



An analysis of judicial functions of traditional leaders in South Africa



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Abstract

Traditional leadership has played a vital role in establishing social cohesion, peace, and harmony in communities for a long time. Traditional leaders resolve disputes through traditional courts (*makgotla* or *inkundla*), as is the case in the sphere of administration of justice. However, the adoption of the *Constitution of the Republic of South Africa, 1996* recognised the institution, status, and role of traditional leadership according to customary law but subject to the *Constitution*. It also recognises that, subject to any applicable legislation and customs, a traditional authority following a system of customary law may function. The *Constitution*, which is based on the grounds of human dignity, the achievement of equality, and the advancement of human rights and freedoms, non racialism and non-sexism. This constitutional dispensation repealed and amended discriminatory laws and practices.

The South African legislative framework is constructed in such a way that it mitigates historical injustices by promoting constitutional principles such as human dignity and equality. However, there are still legislative provisions that appear to be ineffective regarding the mechanisms to hold traditional leaders accountable for misconduct when exercising judicial authority.

This dissertation examines the judicial functions of traditional leaders in South Africa. In doing so, it analyses the historical background of the judicial functions of traditional leaders in South Africa, and the legal framework regulating the traditional justice system in South Africa. It analyses traditional leadership and traditional courts operating under customary law and constitutional recognition. Traditional leaders have jurisdiction to hear both civil and criminal cases in traditional communities. Furthermore, the study proposes measures that can be employed to ensure that traditional leaders who exercise judicial authority can be held accountable for judicial misconduct.

Keywords: Traditional leadership, traditional courts, judicial functions, democracy, traditional authorities, legislation, Constitution

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List of abbreviations and acronyms

BAA	Black Administration Act 38 of 1927
CLS	Centre for Law and Society
Comp & Intl LJ S Afr	Comparative and International Law Journal of Southern Africa
DOJ & CD	Department of Justice and Constitutional Development
ECTLGA	Eastern Cape Traditional Leadership and Governance Act 4 of 2005
FSTLGA	Free State Traditional Leadership and Governance Act 8 of 2005
KZNTLGA	KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005
LTLIA	Limpopo Traditional Leadership and Institutions Act 6 of 2005
MSA	Municipal Structures Act 117 of 1998
MTLGA	Mpumalanga Traditional Leadership and Governance Act 3 of 2005
NHTLA	National House of Traditional Leaders Act 10 of 1997
NWTLGA	North West Traditional Leadership and Governance Act 2 of 2005
PELJ	Potchefstroom Electronic Law Journal
SACQ	South African Crime Quarterly
SAJHR	South African Journal on Human Rights

SALC	South African Law Commission
SALJ	South African Law Journal
TCB	Traditional Courts Bill, 2017
TLGFA	Traditional Leadership and Governance Framework Act

Chapter 1: Introduction

1.1 Background to the study

The South African *Constitution*¹ recognises the institution, status, and role of traditional leadership according to customary law but subject to the *Constitution*.² It also recognizes that, subject to any applicable legislation and customs, a traditional authority following a system of customary law may function.³

The *Black Administration Act*,⁴ which was defined by racial segregation, was repealed in November 2005. Therefore, the government is confronted with a duty to enact new legislation in order to regulate traditional leaders' roles and functions in the administration of justice.⁵ After the 1994 elections, South Africa transitioned to a new democratic order. The new democratic order was defined by transformation, which meant that practices and legislation that existed before the democratic dispensation were to be reviewed.⁶ The government seeks to change the traditional leadership institution to be more in line with constitutional values like equality and non-discrimination.⁷

In old-style communities, the body of traditional leadership plays a key role in administering justice.⁸ It is also important to mention that traditional leadership is recognised by the *Constitution* and closely linked to the cultural heritage of African people.⁹ Customary law has existed for a long time and is still applied by members of traditional societies.¹⁰ The South African legal system recognises customary law. As such, members of traditional communities do accept and acknowledge the practices and principles of customary law, including the traditional court system that applies

¹ *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

² Section 211 of the *Constitution*.

³ Section 211(2) of the *Constitution*.

⁴ 38 of 1927 (hereafter the *BAA*).

⁵ Mokgoro 1996 *Review of Constitutional Studies* 61-62.

⁶ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 13-14.

⁷ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 7.

⁸ Department of Justice and Constitutional Development (hereafter the DOJ & CD) 2008 *Policy Framework on the Traditional Justice System under the Constitution* https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 1.

⁹ Himonga and Manjoo 2009 *Malawi Law Journal* 160.

¹⁰ Sekgala 2018 *Bangladesh e-Journal of Sociology* 82-83.

customary law.¹¹ In relation to the Khoi and San people living in South Africa, the *Traditional and Khoi-San Leadership Act*¹² is the first legislative recognition of the Khoi-San communities. The Act recognises Khoi-San communities and their leadership positions.

The institution of traditional leadership plays an important role in promoting social cohesion, and peace, and harmony within communities.¹³ What happens, in this field of the administration of justice, is that traditional leaders resolve disputes through traditional courts (*makgotla* or *inkundla*). Traditional courts are important and significant because they are closest to communities and use the language and procedures that they are familiar to the communities, as opposed to the formal procedures applied by the formal courts (Magistrates' Courts, High Courts, Supreme Court of Appeal, and the Constitutional Court).¹⁴ A traditional leader sits in a commune (*lekgotla*) with his or her councillors and hears evidence put forth by complainants and "accused" persons. They hear and resolve disputes in accordance with the customs and cultural practices that are applicable to the relevant community. This differs from the formal court system as written sets of rules are not applicable in the traditional courts.¹⁵ In this way, justice is quickly and easily relinquished.

One of the basic principles of our constitutional democracy relating to the legal system it is to treat both African customary law and the common law equally. Therefore, one can accept that the *Constitution* is designed to deter the infiltration of its colonial legacy as previously envisioned by the now outlawed systems of "separate development" and "apartheid".¹⁶ As a result, traditional law and its principles, as they are practised within our traditional communities, have not been promoted or developed alongside other legal systems that are used in our courts.¹⁷

¹¹ Himonga and Manjoo 2009 *Malawi Law Journal* 163.

¹² 3 of 2019 (hereafter the *Traditional and Khoi-San Leadership Act*).

¹³ Rautenbach "South Africa: Legal Recognition of Traditional Courts – Loose Ties between Two Judicial Systems" 4-5.

¹⁴ Rautenbach "South Africa: Legal Recognition of Traditional Courts – Loose Ties between Two Judicial Systems" 4.

¹⁵ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 18.

¹⁶ Khunou 2011 *International Journal of Humanities and Social Science* 290.

¹⁷ *Pilane v Pilane* 2013 4 BCLR 431 (CC) (hereafter the *Pilane* case) para 35.

Ever since 1994, South Africa, as a constitutional democracy, has for the first empowered the constitutional recognition of customary law as an independent source of traditional law, subject to the *Constitution*.¹⁸ As a result, it paved the way for new and innovative approaches to the adjudication and resolution of problems arising from customary laws and customs.¹⁹

Section 211(1) of the *Constitution* recognises the institution of traditional leadership and confirms its status and its role according to customary law and subject to the *Constitution*.²⁰ Section (3) "empowers courts to adopt customary law when it is appropriate, subject to the Constitution and any applicable laws."²¹ To achieve this goal, it becomes important for the government to adopt legislation that regulates the traditional justice system and traditional courts. According to Koenane, South Africa has adopted a new path in terms of how traditional leadership, women, and traditional courts are viewed.²²

The legislature has enacted legislation, such as the *Traditional Leadership and Governance Framework Act*,²³ and the government has published some notices, policies, and draft documents, such as the White Paper on Traditional Leadership and Governance, 2003.²⁴ These laws and draft documents are aimed at redefining traditional leadership and traditional courts. The *Constitution* recognises customary law and customary courts.²⁵ The constitutional acknowledgement of customary law and traditional courts obliges legislative measures to incorporate this form of justice into the conventional justice system. As a result, the legislature has been working on a Traditional Courts Bill, 2017 (hereafter the TCB) intending to regulate the traditional justice system, with a focus on traditional courts.

¹⁸ Khunou 2009 *PELJ* 109.

¹⁹ Bekker 2008 *PELJ* 1.

²⁰ Himonga and Manjoo 2009 *Malawi Law Journal* 162.

²¹ Section 211(3) of the *Constitution*; see also Himonga and Manjoo 2009 *Malawi Law Journal* 162.

²² Koenane 2018 *Africa Review* 1-16.

²³ 41 of 2003 (hereafter the *TLGFA*).

²⁴ Gen Not 2336 in GG 25438 of 10 September 2003 "White Paper on Traditional Leadership and Governance" published as Gen Not 2336 in GG 25438 of 10 September 2003 (hereafter the White Paper on Traditional Leadership and Governance).

²⁵ Section 211 of the *Constitution*.

However, some studies have revealed that the adoption of progressive policies and legislation has not effectively rendered new and innovative ways to adjudicate and resolve disputes emanating from traditional law and custom (in traditional communities or South Africa as a whole). For instance, the TCB has not been well received as it has enticed criticism from academics, politicians,²⁶ and civil societies.²⁷ Among the criticism put forth are that the legislature did not take into account the recommendations put forth by the South African Law Reform Commission (hereafter the SALRC), and that the TCB fails to recognise key issues that are fundamental to the traditional justice system,²⁸ such as legal representation, jurisdiction, abuse of power by traditional leaders, the inability to opt-out of traditional councils jurisdiction, women vulnerability under the TCB, gender, and the hierarchy of courts.²⁹

Even when the TCB addresses these issues, it does so in such a manner that is inadequate. Lastly, community activists referred to the TCB as the "Bantustan Bill", because it reinforces the boundaries of the old Bantustan tribal authorities.³⁰ This is indefensible since the traditional courts are responsible for administering justice in traditional communities.

Traditional courts are still referred to as patriarchal and benefiting the interests of traditional leaders just as they did during the periods of colonisation and apartheid periods wherein the oppressive regimes used traditional courts to cause tribal conflicts and advance their rule.³¹ While appreciating the pluralistic nature of South African law, the author submits that traditional communities have the potential to develop customary law and bring it in line with the values as espoused in the *Constitution*. In this context, a "top-bottom" approach refers to where the traditional leader is given more power over his or her subjects (being the members of the traditional communities).

²⁶ Makinana 2013 <http://mg.co.za/article/2013-10-17-traditional-courts-fracas-goes-on>.

²⁷ Classens 2009 *Agenda* 11-20; Weeks 2011 *SACQ* 3-5; Gasa 2011 *SACQ* 24-26; Williams and Klusener 2013 *SAJHR* 277-291.

²⁸ Wicomb 2017 <http://resources.lrc.org.za/resisting-the-traditional-courts-bill/>.

²⁹ Weeks 2016 *SACQ* 4-5.

³⁰ Osman 2018 *SACQ* 46.

³¹ Rakate 1997 *Comp & Intl LJ S Afr* 10.

On the other hand, the "bottom-up" approach aims to revoke the tradition that the traditional leader has the final say in dispute resolutions. The bottom-up approach is simply understood simply as enabling traditional communities to develop their own laws to meet the demands of a changing society under the *Constitution*.³² The bottom-up approach has clearly been demonstrated in the case of *Shilubana v Nwamitwa*³³ where the Constitutional Court was asked to examine whether a traditional society may construct customary law and bring it into compliance with the *Constitution*.³⁴

The case can be summarised as follows: when the Valoyi traditional leader died in 1968 without a male child, the chieftaincy was given to his young brother even though he was survived by his daughter.³⁵ In accordance with the equality clause in the *Constitution*, the Royal Council decided to confer the chieftainship on the daughter. The resolution was undertaken during the younger brother's time in power. Following the death of the reigning brother in 2001, the majority of village members proclaimed the daughter as their traditional leader. However, the aggrieved eldest son of the deceased brother approached the High Court seeking an order declaring him as a rightful party to ascend to the Chieftainship.³⁶ His application was successful and the Court provided that the conduct of the Valoyi Royal Council was a "drastic departure from custom and did not constitute development or evolution, and as such, it was beyond the functions and powers of the royal family".³⁷

After the Supreme Court of Appeal confirmed the High Court's ruling, the daughter approached the Constitutional Court, which overturned the Supreme Court of Appeal's decision, confirming that the daughter is the community's rightful new chief. The Constitutional Court stated:

"If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary and deference should be paid to the development by

³² *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 45.

