

The Paralegal and the Right of Access to Justice in South Africa

by

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KEYWORDS

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ABSTRACT

Political settlements in post-conflict democracies such as South Africa with its accompanying constitutional reforms have altered the relationship between citizens and the State, creating a new order of citizen entitlement and state responsibilities resulting in different expectations about the law, judicial systems and other dispute resolution mechanisms. The post-apartheid government in South Africa introduced various measures to enhance access to justice for the most vulnerable communities in the country. However, poverty, unemployment and inequality threaten South Africa's constitutional democracy. Lack of access to justice and its related socio-economic and health problems create a fertile environment for disillusioned communities to take the law into their own hands with serious consequences for the rule of law, human security, peace and stability.

Measures on the part of the State to remove the barriers to access to justice remain mainly top-down and are predominantly focused on 'the rule of law orthodoxy', a classical definition of access to justice and the private legal profession. The status quo remains in spite of the fact that the interaction of many citizens with the law occurs mostly outside of the formal justice system. The community-based paralegal has rendered a crucial socio-legal service without formal recognition in South Africa among these communities since before 1994. However, the continued existence and efficacy of this service is threatened by its exclusive reliance on donor funding and volunteerism, the lack of accredited education and training and lack of recognition and regulation.

This thesis investigates whether the existing human rights framework creates scope for the community-based paralegal to enhance access to justice in South Africa and, as a consequence, contribute to the transformation of the legal profession. The focus is on section 34 of the Constitution of South Africa, 1996 which guarantees the right of access to procedural justice in civil matters. This right is rendered meaningless without the right to legal assistance, which includes legal aid, where the interest of justice so requires, and legal representation by a legal or a paralegal practitioner. This thesis therefore first considers the legal empowerment paradigm as a philosophical and theoretical framework for access to justice in South Africa; secondly, examines the values that shape the new constitutional order in the country; thirdly, determines the nature, content, application and limitation of the right of access to courts and other dispute resolution fora and the derivative right of access to legal assistance. It further examines, in brief, the extent to which the courts and other dispute resolution fora create scope for paralegal assistance and tracks the legal reforms in the legal profession with a view to determining the scope that these reforms create for a paralegal 'profession'. The study finally examines the community-based paralegal landscape in South Africa and the paralegal landscape in a number of economically developed and developing countries to establish the features that would define a paralegal profession in the country.

DECLARATION

By submitting this thesis, *The Paralegal and the Right of Access to Justice in South Africa*, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



Noleen Leach neé Noble

Date: June 2017



DEDICATION

In memoriam:

Nomboniso Nangu (1968 – 2017) whose tireless efforts for the recognition of the community-based paralegal in South Africa inspired this thesis.



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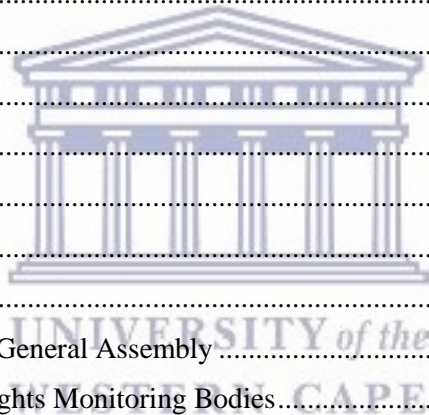
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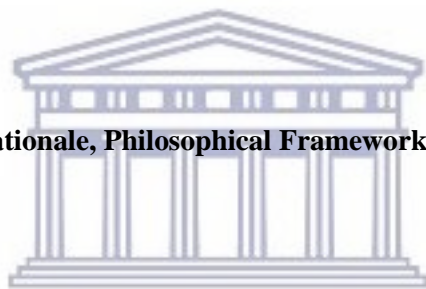
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Part I

Introduction, Rationale, Philosophical Framework and Definitions



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CHAPTER 1

INTRODUCTION AND RATIONALE FOR THE STUDY

1.1. INTRODUCTION

This study intends to investigate whether the existing South African human rights framework creates scope for the community-based paralegal practitioner to improve access to procedural justice in civil matters and, as a consequence, contribute to the transformation of the legal profession.

Access to justice has been an imperative in South Africa since before 1994. The post-apartheid government has introduced various measures to enhance access to justice for the most vulnerable communities. However, serious barriers to access still remain. The United Nations Development Project (UNDP)¹ identified various barriers to access to justice across the world. These include

‘long delays, severe limitations in existing remedies provided either by law or in practice, gender bias and other barriers in the law and legal systems, lack of de facto protection, lack of adequate legal aid systems, limited public participation in reform programmes, excessive number of laws, formalistic and expensive legal procedures and avoidance of the legal system due to economic reasons’.²

These findings correspond with those in the Transformation of the Legal Profession: Discussion Paper,³ in which the uneven geographical distribution of lawyers and the lack of recognition of the role played by paralegal practitioners were identified as additional barriers. Moreover, the devastating effects of the apartheid era continued to hamper the social and economic advancement of the majority of citizens in the country, who, for the most part, appear to be powerless to take advantage of the progressive legal reforms to improve their lives.

The concept ‘access to justice’ eludes universal definition, as it is subject to interpretation and highly contextual. Economically developed countries seem to focus primarily on the classical definition, which

¹ United Nations Development Programme, *Access to Justice: Practice Note*, (2004) p. 4.

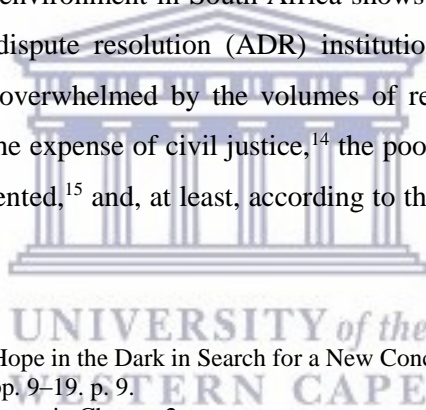
² United Nations Development Programme (2004).

³ Policy Unit of the Department of Justice, *Transformation of the Legal Profession: Discussion Paper*, (1999) South Africa: Department of Justice.

is in essence limited to access to the courts,⁴ whereas in developing countries a much broader definition is required.⁵ Post-apartheid South Africa has adopted a human rights based approach to access to justice, which is defined in South Africa by its constitutional imperatives, mainly contained in the Bill of Rights.⁶

The right of access to justice, in the narrow sense, is contained in section 34 of the Constitution, which guarantees the right of access to the courts, in other words, procedural justice. However, the right of access to the courts or other tribunals in a legally illiterate society is meaningless, especially without the right to legal representation.

Various strategies are employed across the world to overcome the barriers to access to justice.⁷ Although South Africa has employed most of these strategies, serious barriers to access to justice still remain in the country. Beqiraj and McNamara⁸ noted that the barriers to access to justice are societal and cultural⁹, institutional¹⁰ and intersectional.¹¹ A brief examination of the existing legal, judicial, educational and socio-economic environment in South Africa shows that the backlog in the courts is well documented,¹² alternative dispute resolution (ADR) institutions such as the National Credit Tribunal reported that they are overwhelmed by the volumes of referrals,¹³ there is the continued emphasis on criminal justice at the expense of civil justice,¹⁴ the poor literacy and numeracy skills of LLB graduates is constantly lamented,¹⁵ and, at least, according to the Foundation for Human Rights,



⁴ Pinedo, MEM, 'Access to Justice as Hope in the Dark in Search for a New Concept in European Law', (2011), 1(19), *International Journal of Humanities*, pp. 9–19. p. 9.

⁵ See the discussion on legal empowerment in Chapter 2.

⁶ Chapter 2 of the Constitution of the Republic of South Africa, 1996

⁷ These include “legal empowerment, legal information and public awareness, right to court access, legal aid, pro bono work, public interest litigation, small claims tribunals and informal justice systems” United Nations Development Programme 2004 United Nations Development Programme (2004) p. 7.

⁸ Beqiraj, J & McNamara, L, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014), (2014) Tokyo, Japan: International Bar Association.

⁹ These barriers include literacy, education, poverty and discrimination.

¹⁰ These barriers are reflected by insufficient government resources to guarantee or facilitate access to justice, inadequate organisational structure of justice institutions, limited legal assistance and representation and lack of enforcement of decisions.

¹¹ Where there is an overlap between societal and institutional barriers, for example, in the case of corruption and lack of trust in institutional mechanisms.

¹² Department of Justice and Constitutional Development, *Annual Report 2013/2014* (2014) 38.

Domestic violence civil process cases that were brought forward totalled 77 615 and 3 173 were brought forward under the criminal process. (Department of Justice and Constitutional Development, *Annual Report 2013/2014* p 37.)

The number of maintenance cases that were outstanding totalled 1838. (Department of Justice and Constitutional Development, *Annual Report 2013/2014* p 38)

The backlog of criminal cases totalled 29 480. (Department of Justice and Constitutional Development, *Annual Report 2013/2014* p 67.)

¹³ The number of debtors under debt review total 517008, and 41973 cases are still on the court roll. (National Credit Regulator, *Annual Report -2014/2015*, (2015) p. 31.)

¹⁴ Legal Aid South Africa, *South Africa Strategic Plan 2012-2017*, (2012) p. 17.

¹⁵ Pickett, G, *The LLB Curriculum Research Report*, (2010) Advice and Monitoring Directorate of the Council on Higher Education.

poverty, unemployment and inequality pose a serious threat to South Africa's democracy, increasing the vulnerability of the majority of people in the country.¹⁶

Measures to remove the barriers to access to justice are mainly informed by the classical definition, which in essence means access to the courts and legal representation by a legal practitioner. Hence, access to justice in South Africa cannot be addressed in isolation of the legal profession or its transformation. These measures further continue to focus on the narrow legal profession, in spite of the fact that the community-based paralegal practitioner has played a pivotal role in making access to justice a reality for many vulnerable communities in South Africa since before 1994.¹⁷ Access to lawyers, judges, courts and tribunals are important elements of a well-functioning justice system. However, addressing the legal problems of everyday life as experienced by vulnerable communities requires a much broader approach. South Africa is not immune to the malaise of many other countries, where the legal reforms have fallen short of their expectations either due to shortcomings in their design and/or, more importantly, problems in their implementation.¹⁸ The South African legal fraternity has concerned itself with the law, the legal system and legal culture within the legal profession following the country's transition to a constitutional democracy.¹⁹ Hardly any attention was paid to society's interaction with and the perceptions of the law.²⁰

The measures designed to remove the barriers to access to justice failed to address the reality that the poor and disadvantaged conduct most of their social, economic and even political activities outside of the formal justice system. The same reality applies to their interaction with the law. Informal norms, practices and institutions govern the everyday life of the poor. The barriers to access to justice present, in most cases, an insurmountable obstacle to these communities. The South African context presents formidable challenges to a fledgling democratic government. This context is characterised by an extensive informal economy, resulting in insecure means of support and expansive informal settlements that are essentially disconnected from the rural economy spatially, socially, or structurally and not completely incorporated into the urban systems. The current government seems to lack the capacity to fully incorporate customary practices into the country's formal legal system²¹ and multiple barriers to access to justice present itself.

¹⁶ Foundation for Human Rights, "Access to Justice", available at: <http://www.fhr.org.za/programmes/access-justice/>. (accessed 5 June 2016).

¹⁷ See Chapter 9

¹⁸ Cotula, L & Mathieu, P, *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa*, (2008) Accra, Ghana: IIED p. 17.

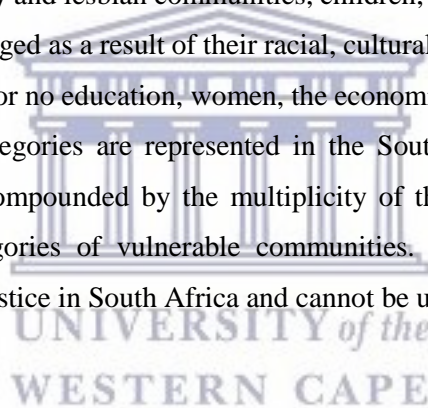
¹⁹ See the discussions on the transformation of the legal profession in Chapter 8

²⁰ Hodgson, TF, 'Bridging the gap between people and the law: transformative constitutionalism and the right to constitutional literacy: part II: reflections on Justice Langa's court and philosophy', (2015), 2015(1), *Acta Juridica*, pp. 189–212.

²¹ See the discussions in Chapters 5 and 7 on the *Traditional Courts Bill [B1-2012]*.

The efforts of the current South African government to improve access to justice have to be acknowledged. However, labour unrest remains a thorny issue,²² the poor have resorted to public mass demonstrations as the preferred mode of communication²³ and the ‘not so poor’ to class actions,²⁴ the backlog of cases in the courts has not been eradicated,²⁵ the gap between the rich and the poor remains a chasm,²⁶ legal services remain unaffordable for the majority of citizens in the country,²⁷ access to legal services in the rural areas remains a challenge,²⁸ vulnerable members of society remain illiterate²⁹ and the paralegal is still battling for recognition as a law professional in the country.³⁰ In addition, many providers of legal services are geographically and/or culturally isolated from the communities they serve, making it difficult for these vulnerable communities to find and receive services.³¹

Vulnerable groups are part of the population who are subjected to discriminatory treatment, or need special protection from a harmful environment by the State or need to be assisted to avoid exploitation. The European Commission considers a common feature of vulnerable communities to be people who ‘experience a higher risk of poverty and social exclusion than the general population’.³² These include persons living with disability, gay and lesbian communities, children, youth and the aged, persons who have been historically disadvantaged as a result of their racial, cultural and linguistic background, rural communities, persons with poor or no education, women, the economically disadvantaged and persons living with HIV. All these categories are represented in the South African population. In most instances, the vulnerability is compounded by the multiplicity of the disadvantage and poverty, in particular, cuts across all categories of vulnerable communities. Poverty, therefore, presents a formidable barrier to access to justice in South Africa and cannot be underestimated.



²² IRMSA, *South Africa Risks 2015*, (2015) South Africa: The Institute of Risk Management South Africa.

²³ Powell DM, O’Donovan O, & De Visser J ‘Civic Protests Barometer 2007-2014’ (2015) 1–14.

²⁴ *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2009 (CCT12/09) ZACC 31 (CC).

Trustees for the Time Being of Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2012 (050/2012) ZASCA 182.

Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others 2013 (90/2013) ZASCA 148 (SCA).

²⁵ Department of Justice and Constitutional Development, *Annual Report 2013/2014*.

²⁶ South Africa has a Gini index of 63.1 and is ranked second among countries with the greatest inequality (World Development Index, ‘Gap Between Rich and Poor: World Income Inequality’, (2013), available at: <http://www.infoplease.com/world/statistics/inequality-income-expenditure.html>. (accessed 15 April 2017).

²⁷ AfriMAP & Open Society Foundation for South Africa, *South Africa: Justice Sector and the Rule of Law*, (2005) Cape Town, South Africa: Open Society Foundation for South Africa.

²⁸ *Transformation of the Legal Profession: Discussion Paper* (1999).

²⁹ Index Mundi, ‘South Africa Literacy - Demographics’, available at: http://www.indexmundi.com/south_africa/literacy.html. (accessed 10 January 2017).

³⁰ *Transformation of the Legal Profession: Discussion Paper*, (1999) See Chapters 8 and 9

³¹ Kaman, C, Radday, A & Stanzler, C, *Civil Legal Assistance - Social Issue Report*, (2012) Boston: rootCAUSE. See Chapters 8 and 9

³² European Commission, *The European Social Fund and Social Inclusion: Summary Fiche*, (2010) Belgium p. 5.

Persons living in poverty are exposed to a variety of vulnerabilities and challenges and can thus not be regarded as a homogenous group. A range of exclusions experienced by these communities and its cumulative effect with the resultant disempowerment, entrenches their poverty stricken state. The Commission on Legal Empowerment of the Poor (CLEP) found that four billion people across the world are excluded from the rule of law.³³ In the Report of the United Nations Secretary-General it was noted that poverty could be considered as both the cause and the consequence of this exclusion.³⁴ The Report states that almost all communities living in poverty share the same characteristics. They do not have equal access to state institutions and services tasked with the protection and promotion of human rights, even where those institutions exist. They are unable to voice their needs, obtain redress for violation of their rights, participate meaningfully in public life and exercise influence over policies that will ultimately regulate their daily lives. They lack the protection of the rights afforded by the law and their meagre resources are not adequately protected or leveraged.

This applies equally to the South African context where the statistics on poverty levels are well documented³⁵ and where poverty presents a formidable barrier to access to procedural justice, in spite of the country's liberal Constitution and the state institutions tasked with the protection and promotion of human rights, Regrettably, for many impoverished and disadvantaged communities the law is inaccessible and consequently they are left disempowered and unable to make the law work for them and improve their lives. This situation presents serious implications for the rule of law and peace and stability in the country. Paradoxically, these communities function in the shadow of the law³⁶ but the shadow function of the law,³⁷ for the most part, does not exist for them. Therefore, even in a constitutional democracy such as South Africa with its progressive laws, citizens experience a difference between the letter of the law and its practice, as the manner in which the law is entrenched in the social and political order affects its potential to empower individuals and groups.³⁸

Cotula argues that there is a reciprocal relationship between law and power which manifests in the way it reflects and shapes power relations.³⁹ Thus, any strategy aimed at legal empowerment of the poor requires a 'societal culture shaped by law and a legal culture shaped by society'.⁴⁰ Law is thus the measure by which powerful State and non-State actors can be held accountable and the poor and

³³ Open Society Justice Initiative, *Community-based Paralegals: A Practitioner's Guide*, (2010) New York, USA: Open Society Institute.

³⁴ Open Society Justice Initiative (2010).

³⁵ Statistics South Africa, *General Household Survey*, (2015) .

³⁶ The law can be wielded as a weapon against them by powerful State and non-State actors alike.

³⁷ They often lack the capacity to make the law work for them and to invoke the protection of the law.

³⁸ A case in point in South Africa is how the apartheid system with its extensive statutory framework, infrastructure, institutions and human resources managed to subjugate an entire nation.

³⁹ Cotula, L & Mathieu, P (2008) p. 16.

⁴⁰ Hodgson (2015) p. 189.

marginalised groups can rally to effect change in practice. The conceptual framework developed by Tuori⁴¹ includes the notion of ‘power by the law’, which refers to the manner in which the law assists in shaping power relations through ‘legal claims that create, strengthen limit and/or legitimise power and through legal services that enable groups and individuals to enforce those claims’.⁴² It also includes ‘power in the law’, which refers to the ‘power relations within the legal professions and between legal professionals and “laymen”’.⁴³ It further identifies ‘power on the law’ which refers to how power relations in society influence the substance and the implementation of the law.⁴⁴ These notions, as proposed by Tuori, all have a bearing on access to justice and the paralegal. The extent to which the substantive legal framework empowers rights-holders to enforce legitimate claims by providing a range of legal services plays an important role in the development of these marginalised communities, enabling them to contribute to their own development.

Law and development share both a promising and perplexing relationship. Law reform as an instrument for promoting development⁴⁵ initially focused on state law reform as a vehicle for ‘social engineering, tackling technical issues, mobilising outside expertise and promoting “legal transplants”’.⁴⁶ Inasmuch as the ‘Law and Development movement’ generated a vast body of academic literature, its results on the ground have been largely declared unsuccessful.⁴⁷ The limitations of law reform as a singular tool for social change is well documented and the importance of incorporating local contexts, politics and power relations has been widely acknowledged.⁴⁸

The ‘rule of law orthodoxy’⁴⁹ which dominated the international legal development agenda for decades, received wide criticism for its lack of success.⁵⁰ Traditional rule of law reforms were condemned for being top-down and were consequently state-centric, justice sector-focused and lawyer-dominated.⁵¹ Although there appears to be consensus in theory that without the rule of law there can be no sustainable

⁴¹ Tuori, K, ‘Law, Power, and Critique’ in Tuori, K, Bankowski, Z & Uusitalo, J (eds) *Law and Power: Critical and Socio-Legal Essays*, Legal Semiotics Monographs (1997) Liverpool, UK: Deborah Charles Publications. quoted in Cotula L & Mathieu P (2008).

⁴² Tuori, K (1997) p. 16.

⁴³ Tuori, K (1997).

⁴⁴ Tuori, K (1997).

⁴⁵ The so-called ‘Law and Development movement’.

⁴⁶ Cotula, L & Mathieu, P (2008).

⁴⁷ Golub, S, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, (2003), Rule of Law Series Washington D.C., USA: Carnegie Endowment for International Peace.

⁴⁸ Cotula, L & Mathieu, P (2008) p. 17.

⁴⁹ The ‘rule of law orthodoxy’ refers to ‘a set of ideas, activities and strategies geared towards bringing about the rule of law, often as a means towards ends such as economic growth, good governance, and poverty alleviation’ Golub, S (2003) p. 7.

⁵⁰ Barendrecht JM & de Langen M ‘Legal Empowerment of the Poor: Innovating Access to Justice’, in *The State of Access: Success and Failure of Democracies to Create Equal Opportunities* (2008) 250–71.

⁵¹ Golub, S (2003).

economic growth,⁵² establishing such a definitive relationship in practice is challenged by anomalies.⁵³ It is argued that the rule of law may promote economic growth but the growth may not be equitable.⁵⁴ Thus, without the legal empowerment of the disadvantaged, the rule of law may very well serve to entrench the dominance of the elites.

In South Africa, in particular, the Constitution⁵⁵ envisions not only a body of law and a legal system based on human rights and constitutionalism, but a ‘society based on democratic values, social justice and fundamental human rights’.⁵⁶ The development of such a society requires, at the very least, its citizens to have a threshold comprehension of the law in order to comply with it and claim its protection so that the justice gap is reduced. The effects of ignorance of the law is highlighted by Dunlap when she concludes that it, ‘robs [the law] of its deterrent effect, deprives those whose rights have been violated of recourse and undermines democracy’.⁵⁷ The narrow legal profession and the justice sector can therefore not be the only engineers and custodians of legal knowledge, procedures and practice. Dunlap argues that one of the reasons for the existence of the justice gap is the vested interest of the private legal profession to maintain a legal system that is ‘intimidating in its complexity’.⁵⁸ A human rights-based approach to access to justice requires that a culture of transformative constitutionalism permeates legal institutions as well as society.

Access to justice is a key component of legal empowerment, which has become an important element of the international developmental agenda since the turn of the millennium.⁵⁹ Legal empowerment signalled a shift beyond the ‘supply and demand’ approach to access to justice and has its origins in a ‘human rights based approach to development, which recognises that poverty results from disempowerment, exclusion and discrimination’.⁶⁰ Legal empowerment is ‘a process of systemic change’⁶¹ which has as its focus the protection and empowering of the poor, enabling them to promote

⁵² Ramanujam, N & Anstis, S, 'Legal Empowerment , Social Movements and Fostering Equitable Economic Development in Cambodia', (2013), 2(1), *Canadian Journal of Poverty Law*, pp. 104–139. p. 107.

⁵³ Some countries experience significant economic growth in spite of scoring middle to low rankings on the World Justice Project Rule of Law Index, for example Brazil, China, Russia, India, Sierra Leone & Nigeria. (Ramanujam, N & Anstis, S (2013).).

⁵⁴ Ramanujam, N & Anstis, S (2013) p. 114.

⁵⁵ *Constitution of the Republic of South Africa*, of 1996.

⁵⁶ Hodgson, TF (2015).

⁵⁷ Dunlap, B, 'Anyone Can “Think Like a Lawyer”': How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States', (2014), 82(6), *Fordham Law Review*, pp. 2817–2842. p. 2817.

⁵⁸ Dunlap, B (2014).

⁵⁹ McInerney, T & Golub, S, *Legal Empowerment: Practitioners' Perspectives*, (2010) Rome, Italy: International Development Law Organisation.

⁶⁰ UN General Assembly, *Legal Empowerment of the poor and eradication of poverty: report of the Secretary General*, (2009) A/64/133 United Nations p. 2.

