of culture.<sup>1</sup> It acknowledges the problem of gender discrimination in these forums, but advocates for the state to strike a balance by weighing the right of access against the right to a fair trial—at least in civil cases.

This suggestion does not suggest disregarding the fundamental right to equality for female litigants, but recognises the need for traditional institutions, which require the state to strengthen their role in promoting good governance and the rule of law in South Africa. It also argues that formal courts are *de facto* discriminatory towards rural women, owing to the difficulties they confront in these forums, and it notes the inability of the state to fully enforce the right to legal representation in civil matters.

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.

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<sup>1</sup> Bennett argues that ‘where the society in question is in fact culturally plural, as South Africa still is, the legal endorsement of cultural differences gives effect to the pre-eminent right of self-determination. In this regard, it is noteworthy that most constitutional documents and international treaties include the protection of cultural rights’. See TW Bennett ‘The Compatibility of African Customary Law and Human Rights’ (1991) 18 *Acta Juridica* at 23.

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Hence, the state should not favour a Western legal system at the expense of the traditional African system.<sup>2</sup> In *Christian Education South Africa v Minister of Education*,<sup>3</sup> the Constitutional Court held that the state is obliged to preserve group identity through the use of own culture and language.<sup>4</sup>

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.

Although harmonisation will inevitably be an incremental process—no one should expect customary law to be transformed overnight—the delicate and complex nature of the task cannot justify courts in avoiding their responsibility to accommodate customary law to the ‘values which underlie an open and democratic society based on freedom and equality’. Even if interpreted narrowly as guarding only the individual’s freedom of cultural affiliation, would appear to require that customary law, which remains integral to the domestic culture of millions of South Africans, be accorded due respect.<sup>5</sup>

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.<sup>6</sup> Conversely, in *Kitok v Sweden*,<sup>7</sup> it recognised culture as a group right. Bennett contends that individual rights and group rights are in fact ‘symbiotic partners’:

the individual right to pursue a culture of choice presupposes the existence of a cultural community, and this community must first be secure if individual rights are to have any substance. Accordingly, it can be argued that a person’s right to have customary law applied to a dispute rests on membership of a group, which has a prior claim that the state recognise and enforce its law.<sup>8</sup>

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<sup>2</sup> See TW Bennett *Customary Law in South Africa* (2004) at 88.

<sup>3</sup> 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para 26.

<sup>4</sup> See also Bennett (2004) op cit at 88.

<sup>5</sup> J Mokgoro in *Du Plessis & others v De Klerk* 1996 (5) BCLR 658 at para 174.

<sup>6</sup> *Sandra Lovelace v Canada* 68 ILR 17.

<sup>7</sup> 96 ILR 637.

<sup>8</sup> TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) at 25.

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It follows that individual and communal rights do not exist independently of each other.

With the foregoing in mind, the role of courts involves constantly balancing conflicting rights and interests. As a result, they have devised a means of interpreting traditional norms in accordance with constitutional principles. Where the two differ sharply, some of the courts have declared traditional principles unconstitutional and inapplicable in a democratic society.<sup>9</sup>

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 international law.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

Banda has identified three potential guides to resolving a conflict between the rights to equality and culture. She speaks of the following:

a strong cultural relativism, which allows customary law to exist unfettered by considerations of non-discrimination or equality before the law provisions;

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<sup>9</sup> See *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; SAHRC & another v President of the RSA* 2005 (1) SA 580 (CC) at para 95.

<sup>10</sup> Section 7 of the Constitution.

<sup>11</sup> Section 39(2) of the Constitution.

<sup>12</sup> 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.