³³ 2009 2 SA 66 (CC) (hereafter the *Shilubana v Nwamitwa* case).

³⁴ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 1.

³⁵ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 3.

³⁶ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 7.

³⁷ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 25.

customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law."³⁸

Academics and our courts have described the South African *Constitution* as a transformative tool.³⁹ Because the *Constitution* seeks to transform the country from its past (which is riddled with inequality and human rights violations) to a future that is defined by equality and the advancement of human rights. As a result, section 2 of the *Constitution* declares that the *Constitution* is the supreme law of the Republic, implying that the *Constitution* influences and qualifies all laws and actions, as well as all traditions, customs, customary norms, and the traditional rule system.⁴⁰ However, the evidence suggests that it is hard to believe that the government has taken necessary and adequate measures to comply with its constitutional mandate to prohibit inequality in access to justice by all people living in traditional communities. This dissertation is thus motivated by these concerns and seeks to stress the importance of upholding the right to access to justice in South Africa, especially in rural communities where customary law applies.

1.2 Problem statement

Despite the recognition and acknowledgement of traditional courts in traditional communities, the majority of people in traditional communities remain dissatisfied with the manner in which traditional leaders administer justice.⁴¹ The issue is that the judicial functions and powers of traditional leaders are not clearly defined.⁴² For example, section 20 of the *TLGFA* does not give powers directly to traditional leaders, and instead, it indicates that the government may have a role for traditional council or traditional leaders in respect of certain areas, which amongst them is the administration of justice.⁴³ There is a clear *lacuna* in that there is no legislative mechanism for addressing judicial transgression involving traditional leaders when

³⁸ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 49.

³⁹ Klare 1998 *SAJHR* 146-155.

⁴⁰ Khunou 2009 *PELJ* 111.

⁴¹ *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly* 2017 2 All SA 463 (WCC) para 33.

⁴² Buthelezi and Yeni 2016 *Nelson Mandela Foundation* 3.

⁴³ Section 20(1) of the *TLGFA*.

they exercise their judicial authority. This legislative deficiency may create a room for traditional leaders to abuse their powers when exercising their judicial functions.

The *TLGFA* establishes a code of conduct⁴⁴ for traditional leaders and empowers provincial governments to enact their own codes of conduct for traditional leaders in their jurisdictions. Traditional leaders will be aware of what is expected of them with regards to behaviour, which is a progressive measure. Members of traditional communities will be able to hold traditional leaders accountable by citing the standards of the code of conduct. Traditional leaders, however, need to be held to a defined code of conduct, according to press sources, in order to defend the institution of traditional authorities and the people under their jurisdiction.⁴⁵ This will ensure that traditional community members are able to firmly raise their issues towards traditional leaders without fear of victimisation. This means that traditional leaders will be held accountable by their communities.

There is a sense that Traditional Councils also do not make it easy for members of traditional communities to effectively raise their issues and hold traditional leaders accountable.⁴⁶ Traditional councils utilise their official status or recognition to prevent traditional community members from holding meetings, meetings which may serve the purpose of holding traditional leaders accountable. Traditional councils maintain that this is because they are the legitimate traditional councils and that other members of the community lack the legal capacity to demand accountability.⁴⁷

The unclear code of conduct leads to confusion and clashes between traditional leaders and community members, and it consequently impedes the right of ordinary people in traditional communities to access the courts as afforded by the *Constitution*.⁴⁸ As such, this raises the question relating to how the power is regulated

⁴⁴ Section 27 of the *TLGFA*.

⁴⁵ Tshela 2005 *Institute for Security Studies Monographs* 18.

⁴⁶ CLS 2015 "*The Official Recognition of Traditional Councils and the Legal Standing of Community Members*" 3.

⁴⁷ CLS 2015 "*The Official Recognition of Traditional Councils and the Legal Standing of Community Members*" 4.

⁴⁸ Section 34 of the *Constitution of the Republic of South Africa, 1996*.

and what safeguards there are to ensure a rational relationship between traditional leaders and traditional community members and attaining a legitimate relationship.

Tshitangoni and Francis provided that uncertainty of the respective powers of traditional authority was a cause for concern and was likely to trigger conflicts.⁴⁹

Traditional leaders' duties, powers, and functions were incorporated both in the homelands and apartheid legislative frameworks. Moreover, those various pieces of legislation like the *Bantu Authorities Act*,⁵⁰ the *Bantu Homelands Citizenship Act*,⁵¹ and the *Bantu Self-Government Act*⁵² weakened the foundations on which the traditional leadership institution was created and established.⁵³ With the arrival of South Africa's constitutional democracy, the institution of traditional leadership should consider redefining itself for it to be in harmony with the democratic dispensation.

South Africa is still faced with the challenges of transforming the traditional justice system.⁵⁴ There have been attempts to deal with this challenge. However, these attempts have not fully addressed the problem. Ntlama posits that the introduction of the TCB is to reverse the distortions inflicted on African traditional justice through many years of colonialism and apartheid.⁵⁵ Recognising that traditional leaders abuse their powers⁵⁶ and violate the rights of the people living in the traditional communities⁵⁷ necessitates a legislative mechanism dealing with judicial misconduct of traditional leaders when they exercise judicial authority.

1.3 Motivation

The dissertation seeks to explore and identify the underlying reasons for the dissatisfaction of people residing under traditional communities regarding how traditional leaders discharge their judicial functions. It analyses the constitutional and

⁴⁹ Tshitangoni and Francis 2017 *Studies of Tribes and Tribals* 8.

⁵⁰ 68 of 1951.

⁵¹ 26 of 1970.

⁵² 46 of 1959.

⁵³ Himonga and Manjoo 2009 *Malawi Law Journal* 161.

⁵⁴ Khunou 2009 *PELJ* 117.

⁵⁵ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 6-30.

⁵⁶ Tshehla 2005 *Institute for Security Studies Monographs* 18.

⁵⁷ Wicomb 2017 <http://resources.lrc.org.za/resisting-the-traditional-courts-bill/>.

legislative provisions that speak to the administrative role being played by traditional leaders with respect to justice in South Africa. Furthermore, the dissertation seeks to propose changes in the legislation relating to the role of traditional leaders in the administration of justice. This is particularly important because it seeks to enforce the alignment of the traditional justice system with the *Constitution* and as a result, the rights of people in traditional communities will be protected. Traditional leaders are not provided with training on how to administer justice among their community members.⁵⁸ Thus, they are prone to err in their judicial functions and they are not held accountable for their misconduct.

1.4 Research question

To what extent does the existing legal framework address the judicial misconduct of traditional leaders when exercising their judicial authority?

1.5 Research method

The qualitative research method and the quantitative research method, according to Maree, are the two basic types of research methodology.⁵⁹ According to Creswell,⁶⁰ the distinction between the two methodologies is primarily defined by the use of words in qualitative research versus numbers in quantitative research, or the use of open-ended questions in the former, versus closed-ended questions in the latter. The issue of quality in qualitative research can be addressed by addressing issues of validity, practicability, and efficacy.⁶¹ In the sense that it deals with statistics and uses statistical processes to study research problems, quantitative research is empirical.⁶²

This dissertation adopts the qualitative research method and uses primary sources (such as the *Constitution*, legislation, and case law) and secondary sources (including journal articles, books, chapters in books, and internet sources). Books, journal articles, case law, and legislation are used in the qualitative research technique.

⁵⁸ See DJCD 2009 http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/DOJ_report_2009.pdf at 3.1.3.

⁵⁹ Maree 2007 *Van Schaik Publishers* 38-39.

⁶⁰ Creswell 2017 *Sage publications* 4.

⁶¹ Maree 2007 *Van Schaik Publishers* 38.

⁶² Maree 2007 *Van Schaik Publishers* 39.

Desktop research facilitates this research by allowing for a more generalised debate as it is hard to account for the situational realities in all recognised and unrecognised traditional groups in South Africa. This dissertation relies on both primary and secondary legal sources.

1.6 Framework of the study

This dissertation is divided into five chapters. Chapter one consists of an introduction to the dissertation, the background to the research, problem statement, research question, significance or purpose of the study, research methodology, statement regarding ethics, framework of the study, and a summary.

Chapter two covers the historical background of judicial functions of traditional leaders in South Africa. Chapter three explores the legal framework regulating the traditional justice system in South Africa. Chapter four deals with the challenges and successes of the traditional justice system.

Chapter five concludes the research and suggests some recommendations on how challenges within the traditional justice system can be curbed.

1.7 Relevance for the research unit

This research falls within a broad focus of the research unit Law, Justice, Sustainability. It falls under the subcategory "Justice in Practice". The research analyses access to justice for people living in the traditional communities, the role of traditional leaders in the administration of justice, and the introduction of traditional courts. The research also seeks to interrogate the reasons for the introduction of traditional courts outside the ordinary courts in South Africa, without providing for the accountability of traditional leaders when exercising their judicial functions. The subject field is of importance because of its contribution to the existing body of knowledge on the role of traditional leaders in administering justice in South Africa.

1.8 Significance of the research

This research is important to the members of traditional communities as a whole as it may contribute towards the development of the body of knowledge — particularly issues faced by the institution of traditional leadership and members of traditional communities. It is also important because it contributes towards the advancement of the lives of people living in traditional communities in a sense that fewer conflicts between traditional leaders and members of traditional communities will occur if effective measures for holding traditional leaders accountable are undertaken. It is also important for the government to consider reform policies and legislation regarding the current legislation regulating the traditional justice system to prevent the judicial misconduct of traditional leaders.

1.9 Summary

This chapter serves as an introductory chapter and contextualises and outlines the research. This chapter provides the background to the research, the problem statement, research question, research methodology, and the scope and limitations of the study.

The next chapter focuses on the historical background of judicial functions of traditional leaders in South Africa.

Chapter 2: Historical background of judicial functions of traditional leaders in South Africa

2.1 Introduction

This chapter presents the historical legal background on the judicial functions of traditional leaders in South Africa during the pre-colonial era and the colonial period. An analysis of the hierarchy, composition, and procedure of traditional courts is undertaken. This is crucial as the traditional courts provide a platform where the judicial functions of the traditional leaders are exercised. This chapter analyses the judicial functions of traditional leaders as adjudicators in traditional courts, charged with the responsibility of administering justice in traditional communities.

2.2 Precolonial period

There is very limited literature on the state of traditional courts and judicial functions of traditional leaders in South Africa in the pre-colonial period. However, before the arrival of the Dutch and British colonisers, indigenous legal institutions were found everywhere in South Africa.⁶³ Khunou argues that in pre-colonial Africa, kings were supported by a hierarchy of chiefs, counsellors, and advisors who were either close relatives or chosen from their communities.⁶⁴ They settled disagreements with a focus on reconciliation, ensuring neighbourly harmony as a result.⁶⁵

Hugh makes an argument that traditional leaders served as judges in cases involving customary law.⁶⁶ According to Ntloedibe, the traditional leaders' duties in pre-colonial times (in terms of customary law and custom) were to fairly adjudicate disputes.⁶⁷ Traditional courts differed from one location to the next.⁶⁸ Traditional chiefs served as supreme judges in these courts, acting on the recommendations of their executive councils,⁶⁹ as the presiding traditional leader and his councillors (the bench of the

⁶³ Khunou 2011 *International Journal of Humanities and Social Science* 278.

⁶⁴ Khunou 2011 *International Journal of Humanities and Social Science* 278.

⁶⁵ Khunou *A legal history* 23.

⁶⁶ Hugh *Traditional Leadership* 52.

⁶⁷ Ntloedibe "The Role of Traditional Leaders" 3-4.

⁶⁸ Khunou *A legal history* 23.

⁶⁹ Khunou *A legal history* 23.

court) were natural components of the community.⁷⁰ These court officers were usually community elders who contributed to the traditional courts' success.⁷¹

According to Holomisa, in the old system of justice administration, a hierarchy began with the clan and close kin, particularly if the parties were from come from the same clan.⁷² Family leaders, in collaboration with family elders, frequently settle family issues at this level.⁷³ According to Holomisa, courts of sub-headmen were then established, with jurisdiction over the village as a whole, as well as the numerous neighbouring clans.⁷⁴ The court of the headman, whose jurisdiction included several villages led by sub-headmen under his authority, was third in the hierarchy.⁷⁵ The traditional leader's court was at the apex of the hierarchy. According to Holomisa, this system is known as the traditional authority.⁷⁶ The king's court was the highest level in the hierarchy.⁷⁷ The king's court also served as a court of appeal.⁷⁸

The courts of traditional leaders had jurisdiction over criminal and civil cases.⁷⁹ However, Rakate argues that there was no clear distinction between civil and criminal cases.⁸⁰ Court hearings were held openly, both verbally and figuratively, as Holomisa observes.⁸¹ Traditionally, court proceedings were held under a tree or near a cattle kraal, and traditional courts, unlike western common law courts, worked on an inquisitorial basis.⁸² The approach and process were comprehensive.⁸³ Everyone in the courtroom was allowed to partake in the examination and cross-examination of all relevant parties.⁸⁴

⁷⁰ Khunou *A legal history* 24.

