Article

The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms

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Abstract

South Africa and India both struggle with a high crime rate and case backlogs in the mainstream courts. Both countries have a pluralistic system where state law consists of formal law and customary law. Both have mainstream and traditional courts following dispute resolution based on traditional values and principles. The *panchayat* system in India is comparable to traditional authorities in South Africa. The *panchayat* system performs judicial-like functions, and traditional courts operate at informal (*nyaya panchayat*) and formal (*gram nyayalayas*) levels in the rural areas. The *lok adalat* system is an alternative dispute resolution mechanism employed by the Indian government to address the high crime rate and court backlogs. Statistics reveal that these alternative justice mechanisms based on traditional values and principles have successfully cleared some backlogs. South Africa is in the process of adopting legislation on traditional courts, and it is envisaged that the Traditional Courts Bill [B1-2017] will soon be transformed into law. In reconsidering traditional courts' role in the South African criminal justice system, it is worthwhile to explore what the Indian government has been doing in this regard. The main aim is to analyse the Indian approach to criminal justice regarding dispute resolution examples based on traditional laws, namely the *panchayat* system (*nyaya panchayats* and *gram nyayalayas*) and also *lok adalats* in a comparative context.

Keywords: Traditional African courts; formal criminal justice system; Indian traditional courts; alternative dispute resolution; traditional criminal justice; criminal justice

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Introduction

The high crime rate in South Africa is taking a toll on the mainstream (or state-run) court system,[1] and it is time to reconsider more options. One possibility is to rethink the role of traditional African courts (or customary courts). [2] Currently, they are not recognised by the government as part of the mainstream criminal justice system.[3] The National Prosecuting Authority (NPA) describes the South African criminal justice system as consisting of six parts: the police service; the judiciary; the prison service; the prosecution service; the Department of Justice; and social services.[4] The list does not include traditional African courts. Even though they are generally referred to as 'courts', they are not seen as analogous to their state-run counterparts.[5] The South African government distinguishes between courts established in section 166, and traditional courts set up in terms of customary law.[6] The latest version of the TC Bill-2017[7]

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1 The annual crime statistics for 2018/19 are available at <https://www.saps.gov.za/services/crimestats.php> accessed 8 November 2019. According to the National Prosecuting Authority of South Africa, *Annual Report 2018/19* (*NPA Report 2018/19*) 54–55 <https://www.npa.gov.za/content/annual-reports/ndpp-annual-report-2018-19> accessed 8 November 2019, an outstanding case load of 179 033 cases was carried into the 2017/18 financial year.

2 We acknowledge that it would be impossible to rethink the role of traditional African courts in light of the comparative discussion we provide in this article. The purpose of this discussion is merely to illustrate what is done in other jurisdictions such as India. We hope to spark a debate on the issue of a closer working relationship between state-run and traditional courts, that could ameliorate the high crime rate and backlogs experienced in South Africa.

3 A manual that explains the NPA's approach to the criminal justice system is available on the internet in the eleven official languages. National Prosecuting Authority (NPA), *Understanding the Criminal Justice System* (Jacana Media 2008) <https://www.npa.gov.za/node/34> accessed 8 October 2020.

4 NPA (n 3) 5.

5 Constitution of the Republic of South Africa, 1996 (the Constitution). The only courts listed are the Constitutional Court, the Supreme Court of Appeal, High Courts, Magistrates' Courts, and Small Claims Courts. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa, 1996* 1996 (4) SA 744 (CC) para 199, held that s 166(1) include traditional courts established in terms of the Black Administration Act 38 of 1927 (the BAA). It is evident, however, from the Traditional Courts Bill [B1-2017] (hereafter TC Bill-2017) that government does not agree with this approach, and that they will not be regarded as state-run institutions.

6 It is true that the Constitution does not list traditional courts specifically as part of the judicial system but s 166(e) does include 'any other court established or recognised in terms of an Act of Parliament.' Traditional courts operate in terms of ss 12 and 20 of the Black Administration Act 38 of 1927 (the BAA), and it is not clear why they are not regarded as 'any other court established or recognised in terms of an Act of Parliament' as referred to in s 166(e). cf Christa Rautenbach, 'South Africa: Legal Recognition of Traditional Courts – Legal Pluralism in Action' in Matthias Kötter and others (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (Palgrave Macmillan 2015) 122.

7 A critical discussion of the TC Bill-2017 falls outside the scope of this discussion. For more information see, Nomboniso Gasa, 'The Traditional Courts Bill: A Silent Coup?' (March 2011) SA Crime Quarterly 23. Also see the arguments by Marius Pieterse, 'It is a "Black Thing": Upholding

differentiates between a 'court' and a 'traditional court'. The TC Bill-2017 envisages a clear distinction between a court and a traditional court. It defines a 'court' as one established in terms of section 166 of the Constitution, and a 'traditional court' as:[8]

> … a customary institution or structure, which is constituted and functions in terms of customary law and custom, for purposes of resolving disputes, in accordance with constitutional imperatives and this Act, and which is referred to in the different official languages as—
>
> (a) "eBandla" in isiNdebele;
> (b) "Huvo" in Xitsonga;
> (c) "Inkundla" in isiZulu;
> (d) "Nkhundla" in siSwati;
> (e) "iNkundla" in isiXhosa;
> (f) "Kgoro" in Sepedi;
> (g) "Kgotla" in Sesotho;
> (h) "Khoro" in Tshivenda;
> (i) "Kgotla" in Setswana; and
> (j) a tribunal for Khoi-San communities.

This definition differs from those in the previous two versions of the Bill. It no longer contains a reference to 'traditional justice'. It is uncertain whether this change signifies that there is no longer a difference between criminal justice in general and justice dispensed in traditional communities.[9] However, as spelt out in clause 6 of the TC-Bill, traditional courts' nature remains conflict resolution to restore harmony in communities. It differs from the concept that justice is achieved when an offender is punished for his or her wrongful deeds. Secondly, the definition no longer contains the Afrikaans translation *tradisionele hof* (traditional court). It is understandable why 'a tribunal for Khoi-San communities' was added, considering their recent inclusion in the Traditional and Khoi-San Leadership Act. Still, it is unclear if the TC Bill-2017 intends to establish

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Culture and Customary Law in a Society founded on Non-racialism' (2001) 17 SAJHR 364 at 372 that the continued dualism of the mainstream and traditional court systems in South Africa is based on racial underpinnings.

8 TC Bill-2017: cl 1(a).

9 The previous two versions are the Traditional Courts Bill [B15-2008] (hereafter TC Bill-2008) and the Traditional Courts Bill [B1-2012] (hereafter TC Bill-2012). The differences between western and traditional justice remains a point for discussion. cf Pieterse (n 7) 372 argues that the continued dualism of the mainstream and traditional court systems in South Africa is based on racial underpinnings. cf also Charles RM Dlamini, 'The Role of Customary Law in Meeting Social Needs' (1991) 16 Acta Juridica 71–85 who points out that customary law and its values also have value in a system based on Western norms and values.

a 'tribunal' to which the Act's provisions will apply because no such forum is currently in existence.[10]

The continued reference to 'traditional court' and now also to 'tribunal of Khoi-San communities' is confusing. Clause 6 of the TC Bill-2017 explains the nature of traditional courts as 'courts of law under customary law' but, if they are no longer regarded as 'any other court established or recognised in terms of an Act of Parliament' as listed in section 166 of the Constitution, why continue to refer to them as 'courts'? Should they not be called something else that reflects their unique character, such as 'traditional dispute forums' or 'tribunals'? We do not want to ponder too long on whether traditional courts should be regarded as courts or not, since they have been called courts in the colloquial language for a long time, but this is a question that should be considered before the Bill is transformed into law.

Traditional African courts currently operate under sections 12 (civil jurisdiction) and 20 (criminal jurisdiction). The TC Bill-2017 will regulate their future operation if it is transformed into legislation. However, this contribution is not concerned with their functioning in terms of this legislative framework but their role as alternative dispute resolution mechanisms in mainstream criminal justice. Whereas modern criminal dispute resolution methods have a more retributive aspect, traditional systems focus primarily on restoring equilibrium and harmony in society rather than punishing offenders. In traditional societies, the aim of dispute resolution was and in many respects still is the reconciliation of the parties and restoration of the harm done.[11] In the words of Nyakundi:[12]

> Traditional societies had well outlined indigenous techniques of settling conflicts. These techniques bordered on restorative justice approaches through the use of mediation and arbitration in order to re-establish the pre-conflict geniality between the disputants.

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10 3 of 2019. The Act was signed by the President on 20 November 2019 but it has not yet commenced. Some commentators have raised concerns about the signing of the Act. cf Jan Gerber, 'Ramaphosa Signs Contentious Traditional and Khoi San Leadership Bill into Law' (*News 24*, 29 November 2019) <https://www.news24.com/SouthAfrica/News/ramaphosa-signs-contentious-traditional-and-khoi-san-leadership-bill-into-law-20191129> accessed 20 December 2019. It is unclear why the Afrikaans translation has been omitted, especially considering that it is one of the official languages and also the spoken language of many members of Khoi-San communities.

11 Navilla Somaru, 'Hindu Perspectives on Alternative Dispute Resolution: Lessons for South African Criminal Law' (LLM thesis, North-West University 2017) 24.