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a weak cultural relativism, which recognises customary law and also provides for equality before the law without making explicit the hierarchy between the formal recognition of equality provisions and the continued existence of customary law;

the ‘universalist’ position, which, whilst recognising customary law and a right to culture, makes both subject to the test of non-discrimination and equality before the law.<sup>13</sup>

According to Banda’s categorisation, in South Africa, the Constitutional Court leaned towards a weak cultural relativism or universalism, as seen in *Bhe & others v Khayelitsha Magistrate & others*,<sup>14</sup> and in *Shilubana & others v Nwamitwa*.<sup>15</sup>

Several jurists have 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 rights.<sup>16</sup> Justice Sachs in *S v Makwanyane & another*,<sup>17</sup> alluded to this when he said that:

the secure and progressive development of our legal system demands that it draw the best from all streams of justice on our country... it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice.<sup>18</sup>

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.<sup>19</sup> This suggests that certain rights may be recognised universally, but that they might also require subjective interpretation.

In line with the idea of weak cultural relativism, the decisions of the Constitutional Court has paved the way for the harmonisation of customary law and human rights. This approach will gradually encourage female participation in the development and application of customary law and the suppression of customs that

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<sup>13</sup> F Banda *Women, Law and Human Rights: An African Perspective* (2005) at 34.

<sup>14</sup> *Bhe v Magistrate, Khayelitsha (CGE as Amicus Curiae); Shibi v Sithole; SAHRC v President of the RSA* 2005 (1) SA 580 (CC).

<sup>15</sup> 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).

<sup>16</sup> See J Church, C Schulze & H Strydom *Human Rights from a Comparative and International Law Perspective* (2007) at 67.

<sup>17</sup> 1995 (3) SA 391 (CC).

<sup>18</sup> *Supra* at para 364–5.

<sup>19</sup> Church *et al* (eds) (2007) at 68.

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violate the right to equality and human dignity (which were all too often devised by colonial and apartheid authorities in conjunction with male traditional leaders).<sup>20</sup>

**b) Section 36(2): the limitation clause**

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 the following test:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In the *Makwanyane case*,<sup>21</sup> and in subsequent cases, the Constitutional Court held that the limitation clause requires a proportionality test, namely, a balancing of rights and interests. Hence, courts have to weigh the constitutional right against the law in question to ascertain whether it is reasonable and justifiable in an open and democratic society.

The courts have attempted to resolve the divergence between customary law and gender equality by applying the limitation clause in section 36(2) of the Constitution.

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<sup>20</sup> See Bennett (1991) op cit at 23.

<sup>21</sup> Supra at para 104. See also *S v Manamela & another* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32 and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 31.

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In doing so, they considered the interests of the recipients of the law. In *Bhe & others v Magistrate, Khayelitsha & others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & others*, the Constitutional Court held that:

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law, should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution... It is protected by and subject to the Constitution in its own right...it is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of common law or legislation...would be incorrect.<sup>22</sup>

In the *Bhe* case, the daughters of the deceased were challenging the appointment of the father of the deceased's sole heir to his estate under section 23(1) of the BAA.<sup>23</sup> They contended that they should have been so appointed and that the principle of primogeniture in customary succession was against their human dignity and right to equality. On final appeal, the Constitutional Court contrasted official customary law with living customary law, which held sway in this case, and declared the provisions of section 23 as unconstitutional and invalid.<sup>24</sup> The 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.<sup>25</sup> (To achieve a different result, however, the court could have sought to develop that rule as provided for in section 39(2)).<sup>26</sup> This rule of primogeniture could have been developed in line with the right to equality in the Constitution.

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<sup>22</sup> *Bhe v Magistrate, Khayelitsha* supra at para 41–2.

<sup>23</sup> Section 23(1) provides thus: 'All moveable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.'

<sup>24</sup> At para 143.

<sup>25</sup> Para 95.

<sup>26</sup> '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.'

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**c) ‘Developing’ customary law under section 39 and the ‘living’ law**

The Constitution requires equality for all citizens, regardless of race, sex, gender or status and any forum which negates one of these cannot be said to provide access to justice. While real access requires that all people can come to the court, it also demands that they can approach the court as equals.