⁷¹ Khunou *A legal history* 24.

⁷² Holomisa 2011 *South African Quarterly* 2.

⁷³ Holomisa 2011 *South African Quarterly* 2.

⁷⁴ Holomisa 2011 *South African Quarterly* 2.

⁷⁵ Holomisa 2011 *South African Quarterly* 2.

⁷⁶ Holomisa 2011 *South African Quarterly* 2.

⁷⁷ Holomisa 2011 *South African Quarterly* 2.

⁷⁸ Holomisa 2011 *South African Quarterly* 2-3.

⁷⁹ Khunou *A legal history* 26.

⁸⁰ Rakate 1997 *Comp & Intl LJ S Afr* 180.

⁸¹ Holomisa 2011 *South African Quarterly* 2-3.

⁸² Rakate 1997 *Comp & Intl LJ S Afr* 181.

⁸³ Khunou *A legal history* 26.

⁸⁴ Bekker 2002 *Speculum Juris* 246.

The verdict was made after the evidence had been presented and acquired from the witnesses and parties involved.⁸⁵ After all deliberations, the traditional leader, who also served as the presiding officer, then delivered his verdict.⁸⁶ The reasons for the decision were properly stated to the parties involved. The decision of the traditional chief had to be approved by his councillors. Traditional leaders were required to restore social equilibrium and secure the agreement of both parties to a compromise decision in the performance of their judicial duties under traditional justice.⁸⁷

Traditional leaders, according to Rautenbach, use traditional court institutions and customary law values and principles to resolve disputes in their communities.⁸⁸ Indigenous societies had a rudimentary system of justice in pre-colonial times, which was based on their customs and traditions.⁸⁹

In general, this system consisted of a hierarchical court structure with the family at the bottom, followed by ward heads, then headmen, then chiefs, and finally the king at the top.⁹⁰ In his sole capacity, or in collaboration with other notable members of the community, a traditional leader fulfilled executive, legislative, and judicial functions.⁹¹

In pre-colonial times a traditional court consisted of the traditional chief as presiding officer, who was aided by his councillors.⁹² As mentioned, the sessions were frequently held under a tree and were informal. There were no official standards of evidence in place, and any member of the community (typically limited to males) could cross-examine the accused.⁹³ The court was the court of first and final instance, and the criminal was bound by the court's decision. The hearing's major goal was to remedy the community's imbalance produced by the offender, as opposed to the main goal of

⁸⁵ Khunou *A legal history* 26.

⁸⁶ Khunou *A legal history* 26.

⁸⁷ Khunou *A legal history* 27.

⁸⁸ Rautenbach 2015 *J. Int'l & Comp. L* 6.

⁸⁹ Sections 1 and 2 of the *TLGFA*.

⁹⁰ Khunou *A legal history* 24, see also Holomisa 2011 *South African Quarterly* 2.

⁹¹ Rakate 1997 *Comp & Intl LJ S Afr* 180.

⁹² Khunou *A legal history* 23.

⁹³ Bekker 2002 *Speculum Juris* 246.

Western law, which is to compensate individuals in civil cases and to punish them in criminal cases.

2.3 Colonial period

There was some confusion concerning the status of customary law during South Africa's colonial and Union periods, respectively,⁹⁴ especially after the British imposed a Western legal system on the indigenous tribes.⁹⁵ Rakate argues that during the colonial era the administration of justice by traditional leaders completely changed.⁹⁶ In 1814 the Cape formally became the colony of the British, terminating the Dutch rule.⁹⁷ As the British settled, they introduced their legal institutions in the Cape, which meant that the Khoisan community had to be subjected to foreign British laws and institutions.⁹⁸ Rakate provides that the Cape colony did not recognise customary law as a system of law nor their traditional courts.⁹⁹ Transkei was annexed in 1884, which resulted in appeals emanating from civil matters between blacks being heard in the Native Territories Appeal Court, and in Transvaal, the chief magistrates enjoyed appellate jurisdiction in civil matters between black people.¹⁰⁰

In the Transvaal, black chiefs had the authority to hear civil cases involving blacks, as long as they did not violate natural justice principles.¹⁰¹ In Natal, section 56 of the *Court Act* 49 of 1889 provided that the chief's court has the jurisdiction to adjudicate matters between black parties, with the Natal High Court acting as the appeal court.¹⁰²

According to Aiyedun, the government ensured that customary law was distorted, by promoting and advancing racial segregation.¹⁰³ This was realised with the enactment

⁹⁴ Himonga and Bosch 2000 *SALJ* 307, colonial periods; Dutch (1652-1795); Great Britain (1795-1961); and South Africa became a Union with its own white government in 1910).

⁹⁵ Mann and Roberts *Law in Colonial Africa* 18-23.

⁹⁶ Rakate 1997 *Comp & Intl LJ S Afr* 182.

⁹⁷ Khunou *A legal history* 41.

⁹⁸ Ritner *Death of Africa* 30.

⁹⁹ Rakate 1997 *Comp & Intl LJ S Afr* 182.

¹⁰⁰ Rakate 1997 *Comp & Intl LJ S Afr* 182.

¹⁰¹ Rakate 1997 *Comp & Intl LJ S Afr* 182.

¹⁰² Rakate 1997 *Comp & Intl LJ S Afr* 183.

¹⁰³ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 145.

of discriminatory legislation, such as the *Native Administration Act, 1927* (later known as the *BAA*).¹⁰⁴

The *BAA* established a standard system of judicial duality for the entire country, regulating dispute resolution across the country.¹⁰⁵ It recognised traditional leaders' and headmen's courts and allowed them the authority to hear civil disputes and minor criminal offenses involving Africans.¹⁰⁶ It also established commissioner's courts, which were staffed by white administrative officers and provided Africans with low-cost and straightforward legal procedures.¹⁰⁷

It is, however, crucial to recall that the aforementioned courts had no jurisdiction over whites, who were only subject to the Magistrates' Courts and the Supreme Court.¹⁰⁸ As a result, customary law was administered by commissioners and traditional leaders, while English and Roman-Dutch laws were applied by the Magistrates' Courts and the Supreme Court, subservient to the Department of Justice.¹⁰⁹

Section 12 of the *BAA* provided that:

- “(1) The Minister may–
- (a) authorise 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), authorise a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before 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.”¹¹⁰

¹⁰⁴ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 145.

¹⁰⁵ Seymour *Seymour's Customary Law in Southern Africa* 7.

¹⁰⁶ Section 12 of the *BAA*.

¹⁰⁷ Suttner 1968 *SALJ* 439.

¹⁰⁸ Section 12 of the *BAA*.

¹⁰⁹ Bennett *Human Rights and African Customary Law* vii.

¹¹⁰ Section 12 of the *BAA*.

To relieve the Magistrates' Courts of their burden, traditional tribunals were finally granted criminal jurisdiction over minor common-law and statute offenses.¹¹¹ Section 20 of the *BAA*¹¹² 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]

In the case of customary law, the commissioner's courts were given jurisdiction.¹¹³ They had comprehensive powers to consider practically all civil affairs, except for divorce cases deriving from civil (or Christian) marriages, and they had additional jurisdiction over a variety of common-law and statutory offences, including the notorious Apartheid-Era offences. Although they had to deal with appeal cases from the start, they also acted as appeals courts and headmen's tribunals for traditional leaders.¹¹⁴

The *BAA* also included a repugnancy clause, which stated that customary law may only be used if it was admissible to the "Western world". According to section 11(1) of the *BAA*, in commissioner's courts, customary law could be implemented

"[...] except in so far as it has not been abolished, modified: provided that such Black law shall not be adverse to the principles of public policy or natural justice."

In 2005, this section was repealed by *Amendment of Certain Laws Act*.¹¹⁵ In 1986, the commissioner's courts were disbanded. Traditional courts were kept despite the commissioner's courts being abolished. Instead of going through the commissioner's court, an aggrieved litigant in a traditional court could appeal directly to the Magistrates' Court.¹¹⁶

¹¹¹ SALC *Project 90, Discussion Paper 82* at 3.3–3.4.

¹¹² Section 20 of the *BAA*.

¹¹³ Section 10(1) of the *BAA*.

¹¹⁴ Section 10(1) of the *BAA*.

¹¹⁵ *Amendment of Certain Laws Act 28* of 2005.

¹¹⁶ Section 12(4) of the *BAA*.

2.4 Apartheid regime

The apartheid regime did little to alter the legal system's essential foundation, which had been formed during the colonial period.¹¹⁷ Traditional courts, like customary law, were regarded as less essential and inferior to the common law.¹¹⁸ Traditional leaders' positions were bolstered in order for them to assume control of the Bantustans, which later became known as the "Homelands".¹¹⁹ As a result, the apartheid government maintained the *BAA*.¹²⁰ Until the 1980s, traditional tribunals and commissioner's courts held exclusive authority over disputes involving blacks.¹²¹

2.5 Judicial functions of traditional leaders in independent homelands

An analysis of the judicial functions of traditional leaders in the independent homelands is undertaken below.

2.5.1 Bophuthatswana

In the Batswana community, the majority of the disputes were expected to be resolved by the family concerned, and in some cases where the family is unable to resolve the dispute, the matter has to be transferred to, and resolved by, headmen.¹²² The senior male relative of the plaintiff would then formally make a complaint to the headmen to hear that matter.¹²³ However, it is important to note that the headmen did not deliberate on the issue alone as the headmen extend the invitation to the members of their ward so that they may join the headmen and hear the matter before them.¹²⁴ The members of the ward gather in his *kgotla* (where the proceedings take place) and

¹¹⁷ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 147.

¹¹⁸ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 147.

¹¹⁹ Bennett *Customary Law* 42.

¹²⁰ Bennett *Human Rights and African Customary Law* vi.

¹²¹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 147.

¹²² Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 108.

¹²³ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 108.

¹²⁴ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 108.

the headmen briefly explain the nature of the matter to them, and the complainant is also allowed to state his or her case.¹²⁵ It is important to note that there was a lack of women's involvement as active participants in the traditional courts.

The proceedings in the *kgotla* are simple and not complex, the headman and his assessors gather and sit before the group, which sit in a semi-circle facing them, and the parties are then placed before the group who will be surrounded by witnesses to the case.¹²⁶ The proceedings are conducted in public, so the public can easily attend and participate in the proceedings.¹²⁷ The witnesses in the case are expected to speak the truth during the proceeding, hence there is no oath which is undertaken before proceedings start.¹²⁸ Witnesses will be faced with questions from both sides¹²⁹ to establish the truth, and corroborative evidence plays a major role in establishing the truth.¹³⁰

When the parties to a dispute are aggrieved with the headmen's judgment, they have a recourse to challenge the decision of the headmen through appeal to the chiefs.¹³¹ The appeals will be directed to the chief's assistant, and the traditional leader has the power to refuse to hear the appeal from the headmen's court if the traditional leader is satisfied with the headmen's judgment.¹³²

Traditional courts, in traditional communities, deal with matters involving the senior members of the royal family, and matters emanating from serious criminal offences

¹²⁵ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 108.

¹²⁶ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 109.

¹²⁷ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 109.

¹²⁸ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 109.

¹²⁹ Schapera *A handbook of Tswana law and custom* 293.

¹³⁰ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 109.

¹³¹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 110.

¹³² Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 110.

(as a court of first instance), and these are mostly matters that fall outside of the jurisdiction of the headmen's court.¹³³

The proceedings in the traditional court are similar to the ones in the headmen's court, with men sitting facing the direction of the traditional leader, his assessors, and other senior members of the community.¹³⁴ The people form a semi-circle around participants and witnesses, whilst before the traditional leader men stand up when they speak, and women sit.¹³⁵ Women are allowed to participate in court when they testify against their husbands.¹³⁶ The traditional leader will deliberate on the matter and after both participants in the dispute have stated their case, the traditional leader is expected to make a judgment. Parties to the dispute expect the traditional leader to promote fair dispute resolution.¹³⁷

The traditional leader in a court does not sit alone, he has advisors *banna ba le kgotla* (men of the court) who play a role in the judicial functions of the traditional leader.¹³⁸ The advisor assists the traditional leader when deciding cases with the law and sets of precedents based on their legal knowledge.¹³⁹ The advisors are appointed because of their influence and trustworthiness.¹⁴⁰ The advisors together with ward headmen form a council, which works as the advisor of the traditional leader and deals with administrative issues.¹⁴¹ In the absence of the traditional leader, the assessors may preside over the issues before the traditional court and render a verdict. However, the

¹³³ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 110.