12 Freda M Nyakundi, 'Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution' (LLM dissertation, University of Cape Town 2015) 8. The terminology 'alternative dispute resolution' in the context of this article denotes the broader meaning given to it, namely all forms of dispute resolution other than litigation or adjudication through the [mainstream] courts.' See South African Law Reform Commission, *Issue Paper 8 on Alternative Dispute Resolution: Project 94* (SALRC 1997) 13.

> African culture affirmed methods that promoted its foundations on brotherliness and harmony.

A cursory reading of the TC Bill-2017 suggests a minimal role for traditional courts in future by restricting their operation to disputes arising out of customary law. They are not considered essential role players in addressing the crime rate and easing case backlogs in South Africa.

In contrast, traditional justice systems have been used in India to address the backlog in mainstream courts, although the country struggles with similar backlog issues.[13] In April 2017, more than 30 million cases were pending in Indian courts.[14] A solution to these backlogs was to utilise traditional justice systems for many years in rural areas.[15] Two examples are *panchayats* (village councils) and *lok adalats* (people's courts).[16]

Like South Africa, India experienced a period of British colonial rule, and both legal systems contain elements of English law and customary law.[17] Furthermore, the two countries share similar corruption, crime, congested court rolls and case backlogs. Both have a pluralistic legal system where both transplanted and indigenous laws and customs co-exist. The Indian government has been using traditional alternative dispute resolution based on Hindu principles to address the high crime rate and court caseloads with some success, as illustrated in this contribution.[18]

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13 India struggles with similar crime and backlog related issues than South Africa. For example, media reports refer to one of the oldest cases in India that was finalised on 3 March 2013 after being on the court roll for 76 years. It involved a claim of 807 rupees (around R200). Santosh Singh, 'India's "Oldest Case" Ends After 76 Years for Rs 807' (*The Indian Express*, 3 March 2013) <https://indianexpress.com/article/news-archive/latest-news/indias-oldest-case-ends-after-76-yrsfor-rs-807/> accessed 10 December 2019.

14 The data include the cases pending in the Supreme Court, High Courts and lower courts. cf PRS Legislative Research, 'Vital Stats: Pendency of Cases in the Judiciary' (PRS, 2018) <http://prsindia.org/policy/vital-stats/pendency-cases-judiciary> accessed 10 December 2019.

15 The reasons for people preferring these traditional justice systems are similar to those put forward by people going to traditional courts in South Africa: the mainstream courts are 'poorly designed to meet the needs of a rural population with widespread poverty, illiteracy, and unfamiliarity with formal legal procedures'—cf Hiram E Chodosh and others, 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1998) 30 New York Univ J of Intl L and Politics 1 at 29.

16 Binny Seth, 'Institutionalized Corruption in India: Judicial Systems, Ineffective Mechanisms, and Movement of Reform' (2012) 15 Touro International Law Review 169 at 175.

17 Anil Chandra Banerjee, *English Law in India* (Abhinav Publications 1984) 190; Christa Rautenbach, 'The Legal Position of South African Women under the Law of Succession' (LLD thesis, North-West University 2001) 121.

18 Sarfaraz Ahmed Khan, *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* (APH Publishing Company 2006) 119; Anon, 'Lok Adalat' (Articles on Various Topics on Law Blog,

Despite commonalities between South Africa and India, the two countries' legal systems vary considerably because of cultural and other differences. This article does not deal with these differences but focuses mainly on the Indian approach to traditional justice. Specifically, it focuses on the two dispute resolution systems based on tradition: the *panchayat* (*nyaya panchayats* and *gram nyayalayas*)[19] and the *lok adalats*.

We acknowledge that a link between the high crime rates and backlogs in state-run courts in South Africa and India had not been determined scientifically. Neither have we proved that these issues could be resolved by employing traditional justice structures. Such a link can only be established by empirical research, which has not been carried out. However, comparing how other jurisdictions are faring might help reconsider traditional courts' role as alternative dispute resolution mechanisms in South Africa. We do not provide a critical discussion of the TC Bill-2017 because we are not questioning traditional courts' functioning or constitutionality, as extensive scholarship about these already exists. The focus is on analysing the two types of traditional justice systems employed in India to address the high crime rate and backlogs in Indian courts, to shed light on how other jurisdictions handle these. This approach is in line with one of the aims of comparative law that Patrick Glenn describes as an instrument of learning and knowledge. In other words, information on the law elsewhere and a better understanding thereof.[20]

Traditional Alternative Dispute Resolution in India

India, the southern subcontinent of Asia, is a landscape as diverse as its people, and it is also the global hub of Hindu law.[21] Twenty-two significant languages with over 720 dialects are spoken. The country is almost the size of western Europe, with an estimated population of 1.2 billion on approximately 3.28 million square kilometres. Eighty per

undated) <http://monthlyarticle.blogspot.com/search/label/Lok%20Adalat> accessed 10 December 2019.

19 *Nyaya panchayats* based on traditional Hindu principles were reintroduced into the Indian justice system in the late 1940s but by the late 1970s they no longer existed. The Indian government tried to revive them in 2008 but the attempt failed. They have been replaced by *gram nyayalayas,* which are also based on 'a system of decentralised and accessible judicial institutions for rural litigants at the village level.' cf Shishir Bail, 'From *Nyaya Panchayats* to *Gram Nyayalayas*: The Indian State and Rural Justice' (2015) 11 Socio-Legal Review 83, 84–85; Mayank Shekhar, 'Nyaya Panchayats' (Legal Bites: Law and Beyond, 31 December 2016) <https://www.legalbites.in/nyaya-panchayats/> accessed 27 December 2019.

20 Patrick H Glen, 'Aims of Comparative Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 65–74.

21 Anil Malhotra and Ranjit Malhotra, 'Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities' (IAFL 2010) 1-3 <https://www.iafl.com/media/1129/alternative_dispute_resolution_in_indian_family_law.pdf> accessed 10 December 2019 1–3.

cent of the population is Hindu.[22] Hindu law is indigenous to India [23] and according to the *New World Encyclopaedia*, refers 'to the system of personal laws traditionally derived from Hindu texts and traditions that shaped Hindu communities' social practice.' Currently, Hindu law refers to the Code of Law applied to Hindus, Buddhists, Jains and Sikhs as practised in India.[24]

Roughly sixty per cent of the two per cent of Indians living in South Africa identifies as Hindu.[25] Although Hindu law is unrecognised in South Africa,[26] it could be interesting to analyse how India has been using traditional forums to assist with the high crime rate and congested court rolls, though with varying success.[27] As in South Africa, the cordial dispute resolution methodology in India can be traced back in history, when disputes were resolved between members of a traditional community. In rural India, the *panchayats* settled almost all disputes locally. The methods of amicable dispute resolution that were used in the *panchayats* were established and acknowledged systems of administration of justice and not just an 'alternative' to a formal justice system.[28]

The *panchayat* system

The *panchayat* system is a traditional governance system analogous to that of traditional authorities in South Africa.[29] The word '*panchayat*' denotes a village council of five members.[30] One can find a detailed description of these village councils in scripture called *Arthashastra,* written by Kautilya, around 400 BC.[31] It began as a system of local

22 Somaru (n 11) 49–50.

23 René David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn, Free Press 1978) 463, 465.

24 Werner M Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2009) 1.

25 Hindus from India arrived in South Africa as indentured labourers from 1860 onwards and they observe and practise their own customs and religion. Christa Rautenbach (ed), *Introduction to Legal Pluralism in South Africa* (LexisNexis 2018) 280–282.

26 Rautenbach (n 25) 283.

27 Anil Nauriya, 'Panchayats: Regular and Irregular' <https://www.academia.edu/1834419/Panchayats_Regular_and_Irregular> accessed 13 December 2019 points out that there are also 'pretender panchayats' that reign with terror in certain areas in the north of India without legality.

28 Malhotra and Malhotra (n 21) 7.

29 Raj Singh, *Manual: A Socio-Historical-cum-Legal Perspective* (Anmol Publications 1996) 10.

30 A 'village' is defined in s 243 of the Constitution of India as 'a village specified by the Governor by public notification to be a village for the purposes of this Part [Part IX] and includes a group of villages so specified.' This definition is in broad terms similar to the definition of 'traditional community' contained in the Traditional Leadership and Governance Framework Act 41 of 2003 (the 'TLGFA'), which also requires formal recognition. See s 1 read in conjunction with s 2.

31 English translations are available. See the eBook by R Shamasastry, *Kautilya's Arthashastra* <https://csboa.com/eBooks/Arthashastra_of_Chanakya_-_English.pdf> accessed 20 December 2020.

government[32] under the sole leadership of the village headman. It developed further to include other influential and respected sages of the village.[33] It was essentially a system that operated at a grassroots level in villages. *Panchayats* is a self-governing system with various responsibilities and judicial duties. [34]

A *panch* or *pancha* refers to a single member of the *panchayat*, and village members elected all the *panchas* or members of the *panchayat*.[35] Each *panchayat* consisted of at least five elders (*panchas*) from the immediate village.[36] This council or assembly's duties were to enforce and administer justice, watch over the village's interests and welfare, impose punishment on defaulters, and liaise with the higher state administrative authorities.[37] *Panchayats* were also instrumental in resolving village disputes, both criminal and civil, which included offences such as the infringement of property rights, succession, rape, murder, marital and other family disputes.[38]

The *panchayat* system, though slightly changed over the ages, is still being practised in India today. Like traditional authorities in South Africa, they have both governance and judicial functions. *Panchayats* consist of five elders acting as arbitrators who resolve local disputes 'by utilising customary law, rather than State law'.[39] Like traditional African courts in South Africa, they are regarded as familiar, inexpensive, accessible and swift,[40] and like traditional authorities, are constitutionally endorsed.[41] Article 40 of the Directive Principles of the State Policy (the 'Art 40 Directive') in the Constitution of India, declares:[42] 'The states shall take steps to organise village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.' According to Mathur,[43]

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32 George Mathew, *Panchayati Raj in India: An Overview: Status of Panchayati Raj in India* (Institute of Social Science Concept Publishing 2000) 3.