⁶¹ *Report of the Secretary General* (2009) A/64/133.

and enforce their rights and interests not only as citizens but also as economic actors. The Report of the Secretary-General to the United Nations⁶² states unequivocally that legal empowerment that is focused on livelihood security has the capacity to deliver the ‘freedom from want’ as well as the ‘freedom from fear’.⁶³ The International Development Law Organization (IDLO) has shifted its focus to legal empowerment programmes that combine a robust economic focus with efforts to enhance the capacity of communities to apply the law to claim and enforce their rights, particularly in areas such as health, education and freedom from gender discrimination.⁶⁴ This shift in focus introduced a more expansive approach to legal empowerment aimed at optimising the potential of the law to improve the lives of the poor and disadvantaged populations and is of particular relevance to South Africa, as sub-Saharan Africa is set not to meet any of its Millennium Development Goals.⁶⁵ These goals have now been converted into Sustainable Development Goals that include access to justice.⁶⁶

None of the barriers to access to justice operate in isolation from each other. They are interrelated and interact with multiple reciprocal effects. Hence, no single strategy will be sufficient to overcome these barriers. It is therefore crucial to explore a multi-pronged and multi-level approach to legal empowerment. Moreover, the right to legal assistance, especially in developing countries, is pivotal to the right of access to procedural justice which is one of the leverage rights that citizens can employ to enforce their rights. A key role player in legal empowerment, nationally and internationally, is the paralegal. Whether recognised as a law professional or not, the paralegal practitioner has carved out a niche in legal systems across the world. The paralegal is to be found in economically developed countries such as the Netherlands,⁶⁷ the United States of America,⁶⁸ the United Kingdom⁶⁹ and Canada⁷⁰ and has played an important role in ensuring access to justice in economically developing countries such as Indonesia⁷¹ and the Philippines,⁷² and across the African continent, including Malawi⁷³

⁶² *Report of the Secretary General* (2009) A/64/133.

⁶³ *Report of the Secretary General* (2009) A/64/133. p 3.

⁶⁴ McInerney, T & Golub, S 2010 McInerney, T & Golub, S (2010).

⁶⁵ United Nations, *The Millennium Development Goals*, 978-92-1-101320-7, (2015).

⁶⁶ United Nation Development Programme, *Sustainable Development Goals*, 10.1017/CBO9781107415324.004, (2015).

⁶⁷ Open Society Justice Initiative, *Community-Based Paralegals: A Practitioner 'S Guide* (2010), p. 7.

⁶⁸ Open Society Justice Initiative (2010).

⁶⁹ Open Society Justice Initiative (2010).

⁷⁰ The Law Society of Upper Canada, *Report to the Attorney General of Ontario Pursuant to Section 63.1 of the Law Society Act*, (2012) Toronto, Canada.

⁷¹ Open Society Justice Initiative (2010).

⁷² Open Society Justice Initiative (2010).

⁷³ Open Society Justice Initiative (2010).

Mozambique⁷⁴ and Sierra Leone.⁷⁵ It has often been argued that the community-based paralegal, who features prominently in developing countries, can

‘focus on the justice needs of an entire community, not just the client who hires them, they can often resolve issues much faster than lawyers and judges can, entry barriers are low, it is much easier and less expensive to train and deploy paralegals than lawyers, paralegals are low cost compared to lawyers, they often know the community they serve and its needs better than a lawyer would’.⁷⁶

In South Africa, the community-based paralegal has rendered a vital service to vulnerable communities for decades yet it has received little attention during the final stages of the legal reforms in the legal profession.⁷⁷ Three factors threaten the sustainability of this service, namely, the exclusive dependability on external donor funding, the dependence on volunteerism and the lack of recognition and regulation of the paralegal within the legal system.⁷⁸ Donor funding aimed at assisting governments to meet their obligations towards their most vulnerable citizens is intended as a temporary measure that enables governments to find more sustainable ways of meeting their obligations towards their citizens. Once donor fatigue sets in or donor funds are directed to more critical projects, as perceived by them, the sustainability of this service is seriously under threat.

Lack of access to justice and consequent related socio-economic and health problems⁷⁹ create a fertile environment for already disillusioned communities to take the law into their own hands and embark on ‘self-help practices’ with serious consequences for peace and security. Vigilantism⁸⁰ is one of the ways in which communities take the law into their own hands. It has been a feature of South African society since before 1994 and continues to surface in contemporary South Africa.⁸¹ Moreover, the lack of

⁷⁴Tanner, C & Bicchieri, M, *When the law is not enough: Paralegals and natural resource governance in Mozambique*, (2014) Rome, Italy: Food and Agriculture Organization of the United Nations.

⁷⁵ Open Society Justice Initiative (2010).

⁷⁶ Open Society Justice Initiative (2010).

⁷⁷ See Chapters 8 and 9.

⁷⁸ The Law & Development Partnership Ltd, *Developing a portfolio of financially sustainable, scalable, basic legal service models: Final Report*, (2015) London, UK.

⁷⁹Currie, A, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, (2009) Department of Justice Canada.

⁸⁰ It is described as ‘the assumption of responsibility for community safety and values by self-appointed custodians prepared to use lethal force’(Häefele, B, *Vigilantism in the Western Cape*, (2006) Cape Town, South Africa: Department of Community Safety - Provincial Government of the Western Cape p. 1.).

⁸¹ Häefele, B (2006).

Department of Community Safety, *Recent Trends and Patterns of Vigilantism in the Western Cape*, (2013) .

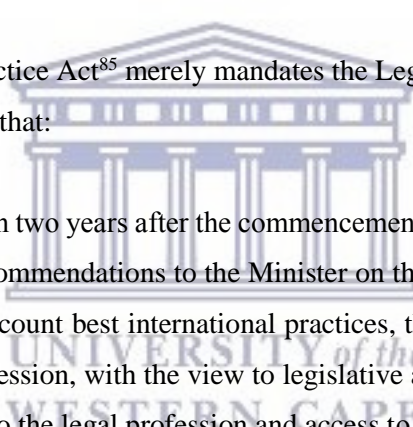
Madienyane, D, *The Effects of Vigilantism on the Community of Diepsloot*, University of Witwatersrand, (2013) 71.

Buur L and Jensen S ‘Introduction: Vigilantism and the Policing of Everyday Life in South Africa’ *African Studies* 63.2 (2004) 139–52.

formal recognition of the paralegal in general but the community-based paralegal in particular, denies them legal status among the legal fraternity and the failure to regulate the sector leaves already vulnerable communities open to exploitation. These factors, among others, constrain the potential of the paralegal to contribute to broader societal change.

The importance of the role of the paralegal practitioner in South Africa was evidenced by its inclusion in the Legal Practice Bill 2000. The drafters reached consensus at the time that both legal and paralegal practitioners should be regulated in terms of one statute and that there should be one statutory regulatory body. Chapter 4 of the Legal Practice Bill 2009⁸² contains provisions related to the rendering of services by paralegals and the establishment, constitution and functioning of a Paralegal Committee. However, when the Legal Practice Bill 2012⁸³ was introduced in parliament, Chapter 4 was completely removed. The reasons for this action are unclear but the Director-General of the Department of Justice and Constitutional Development first suggested that the main reason was funding for the project and subsequently indicated that the Legal Practice Act itself was the obstacle.⁸⁴

Section 34(9)(b) of the Legal Practice Act⁸⁵ merely mandates the Legal Practice Council to investigate the matter. The section stipulates that:



‘The Council must, within two years after the commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on the statutory recognition of paralegals, taking into account best international practices, the public interest and the interests of the legal profession, with the view to legislative and other interventions in order to improve access to the legal profession and access to justice generally.’

The lofty ideals for paralegals contained in the Draft Strategic Plan for Transformation and Rationalisation of the Administration of Justice (Justice Vision 2000) have been reduced to one single sentence.⁸⁶ The paralegal remained unregulated and the future of the paralegal remained uncertain.

Buur, L, 'Democracy and its Discontents: Vigilantism, Sovereignty and Human Rights in South Africa', (2008), 35(118), *Review of African Political Economy*, pp. 571–584.

⁸² *Legal Practice Bill: First Working Draft 2009*.

⁸³ *Legal Practice Bill 2012 [B20B-2012]*.

⁸⁴ Parliamentary Portfolio Committee on Justice and Constitutional Development, *Committee Meeting on Justice and Constitutional Development on 2nd and 3rd Quarter Performance Date* (2016).

⁸⁵ *Legal Practice Act*, 28 of 2014.

⁸⁶ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice*, (2000).

During the consultations on the Legal Practice Act, the Parliamentary Committee on the Department of Justice and Constitutional Development indicated that insufficient research has been done to inform policy makers with regard to the particular niche that the paralegal is to occupy within the South African legal landscape.⁸⁷

During the drafting of the Legal Practice Act, it was acknowledged that no baseline survey had been done on the characteristics of advice offices⁸⁸ and community-based paralegals,⁸⁹ who constitute the bulk of the paralegal sector, and that more empirical research has to be done to inform policy.⁹⁰ However, the community-based paralegal represents only one, yet very important, component of the paralegal sector. Very few submissions were made by those who advocated for its inclusion as part of the 'narrow' legal profession.⁹¹ Given the fact that the Legal Practice Act took 14 years to be enacted, the quest for the professionalisation of the paralegal sector has, at best, been temporarily delayed or, at worst, stalled indefinitely.

1.2. RESEARCH QUESTION

The question that is raised in this thesis is whether, under the current human rights framework, the paralegal has a role to play in improving access to justice in contemporary South Africa, considering its fragmented nature and bearing in mind that the concept itself defies definition within the South African context and lacks universal definition. The focus is on the community-based paralegals as these practitioners are more prevalent in the country and most closely associated with access to justice for vulnerable communities. Hence, the following research question is posed: *Does the existing human rights framework create scope for the community-based paralegal to improve access to procedural justice in civil matters in contemporary South Africa?*

⁸⁷ Parliamentary Portfolio Committee on Justice and Constitutional Development, *Legal Practice Bill: NADCAO & National Task Team on community based paralegals submissions; Committee report on the Department of Justice and Constitutional Development Strategic Plan 2013*, (2013).

⁸⁸ These definitions clause of the Community Advice Office Draft Bill describes these as '...community-based organisations that are governed and mandated by their community. Community Advice Offices house Community-Based Paralegals and provide primary legal information, empowerment, advice and social justice services to people who are not familiar or do not understand their legal and constitutional rights and who do not have access to legal practitioners due to their indigence and/or to their social circumstances at no cost to persons who cannot afford to pay for such, in terms of this Act.' (*Community Advice Office Draft Bill*, of 2016.).

⁸⁹ The definitions clause of the Community Advice Office Draft Bill describes community-based paralegals as 'persons who provide primary legal services free of charge to indigent persons who cannot afford to pay for such and who are qualified as such under this Act'. (National Alliance for the Development of Community Advice Offices (2016).)

⁹⁰ Parliamentary Portfolio Committee on Justice and Constitutional Development 2013 Parliamentary Portfolio Committee on Justice and Constitutional Development (2013) p. 5.

⁹¹ Hawkey, K, 'Written submissions on the Legal Practice Bill', (2013), April (529), *De Rebus*, pp. 38–48.

Access to justice is measured by the knowledge, values and attitudes that are conducive to ensuring access, the substantive legal framework that codifies it and the institutions, infrastructure and human resources that support that access.⁹² These factors are informed by and should be aligned to a philosophical and theoretical paradigm adopted by the nation. The research question is therefore addressed by posing the following sub questions:

- (i) What are the constitutional values that shape access to justice in contemporary South Africa?
- (ii) What is the philosophical and theoretical paradigm that informs access to justice and, as a consequence, the role of the paralegal in contemporary South Africa?
- (iii) What are the institutions and human resources that support access to justice and what scope do these institutions create for the paralegal in South Africa?
- (iv) What is the substantive human rights framework of access to procedural justice in civil matters?
 - Does this framework create scope for the community-based paralegal to improve access to procedural justice in civil matters?
 - If it does, what is that scope?
 - If it does not, how should this framework be reformed to create that scope?

1.3. RESEARCH OBJECTIVES

This study intends to investigate whether the existing South African human rights framework creates scope for the paralegal to improve access to justice in civil matters. It would therefore endeavour to:

- (i) Examine the constitutional values that animate the new democratic order in the country;
- (ii) Examine the legal empowerment paradigm as a conceptual framework for access to justice in South Africa;
- (iii) Review the substantive human rights framework of access to procedural justice in civil matters by
 - a) Analysing the relevant provisions of the international and regional human rights instruments, in particular the Universal Declaration of Human Rights,⁹³ the International

⁹² UNDP Justice System Programme, *Access to Justice – Concept Note for Half Day General Discussion*, (2011) p. 3.

⁹³ United Nations General Assembly, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71.

Covenant on Civil and Political Rights⁹⁴ and the African Charter on Human and People's Rights;⁹⁵

- b) Analysing section 34 and related provisions of the Constitution of the Republic of South Africa⁹⁶ with a view to establishing the nature, content and scope of the right of access to the courts and other dispute resolution fora; and
 - c) Examining the right to legal assistance in civil matters as derived from section 34 of the Constitution.
- (iv) Review the institutions created by Chapter 8 and 9 of the Constitution of South Africa in brief with a view to determining the scope for paralegal representation in these fora;
 - (v) Review the legal reforms in the legal profession in post-apartheid South Africa (commencing with Justice Vision 2000 and culminating in the Legal Practice Act 28 of 2014) by examining the rationale for the reforms and identifying the shortcomings of the reforms with regards to the paralegal 'profession';
 - (vi) Examine the community-based paralegal landscape in South Africa and identify the features of this practice.
 - (vii) Evaluate the paralegal 'profession' in a selection of common law and mixed legal systems where the paralegal features prominently, against the conventional features of a legal profession. The common law legal systems include the United States of America and England and mixed legal systems on the African continent include Mozambique and Sierra Leone;
 - (viii) Draw conclusions and make recommendations.

1.4. ASSUMPTIONS

This study assumes, first, that the Legal Practice Act falls short in ensuring access to justice in so far as it relates to the rendering of civil legal services to vulnerable communities and the transformation of the legal profession. Secondly, it assumes that the community-based paralegal in South Africa is part of an undefined, unregulated professional group, who generally lacks formal legal education but whose existence is fundamental to meeting the needs for primary legal services in South Africa. Thirdly, it assumes that the failure to formally recognise the paralegal sector in general and the community-based paralegal in particular, contributes to the limitation of the right to access to justice in South Africa. It therefore advances the argument that the formal recognition of the community-based paralegal can contribute to improving access to justice and transforming the legal profession.

⁹⁴ The United Nations General Assembly, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171 (1966).

⁹⁵ Organization Of African Unity (OAU), *African Charter on Human and Peoples' Rights.*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁹⁶ *Constitution of the Republic of South Africa*, 1996.

1.5. RESEARCH METHODOLOGY

This investigation encompasses an exploratory study comprising a synthesising literature review, legal historical method and legal comparative method.⁹⁷ The purpose of the synthesising literature review is first, to examine the legal empowerment paradigm as a philosophical framework for access to justice in South Africa; secondly, examine the values that shape the new constitutional order in the country; thirdly, determine the nature, content, application and limitation of the right of access to procedural justice in civil matters contained in section 34 of the Constitution of South Africa as reflected in legislation, legal opinion, case law and other relevant literature; and fourthly, to determine the right to legal assistance in civil matters as derived from section 34.

The legal historical method will be used to track the legal reforms in the legal profession leading up to the enactment of the Legal Practice Act with a view to establishing the shortcomings for the transformation of the legal profession and access to justice. This method will also be used to scope the community-based paralegal landscape in South Africa and the contribution of this paralegal to access to justice for vulnerable communities in the country.

The legal comparative method will be used to examine the paralegal 'profession' in a selection of foreign legal systems where the paralegal features prominently. The common features under consideration are, scope of practice, governance, regulation, certification and education and training. The focus will be on a selection of countries on opposite ends of the economic divide where the paralegal features prominently. The countries include economically developed countries, in particular, the United States of America and England, which have their foundation in a common law legal system, and economically developing countries, in this instance, Mozambique, Malawi and Sierra Leone, representing a mixed legal system.

The findings will inform the conclusions that will be drawn with regards to the shortcomings in the legal reforms to date and the recommendations for a paralegal 'profession'.

⁹⁷ Du Plessis, W, *A self help guide: Research methodology and dissertation writing*, (2007) Potchefstroom, South Africa: North-West University.

1.6. SIGNIFICANCE OF THE STUDY

Conceptual benchmark: Various pieces of legislation have been enacted that have a bearing on access to justice. However, lack of conceptual clarity on key terms remains a challenge. This study endeavours to provide a basic benchmark for these key terms.

Policy reform: The Hansard record suggests that insufficient research has been done to inform policy makers with regards to the particular niche that the paralegal is to occupy within the SA legal landscape. This may explain the paucity of references to these practitioners in the Legal Practice Act. This study endeavours to contribute to addressing that shortage.

Education: The Council on Higher Education in South Africa (CHE)⁹⁸ has conducted a national review of the Bachelor of Laws (LLB) degree, which is the law degree for access to the legal profession in South Africa. It placed four universities on notice of withdrawal of accreditation and granted all other universities in the country conditional re-accreditation only.⁹⁹ This study endeavours to inform curriculum design in the legal sciences in higher education.

Socio-economic impact: This consideration of proposals contained in the study and its inclusion in policy could have socio-economic impact in the form of access to justice and job creation in the form of an expansion of a different layer of law practitioners that will meet the dire needs of vulnerable communities.

Research: Applied and multi-disciplinary research in the legal sciences in the country is, for the most part, not regarded as mainstream research. The legal empowerment of the poor involves politics, economics and law. Scientific evidence influences policy making and the absence thereof could stall crucial legislation. This study endeavours to encourage multi-disciplinary research.

⁹⁸ The Council on Higher Education (CHE) is an independent statutory body established in terms of the Higher Education Act 101 of 1997, as amended. It functions as the Quality Council for Higher Education in terms of the National Qualifications Framework Act 67 of 2008.

⁹⁹ Council on Higher Education, *Outcomes of the National Review of the Bachelor of Laws (LLB) qualification*, (2017) Technopark, South Africa: CHE.

1.7. STRUCTURE OF THE DISSERTATION

The direct link between the services of the community-based paralegal and access to justice is recognised internationally.¹⁰⁰ The right of access to procedural justice, in particular, is meaningless without the right to legal assistance, which under certain circumstances the State must provide at its own expense. The right of access to procedural justice in civil matters is measured by the substantive legal framework that codifies it, the institutions, human resources and infrastructure that support it and the knowledge, values and attitudes that are conducive to ensuring access. These values, institutions, human resources and substantive legal framework are the themes that inform the scope, nature and content of this investigation and determine the structure of this thesis.

Part I provides the introduction to the study. It contains two chapters.

Chapter 1 contains the introduction and rationale for the study. It addressed, in particular, the research question, research objectives and research methodology.

Chapter 2 examines the philosophical framework for access to justice in South Africa and addresses a number of definitional issues. It therefore addresses the theoretical foundations of the concept ‘justice’, examines the legal empowerment paradigm and settles a number of definitional issues for the purpose of this investigation.

Part II focuses on the constitutional *values* that support access to justice in South Africa. It contains Chapter 3, in which the triumvirate of constitutional values, namely, human dignity, equality and freedom are examined.

Part III addresses the *substantive human rights framework* of access to procedural justice in civil matters in South Africa. It contains Chapters 4, 5 and 6.

Chapter 4 examines the international and regional human rights framework of the right of access to procedural justice in civil matters. The focus is on key provisions of the relevant international instruments, in particular, the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights.

¹⁰⁰ Open Society Justice Initiative (2010).

Chapter 5 examines the nature, application, content and limitations of section 34 of the Constitution of South Africa and the key constitutional provisions most closely related to it.

Chapter 6 examines the right to legal assistance in civil matters as derived from section 34 of the Constitution of South Africa.

Part IV focuses on the *institutions* that support access to justice. It contains Chapter 7, which examines, in brief, the extent to which the legal framework of the courts and other dispute resolution fora create scope for paralegal representation. It also examines, in brief, the State institutions supporting constitutional democracy established in terms of Chapter 9 of the Constitution of South Africa with a view to determining the role of the community-based paralegal in ensuring greater access to these institutions.

Part V addresses the theme of the *human resources* that support access to justice with the focus on the legal and paralegal professions. It contains Chapters 8 and 9.

Chapter 8 tracks the legal reforms in the legal profession in post-apartheid South Africa and its implications for a paralegal 'profession'. It commences with the Justice Vision 2000 and culminates in the Legal Practice Act, 2014.

Chapter 9 focuses on the evolution of the community-based paralegal in South Africa. It briefly examines the paralegal landscape in a number of foreign legal systems where the paralegal features prominently for the purpose of determining the features that characterise this practice. These include economically more advanced countries such as the United States of America and England, who are considered to have a common law legal system. The economically less advanced countries on the African continent with a mixed legal system include Mozambique and Sierra Leone. The purpose of this examination is to make recommendations for a paralegal profession.

Part VI consists of Chapter 10 which contains the conclusions and recommendations.

CHAPTER 2

PHILOSOPHICAL FRAMEWORK AND DEFINITIONS

2.1 INTRODUCTION

The literature involving the paralegal in general and the related case law in South Africa are extremely limited.¹⁰¹ Throughout the literature the relationship between the community-based paralegal and access to justice for the marginalised and the poor is emphasised.¹⁰² However, justice is a nebulous concept and requires clarification, especially in a country where the vast inequalities in society ensure that deep divisions persist. The multiple barriers to access to justice for vulnerable communities require systematic identification and removal of the barriers to access to justice. This would assist in empowering these communities to influence, access and utilize the mechanisms and institutions that are designed to improve their lives. This requires legal empowerment. A review of the literature in this chapter will address the concept ‘justice’ and examine ‘legal empowerment’ as a philosophical and theoretical framework for access to justice in South Africa.

Moreover, the literature, in some instances, does not generate universally accepted definitions of key concepts related to access to justice or these concepts are not defined within the South African context. A number of these definitional issues are addressed in this chapter. The relevant concepts are, ‘paralegal’, ‘legal services’, ‘legal aid’ and ‘legal remedy’. Associated concepts relevant to the study such as ‘legal profession’ and ‘legal assistance’ are addressed in subsequent chapters.

2.2 WHAT IS ACCESS TO JUSTICE?

No discourse on the right of access to justice is complete without addressing the concept ‘justice’, which in itself defies universal definition, as the consideration of the philosophical underpinnings of the concept demonstrates. The focus on etymology and dictionary definitions inevitably seems to lead to a debate on the distinction between law and morality and often lead to circular reasoning. Justice is

¹⁰¹ A search on the Southern African Legal Information Institute (SAFLII) shows: 38 cases that contain reference to the paralegal of which 12 relate to labour matters. 25 documents that make reference to a limited extent to the paralegal in South Africa.

Southern African Legal Information Institute, “SAFLII Search | SAFLII”, available at: http://www.saflii.org/cgi-bin/sinosrch-adw.cgi?query=paralegal;method=auto;results=50;meta=%2Fsaflii;mask_path=&offset=50. (accessed 18 March 2017)

However, none of these documents hold particular relevance for the purpose of this study.

See Chapter 9.

¹⁰² See Chapter 9.

described as ‘equity’. Equity is described as ‘fairness’ which, in turn, is described as ‘justice’.¹⁰³ However, addressing the concept ‘justice’ here is not aimed at bringing clarity and certainty to the construct but to align this study to a functional definition and set the context within which justice will be considered.

2.1.1. Traditional schools of thought

Western philosophy on the subject, embodied in theories of Ancient Rome and Greece, enunciated by Cicero, Aristotle and Plato, medieval Christianity expressed by Augustine and Aquinas, early modernist such as Hobbes and Hume, recent modernists as per Kant and Mill and contemporary theorists represented by Rawls and his successors, provide an impressive body of knowledge.¹⁰⁴ A comprehensive discussion of the various schools of thought would not only divert the focus of this dissertation but will not reduce it to a singular, universally acceptable concept. Therefore, this study will make brief mention of the main schools of thought and clarifying the context within which this study will view the construct.

Traditionally, two schools of thought dominated theories of justice, namely, the naturalist and the positivist school. Volumes have been written on the distinction between the two paradigms, which has been regarded as the primary debate in jurisprudence.¹⁰⁵ However, determining what truly distinguishes one from the other is proving to be more of a challenge than initially anticipated. The debate on the concept ‘justice’ has been approached throughout history from two perspectives, namely, as ‘a supra-mundane eternal verity external to man’¹⁰⁶ and ‘a temporal man-made social ideal’.

The first is associated with the traditional natural law theorists who advanced the notion that there is a ‘higher law’ (natural law, constituting natural justice) which sets the standard against which positive law (man-made law, constituting legal justice) is measured.¹⁰⁷ As a result, they argued, positive law should be consistent with natural law. This view is captured by the maxim ‘lex iniusta non est lex’,

¹⁰³ ‘the quality of being just; righteousness, **equitableness**, or moral rightness’ ... ‘to act **fairly**’ (Farlex, ‘The Free Dictionary’, *Dictionary*, 2003 available at <http://www.thefreedictionary.com/> (accessed 5 June 2015).