¹³⁴ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 111.

¹³⁵ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 111.

¹³⁶ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 110.

¹³⁷ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 111.

¹³⁸ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 111.

¹³⁹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 112.

¹⁴⁰ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 112.

¹⁴¹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 112.

chief may overturn the decision of the assessors if he is not satisfied with their decision.¹⁴²

The traditional court's decision is final and is binding on the parties, meaning that the parties must accept the judgment.¹⁴³ However, a party who is not satisfied with the decision of the traditional court may appeal to the senior relative of the traditional leader.¹⁴⁴ The senior relative of the traditional leader may refuse to change the ruling if he agrees therewith, and if he is not satisfied, he may (to a certain extent) lower a fine or punishment.¹⁴⁵

2.5.2 Ciskei and Transkei

These two homelands were dominated by Xhosa people. Traditional authorities in these homelands were organised in the following manner: (1) court of paramount chief; (2) court of chief; (3) headmen's court; (4) court of sub-headmen; and (5) family court.¹⁴⁶ Family court matters are engaged in the kraal of the oldest male, together with adult male relatives and their nephews.¹⁴⁷ The proceedings are led by the oldest male with the active participation of other male relatives, making meaningful contributions to the dispute resolution.¹⁴⁸ Women enjoyed limited participation in these courts, and they participate in this court as witnesses.¹⁴⁹

The court of sub-headmen engages in less serious matters, like trespass and minor delicts, and in the process of resolving the disputes, all parties within the ward who

¹⁴² Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 112.

¹⁴³ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 112.

¹⁴⁴ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 113.

¹⁴⁵ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 113.

¹⁴⁶ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 115.

¹⁴⁷ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 115.

¹⁴⁸ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 115.

¹⁴⁹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

are interested in the matter can participate in the dispute resolution.¹⁵⁰ The court of sub-headmen deliberate on the matter and allow parties to openly state their case, and after the facts have been established the court has to come to a conclusion and render a verdict.¹⁵¹ In cases where the court of sub-headmen cannot resolve the dispute, the matter will then be referred to the headmen's court.¹⁵²

The headmen's court settles many cases as referred from the courts of the sub-headmen. This court acts as a court of first instance for the majority of cases emanating from members of traditional communities. However, it is important to note that the headmen's court does not enjoy both criminal and civil jurisdiction.¹⁵³ The way disputes are settled in the court is simple and convenient to the members of the traditional communities; this is a process where the complainant and the defendants are given equal opportunity to state their cases.¹⁵⁴ In the quest to establish the truth from the parties in dispute, members of the community are allowed to cross-examine the litigants by asking them questions. During this process, the headmen act as a mediator and meditate. The court makes a judgment after hearing the facts from both parties in more detail.¹⁵⁵

The chief's court has the power to deal with both criminal and civil cases, the chief sits in court with the headmen and other adult men residing within the area of its jurisdiction.¹⁵⁶ The judicial process in the chief's court involves the procedure of examination and cross-examination by individuals that are well trained with adducing

¹⁵⁰ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 115.

¹⁵¹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 116.

¹⁵² Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 116.

¹⁵³ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

¹⁵⁴ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

¹⁵⁵ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

¹⁵⁶ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

evidence.¹⁵⁷ Community members are also allowed to pose questions, which allows the process to be more flexible. Before a final decision is made, the evidence is first weighed to produce a rational decision.¹⁵⁸

The court of paramount chief hears appeals from the traditional leader's courts, these courts deal with more complex matters involving both civil and criminal cases.¹⁵⁹ Civil matters include family disputes, delicts, contracts, property claims, adultery, and animal-related issues. Criminal matters include disobeying court orders, agricultural and afforestation grievances, the causing of bodily injury, and accusations of witchcraft.¹⁶⁰

2.6 Post-apartheid

The 1996 *Constitution* permits the continued operation of traditional courts, provided that they are consistent with the *Constitution*. Traditional courts continue to operate until they are repealed by subsequent legislation, as provided for in the *interim Constitutions*¹⁶¹ and the 1996 *Constitutions'* transitional provisions.¹⁶² Item 16(1) of schedule 6 to the 1996 *Constitution* explicitly provides as follows:

"Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to —

- (a) any amendment or repeal of that legislation; and
- (b) consistency with the new Constitution."

¹⁵⁷ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 117.

¹⁵⁸ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 118.

¹⁵⁹ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 118.

¹⁶⁰ Aiyedun *FAIR TRIAL AND ACCESS TO JUSTICE IN SOUTH AFRICA: HOW TRADITIONAL TRIBUNALS CATER TO THE NEEDS OF RURAL FEMALE LITIGANTS* 118.

¹⁶¹ *Constitution of the Republic of South Africa* 200 of 1993.

¹⁶² Section 229 stipulated as follows: "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority".

Similarly, item 2 of schedule 6 of the Constitution stipulates that:

- (1) "All law that was in force when the new Constitution took effect, continues in force, subject to —
 - (a) any amendment or repeal; and
 - (b) consistency with the new Constitution."

- (2) "Old order legislation that continues in force in terms of subitem (1) —
 - (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
 - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

2.7 Conclusion

Tracing back in history regarding the judicial functions of traditional leaders in South Africa, one can argue that traditional leaders have played a major role in the administration of justice in traditional communities. Despite the infiltration by the colonialist and apartheid regime in the affairs of traditional leaders and communities, traditional courts and traditional leaders continued to enjoy support from members of traditional communities.

As evident from the above observations, the use of traditional courts became a means for members of traditional communities to resolve their disputes. Traditional leaders were expected to promote fair dispute settlement and in cases where the parties to a dispute felt aggrieved by the decision of the court, they had avenues to appeal such decision. There was no clear account of how traditional leaders in the traditional court could be held accountable for abuse of power issues. This chapter discussed the judicial functions of traditional leaders from pre-colonial times, the colonial era, and the apartheid era. The next chapter inspects the legal framework regulating the traditional justice system in South Africa.

Chapter 3: Legal framework regulating traditional justice system in South Africa

3.1 Introduction

South Africa is a democratic state based on "equality, freedom, and supremacy of the *Constitution* and the rule of law."¹⁶³ Since the democratic era, South Africa had a duty to establish and transform democratic institutions, and the institution of traditional leadership was on the agenda.¹⁶⁴ South Africa has implemented laws to govern the traditional judicial system in the country in an attempt to transform the institution of traditional leadership, and other laws to determine the powers, structures, and functions of traditional leadership.

This chapter analyses the legal framework that regulates traditional leadership in South Africa. The matter of traditional leadership in post-apartheid South Africa can be traced back to the *interim Constitution*.¹⁶⁵ Section 181 of the interim Constitution recognized customary law and established a framework for the protection and recognition of traditional leadership roles. The *interim Constitution* is the first piece of law to deal with issues relating to the institution of traditional leadership in South Africa.¹⁶⁶ The 1996 *Constitution* is also analysed because it endorses the existence of the institution of traditional leadership. Section 211 of the 1996 *Constitution* recognises the status and roles of traditional leadership according to customary law.

The *Constitution* also provides that an Act of parliament should be enacted to regulate the institution of traditional leadership.¹⁶⁷ This is followed by a discussion on the legislation that governs the role of traditional leadership. In this dissertation, the *interim Constitution* is explored, followed by the 1996 *Constitution*, the *National House of Traditional Leaders Act*,¹⁶⁸ the *TLGFA*, the White Paper on Traditional Leadership

¹⁶³ Section 1 of the *Constitution*.

¹⁶⁴ Soyapi 2014 *PELJ* 1442.

¹⁶⁵ *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the *interim Constitution*).

¹⁶⁶ Bennett *Human Rights and African Customary law* 22.

¹⁶⁷ Section 212(2) of the *Constitution*.

¹⁶⁸ 10 of 1997 (hereafter the *NHTLA*).

and Governance, and the TCB. This chapter covers the legal framework regulating the traditional justice system in South Africa.

3.2 Legal framework of traditional leadership

3.2.1 Constitution of the Republic of South Africa 200 of 1993

According to Mokgoro, political dynamics and participation of organised traditional leaders and political parties throughout the multi-party negotiation process played a vital role in ensuring that traditional leaders and traditional powers were recognised in the *interim Constitution*.¹⁶⁹ The *interim Constitution* recognised traditional authorities and ensured that their indigenous laws and customs were subject to the *Constitution* as entrenched rights.¹⁷⁰ In accordance with Constitutional Principle VII, the *interim Constitution* “recognised and protected the institution, status, and role of traditional leadership according to indigenous law.”¹⁷¹

Traditional authorities, indigenous law, and customary law were recognised by the *interim Constitution*.¹⁷² Provisions that contained the functions of the traditional leaders were provided for in the *interim Constitution*.¹⁷³ Chapter 11 of the *interim Constitution* recognised all existing traditional leaders and customary law.¹⁷⁴ The *interim Constitution* recognised the traditional authority and indigenous law in the following terms:

- (1) “A traditional authority, which observes a system of indigenous law is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.”¹⁷⁵

¹⁶⁹ Mokgoro 1996 *Review of Constitutional Studies* 69.

¹⁷⁰ Section 181 of the *interim Constitution*.

¹⁷¹ Bennett *Human Rights and African Customary Law* 22.

¹⁷² Bennett *Human Rights and African Customary Law* 22.

¹⁷³ Section 181 of the *interim Constitution*.

¹⁷⁴ Bennett *Transformation* 22.

¹⁷⁵ Section 188 of the *interim Constitution*.

Traditional leaders were further provided with the right to be *ex officio* members of local governments within whose jurisdiction their fall.¹⁷⁶ Bank and Southall posit that traditional leaders were dissatisfied by the responsibilities and powers given to them providing that those powers were less compared to what their representatives had bargained for during the constitutional negotiation process.¹⁷⁷ The *interim Constitution* did not directly provide for the judicial functions of traditional leaders, however, it provided that the legislation, which provided for the judicial functions of traditional leaders (*BAA*) continue to be operational until amended or repealed.¹⁷⁸

Section 183 of the *interim Constitution* provided that, in conjunction with traditional authorities and members of traditional communities in the province in question, a house of traditional leaders be constituted. These rules ensure that these houses have the authority to offer proposals and advise provincial legislatures or parliament on matters which concern traditional authorities and customary law, as well as issues that impact traditional communities.

3.2.2 *Constitution of the Republic of South Africa, 1996*

The 1996 *Constitution* provides for the recognition of the role of traditional leaders.¹⁷⁹ Chapter 12 of the *Constitution* clearly provides that the

“institution, status and role of traditional leadership, according to customary law, are recognised and subject to the Constitution.”¹⁸⁰

However, it should be highlighted that the *Constitution* does not clearly provide the specific roles of traditional leaders. The *Constitution* merely provides that roles and status according to customary law are recognised and are subject to the *Constitution*.¹⁸¹

¹⁷⁶ Section 182 of the *interim Constitution*.

¹⁷⁷ Bank and Southall 1996 *Journal of Legal Pluralism* 409.

¹⁷⁸ Section 181 of the *Interim Constitution*.

¹⁷⁹ Section 211 of the *Constitution*.

¹⁸⁰ Section 211 of the *Constitution*.

¹⁸¹ Section 211 of the *Constitution*.

Traditional leaders' roles are governed by applicable laws and customs, which include amendments to and repeals of those laws and customs.¹⁸² When customary law is applicable, the *Constitution* permits courts to apply it, as well as any legislation dealing with customary law.¹⁸³ The *Constitution* further states that traditional leadership must be recognised as an institution at the local level that deals with issues that impact local communities.¹⁸⁴ A national council of traditional leaders and a provincial house of traditional leaders may be established as part of the law. Traditional leaders' institution, role, power, and status may also be addressed in provincial constitutions. Rugege argues that the *Constitution* does not clearly spell out the roles of traditional leaders and that their roles are vague.¹⁸⁵ Section 166 of the *Constitution* indirectly recognises traditional courts as

“any other courts established or recognised by an Act of parliament, which may include any court of a status similar to either High Courts or the Magistrates Courts.”¹⁸⁶

The *Constitution* does not provide for the roles of traditional leaders in traditional courts. Traditional courts were recognised by the *BAA* as courts to deal with disputes that emanated from customary law and traditional communities.¹⁸⁷

The *Constitution* has allowed for the recognition of the institution, role, status, powers, and functions of the traditional leadership.¹⁸⁸ This allows the functioning of traditional authority and indigenous law subject to constitutional values. The *Constitution* demonstrates the importance of the institution of traditional leadership in traditional communities, and it paves a ground for the transformation of the judicial functions of traditional leaders to be in harmony with the democratic principles of the *Constitution*.