In the *Bhe case*, the court rightly observed that the primogeniture principle was in violation of the non-discrimination provisions of the Constitution and proclaimed that ‘African females, irrespective of age or social status, are entitled to inherit from their parents’ intestate estate like any male person’.<sup>27</sup> The Court noted that:

the exclusion of women from heirship, and consequently from being able to inherit property, was in keeping with a patriarchal system which reserved for women a position of subservience and subordination in which they were regarded as perpetual minors under the tutelage of fathers, husbands or heads of the father’s estate in customary law.<sup>28</sup>

The Constitutional Court went on to hold that discrimination here, on the grounds of gender, was a clear violation of section 9(3) of the Constitution. It noted that it was a form of discrimination that entrenched past patterns of disadvantage among a vulnerable group, and was exacerbated by ‘old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order’.<sup>29</sup>

In *Shilubana & others v Nwamitwa*,<sup>30</sup> the Constitutional Court also affirmed the obligation of a traditional court to develop its customs and traditions to promote gender equality in accordance with the provisions of the Constitution. In that case, the Court was asked to decide whether a community has the authority to restore the position of traditional leadership—which was removed by reason of gender discrimination and the rule of male primogeniture. Justice Van der Westhuizen

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<sup>27</sup> *High Court of South Africa, Cape Provincial Division*, unreported case no 9489/02, at 13.

<sup>28</sup> *Supra* at paras 77, 78 and 89.

<sup>29</sup> Para 91.

<sup>30</sup> 2009 (2) SA 66 (CC).

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stated that section 211(3) of the Constitution demands that all courts should apply customary law, subject to the Constitution.<sup>31</sup>

What is interesting in this case is the Court's explicit reliance on section 39(2) to develop customary law in accordance with the spirit, purport and aims of the Bill of Rights.<sup>32</sup> Justice Van der Westhuizen, therefore, held that customary law was to be developed to reflect contemporary practice so that it did not remain rooted in the past.<sup>33</sup>

Accordingly, the Court enforced the position of Ms Shibulana, one of the daughters of the late Chief Fofeza, a former Hosi of the Valoyi community, as chief. The royal family of the Valoyi made the supporting statement that:

though in the past it was not permissible by the Valoyi[']s] that a female child be heir, in terms of democracy and the new Republic of South Africa's Constitution, it is now permissible that a female child be heir since she is also equal to a male child.<sup>34</sup>

These progressive decisions have the effect of increasing the use of courts, both formal and traditional, by rural litigants in general, and women in particular, thus increasing their access to justice.

To address the problem of gender discrimination in the courts, the following recommendations are made with the intention of mitigating Fundi's situation as described in the introduction to this thesis.

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<sup>31</sup> *Shilubana v Nwamitwa* supra at para 68.

<sup>32</sup> *Shilubana v Nwamitwa* supra at para 74.

<sup>33</sup> At para 55.

<sup>34</sup> Para 4.

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### 3. Reading rights together

#### a) **Civil and political rights cannot be realised unless the state fulfils its socio-economic duties**

At the foundation of the problem of enforcement of human rights are conceptual issues, which pit universal principles against cultural ideals as opposites. Universalists refuse to accept the impact of cultural differences on human rights, and consider them absolute in every context, while cultural relativists recognise the importance of promoting human rights within specific situations.

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.<sup>35</sup>

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.<sup>36</sup> Many have described international human rights conventions as the remnants of Western imperialism, and an attempt to impose Western cultural hegemony on Africans.<sup>37</sup> They contest the universality of the rights

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<sup>35</sup> See Bennett (2004) op cit at 83. See also J Nedelsky 'Reconceiving Rights and Constitutionalism' (2008) 7(2) *J of Human Rights* 143–144.

<sup>36</sup> '...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.

<sup>37</sup> 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*

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contained in the international treaties in the light of their Western philosophies and bourgeois values.<sup>38</sup> 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.<sup>39</sup>

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. This argument implies a limited degree of convergence between African and Western cultures, suggesting that a new approach to human rights in Africa is required.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup> They recommend that customary law should be influenced by the voices of rural women who are mostly affected by it.<sup>43</sup> In this manner, the content of living customary law can be developed through re-negotiated

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*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.

<sup>38</sup> See, for example, Bennett (1995) op cit at 1–2.

<sup>39</sup> 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.

<sup>40</sup> See Bennett (2004) op cit at 83.