‘fairness in the way people are dealt with’. Cambridge University Press, “Cambridge English Dictionary”, (2013), available at: *Cambridge Dictionary* <http://dictionary.cambridge.org/dictionary/business-english/>.

¹⁰⁴ Pomerleau, WP, ‘Western Theories of Justice’ (2013) *Internet Encyclopedia of Philosophy*, available at: <http://www.iep.utm.edu/justwest/>. (accessed 5 August 2015)

¹⁰⁵ Priel D ‘Towards Classical Legal Positivism’ *Comparative Research in Law & Political Economy* 20/2011 (2011).

¹⁰⁶ Hostein WJ and others *Introduction to South Africa Law and Legal Theory* 2ed (1995) 23.

¹⁰⁷ Cicero for example, considered living by natural law as justice and thus justice is derived from nature. (Rudd, N, *Cicero: The Republic and The Laws*, (1998), Powell, JG (ed.) New York, USA: Oxford University Press.)

Aquinas held that a just law is one that is consistent with the requirements of natural law (Finnis, J, “Aquinas’ Moral, Political, and Legal Philosophy”, (2014), available at: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political/#Bib.>) (accessed 5 August 2015)

meaning, an ‘unjust law is not a *true* law’, commonly attributed to Saint Augustine.¹⁰⁸ Traditional natural law theorists, thus, acknowledge the dual nature of positive law and accept that law can be deemed both as a ‘sheer social fact of power and practice’ (conventional device) and as ‘a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them’ (supramundane verity external to man).¹⁰⁹ No clear distinction is therefore drawn between law and justice. Having said this, it has to be noted that there is by no means consensus among natural law theorists as to the origin of this ‘higher law’, which points to the complexity of the paradigm that this rudimentary synopsis conceals.¹¹⁰

The second approach is consistent with the positivist approach, the proponents of which in essence regard law as ‘man-made’.¹¹¹ Proponents of this paradigm argue that social facts, and not merit, determine the very existence and content of law, thus arguing for its separation from concepts such as ethics and morality, which includes justice. The positivist paradigm does not claim that the merits of law are incomprehensible, insignificant, or peripheral to the philosophy of law.¹¹² To the contrary, their key position is that the merits of law do not determine whether the laws or legal systems exist, thus the need to distinguish a *legal* rule from a *just* rule.¹¹³

Traditional natural law theorists recognised the existence of unjust laws, which means that they acknowledged that there are instances where law and justice diverge, not *ought* to diverge, which is a position that some positivists mistakenly attribute to them.¹¹⁴ It is not difficult to recognise the essentially identical nature of the maxim *lex iniusta non est lex* (which captures the naturalist position) and Hart's ‘positivist’ exposition: ‘This is law but too iniquitous to be applied or obeyed’.¹¹⁵ The mere fact that a law suffers from a deficiency in justice, strips it of its authority, since justice is the very purpose of the *existence of and obedience to* the law.¹¹⁶ This having been said, it is clear, in the author’s

¹⁰⁸ Marmor, Andrei; Sarch, A, “The Nature of Law”, (2015), available at: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/>. (accessed 21 January 2016)

¹⁰⁹ Finnis, J, 'Natural law theories' in Zalta, EN (ed) *The Stanford Encyclopedia of Philosophy*, Winter 2015 ed (2015) Metaphysics Research Lab, Stanford University.

¹¹⁰ It is unclear from the works of the classic writers whether this ‘natural law’ is derived from human nature or, because it is accessible by our natural faculties or, because it is expressed by nature or, a combination of all three. Early Christian writers added another dimension to it, suggesting that it is derived from divine command and at times referring to the rules of nature as an expression of divine will.

¹¹¹ Coleman, J & Leiter, B, 'Legal Positivism' in Patterson, D (ed) *A Companion to the Philosophy of Law and Legal Theory*, 2d ed (2010) Singapore: Blackwell Publishing Ltd.

¹¹² Green, L, “Legal Positivism”, (2009), available at: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>. (accessed 5 August 2015)

¹¹³ Hart, HLA, 'Positivism and the Separation of Law and Morals', (1958), 71(4), *Harvard Law Review*, pp. 593–629.

Bentham argues for a utilitarian approach to morality and law, defining utility as whatever promotes pleasure and prevents pain.

¹¹⁴ Priel, D 2011 Priel, D (2011).

¹¹⁵ Hart, HLA, *The Concept of Law*, 2d ed, (1994) Oxford, UK: Clarendon Press p. 208.

¹¹⁶ Finnis, J (2015).

view, that there is consensus between the two paradigms. However, as Priel concluded, paradoxically, ‘there is a lingering feeling that despite seemingly in agreement on everything, the two sides could not be further apart’.¹¹⁷

The two schools of thought ultimately traverse, both in theory and in practice, especially through the codification, interpretation and application of human rights instruments. Natural law theory has influenced, at least in part, arguments on ‘natural rights’, which ultimately evolved into human rights.¹¹⁸ Two ideas that are central to natural law theory, namely, that of a universal order governing all men and the immutable rights of the individual, form an integral part of human rights law. Finis¹¹⁹ noted that human rights law contains elements that are both positive¹²⁰ and natural.¹²¹ The natural law notion of the existence of minimum standards for the well-being of all human beings that accrue to them simply by virtue of them being human (‘higher law’ or ‘ius cogens erga omnes’), is central to human rights law. The instruments that are designed to give recognition and effect to these minimum standards (‘ius gentium’) fall within the domain of positive law. Needless to say, if there are fundamental human rights that are derived from natural law and these require a legal system established through the enactment of positive law to ensure its observance, the mutually exclusive character of the two paradigms is unclear. The distinction between the two, for the purpose of this study, has then become irrelevant.

The challenge in attempting to deconstruct the concept ‘justice’ is demonstrated by the founder of deconstruction, postmodern philosopher, Jacques Derrida,¹²² whose view of justice is summarised as the ‘un-deconstructable reality that guided all deconstruction’.¹²³ In a review of a compilation of some of his works,¹²⁴ Litowitz,¹²⁵ in a self-proclaimed moderate positivist stance on Derrida, posits that the philosopher describes justice

‘in vague, reverential, openly messianic terms as some kind of impossible, incalculable, unrepresentable and singular obligation to the other, something that is never fully

¹¹⁷ Priel, D (2011) p. 21.

¹¹⁸ Patterson, D, *A Companion to Philosophy of Law and Legal Theory*, 2nd ed, (2010), Patterson, D (ed.) Wiley-Blackwell p. 215.

¹¹⁹ Finnis, J (2015).

¹²⁰ This means that these laws are made and part of official practice.

¹²¹ This means that these laws are rationally required for at least minimal human flourishing.

¹²² Derrida J ‘Force of Law: The “Mystical Foundation of Authority”’ In Ed Cornell D, Rosenfeld M & Carlson DG in *Deconstruction and the Possibility of Justice* ed by Cornell D, Rosenfeld M & Carlson DG Routledge USA (1992).

¹²³ McLaren BD, Padilla E & Seeber BA *The Justice Project* (2009) 21.

¹²⁴ Goodrich P *Derrida and Legal Philosophy* ed by Hoffmann F, Roenfeld, M & Vismann C, 1ed (2008).

¹²⁵ Litowitz, D, ‘Derrida and Legal Philosophy’, (2009), 2(1), *Notre Dame Philosophical Reviews*, online: <<http://ndpr.nd.edu/news/23897-derrida-and-legal-philosophy/>>. (accessed 7 November 2015)

present but which is “to come” and which “transcend the *now* in the mode of *perhaps*”¹²⁶.

He found it curious that ‘Derrida did not simply hold that justice is relative to social meanings and that these meanings are relatively fluid and contestable.’¹²⁷ Admittedly, Derrida’s work has proven to be a challenge to comprehend. However, Litowitz’s ‘translation’ of Derrida’s views on the concept provides a basis from which further discussion could be had.

D’Amato¹²⁸ considers an attempt to commence with a definition of a concept such as justice a ‘false start’ to any meaningful discussion related to it, for the simple reason that the definitions offered would only hold persuasive value for those who accept them.¹²⁹ Rather than generating what might ‘appear as nothing more than a vast tautology’¹³⁰ it might be more useful to consider justice ‘not as a single concept capable of definition, but as a collection of differing viewpoints on fairness in society’.¹³¹

The heterogeneous nature of modern society with its pluralistic values, needs and social structures means that no singular meaning of justice would sufficiently capture its essence as the need for it manifests itself in society. As a result, an attempt to address access to justice in practice through universally applicable means may fall short of achieving the very objective. This realisation, in part, gave rise to the emergence of the legal empowerment paradigm. Considering the nebulous nature of the concept, access to justice, this study would therefore, instead of embarking on voluminous tautology, rather consider how the quest for justice manifests in South African society as the foundation for further discussion.

2.1.2. Access to justice in South Africa

Post-apartheid South Africa has not entirely transcended what is considered to be ‘transitional justice’, which aims to address the challenges that confront societies as they emerge from serious conflict and transition from an authoritarian state to a form of democracy.¹³² Inasmuch as South Africa has

¹²⁶ Litowitz, D (2009), para 3.(own emphasis added).

¹²⁷ Litowitz, D (2009), para 5.

¹²⁸ D’Amato, A, 'On the Connection Between Law and Justice', (2011), *Faculty Working Papers*, online: <<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2>>. (accessed 15 June 2015)

¹²⁹ D’Amato, A (2011) p. 4.

¹³⁰ D’Amato, A (2011).

¹³¹ Jenkins, JA, *The American Courts: A Procedural Approach*, (2011) Sudbury, MA: Jones and Bartlett Publishers p. 5.

¹³² This form of justice is described as ‘...a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and start a process of reconciliation and transformation toward a more just and humane society’ (Jenkins, JA (2011) p. 365.).

exchanged an apartheid authoritarian state for a constitutional democracy in 1994, the residues of apartheid continue to haunt contemporary society through its deeply ingrained inequalities. Apartheid policies were not only implemented by the State but also private citizens, natural and juristic, who were not required by law to do so.¹³³ The residual effects are hard to dispense with as the ‘culture of authority’ was ingrained in the daily existence of all citizens and the ‘ethic of obedience’ permeated the very fabric of our society.¹³⁴ The reversal of the net effects of such a deep-rooted system requires a multipronged approach at multiple levels, with its focus on the empowerment of the disadvantaged.

Boraine¹³⁵ refers to five (5) components of a holistic approach to transitional justice, namely, accountability, truth recovery, reconciliation, institutional reform and reparation. Following the Truth and Reconciliation Commission’s¹³⁶ attempts at accountability, truth recovery and reconciliation in South Africa, for which it received both praise and condemnation,¹³⁷ the democratically elected government embarked on the laborious process of institutional transformation and reparation. The slow pace of regulatory reform and the ongoing conflict on the distribution of resources, for example, are evidence of the complexity of that transition.

The quest for justice in post-apartheid South Africa, therefore, essentially manifests as a quest for redress. Persons who perceive themselves to have been treated unjustly, or others on behalf of them, embark in pursuit of a remedy for the perceived injustice suffered. In answer to the hypothetical question as to what they seek, the hypothetical responses may centre on the following, which are not mutually exclusive:

- Punishment for those whom they perceived to have treated them unjustly;
- Compensation for the perceived injustice that they have suffered;
- A fair process through which the perceived injustice is addressed and/or
- Equitable/equal distribution of rights, liberties and benefits within society.

Theorists and practitioners of transitional justice focus on the most effective and legitimate ways of addressing past wrongs and moving towards the (re)establishment of a decent civil order. (Eisikovits, N, 'Transitional justice' in Zalta, EN (ed) *The Stanford Encyclopedia of Philosophy*, winter 2016 ed (2016) Metaphysics Research Lab, Stanford University.)

¹³³ Hodgson, TF (2015) p. 194.

¹³⁴ Mureinik, E, 'A Bridge to Where?' Introducing the Interim Bill of Rights', (1994), 10, *South African Journal on Human Rights*, pp. 31–48. p. 31.

¹³⁵ Boraine, A, 'Transitional Justice' in Heynes, C & Stefiszyn, K (eds) *Human Rights, Peace and Justice in Africa* (2006) Pretoria: Pretoria University Law Press.

¹³⁶ This commission was established under the *Promotion of National Unity and Reconciliation Act*, 34 of 1995.

¹³⁷ Verbuyst, R, 'History, historians and the South African Truth and Reconciliation Commission', (2013), 66, *New Contree*, pp. 1–26.

Legal philosophers have categorised the above as retributive justice,¹³⁸ restorative justice,¹³⁹ distributive justice¹⁴⁰ and procedural justice.¹⁴¹ However, without derogating from the ‘other’ forms of justice and, being acutely mindful of the fluidity of demarcations and the interrelatedness of the various forms of justice, this study accords itself the privilege of focusing on procedural justice, which it regards as one of the conduits for accessing the ‘other’ forms of justice. The right of access to procedural justice has evolved into a constitutional and statutory right in post-apartheid South Africa and forms the focus of discussion in the ensuing chapters.

The question as to what constitutes access to justice, in this case, procedural justice, in contemporary South Africa would be best answered by examining whether citizens are legally empowered to pursue, claim and enforce their rights. Access to justice, within this context, is therefore measured not only by the substantive legal framework that codifies it and the institutions, human resources and infrastructure that support it, but the knowledge, values and attitudes that are conducive to ensuring access.¹⁴² It should thus concern itself with whether rights bearers are capacitated to access the mechanisms, formal and informal, that are intended to facilitate that access. The knowledge, values and attitudes in our constitutional democracy are to be shaped by an inviolable human rights culture. All of these are supposed to work in tandem to ensure that the rights holders are empowered to realise their rights. On the African continent paralegals have proven themselves to be formidable facilitators of that empowerment process.¹⁴³

Legal empowerment, as a development objective (aim) as well as an outcome (result), is considered to be critical from a human rights perspective. It is designed to provide vulnerable communities (such as the poor) as rights-holders with the legal tools to claim and exercise their rights and to develop the capacity of duty-bearers (state and non-state) to meet their obligations. The key to ensuring legal

¹³⁸ The concept of retributive justice mainly concerns itself with proportional punishment for crimes committed by those who are morally deserving thereof. (Walen, A, “Retributive Justice”, (2014), available at: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/>.) (accessed 23 June 2016)

¹³⁹ Restorative justice refers not only to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict but also to address and resolve conflict in a variety of other contexts and settings (United Nations Office on Drugs and Crime, *Handbook on Restorative justice programmes*, (2006) Vienna, Italy: United Nations p. 6.).

¹⁴⁰ Distributive justice is concerned with the fair allocation of resources among diverse members of a community. (Maiese, M, “Distributive Justice”, (2003), available at: *Beyond Intractability* <http://www.beyondintractability.org/essay/distributive-justice>.) (accessed 23 June 2016)

¹⁴¹ Procedural justice is concerned with making and implementing decisions according to fair processes. People feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept even outcomes they do not like (Maiese, M, “Procedural Justice”, (2004), available at: *Beyond Intractability* <http://www.beyondintractability.org/essay/procedural-justice>.) (accessed 23 June 2016)

¹⁴² UNDP Justice System Programme (2011) p. 3.

¹⁴³ See Chapter 9.

empowerment in South Africa is the systematic identification and removal of the barriers to access to justice, thereby empowering the poor and the marginalised to influence, access and utilize the mechanisms and institutions that are designed to improve their lives. Legal empowerment of the disadvantaged is therefore critical for creating a South African society less unequal than today. What constitutes legal empowerment requires further examination.

2.3 WHAT IS LEGAL EMPOWERMENT?

Political settlements in post-conflict democracies such as South Africa, with its accompanying constitutional reforms, have radically altered the relationship between citizens and the state, creating a new order of citizen entitlement and state responsibilities. Individuals and communities, therefore, have different expectations about the law, judicial systems and other dispute resolution mechanisms. For example, where in the past state mechanisms were used to oppress the large majority politically, socially and economically, the legitimate expectation on the part of this overwhelming majority of poor and marginalised South African citizens is that these mechanisms would now be transformed into instruments of transformation on which they can rely so that they can liberate themselves, not only politically but also socially and economically.

Traditional ‘rule of law’ reforms failed to bring about the transformation required for the sustained development of vulnerable communities across the world.¹⁴⁴ Legal empowerment, as an alternative to these traditional reforms, is therefore described as a ‘demand-side response to addressing the deficits in the rule of law.’¹⁴⁵ It combines a range of alternative approaches to promoting access to justice that have been developed largely in response to the discontent with traditional rule of law and law and development approaches that characterised ‘legal interventions’ for decades.¹⁴⁶ The Commission on Legal Empowerment of the Poor identified four pillars of legal empowerment, namely, access to justice and the rule of law, property rights, labour rights and business rights.¹⁴⁷ A variety of interventions are applied in this response. These include legal assistance, including legal aid, community-based paralegals, capacity building and awareness-raising for rights holders and duty bearers.

¹⁴⁴ Barendrecht, J & de Langen, M (2008).

¹⁴⁵ Bakrania, S, *Safety, Security and Justice: Topic Guide*, (2014) Birmingham, UK: GSRDC, University of Birmingham p. 14.

¹⁴⁶ Legal empowerment overlaps with activities that resort under ‘legal services for the poor’, ‘public interest law’, ‘alternative lawyering’, ‘developmental lawyering’, ‘social justice’, ‘social accountability’, ‘women’s empowerment’ and ‘strengthening the poor’s land tenure security’. (McInerney, T & Golub, S 2010 McInerney, T & Golub, S (2010) p. 10.).

¹⁴⁷ United Nations Development Programme, *Making the Law Work for Everyone*, (2008) New York, USA: Commission on Legal Empowerment of the Poor, UNDP.

Although not mainstream, the concept legal empowerment has made its way into the international developmental dialogue over the past decade.¹⁴⁸ Legal empowerment manifests when

‘poor and marginalised people [individually or collectively] use the law, legal systems and dispute resolution systems (formal and informal) to improve or transform their social, political or economic situations, to hold power holders to account, or to contest unjust power relations’¹⁴⁹.

Legal empowerment therefore has a social and political context aimed at bringing about social, political and economic transformation. It is intended to mould the capacity of the disempowered to apply the law in order to contest and reconstruct the asymmetric power relations that exist in inequitable societies by holding powerholders, state and non-state, to account. Various factors influence the accessibility of the law, the quality of justice and its social impact.¹⁵⁰ Gloppen identifies some of these, including ‘the nature of the political regime, the legal framework, dominant social norms and histories of social mobilisation’.¹⁵¹ The extent to which legal empowerment impacts on the disadvantaged is therefore dependent upon the socio-political context, involvement of stakeholders, the nature of the dispute(s) and the levels of support and opposition to goals and objectives that favour the poor.¹⁵² Proponents of the concept, legal empowerment, claim that it has a positive impact in the form of ‘personal empowerment’, ‘confirmation and extension of formal rights’, ‘policy change and social accountability’ and ‘increased social justice’.¹⁵³ This is based on a collection of interventions involving law and development which has proven itself successful in practice.

Legal empowerment is a broad and multi-faceted concept which does not consist of a single strategy, nor does it constitute a magic elixir for alleviating poverty. Definitions abound, a core concept nevertheless emerges. It has been defined as ‘the use of law specifically to strengthen the disadvantaged’.¹⁵⁴ The use of the law within this context is understood to involve not only legislation and court decisions but a plethora of regulations, procedures, agreements and traditional justice systems by which the disadvantaged is governed.¹⁵⁵ Legal empowerment is also understood to involve legal

¹⁴⁸ McInerney, T & Golub, S (2010).

¹⁴⁹ Domingo, P & O’Neil, T, *Overview: The politics of legal empowerment: Legal mobilisation strategies and implications for development*, (2014) London, UK: Overseas Development Institute (ODI) p. 1.

¹⁵⁰ Domingo, P & O’Neil, T (2014).

¹⁵¹ Gloppen, S, ‘Litigation as a strategy to hold governments accountable for implementing the right to health.’, (2008), 10(2), *Health and Human Rights*, pp. 21–36.

¹⁵² Domingo, P & O’Neil, T (2014) p. 5.

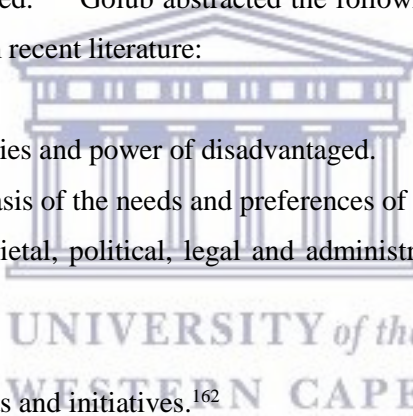
¹⁵³ Domingo, P & O’Neil, T (2014) p. 2.

¹⁵⁴ Golub, S, ‘What is Legal Empowerment? An Introduction’ in *Legal Empowerment: Practitioners’ Perspectives* (2010) Rome, Italy: International Development Law Organisation p. 13.

¹⁵⁵ Golub, S (2010).

services that are designed to have ‘good laws actually implemented by or for the disadvantaged’.¹⁵⁶ It is intended to enhance the control that vulnerable communities exercise over their daily lives, increasing their capacity to act on their own. Legal empowerment is thus understood as ‘the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors’.¹⁵⁷ It is therefore both a process and a goal. As a process it involves legal reforms and services that improve the bargaining power of these vulnerable communities. As a goal it is intended to improve the plight of these communities in respect of their income, assets, health, physical security and freedom.¹⁵⁸ Its multi-faceted nature is reflected in the understanding that it is a ‘means to an end but also an end in itself’.¹⁵⁹

Golub categorised the combination of activities that constitute legal empowerment into two groups, namely, access to information and awareness raising and direct support for meeting the needs of the target group.¹⁶⁰ In both instances the community-based paralegals have proven themselves invaluable in economically developing countries with a pluralistic legal system where both formal and informal means of dispute resolution is used.¹⁶¹ Golub abstracted the following five common elements of the legal empowerment strategy from recent literature:

- 
- Strengthening the capacities and power of disadvantaged.
 - Selecting issues on the basis of the needs and preferences of the poor.
 - Focusing on broader societal, political, legal and administrative actors, not only the justice sector.
 - Supporting civil society.
 - Relying on domestic ideas and initiatives.¹⁶²

The above signals, in essence, a challenge to the rule of law orthodoxy and an expansion of the concept ‘access to justice’ beyond mere law and development.

In the United Nations Secretary-General’s Report¹⁶³ a concerted effort was made to convert the concept legal empowerment into action. The report addresses the conceptual foundation of legal empowerment,

¹⁵⁶ Golub, S (2010) p. 13.

¹⁵⁷ General Assembly (2009) p. 2.

¹⁵⁸ Golub, S (2010) p. 13.

¹⁵⁹ Golub, S (2010) p. 2.

¹⁶⁰ Golub, S (2010).

¹⁶¹ See Chapter 9.

¹⁶² Golub, S, 'The Legal Empowerment Alternative' in McInerney, T (ed) *Promoting the Rule of Law Abroad: The Search of Knowledge* (2006) Washington D.C.: Carnegie Endowment for International Peace p. 164.

¹⁶³ *Report of the Secretary General* (2009) A/64/133.

its orientation, approach, key areas of priority and highlights the critical issue of the challenge with legal implementation.¹⁶⁴

Legal empowerment constitutes first, at a conceptual level, an expansive interpretation of access to justice and poverty. The report does not confine access to justice to judicial access, law enforcement agencies and the services rendered by lawyers. Paralegals and informal dispute resolution feature prominently as legal empowerment is intended to agentize communities. Legal empowerment also includes the extensive array of traditional justice systems that communities have been using as the primary mechanisms to settle conflicts among them.

Legal empowerment further focuses on an expansive view of poverty that encompasses more than financial well-being and material wealth. Poverty is therefore regarded as more than a 'lack of material goods and opportunities such as employment, ownership or productive assets and savings'.¹⁶⁵ It encompasses a lack of legal civil status, good health, bodily integrity, safety, organisational capacity, capacity to exert political influence and the capacity to enforce rights, in other words, lack of access to procedural justice. The identification of a lack of access to procedural justice, especially in civil matters, as a manifestation of poverty is of particular significance in the South African context where poverty and inequality still prevail. The majority of the citizens appear to be unable to claim and enforce their rights and, in some instances, communities resort to vigilantism and a defiance of the rule of law. The report of the Secretary-General accentuates four pillars of legal empowerment, of which three are focused on livelihood, involving property rights, labour rights and business rights. The fourth pillar constitutes an enabling framework for access to justice and the implementation of the rule of law. A critical issue highlighted in the report is that of the need to enforce existing laws. The report acknowledges the existence of laws to protect the poor but cautions that these laws are often 'too ambiguous, cumbersome and costly to access'.¹⁶⁶

Secondly, legal empowerment has a grassroots and civil society orientation. The report recognises the pivotal role that the poor and disadvantaged can play as key actors in their own legal empowerment, without derogating from the importance of outside assistance. Legal empowerment therefore suggests a bottom-up approach. It is intended to promote development through 'empowering and strengthening the voices of individuals and communities, starting at the grassroots and from within'.¹⁶⁷ The report endorses a concept of legal empowerment that recognises the importance of engaging civil society and

¹⁶⁴ Golub S 'What Is Legal Empowerment? An Introduction' (2010).