¹⁸² Section 212 of the *Constitution*.

¹⁸³ Section 211(3) of the *Constitution*.

¹⁸⁴ Section 212 of the *Constitution*.

¹⁸⁵ Rugege "*Institution of Traditional Leadership*" 16.

¹⁸⁶ Section 166 of the *Constitution*.

¹⁸⁷ Section 12 of the *BAA*.

¹⁸⁸ Sections 211 and 212 of the *Constitution*.

3.2.3 National House of Traditional Leaders Act 10 of 1997

On 18 April 1997, the parliament enacted the *NHTLA*. The national house of traditional leaders was established by the *NHTLA*. The objects of the national house of traditional leaders include the following:

“[T]o promote the role of traditional leadership within a democratic constitutional dispensation;

to enhance unity and understanding among traditional communities; and

to enhance co-operation between the National House and various Provincial Houses with a view to addressing matters of common interest.”¹⁸⁹

The national house of traditional leaders also contains functions to be exercised which include:¹⁹⁰

The National House may advise national government and make recommendations regarding;

matters relating to traditional leadership;

the role of traditional leaders;

customary law; and

the customs of communities observing a system of customary law.

It may investigate and disseminate information on the above-mentioned matters,

At the request of the President, it has to advise him or her on any matter referred to it.

The national house of traditional leaders has the authority to run its own affairs and to establish its own norms and procedures for conducting its business and proceedings.¹⁹¹ The national house of traditional leaders may form committees and outline their functions, order, and proceedings in accordance with its regulations.¹⁹² However, the Act does not provide for the judicial functions of traditional leaders, and the Act only plays an advisory role.¹⁹³

¹⁸⁹ Section 7 of the *NHTLA*.

¹⁹⁰ Section 7(2) of the *NHTLA*.

¹⁹¹ Section 10 of the *NHTLA*.

¹⁹² Section 12 of the *NHTLA*.

¹⁹³ Hugh *Traditional Leadership* 65. See also Khunou *A legal history* 210.

3.2.4 *White Paper on Traditional Leadership and Governance, 2003*

The White Paper on Traditional Leadership and Governance¹⁹⁴ emanates from a process that consists of four phases, namely: (1) research; (2) debates; (3) consultations; and (4) discussions.¹⁹⁵ The policy positions were later outlined on the Draft White Paper, and the end-product produced from all the processes is the White Paper on Traditional Leadership Governance. The White Paper on Traditional Leadership and Governance contains objectives of the Paper, including, *inter alia*, establishing an institution that reflects the principles of democracy, transparency, and being accountable to the members of traditional communities.¹⁹⁶

3.2.5 *Municipal Structures Act 117 of 1998*

The *Municipal Structures Act*¹⁹⁷ ensures the active involvement of traditional leaders in the municipal councils. Traditional leaders are required to attend and participate in municipal councils as ex officio members of South African local government systems under Section 81 of the *MSA*. However, it is important to note that the *MSA* deprived traditional leaders of voting rights in the local government processes.¹⁹⁸ The *MSA* allowed traditional leaders to actively participate on issues that fundamentally impact their communities.¹⁹⁹ The number of traditional leaders who can serve on the council is limited to 20% of the total number of councillors.²⁰⁰

The code of conduct located in schedule 1 of the *Local Government: Municipal Systems Act* 32 of 2000 applies to traditional leaders when participating in the proceedings of the municipal council.²⁰¹ The Act does not provide for the judicial functions of

¹⁹⁴ Gen Not 2336 in GG 25438 of 10 September 2003 "White Paper on Traditional Leadership and Governance" published as Gen Not 2336 in GG 25438 of 10 September 2003 (hereafter the White Paper on Traditional Leadership and Governance).

¹⁹⁵ White Paper on Traditional Leadership and Governance 3.

¹⁹⁶ White Paper on Traditional Leadership and Governance 11.

¹⁹⁷ 117 of 1998 (hereafter the *MSA*).

¹⁹⁸ Hugh *Traditional Leadership* 68.

¹⁹⁹ Hugh *Traditional Leadership* 68.

²⁰⁰ Hugh *Traditional Leadership* 68.

²⁰¹ Hugh *Traditional Leadership* 68.

traditional leaders, it deals with administrative issues relating to the institution of traditional leadership in local government.

Makama and Mathenjwa hold the view that the participation of traditional leaders in municipal councils without the power to vote is inappropriate, in a sense that voices of traditional leaders are subverted and this will only create further division between traditional leaders and councillors in a sense that it may be perceived that traditional leaders are juniors to councillors in decision-making processes.²⁰²

3.2.6 Traditional Leadership and Governance Framework Act 41 of 2003

The *TLGFA* was enacted for among other things the "recognition of traditional leaders²⁰³ and removal from office of traditional leaders and also to provide for the functions and roles of traditional leaders."²⁰⁴ The *TLGFA* aims to define traditional leadership's role and place in a democratic system of administration, as well as to ensure that traditional leadership is reformed in accordance with the Constitution.²⁰⁵

The institution of traditional leadership promotes the values expressed in our *Constitution*, which include "freedom, human dignity, and the achievement of equality and non-sexism".²⁰⁶ Traditional leadership must also promote fast, effective, and fair dispute resolution and justice administration. The *TLGFA* provides that the government may provide roles for traditional leaders or traditional councils in respect of certain areas, *inter alia*, the administration of justice.²⁰⁷ The *TLGFA* goes even further by establishing a code of conduct for traditional leaders and allowing provincial governments to enact similar codes in their own jurisdictions.²⁰⁸

This *TLGFA* contains a great potential to position the institution of traditional leadership in line with the *Constitution*. The *TLGFA* is also clear in its prohibition of discrimination on the grounds of gender and the rights of women are protected.

²⁰² Makama and Mathenjwa 2016 *Law Democracy & Dev* 213.

²⁰³ Section 2 of the *TLGFA*.

²⁰⁴ Section 20 of the *TLGFA*.

²⁰⁵ See Preamble of the Act.

²⁰⁶ See Preamble of the Act.

²⁰⁷ Section 20(1) of the *TLGFA*.

²⁰⁸ Section 27 of the *TLGFA*.

According to the *TLGFA*, women must make up at least a third of traditional council members.²⁰⁹ The dignity of the institution of traditional leadership is to, some extent, restored by the *TLGFA*, and this houses the potential to energise traditional leaders to feel welcomed and empowered. If the *TLGFA* provides a sense of belonging to traditional leaders, the process of integrating the institution of traditional leadership and customary law into South Africa's democratic governance (under the *Constitution*)²¹⁰ becomes less difficult. However, the *TLGFA* does not clearly provide for the judicial functions of traditional leaders. The state is required by Section 20(3) of the *TLGFA* to supervise and verify that traditional leaders' functions are carried out in accordance with the Constitution. Hugh, on the other hand, claims that this clause stripped traditional leaders of their authority by putting the monitoring process in the hands of governmental organs.²¹¹

From the national legislation emanates the subsequent provincial legislation that is required to regulate certain fields, of which most are located in section 20 of the *TLGFA*. A brief overview of the provincial legislation is undertaken below to provide some insight on how provincial legislation provides for the judicial functions of traditional leaders. The provincial legislation includes the *KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005*; *Mpumalanga Traditional Leadership and Governance Act 3 of 2005*; *North West Traditional Leadership and Governance Act 2 of 2005*; *Free State Traditional Leadership and Governance Act 8 of 2005*; *Limpopo Traditional Leadership and Institutions Act 6 of 2005*; and the *Eastern Cape Traditional Leadership and Governance Act 4 of 2005*.

3.2.6.1 Traditional leadership in North West Province

The *North West Traditional Leadership and Governance Act*²¹² seeks to, *inter alia*, "provide for the recognition of traditional communities;²¹³ traditional leadership;²¹⁴

²⁰⁹ See Preamble of the Act.

²¹⁰ Section 1 of the *Constitution*.

²¹¹ Hugh *Traditional Leadership* 76.

²¹² 2 of 2005 (hereafter the *NWTLGA*).

²¹³ Section 3 of the *NWTLGA*.

²¹⁴ Section 13 of the *NWTLGA*.

institutions; to define the role and functions of traditional leaders;²¹⁵ and to provide for the appointment, recognition, and removal of traditional leaders."²¹⁶ According to the *NWTLGA*, as established by applicable legislation, traditional leadership must ensure and encourage an efficient, effective, and fair conflict resolution mechanism, as well as a fair system of justice administration.²¹⁷ The *NWTLGA* provides for the recognition of *kgosi* or *kgosigadi* in accordance with the customary law and customs of the traditional communities within the province.

Section 18 of the *NWTLGA* provides for the roles of a *kgosi* or *kgosigadi*.²¹⁸ Section 18 includes the function to maintain peace in the traditional community by consolidating and mediating disputes among members of the community. This section is not clear regarding if the consolidation and mediation of disputes by the *kgosi* or *kgosigadi* constitute an exercise of their duties under a judicial role. The *NWTLGA* should be clear to provide that the *kgosi* or *kgosigadi* resolve disputes in the traditional courts as judicial officers under the customary law and customs of the community. Furthermore, the *NWTLGA* could have provided that when the *kgosi* or *kgosigadi* exercise their judicial functions, to be guided by the code of conduct provided in schedule II of the *NWTLGA*.

Section 27 of the *NWTLGA* provides for the actions which may be taken if the traditional leader (*kgosi* or *kgosigadi*) is found to be in contravention of the code of conduct provided for in schedule II of the Act. This provision provides a sense of accountability as far as the functions of the *kgosi* or *kgosigadi* are concerned. However, it is not clear enough to determine whether this provision applies to *kgosi* or *kgosigadi* when he or she exercises his or her judicial functions. The *NWTLGA* could have provided that a traditional leader who exercises his judicial functions in

²¹⁵ Section 18 of the *NWTLGA*.

²¹⁶ See the Preamble of the Act.

²¹⁷ See the Preamble of the Act.

²¹⁸ Section 1 of the *NWTLGA* *kgosi* or *kgosigadi* "means the person who in accordance with the laws and customs of a particular traditional community is recognised as the hereditary head of such traditional community and who is a citizen of the Republic of South Africa".

contravention with the code of conduct will invoke the measures located in section 27 of the Act.

Section 39 of the *NWTLGA* provides for the offences and penalties which the *kgosi* or *kgosigadi* should refrain from committing. However, it is still not clear whether the provisions of this section apply to the *kgosi* or *kgosigadi* when he or she exercises his or her judicial functions. If section 18 was clearly provided for the judicial functions of *kgosi* or *kgosigadi* then section 39 would apply to the *kgosi* or *kgosigadi* when they exercise their judicial functions.

3.2.6.2 Traditional leadership in Eastern Cape Province

The *Eastern Cape Traditional Leadership and Governance Act*²¹⁹ “provides for the recognition of traditional communities,²²⁰ traditional councils, and traditional leadership.”²²¹ The *ECTLGA* also provides for the roles and functions of traditional leaders. Section 2 of the *ECTLGA* provides that the interpretation of this Act should be in accordance with the *Constitution* and the *TLGFA*. According to Section 3 of the *ECTLGA*, traditional leadership must be modified to be in accordance with the *Constitution* and the Bill of Rights in order to produce an efficient, effective, and fair conflict resolution system and a fair system of administration of justice.

Section 24 of the *ECTLGA* provides for the roles and functions of traditional leaders. They exercise their functions under the (1) *ECTLGA*; (2) customary law of the traditional community concerned; (3) *TLGFA*; and (4) other applicable legislation. Section 20 of the *TLGFA* provides for the administration of justice. Therefore, it can be concluded that the *ECTLGA* provides traditional leaders with the role of administering justice in their traditional communities.²²² Section 27 of the *ECTLGA*

²¹⁹ Act 4 of 2005 (hereafter the *ECTLGA*).