<sup>41</sup> Ibid.

<sup>42</sup> A Claassens & S Mnisi ‘Rural Women Redefining Land Rights in the Context of Living Customary Law’ (2009) 25 *South African Journal on Human Rights* 491 at 494. See also V Bronstein ‘Reconceptualising the Customary Law Debate in South Africa’ (1998) 14 *SAJHR* 388 at 402–10.

<sup>43</sup> See Classens & Mnisi (2009) op cit at 513.

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power relations in the rural areas,<sup>44</sup> thereby removing sole right of control from traditional leaders to members of the community—who are mostly women.<sup>45</sup> This argument purports to align customary practices with constitutional principles, such as the right to equality, which does not necessarily have to remain in opposition to culture.<sup>46</sup> The approach of Classens and Mnisi-Weeks requires a balance between the core values embedded in both rights and culture, while guaranteeing women real and effective access to justice.<sup>47</sup>

In support, this thesis argues that a denial of women's social, economic or cultural rights undermines their civil and political rights.<sup>48</sup> This requires a re-distribution of resources as well as power relations within society.<sup>49</sup> Many arguments within this thesis have shown that traditional tribunals are more accessible to rural women than formal courts. These litigants are often poor and disadvantaged, but the government has provided very little financial or material support for traditional tribunals. Most solutions proffered 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.<sup>50</sup> The primary focus, however, needs to be the *capacity to access* a dispute

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<sup>44</sup> See Oomen B *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) at 251.

<sup>45</sup> 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 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).

<sup>46</sup> Classens & Mnisi (2009) op cit at 513.

<sup>47</sup> A An-Na'im *A Cultural Transformation and Human Rights in Africa* (2002) at 1.

<sup>48</sup> See the Montreal Principles; Appendix G.

<sup>49</sup> C Albertyn 'Equality' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) at 93–4.

<sup>50</sup> See E Wojkowska *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

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resolution forum, with secondary focus on the quality of justice.<sup>51</sup> The issue of quality or the level of fairness administered in traditional tribunals can only be tackled once there is access.<sup>52</sup> In the words of Bennett: ‘A realistic appraisal of social and economic conditions in South Africa may indicate that existing institutions can cater for individual needs, in the short term at least, more effectively than a bill of rights can’.<sup>53</sup>

#### b) The budget and funding

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.<sup>54</sup> For example, the government has been focusing on enforcing the right of

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<http://www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf> at 12, and last accessed 13 February 2013.

<sup>51</sup> Ibid.

<sup>52</sup> Wojkowska (2006) op cit at 6.

<sup>53</sup> Bennett (1994) op cit at 123.

<sup>54</sup> 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’. See Submissions to the Portfolio Committee on Justice and Constitutional Development by the Legal Resource Centre: in re Traditional Tribunals Bill 15 of 2008 on 6 May 2008, available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal\\_submission\\_lrc\\_2008.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/legal_submission_lrc_2008.pdf), and last accessed on 17 February 2013 at 1.3. CRM Dlamini put it best, when he said: ‘the decisions of chiefs result in fewer costs; the proceedings are 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.

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access to health for the poor and disadvantaged in society, by recognising the socio-economic injustices, imbalances and inequities of health services of the past.<sup>55</sup>

Bearing in mind the statistics on how many people use traditional tribunals, the state ought to provide adequate financial support to these courts. As was discussed in Chapter Six, information from the DTA's budget in recent years shows that funding is inadequate-and that the funding is channeled through traditional councils, which may well be disbursing the monies on other matters. Formal courts, on the other hand, receive far more generous budgets, even though they may not administer as many cases. 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*,<sup>56</sup> the Constitutional Court stated that:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society . . . . Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 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.<sup>57</sup>

If anything, this statement is indicative of the approach that government and other courts should take in their approach to human rights. As the Court stated, these rights are 'inter-related' and mutually supporting.<sup>58</sup> Hence, the right to a fair trial – and the

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<sup>55</sup> See the Preamble to the National Health Bill of 2003 at <http://www.doh.gov.za/docs/bills/b32b.pdf>, last accessed 6 September 2013. See also

<http://www.info.gov.za/view/DownloadFileAction?ID=70285>

<sup>56</sup> 2000 (11) BCLR 1169 (CC).