¹⁶⁵ *Report of the Secretary General* (2009) A/64/133, para 8.

¹⁶⁶ *Report of the Secretary General* (2009) A/64/133, para 2.

¹⁶⁷ *Report of the Secretary General* (2009) A/64/133, para 4

organisational structures within the community, ensuring that the poor and marginalised have identity and voice. In so doing, democratic governance and accountability are strengthened, which has the potential to play a pivotal role in the achievement of development goals and objectives.¹⁶⁸

Thirdly, a legal empowerment approach focuses on political economy and social accountability. A political economy approach acknowledges the limitations of capacity-building and technical assistance and focuses on the ‘underlying incentive structures of state institutions’.¹⁶⁹ Legal empowerment thus recognises the importance of government and its political will to make legal empowerment a reality. Legal empowerment should therefore assist in influencing these justice institutions and the individuals staffing them to execute their responsibilities with due diligence. There is thus a direct link between the political economy approach of legal empowerment and social accountability.

Social accountability, which is the ability of communities and individuals to hold governments to account for service delivery and other functions, is couched by the United Nations in human rights terms. The report of the United Nations Secretary-General states that,

‘[a] characteristic of virtually all communities living in poverty is that they do not have access, on an equal footing, to government institutions and services that protect and promote human rights – where such institutions exist in the first place. Often, they are also unable to adequately voice their needs, to seek redress against injustice, participate in public life, and influence policies that ultimately will shape their lives’.¹⁷⁰

Fourthly, legal empowerment has key areas of priority, namely gender equity and certain environmental imperatives. The report recognises that the overwhelming majority of adult poor are women and highlights women’s rights arguably more than any other legal empowerment focus.¹⁷¹ It recommends that initiatives such as legal literacy, legal aid and legal reform be actively pursued for the advancement of women’s legal empowerment.¹⁷² The income/asset-increasing value of land and other natural resources to the poor and its related environmental challenges and opportunities also featured prominently in the report. Legal empowerment is believed to capacitate vulnerable communities with the legal tools to proactively protect themselves from the effects of climate change. It further enables

¹⁶⁸ *Report of the Secretary General* (2009) A/64/133.

¹⁶⁹ *Report of the Secretary General* (2009) A/64/133, para 7.

¹⁷⁰ *Report of the Secretary General* (2009) A/64/133, para 8.

¹⁷¹ *Report of the Secretary General* (2009) A/64/133, para 77.

¹⁷² *Report of the Secretary General* (2009) A/64/133.

these communities to access new climate funding opportunities and security of land rights is considered to be critical for access to these opportunities.¹⁷³

2.4 LEGAL EMPOWERMENT IN SOUTH AFRICA

Legal empowerment of the poor, albeit not known by this nomenclature, is not foreign to the South African developmental paradigm as it manifests in practice through initiatives such as legal services for the poor,¹⁷⁴ public interest litigation, social justice litigation, social accountability, women's empowerment and land tenure security. The community-based paralegal in South Africa plays an important role in each of these initiatives.¹⁷⁵ However, state-funded legal services for the poor are still heavily focused on criminal justice, the courts and the narrow legal profession and initiatives such as public interest and social justice litigation are, for the most part, dependent on donor funding.

Moreover, a member of the narrow legal profession in South Africa is still mainly considered to be a 'hired gun' whose service is available to those who can afford it and a legal empowerment initiative such as alternative or developmental lawyering, has lagged behind. Alternative or developmental lawyering is often perceived as human rights lawyering or the rendering of legal aid.¹⁷⁶ However, it extends beyond public interest litigation and providing free legal assistance.¹⁷⁷ Alternative or developmental lawyering first constitutes lawyering for social justice, secondly, lawyering for social change and thirdly, lawyering for social development.¹⁷⁸ It does not concern itself with technical assistance and the courts only but extends its enquiry by examining the social context and powers that impact on the individual's legal problem.¹⁷⁹ Its primary goal is to 'contribute to the correction or elimination of deeply rooted unjust social structures and relations' and employs the law as an instrument for social change.¹⁸⁰ Alternative or developmental lawyering is aimed at 'work(ing) for a holistic, sustainable development of persons and communities in a society that is more just, more peaceful, and more humane'.¹⁸¹

¹⁷³ *Report of the Secretary General* (2009) A/64/133.

¹⁷⁴ See Chapter 6.

¹⁷⁵ See Chapter 6.

¹⁷⁶ Candelaria, S & Mundin, M, 'A Review of Legal Education in the Phillipines', (2010), 55(3), *Ateneo Law Journal*, pp. 567–597.

¹⁷⁷ Candelaria, S & Mundin, M (2010).

¹⁷⁸ Candelaria, S & Mundin, M (2010).

¹⁷⁹ Candelaria, S & Mundin, M (2010).

¹⁸⁰ Candelaria, S & Mundin, M (2010) p. 592.

¹⁸¹ Candelaria, S & Mundin, M (2010).

The socio-legal function that community-based paralegals have performed over decades in South Africa, in some instances with the support of members of the narrow legal profession, falls within the domain of alternative or developmental lawyering.¹⁸² The array of remedies used by community-based paralegals, for the most part, does not involve the courts but extends to the corridors of power and even the streets.¹⁸³ However, what constitutes a paralegal is by no means settled, nationally or internationally and requires elucidation.

2.5 THE PARALEGAL DEFINED

One of the prominent features of the concept ‘paralegal’ is the diverse meanings attributed to it not only across various judicial systems but also within a particular judicial system and South Africa is no exception. The International Paralegal Management Association defines a paralegal as,

‘a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible’.¹⁸⁴

The Paralegal Society of Ontario defines it as ‘an individual qualified through education or experience licensed to provide legal services to the general public in areas authorized by the Law Society of Upper Canada’.¹⁸⁵ In the United Kingdom, the National Association of Licensed Paralegals (NALP) considers a paralegal to be ‘a person who is educated and trained to perform substantive legal work that requires knowledge of the law and procedures but who is not a qualified solicitor or barrister’.¹⁸⁶ Various professional bodies within the United States, such as the American Bar Association,¹⁸⁷ National

¹⁸² See Chapter 9 for the discussion on the paralegal ‘profession’.

¹⁸³ See Chapter 9.

¹⁸⁴ The International Paralegal Management Association, *Position Paper on U.S. Paralegal Regulation*, (2011).

¹⁸⁵ The Law Society of Upper Canada, *Paralegal Rules of Conduct*, (2017).

¹⁸⁶ Hamilton, A, “A fine distinction - Amanda Hamilton takes the stand in the paralegal definition debate”, (2012), available at: *New Law Journal* <https://www.newlawjournal.co.uk/content/fine-distinction-2>. (accessed 7 November 2015)

¹⁸⁷ In 1997, the ABA amended the definition of legal assistant by adopting the following language: “A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.” (American Bar Association; Standing Committee on Paralegals, *ABA Model Guidelines for the Utilization of Paralegal Services*, (2012) Chicago, Ill.: American Bar Association, Standing Committee on Paralegals p. 1.).

Federation of Paralegal Associations,¹⁸⁸ National Association of Legal Assistants¹⁸⁹ and the American Association for Paralegal Education,¹⁹⁰ have their own definition of a paralegal, yet there are three criteria that are common to these definitions. These are, specialised training, supervision by an attorney and the substantive legal nature of the work that they perform. All the aforementioned definitions share one key feature, namely, the law(yer)-centredness of the concept ‘paralegal’.

Countries across the African continent that have a history of paralegalism also have different definitions. However, the community-based nature of its work seems to be a common feature. The Paralegal Advisor Services Institute in Malawi describes paralegals as follows: ‘Paralegals, like paramedics or bare foot doctors, provide “first” legal aid to ordinary people.’¹⁹¹ The Nigeria Community-based Paralegal Training Manual describes it as ‘a community-based person trained with the basic knowledge of the law and the legal system.’¹⁹² In Sierra Leone they are regarded as ‘laypeople working directly with the poor or otherwise disadvantaged to address issues of justice and human rights’.¹⁹³ However, Sierra Leone’s Legal Aid Act defines ‘accredited paralegal’ as ‘a person employed by the Board, a government department, an accredited civil society organization or a non-governmental organization and who has completed a training course in the relevant field of study at the Judicial and Legal Training Institute or an educational institution approved by the Board’.¹⁹⁴ The inclusion of paralegals in the Legal Aid Act in Sierra Leone is a significant development towards incorporating these



¹⁸⁸ The National Federation of Paralegal Associations defines ‘a Paralegal [a]s a person, qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work. Substantive shall mean work requiring recognition, evaluation, organization, analysis, and communication of relevant facts and legal concepts.’ (National Federation of Paralegals Associations, ‘Paralegal Definition’, (2016), available at: *Paralegals* <https://www.paralegals.org/i4a/pages/index.cfm?pageid=3315>.) (accessed 16 June 2016)

¹⁸⁹ The Code of Ethics and Professional Responsibility of this professional body describes paralegals as follows: ‘Legal assistants, also known as paralegals, are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney. National Association of Legal Assistants Inc, “NALA Code of Ethics and Professional Responsibility”, (2007), available at: <https://www.nala.org/certification/nala-code-ethics-and-professional-responsibility>. (accessed 16 June 2016)

¹⁹⁰ AAfPE describes paralegals according to their scope of practice: ‘Paralegals perform substantive and procedural legal work as authorized by law, which work, in the absence of the paralegal, would be performed by an attorney. Paralegals have knowledge of the law gained through education, or education and work experience, which qualifies them to perform legal work. Paralegals adhere to recognized ethical standards and rules of professional responsibility.’ American Association for Paralegal Education, *Statement on Academic Quality*, (1998) .

¹⁹¹ The Paralegal Advisory Service Institute, *Where there is no lawyer: Bringing justice to the poorest of the poor*, (2015).

¹⁹² Akinrimisi, B, *Paralegal Training Manual for Nigeria*, (2010) Heinrich Böll Foundation.

¹⁹³ Maru, V, ‘Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide’, (2006), 31, *The Yale Journal of International Law*, pp. 427–476.

¹⁹⁴ Part I of the *The Legal Aid Act*, of 2012.

practitioners into the conventional legal system and strengthening the legitimacy of the service that they render.

In South Africa, the definitions clause of the Legal Practice Bill 2002 (Task Team Proposal) contains a broad definition of a paralegal practitioner as ‘a person who may render legal services as contemplated in section 43’. Section 43 specifically empowered the Minister of Justice in consultation with the Legal Practice Council and Paralegal Committee to ‘make regulations to regulate the rendering of legal services to the public by paralegal practitioners’ and to ‘authorise paralegal practitioners to appear in courts, subject to conditions as he or she may determine’. The Legal Practice Act contains no definition of a paralegal. The absence of a definition of the concept from the Legal Practice Act is not surprising as this Act governs the private legal profession only and hardly any reference is made to the paralegal in the statute. The Legal Services Charter¹⁹⁵ does define the term but confines a paralegal to a ‘non-profit, community based paralegal providing legal services to poor and rural communities as defined in the Legal Practice Act’.

In South Africa, the Paralegal Manual¹⁹⁶ contains different definitions of the paralegal. In one instance the paralegal is defined as ‘a person without a law degree who has legal skills, knowledge and experience’,¹⁹⁷ and in another, it is described as ‘an accredited person who has a basic knowledge of the law and procedures, knows about conflict resolution and procedures and who shows motivation, commitment, attitudes and skills’.¹⁹⁸ Neither definition is useful for the purpose of identifying the paralegal in South Africa as no system of accreditation of paralegals, statutory or voluntary, exists and the definition is out of sync with the latest development in paralegal education.¹⁹⁹

Dugard and Drage highlight the ‘amorphous’ nature of the construct.²⁰⁰ They nevertheless argue that, whether the paralegal is an unpaid volunteer or a salaried worker, they share one common characteristic, namely, ‘direct legal and quasi-legal interface with clients [and/or] the communities they serve’.²⁰¹ The community-based paralegal, in particular, straddles the social development and legal systems, hence the socio-legal nature of their work. It is therefore not surprising that they deal for the most part with ‘the most serious remaining fault lines’ in South African society.²⁰²

¹⁹⁵ *Legal Services Sector Charter*, of 2007.

¹⁹⁶ Education and Training Unit, *Paralegal Manual*, (2011) Black Sash p. 653.

¹⁹⁷ The Black Sash (2011).

¹⁹⁸ The Black Sash (2011) p. 585.

¹⁹⁹ The Unit for Applied Law at the Cape Peninsula University of Technology became the first institution of higher learning to be accredited by the Council on Higher Education to offer a Bachelor of Paralegal Studies degree.

²⁰⁰ Dugard, J & Drage, K, ‘To whom do the people take their issues? The contribution of community-based paralegals to access to justice in South Africa’, (2013), 21/2013, pp. 1–41.

²⁰¹ Dugard, J & Drage, K (2013) p. 11.

²⁰² Dugard, J & Drage, K (2013).

The proposed Advice Office Draft Bill offered a definition of the community-based paralegal as a ‘person who provides primary legal services free of charge to indigent persons who cannot afford to pay for such and who are qualified under this Act’.²⁰³ This links the community-based paralegal directly to legal assistance at the expense of the State. Currently the service is funded by external donors and by making use of the services of volunteers, which is unsustainable.

The Commission on Legal Empowerment of the Poor (CLEP), an independent international organisation hosted by the United Nations Development Programme,²⁰⁴ and Ukraine²⁰⁵ share this community-based feature of the paralegal. These definitions suggest that the community-based paralegal has a critical role to play in the legal empowerment of marginalised communities and in the enhancement of access to justice. This provides justification for the focus in this dissertation on the community-based paralegal.

In the Legal Aid Act²⁰⁶ paralegals are defined as:

‘persons that are not legal practitioners but have knowledge and understanding of the law, its procedures and its social context acquired through training, education, work experience or a national registered qualification in paralegal practice’.

This definition uses the narrow legal profession (legal practitioners) as a benchmark to define the paralegal. This tendency is not uncommon in other countries.²⁰⁷ It is nevertheless problematic in that it suggests that paralegals are not practitioners of the law. There also seems to be a failure in South Africa to comprehend the magnitude of legal and quasi-legal services that fall outside the conventional mould of the narrow legal profession or the courts. This has the potential to produce a rather flawed definition of a paralegal. The reference to the social context of the law in the definition nevertheless seems to suggest, in theory at least, recognition of the potential of the paralegal to engage in developmental or alternative lawyering.

²⁰³ The definitions clause of the *Community Advice Office Draft Bill* (2016).

²⁰⁴ Paralegals are considered to be ‘persons well-respected in their communities who possess certain legal knowledge and skills (but are not certified lawyers), and who undertake all or some of the following activities: provision of simple legal advice, information and assistance to individuals; referrals of individuals to other organizations providing legal services (if more complex legal assistance is needed); community legal education; mediation in conflicts within the community; identifying, and helping to resolve legal problems important for the entire community through community mobilization, or by taking appropriate action. (Ogorodova, A, *International Study of Primary Legal Aid Systems with the Focus on the Countries of Central and Eastern Europe and CIS*, (2012) Kyiv.)

²⁰⁵ ‘Paralegals are community activists who not only have a substantial training in legal principles but also familiarity with local community norms and practices and an ability to offer advice and advocacy services that go beyond narrow legal advice.’ (United Nations Development Programme (2008).)

²⁰⁶ *Legal Aid South Africa Act*, 39 of 2014.

²⁰⁷ See Chapter 9.

The literature illustrates that the term ‘paralegal’ is not only confined to the community-based practitioner, who is prevalent particularly on the African continent. Paralegal practice also covers a range of legal and quasi-legal services rendered by persons who are not admitted to the narrow legal profession. Paralegals in South Africa may function as legal assistants to legal practitioners, for example, conveyancing paralegals or legal aid paralegals, or independent from legal practitioners, such as debt counsellors or reviewers and community-based paralegals. The full range of paralegal services in South Africa has not been examined to date and the construct must therefore be couched in wide terms. A paralegal in South Africa should thus be considered to be a multi-dimensional construct consisting of multiple underlying concepts defined by one or more of the following criteria: qualifications (quasi-legal/legal), market position (employee, volunteer, independent service provider) and functioning (rendering basic legal and quasi-legal services).

This study proposes a benchmark definition for the construct paralegal within the South African context, whose scope of practice spans a continuum of services as illustrated in Figure 1 below.²⁰⁸ A paralegal, for the purpose of this study, will be defined as a person with or without formal legal training, who renders basic legal and quasi-legal services with or without reward. This proposed definition allows for the evolution of the construct as informed by its scope of practice. The focus in this study is on the community-based paralegal as it is most closely linked to access to justice for the poor and the marginalised. There is a direct link between the scope of practice of the paralegal practitioner and legal services. Therefore, what constitutes legal services in South Africa requires examination.

2.6 LEGAL SERVICES DEFINED IN SOUTH AFRICA

The definition of legal services is confined to legal services as it is traditionally known to be provided by the private legal profession. Legal services are defined as ‘work done by a lawyer for a client’,²⁰⁹ or ‘services involving legal or law related matters like the issue of legal opinion, filing, pleading and defending of law suits etc. by a lawyer or attorney practicing law related services’.²¹⁰

The second draft of the Legal Services Sector Charter²¹¹ defines ‘legal services’ as ‘any form of legal advice, or drafting of documents, or representation of any person that requires the expertise of a person trained in the practice of law’. Although it may be argued that the ‘practice of law’ may only be confined to practitioners of the law such as advocates and attorneys, community-based paralegals have

²⁰⁸ Page 42.

²⁰⁹ Cambridge University Press (2013).

²¹⁰ “Legal Services definition”, (2007), available at: *Legal Explanations* <http://www.legal-explanations.com/definitions/legal-services.htm>. (accessed 10 June 2016)

²¹¹ Department of Justice and Constitutional Development 2007 *Legal Services Sector Charter* (2007).

been identified as stakeholders in the Charter. The conclusion could arguably be drawn that the definition is broad enough to encompass the basic legal and quasi-legal services rendered by paralegals. However, although the term ‘legal services’ appears eighty (80) times in the final Charter adopted by the narrow legal profession, it contains no definition thereof and thus brought no clarity to the scope of practice of legal and paralegal practitioners.

Furthermore section 33(1) of the Legal Practice Act which deals with the authority to render legal services, stipulates that:

‘Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward—

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or

(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.’

The concept ‘legal services’ is not defined in the Legal Practice Act and section 33(1) seems to suggest that legal services is very narrowly defined, confined to a statutory right of appearance and the execution of instruments and documents related to litigation in a court of law. Section 33(1), read with the Draft Legal Services Sector Charter, provides for the narrow expansion of the concept ‘legal services’ to include the rendering of legal advice, which is not defined. The demarcation of ‘territory’ reflected by section 33(1) shows similarities with developments in countries like the United Kingdom and United States of America.²¹² The American Bar Association (ABA) Model Code of Professional Responsibility²¹³ declared that ‘it is neither necessary nor desirable to attempt a formulation of ... what constitutes the practice of law’. However, it offered a functional definition, in essence confining the practice of law to those traditionally rendered by lawyers.²¹⁴ The Legal Services Act²¹⁵ in the United Kingdom governs ‘reserved legal activity’²¹⁶ for licensed solicitors, barristers and those exempted from

²¹² American Bar Association, Centre for Professional Responsibility, *Model Code of Professional Responsibility*, 1969.

²¹³ *Ethical Consideration*.3-5.

²¹⁴ ‘The practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.’ (*Ethical Consideration* .3-5).

²¹⁵ *Legal Services Act*, of 2007.

²¹⁶ Ss 12-15 of the Legal Services Act (2007)
Schs 2 & 3 of the Legal Services Act (2007)

the exclusion.²¹⁷ None of these offers a comprehensive definition of legal services rendered to society as a whole and draws no distinction between secondary and primary legal services. This distinction is important for the purpose of distinguishing between the scope of practice of the paralegal and that of the narrow legal profession which impacts directly on the cost of these services. Where legal services are framed within the context of providing *legal assistance* or *legal aid*, a more detailed account of legal services emerges.

2.7 LEGAL ASSISTANCE DEFINED IN SOUTH AFRICA

A comprehensive description of legal services within the context of legal assistance requires an examination of the latter as codified in other jurisdictions. The focus here is on Belgium, Ukraine and Australia. The Judicial Code in Belgium,²¹⁸ for example, makes provision for two systems of legal assistance applicable in both civil and criminal matters, namely, primary and secondary legal assistance²¹⁹ and legal aid.²²⁰ Primary legal assistance means ‘legal assistance in the form of practical information, legal information, an initial legal opinion or referral to a specialised body or organisation.’²²¹ Secondary legal assistance means ‘legal assistance to an individual in the form of a detailed legal opinion or legal assistance, whether or not in the context of formal proceedings, and assistance with a court action, including legal representation’.²²²

Similarly, in Ukraine, a distinction is drawn between primary and secondary legal services. Secondary legal assistance is defined as ‘assistance provided by certified lawyers and/or linked to court procedures’,²²³ whereas primary legal assistance is defined as ‘any form of individual or community-oriented legal advice, assistance or representation that may be provided by non-certified lawyers (paralegals), and which does not include representation before courts or other activities that may only be performed by certified lawyers.’²²⁴ The distinction drawn between primary and secondary legal services in the Ukraine and Belgium provides useful precedent for the purpose of this study given the lack of clarity around what constitutes legal services in South Africa.

²¹⁷ These include the exercise of right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.

²¹⁸ *Judicial Code*, of 1967.

²¹⁹ Article 446 bis & 508/1 – 508/23 J.C

²²⁰ Article 664 – 699 J.C.

²²¹ Article 198 J.C.

²²² Article 198 J.C.

²²³ Ogorodova, A (2012) p. 7.

²²⁴ Ogorodova, A (2012) p. 14.

Ogorodova cautions against the mere listing of the types of activities that make up legal services, as such an approach would limit non-court legal action that takes different forms and shapes and evolve constantly.²²⁵ The Alternate Delivery of Legal Services Committee Report²²⁶ in Alberta, Canada expressed a similar view on the mere listing of activities that lawyers perform.²²⁷ This report accepted as a fundamental principle for consumer protection that ‘there are services that only trained, insured, regulated professions/occupations can provide to members of the public’.²²⁸ The report distinguishes between low risk and low complexity legal services that non-lawyers can provide and higher risk and higher complexity legal services that require the attention of a lawyer. The importance of striking a balance between the delivery of competent legal services and access to legal services is identified as one of the key principles in the definition of the practice of law. The report advises that the spectrum of legal service activities should be assessed based on the risk to the public and that any definition of the practice of law should respect the non-lawyer activity authorised by law. The adoption of a legal services model in South Africa that reflects this balanced approach to the delivery of legal services, could greatly assist in addressing the legal and quasi-legal needs of citizens in the country.

The nature of legal services is determined by the types of legal problems that these services are intended to help resolve. Given the fact that the interaction of citizens with the law occurs overwhelmingly outside the courts, a narrow definition of legal services is wholly insufficient to address the basic legal and quasi-legal needs of all South African communities, vulnerable or not. Legal services within the South African context require a conception beyond litigation and lawyer-provided advice, in other words, beyond the practice of law as it is narrowly defined. These needs are of a civil and administrative nature, rather than a criminal nature, and it is within these two areas where the primary justice needs reside.

In addition, no distinction is drawn between primary legal services and secondary legal services in the country. This conflation results in a mismatch between the provision of legal services and the legal needs in the country, which, in turn, results in a justice gap. The overwhelming need for legal services is basic and when these needs are not met, it has the potential to escalate into a legal problem that ultimately requires intervention by a court of law. Marginally increasing access to legal services rendered by the narrow legal profession will not close the justice gap that exists in the country, whether through legal aid, mandatory pro bono services rendered by the narrow legal profession or mandatory

²²⁵ Ogorodova, A (2012).