²²⁰ Section 5 of the *ECTLGA*.

²²¹ Section 6 of the *ECTLGA*.

²²² Section 20 of the *TLGFA*.

provides that the code of conduct located in schedule 1 of the Act applies to all traditional leaders.²²³

Section 19 of the *ECTLGA* provides recourse for when traditional leaders conduct themselves in a manner that constitutes misconduct. Section 19 of the *ECTLGA* empowers the chairperson of the traditional council or the Royal Family to charge a traditional leader in writing whenever there is grounds to suspect that he or she has committed an act of misconduct (located in schedule 1 of the *ECTLGA*). However, the provision does not indicate whether an act of misconduct is committed when the traditional leader exercises his or her functions. The provisions could have highlighted that the traditional leader —when exercising his or her functions— and there is a belief that the traditional leader committed an act of misconduct, he or she should be charged. If it were worded this way it could be concluded that even traditional leaders —when exercising his or her judicial functions— are held to certain standards and can be held accountable when performing their judicial functions.

3.2.6.3 Traditional leadership in Free State Province

The *Free State Traditional Leadership and Governance Act*²²⁴ “recognises traditional communities,²²⁵ traditional councils,²²⁶ and traditional leaders, and provides for the roles and functions of traditional leaders”. The *Constitution* and the *TLGFA* act as an interpretive aid to the *FSTLGA*.²²⁷ The *FSTLGA* does not provide roles and functions of traditional leaders; however, it provides for the functions of traditional leaders in a traditional council.²²⁸

Section 7 of the *FSTLGA* provides for the establishment and recognition of a traditional council. The traditional council consists of a *kgosi* or *morena* who convene and presides over a *pitso* (a general meeting of members of a traditional community) and

²²³ Section 1 of the *ECTLGA* Traditional leaders “means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position as *iKumkani*, *iNkosi* or *iNkosana*”.

²²⁴ 8 of 2005 (hereafter the *FSTLGA*).

²²⁵ Section 3 of the *FSTLGA*.

²²⁶ Section 7 of the *FSTLGA*.

²²⁷ Section 2 of the *FSTLGA*.

²²⁸ Section 8 of the *FSTLGA*.

the *kgosi or morena* who presides over the *pitso* is to establish a traditional council. Section 8 of the *FSTLGA* provides for the functions of the traditional council. However, the section that deals with the administration of justice is section 9 of the *FSTLGA*. According to Section 9 of the *FSTLGA*, the traditional council must exercise its rights and discharge its responsibilities and functions in connection with the administration of justice as may be bestowed or assigned to it by law. The provisions of this section suggest that the *kgosi or morena* who preside over the *pitso* is charged with the administration of justice together with the traditional council assisting the *kgosi or morena* in their judicial functions.

Section 19 of the *FSTLGA* deals with acts of misconduct by traditional leaders.²²⁹ The section sets out grounds of misconduct and provides that the Premier may charge those who are guilty of misconduct in writing. The Premier may then appoint any person to enquire into the matter and make a finding, after it is found that the accused is in breach of the code of conduct, hence, action is taken against him or her.²³⁰ The *FSTLGA* does not set out how traditional leaders perform their judicial functions. The *FSTLGA* does not provide which channels can be utilised to lay a complaint of misconduct against a traditional leader, nor does it provide for the protection of those who lay complaints against harassment and intimidation.

3.2.6.4 Traditional leadership in Mpumalanga Province

The *Mpumalanga Traditional Leadership and Governance Act*²³¹ “provides for the recognition of traditional communities;²³² recognition and establishment of traditional councils;²³³ and the recognition, appointment, and removal of traditional leaders from office”. The *MTLGA* does not explicitly provide for the roles and functions of traditional leaders. However, section 2 of the *MTLGA* could be interpreted to refer to the functions of traditional leaders as contained in section 20 of the *TLGFA*. As much as the *ECTLGA*

²²⁹ Section 1 of the *FSTLGA* “Traditional leader means a *kgosi, morena, kgosana, morena wa motse, or ramotse*”.

²³⁰ Section 19 of the *FSTLGA*.

²³¹ 3 of 2005 (hereafter the *MTLGA*).

²³² Section 3 of the *MTLGA*.

²³³ Section 5 of the *MTLGA*.

provides for the administration of justice, there is a sense that the *ECTLGA* fails to clearly provide how traditional leaders perform their judicial functions.

3.2.6.5 Traditional leadership in Limpopo Province

The *Limpopo Traditional Leadership and Institutions Act*²³⁴ provides for the recognition of traditional communities,²³⁵ traditional councils,²³⁶ and traditional leaders together with their roles and functions.²³⁷ Section 18 of the *LTLIA* provides for the functions of traditional leaders and provides that a traditional leader may perform any function provided for in terms of customary law and subject to section 20 of the *TLGFA*, including the administration of justice by traditional leaders. Section 23 of the *LTLIA* provides that traditional leaders must adhere to the code of conduct contained in schedule 2 of the *LTLIA*.

Under schedule 2, Part B deals with the grounds of misconduct of traditional leaders. Schedule 2 of Part B of the *LTLIA* provides the procedure to be taken when a traditional leader is accused of misconduct. The procedure starts with the traditional council, which must investigate the allegations in accordance with the traditional community's customary law. After the traditional council has deliberated on the matter and established that the traditional leader is guilty of misconduct, the traditional council together with the royal family may refer the findings and recommendation to the premier. The premier will then refer the matter to the provincial house of traditional leaders for its recommendation and if the premier is satisfied with the recommendation of the provincial house of traditional leaders, the premier may take actions located under section 4 of Part B against the traditional leader who is found guilty of misconduct.²³⁸

²³⁴ 6 of 2005 (hereafter the *LTLIA*).

²³⁵ Section 3 of the *LTLIA*.

²³⁶ Section 4 of the *LTLIA*.

²³⁷ Section 18 of the *LTLIA*.

²³⁸ Section 1 of the *LTLIA*.

3.2.6.6 Traditional Leadership in KwaZulu-Natal Province

The *KwaZulu-Natal Traditional Leadership and Governance Act*²³⁹ “provides for the recognition of traditional leaders, traditional communities, and traditional councils, and it also contains the roles and functions of traditional leaders.” Amongst the functions of traditional leaders is the administration of justice, but the *KZNTLGA* does not clearly state how the traditional leaders exercise their judicial functions. The *KZNTLGA* goes further to provide for a code of conduct, which traditional leaders and traditional councils must adhere to when exercising their functions.

However, all these provincial Acts fail to outline how traditional leaders should exercise their judicial functions. These provincial Acts contain a great potential to include provisions that demonstrate how traditional leaders should exercise their functions. The *TLGFA* opened the pathway to recognise that one of the functions of traditional leaders is the administration of justice; therefore, provincial legislation should be amended to explicitly provide for how traditional leaders should exercise their judicial functions.

3.2.7 *Traditional Courts Bill, 2017*

The TCB is a measure taken by the government to regulate the traditional justice system.²⁴⁰ The TCB aims to provide a unified legal framework that governs the role and functions of traditional leadership and traditional justice institutions.²⁴¹ The Department of Justice and Constitutional Affairs provides that the objectives of the proposed Bill are:

“to preserve the African justice value system which has evolved over time and is seen as vital in attaining the goal of access to justice,

to ensure the effectiveness and efficiency of the traditional court system in the administration of justice, and

²³⁹ 5 of 2005 (hereafter the *KZNTLGA*).

²⁴⁰ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf at 7.

²⁴¹ Section 2 of the Traditional Courts Bill, 2017 (hereafter the TCB).

to harmonise the traditional justice system with the Constitution.²⁴²

The TCB affirms the importance of traditional leadership in promoting an efficient, effective, and fair dispute resolution system.²⁴³ The TCB contains objectives, such as to affirm the elements of restorative justice present in the traditional justice system and align the traditional courts with the *Constitution*.²⁴⁴

The TCB has not yet been enacted into law. Despite this, it contains crucial provisions that are unique to the administration of justice by traditional leaders. According to the TCB, traditional courts are convened by a traditional leader or any person designated by the traditional leader.²⁴⁵ The TCB provides how proceedings are instituted in traditional courts and the nature of traditional courts is provided for in the TCB.²⁴⁶ The TCB provides jurisdiction to traditional leaders who preside over disputes in traditional courts to hear both civil and criminal matters. The TCB provides a code of conduct for traditional leaders and those who participate in traditional courts, which dictate the conduct of traditional leaders and those who assist the traditional courts.²⁴⁷ Persons who are aggrieved by the decisions of a traditional court have a recourse to appeal and review the decision.²⁴⁸

As much as the TCB outlines how the proceedings in traditional courts should be in harmony with the prescripts of the *Constitution*, it is still not clear from the TCB's provisions which channels could be used to lay complaints against traditional leaders performing their judicial functions. The code of conduct is provided and sets out how the proceedings in court should take place, without the infringement of anyone's rights. However, there are no proper channels to ensure that the ordinary members of traditional communities can put forth their complaints in a manner that prevents intimidation and harassment by members of traditional courts responsible for adjudicating disputes together with the traditional leader.

²⁴² Section 2 of the TCB.

²⁴³ Section 3 of the TCB.

²⁴⁴ Section 2 of the TCB.

²⁴⁵ Section 5 of the TCB.

²⁴⁶ Section 4 of the TCB.

²⁴⁷ Section 16 of TCB.

²⁴⁸ Sections 11-12 of the TCB.

3.3 Conclusion

The discussion of the legislation above indicates that traditional leaders in South Africa still have a significant role to play. However, it is apparent that the powers and roles of traditional leaders (especially the judicial functions of traditional leaders when administering justice in traditional communities) are not clearly articulated in the respective Acts. Despite the lack of clarity on this certain aspect of traditional leadership, the TCB has the potential to address these issues as illustrated above.

The above discussion of legislation clearly demonstrates that the government appreciates the importance of the institution of traditional leadership, and its intention and willingness to develop and reform the institution of traditional leadership and seek to align it with the constitutional values of the country. The laws discussed above shows that legal reform has a great potential to integrate the institution of traditional leadership into the South African democratic governance. This chapter analysed the legislative framework regulating the traditional justice system, particularly the judicial functions of traditional leaders. The following chapter explores the challenges and successes of the traditional justice system.

Chapter 4: Successes and challenges of the traditional justice system

4.1 Introduction

The traditional justice system has for long promoted and preserved the African values of justice, which are based on reconciliation and restorative justice.²⁴⁹ The traditional justice system, through cultural values (emanating from customary law and custom, which are unique to traditional communities),²⁵⁰ has proven itself as being able to resolve disputes, promote social cohesion, coexistence, peace, and harmony.²⁵¹ Despite the continued success of the traditional justice system in the traditional communities, the traditional justice system continues to experience constitutional and operational challenges.²⁵² There have been allegations of abuse of judicial authority conferred on traditional leaders;²⁵³ exclusion of women in traditional courts; issues relating to legal representation in traditional courts; penalties; enforcement of orders in the traditional justice system; and race issues.²⁵⁴

This chapter deals with the successes and challenges of the traditional justice system in South Africa.

4.2 Success of the traditional justice system

In 1983, the government established the Commission of Inquiry into the Structure and Functioning of the Courts, which had a duty to enquire the structures of the courts.²⁵⁵ The Commission recognised that the chief's courts, to a certain extent, function imperfectly and that they widely enjoy support from black people and experts in African customary law.²⁵⁶ The Commission provided that the chief's courts are a

²⁴⁹ Rakate 1997 *Comp & Intl LJ S Afr* 180.

²⁵⁰ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 17.

²⁵¹ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprmw.pdf at 30.

²⁵² Khunou 2013 *Journal of Global Peace and Conflict* 59.

²⁵³ Tshehla 2005 *Institute for Security Studies Monographs* 20.

²⁵⁴ Khunou 2009 *PELJ* 104-105.

²⁵⁵ See *Commission of Inquiry into the Structure and Functioning of the Courts* (Chairperson: Mr Justice GG Hoexter) Fifth and Final Report (Vol III) RP 78/1983 Pretoria: Government Printer 1983 (hereafter the Hoexter Report) Part 1, para 3.4.3.8. This Commission of Inquiry often referred to as the Hoexter Commission.