33 Singh (n 29) 10.

34 Ratna Ghosh, *Panchayat System in India: Historical, Constitutional and Financial Analysis* (Kanishka Publications 1999) 208.

35 Mukkavilli Seetharam, *Citizen Participation in Rural Development* (Mittal Publications 1990) 34.

36 The number five is of great significance, and appears in the Hindu scripts quite a number of times, cf Shamasastry (n 31).

37 Ghosh (n 34) 209–210.

38 James Alan Jaffe, *Ironies of Colonial Governance* (Cambridge University Press 2015) 168–169.

39 Seth (n 16) 175.

40 ibid. cf Rautenbach (n 6) 122–123.

41 SA Constitution, ss 211 and 212.

42 The Directive Principles are contained in Part IV of the Constitution of India, and their status as explained in article 37 is as follows: 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

43 SN Mathur, *Nyaya Panchayats as Instruments of Justice* (Concept Publishing Company 1997) 23.

> *Panchayat* justice is not a novel idea but a time honoured institution having its deep roots in the ethos of the country. It is village self-government in action at the level of administration of justice. It both helped in involvement of people in dealing with law and justice and institutionalisation of expeditious local resolution of disputes.

Despite the Art 40 Directive in India's Constitution, the formal regulation of *panchayats* was delayed until 1993 when the Indian government regulated them in detail, viz. Part IX titled *The Panchayats*.[44] Part IX sets forth a three-tier *panchayat* system at the village, intermediate[45] and district levels.[46] However, as in South Africa, *panchayats*' structure and operation are not free of state involvement. States may legislate in terms of the composition, functions, and powers of panchayats in their areas, but mainstream courts are barred from interfering with *panchayats*' election process.[47] The Constitution of India provides for the continuation of informal *panchayats* already in existence in 1993 until a competent authority dissolves them.[48]

According to a report on the Ministry of Panchayati Raj's official website, there are currently 654 district panchayats, 6717 intermediate panchayats, and 253 057 village *panchayats*, illustrating the sheer magnitude of India's traditional system.[49] Although these are formal or state-run *panchayats*, large numbers of unofficial traditional *panchayats* are still in existence.[50]

The provisions of Part IX of India's Constitution display a remarkable resemblance between the *panchayat* and the traditional governance systems of South Africa.[51] Although a detailed discussion of the aspects that the systems may have in common falls outside this discussion's scope, a few examples can be provided. A *panchayat* is described as an institution of 'self-government' in the rural areas,[52] while a traditional authority is an institution of governance 'recognised, utilised or practised by traditional

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44 cf Constitution of India, articles 243–243O inserted by the 73rd Amendment on 24 April 1993.

45 Article 243 of the Constitution of India defines this level as 'a level between the village and district levels specified by the Governor of a State by public notification to be the intermediate level for the purposes of this Part [Part IX].'

46 Constitution of India, art 243, defines a 'district' as 'a district in a State'.

47 cf Constitution of India, art 243O.

48 cf Constitution of India, art 243N.

49 cf Ministry of Panchayati Raj (Government of India, 20 December 2019) <https://www.panchayat.gov.in/> accessed 20 December 2019.

50 Seth (n 16) 176.

51 For an overview of traditional African courts, cf Rautenbach (n 25) ch 11; Christa Rautenbach, 'Legal Reform of Traditional Courts in South Africa: Exploring the Links between Ubuntu, Restorative Justice and Therapeutic Justice' (2015) 2 Journal of International and Comparative Law 275; Rautenbach (n 6) 122.

52 Constitution of India, art 243(d).

communities'.[53] The definition of a 'village' in terms of the Indian Constitution[54] that requires identification by the Indian government through notice, reminds one that the same type of recognition is required to qualify as a 'traditional community' in South Africa.[55] The Indian Constitution allows for the *gram sabha*, a body of persons linked to a particular village, with state legislature powers,[56] similar to the traditional council established for a community in the TLGFA.[57] The Indian Constitution also provides a representation of members of the *panchayats* at various village levels and mainstream government, which can be compared to communities' representation through the national house and provincial houses of traditional leaders in South Africa.[58] A final example relates to the powers, authority and responsibilities of *panchayats* that enable them to self-govern. These are prescribed through state legislation[59] and include a list of functions similar to traditional authorities' powers in the previous dispensation of South Africa: agriculture; land reform; development and conservation; water; poverty alleviation; education; cultural activities; health; sanitation; and welfare.[60] Although most of these powers have been removed from traditional authorities in South Africa, the TLGFA provides a list of their functions in the new constitutional dispensation that generally is 'aimed at supporting, advising, and participating in the affairs of municipalities and other government organs.'[61]

Two types of dispute resolution forums fall under the *panchayat* system, namely the *nyaya panchayats* (a traditional dispute resolution system at village level) and *gram nyayalayas* (mobile village courts).

Nyaya panchayats

The *nyaya panchayat* was an informal justice system established by members of each village's *grama sabha* (traditional council). In form and substance, it is probably the

53 TLGFA, s 1. In general, for a discussion of traditional leadership, see Rautenbach (n 6) ch 10; Christa Rautenbach, 'Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance' in Charles Fombad and Nico Steytler (eds), *Decentralisation and Constitutionalism in Africa* (Oxford University Press 2019) 483.

54 Constitution of India, art 243(g).

55 TLGFA, section 1 read in conjunction with s 2.

56 Constitution of India, art 243(b) read in conjunction with art 243A.

57 TLGFA, s 1 read in conjunction with ss 3 and 4B.

58 cf Constitution of India, art 243C and TLGFA, ch 4.

59 India has twenty-eight states, and nine union territories. An Indian state is comparable to a province in South Africa. A union territory, on the other hand, is directly ruled by the central Indian government. cf India Today Web Desk, 'What is the Difference between a State and a Union Territory?' (*India Today*, 6 August 2019) <https://www.indiatoday.in/education-today/gk-current-affairs/story/what-is-the-difference-between-a-state-and-an-union-territory-1577445-2019-08-0> accessed 16 December 2019.

60 Constitution of India, art 243G and sch 11.

61 TLGFA, s 3. cf Rautenbach (n 53) 498.

closest to traditional courts in South Africa. Although ancient, they fell into disuse during British rule and efforts to restore them were made after independence. However, in the late 1970s, they vanished almost entirely because of politics and the difficulty in defining their role within a legal system based on Western principles.[62]

In 1986 the Law Commission of India published a report on the *nyaya panchayat* system.[63] The Commission believed that this system was problematic because—[64]

> [t]he prejudice that the Nyaya Panchayats composed of elected representatives suffered at the hands of the elite and the superior courts cannot be wished away. The growth of Nyaya Panchayat was thwarted by the superior courts, but could not subscribe to the view that a lay person not trained in technicalities of laws is capable of resolving disputes and rendering justice.

The execution of orders issued by the *nyaya panchayats* was also problematic.[65] According to the Law Commission, the only solution was to create a new forum which consisted of a 'legally trained Judge and two lays (sic) Judges'.[66] Instead of re-introducing *nyaya panchayats,* the Commission recommended establishing *gram nyayalayas*, each consisting of a judge and two laypersons.[67] Despite the Law Commission's recommendation, the Indian government tried to revive the *nyaya panchayats* as dispute resolution forums in rural areas through the Nyaya Panchayats Bill, 2009 (the 'Bill'). The Bill aimed to formalise *nyaya panchayats* at the village level for dispute resolution at the grassroots level. However, the Bill never became law. In 2012, the Indian government issued a press release stating that the proposed Bill's objective was 'to provide a sound institutionalised, alternative forum at the grassroots level with community involvement for dispute resolution through mediation, conciliation and compromise.'[68] As well as objections against the Bill, the Ministry of Law of Justice also had reservations regarding the Bill's viability,[69] which then seems

62 Bail (n 19) 84–85, 88–91.

63 Law Commission of India, *114th Report on Gram Nyayalaya* (August 1986) <https://www.prsindia.org/sites/default/files/bill_files/Law%20Commission%20Report%20on%20Gram%20Nyayalayas%201986.pdf> accessed 10 December 2019.

64 ibid para 3.4.

65 ibid para 3.10.

66 ibid para 3.4.

67 ibid para 3.7.

68 Ministry of Panchayati Raj, 'Establishment of Nyaya Panchayats' (Press Information Bureau, 10 May 2012) < https://pib.gov.in/newsite/PrintRelease.aspx?relid=83497> accessed 22 December 2019.

69 One of the concerns raised was the fact that it overlapped with The Gram Nyayalayas Act, 2008. cf the discussion in the next section.

to have died a silent death. After which the Indian parliament decided not to proceed with the Bill; a decision not widely publicised.[70]

The Gram Nyayalayas Act, 2008 (the GNA),[71] survived, and these courts continue to dispense justice in India's rural areas. Still, they do not represent pure traditional forms of dispute resolution forums as legally trained presiding officers lead them.