²²⁶ Mah, DR, Schutz, F & Fenwick, F, *Alternate Delivery of Legal Services*, (2012) Alberta, USA: The Law Society of Alberta.

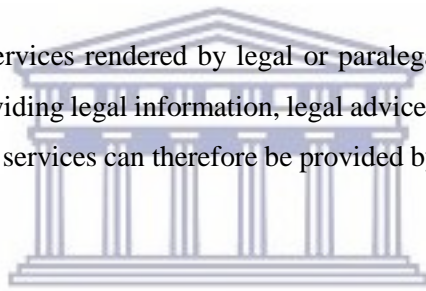
²²⁷ Mah, DR, Schutz, F & Fenwick, F (2012) p. 25.

²²⁸ Mah, DR Schutz, F & Fenwick, F (2012).

community service of law interns. A failure to recognise the need for primary legal services in South Africa not only hampers the delivery of access to justice for those who need it most but impedes the potential of the paralegal to facilitate that access. Legal services, like health services, require different interventions at different stages.

The absence of a comprehensive description of legal services from key legal instruments²²⁹ in the South African legal framework provides the opportunity to offer a benchmark description. This study draws on the precedent in Australia where the National Legal Assistance Data Manual²³⁰ created broad categories of legal assistance services. These services are available to individuals, groups, organisations and communities. Legal services provided for individuals include discrete assistance,²³¹ facilitated resolution process,²³² services of a duty lawyer²³³ and representation.²³⁴ In Australia, legal services for the community include community legal education (CLE),²³⁵ community education,²³⁶ law and legal service reform,²³⁷ stakeholder engagement.²³⁸ This service compares favourably with the advocacy role that community-based paralegals have been performing in South Africa.²³⁹

Four broad categories of legal services rendered by legal or paralegal practitioners emerge from the preceding literature, namely, providing legal information, legal advice, legal support²⁴⁰ (assistance) and legal representation. All of these services can therefore be provided by a legal practitioner or paralegal



²²⁹ Legal Practice Act *Legal Practice Act* (2014); *Legal Aid Act*, 39 of 2014; Department of Justice and Constitutional Development 2007 *Legal Services Sector Charter* (2007).

²³⁰ Commonwealth Attorney-General's Department, *National Legal Assistance Data Standards Manual* Australia: Commonwealth Attorney-General's Department.

²³¹ This includes information, referral, legal advice, non-legal support and/or legal task (Commonwealth Attorney-General's Department p. 4–5.)

²³² An activity conducted to assist the parties to resolve or narrow issues in dispute through a screening process and facilitated by an independent, suitably qualified professional (Commonwealth Attorney-General's Department p. 8.).

²³³ This is once-off legal representation provided free of charge by a lawyer at a court or tribunal (Commonwealth Attorney-General's Department p. 9.).

²³⁴ This denotes taking ongoing carriage of a legal matter in a representative capacity. (Commonwealth Attorney-General's Department p. 10.)

²³⁵ CLE includes providing information as well as arranging activities to raise awareness among and provide education to communities, groups, organisations and schools about the law and how to recognize, prevent and deal with legal problems. (Commonwealth Attorney-General's Department p. 13.)

²³⁶ These relate to non-legal associated issues such as social welfare that directly impact on the person's ability to participate in the justice system to prevent legal matters from escalating. (Commonwealth Attorney-General's Department p. 14–15.)

²³⁷ These are activities undertaken to change the law and the legal process or to improve the provision of legal assistance services. (Commonwealth Attorney-General's Department p. 15–16.)

²³⁸ Stakeholder engagement include participation in fora at various levels to improve the co-ordination and delivery of legal assistance services and/or representation at these fora and/or making collaborative arrangements with other service providers to integrate and coordinate legal assistance. (Commonwealth Attorney-General's Department p. 16.)

²³⁹ See Chapter 9.

²⁴⁰ This term is used to avoid confusion between legal assistance, which refers to the comprehensive continuum of services and legal assistance as defined in the National Legal Assistance Data Standards (Commonwealth Attorney-General's Department.).

practitioner (as defined in this study) depending on the degree of complexity of the matter and the risk to the client. However, the benchmark description of legal services proposed by this study is also informed by the caveat expressed by Ogorodova as well as the description of legal services for the community contained in the Australian National Legal Assistance Data Standards Manual.²⁴¹ This benchmark description therefore refers to broad categories of legal services only and a detailed model will have to be developed through research and stakeholder engagement. This study also does not embark on the demarcation of the scope of practice of practitioners of the law in the country, as it will divert its purpose.

2.8 A LEGAL SERVICES FRAMEWORK IN SOUTH AFRICA

A broad framework of legal services in South Africa, for the purpose of this study, includes, providing legal or quasi-legal information²⁴² or advice²⁴³, assisting a client/s in a law related matter²⁴⁴ or representing a client/s in a law related matter.²⁴⁵ Figure 1 below offers a diagrammatic representation of a basic framework for legal services in South Africa.



²⁴¹ See the preceding paragraph.

²⁴² This includes information about the law, legal systems and processes, legal and other support services to assist in the resolution of legal and related problems, including referral.

²⁴³ This entails fact-specific legal advice.

²⁴⁴ This refers to performing a 'legal task' such as preparation or drafting of documents, writing a letter on behalf of a client requesting another to do or refrain from doing something, advocating on behalf of a client/s without taking ongoing carriage of the matter, facilitating dispute resolution and a minor appearance on behalf of a client.

²⁴⁵ This entails representation of a client at a dispute resolution forum or a court/tribunal, or taking carriage of a matter that doesn't proceed to a court/tribunal/inquiry.

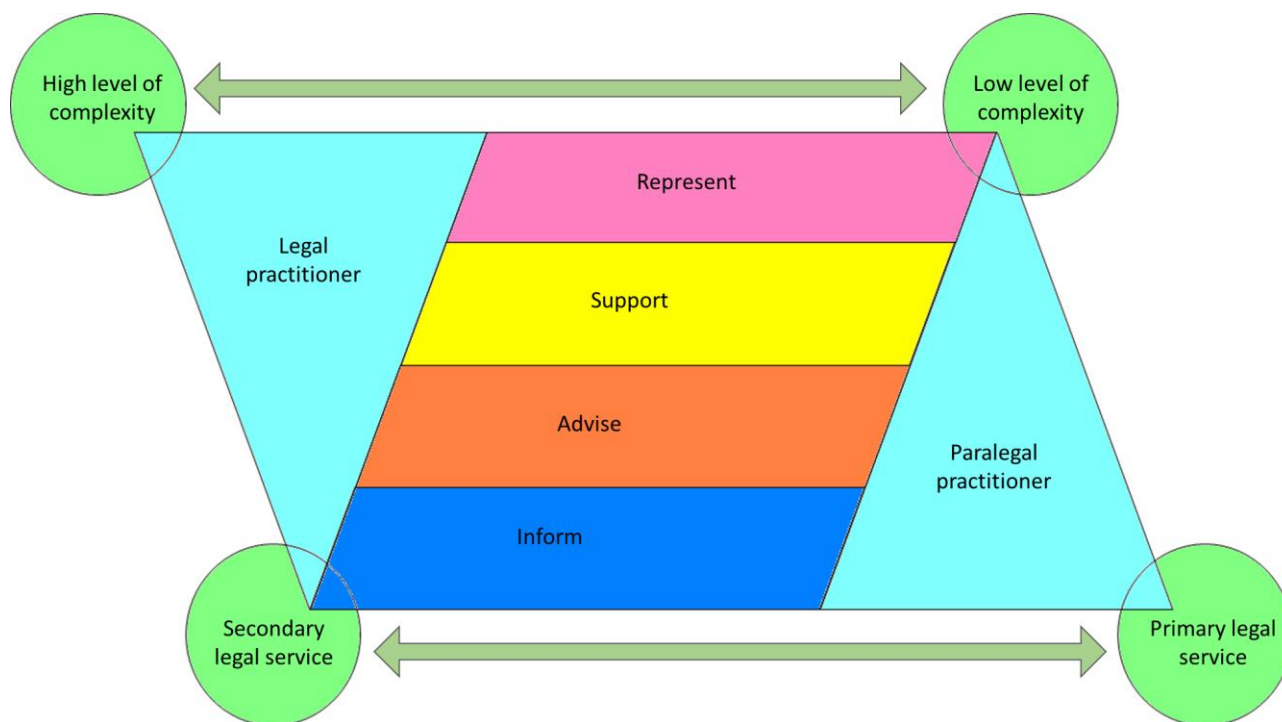


Figure 1. Legal Services Framework

Legal services, in terms of this framework, constitute a continuum of services that can be categorised as primary or secondary legal services. This continuum of services requires the legal practitioner²⁴⁶ or paralegal practitioner²⁴⁷ to inform, to advise, to support and/or represent a client. Legal services are categorised as primary or secondary depending on the degree of legal complexity of the service and the risk to the client should it be rendered by an unqualified practitioner. The degree of complexity and risk of the legal service also assists in determining which practitioner is better qualified to render the service.

Determining the latter is indeed not uncontested space among legal practitioners, nor between legal and paralegal practitioners. Given the fact that neither legal practitioners nor paralegal practitioners represent a homogenous group, the multiple shaded area between the conventional domain of the practitioners represents the potentially contested space. However, there are legal services at the high complexity/risk end that can clearly only be performed by individuals who have received specialised training. This should be the domain of the legal practitioner and the trained paralegal may perform a support function under the supervision of the legal practitioner. On the other hand, there are legal and quasi-legal services at the low complexity/risk end that can be performed by individuals who have

²⁴⁶ As defined in the *Legal Practice Act* (2014). (See Chapter 8)

²⁴⁷ As defined in this study.

acquired a certain degree of literacy or narrowly focused legal training and/or experience and gained insights into the social complexities of the situation that manifests as a legal problem. This should be the domain of the paralegal practitioner and the legal practitioner may perform a support function as legal assistance at this end may include a range of remedies which may or may not include litigation.

2.8.1 Information service

Providing information to a client or clients includes, among others, supplying information about the law, the legal system and processes, legal and other support services (such as the services of an ombudsman, social and health services), as well as referring the matter to the relevant department or agency tasked with dealing with the matter. It also includes community legal education and community education as defined above. Providing information at the higher end may involve, for example, information on mergers and acquisitions and the Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South Africa. At the lower end it may, for example, involve information on the procedure to follow if the client wishes to lodge a complaint with one or other alternative dispute resolution forum or require information on how to access a social grant. However, rendering an information service and performing a screening function, for the most part, are atypical services for a legal practitioner. For that reason, information services represent the narrow end of the legal practitioner's domain. The paralegal practitioner, on the other hand, is regarded as the 'first aid' to the legal problem, therefore, providing information, screening and referral represent the broad end of paralegal services.

2.8.2 Advisory service

Advising a client requires the practitioner to analyse the legal or quasi-legal problem and suggest possible solutions, in other words, providing fact-specific legal advice to resolve the problem. At the higher end of the spectrum this may, for example, require a detailed legal opinion advising a government department of its prospects of success in pursuing an appeal to the Constitutional Court on a highly complex constitutional matter, which requires the services of a legal practitioner. At the lower end, it may require a basic opinion on whether the employer of a domestic worker is compliant with the minimum wage requirement as prescribed. This is a service that can be rendered by a paralegal practitioner.

2.8.3 Support service

Assisting a client involves performing a legal task such as preparation or drafting of documents or assisting therewith, interceding on behalf of a client by communicating with the other party or parties to the dispute orally or in writing and advocating on behalf of a client or clients with or without taking ongoing carriage of the matter. It further entails facilitating dispute resolution. At the higher end of the continuum, legal services may, for example, involve the drafting of an international trade agreement whereas at the lower end it may involve assisting a client with the preparation of documents for a commercial matter that falls within the jurisdiction of the Small Claims Court. The first requires the service of a highly skilled practitioner, whereas the latter service could be rendered by a trained paralegal.

2.8.4 Representation service

Representation entails representing a client at a dispute resolution forum or a court or tribunal, or taking carriage of a matter that does not proceed to a court, tribunal or inquiry. However, it could also entail representing individuals, communities or groups at various levels in various fora to coordinate and integrate the delivery of legal and other services. At the higher end of the continuum it may, for example, involve the drafting of complex legal pleadings and appearance on behalf of a client in a superior court, which requires the services of a legal practitioner. At the lower end, it may require representing a client in an alternative dispute resolution forum such as the CCMA, which is a service that can be rendered by a paralegal practitioner. Although representation is currently reflected as the broad end of the services rendered by legal practitioners and the narrow end for paralegal practitioners, an assessment of the legal needs of citizens in the country and expanding representation beyond the conventional courts and litigation may alter the manner in which representation is reflected.

Legal services with a high degree of complexity and risk should be rendered by practitioners of the law with the required knowledge and skill to do so, whereas primary legal services with a low degree of risk may not require formal legal training. Whether legal assistance should be categorised as primary or secondary and determining who is better suited to provide the legal assistance beyond the domain of legal and paralegal practitioners as demarcated in this framework, requires investigation. The constitutional obligation on the part of the State to provide access to, at the very least, procedural justice, which is not only confined to the courts and litigation, should be a key determinant in this process.

Secondary legal services rendered by legal practitioners, in true supply and demand fashion, is ostensibly available to all those who require it in South Africa, without discrimination. However, many persons with limited or no wealth or knowledge of the regulatory framework that governs their daily

lives and who often also experience a host of other barriers to access to justice, find these services inaccessible. Primary legal services rendered by community-based paralegals are also limited and dependent upon donor funding and volunteerism. Bearing in mind that the social contract between the State and its citizens, codified in the Bill of Rights, places an obligation on the State to provide peaceful alternatives to the settling of disputes without discrimination, the State is obliged to provide some form of legal assistance for those who are unable to access procedural justice. Legal assistance, at the expense of the State, in other words, legal aid, is required to meet not only the criminal justice needs but also the civil justice needs of the poor and the marginalised in the country. The concept legal aid is therefore addressed next.

2.9 WHAT IS LEGAL AID?

The earliest recorded statutory form of legal aid was apparently contained in the Statute of Henry VII 1495 which allowed for the waiving of all fees for indigent civil litigants in the common law courts in England. This statute empowered the courts to appoint lawyers to provide representation in court without compensation.²⁴⁸ Continental statutes during the 19th century codified the principle of ‘poor man’s law’ which allowed for waiving of court fees and appointment of a duty lawyer for the poor.²⁴⁹ The legal aid was therefore provided on a pro bono basis. What emerged from this is a concept of legal assistance synonymous with free legal representation by a practitioner of the law in a conventional court.

Although several international human rights treaties recognise the right to free legal assistance (legal aid) as an essential component of a fair trial, the express codification thereof is limited to criminal matters.²⁵⁰ More importantly, a definition of legal aid/assistance is absent from these treaties.²⁵¹ The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems contain the only mutually agreed upon international definition of legal aid. It is defined as

²⁴⁸ Johnson Jr, E, 'Toward Equal Justice: Where the United States Stands Two Decades Later', (1994), 5(2), *Maryland Journal of Contemporary Legal Issues*, pp. 199–221. p. 204.

²⁴⁹ Blankenburg, E, 'Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid' contained in Volume II of the Conference Papers presented at the International Legal Aid Conference', (1997), *Edinburgh, June 2*, pp. 1–12. p. 2.

²⁵⁰ *Report of the Special Rapporteur on the independence of judges and lawyers*, (2013) A/HRC/11/41/Add.3 United Nations. paras 20-24.

²⁵¹ *Report of the Special Rapporteur on the independence of judges and lawyers* (2013). para 26 Human Rights Council, 23rd session Item 3 Promotion and Protection of all human rights, civil, political, economic, social and cultural including the right to development.

‘legal advice, assistance and representation for victims and for arrested, prosecuted, and detained persons in the criminal justice process, provided free of charge for those without means’.²⁵²

This definition contains a number of core features. It makes provision for the offering of services on a continuum, from legal advice, to assistance, to representation. This service is made available to victims and alleged perpetrators alike and thus applies to criminal proceedings only. It is also made available at the expense of the State and citizens qualify for it when they are unable to pay for it.

Although legal assistance and legal aid are used interchangeably internationally, legal aid in South Africa is commonly referred to as such when legal assistance is provided at the expense of the State. Ironically neither the Legal Aid South Africa Act nor the Legal Aid Guide²⁵³ contains a definition of legal aid. This definitional vacuum supports and encourages the justification for the lack of legal assistance in civil matters. Considering the extensive range of legal services required in modern societies and the obligation of the State in terms of its social contract, legal aid/assistance can no longer be confined to the definition offered by the Principles and Guidelines above, especially in a South African society that mirrors the characteristics of both an economically developing and developed world with its ingrained inequalities presenting multiple barriers to access to justice. The Report of the Special Rapporteur stated that the purpose of legal aid is to assist in removing barriers to access to justice by providing assistance to those who are otherwise unable to afford legal representation and access to the court system. It noted specifically that,

‘...the definition of legal aid should be as broad as possible. It should include not only the provision of legal assistance in criminal proceedings...but also the provision of effective legal assistance in any judicial or extra-judicial procedure aimed at determining rights and obligations’.²⁵⁴

Legal aid, therefore, has to be re-imagined to include free legal assistance, on a continuum suggested in Figure 1,²⁵⁵ regardless of the nature of the proceedings, rendered by a range of practitioners depending on the complexity of the matter and the risk to the client and should be subjected to a means and a merit

²⁵² United Nations Office on Drugs and Crime, *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (2013) Vienna: United Nations p. 6.

²⁵³ Legal Aid South Africa, *Legal Aid Guide*, 13th ed, (2014) Johannesburg, South Africa: Juta & Co. Ltd.

²⁵⁴ Report of the Special Rapporteur on the independence of judges and lawyers (2013).

²⁵⁵ Page 42.

test. This will be discussed in greater detail in Chapter 6. Since the right to an effective remedy is central to the right of access to procedural justice, a discussion on this concept will be examined briefly.

2.10 WHAT IS A LEGAL REMEDY?

The right to an effective remedy is considered to be a ‘key element of human rights protection’²⁵⁶ and ‘implies that remedies must be effective and legal, and that judicial outcomes must be just and equitable’.²⁵⁷ This right encompasses redress sought for all human rights violations, whether first, second or third generation rights.

Definitional ambiguity seems to obscure the subject of remedies in international law.²⁵⁸ In some instances reference to a remedy denotes both a procedural and a substantive remedy and in others a procedural remedy only.²⁵⁹ The right to a remedy could be defined as ‘the right to vindicate one’s right before an independent and impartial body, with a view to obtaining recognition of the violation, cessation of the violation if it’s continuing, and adequate reparation’.²⁶⁰ This definition suggests that this right denotes two separate but interrelated legal concepts, namely, legal action and reparation.

The International Commission of Jurists distinguishes between remedy and reparation, referring to the former as procedural remedy and the latter as ‘the obligation to provide compensation, satisfaction, restitution and rehabilitation’, in other words, a substantive remedy.²⁶¹ The Commission identified the following characteristics of an effective remedy as it emerged from the interpretation of international human rights bodies, namely, promptness and effectiveness, independent authority, accessibility, including legal assistance, leading to cessation and reparation, leading to an investigation, varying nature of the remedy and compliance and enforcement by the authorities. Pertinent to this study are the characteristics of independent authority and accessibility, which includes legal assistance.

²⁵⁶ *Report of the Special Rapporteur on extreme poverty and human rights*, (2012) A /HRC/23/36/Add.1 United Nations p. 4.

²⁵⁷ *Report of the Special Rapporteur on extreme poverty and human rights* (2012).

²⁵⁸ Musila, GM, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights', (2006), 6(2), *African Human Rights Law Journal*, pp. 441–464. p. 445.

²⁵⁹ Musila, GM (2006).

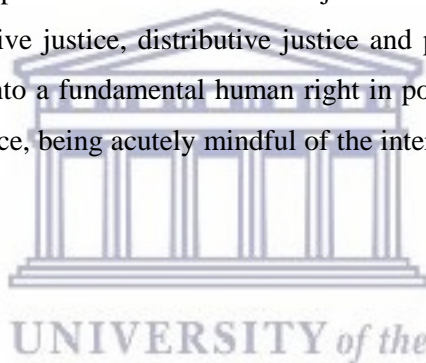
²⁶⁰ Droege, C, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*, 2d ed, (2006) Geneva, Switzerland: International Commission of Jurists.

²⁶¹ Droege, C (2006).

The Constitution of the Republic of South Africa contains two primary remedy clauses,²⁶² namely, the ‘supremacy clause’²⁶³ and the ‘fundamental rights remedy clause’²⁶⁴, and a secondary remedy clause.²⁶⁵ The South African Constitution therefore distinguishes between a procedural remedy and a substantive remedy and provides expressly for both. The concept remedy, therefore, for the purpose of this study, denotes both a procedural as well as substantive remedy. However, this study focuses on a procedural remedy which includes the right of access to the courts, tribunals and other dispute resolution mechanisms²⁶⁶ and the right to legal representation.²⁶⁷ The right to legal representation is included in the focus of this study first, because the right to procedural justice is meaningless without it and, secondly, because of its relevance for a paralegal ‘profession’.

2.11 CONCLUSION

Justice is a nebulous concept and a consideration of the traditional schools of thought generated no universally acceptable definition. However, this investigation proceeds from the premise that within the South African context, a comprehensive examination of justice should involve what is considered to be retributive justice, restorative justice, distributive justice and procedural justice. The right to procedural justice has evolved into a fundamental human right in post-apartheid South Africa. This study focuses on procedural justice, being acutely mindful of the interrelatedness of the various forms of justice.



²⁶² Klaaren, J, 'Judicial Remedies' in Chaskalson, M (ed) *Constitutional Law of South Africa*, 1st ed (1999) Kenwyn, South Africa: Juta.

²⁶³ S 2. 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

²⁶⁴ S 38. 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights...'

²⁶⁵ S172 (1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Par (a) substituted by s. 7 of the *Constitution Seventeenth Amendment Act, 72 of 2012*.]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

²⁶⁶ S 34 & 38.

²⁶⁷ S 35(3)g.

Access to justice requires the systematic identification and dismantling of the barriers to access to justice, especially those that confront vulnerable communities. These communities often see the law as a means of oppression rather than liberation. Access to justice should therefore be measured by the extent to which citizens are legally empowered to pursue, claim and enforce their rights. The sustained development of the marginalised and the poor therefore necessitates a shift in the conceptual framework from the 'rule of law orthodoxy' to legal empowerment of the poor. Legal empowerment is described, in brief as 'the use of law specifically to strengthen the disadvantaged'.²⁶⁸ This paradigm manifests in South Africa as legal services for the poor, public interest litigation, social justice litigation, social accountability, women's empowerment and land tenure security. The community-based paralegal, in particular, plays a central role in the legal empowerment of the poor in the country.

The nature of the service rendered by the paralegal is highly contextual which renders its scope of practice heterogeneous and the nomenclature of the practitioner fluid. The paralegal, for the purpose of this study, is defined as a person with or without formal legal training, who renders basic legal and quasi-legal services with or without reward. The scope of practice of the paralegal is defined by the legal needs of the community. This requires legal services to be expressed as a continuum of services which involves providing legal information, advice, support and representation. The degree of complexity of the service and the risk to the client will determine which practitioner is better qualified to render this service. These two factors will also assist in determining whether the legal service is categorised as primary or secondary. This is indeed not uncontested space and would require thorough investigation.

The State has a constitutional obligation to provide an effective remedy for the disputes that arise between the State and citizens and between citizens themselves. The literature suggests that an effective remedy denotes both legal action and reparation. The Constitution of the Republic of South Africa provides expressly for a procedural and a substantive remedy. The focus in this study is on a procedural remedy, which includes the right of access to the courts and other dispute resolution mechanisms. This right, in many instances, is rendered meaningless without the right to legal assistance and the right of access to procedural justice may require that this assistance is rendered at the expense of the State. A legal service rendered at the expense of the State in South Africa is regarded as legal aid.

Whether the State succeeds in providing access to justice to its citizens is measured by the knowledge, values and attitudes that are conducive to ensuring access, the substantive legal framework that codifies it and the institutions, human resources and infrastructure that support access to justice. The

²⁶⁸ Golub, S (2010) p. 13.

constitutional values, substantive legal framework, institutions and human resources that support access to justice in South Africa are the themes that inform the structure and content of this thesis. The manner in which the constitutional values of human dignity, equality and freedom shape access to procedural justice in South Africa will thus be examined in Chapter 3.