²⁵⁶ Hoexter Report Part 1, para 3.4.3.8.

significant instrument of reconciliation in traditional communities, being the reason why they enjoy support from traditional communities.²⁵⁷

In 1999, the South African Law Commission (hereafter the SALC) investigated the question of customary courts and the judicial functions of traditional leaders.²⁵⁸ The SALC conducted extensive research and made recommendations.²⁵⁹ Part of the investigation was to determine the reasons why traditional courts should be retained in democratic South Africa.²⁶⁰ Subsequently, several reasons were provided by the SALC, one being that customary law is practiced by the majority of African people and utilised by traditional courts to administer justice under customary law. Hence, it plays a significant role in the cultural heritage of African people. In addition, the SALC provided that traditional courts play an important role as a mechanism to conduct speedy dispute resolutions in traditional communities, given that the nature of traditional courts are easily accessible, and cost-effective.²⁶¹

The traditional justice system enjoyed a victory in the case of *Bangindawo*.²⁶² The applicants, in this case, challenged some provisions in the Transkei's *Regional Authority Courts Act* 13 of 1982. The applicants argued that traditional leaders who were presiding officers in traditional courts lacked legal training and that such courts are illegitimate because they did not allow legal representation. The applicants argued that the procedures followed in the traditional courts were inappropriate because they were not similar to the ones in Magistrates' Courts.

The issue of the impartiality of traditional leaders was also put forward by the applicants. They argued that traditional leaders can never be impartial because there is no separation of powers in traditional leadership.²⁶³ However, Madlanga J dismissed this argument and provided that these arguments were misguided and not helpful, as

²⁵⁷ Hoexter Report Part 1, para 3.4.3.8.

²⁵⁸ SALC *Project 90, Discussion Paper 82* at xi.

²⁵⁹ SALC *Project 90, Discussion Paper 82* at xi.

²⁶⁰ SALC *Project 90, Discussion Paper 82* at 6.

²⁶¹ SALC *Project 90, Discussion Paper 82* at 1.

²⁶² *Bangindawo v Head of Nyanda Regional Authority; Hlantalala v Head of the Western Tembuland Regional Authority* 1998 3 SA 262 (Tk) (hereafter the *Bangindawo* case).

²⁶³ *Bangindawo* para 327.

one could not judge nor compare the customary courts (based on customary law with a different value system) to the Magistrates' Courts.²⁶⁴ This judgment is important as it recognises the importance of the traditional justice system with its unique processes and mechanisms. The judgment clearly demonstrates that the traditional justice system has a place in democratic South Africa.

Rakate provides that there is a resemblance between traditional courts and the Magistrates' Courts as both serve as a court of first instance, and are creatures of statute.²⁶⁵ However, the manner in which they operate is different. Rakate posits that traditional courts are not courts of record and in Magistrates' Courts, the magistrates are required to possess a qualification. Rakate concludes by providing that these two courts are not identical.²⁶⁶

Section 166 of the *Constitution* deals with courts.²⁶⁷ However, it is important to note that "traditional courts" are not expressly listed with other courts under section 166 of the *Constitution*. Section 166 of the *Constitution* lists the following courts:

"Constitutional Court, the Supreme Court of Appeal, the High courts, the Magistrates' Courts and any other court recognised or established by an Act of parliament."

However, in the case of *Ex parte Chairperson*²⁶⁸ the Constitutional Court clarified the position of traditional courts. The Constitutional Court provided that "[...] any other court established or recognised in terms of an Act of parliament" (under section 166(e) being read together with section 16(1) of schedule 6) can be broadly interpreted to include traditional courts, which were established by the *BAA*.²⁶⁹ Traditional courts are constitutionally endorsed and form a part and parcel of the South African legal system. The endorsement illustrates the continued success of traditional leaders in administering justice in traditional communities.

²⁶⁴ *Bangindawo* para 326.

²⁶⁵ Rakate 1997 *Comp & Intl LJ S Afr* 178.

²⁶⁶ Rakate 1997 *Comp & Intl LJ S Afr* 178.

²⁶⁷ Section 166 of the *Constitution*.

²⁶⁸ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) (hereafter the *Certification* case).

²⁶⁹ *Certification* para 199.

In 2009 the Department of Justice and Constitutional Development produced a policy document entitled "Policy Framework on the Traditional Justice System under the Constitution" (hereafter the Policy Document).²⁷⁰ The Policy Document's main goal was to align the traditional justice system with the *Constitution*.²⁷¹ It is important to note that this Policy Document culminated the TCB.²⁷² The Policy Document is the result of a literature review, a comparative analysis of other jurisdictions, and meetings with traditional leaders, traditional government departments, and other stakeholders in the field of customary law.²⁷³

The Policy Document recognises the important role of traditional leaders in the administration of justice in traditional communities.²⁷⁴ A large number of people who live in traditional communities prefer and embrace the principles of customary law and the traditional court system, according to the report.²⁷⁵ The Policy Document provided that an estimated 14 million people live in traditional communities across all provinces, with the exception of the Western Cape.²⁷⁶

The Policy Document provided that national legislation should be established to affirm traditional institutions sitting as traditional courts, with traditional leaders exercising their role and functions of administering justice.²⁷⁷ The Policy Document seeks to affirm the traditional methods of the administration of justice grounded in the values of traditional communities.²⁷⁸ Despite the opposition of traditional leadership into the

²⁷⁰ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf.

²⁷¹ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 7.

²⁷² DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 7.

²⁷³ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 7.

²⁷⁴ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 7.

²⁷⁵ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 6.

²⁷⁶ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 6.

²⁷⁷ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 31.

²⁷⁸ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf at 30.

democratic state, the institution received and continues to have support from people in local and rural communities, who continue to view the institution as their voice.²⁷⁹

The Policy Document outlines the factors which ensured the continued success and resilience of the traditional justice system, such as the cheap, speedy, informal, conciliatory, and accessible nature of the traditional justice system.²⁸⁰

The traditional justice system is conciliatory in nature as it repairs the relationship between the wrongdoer and the community.²⁸¹ The wrongdoers come to terms with all the wrongful acts they have committed.²⁸² Traditional courts are easily accessible, as they are close to the communities, which makes it easy for those aggrieved to access them.²⁸³ The methods used in traditional courts are simple and user-friendly, and these methods are easily understood by members of traditional communities.²⁸⁴ The languages used in traditional courts are known to members of traditional courts and this ensures an efficient and effective administration of justice as there are no language barriers that hamper the smooth process of the courts.²⁸⁵

4.2.1 Positive features of the Traditional Courts Bill

4.2.1.1 Gender

There is a deliberative attempt in the TCB to ensure that women play a meaningful role in the proceedings of the traditional court. Unlike in the past, where women enjoyed less participation and representation in traditional courts. Section 2 of the TCB provides guiding principles for its application, including the achievement of equality, which means both men and women should be treated equally. In the application of the TCB, it is suggested the existence of systemic unfair discrimination

²⁷⁹ Khunou 2009 *PELJ* 105.

²⁸⁰ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf at 10.

²⁸¹ Rakate 1997 *Comp & Intl LJ S Afr* 181.

²⁸² Holomisa 2011 *South African Quarterly* 3.

²⁸³ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf at 6.

²⁸⁴ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf at 6.

²⁸⁵ DOJ & CD 2008 https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf at 6.

and inequalities or attitudes, which are contrary to constitutional values, should be recognised. Unfair discrimination and inequalities have the potential of depriving any person or group of persons the meaningful and voluntary participation in traditional courts based on gender.²⁸⁶ The word "should" suggests that it is mandatory for a deliberate enquiry and cognisance of the discrimination women systemically face. If the TCB becomes law, this enquiry will potentially guide the application of the TCB to be in harmony with constitutional values located in section 1 of the *Constitution*.²⁸⁷ Section 7(3) of the TCB provides that

during proceedings, a traditional court must ensure that women as parties to any proceedings or members of traditional courts are afforded full and equal participation in proceedings as men.

4.2.1.2 Code of Conduct

Section 16 of the TCB provides for a code of conduct to be compiled for all persons who have a role in terms of customary law for the effective functioning of traditional courts. The code of conduct will set standards that will guide those who are present in the traditional courts' proceedings on how they should conduct themselves when exercising their functions and powers. This provision includes traditional leaders, and this is a step in the right direction to ensure that there is a sense of accountability.

The above discussion dealt with the success of the traditional justice system. As alluded to above, the traditional courts and traditional leaders have, for countless years, ensured the administration of justice in traditional communities under cultural practices and customs applicable to the relevant community. The traditional communities' continued support of traditional leaders and courts has ensured a constitutional endorsement of traditional courts.

4.3 Challenges of the traditional justice system

The *Constitution* recognises that traditional courts play a central role in the traditional justice system.²⁸⁸ However, there exists a need for legislative measures to incorporate

²⁸⁶ Section 3(2) of the TCB.

²⁸⁷ Section 1 of the *Constitution*.

²⁸⁸ Section 166 of the *Constitution*.

this into the mainstream justice system and align it with the *Constitution*. The *Constitution* also recognises national and provincial legislation, which may provide for the roles and powers of traditional leaders. According to Khunou, the failure of the *Constitution* to expressly provide the traditional leaders' constitutional status, powers, and duties has led to traditional leaders feeling marginalised in the democratic government.²⁸⁹ Khunou provides that traditional leaders hold a view that their role and functions have been reduced in many respects, including the administration of justice.²⁹⁰ The government has sought to address and reform the traditional justice system by enacting the *TLGFA* and drafting the TCB. Unfortunately, the *TLGFA* makes little contribution to resolve the issues of the judicial functions of traditional leaders. On the other hand, the TCB is designed to reform the traditional justice system.

4.3.1 *Traditional Courts Bill*

The TCB aims to harmonise the traditional justice system with the Constitution and ensure the traditional court system's efficacy and efficiency in the administration of justice.²⁹¹ This TCB aspires to provide a system of law based on African customary law. The TCB provides for the traditional courts within the traditional justice system, which are presided over by a king or queen, senior traditional leader, headmen, or a member of a royal family.²⁹² The TCB is closely related to the *TLGFA*, which seeks to promote an efficient, effective, and fair dispute-resolution system, as well as a fair system of administration of justice.

However, the TCB contains some challenges that, if enacted into law, will continue to attract criticism from the parties affected by it. Ntlama and Ndama characterise the weaknesses of the TCB as (1) inconsistency; (2) unpredictability; and (3) some discriminatory practices (particularly against women).²⁹³ According to Soyapi, the legislature has failed to redefine and shape the traditional justice systems in line with

²⁸⁹ Khunou 2013 *Journal of Global Peace and Conflict* 59.

²⁹⁰ Khunou 2013 *Journal of Global Peace and Conflict* 59.

²⁹¹ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 17.

²⁹² Section 4 of the TCB.

²⁹³ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 18.

the new constitutional dispensation and the TCB fails to achieve it.²⁹⁴ Soyapi argues that the following issues should be revisited for the proposed legislation (TCB) to achieve its intended purpose: "(1) ascertainment; (2) legal representation; (3) jurisdiction; (4) gender; (5) hierarchy of courts; and (6) appeals."²⁹⁵ According to Khunou, the following factors hinder the progress of an effective traditional justice system: (1) the historical legacy of colonialism and apartheid, which disempowered and degraded traditional leaders' overall expertise as justice dispensers; (2) the widespread belief that traditional courts are inherently regressive; and (3) a lack of traditional courts infrastructure.²⁹⁶

4.3.2 Negative Features of the Traditional Courts Bill

4.3.2.1 Hierarchy of traditional courts

The TCB does not provide for the hierarchy of traditional courts as they have been for some time.²⁹⁷ By nature, the traditional courts have always been hierarchical.²⁹⁸ The dispute between parties is also firstly resolved from the family level and moves to the headmen's court if the matter was not resolved in family court.²⁹⁹ Instead, the TCB provides for one level of courts to be presided over by traditional leaders.³⁰⁰ This is unfortunate because there is no compelling reason to set aside the hierarchal structure of traditional courts, which have worked for decades.

The setting aside of the hierarchal structures of traditional courts is a distortion of the functioning of traditional courts, and it confirms the assumption that the government is taking away the powers and roles of traditional leaders in the administration of justice. The refusal to recognize levels of seniority in traditional courts, according to Ntlama and Ndima, is detrimental because it is a fundamental aspect of the traditional leadership system.³⁰¹ Soyapi argues that there is no legal basis for disregarding the

²⁹⁴ Soyapi 2014 *PELJ* 1459.

²⁹⁵ Soyapi 2014 *PELJ* 1460.

²⁹⁶ Khunou 2013 *Journal of Global Peace and Conflict* 61.

²⁹⁷ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 20.

²⁹⁸ Soyapi 2014 *PELJ* 1456.