Gram nyayalayas

Following the Law Commission of India's recommendations, *gram nyayalayas* were established through the GNA, which came into force on 2 October 2009. *Gram nyayalayas* differ from *nyaya panchayats* in that they operate as 'formal courts', comparable to the small claims courts in South Africa.[72] As explained by the preamble to the GNA, the purpose of the *gram nyayalayas* is to provide—

> Access to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

A *gram nyayalaya* is defined as a 'court as established under section 3',[73] which requires that government, after consultation with the high court, may establish a *gram nyayalaya* through notification. A *gram nyayalaya* is a fully-fledged and fully resourced mobile court that travels to the people at specific intervals. It operates similarly as the South African periodical courts, that regularly visit rural and outlying areas.[74]

A *gram nyayalaya* is presided over by a *nyayadhikari*,[75] who must be 'eligible to be appointed as a judicial magistrate of the first class.'[76] The salary and benefits of the *nyayadhikari* are the same as those of a first-class judicial magistrate.[77] Unlike traditional African courts in South Africa, the presiding officer of the *gram nyayalaya* has a legal qualification and equal status and responsibility as a judicial magistrate, who

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70 Government of India, (Panchayati Raj, Lok Sabha 10 August 2017) <https://eparlib.nic.in/bitstream/123456789/707040/1/57513.pdf> accessed 22 December 2019.

71 4 of 2009.

72 Small claims courts in South Africa, however, deal only with civil matters, while a *gram nyayalayas* has civil and criminal jurisdiction.

73 GNA, s 2(a).

74 Somaru (n 11) 72.

75 This is the presiding officer. cf. the definition contained in s 2 of the GNA.

76 Section 6 of the GNA.

77 Section 7 of the GNA: 'The salary and other allowances payable to, and the other terms and conditions of service of, a Nyayadhikari shall be such as may be applicable to the Judicial Magistrate of the first class.'

is appointed by the state government and the relevant high court.[78] Section 6(2) of the GNA dictates that the representation of members of 'Scheduled Castes' and 'Scheduled Tribes' and women should be considered when appointing a *nyayadhikari*.[79] Furthermore, two advocates are assigned for each *gram nyayalaya*, and they offer the parties *pro bono* counsel in both civil and criminal cases. Section 11 of the GNA confers upon the *gram nyayalaya* jurisdiction over both civil and criminal matters.[80]

Other than traditional African courts, a *gram nyayalaya* may receive a case from either the police or directly from the complainant.[81] In criminal matters, a *gram nyayalaya* is authorised to adjudicate offences bearing a maximum one-year prison sentence and the imposition of fines. In civil matters, the *gram nyayalayas* can preside over all civil cases classified under the Second Schedule.[82] The standard trial procedure applies to both civil and criminal matters. However, the presiding officer may deviate from the strict legal rules should he deem it necessary.[83] All the official languages are accepted in the court.[84] The *gram nyayalaya* aim to reach speedy and transparent conclusions. Therefore, a judgment must be swift in open court immediately after the trial and, in the case of a civil dispute, within fifteen days.[85]

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78 Section 5 of the GNA: 'The State Government shall, in consultation with the High Court, appoint a Nyayadhikari for every Gram Nyayalaya'; Section 6 of the GNA: 'A person shall not be qualified to be appointed as a Nyayadhikari unless he is eligible to be appointed as a Judicial Magistrate of First Class'; Section 7 of the GNA: 'The salary and other allowances payable to, and the other terms and conditions of the service of a Nyayadhikari shall be such as may be applicable to the Judicial Magistrate of First Class.'

79 Section 6(2) of the GNA: 'While appointing a Nyayadhikari, representation shall be given to the members of the Scheduled Castes, the Scheduled Tribes, women and such other classes or communities as may be specified by notification, by the State Government from time to time.'

80 Section 11 of the GNA: 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or the Code of Civil Procedure, 1908 or any other law for the time being in force, the Gram Nyayalaya shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act.'

81 Section 12 of the GNA: 'Notwithstanding anything contained in the *Code of Criminal Procedure*, 1973 or any other law for the time being in force, the *Gram Nyayalaya* may take cognizance of an offence on a complaint or on a police report.' Clause 4(2)(b) of the TC Bill-2017 prevents an traditional African court from determining a dispute under investigation by the South African Police Service, which means that a police officer would not have a discretion to transfer a dispute to the traditional court even if he or she is of the opinion that the case could be better resolved in a traditional setting.

82 Section 13(1)(a) of the GNA: 'Try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule.'

83 Section 30 of the GNA: 'A *Gram Nyayalaya* may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act 1872.'

84 GNA, s 29.

85 ibid ss 22(1) and 24(9).

As per section 16 of the Act, *gram nyayalayas* may receive cases on the roll from a district court or a court of session.[86] Once a case has been registered, a *gram nyayalaya* may either retry it or continue from the stage when it was transferred from the court *a quo*.

The GNA makes provision for appeals in both criminal and civil cases, and the appellant has the right to appeal within thirty days of judgment.[87] All appeals are referred to the court of session (a district court) which must finalise the appeal within six months.[88] No appeal shall follow from a case where a party has pleaded guilty in the *gram nyayalaya* or where the fine imposed is less than one thousand rupees (approximately R250).[89] All other appeals, whether civil or criminal, are forwarded to the local district court for consideration.[90]

Conciliation is actively encouraged in the GNA. Section 26 instructs explicitly that in every case at the very first instance, the *gram nyayalaya* must make every endeavour to 'assist, persuade and conciliate the parties' to arrive at a just settlement.[91] Furthermore, *gram nyayalayas* may adjourn to allow for conciliation proceedings to take place between the parties.[92] The conciliation efforts are well organised. In terms of section 27, only qualified social workers may act as conciliators if appointed by the district judge.[93]

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86 Section 16(7) of the GNA: 'The District Court or the Court of Session, as the case may be, with effect from such date as may be notified by the High Court, may transfer all the civil or criminal cases, pending before the courts subordinate to it, to the *Gram Nyayalaya* competent to try or dispose of such cases.'

87 cf ss 33 and 34 of the GNA.

88 Appeals must be heard and disposed of within six months from the date of the filing of such an appeal. The appeal procedure is dealt with in ch 7, s 33.

89 Section 33(2) of the GNA: 'No appeal shall lie where an accused person has pleaded guilty and has been convicted on such plea and where the Gram Nyayalaya has passed a sentence of fine not exceeding one thousand rupees.'

90 Section 33(3) GNA: 'An appeal shall lie from any judgement, sentence or order of a Gram Nyayalaya to the Court of Session.'

91 Section 26(1) of the GNA: 'In every suit or proceeding, endeavour shall be made by the Gram Nyayalaya in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist, persuade and conciliate the parties in arriving at a settlement in respect of the subject matter of the suit, claim or dispute and for this purpose, a Gram Nyayalaya shall follow such procedure as may be prescribed by the High Court.'

92 Section 26(2) of the GNA: 'Where in any suit or proceeding, it appears to the Gram Nyayalaya at any stage that there is a reasonable possibility of a settlement between the parties, the Gram Nyayalaya may adjourn the proceeding for such period as it thinks fit to enable them to make attempts to affect such a settlement.'

93 Section 27(1) of the GNA: 'For the purposes of section 26, the District Court shall, in consultation with the District Magistrate, prepare a panel consisting of the names of social workers at the village level having integrity for appointment as Conciliators who possess such qualifications and experience as may be prescribed by the High Court.'

This provision of the Act, coupled with section 9,[94] provides for alternative dispute resolution and allows welcome relief for those unable to access justice easily. This type of court offers simple access to justice, and the alternative dispute resolution mechanisms result in the rapid and effective resolutions of cases. The *gram nyayalaya* must be a last resort court and has alleviated the extensive case backlog experienced by the lower courts.[95]

Chapter 6 of the GNA sets out the trial procedure based on more relaxed rules of evidence.[96] These allow for oral and affidavit evidence. The court has the discretion to summon witnesses and examine documentary evidence relevant to the facts if it 'thinks it fit'.[97]

Although *gram nyayalayas* were formally regulated in terms of the GNA to alleviate court backlogs in rural areas, they have not successfully replaced the irregular *panchayats,* notorious for dispensing a kind of mob justice, especially in the northern parts of rural India.[98] The implementation of the provisions of the GNA is not without problems. The plea-bargaining process in criminal cases could encourage innocent suspects to plead guilty under social pressure. Also, exclusion of the right to appeal in a criminal or civil case is regarded by some as too strict.[99] Although the intentions of the GNA with the establishment of *gram nyayalayas* are noble, Obulesh[100] points out that—

> [g]ram nyayalayas have a long way to go in fulfilling their purpose, whether improving access to judicial institutions or reducing pendency of cases before the formal courts. Despite being excellent models, gram nyayalayas have been grappling with systemic

94 Section 9(1) of the GNA: 'The Nyayadhikari shall periodically visit the villages falling under his jurisdiction and conduct trial or proceedings at any place which he considers is in close proximity to the place where the parties ordinarily reside or where the whole or part of the cause of action had arisen: provided that where the Gram Nyayalaya decides to hold mobile court outside its headquarters, it shall give wide publicity as to the date and place where it proposes to hold mobile court.'