Part II

The Constitutional Values that Support Access to Justice in South Africa



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CHAPTER 3

THE VALUES OF HUMAN DIGNITY, EQUALITY AND FREEDOM IN THE SOUTH AFRICAN CONSTITUTIONAL ORDER

3.1. INTRODUCTION

Access to justice, in part, is measured by the knowledge, values and attitudes that are conducive to ensuring access. The Constitution informs us that the content, scope and limitations of the rights that are enshrined in the Bill of Rights should be determined through the prism of five fundamental values that animate the new democratic order in South Africa, namely openness, democracy, human dignity, equality and freedom.²⁶⁹ Woolman and Botha argue that openness and democracy do not operate on the same normative plane as human dignity, equality and freedom.²⁷⁰ The author concurs with this view.

This chapter, therefore, examines the way in which the values of human dignity, freedom and equality shape a human rights-based approach to access justice in South Africa. This examination includes a consideration of distinct waymarks that make express reference to these values. These waymarks include the preamble, founding provisions and sections 7, 36 and 39 of the Constitution.

The convergence of natural law and positive law is a characteristic of all human rights instruments such as the Constitution.²⁷¹ The view is held here that the right to human dignity, freedom and equality are innate to all human beings. Their existence predates their express codification as rights in the Constitution and an individual's claim to these rights does not depend on such express codification. The values of human dignity, equality and freedom to a greater or lesser extent permeate every right in the Bill of Rights and influence the manner in which each right in the Bill of Rights is to be interpreted. This permeation is not coincidental.

First, human rights are interrelated and interdependent. A synthesis of constitutional jurisprudence led Woolman to conclude that dignity operates as a first order rule, a second order rule, a correlative right, a value and a grundnorm and sometimes all of the aforementioned combined.²⁷² Equality and freedom

²⁶⁹ S 39(1) of the Constitution of the Republic of South Africa, 1996

²⁷⁰ Woolman, S, 'Dignity' in Woolman, S et al (eds) *Constitutional Law of South Africa*, 2d ed (2006) Juta.

²⁷¹ See the discussion on the traditional schools of thought in Chapter 2.

²⁷² Woolman, S (2006).

display similar characteristics.²⁷³ These values are not only regulative ideals, but substantive rights. They function as correlative rights, each justiciable in their own right,²⁷⁴ their justiciability as freestanding rights means that they operate as first order rules and can also be invoked as second order rules. Constitutional jurisprudence bears this out. *Bhe and Others v Magistrate, Khayelitsha, and Others* demonstrated the correlative nature of the right to equality and dignity,²⁷⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*²⁷⁶ and *Ferreira v Levin*²⁷⁷ the right to dignity and individual freedom, and *President of the Republic of South Africa v Hugo*²⁷⁸ demonstrated the interrelatedness of all three rights. These three values and their corresponding rights thus impact on each other with reciprocal effect.

Secondly, these three values have not only been entrenched in various waymarks in the Bill of Rights, but they have also been super-entrenched in the preamble and the founding provisions of the Constitution. The fact that these values are not only embedded in the preamble and founding provisions but are also given explicit expression in the text, clothes them with exceptional foundational importance. Each of these values will be considered in turn.

3.2. HUMAN DIGNITY

Woolman proceeds from the premise that dignity is grounded in the understanding that ‘justice consists of the refusal to turn away from suffering’.²⁷⁹ He refers to dignity, as contained in our Constitution, as ‘a set of rules that disposes of specific disputes in a court of law’. However, he stresses that dignity is also ‘a philosophical concern’.²⁸⁰ The ‘refusal to turn away from suffering’, in his view, triggers a moral awakening from which the following wisdoms emerge:

- (a) that others are entitled to the same degree of concern and respect that we demand for ourselves; and

²⁷³ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (CCT31/01) ZACC 22.

²⁷⁴ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (2002).

²⁷⁵ *Bhe and Others v Khayelitsha Magistrate and Others* 2004 (CCT49/03) ZACC 17.

²⁷⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (CCT11/98) ZACC 15.

²⁷⁷ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (CCT5/95) ZACC 13.

²⁷⁸ *President of the Republic of South Africa and Another v Hugo* 1997 (CCT11/96) ZACC 4.

²⁷⁹ Woolman, S (2006) p. 2.

²⁸⁰ Woolman, S (2006).

- (b) that others are entitled to that *equal* respect and *equal* concern because they, like us, are possessed of faculties that *enable them to pursue ends which give their lives meaning*.²⁸¹

These two wisdoms demonstrate the interconnectedness of the right to dignity, equality and freedom. A dignified existence is thus defined as having equal regard for each other and the freedom to make meaning of your own life.

Woolman deduces, following a synthesis of South African constitutional jurisprudence on the subject, that five definitions of dignity emerge. Drawing on similar constructs by Kant²⁸² and Rawls,²⁸³ Woolman suggests that the five definitions of dignity constitute the foundation from which a ‘realm of ends’ can be constructed.²⁸⁴ The first definition, namely, the ‘individual as an end-in-herself’, is grounded in the Kantian imperative of respect for the immeasurable inner worth of each individual.²⁸⁵ The individual is viewed simultaneously as a means and an end. Dignity, in this respect, sets the minimum criteria which ethical and legal behaviour must meet.²⁸⁶ The second definition, dignity as ‘equal concern and respect’, is intimately connected to equality.²⁸⁷ Dignity demands equal treatment. The law may therefore not irrationally differentiate between classes of persons nor reflect the ‘naked preferences’ of the State.²⁸⁸ Equal treatment requires that individuals should not be subjected to discrimination on arbitrary grounds.

The third definition, namely, dignity as ‘self-actualization’, is closely associated with agency-freedom.²⁸⁹ In this context, dignity describes a political state and not a metaphysical state of being.²⁹⁰ The Constitutional Court captured this view as follows: ‘An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.’²⁹¹ Dignity, therefore, safeguards the realm of self-actualisation.

²⁸¹ Woolman, S (2006) p. 17–18. (own emphasis added).

²⁸² (1724-1804) Immanuel Kant was one of the most influential philosophers in the history of Western philosophy.

²⁸³ (1921-2002) John Rawls was an American political philosopher in the liberal tradition.

²⁸⁴ Woolman, S (2006).

²⁸⁵ Woolman, S (2006) p. 7.

²⁸⁶ Woolman, S (2006) p. 9. ‘Dignity... sets a floor below which ethical and legal behaviour may not fall’.

²⁸⁷ Woolman, S (2006) p. 10.

²⁸⁸ Woolman, S (2006).

²⁸⁹ See the discussion on freedom in para. 3.3 below.

²⁹⁰ Woolman, S (2006) p. 11.

²⁹¹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995).

Dignity as ‘self-governance’ recognises the capacity of most individuals to reason and legislate for themselves.²⁹² Individuals are therefore capable of shaping their own ends. Here, dignity is again intricately linked to agency-freedom. The Constitutional Court has been reluctant to recognise a form of agency-freedom of the individual that excludes interference in any form or shape.²⁹³ In a constitutional democracy, dignity requires that individuals, at the very least, must be able to participate meaningfully in the ‘collective decision-making processes that determine the ends of [their] community’.²⁹⁴ Dignity requires that the agency-freedom of the disadvantaged be enhanced to ensure such meaningful participation.

Finally, dignity as ‘collective responsibility for the material conditions of agency’ focuses beyond the individual ends in the ‘realm of ends’ and attaches dignity to society as a whole.²⁹⁵ For this purpose, dignity is regarded as a ‘collective good’.²⁹⁶ The Constitutional Court has made it clear that,

‘[i]t is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place to where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation’.²⁹⁷

Dignity is therefore not only a manifestation of citizen entitlements and corresponding State responsibilities. It requires a shared recognition that society, collectively, bears the responsibility for the material conditions for agency. This definition of dignity bears a strong resemblance to Sen’s capability approach to freedom and development.²⁹⁸

Ending discrimination, refusing to turn away from suffering and granting all citizens the franchise represent an important start in the quest for the recognition of the dignity of all citizens.²⁹⁹ However, dignity as a value and a substantive right requires the recognition of others not only as means, but also as ends. This requires society as a whole to commit itself to create the conditions conducive to agency. Denying others the means to exercise their agency or frustrating them in their efforts might very well

²⁹² Woolman, S (2006) p. 12.

²⁹³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995).

²⁹⁴ Woolman, S (2006) p. 13.

²⁹⁵ Woolman, S (2006) p. 14–15.

²⁹⁶ Woolman, S (2006) p. 15.

²⁹⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 (CCT53/03) ZACC 7, para 18.

²⁹⁸ See para. 3.3 below.

²⁹⁹ Woolman, S (2006).

undermine the purpose of the Constitution and render the guarantees contained in the Bill of Rights meaningless.

3.3. FREEDOM

The sparsity of Constitutional Court jurisprudence in South Africa dealing with freedom as an aspirational ideal is a reflection of the complexities of the concept.³⁰⁰ Ackermann J in *Ferreira v Levin* attempted to ground a disjunctive reading of the right to freedom and security of person in, what Bishop and Woolman describe as, the ‘Berlinian conception of “freedom” as negative liberty’.³⁰¹ Ackermann defined the right to freedom as the right of individuals not to have “obstacles to possible choices and activities” placed in their way by...the state’.³⁰² Pettit considers this school of thought, freedom as non-interference, as a ‘diluted form of agency-freedom’ that results from a failure to focus decisively on either freedom as non-limitation or freedom as non-domination.³⁰³ The majority in *Ferreira v Levin* remained unconvinced that section 12(1) of the Constitution grants two distinct rights, namely the right to freedom and the right to security of person. The notion of freedom as an independent justiciable right, beyond the express constitutional imperatives, was therefore not entertained.

Pettit claims that debates in recent times around the nature of social freedom, which is mainly understood in a negative way, have generated three schools of thought.³⁰⁴ These are freedom as non-limitation,³⁰⁵ non-interference³⁰⁶ and non-domination.³⁰⁷ Freedom as non-limitation is regarded as ‘a function of how much choice a person is left by his or her overall context, human and natural...’.³⁰⁸ Freedom as non-domination is considered to be ‘a function of how far the person can live and choose beyond the arbitrary power of others’.³⁰⁹ Freedom as non-interference ‘holds that freedom is a function of how

³⁰⁰ Woolman, S, Bishop, M, Chaskalson, M, et al, *Constitutional Law of South Africa*, 2d ed, (2006), Woolman, S & Bishop, M (eds.) Juta.

³⁰¹ Bishop, M & Woolman, S, 'Freedom and security of the person' in Woolman, S et al (eds) *Constitutional Law of South Africa*, 2d ed (2006) 1 p. 7.

³⁰² Woolman, S (2006), para 54.

³⁰³ See the ensuing discussion.

³⁰⁴ Pettit, P, 'Agency-freedom and Option-freedom', (2003), 15(4), *Journal of Theoretical Politics*, pp. 387–403.

³⁰⁵ Steiner, H, *An Essay on Rights*, (1994) Oxford, UK: Blackwell; Sudgen, R, 'The Metric of Opportunity', (1998), 14(2), *Economics & Philosophy*, pp. 307–337.; Carter, I, *A Measure of Freedom*, (1999) Oxford, UK: Oxford University Press.

³⁰⁶ Berlin, I, *Four essays on liberty*, (1969) London, UK: Oxford University Press; Miller, D, 'Constraints on freedom', (1983), 94(1), *Ethics*, pp. 66–86.

³⁰⁷ Pettit, P, *Republicanism: A Theory of Freedom and Government*, (1997) Oxford, UK: Oxford University Press; Skinner, Q, *Liberty Before Liberalism*, (1998) New York, USA: Cambridge University Press; Virolo, M & Shugaar, A, *Republicanism*, (2001) New York, USA: Hill and Wang.

³⁰⁸ Pettit, P (2003) p. 387.

³⁰⁹ Pettit, P (2003) p. 388.

much choice someone is more or less intentionally [or negligently] left by other individuals and groups'.³¹⁰

Petit argues that social freedom is understood as option-freedom or agency-freedom and that the differences between the schools of thought are maintained by vacillating between these two types of freedom. However, it is his contention that these two types of freedom are not in conflict. Option-freedom concerns itself with the 'character of the options that are accessible to the agent' and the 'character of the access to these options that the agent enjoys'.³¹¹ Variations in the nature of the access that the agents enjoy influence the overall freedom of these agents. Carter,³¹² Steiner³¹³ and Taylor³¹⁴ nevertheless advanced the argument that the 'physical possibility' of the agent exercising the option satisfies the requirement of access to the options. These authors claim that different agents presented with a number of options will be equally free to choose between the options, provided that it is physically possible for them to choose an option. Yet, option-freedom is also measured by the diversity, the objective significance³¹⁵ and the subjective significance³¹⁶ of the options.

Vulnerability to influences affects the capacity of agents to exercise their freedom of choice autonomously. This vulnerability affects the access that agents have to the full complement of choices on offer. Freedom-affecting influences stem from interpersonal³¹⁷ or impersonal³¹⁸ causes. Interpersonal causes may manifest negatively through the intentional conduct of others by obstructing, burdening or threatening to obstruct or burden the choice of the agent.³¹⁹ It may also manifest through the awareness of others of the vulnerability of one agent vis-à-vis another.³²⁰ Factors such as penalty and awareness thus impact on the capability of the agents to exercise their choices. The mere fact that

³¹⁰ Pettit, P (2003).

³¹¹ Pettit, P (2003) p. 389.

³¹² Carter, I 1999 Carter, I (1999).

³¹³ Steiner, H 1994 Steiner, H (1994).

³¹⁴ Taylor, M, *Community, Anarchy and Liberty*, (1982) Cambridge, USA: Cambridge University Press.

³¹⁵ Objective significance 'represent[s] ways of the changing world' (Pettit, P 2003 Pettit, P (2003) p. 392.)

³¹⁶ Subjective significance 'represent[s] choices that matter within the local culture or according to the agent's own values system. Pettit, P (2003).

³¹⁷ Interpersonal causes reflects 'the intentions and attitudes of the others towards the agent (Pettit, P (2003) p. 393.).

³¹⁸ Impersonal causes are associated with 'brute, [miserly] nature; with the social system considered as something beyond anyone's control; or with the unintended impact of others' actions'. (Pettit, P (2003).).

³¹⁹ For example, a commuter in a township is presented with the option of joining a lift club or taking a minibus taxi to work. This choice is affected by the minibus taxi cartel illegally controlling the exit road from the township, only allowing the driver of the vehicle through and not the passengers, unless they walk or take a minibus taxi.

³²⁰ A seller of a defective product may, for example, be aware of the poor literacy levels of a buyer. The buyer may be unaware of the automatic warranty against defective products contained in section 55 of the Consumer Protection Act 68 of 2008 and the range of remedies that it offers. This warranty provides the buyer with the remedies of having the defective product repaired, replaced or the buyer could be refunded upon returning the product. The choice of remedies is at the behest of the buyer. The more knowledgeable seller may offer to repair the defective product, which the buyer accepts, unaware of the options.

it is physically possible for agents to exercise their options is no guarantee of their agency. This is tantamount to offering agents the chimera of equality by presenting them with formal equality.

Pettit describes agency-freedom as ‘a property of agents’ and ‘an ideal that turns on how a person relates to their fellows, not something that is fixed just by the quantity of choice they enjoy’.³²¹ It is essentially a matter of social standing or status. Persons enjoy their agency-freedom when a number of conditions are met. This occurs when their option-freedom is protected to the same extent as others and that the extent of the protection is common knowledge.³²² Equality is therefore inextricably linked to agency-freedom.

One kind of freedom without the other handicaps the agent. Agency-freedom without option-freedom may guarantee the agent the full protection of the law and that protection may be common knowledge, yet the agent might, for example, suffer from economic poverty. This limits the agent’s option-freedom. Option-freedom without agency-freedom, on the other hand, may grant the agent access to a full complement of choices. However, the difference in social status leaves the agent unprotected against the grantor.

Sen’s capability approach to development and freedom shifts the assessment of the quality of life from income to capability.³²³ This in part, resonates with a legal empowerment paradigm. He recognises the importance of social capabilities³²⁴ and the importance of social arrangements in creating the conditions that are conducive to individuals exercising their capabilities.³²⁵

A central theme to this approach is that development should be evaluated ‘in terms of the expansion of substantive human freedoms’.³²⁶ These freedoms manifest ‘in the form of individual capabilities to do the things that a person has the reason to value’.³²⁷ Individuals, for example, have a reason to value the capability to enforce a right to which they have a claim. However, the autonomy of individuals is inexorably tempered and constricted by their social, political and economic opportunities. Social arrangements and institutions play a central role in promoting the freedoms of individuals. The access

³²¹ Pettit, P (2003) p. 394.

³²² Pettit, P (2003).

³²³ Sen, A, *Development as Freedom*, (1999), Oxford India Paperbacks Oxford University Press.

³²⁴ This denotes as meaningful participation in the life of the community or ‘to appear in public without shame’.

(Deneulin, S, 'Beyond Individual Freedom and Agency: Structures of Living Together in Sen’s Capability Approach to Development' in Alkire, S, Comim, F & Qizilbash, M (eds) *The Capability Approach: Concepts, Measures and Application* (April 2008) Cambridge: Cambridge University Press p. 108.

³²⁵ Deneulin, S (2008).

³²⁶ Dreze, J & Sen, AK, *India: Development and participation*, 2d ed, (2002) New York, USA: Oxford University Press p. 3.

³²⁷ Sen, A (1999) p. 56.

to adjudicating mechanisms that individuals have and their meaningful participation in these proceedings have a direct impact on the freedoms that they enjoy.

Sen nevertheless acknowledges that the preferences that individuals and communities value can be socially distorted and Deneulin argues that this distortion extends to capabilities in equal measure.³²⁸ Evans also cautions that the capabilities that individuals value are influenced by many forces, some over which the individual has no control.³²⁹ In South Africa, for example, the poor and the marginalised live alongside an elite (albeit from a distance) whose very existence is characterised by the ‘four c’s’³³⁰ and these communities are bombarded on a daily basis by consumerist traditions of existence in the media and other platforms. Their preferences and capabilities, at times, are distorted by this ‘mental conditioning’³³¹ and may ultimately reflect the interests of those with greater economic and political power.³³² This is a dilemma that the capability approach may not be able to resolve completely.

However, the caveat serves to amplify the importance of maintaining a balance between non-limitation, which primarily focuses on option-freedom and non-domination, which focuses on agency-freedom. In a constitutional democracy, such as South Africa, these distortions must be evaluated against the fundamental values that serve the common purpose of a democratic order. This common purpose is to bring about social transformation. These distortions cannot have the effect of diluting this purpose, endorsed by the supreme law of the country, and the ideal of individual freedom must serve alongside the values of human dignity and equality. Woolman and Botha, having considered the conflict among constitutional values, concluded as follows:

‘Any attempt to eradicate these conflicts and to deny the distinctive meaning of each of these values would do real violence to the constitutional text and deny the commitment to openness and to plurality on which it is premised.’³³³

³²⁸ Deneulin, S (2008).

³²⁹ Evans, P, 'Collective capabilities, culture, and Amartya Sen's Development as Freedom', (2002), 37(2), *Studies in Comparative International Development*, pp. 54–60.

³³⁰ These constitute the trappings of success, namely, the castle, car, cash and clothes.

³³¹ Evans, P (2002) p. 58.

³³² A case in point is the *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others* 2016 (CCT127/15) ZACC 32 (CC).

³³³ Woolman, S & Botha, H, 'Limitations' in Woolman, S & Bishop, M (eds) *Constitutional Law Of South Africa*, 2d ed (2014) Juta p. 117.

3.4. EQUALITY

Albertyn and Goldblatt describe the aspirational ideal of the achievement of equality as ‘...a constitutional imperative of the first order’.³³⁴ However, it has also been described as the most difficult right as it very often falls short of what it promises. The following view of McLachlin³³⁵ captures this contradiction: ‘Equality is not only the Leviathan of rights; it is also a Tantalus. It promises more than it can deliver.’³³⁶

Albertyn and Goldblatt argue that equality as a value allows for discourse on the nature and ambitions of social transformation, unencumbered by institutional impediments.³³⁷ This applies equally to the values of dignity and freedom. As a right, equality offers an essential mechanism for achieving equality and a powerful and progressive jurisprudence has developed in the country. The value of equality not only assists in giving meaning to the substantive constitutional right to equality, but also the right of access to procedural justice.

An understanding of equality as a value and a justiciable right requires that a distinction is drawn between formal and substantive equality. Formal equality is described as ‘the abstract prescription of equal treatment for all persons, regardless of their circumstances’.³³⁸ This view of equality fails to take into consideration the social and economic differences between individuals and groups. Substantive equality, on the other hand, ‘proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society’.³³⁹ Substantive equality thus exposes the limitation in formal equality and recognises fundamental truth that all human beings are possessed of the same innate human dignity and are of

³³⁴ Albertyn, C & Goldblatt, B, 'Equality' in Woolman, S & Bishop, M (eds) *Constitutional Law Of South Africa*, 2d ed (2014) Juta; Woolman, S & Botha, H 2014 Woolman, S & Botha, H (2014).

³³⁵ McLachlin, PC, 'Equality: The Most Difficult Right', (2001), 14(1), *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, pp. 17–26.

³³⁶ Leviathan (in biblical use) a sea monster, identified in different passages with the whale and the crocodile (e.g. Job 41, Ps. 74:14), and with the Devil (after Isa. 27:1).

A very large aquatic creature, especially a whale.

A thing that is very large or powerful, especially an organization or vehicle.

An autocratic monarch or state. (Oxford Living Dictionaries, “Leviathan”, available at: *Oxford Dictionary* <https://en.oxforddictionaries.com/definition/leviathan>.) (accessed 10 March 2017)

Tantalus. Classical Mythology. a Phrygian king who was condemned to remain in Tartarus, chin deep in water, with fruit-laden branches hanging above his head: whenever he tried to drink or eat, the water and fruit receded out of reach.

(lowercase) Chiefly British. a stand or rack containing visible decanters, especially of wines or liquors, secured by a lock. (Dictionary.com, “Tantalus”, available at: *Dictionary* <http://www.dictionary.com/browse/tantalus?s=t>.) (accessed 10 March 2017)

³³⁷ Albertyn, C & Goldblatt, B (2014).

³³⁸ Albertyn, C & Goldblatt, B (2014) p. 6.

³³⁹ Albertyn, C & Goldblatt, B (2014).

equal worth. This is a principle which the law is obliged to protect, not only in form, but also in substance.

At the heart of an enquiry into equality in the legal process (procedural justice), therefore, is an acute comprehension of the nature of the inequality, discrimination and deprivation that permeated South African society in the past and continues to plague its present. Anything less would fail to provide an effective remedy for the harm caused by the social and economic conditions that fashioned and reinforced the inequalities.³⁴⁰ All role players, including the State, are mandated to embrace transformative constitutionalism by balancing the restorative justice imperative with the right to equality and equal protection and benefit of the law.

One of the reasons advanced for disconnecting the values of openness and democracy from human dignity, equality and freedom, is their super-entrenchment in the preamble and the founding provisions and their express codification as substantive rights. The preamble, founding provisions and sections 7, 36 and 39 constitute important waymarks in the interpretation of the Constitution and will be considered below.

3.5. THE WAYMARKS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

3.5.1. The preamble

The preamble is not merely a rhetorical statement, but an ineluctable constitutional waymark in the interpretation of the Bill of Rights. The following dictum of the Constitutional Court delivered by Sachs J captures this view eloquently:

‘The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.’³⁴¹

The preamble makes express reference to two forms of justice, namely ‘social justice’ and procedural justice which is embodied in the phrase, ‘...every citizen is equally protected by the law ...’. Social

³⁴⁰ See *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (CCT20/04) ZACC 5 (CC).

³⁴¹ *S v Mhlungu and Others* 1995 (CCT25/94) ZACC 4.

justice and procedural justice are to be achieved through the adherence to democratic values and fundamental human rights and will be measured against its capacity to 'heal the divisions of the past' and '[i]mprove the quality of life of all citizens'. The preamble thus directs the process and identifies the purpose of the transformation that the new democratic order demands and the Bill of Rights is held up as the cornerstone of that transformation.