²⁹⁹ Khunou *A legal history* 24; see also Holomisa 2011 *South African Quarterly* 2.

³⁰⁰ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 20.

³⁰¹ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 20.

courts of headmen as these courts have always been functional and preserve the chain of authority in providing an appeal system.³⁰²

4.3.2.2 Race

The TCB does not provide a clear provision that outlines jurisdiction on the grounds of race.³⁰³ The jurisdiction is defined by the geographic location of traditional communities.³⁰⁴ This creates uncertainty and the TCB should provide that jurisdiction of traditional courts cuts across all races in South Africa to avoid the selective practice of the justice system. Ntama and Ndima argue that all races should be brought within the jurisdiction of traditional courts to avoid racial polarisation.³⁰⁵ Ntlama and Ndima provide that it will be absurd for a wrongdoer to simply avoid accountability on the grounds of race. He argues for a mechanism that will serve all South Africans without race or colour.³⁰⁶ Khunou provides that there is a need for a mechanism that will serve South Africans irrespective of race.³⁰⁷

4.3.2.3 Accountability of traditional leaders in traditional courts

There is no proper mechanism in place to allow the registration of complaints against presiding officers in traditional courts. Section 16 of the TCB requires that complaints of incapacity, gross incompetence, or misconduct by the presiding officers should be directed through the Director-General to the Minister of Justice and Constitutional Development.³⁰⁸ This method is complicated, complex, and time-consuming for ordinary members of traditional communities.

The method should be simple and effective. To ensure this, traditional councils should be able to safeguard some effective measures to guarantee that traditional leaders guilty of misconduct are held accountable. Ntlama and Ndima argue that the system

³⁰² Soyapi 2014 *PELJ* 1457.

³⁰³ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 21.

³⁰⁴ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 21.

³⁰⁵ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 21.

³⁰⁶ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 21.

³⁰⁷ Khunou 2013 *Journal of Global Peace and Conflict* 60.

³⁰⁸ Section 16 of the TCB.

adopted by the TCB is flawed, as the complaints should be lodged within the traditional hierarchal structures.³⁰⁹

4.3.2.4 Appeals

The TCB provides some recourse for the parties who are aggrieved by the decision of the traditional court. Section 12 of the TCB provides that the parties aggrieved by the decision of the traditional court, on any grounds except those provided for in section 11(1) of the TCB, and may ventilate the matter to a customary institution or structure following customary law and custom.³¹⁰ The word "may" should be replaced with "must" to ensure that matters are firstly reviewed and resolved within the traditional institutions before being referred to the High Court. The word "must" does not necessarily suppress freedom of choice but it is a deliberate attempt to encourage ventilation of matters within traditional institutions.

4.3.2.5 Pledge or Affirmation

Section 5(5) of the TCB requires presiding officers in traditional courts to swear their pledge or affirmation.³¹¹ This is a progressive step to ensure that there is a sense of accountability. However, the manner in which it is prescribed is not clear as the TCB does not provide to whom the presiding officers must swear their pledge or affirmation.³¹² Presiding officers should swear their oath within the traditional hierarchal structures and not to the magistrate. The swearing of an oath to the magistrate oversteps the notion of harmonising the traditional justice system with the *Constitution*. Ntlama and Ndima contend that this obstructs the autonomous growth of customary law, making it inferior to the point where it seeks validation from an external (Western) system.³¹³

³⁰⁹ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 23.

³¹⁰ Section 12 of the TCB.

³¹¹ Section 5(5) of the TCB.

³¹² Section 15 of the TCB.

³¹³ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 20.

4.4 Conclusion

This chapter has dealt with the challenges and successes of the traditional justice system in South Africa. It has been outlined that the traditional justice system has played a major role in dispute resolution in traditional communities and has acted as a preserve for customary law. The constitutional endorsement of the traditional justice system and the legislative recognition of the traditional justice system has been discussed. The continued success of the traditional justice system in traditional communities emanates from the following factors regarding traditional courts that administer justice in traditional communities. These factors include, *inter alia*, (1) the accessibility of traditional courts; (2) the cost-effectiveness of traditional courts; (3) language in traditional courts; and (4) simplicity and informality in traditional courts. The continued success and constitutional endorsement of the traditional justice system demonstrate that the traditional justice system has a place in this democratic dispensation and illustrates the significance of the traditional justice system in traditional communities.

However, this chapter also demonstrates that the successes of the traditional justice system are hampered by certain challenges that need to be addressed. The challenges include (1) legal representation; (2) jurisdiction; (3) gender; (4) hierarchy of courts; (5) accountability of traditional leaders in traditional courts; and (6) appeals. If these challenges are addressed, it will ensure that the traditional justice system is in harmony with the *Constitution*.

The following chapter provides a conclusion and recommendations to this research.

Chapter 5: Conclusions and Recommendations

5.1 Introduction

This chapter provides a conclusion as well as recommendations for law reform to address the problems raised in this research.

As mentioned in Chapter 1, the research analyses the judicial functions of traditional leaders in South Africa. The research problem is concerned with the judicial functions and powers of traditional leaders that are not clearly defined. Notably, there exists a clear legislative deficiency as there is no legislative mechanism to deal with the judicial misconduct and/or abuse of power by traditional leaders (when exercising their judicial authority). As mentioned in Chapter 1, the research aims to analyse the extent to which the existing legal framework addresses the judicial misconduct of traditional leaders when exercising their judicial authority.

5.2 Conclusion

This dissertation unpacks the legislation governing the judicial functions of traditional leaders. There can be no doubt surrounding the major role played by customary law and the traditional justice system in providing access to justice in South Africa — particularly in traditional communities.³¹⁴ This underpins the justification for the constitutional recognition of the institution of traditional leadership and the traditional justice system.³¹⁵

The TCB provides for active participation of women in court proceedings and the TCB provides for a code of conduct to be compiled for all persons who have a role in terms of customary law to facilitate the effective functioning of traditional courts. However, the major challenge still remains. The challenge pertains to the legal recognition of the traditional justice system and its dispute settlement institution (traditional courts),

³¹⁴ Williams and Klusener 2013 *SAJHR* 276.

³¹⁵ Section 211-212 of the *Constitution*.

particularly the legislative *lacuna* and non-existing legislative mechanisms for dealing with the judicial misconduct of traditional leaders (exercising their judicial authority).

This legislative *lacuna* and non-existing accountability mechanisms pose a question of justice delivered in traditional courts and whether the traditional justice system can uphold, protect, and promote the rights in the Bill of Rights in harmony with the *Constitution*? The expected outcome of this legislative gap is that room is created for traditional leaders (exercising their judicial authority) to abuse their powers — without being held accountable.³¹⁶

Furthermore, this legislative gap gives rise to a degree of vulnerability for traditional court users. One can never be certain that challenging and exposing the judicial misconduct of traditional leaders will not lead to intimidation and victimisation. This is indicative of a justice system that needs legal reform. However, it is important to note that despite all the challenges facing the traditional justice system, the traditional courts remain the focal and important forums for dispute resolution in traditional communities. In this context, it is safe to say that the challenge of addressing this legislative deficiency lies squarely in legislative reform, which must ensure that clear mechanisms and measures are put in place to ensure the accountability of traditional leaders who engage in judicial misconduct.

In conclusion, for as long as this legislative deficiency is not sufficiently dealt with, conflicts between traditional leaders and members of traditional communities will continue to exist regarding the judicial functions of traditional leaders in traditional courts.

It is against this background that the researcher proposes the following recommendations to minimise these conflicts between traditional leaders and members of traditional communities to ensure a traditional justice system that is in harmony with the *Constitution* and that the peaceful resolution of disputes in traditional communities persists.

³¹⁶ Tshitangoni and Francis 2017 *Studies of Tribes and Tribals* 8.

5.3 Recommendations

5.3.1 Provision of judicial functions of traditional leaders

Section 20 of the *TLGFA* must provide for the functions of traditional leaders. Regarding the administration of justice, the *TLGFA* should clearly outline the general judicial functions of traditional leaders. The general judicial functions of traditional leaders should be uniform across provincial legislation. The provincial legislation should then, in accordance with their unique jurisdiction, provide for the detailed set of judicial functions of traditional leaders, which do not deviate from the general functions as outlined in section 20 of the *TLGFA*. This provision will then be able to erase confusion regarding the judicial functions of traditional leaders. Judicial functions may include the power to hear civil and criminal disputes arising out of the traditional communities and customs between residents within their areas of jurisdiction. The functions may include family disputes, divorce or separation in respect of customary marriage, delicts, property claims, agricultural and afforestation grievances, and the causing of bodily injury, *etcetera*.

5.3.2 Oath or affirmation within traditional hierarchal structures

It is submitted that section 5(5) of the TCB requires presiding officers in traditional courts to swear their pledge or affirmation.³¹⁷ This is a progressive step to ensure that there is a sense of accountability.³¹⁸ Presiding officers must swear their oath or affirmation, swear or affirm faithfulness to the Republic, and obedience to the *Constitution* within traditional hierarchal structures.³¹⁹ Those in breach of their oath or affirmation of office should be liable for an offence of perjury.

5.3.3 Establishment of a body like the Judicial Service Commission

It is submitted that the *TLGFA* should establish a body of traditional leaders which is similar to the Judicial Service Commission. The established body should specifically

³¹⁷ Section 5(5) of the TCB.

³¹⁸ Section 15 of the TCB.

³¹⁹ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 20.

deal with complaints brought against traditional leaders as presiding officers in traditional courts. It should consist of provincial traditional house members and respected members of traditional communities who know customary law, also legal scholars and customary law experts should form part of the body. Members of the traditional council should not form part of the established body unless called upon to provide evidence as witnesses. Members of the traditional council are a part and parcel of the council that assists the traditional leader in exercising his or her judicial functions. This has the potential to tamper with the traditional council's impartiality.

Secondly, in cases of misconduct by traditional leaders, the first level of enquiry begins at the level of the traditional council to deliberate on the matter. The commission should investigate the complaints of abuse of power by traditional leaders who exercise judicial authority. The commission should be mandated to conduct investigations and make findings that are final and binding. The commission should be open to users of a traditional court.

5.3.4 Uniform code of conduct in the Framework Act

After section 20 of the *TLGFA*³²⁰ has provided for a provision that deals with the judicial functions of traditional leaders, it is submitted that the code of conduct that is set out under schedule 1 of the Act should be utilised for purposes of the judicial authority of traditional leaders. The provision should read as follows:

[T]he traditional leader exercising his or her judicial authority should abide by the code of conduct located in schedule 1 of the Act.

This provision should apply to all provincial legislation with a uniform code of conduct for purposes of uniformity and legal certainty. The grounds listed under schedule 1 of the Act should be put forth as grounds that constitute judicial misconduct in *TLGFA*.

³²⁰ Section 20 of the *TLGFA*.

5.3.5 Uniform set of channels to lay a complaint against traditional leaders exercising judicial authority

Section 19 of the *ECTLGA* provides that whenever there is a reason to believe that a traditional leader committed an act of misconduct located in schedule 1 of the *ECTLGA*, the chairperson of the traditional council or the Royal Family may charge him or her in writing with such misconduct. This is a progressive step that can be utilised for cases relating to the judicial misconduct of traditional leaders. It is submitted that the *TLGFA* adopts this procedure of laying complaints against traditional leaders guilty of judicial misconduct. The procedure should then descend to all provincial legislation and be applicable in the same manner as provided for in the *TLGFA*. The provision should read as follows:

[A]nyone who is aggrieved by the conduct or actions of a traditional leader exercising judicial authority may lay a complaint or charge to the chairperson of traditional council or the Royal family which will formally charge him or her in writing with such misconduct.

In cases the traditional council or Royal Family fails or unreasonably delays to take actions against a traditional leader accused of judicial misconduct, the matter should be escalated to the established body under section 20 as provided above.

5.3.6 Complaint and awareness mechanisms

The provincial legislation and provincial government must put in place effective measures to ensure that traditional court users are aware of the mechanisms that could be utilised to ensure that traditional leaders (exercising judicial authority) are held accountable for their judicial misconduct. More importantly, traditional court users and the public must know how to use these mechanisms.

5.3.7 Adoption of measures to avoid victimisation and intimidation for rising claims against traditional leaders for judicial misconduct

It is submitted that provincial legislation must prescribe measures to ensure that there is no victimisation and intimidation of those taking actions against traditional leaders.

This will promote the active participation of traditional court users and act as a deterrent for wrongdoers who rely on the silence of those around them.

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