95 Statistics are provided in Economic Services Group National Productivity Council, *Final Report: Evaluation Study of the Scheme of Establishing & Operationalising Gram Nyayalayas* (New Delhi 2018) <https://doj.gov.in/sites/default/files/Gram%20Nyayalaya%20final%20report_1.pdf> accessed 6 January 2021.

96 The GNA clearly sets out that it is not bound by the Rules of Evidence as provided for in the Indian Evidence Act, 1872.

97 Chapter VI of the GNA, particularly sections 29–32.

98 Nauriya (n 27).

99 ibid.

100 Ashwini Obulesh, 'Institutionalising Justice: Gram Nyayalayas and Consumer Courts' in Harish Narasappa and Shruti Vidyasagar (eds), *State of the Indian Judiciary: A Report by DAKSH* (Eastern Book Company 2016) ch 20 <http://dakshindia.org/state-of-the-indian-judiciary/00_cover.html> accessed 27 December 2019.

> defects, lack of practice of recording case data and status, inadequate funding and worst of all, lack of political will.

A dispute forum, regarded as an offshoot of *panchayats*, is the *lok adalat* system. There is evidence that *lok adalats* have been used with some success to render justice to the lower-income population in less severe cases in India, as is discussed in the next section.[101]

Lok adalats

Another popular forum for alternative dispute resolution settlements in India is the *lok adalat*. The word *lok adalat* means 'people's court', arising from the word *lok* which means people and *adalat*, which means a court,[102] although it is not a court in the strict sense of the word. Instead, it resembles a forum where disputes are settled by alternative resolution mechanisms outside the realm of formal justice. According to Khan,[103] '*lok adalat* is a forum where voluntary efforts are made to bring about the settlement of disputes.' Khan[104] explains further that it is a 'para-judicial institute developed by the people' with its primary function to provide 'speedy and effective justice at the doorsteps of the people', comparable to the so-called South African 'people's courts'. However, the latter developed as informal alternative dispute forums in townships, often of doubtful reputation.[105]

Historically *lok adalats* have been a prominent feature of Indian justice.[106] Despite constant invasions of India over the years, the structure and mechanism of these forums remained unchanged.[107] They provide a swift and cost-effective alternate dispute resolution.[108] The *lok adalat* was formalised in recent years, to complement and enhance the ordinary court system.[109]

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101 Seth (n 16) 169.

102 Kirti Dashora, 'Significance of Lok Adalats in Present Scenario' (Legal Service India March 2011) <http://www.legalservicesindia.com/article/583/Significance-of-Lok-Adalats-in-present-scenario.html> accessed 10 December 2019.

103 Khan (n 18) 29.

104 ibid.

105 Rautenbach (n 25) 260–261.

106 Mahabaleshwar N Morje, 'Lok Nyayalaya: A Place of Justice for the Common Man in Changing Society' (1984) 71 All India Reporter Journal 68.

107 Henry Beveridge, *A Comprehensive History of India: Civil, Military and Social Vol I* (Associated Publishing House 1862) 102*;* Jadunath Sarkar, *Mughal Administration* (Patna University Readership Lectures 1920) 72 <https://www.rarebooksocietyofindia.org/book_archive/196174216674_10152041675461675.pdf> accessed 10 December 2019.

108 Sarkar (n 107) 72.

109 Somaru (n 11) 77.

Consequently, the Legal Services Authorities Act[110] (the 'LSAA') which came into effect on 11 October 1987 formalised *lok adalats* yet the procedure is uncomplicated. Section 19 of the Act stipulates that state, high and district courts may 'organise *lok adalats* at such intervals and such places and for exercising such jurisdiction and for such areas as it thinks fit.'[111] Section 19(2) states that the *lok adalat* may be composed 'of serving or retired judicial officers and such other persons as prescribed by the Legal Services Authority.'[112]

Section 20 is pertinent as it pronounces that any case, which is pending in any court, can be transferred to the *lok adalat*, with the permission of the parties concerned. Should the parties be unwilling, a court can, of its own accord, transfer a case when satisfied that the *lok adalat* will be the appropriate forum for the dispute.[113] Parties may appoint legal representation and, if they cannot afford such, free legal aid is provided. The *lok adalat* operates based on the disputing parties reaching a compromise. In the case of *State Bank of Indore v Balaji Traders*[114] the Indian Supreme Court stated that:

> The Lok Adalat is a forum for alternate dispute resolution. The Bench of Lok Adalat can act on conciliation. It has no adjudicatory functions. For adjudication of a case, the parties had to be sent back to a regular court.

It is evident that the *lok adalat* actively promotes alternative dispute resolution with its sole purpose to resolve disputes and not to adjudicate trials. Section 22C(5) of the LSAA specifically states 'the permanent lok adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.' In *Interglobe Aviation v Satchitanand*[115] it was confirmed that the *lok adalat* procedure is conciliatory and not adjudicatory.

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110 39 of 1987.

111 Section 19(1) of the LSAA: 'Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.'

112 Section 19(2) of the LSAA: 'Every Lok Adalat organized for an area shall consist of such number of – (a) serving or retired judicial officers; and (b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee, organizing such Lok Adalat.'

113 Section 20(1)(b)(ii) of the LSAA states that 'if the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat.'

114 *State Bank of Indore v Balaji Traders Jarye Proprietor* AIR 2003 MP 252.

115 *Interglobe Aviation Ltd v N Satchitanand* 2011 (7) SCC 463.

Section 20(1) to (3) of the LSAA sets out the process in which cases can be referred to the *lok adalat* for consideration. Briefly, a case can be referred to and from a *lok adalat* in the following instances: from an ordinary court to the *lok adalat* with the consent of both parties to the dispute; from a typical case to the *lok adalat* when one of the parties applies for the transferal and both parties agrees; and when the court believes that the matter before it should be referred to the *lok adalat* for alternative dispute resolution consideration, even if one or both of the parties do not agree.

Section 22C(1) of the LSAA stipulates the spectrum of cases to be handled by the *lok adalat* for instance: any dispute which is brought directly to or referred from another court to the *lok adalat*; any offence which as is non-compoundable; any crime where the value of the property does not exceed twenty-five lakh rupees.[116] In *Afcons Infrastructure and Ors v Cherian Varkey Construction and Ors*,[117] the Indian Supreme Court listed the following suitable issues for the *lok adalat*: contracts, trade and commerce; familial and marital disputes; reparation of pre-existing relationships; conflicts between neighbours, friends and other members of the community; consumer-related disputes; road accident claims; and claims arising from tortious liability.[118]

In contrast, South Africa's Schedule 2 of the TC Bill-2017 provides a limited list of less severe disputes that can be heard by a traditional African court. In general, the cases include disputes between community members, impacting on harmonious relationships. Clause 4(3)(f) of the TC Bill-2017 creates the possibility; however, for a traditional court to counsel or facilitate other disputes brought before it, provided:

> … that if a person approaches the traditional court for any relief in respect of any matter not referred to in Schedule 2 and the matter is placed before the court, nothing precludes such a traditional court from—
>
> (i) counselling, assisting or guiding a party to the dispute who has approached it; or
>
> (ii) facilitating the referral of the matter to another traditional court, court or an appropriate institution or organisation,
>
> and provided it is done in a manner that does not have the potential of influencing the proceedings or outcome of the matter in a court or forum which has jurisdiction to hear the matter.

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116 This figure converts to approximately R522 000 as per the rupee/rand currency conversion rate on 10 December 2019.

117 *Afcons Infrastructure and Ors v Cherian Varkey Construction and Ors* 2010 (8) SCC 24.

118 ibid para 18.

Although the traditional court would not be allowed to hear and determine the outcome of the dispute, it could play an essential role in restoring relations between aggrieved members of the community by either counselling the parties or ensuring that the matter is referred to the correct forum.

A crucial and defining aspect of the *lok adalat* is that it focusses on the harmonious resolution of disputes, rather than legal technicalities. A *lok adalat* is chaired by a judicial officer, retired or in service,[119] as well as 'other persons'[120] and, as per section 22, a *lok adalat* '[h]as the same powers vested in a civil court under the Code of Civil Procedure 1908.' The appointment of a person with a legal background is meaningful. This section essentially recognises that the *lok adalat* is a fully-fledged court and confers upon it the same status as other civil courts in the country. Also, according to section 22(1) LSAA, the *lok adalat* is empowered to: summon a witness and enforce the attendance of a witness and to examine him or her under oath; effect the discovery and production of documents; receive evidence by way of affidavits; requisition any public document or record from any court or office; and deal with any other such matters as may be prescribed.

Furthermore, as directed by section 22(2), 'all proceedings before a lok adalat shall be deemed to be judicial proceedings', and 'every lok adalat shall be deemed to be a civil court.' Effectively, this section reaffirms that the *lok adalat* is a court.

In *Menon v Shaji*,[121] the Indian Supreme Court held that the *lok adalat's* power to authorise an award when an agreement has been arrived at, cannot be restricted. Consequently, the *lok adalat* can hear matters from the civil and criminal courts, the family court, the rent control court, the consumer redress forum, motor accidents claims tribunals and other tribunals. Clearly, the *lok adalat* has widespread jurisdiction relating to the type of cases that fall within its ambit.

According to section 22D, 'the *lok adalat* shall, while conducting conciliation proceedings, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure of 1908 and the Indian Evidence Act of 1908.' This provision's significance cannot be underestimated, as the *lok adalat* is not confined to legal technicalities that may confuse the parties, making an amicable compromise more difficult. Most importantly, in as

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119 Section 19(2) of the LSAA: 'Every Lok Adalat organized for an area shall consist of such number of (a) serving or retired judicial officers; and (b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee, organizing such Lok Adalat.'