<sup>57</sup> *Grootboom* supra at para 23.

<sup>58</sup> 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

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implicit right to equal treatment – must be read in conjunction with what is, in essence, a socio-economic right: that of access to justice. There should, therefore, be no question of placing greater value on one right over another.

The implications, however, cannot be ignored. The Constitutional Court reiterated the statement in the *Certification* judgment<sup>59</sup> thus:

(T)hese rights are, at least to some extent, justiciable. As we have stated . . . , many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.<sup>60</sup>

To have a fair trial, the individual needs to have his or her right of access to courts upheld.<sup>61</sup> When it comes to access, the words of Lord Justice Stephen Sedley drive home the fact that:

the hard truth — truism even — that rights without remedies are of little value. To possess a right of free speech or movement is of little value if you lack the legal means to vindicate it when others obstruct it; and legal means include both access to the courts and skilled representation in court.<sup>62</sup>

Therefore, civil and political rights may also impose positive duties on the state, which require a careful re-consideration of the budget. The state is required to adopt appropriate legislative, administrative, budgetary, judicial and promotional measures towards the full realisation of this right.

Budlender argues that what is required of the state is the creation of an environment in which individuals can enjoy the right through their own efforts. Where they have failed to do this for themselves, the state has an obligation to fulfill

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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.

<sup>59</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744.

<sup>60</sup> *Government of the Republic of South Africa & others v Grootboom & others* supra at para 20.

<sup>61</sup> See I Currie, J van de Waal & G Erasmus *The Bill of Rights Handbook* (2001) at 434.

<sup>62</sup> S Sedley 'The Free Individual and the Free Society' in Stephen Sedley (ed) *Freedom, Law and Justice* (1999) at 3.

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and provide those rights directly.<sup>63</sup> Liebenberg agrees and has defined state duty to fulfill human rights in the following manner:

[It] requires the state to take positive measures to assist those who currently lack access to the rights to gain access to them. This includes the adoption of 'enabling strategies' to assist people to gain access to the rights through their own endeavours and initiatives, as well as more direct forms of assistance to groups in especially vulnerable or disadvantaged circumstances.<sup>64</sup>

It is thus crucial for the government to provide access to courts to guarantee the enjoyment of the other rights mentioned in the Bill of Rights.<sup>65</sup> Justice Ackermann, in the case *S v Makwanyane & another*,<sup>66</sup> emphasised the duty of the government to protect ordinary citizens as provided for by the Constitution, when he said that:

in a Constitutional State individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the state, in the Constitutional State compact, assumes the obligation to protect these rights. If the state fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights.<sup>67</sup>

Given the clear constitutional provisions and the interpretations emanating from the courts, the state is obliged to ensure that justice is accessible. As mentioned before, budgetary implications arise in the fulfillment of all rights. Scarcity of resources does not relieve the state of its duty to ensure its 'core minimum obligations', and, with this aim in view, the state must strive to implement the right of access for rural litigants, particularly women.

Lack of resources should not serve as a justifiable limitation of the right of access to courts. Section 36(1) provides for limitations to the extent that they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This requires a proportionality test of the extent to which the state has funded traditional justice systems in relation to formal courts.

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<sup>63</sup> G Budlender 'Access to Courts' (2004) 121 *SALJ* 339 at 346.

<sup>64</sup> S Liebenberg 'Socio-Economic Rights' in M Chaskalson, S Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1996) at 41.

<sup>65</sup> *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC) at 549.

<sup>66</sup> 1995 (3) SA 391 (CC).

<sup>67</sup> *Supra* at para 168.

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Furthermore, a re-apportionment of the budget of traditional tribunals may enable wider reach from rural to urban areas. With the crisis of access to formal justice in the country, suburban dwellers may prefer customary courts to no courts at all—in particular, litigants seeking enforcement of communal rights in tandem with individual human rights.

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