In the preamble, the Constitution is declared supreme for the purpose of 'establish[ing] a society based on democratic values, social justice and fundamental human rights' in which 'every citizen is equally protected by the law' in order to 'improve the quality of life of all citizens and free the potential of each person'. This reflects a characteristic of transformative constitutionalism aimed at overcoming the past discrimination and disadvantage while simultaneously, extending the right to equality and equal protection to all South African citizens. Klare describes transformative constitutionalism as follows:

'... [Transformative constitutionalism] connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law ... a transformation vast enough to be inadequately captured by the phrase "reform," but something short of or different from "revolution" in any traditional sense of the word. In the background is the idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the "private sphere"'.³⁴²

The declaration of the supremacy of the Constitution thus signalled a paradigm shift away from what has been labelled a 'culture of arbitrary authority' and blind obedience to a 'culture of justification' and accountability, endeavouring to create a society built on persuasion rather than intimidation.³⁴³ The preamble, therefore, embraces specific features of a legal empowerment agenda which are aimed at capacitating communities to claim the protection of the law and legal systems in order to transform their social and economic situations.

3.5.2. The founding provisions

In spite of the seemingly inconsistent interpretation of the role of section 1 of the Constitution by the Constitutional court,³⁴⁴ it is argued that a descriptive understanding of this section indicates that aspects

³⁴² Klare, KE, 'Legal Culture and Transformative Constitutionalism', (1998), 14, *South African Journal on Human Rights*, pp. 146–188.

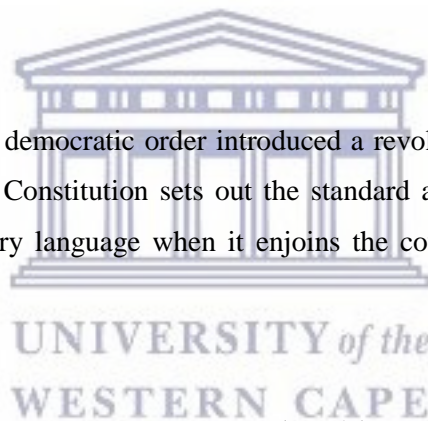
³⁴³ Mureinik, E 1994 Mureinik, E (1994).

³⁴⁴ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2004 (CCT03/04) ZACC 10 (CC); *President of the Republic of South Africa and Another v Modderklip*

of subsequent provisions in the Constitution that are of particular foundational importance are ‘super-entrenched’ in this section.³⁴⁵ Section 1 of the Constitution places a premium on the founding values of equality and human dignity, rights and freedoms, with particular emphasis on non-racialism and non-sexism.³⁴⁶ It further ‘super-entrenches’ the supremacy of the Constitution and the rule of law. The rule of law dictates that the State provides the necessary mechanisms to enable citizens to resolve disputes that arise between them and the State and between citizens themselves.³⁴⁷ The corollary to this obligation is the right of every person to have access to the courts and other dispute resolution mechanisms. Respecting and upholding the rule of law is important to ensure the existence of a successful democratic order as it is meant to protect basic individual rights. However, a positivist approach to the application of the rule of law has the potential to produce unjust results and require safeguards, lest it merely results in formal equality³⁴⁸ at the expense of substantive equality.³⁴⁹ Having meaningful access to these adjudicating mechanisms, in the face of various barriers, gives rise to the right to legal assistance, which encompasses a range of services, including paralegal services, as indicated in Figure 1.³⁵⁰

3.5.3. Section 39

The advent of our constitutional democratic order introduced a revolution in statutory interpretation. The interpretation clause of the Constitution sets out the standard against which all laws are to be interpreted.³⁵¹ It uses peremptory language when it enjoins the courts, tribunals and other fora to



Boerdery (Pty) Ltd (2005); *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening)* 2002 (CCT23/02) ZACC 21.

³⁴⁵ Fowkes, J, 'Founding Provisions' in Woolman, S & Bishop, M (eds) *Constitutional Law Of South Africa*, 2nd ed (2014) Juta p. 21.

³⁴⁶ 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
Human dignity, the achievement of equality and the advancement of human rights and freedoms.
Non-racialism and non-sexism.

Supremacy of the constitution and the rule of law.

Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

³⁴⁷ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).

³⁴⁸ 'sameness of treatment' regardless of the circumstances De Waal, J, Currie, I & Erasmus, G, *The Bill of Rights Handbook*, 4th ed, (2001) Juta & Co..

³⁴⁹ 'ensuring equality of outcome' (*President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).)

³⁵⁰ Page 42.

³⁵¹ Section 39(1)

(a) When interpreting the Bill of Rights, a court, tribunal or forum—
must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
must consider international law; and

(b) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’³⁵² and to ‘promote the spirit, purport and objects of the Bill of Rights’.³⁵³ The interpretation clause specifically recognises the rights and freedoms conferred by other sources of law, in particular, common law, customary law and legislation. However, it declares all sources of law subject to the Constitution.³⁵⁴ The Constitutional Court therefore held that ‘[a]ll statutes must be interpreted through the prism of the Bill of Rights.’³⁵⁵ The principle of reading all enacted law in conformity with the Constitution has thus been codified in South African jurisprudence.

Moreover, adjudicating fora are legally obliged to consider international law³⁵⁶ and permitted to consider foreign law.³⁵⁷ The preamble to the International Covenant on Civil and Political Rights (ICCPR), for example, recognises the ‘inherent dignity and the equal and inalienable rights of all members of the human family [a]s the foundation of freedom, justice and peace in the world’. The ICCPR further recognises, ‘in accordance with the Universal Declaration of Human Rights, [that] the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’.

The preamble to the Charter of the Organisation of African Unity, the predecessor of the Constitutive Act of the African Union, echoes similar principles of ‘freedom, equality, justice and dignity [as the] essential objectives for the achievement of the legitimate aspirations of the African peoples’.³⁵⁸ One of the objectives of the African Union stated in the Constitutive Act is to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights (ACHPR) and other relevant human rights instrument.’³⁵⁹ The Constitutive Act further expressly includes the principles of ‘promotion of gender equality’,³⁶⁰ ‘respect for democratic principles, human rights, the rule of law and good governance’,³⁶¹ ‘promotion of social justice’ and ‘respect for the sanctity of human life’.³⁶²

³⁵² Section 39(1)(a).

³⁵³ Section 39(2) .

³⁵⁴ Section 39(3).

³⁵⁵ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (CCT1/00) ZACC 12, para 21.

³⁵⁶ Section 39(1)(b).

³⁵⁷ Section 39(1)(c).

³⁵⁸ Organization Of African Unity (OAU), *Charter of the Organisation of African Unity*, 479 U.N.T.S. 39 (1963).

³⁵⁹ Article 3(h).

³⁶⁰ Article 4(l).

³⁶¹ Article 4(m).

³⁶² Article 4(o).

The drafters of the Constitution deemed it appropriate to incorporate these principles into our domestic legal order, thus giving binding effect to these international and regional standards. The preambles of regional instruments such as the European Convention on Human Rights³⁶³ and the American Convention on Human Rights³⁶⁴ contain similar core values, emphasising ‘personal liberty, social justice’ and ‘fundamental human rights’³⁶⁵ as well as ‘democratic order, fundamental freedoms’ and ‘common observance of human rights’.³⁶⁶ Its regional counterpart, the preamble to the African Charter on Human and Peoples’ Rights similarly reaffirms the commitment of State Parties to ‘the principles of human and peoples’ rights and freedoms contained in these declarations, conventions and other instrument(s) adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations’.³⁶⁷

However, inasmuch as constitutional interpretation may involve an analysis of the written text to ascertain its meaning, it does not strictly conform to the conventional rules of statutory interpretation. Du Plessis argues that ‘[c]onstitutional interpretation ... activates – and gives content to – the values that underlie and pervade a democratic, constitutional state (*Rechtsstaat*)’.³⁶⁸ In fact, human rights instruments, such as the Constitution, allow for the convergence of natural and positive law. This, in the author’s view, invites a reading of the Bill of Rights, unencumbered by the institutional constraints imposed by the conventional canons of statutory interpretation, yet guided by the text of the ‘enacted Constitution-in-writing’.³⁶⁹ He further states that the ‘most distinctive and consequential feature [of constitutional interpretation] as an interpretive endeavour is its ability to underwrite constitutional supremacy, warding off unconstitutional action, halting the abuse of power or providing redress for the adverse consequences of unconstitutional conduct.’³⁷⁰ Constitutional Court jurisprudence tells us what the Constitution demands in respect of transformation:

‘Final Constitution does not simply ask us to react to, and to reverse, past indignities. It demands that we transform our society into one that will ultimately recognise the intrinsic worth of each individual.’

³⁶³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5 (1950).

³⁶⁴ Organisation of American States (OAS), *American Convention on Human Rights “Pact of San Jose”*, Costa Rica, Treaty Doc. No. 95-21,1144 U.N.T.S.123, O.A.S.T.S. No. 36, 9 I.L.M. 99 (1970).

³⁶⁵ *American Convention on Human Rights “Pact of San Jose”*(1970)

³⁶⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

³⁶⁷ Preamble to the *African Charter of Human and Peoples’ Rights*.

³⁶⁸ Du Plessis, L, ‘Interpretation’ in Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa*, 2nd ed (2014) Juta p. 2.

³⁶⁹ Du Plessis, L (2014) p. 107.

³⁷⁰ Du Plessis, L (2014) p. 2.

Simply put, the Constitution must be interpreted in a manner that ensures access to justice in a country that is still grappling with transitional justice. Access to justice is at the heart of the social transformation that the new democratic order demands and the democratic values of dignity, equality and freedom are instrumental in that transformation.

3.5.4. Section 7

Most of the jurisprudence on section 7 is concentrated on section 7(3) which refers to the limitation clause.³⁷¹ Although section 7 is not an interpretation clause to the same extent as section 39, the latter is not the only source of interpretation in the Constitution. Section 7, as an interpretive waymark, cements the authority of the Bill of Rights as the ‘cornerstone of democracy’ and re-affirms the democratic values of the Constitution, namely, human dignity, equality and freedom.³⁷² Section 7(2) further directs the State in the manner in which it is to deliver on the promise of the substantive rights contained in the Bill of Rights. Du Plessis cautions that these two provisions would remain intangible aspirations if they are not given concrete expression through interpretation.³⁷³ He further expresses the opinion that,

‘lofty constitutional values and ideals will come to naught if they are not invoked to shepherd and shape the way in which authorised interpreters of the Final Constitution (and the Bill of Rights) give effect to the provisions of the country’s supreme law’.³⁷⁴

Section 7(2) reads, ‘... the state must *respect, protect, promote* and *fulfil* the rights in the Bill of Rights’.³⁷⁵ This section uses peremptory language and places the obligations of the State in a hierarchical order. The Constitution first places a negative obligation on the State to refrain from undue interference with the rights of individuals. This in essence means that the state itself must refrain from limiting or depriving the individual from existing rights, whether by design or by default. The Constitution further places a positive obligation on the State to protect the individual from undue interference with the exercise and enjoyment of their rights. The State, thus, has a duty to enhance the enjoyment of existing rights and to assist those who do not have access to the rights to gain access. Furthermore, the State has a constitutional obligation to raise awareness among its citizens and inform them of their rights, thus promoting the rights in the Bill of Rights. Finally, the State has a duty to adopt

³⁷¹ Du Plessis, L (2014) p. 120.

³⁷² Section 7(1).

³⁷³ Du Plessis, L (2014).

³⁷⁴ Du Plessis, L (2014).

³⁷⁵ Own emphasis added.

appropriate legislative administrative, budgetary, judicial, promotional and other measures to provide access for those who do not currently enjoy these rights.³⁷⁶ In so doing, the State would be complying with its positive obligation to fulfil the rights in the Bill of Rights.

Case law favours an interpretation of section 7(2) that not only places a negative obligation on the State to refrain from limiting the rights contained in the Bill of Rights, but imposes a positive obligation on the State to enhance and give effect to their enjoyment.³⁷⁷ In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* the Constitutional Court specifically addressed section 34 of the Constitution and held that the State has an obligation to provide an effective remedy for disputes and ensure the enforcement thereof.³⁷⁸ The State therefore has a positive obligation to provide the necessary statutory framework, human resources, institutions and infrastructure to ensure access to this right for those who do not currently enjoy access. This includes access to legal assistance, at the expense of the State, if the interest of justice so requires. The entrenchment of the triumvirate of values in section 7 confirms that an examination of the extent of the obligation of the State to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ is a value-laden endeavour. The purpose of such an exercise must be to provide the individual with the best possible protection under the Constitution.

3.5.5. Section 36

The limitation clause³⁷⁹ in the Constitution provides the apparatus through which a frank appraisal of competing values and interests can occur and through which the tensions between democracy and rights can be reconciled.³⁸⁰ Section 36 informs us that a limitation of a fundamental right will not pass constitutional muster unless it is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This phrase does not only bear the hallmark of constitutional interpretation, but it also burdens this analysis with interpretive challenges. Woolman and Botha argue that the phrase is not only framed very broadly but that it reproduces the very tensions that it is intended to settle.³⁸¹ Tensions exist between democracy and rights, equality and freedom, equal treatment and diversity and social justice and individual freedom.³⁸² These authors claim that the approach of the Constitutional Court in respect of the interpretation of rights and the analysis of limitations ‘lacks

³⁷⁶ Du Plessis, L (2014).

³⁷⁷ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).
S v Baloyi and Others 1999 (CCT29/99) ZACC 19; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (CCT11/00) ZACC 19; *Carmichele v Minister of Safety and Security* 2001 (CCT48/00) ZACC 22 (CC).

³⁷⁸ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).

³⁷⁹ Section 36 Constitution of the Republic of South Africa, 1996.

³⁸⁰ Woolman, S & Botha, H (2014).

³⁸¹ Woolman, S & Botha, H (2014).

³⁸² Woolman, S & Botha, H (2014) p. 67.

analytical rigour'.³⁸³ They emphasise the importance of the formation of a framework for a limitation analysis as it fortifies the law-making process in a constitutional democracy. Legislation and conduct can therefore be assessed against the constitutional mandate to create an open and democratic society based upon human dignity, equality and freedom. A framework for a limitation analysis should thus give substance to this mandate and require an exposition of the collaboration between dignity and democracy.³⁸⁴

Section 39 confirms that constitutional interpretation is a value-laden endeavour. This informs and encourages a two stage approach to limitation analysis for a number of reasons.³⁸⁵ Firstly, a value-laden approach to the interpretation of the protected right eliminates conduct that is undeserving of the protection of the Constitution.³⁸⁶ Secondly, a value-laden screening during stage one of the limitation analysis allows only authentic and serious violations through to stage two of the enquiry.³⁸⁷ Thirdly, a value-laden approach is in harmony with the idea that a 'unity of values' inspires both stages of the limitation analysis.³⁸⁸ Stage one involves the determination of the nature and scope of the right followed by an enquiry into whether a law or conduct infringes the right. Stage two involves the justification for the infringement. Both stages are informed by the five foundational values of the Constitution. Constitutional interpretation in general and a limitation analysis in particular is thus inescapably influenced by the values that animate the democratic order in South Africa.

All of the above demanded a shift in jurisprudential theory³⁸⁹ as the courts have now been declared the custodians of the Constitution and are clothed with the authority to subject the conduct of the State and individuals to constitutional scrutiny, thus taking the nation a step closer to actualising substantive justice. The aforementioned values, therefore, are foundational to our democratic and constitutional order and pivotal to developing an egalitarian society. The Constitution has thus become the grundnorm of our legal system and constitutes the social contract between citizens and the State.

³⁸³ Woolman, S & Botha, H (2014) p. 9.

According to these authors the Constitutional Court provides insufficient insight or guidance. The Court failed to provide detail of the analytical process at each stage and does not explain the reasons for allocating particular tasks to the various stages of the analysis.

³⁸⁴ Woolman, S & Botha, H (2014).

³⁸⁵ Woolman S & Botha H argue that the 'amorphous' one-stage enquiry applied by the Constitutional Court in some instances 'compromised the analytical rigour' of the two-stage approach' (2014) p. 42.

³⁸⁶ Woolman, S & Botha, H (2014).

Freedom of speech, for example is protected under the Constitution. However, when it amounts to hate speech it does not merit protection.

³⁸⁷ Woolman, S & Botha, H (2014). argue that this allows the court to adopt a relatively rigorous approach with regards to the justification for the infringement.

³⁸⁸ Woolman, S & Botha, H (2014) p. 18.

³⁸⁹ *Coetsee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (CCT19/94) ZACC 7 (CC); Rapatsa, M, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy', (2014), 5(27), *Mediterranean Journal of Social Sciences*, pp. 887–895. p. 891.

However, these values do not necessarily manifest in the attitudes of the citizens of the country. The AJCPR Baseline Survey shows that the attitudes of many of the respondents in the study are in conflict with the values and rights contained in the Constitution.³⁹⁰ The results reflect an attitude of discrimination among most of the respondents towards vulnerable communities such as lesbian and gay communities³⁹¹ and women.³⁹² There is also still substantial support for the death penalty³⁹³ and for government censorship of publications.³⁹⁴ Moreover, the results of the survey show a lack of awareness of the Constitution and the Bill of Rights.³⁹⁵ Respondents also had an extremely low level of awareness of key human rights-related legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act.³⁹⁶

The results of the AJCPR Baseline Survey reveal the extent of the challenge facing the country in their efforts to entrench a culture of human rights in our society and reflect the gap between the law and the people. This is a gap that will not be completely bridged without the aid of the community-based paralegal sector.³⁹⁷ This much had been acknowledged by the Deputy Minister of Justice and Correctional Services when he stated that, '[g]overnment cannot play this role in isolation and civil society organisations in South Africa may achieve greater success in promoting human rights awareness than government is able to achieve. Partnership in this regard is vital'.³⁹⁸

3.6. CONCLUSION

The Constitution informs us that the content, scope, application and limitations of the rights that are enshrined in the Bill of Rights should be determined through the prism of the five fundamental values that animate the new democratic order in South Africa. However, the values of human dignity, equality and freedom are distinguished from openness and democracy. This triumvirate of values are regarded as innate to all human beings and their recognition is therefore not dependent upon an express

³⁹⁰ Kimmie, Z & O'Sullivan, G, *Report of the AJPCR Baseline Survey on the Awareness of, Attitude and Access to Constitutional Rights*, (2015) South Africa: Foundation for Human Rights & Department of Justice and Constitutional Development.

³⁹¹ Most respondents (63%) indicated that homosexuals should not have the same rights as other citizens. (Kimmie, Z & O'Sullivan, G (2015) p. 15.

³⁹² An overwhelming majority (73%) indicated that married women cannot refuse to have sex. (Kimmie, Z & O'Sullivan, G (2015).

³⁹³ Forty-three percent (43%) supported the death penalty. (Kimmie, Z & O'Sullivan, G (2015).

³⁹⁴ The majority (55%) agreed that government can decide what information newspapers print. (Kimmie, Z & O'Sullivan, G (2015).

³⁹⁵ Less than ten percent (10%) of the respondents had read the Constitution or had it read to them and forty six percent (46%) claimed to have a basic awareness of them. (Kimmie, Z & O'Sullivan, G (2015) p. 11.

³⁹⁶ *Promotion of Equality and Prevention of Unfair Discrimination Act*, 4 of 2000..

Only fourteen percent (14%) of the respondents displayed an awareness of this legislation (Kimmie, Z & O'Sullivan, G (2015) p. 12.

³⁹⁷ See Chapter 9 for a discussion on the community-based paralegal in South Africa.

³⁹⁸ Kimmie, Z & O'Sullivan, G (2015) p. 3.

codification as rights. These three values, to a greater or lesser extent, permeate every right in the Bill of Rights due to the interrelatedness and interdependence of human rights.

Five different aspects of human dignity emerge from jurisprudence, namely, ‘the individual as an end-in-herself’, ‘equal concern and respect’, ‘self-actualisation’, ‘self-governance’ and ‘collective responsibility for the material conditions of agency’.³⁹⁹ Human dignity thus denotes more than a manifestation of citizen entitlements and corresponding State responsibilities. It requires a shared recognition of a common responsibility for the ‘material conditions of agency’.⁴⁰⁰

Debates on the value of freedom generated three schools of thought categorised as freedom as non-limitation, non-domination and non-interference. It is suggested that social freedom is best understood as option-freedom or agency-freedom. Vulnerabilities impact on the freedom of choice of the agent, therefore, one form of freedom without the other, handicaps the agent. This forms the foundation for the capability approach to freedom proposed by Sen.

Equality as an aspirational ideal is described as ‘a constitutional imperative of the first order’. The value of equality does not only give meaning to the substantive constitutional right to equality, but also the right of access to procedural justice. The substantive right of equality offers an essential mechanism for achieving equality. At the heart of an enquiry into equality in the legal process (procedural justice), lies an understanding of the nature of the inequality, discrimination, and deprivation that permeated South African society in the past and continues to plague its present.

The values of human dignity, equality and freedom are entrenched in distinct waymarks in the Constitution. The preamble and founding provisions of the Constitution super-entrench these values. The preamble declares the Constitution supreme and codifies a transformation agenda that reflects characteristics of transformative constitutionalism and embraces a legal empowerment agenda. The founding provisions, in addition, codify South Africa’s commitment to the rule of law and place a premium on the triumvirate of values that informs the rule of law.

The advent of a new democratic order ushered in new national and international standards in terms of which laws in the country are to be interpreted. Section 39 enjoins courts and tribunals to promote the values of the Constitution and the spirit, purport and objects of the Bill of Rights. Section 7 cements the authority of the Bill of Rights and imposes a negative obligation on the State to refrain from undue

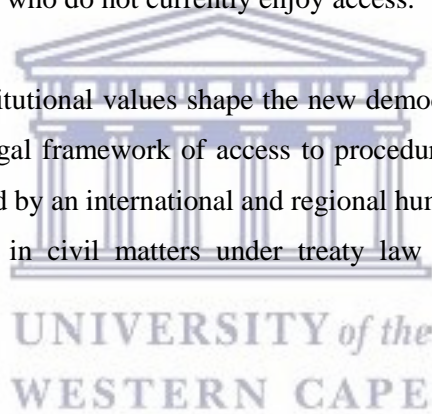
³⁹⁹ Woolman, S (2006) p. 6–17.

⁴⁰⁰ Woolman, S (2006) p. 14–17.

interference with the fundamental rights of individuals. It also imposes a positive obligation on the State to protect the individual from undue interference with the exercise and enjoyment of their fundamental rights, to inform citizens of their rights and to adopt measures to provide access to those who do not currently enjoy those rights. The triumvirate of values informs an examination of the extent the State's obligation under section 7. The limitation clause provides the apparatus for a frank appraisal of competing values and interests. An enquiry into the limitation of any right but particularly the right to procedural justice is thus inescapably influenced by the values that animate the democratic order in South Africa.

However, the foundational values do not necessarily manifest in the attitudes of the citizens of the country. Preliminary research shows that the South African public has not entirely embraced the values and attitudes entrenched in the Constitution. This is in part as a result of the gap between the law and the people. The State has acknowledged that it will not be able to narrow this gap without the aid of civil society. Community-based paralegals, therefore, have a key role to play in making access to justice in civil matters a reality for those who do not currently enjoy access.

Having examined how the constitutional values shape the new democratic order in South Africa, the focus turns to the substantive legal framework of access to procedural justice in civil matters. The domestic legal order is influenced by an international and regional human rights framework. The right of access to procedural justice in civil matters under treaty law will therefore be examined in Chapter 4.



Part III

**The Substantive Legal Framework of Access to Procedural Justice in Civil Matters in
South Africa**



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WESTERN CAPE

CHAPTER 4

INTERNATIONAL LAW AND THE RIGHT OF ACCESS TO PROCEDURAL JUSTICE IN CIVIL MATTERS IN SOUTH AFRICA

4.1. INTRODUCTION

Social contract theorists contend that citizens surrender their natural right to self-help in return for the promise by the state to provide a peaceful and fair alternative to all without discrimination.⁴⁰¹ In the absence of a well-functioning civil justice system, which is a fundamental component of the rule of law, citizens have limited options. Many simply abandon any attempt to resolve the dispute or resort to vigilantism to settle the conflict.⁴⁰²

The right of access to the courts is a pivotal precept of the right to procedural justice. This right constitutes the fulcrum for the protections and guarantees contained in the South African Bill of Rights. It is regarded as the ‘bulwark against vigilantism’ and the ‘guarantee against partiality’.⁴⁰³ In the absence of the right of access to procedural justice, the constitutional protections and guarantees will be worthless.