120 Section 19(2)(b) of the LSAA.

121 *KN Govindan Kutt Menon v CD Shaji* (2012) 2 SCC 51.

much as the *lok adalat* does not have to conform to strict legal rules relating to procedure and evidence, the laws of *dharma*, natural justice and fairness always remain paramount.[122]

In the very first instance, the LSAA instructs the *lok adalat* to utilise the process of conciliation and to support the parties in their endeavour to arrive at an agreeable settlement fairly and objectively.[123] Upon closer inspection, it appears that the 'other persons' as referred to in section 19(2)(b) in addition to the judicial officer are usually social workers or members of the legal profession. In recent years the *lok adalat* bench has consisted of a judicial officer, one practising advocate and a third person, usually, an expert on the case before it.[124]

The award granted upon the finalisation of the dispute is final and an order of the *lok adalat* that cannot be appealed because it is primarily regarded as a judgement by consent.[125]

Agarwal[126] deduces that the *lok adalat* is a fine blend of the main methods of alternative dispute resolution, namely negotiation, mediation, conciliation and arbitration. Agarwal[127] goes further to add:

> The ancient concept of settling disputes through mediation, negotiation or through arbitral process known as 'people's court' verdicts or decisions of *Nyaya Panch*, is conceptualised and institutionalised in the philosophy of *Lok Adalat*.

The *panchayat* system has been in use to resolve disputes, and the *lok adalat* being similar, is familiar to the community. It is a system that has stood the test of time and gained the trust and confidence of the people owing to its age-old traditions, though it is now statutorily regulated. Under normal circumstances, alternative dispute resolution usually takes place outside mainstream courts. However, the *lok adalat* is regarded as a

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122 *Dharma* can be interpreted widely and presents itself as the sum of duties and obligations, whether they are moral, ethical, religious, social or legal. cf Somaru (n 11) 55–56 for a discussion of the concept, *dharma*.

123 Section 22(D) of the LSAA.

124 Bhumika Sharma, *Lok Adalats as Most Popular ADR Mode in India: With Special Reference to HP* (Centre for Public Policy Research Elamkulam 2009) 16 <http://www.adrcentre.in/images/pdfs/LOK_ADALATS_IN_H.P.-%20Final.pdf> accessed 10 December 2019.

125 Section 21(2) of the LSAA: 'Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.'

126 Anurag K Agarwal, 'Role of Alternate Dispute Resolution Methods: Development of Society: "Lok Adalat" in India' (Indian Institute of Management Ahmedabad 2005) 4 <https://ideas.repec.org/p/iim/iimawp/wp01913.html> accessed 10 December 2019.

127 ibid 5.

'court', presided over by a judicial officer. It is unique in the sense that it is a court established explicitly for alternative dispute resolution. As a result, some formality is retained, with the judicial officer legitimising the alternative dispute resolution proceedings and the outcome in one procedure.

The alternative dispute resolution proceedings are overseen by a neutral judicial officer, who directs the parties towards compromise. The bench consists of at least three persons, akin to a jury, to retain impartiality and fairness. The parties themselves are not noticeably in control of the proceedings, although they can determine the outcome largely. The judicial officer may grant an adjournment to allow the parties more time to deliberate the agreement's terms.[128] Each party presents a factual account of the dispute, and the strict formalities and rules that apply in ordinary court cases do not apply to the *lok adalat*. The result is a simple procedure that is acceptable and meaningful to the ordinary man in the street.

Following the conciliation route, the judicial officer navigates the parties towards an acceptable compromise, which eventually becomes a recorded settlement of the *lok adalat* and, as contextualised in the section below, has the effect of a civil court order. Thus, the judicial officer's role is not that of a passive bystander but rather an active participant who must assist the parties to arrive at a just settlement. Section 21 sets out the status of a *lok adalat* award as follows:[129] it has the effect of a decree of a civil judgment; it is final and binding to all parties;[130] and it is regarded as voluntary because it is given after a conciliation and negotiation agreement has been reached, and an appeal is not possible.[131] Failure to comply with the terms of the award will result in that order being handed down by the civil court.[132]

Should there be no compromise, the dispute is referred to an ordinary criminal or civil court for trial. The LSAA stipulates very clearly that the *lok adalat* may not adjudicate any matter since its primary role is conciliatory. In the case of *BP Moideen Sevamandir*

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128 K Ramaswamy, *Settlement of Disputes through Lok Adalats is one of the Effective Alternative Dispute Resolution on Statutory Basis* (Universal Law Publishing Company 1997) 93.

129 Section 21 of the Legal Services Act: 'Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870. Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.'

130 Vijaykumar Shrikrushna Chowbe and Priya Dhanokar, 'Lok Adalat: A Strategic Forum for Speedy and Equitable Justice' (21 February 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766237> accessed 10 December 2019.

131 This aspect was reiterated in the case of *PT Thomas v Thomas Job* 2005 (6) SCC 478.

132 *KN Govindan Kutty Menon v CD Shaji* 2012 (2) SCC 51.

v AM Kutty Hassan[133] the Indian Supreme Court stated that since no compromise between the parties had been reached in the *lok adalat*, the matter must be referred to court for an ordinary adjudicatory process. There was no retribution for not being able to arrive at a settlement.

As in the case of *Pathak v State*[134] the Indian Supreme Court declared that any statements made by any party at the *lok adalat* would not be regarded as evidence once the matter has been referred to the trial court.

Lok adalats have been extremely successful in minimising the backlogs in the mainstream courts of India. Between 27 February 2013 and 3 March 2013, over five days, a mega *lok adalat* was held across all districts in the province of Jharkhand India. The entire district's *lok adalats* coordinated their dates to all sit simultaneously over five days during which a total of 15 140 cases was finalised by alternative dispute resolution across the province.[135] On 23 November 2013, a national *lok adalat* was held throughout India, with every *lok adalat* in the country sitting simultaneously. They amicably resolved 2.8 million cases from the district and other subordinate courts,[136] thereby reducing the district and subordinate court caseload by approximately ten per cent in one day. In November 2016, a national *lok adalat* settled 1.8 million cases in a single day.[137] On 8 April 2017, 600 000 cases were settled in a single day at the second national *lok adalat* held for the year.[138] The cases determined in these *lok adalats* included matrimonial disputes, partition suits, motor accident claims, bank loan cases, dishonoured cheques, petty criminal cases and various civil matters.[139]

According to Khan,[140] since the inception of *lok adalats* in 1987, millions of cases have been amicably resolved. Justice Thakur announced on 10 November 2015 that the *lok*

133 *BP Moideen Sevamandir v AM Kutty Hassan* 2009 (2) SCC 198.

134 *Mayank Pathak v State* (Government of NCT Delhi) 2015 (11) SCC 798.

135 The 2013 Annual Issue of the Nyaya Dagar, *Five Day Mega Lok Adalat* has reported on this initiative <http://jhalsa.org/pdfs/Nyaya_Dagar_2014_Part3.pdf> accessed 10 December 2019.

136 Anon, 'National Lok Adalat "Wipes Out" Over 28 Lakh Cases in India' (*The Economic Times*, 23 November 2013) <https://economictimes.indiatimes.com/news/politics-and-nation/national-lok-adalat-wipes-out-over-28-lakh-cases-in-india/articleshow/26277135.cms?from=mdr> accessed 10 December 2019.

137 Anon, '18 Lakh Cases Settled in National Lok Adalat' (*Deccan Chronicle*, 13 November 2016) <http://www.deccanchronicle.com/nation/current-affairs/131116/18-lakh-cases-settled-in-national-lok-adalat.html#> accessed 10 December 2019.

138 Prabhati Nyak Mishra, 'More Than Six Lakh Cases Settled in National Lok Adalat' (*Live Law India*, 11 April 2017) <https://www.livelaw.in/six-lakh-cases-settled-national-lok-adalat/> accessed 10 December 2019).

139 ibid.

140 Khan (n 18) 121–122.

adalats in India had settled well over 82 million disputes in twenty years.[141] These figures speak for themselves and the success of the *lok adalat* system.

Traditional Courts in South Africa versus those in India

Although the traditional courts in South Africa and India, with the exclusion of *gram nyayalayas*, seem to have common elements, there are also significant differences.[142]

Informal procedures

Traditional courts in South Africa, as with the designated alternative dispute resolution courts in India, have a significant advantage over mainstream courts, in that their procedures are informal and straightforward.[143] All parties are acquainted with one another sets the tone for a more relaxed experience with minimum stress, and everyone knows what to expect. The sitting arrangements are less intimidating, and the language is familiar as opposed to foreign and unfamiliar in state-run courts.[144] The entire process encourages equal participation of the parties, making it more flexible.[145]

Location

Both the courts of the traditional leaders in South Africa and India's traditional courts are located within the communities they serve. The traditional leader's court is often set up in an open and central location, easily accessible and within walking distance.[146] Apart from court hearings, a traditional court is a central meeting place for other assemblies in the village[147] and travel inconvenience is minimised. These structures'

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141 Anon, 'Lok Adalats Settled over 8 Crore Cases in Last 20 Years: TS Thakur' (*The Indian Express*, 10 November 2015) <https://indianexpress.com/article/india/india-news-india/lok-adalats-settled-over-8-crore-cases-in-last-20-years-t-s-thakur/> accessed 10 December 2019.

142 We have not explored these differences and commonalities in detail as the purpose of this section is to merely create awareness.

143 South African Law Commission, *Discussion Paper 82 on Traditional Courts and the Judicial Function of Traditional Leaders: Project 90* (SALRC 1999) 2; Peu Ghosh, *Indian Local Government and Politics* (PHI Learning Private Ltd 2012) 284. The terms 'formal' and 'informal' have been used quite loosely in this article to distinguish between the mainstream courts that operate in terms of legislation (the formal or mainstream courts) and those that operate in terms of indigenous or traditional laws in both South Africa and India.

144 SALRC (n 143) 290.

145 ibid 2; Ghosh (n 143) 284, 290–295.

146 ibid vii.

147 According to the *Collins Online English Dictionary* <https://www.collinsdictionary.com/dictionary/english/lekgotla> accessed 11 December 2019, the word *lekgotla* has its origins in the Sesotho and Setswana languages and refers to a conference, a business meeting or to a meeting place or gathering of 'village assemblies, court cases, and meetings of village people.

central positioning conforms to the fundamental right of access to justice[148] as with the *panchayat* and *lok adalat* system in India.

Jurisdiction relating to offences

In terms of jurisdiction, traditional African courts in South Africa can and do preside over any type of dispute that falls within Schedule 2 of the TC Bill-2017. Still, offences of a more serious nature such as murder, rape, robbery and treason are excluded.[149] This is similar in Indian traditional dispute forums, even in the *gram nyayalayas,* the platform for dispute resolution in the rural areas.

Recognition

In India, *gram nyayalayas* and *lok adalats* are legally recognised as 'courts', while it seems that *nyaya panchayats* continue to operate without formal regulation.

Traditional African courts in South Africa are not formally recognised as 'courts of law' in section 166 of the Constitution, although the TC Bill-2017 refers to them as 'courts'. They currently have legal standing because they operate under sections 12 and 20 of the BAA, which empowers the traditional leader to preside over specific categories of criminal and civil offences and are constitutionally recognised under sections 211 and 212 of the Constitution as 'institutions' of traditional leadership. Also, their recognition stands to be confirmed when the TC Bill-2017 is passed into law.

Access to justice

One could argue that access to traditional African courts is a constitutional right. Section 34 of the Constitution confirms all citizens' right to have their disputes resolved by applying law during a 'fair hearing before a court or, *another independent and impartial tribunal or forum*' (emphasis added).

Also, access to justice signifies every individual's ability to invoke justice and access legal remedies, irrespective of their social, economic, educational, or geographical position.[150] Access to justice also implies a choice of tribunals before which a case is heard.[151] Importantly, this includes a broader approach to justice, whereby alternate dispute resolution is not only encouraged but remains the ultimate objective. Considering these features, it may be argued that traditional courts in South Africa and

148 Mathew (n 32) 3–9.

149 Section 20 (1)(a)(i) of the BAA: '… any offence at common law or under black law and custom other than an offence referred to in the third schedule of this Act.'

150 Mathias Nyenti, 'Access to Justice in the South African Social Security System: Towards a Conceptual Approach' (2013) 46 De Jure 901 at 905.

151 SALRC (n 143) vii.

the alternative dispute resolution courts in India, meet the requirements relating to access to justice.

Process of the hearing

The procedures followed in the traditional courts in South Africa are in terms of customary law. The alternative dispute resolution courts in India are informal and bound solely by custom and tradition, rendering the process simple and easy to understand. In both courts, flexibility and informality feature prominently.[152] No rigid rules apply to either the process or the outcome. Each case is decided on merit and circumstances and follows the traditional dispute resolution systems, demonstrating how different communities, villages and areas utilise their unique methods, based on the environment and its people, to resolve disputes in these courts.[153]

The TC Bill-2017, clause 14, is comparable to India's *lok adalat*, in that it provides for a closer bond between the mainstream justice system and traditional courts. Traditional courts may transfer disputes to magistrates' or small claims courts if they believe that they cannot deal with a matter. Likewise, clause 14(2) allows a prosecutor, a magistrate or a commissioner of a small claims court to refer a criminal or civil dispute to a traditional court if the parties agree and it is a 'matter that can be dealt with more appropriately in terms of customary law.' This provision can provide a more significant role for traditional courts as alternative dispute resolution mechanisms in the future.

Legal authority

The traditional Indian[154] and African systems[155] do not have specific written laws or rules that serve as a guide to dispense justice but depend on cultural and traditional norms, standards and practices, together with the morals and values that inform their societies.[156] Although the Indian *gram nyayalaya* system has been transformed to include judges, both systems generally rely on unwritten[157] customary law and traditional principles to administer justice.[158] Legal authority resides in accepting these

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152 Vincent Museke, 'The Role of Customary Courts in the Delivery of Justice in South Sudan' (LLM dissertation, Unisa 2015) 11.

153 Rautenbach (n 6) 123.

154 John D M Derrett, *Essays in Classical and Modern Hindu Law* (Brill 1976) 34–35.

155 SALRC (n 143) ix; Charles RM Dlamini, 'The Role of Chiefs in the Administration of Justice in KwaZulu' (LLD thesis, KZN 1988) 125.

156 Museke (n 152) 10.

157 Although the bulk of customary law is unwritten and has been passed down orally from one generation to the next, some customs in South Africa have been formalised by means of statutes. Examples include the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 9 of 2009.

158 SALRC (n 143) 2.

institutions by the community where they are situated, although they have become partly institutionalised.[159]

Clause 4(2) of the TC Bill-2017 may stand in the way of traditional African courts being used as alternative dispute resolution mechanisms. In terms of this provision, a traditional court may not deal with a dispute under investigation by the South African Police Service, or pending before any other court in terms of section 166 of the Constitution.

Language

Language plays a vital role in India's alternative dispute resolution courts and traditional African courts. Only those languages predominantly spoken and understood by all community members are used.[160] Misunderstandings are thus avoided, and interpreters' services are rarely needed. The use of indigenous languages in these tribunals is a significant advantage in resolving a dispute speedily and effortlessly and achieving justice.

Restorative justice

The alternative dispute resolution mechanisms of mediation, conciliation and negotiation feature prominently in both systems of traditional dispute resolution.[161] Restorative justice remains the main focus of dispute resolution, and negotiation, mediation, conciliation and reconciliation are frequently employed.[162] Restitution, goodwill, reparation, compensation, forgiveness and settlement are the goals. Traditional courts, as well as the alternative dispute resolution courts in India are united in striving to rectify the harm done, heal relationships, and restore peace.[163] The emphasis is on re-establishing the status quo. Choudree[164] asserts that '[i]n the exercise

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159 For more information, see Rautenbach (n 6) 130, 143–144.

160 SALRC (n 143) 3.

161 The concept of therapeutic justice as the cornerstone of traditional courts, cf. Christa Rautenbach, 'Traditional Courts as Alternative Dispute Resolution (ADR) – Mechanisms in South Africa' in Frank Dietrich (ed), *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (Verlag Dr Kovac 2014) 288, 292; Christa Rautenbach, 'Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents?' (2005) 21 SAJHR 323. Winnie S Mwenda, 'Paradigms of Alternate Dispute Resolution and Justice Delivery in Zambia' (LLD thesis Unisa 2009) 62; SALRC (n 143) 18.

162 Caiphas Brewsters Soyapi, 'Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill' (2014) 17 PER/PELJ 1440, 1442 <https://journals.assaf.org.za/index.php/per/article/view/2170> accessed 11 December 2019.

163 SALRC (n 143) 1.

164 Rajesh Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1 AJCR <https://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/> accessed 11 December 2019.

of their jurisdiction as mediators, the chiefs and headmen's courts are similar to India's lok adalats and panchayats.'

Position of women

Most traditional societies are patriarchal, as is evident in their unequal treatment of their women.[165] However, custom and customary law are regarded as flexible and dynamic, as Justice van der Westhuizen identified in *Shilubana v Nwamitwa*:[166] '[it] develops over time to meet the changing needs of the community.' Cornell,[167] who declared that *Shilubana v Nwamitwa* was 'a big step forward in the respect for customary law and its powers to change', supports this assertion. The changing nature of society and the promotion of gender equality impact women's position in traditional communities in India and South Africa. Many advances in the legal sphere reflect this changing attitude, a realisation of the principle of equal rights provided for in the South African Constitution.[168]

In India, one can draw a parallel to women's empowerment regarding the *panchaya*t councils.[169] Article 243D of India's Constitution reserves a quota of one-third of the positions on *panchayats* for women. In addition to this, special women's courts known as *Parivarik Mahila Lok Adalat* exist in India. These courts were created to deal with specific issues relating to women.[170] This forum is a female version of the *lok adalat*, staffed[171] and presided over by women.[172]

The progressive attitude and legal reforms concerning women's position in African and Indian societies bode well for women's upliftment and development in general. As Swami Vivekananda[173] stated: 'The best thermometer to the progress of a nation is its

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165 Ronald Inglehart and Pippa Norris, *Rising Tide Gender Equality and Cultural Change* (Cambridge University Press 2003) 202–204.

166 2009 (2) SA 66 (CC) para 35.

167 Drucilla Cornell, 'The Significance of the Living Customary Law for an Understanding of Law: Does the Custom Allow for a Woman to be a Hosi?' (2009) 2 Constitutional Court Review 395 at 407.

168 Section 9(3) of the Constitution: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.'

169 Nirmala Buch, *From Oppression to Assertion: Women and Panchayats in India* (Routledge 2010) 3.

170 Padmini Murthy and Clyde Lanford Smith, *Womens Global Health and Human Rights* (Jones and Bartlett Publishers 2010) 21.

171 Amitabha Bhattasali, 'India First Women's Court Opens in West Bengal' (*BBC News*, 24 January 2013) <https://www.bbc.com/news/world-asia-india-21175738> accessed 11 December 2019.

172 M Luxmikanth, *Governance in India* (McGraw Hill Education 2014) 11.

173 Swami Vivekananda was an Indian spiritual leader, a reformist and a revivalist who lived from 1863–1902 and is chiefly credited for disseminating the teachings of Sri Ramakrishna on interfaith awareness, practical Vedanta and the interconnectedness of humanity.

treatment of women', and '[t]here is no chance for the welfare of the world unless the condition of women is improved.'[174] These statements certainly echo the quest for equal rights for women, as reflected in India and South Africa's legal reforms.

Conclusion: Towards a Closer Relationship Between Mainstream and Traditional Courts in South Africa

This article illustrates that other than South Africa, in other countries such as India, traditional and formal justice systems co-exist. India also struggles to find workable models to optimise the cooperation between those two systems to address crime and case backlogs, with some success. Although the Indian government has developed traditional courts (*panchayats* and *lok adalats*) through legislation, the system has remained true to some of the courts' traditional features, making them acceptable as dispute resolution mechanisms in the rural areas.

South Africa is currently overhauling traditional courts, which also dispense traditional justice by following a restorative justice approach. The TC Bill-2017 acknowledges the 'restorative justice' approach of traditional courts, which it defines as follows:

> 'restorative justice'—
>
> (a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation;
>
> (b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and
>
> (c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner

This definition has apparent commonalities with the descriptions of 'restorative justice programme' and 'restorative process' given by the Economic and Social Council of the

[174] These quotations are taken from the Life Integrity, *Complete Works of Swami Vivekananda, Volume 8* <https://lifeintegrity.com/SWAMI-VIVEKANANDA-COMPLETE-WORKS-Vol-8.pdf> accessed 11 December 2019.

United Nations ('ECOSOC'),[175] which is endorsed by the South African government, viz.:[176]

> 'Restorative justice programme' means any programme that uses restorative processes and seeks to achieve restorative outcomes.
>
> 'Restorative process' means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

The definition of restorative justice in the TC Bill-2017 corresponds to its description in the Prosecution Policy Directives issued by the National Director of Public Prosecutions, viz.:[177]

> Restorative Justice (RJ) is an approach which aims to involve the parties to a dispute (the offender, the victim, families concerned and/or community members) in collectively identifying and addressing harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident, and promoting reconciliation. This approach may be applied at any appropriate stage after the incident.

Considering that the South African government favours a restorative justice approach, it should reconsider the relationship between the mainstream justice system and traditional courts. None of the existing legislation, such as the National Prosecuting Authority Act[178] and the Criminal Procedure Act,[179] addresses this. With the TC Bill-

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175 cf Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12 <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> accessed 22 December 2019 (hereafter 'ECOSOC Resolution 2002/12').

176 ibid paras I.1 and I.2. South Africa was also one of the authors of the draft principles, cf <https://digitallibrary.un.org/record/423370?ln=en#record-files-collapse-header> accessed 22 December 2019.

177 The NPA Policy Directives is not in the public domain any more but a copy of the latest version dated 9 January 2015 is in the possession of the authors. It was compiled in terms of s 179(5)(b) of the Constitution, read in conjunction with s 21(1)(b) of the NPA Act. The NPA Policy Directives is a comprehensive manual intended to guide prosecutors in their activities. It came into operation on 1 November 1999 and has been updated regularly since then. The latest update was in January 2015. The confidentiality status of the NPA Policy Directives is unclear, especially considering that some sections were available online at a certain stage (cf Pieter G du Toit and Gerrit M Ferreira, 'Reasons for Prosecutorial Decisions' (2015) 18 PER/PELJ 1507, 1508 fn 7 <https://journals.assaf.org.za/index.php/per/article/view/690> accessed 22 December 2019, and it was regarded as a public document in *S v Schaik* 2008 (2) SA 208 (CC) para 33.

178 32 of 1988.

179 51 of 1977.

2017 still in limbo, perhaps it is time to reconsider traditional African courts' role in administering justice by rethinking possible links between them and the criminal justice system.[180] One option is to review traditional African courts' role in the informal non-criminal dispute resolution processes in the NPA Policy Directives. The Directives make provision for 'diversion, restorative justice and informal mediation in respect of adult offenders.'[181] They offer guidelines on how prosecutors can conduct diversions and informal mediations in petty criminal cases despite the absence of legislation authorising these procedures.

In terms of the NPA Policy Directives, the prosecutor drives the informal mediation process, prepares and finalises the agreement between the victim and the accused, and finally withdraws the charges against the accused in court.[182] The police docket is then returned to the police station and recorded as finalised in court by way of withdrawal. Significantly, a prosecutor is not obliged to preside over informal mediations; he or she has discretion in this regard. The final decision to mediate or not lies with the prosecutor, but there is no uniformity in the process.[183]

Another option for the prosecutor is a diversion, which is also provided for in the NPA Policy Directives.[184] 'Diversion' is[185]

> … the election, in suitable and applicable cases, of a manner of disposal of a criminal case other than through normal court proceedings. Cases are diverted away from the formal criminal justice system, usually at pre-trial stage, with a view to disposing of these cases outside of the criminal justice system.

If a prosecutor decides to divert a case, it may only be withdrawn after the accused has successfully participated in a diversion programme. It could be worthwhile to investigate the possibility of including traditional courts in the diversion programmes. When it would be in the interest of justice to do so, a prosecutor could divert a case to a traditional authority to continue the mediation process. The case could eventually be withdrawn if concluded successfully by the traditional authority and to the satisfaction of all the parties involved.

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180 cf Rautenbach in Dietrich (n 161) 288–329, which discusses their scope and application as alternative dispute resolution mechanisms in South Africa.

181 NPA Policy Directives, Part 7. The three forms of alternative dispute resolution mechanisms are discussed by Adriaan Anderson, 'Disposal of Criminal Disputes by Informal Mediation: A Critical Analysis' (2017) 2 SACJ 162.

182 NPA Policy Directives, Part 7F.

183 Somaru (n 11) 45.

184 NPA Policy Directives, Part 7A.

185 ibid Part 7A(1).

Formal law courts play a vital role in dispensing justice. However, litigation is not the only means of arriving at a fair and just outcome. There may be instances where a traditional court would be a more appropriate forum for achieving this. There is a need for more creative ways of settling criminal disputes in South Africa. Identifying and realising these should form part of the process of judicial reform in a young democracy. South Africa has a long record of seeking justice using formal law and should perhaps be considering alternatives. There might be little to lose. According to the Law Commission of India:

> A popular though warranted belief generated and fed by the legal profession has been that no one is capable of rendering of (sic) dispensing justice unless he is trained in law. To support this unsustainable proposition it is oft-repeated that justice must be done according to law. It is not suggested that to render justice one must violate the law, but knowledge of law is not an essential pre-requisite for rendering justice. An interesting point that has been noticed by number of scholars in the sociology of law is that the differentiation of legal dispute and the slight shift from the traditional court procedures is related to the increased requirement for non-legal specialised knowledge in order to read the judgement … If law is common sense then its development does not necessarily and wholly depend upon the knowledge of lawyers (sic) law or statutory law. The Commission, therefore, adopted the approach that rendering justice is not the preserve of legally trained mind. In rendering justice knowledge of local culture, traditions of the society, behavioral pattern and common sense approach are primary and relevant considerations. More the administration of justice became characterised by the application of law, a view developed that too much legalistic approach hinders justice. Knowledge of local interest and local customs must be allowed to continue to operate and taken note of in dispensation of justice.

The TC Bill-2017 does not provide a closer working relationship between traditional and mainstream courts, except to ensure enforcement of a traditional court's order[186] or the revision by a high court of any proceedings in the traditional court under certain circumstances.[187] It is also possible to transfer a dispute before a traditional court to a magistrate's court or a small claims court when the traditional court believes it is not competent to deal with the matter.[188]

Since the latest version of the TC Bill-2017 has elicited few favourable responses from scholars[189] though controversial aspects remain,[190] it might be transformed into

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186 TC Bill-2017, cl 9, provides for the clerk of the court to get involved when it is brought to his or her attention that an order of a traditional court has not been complied with.

187 ibid cl 11.

188 ibid cl 14.

189 Fatima Osman, 'Third Time a Charm? The Traditional Courts Bill 2017' (2018) 64 SA Crime Quarterly 45 at 50–53.

190 See the discussion by Gasa (n 7).

legislation shortly, which could signal the loss of an opportunity to explore the possibility of closer links between mainstream and traditional courts. It might be worthwhile for the South African government to consider closer ties with traditional justice systems by looking at jurisdictions such as India, where *panchayayats* and *lok adalats* have been used with some success. We do not suggest that the answer lies in the Indian approach to traditional dispute mechanisms. Still, we ask that the South African government keep an open mind when the relationship between mainstream and traditional courts is considered in the future.

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