South Africa has adopted a human rights-based approach to access to justice. The domestic legal regime therefore, functions in collaboration with a global and regional human rights framework in which the innate dignity and equal and immutable rights of all global citizens form the foundation for justice. This human rights-based approach to access to justice yields guarantees of equality before the law and equal access to the law as well as the right to a fair hearing. States comply with their obligation under the social contract by first, codifying the right to procedural justice either in their constitutions or other national law and setting up an institutional framework to give effect to it. These laws would therefore expressly guarantee the right of access to the courts and other dispute resolution fora and the right to legal representation. The drafters of the South African Constitution have deemed it wise to distinguish between criminal and civil matters in respect of the right to access to the courts. However, internationally, this right is contained in the right to a fair trial, which applies to both a suit at law as

⁴⁰¹ Hobbes, T, *De Cive*, (1949) New York, USA: Appleton-Century-Crofts; Locke, J, *Second Treatise of Government*, reprint ed, (1980), Macpherson, CB (ed.), HPC Classics Indianapolis, USA: Hackett Publishing Company; Rousseau, J-J & Gay, DA, *On The Social Contract*, (1987) Indianapolis, USA: Hackett Publishing Company; Rawls, J, *A theory of justice*, revised ed, (1971) Cambridge, USA: Harvard University Press; Gauthier, DP, *Morals by Agreement*, 5th ed, (2006) Oxford, UK: Clarendon Press.

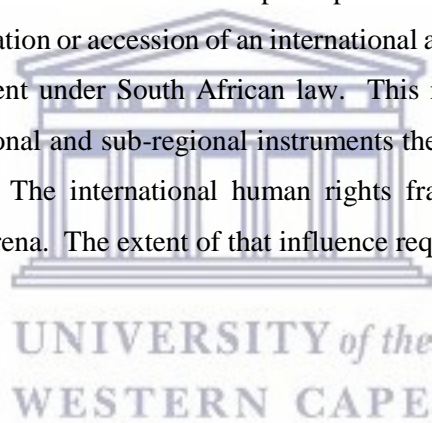
⁴⁰² Ponce, A, *Rule of Law Index*, (2015) Washington D.C., USA.

⁴⁰³ *Lesapo v North West Agricultural Bank and Another* 1999 (CCT23/99) ZACC 16.

well as criminal matters.⁴⁰⁴ The international and global human rights framework exercises an influence on the South African legal order and warrants further investigation. Therefore, the interrelationship between international and domestic law will first be examined, followed by a consideration of the relevant articles in the international and regional human rights instruments signed, ratified or acceded and deposited by South Africa.

4.2. THE INTER-RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW

The delicate act of balancing sovereignty and international law in South Africa has received much attention in the media and the courts in recent times, both nationally and internationally⁴⁰⁵ as individuals and human rights organisations have increasingly exercised the right of access to justice by approaching the South African courts to enforce and clarify the State's legal obligations under the Bill of Rights since the enactment of the Constitution.⁴⁰⁶ South Africa has signed, ratified or acceded a number of global and regional human rights instruments after the post-apartheid government came into power in 1994. However, the act of ratification or accession of an international agreement does not automatically give legal status to that agreement under South African law. This much is evident from key court decisions, the international, regional and sub-regional instruments themselves and the Constitution of the Republic of South Africa. The international human rights framework nevertheless exercises influence in the domestic legal arena. The extent of that influence requires further examination.



⁴⁰⁴ Article 14 of the International Covenant on Civil and Political Rights.

UN Human Rights Committee (HRC), *General Comment No. 13: Article 14 (Administration of Justice): Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, (1984); UN Human Rights Committee (HRC), *General comment no. 32: Article 14: Right to equality before courts and tribunals and to fair trial*, (2007) CCPR/C/GC/32.

⁴⁰⁵ "ICC accuses UN of failing to act against countries refusing to arrest Bashir", (2016), available at: *News24* <http://www.news24.com/Africa/News/icc-accuses-un-of-failing-to-act-against-counties-refusing-to-arrest-bashir-20161214>. (accessed 2 March 2017)

"Botswana reaffirms support for ICC, 'regrets' SA decision", (2016), available at: *News24* <http://www.news24.com/Africa/News/botswana-reaffirms-support-for-icc-regrets-sa-decision-20161026>. (accessed 2 March 2017)

Chabalala, J, "SA under obligation to arrest Al Bashir - SCA", (2016), available at: *News24* <http://www.news24.com/SouthAfrica/News/sa-under-obligation-to-arrest-al-bashir-sca-20160315>. (accessed 2 March 2016)

"Government has a duty to arrest Bashir: SALC", (2016), available at: *SABC News* <http://www.sabc.co.za/news/a/657deb004c0a4458b519bff0bca466af/SouthundefinedAfricanundefinedgovernmentundefinedhasundefinedadundefineddutyundefinedtoundefinedarrestundefinedBashir:SALC-20161503>. (accessed 2 March 2017)

Hunter, Q, "ICC demands SA explain al-Bashir exit", (2015), available at: *Mail & Guardian* <https://mg.co.za/article/2015-09-07-icc-demands-sa-explain-al-bashir-exit>. (accessed 2 March 2017)

⁴⁰⁶ Wilson, Stuart Dugard, J, 'Constitutional Jurisprudence' in Langford, M et al (eds) *Socio-Economic Rights in South Africa* (2012) Cambridge: Cambridge University Press.

The Vienna Convention on the Law of Treaties⁴⁰⁷ declares every treaty in force binding upon the States Parties and enjoins them to perform their duties in respect of these treaties in good faith.⁴⁰⁸ It further precludes States Parties from invoking domestic law as justification for non-compliance with its obligation under the treaty. This in essence implies that, once a State Party has consented to be bound by a treaty, whether by ratification, acceptance, approval⁴⁰⁹ or accession,⁴¹⁰ and it has communicated that consent through exchange between states, deposit with the depository or notification to the depository, if so agreed,⁴¹¹ the maxim pacta sunt servanda should apply. However, the implementation of treaty law in a sovereign state is not that simple.

The Report on the Implementation of International Human Rights Treaties in Domestic law adopted by the Venice Commission⁴¹² highlights four legal factors that impact on the implementation of international human rights treaties under domestic law.⁴¹³ This Report and, as a result, these factors, have relevance for South Africa as human rights treaties in Africa, like Europe and Latin-America, have a regional judicial system of control. Due to the interrelated nature of these factors, this study will consider the implementation of international law and its application in South Africa in brief by first, addressing the conceptualisation of the relationship between international human rights law and domestic law in South Africa characterised by the monist-dualist dichotomy, secondly, examining relevant provisions of international and regional human rights instruments and, thirdly, examining the relevant provisions of the Constitution of the Republic as interpreted through judicial precedent in South Africa.

4.2.1. The monist-dualist dichotomy

Traditionally, two theories dominated the debate on the conceptualisation of the relationship between international and domestic law, namely, monism and dualism. ‘Pure’ monism suggests that national and international law are part of one single, coherent system, with international law at the apex,

⁴⁰⁷ United Nations, *Vienna Convention on the Law of Treaties*, treaty ser ed, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

⁴⁰⁸ Article 26.

⁴⁰⁹ Article 14.

⁴¹⁰ Article 15.

⁴¹¹ Article 16(a)-(c).

⁴¹² European Commission for Democracy through Law, *Report on the implementation of international human rights treaties in domestic law and the role of courts*, (2014) Rome, Italy: Council of Europe.

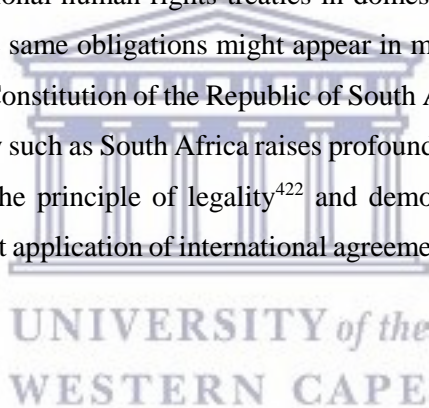
⁴¹³ These are:

- the conceptualisation of the relationship between international and domestic orders
- the status of treaties in the domestic legal order and their place in the hierarchy of norms
- the direct and indirect effect and the interpretation of conformity clauses in the domestic constitutions
- enabling legislation (European Commission for Democracy through Law (2014) p. 6.).

validating and invalidating domestic legal systems.⁴¹⁴ Therefore, in the event of conflict between domestic and international law, international law prevails.

Dualism, on the other hand, suggests that international and domestic legal systems exist as two distinct legal orders.⁴¹⁵ In terms of this regime, international law requires incorporation into domestic law in order to have binding effect on domestic authorities. International law, for that reason, does not have direct application within the domestic order but has to be transformed into national law through the enactment of a statute or other source of national law. State Parties adhering to the dualist approach incorporate international human rights treaties into domestic law mainly through transformation,⁴¹⁶ adaptation⁴¹⁷ and adoption.⁴¹⁸

Killander claims that practitioners of the law in civil law Africa do not often apply international human rights law in spite of the monist constitutional framework, whereas the jurisprudence in dualist common law countries on the continent shows extensive reference to international human rights law.⁴¹⁹ The direct application of the international human rights treaties in domestic legal regimes on the African continent is also rare because the same obligations might appear in most of the national human rights instruments, for example, in the Constitution of the Republic of South Africa.⁴²⁰ This direct application within a constitutional democracy such as South Africa raises profound questions related to the doctrine of the separation of powers,⁴²¹ the principle of legality⁴²² and democracy. Upon considering these questions, the query into the direct application of international agreements has often been conflated with



⁴¹⁴ Kelsen, H, *Reine Rechtslehre*, (1934) Leipzig, Germany: Franz Deuticke.

⁴¹⁵ Triepel, H, *Völkerrecht und Landesrecht*, (1899) Leipzig, Germany: C.L. Hirschfeld. as discussed in Gaja, G, 'Positivism and Dualism in Dionisio Anzilotti', (1992), 3, *European Journal of International Law*, pp. 123–138. Anzilotti, D, *Corso di diritto internazionale (ad uso degli studenti dell'Università di Roma)*, 3d ed, (1928) Rome, Italy: Athenaeum. Discussed in Crivellaro, J, "How did Anzilotti's jurisprudential conception influence the jurisprudence of the Permanent Court of International Justice", (2011), available at: *Jura Genrium* <http://www.juragentium.org/topics/thil/en/crivella.htm>. (accessed 3 May 2015)

⁴¹⁶ The process of incorporating the text of the international human rights treaty literally into the statute or other source of domestic law.

⁴¹⁷ The process of incorporating the international human rights treaty into national law subject to substantive modifications .

⁴¹⁸ The use of provisions of international treaties, or other sources of international law in the case law of national courts without transformation or adaptation.

⁴¹⁹ Killander, M & Adjolohoun, H, *International law and domestic human rights litigation in Africa*, (2010), Killander, M (ed.) Pretoria, South Africa: Pretoria University Law Press.

⁴²⁰ Killander, M & Adjolohoun, H (2010).

⁴²¹ 'The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.' (Mojapelo, JPM, 'The doctrine of separation of powers (A South African perspective)', (2013), 26(1), *Advocate*, pp. 37–46. p. 37.).

⁴²² The principle of legality is regarded as part of the rule of law and indicates, within the context of public administration, that 'the exercise of public power is only legitimate where lawful' *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (CCT7/98) ZACC 17, para 56.

the incorporation of international agreements into the domestic legal order. The distinction between international and domestic law has particular relevance for South Africa as the balance between the sovereignty of the state and its international and regional obligations was the focal point of recent constitutional litigation in the country.⁴²³

South Africa is considered to be a common law country and the conceptualisation of the interrelationship between customary international law and domestic law on the one hand, and treaty law and domestic law on the other, reflects a blend of monism and dualism. Most importantly, the Constitutional Court in South Africa has ruled that the Constitution of the Republic should be the starting point for determining the inter-relationship between international law and domestic law.⁴²⁴ A very brief examination of the relevant provisions of key international and regional human rights instruments nevertheless provides further insight.

4.2.2. International Human Rights Instruments

South Africa has signed, ratified or acceded and deposited a range of international Charters, Covenants, Conventions and Protocols.⁴²⁵ In so doing, the State has committed itself to be bound by the principles contained therein and to adhere to the obligations imposed by these instruments. However, the international obligation resting on the State does not amount to an automatic incorporation of the Principles into domestic law. An examination of the wording of the relevant provisions contained in these instruments confirms that additional action, in the form of incorporation into domestic law, may be required. These instruments require State Parties to '[under]take effective [legislative and other administrative] ... measures'⁴²⁶ or 'adopt',⁴²⁷ 'undertake to adopt',⁴²⁸ or 'incorporate and adopt'⁴²⁹ measures to give effect to the rights and obligations contained the respective instruments. It is evident that the acts of ratification or accession and deposit do not automatically give binding effect to the

⁴²³ *Glenister v President of the Republic of South Africa and Others* 2011 (CCT48/10) ZACC 6; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (867/15) ZASCA 17.

⁴²⁴ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (CCT02/04) ZACC 30, para 22.

⁴²⁵ See para 4.3 below.

⁴²⁶ Article 2.1(c), 2.1(d) and 6 of the United Nations General Assembly, *International convention on the elimination of all forms of racial discrimination*, 4 January 1969, GA Res. 2106(XX), 660 U.N.T.S. 195 (1969).

Article 2.1 of the Danelius, H, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', (2008), 1645(85), *UN Audiovisual Library of International Law*, pp. 1–4.

Principle 3(a) of the *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (2013)

⁴²⁷ Article 5.1 of the United Nations General Assembly, *Convention on the Rights of the Child*, GA Res. 44/25 (1990). Preamble to the *International Covenant on Civil and Political Rights* (1996)

Article 1 of the *African Charter on Human and Peoples' Rights* (1982).

⁴²⁸ Article 6(1) SADC, *Treaty of the Southern African Development Community*, 32 ILM 116, 5 AJICL 418 (1993).

⁴²⁹ Principle 2 of the *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (2013)

principles of the relevant international human rights instrument under domestic law. At best, it creates an obligation by the state on an international level, with the consequence of sanction from the member states in the event of a breach of that obligation. A further act of domestication of international law has to occur for citizens to claim protection within South Africa's borders. This suggests a dualistic relationship between domestic law in South Africa and international law. A brief examination of the relevant provisions of the supreme law of the land, the Constitution of the Republic of South Africa, 1996 and judicial precedent provides further insight.

4.2.3. The Constitution of the Republic of South Africa, 1996

South Africa's domestic law determines how an international obligation functions within its borders. The starting point for that enquiry is the Constitution of the Republic which enjoys supremacy in the national hierarchy of norms.⁴³⁰ International law enjoys special significance in the South African legal regime.⁴³¹ For that reason, its incorporation into the domestic legal order is governed by the Constitution of the Republic and the manner of incorporation reflects a blend of monism and dualism.⁴³²

Customary international law has been incorporated into the domestic legal order in the monist tradition through an incorporation clause. Section 232 of the Constitution confers the status of national law upon customary international law.⁴³³ It therefore has direct application within the domestic domain, barring conflict with an Act of Parliament or the Constitution. In the event of conflict between customary international law and domestic law, the departure from the direct application of customary international law in South Africa is provided for within the confines of South Africa's obligations and commitment in respect of human rights, nationally and internationally.⁴³⁴

Treaty law, on the other hand, is incorporated into the domestic legal order in the dualist tradition. Section 231 of the Constitution prescribes a three step process, each with distinct legal consequences.⁴³⁵ The first step, negotiating and signing an international agreement, merely signals

⁴³⁰ Du Preez, M & Gevers, C, 'Balancing competing obligations: The Rome Statute and AU decisions', (2011), 225, *ISS Paper*, pp. 1–30.

⁴³¹ In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (2014), para 96. Ngcobo J in referred, in particular, to sections 37(4)(b)(i), 39(1)(b) and 233 of the Constitution and held that 'these provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution' and that 'particularly those [international agreements] dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.'

⁴³² Du Preez, M & Gevers, C (2011).

⁴³³ Section 232 reads, 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

⁴³⁴ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (2016), para 17.

⁴³⁵ Section 231 reads, '

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

the State's intention to be bound by the international agreement and has no binding effect on the State without further action.⁴³⁶ The second, ratification by Parliament, binds the State on an international level and creates an obligation on its part to incorporate the agreement into domestic law.⁴³⁷ The act of ratification therefore does not create rights and obligations under domestic law.⁴³⁸ The third, domesticating the international agreement by enacting it into national legislation, confers the status of national law upon the international agreement unless Parliament expressly confers a status superior to that of national law.⁴³⁹ The international agreement, therefore, has binding effect and individuals acquire rights and obligations in respect thereof. Conflict between the domesticated international agreement and national law is resolved by the rules of statutory interpretation.⁴⁴⁰

International law finds application in the interpretation of the Bill of Rights and national law.⁴⁴¹ All courts, tribunals and fora are therefore constitutionally enjoined to consider international law upon interpreting the Bill of Rights. Similarly, all courts are constitutionally bound to favour any reasonable interpretation of the legislation that is consistent with international law over any interpretation to the contrary.⁴⁴² The international and regional framework of the right of access to procedural justice will be examined next.



- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

⁴³⁶ Section 231(1)

Glenister v President of the Republic of South Africa and Others (2011), para 180.

⁴³⁷ Section 231(2)

⁴³⁸ *Glenister v President of the Republic of South Africa and Others* (2011), para 100.

⁴³⁹ *Glenister v President of the Republic of South Africa and Others* (2011), paras 181–182.

⁴⁴⁰ *Glenister v President of the Republic of South Africa and Others* (2011), para 101.

⁴⁴¹ Section 39.

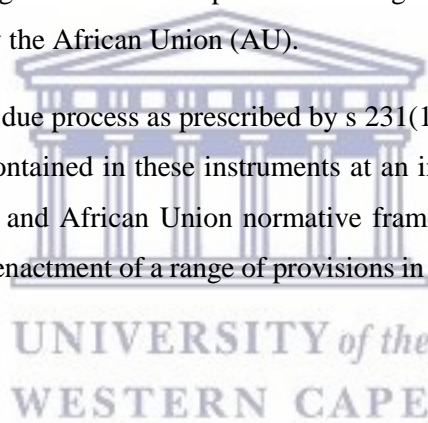
⁴⁴² Section 233 reads,

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.

4.3. HUMAN RIGHTS TREATIES AND THE RIGHT OF ACCESS TO THE COURTS AND OTHER DISPUTE RESOLUTION FORA

South Africa has ratified or acceded various United Nations conventions and protocols related to, among others, international human rights⁴⁴³, women's human rights⁴⁴⁴, children's rights⁴⁴⁵, as well as the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁴⁶ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁴⁷. The Executive has also signed, ratified and deposited a range of African Regional Conventions and Protocols,⁴⁴⁸ in particular, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Protocol of the Court of Justice of the African Union, the Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. These emerged under the auspices of the Organisation of African Unity (OAU) which has since been replaced by the African Union (AU).

The State has therefore followed due process as prescribed by s 231(1) and 231(2) of the Constitution, binding itself to the principles contained in these instruments at an international level. It has further incorporated the United Nations and African Union normative framework of access to a procedural remedy into our law through the enactment of a range of provisions in our Constitution contained in the



⁴⁴³ United Nations, *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).;

International Covenant on Civil and Political Rights(1966);

United Nations, *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302 (1976).;

United Nations, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991 (1991).

⁴⁴⁴ United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 U.N.T.S. 8 (1981); United Nations, *United Nations Convention against Transnational Organised Crime*, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2003); United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2003); United Nations, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*, G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2004).

⁴⁴⁵ United Nations General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, A/RES/54/263, U.N. Doc. CRC/C/OPAC/USA/CO/1 (2002).

⁴⁴⁶ Ratified on 10 December 1998

⁴⁴⁷ Ratified on 10 December 1998

⁴⁴⁸ Organization Of African Unity (OAU) (1982); Organization Of African Unity (OAU), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, (2004); Organization Of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, CAB/LEG/24.3, 1001 U.N.T.S. 45 (1974).

Bill of Rights, thus meeting the requirements as prescribed by s 231(4). In so doing, the State has signalled its intention to commit itself to a social contract with its citizens in which the philosophy of human rights and the promotion thereof are deeply enshrined. The right to a procedural remedy, in some form or another, forms an integral part of international human rights law. It can be found in the Universal Declaration of Human Rights (UDHR),⁴⁴⁹ International Covenant on Civil and Political Rights (ICCPR),⁴⁵⁰ African Charter on Human and Peoples' Rights (ACHPR), European Convention on Human Rights,⁴⁵¹ Revised Arab Charter on Human Rights⁴⁵² and the ASEAN Human Rights Declaration.⁴⁵³ A procedural remedy is also provided for in the International Covenant on the Elimination of All Forms of Racial Discrimination⁴⁵⁴ and the International Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment.⁴⁵⁵ Although not explicitly provided for in the Convention on the Elimination of all Forms of Discrimination against Women, the instrument nevertheless places an obligation on State Parties to ensure the protection of women against any form discrimination through competent national tribunals and other public institutions.⁴⁵⁶ Similarly, in the Convention on the Rights of the Child, States Parties are required to 'undertake all appropriate legislative, administrative and other measures' to implement the rights contained in the Convention.⁴⁵⁷

The focus of this discussion will be on the key instruments that have been ratified or acceded by the State, namely the ICCPR and the ACHPR. This will be preceded by a brief examination of the relevant part of the Universal Declaration of Human Rights.

4.3.1. The Universal Declaration of Human Rights

Although the UDHR does not have binding effect as a matter of treaty law, it forms an important context for the interpretation of, not only treaty law, but also national legislation in the country. It has its origin in the United Nations Charter.⁴⁵⁸ The civil, political, economic, social and cultural rights contained in

⁴⁴⁹ Article 10.

⁴⁵⁰ Article 14.

⁴⁵¹ Article 6.

⁴⁵² Article 13.

⁴⁵³ Article 20.

⁴⁵⁴ Article 6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

⁴⁵⁵ Article 14.1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.'

⁴⁵⁶ Article 2.

⁴⁵⁷ Article 4.

⁴⁵⁸ United Nations, *Charter of the United Nations*, 1 UNTS XVI (1945).

it were separated and incorporated into two binding treaties, namely, the ICCPR and the International Covenant on Social and Cultural Rights. The UDHR extends access to these rights to all persons,⁴⁵⁹ affords them equal protection of the law and declares everyone equal before the law.⁴⁶⁰ It provides specifically for a procedural remedy in the event of a violation of the fundamental rights entrenched in the constitution or by law.⁴⁶¹ It further enshrines the right to a procedural remedy in the right to a fair trial and extends this right to both criminal and civil matters.⁴⁶²

The UDHR has shaped international human rights law since its inception and most treaties ratified and acceded by South Africa recognise it either in their preambles or elsewhere in the body of the text.⁴⁶³ Its relevance for international human rights law is therefore uncontested. The two instruments that spear-head human rights law at an international and regional level are the ICCPR and the ACHPR. The relevant provisions of these will form the focus of discussion below.

4.3.2. The International Covenant on Civil and Political Rights

The right to equality before the courts and tribunals and the right to a fair trial are internationally considered to be the central tenets of human rights protection and it operates as the procedural means of safeguarding the rule of law.⁴⁶⁴ The ICCPR stands at the apex of the international human rights apparatus designed to protect and promote human rights. It is considered to be the benchmark for human rights standards across the world among its proponents and regarded as the principal legal instrument in the international legal order among sceptics.⁴⁶⁵ The ICCPR places an obligation on State Parties, first, to ensure that a victim of human rights violations have an effective remedy, which includes a judicial remedy in the case of civil and political rights.⁴⁶⁶ Secondly, it requires State Parties to ensure that the claims of victims are determined by a judicial, administrative, legislative or other competent

⁴⁵⁹ Article 2.

⁴⁶⁰ Article 7.

⁴⁶¹ Article 8 states that 'Everyone has the right to an effective remedy by the *competent national tribunals* (own emphasis added) for acts violating the fundamental rights granted him by the constitution or by law'.

⁴⁶² Article 10 reads, 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

⁴⁶³ See para 2.3 above.

⁴⁶⁴ HRC *General Comment no. 32* (2007), para 2.

⁴⁶⁵ Tyagi, Y, *The UN Rights Committee: Practice and procedure*, (2011) New York, USA: Cambridge University Press.

⁴⁶⁶ Article 2.3

Each State Party to the present Covenant undertakes:

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

authority⁴⁶⁷ and, thirdly, requires that competent authority to enforce such remedies.⁴⁶⁸ The ICCPR outlaws discrimination on listed and other appropriate grounds and declares, in alignment with the UDHR, everyone equal before the law and extends the protection of the law to the global citizen.⁴⁶⁹ The key provision in the ICCPR that entrenches the right to a procedural remedy reads as follows:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law...’.⁴⁷⁰

The core features of this right include equality before the courts and tribunals, a fair and public hearing and a competent, independent and impartial tribunal. These tribunals must be established by law. Each of these core features will be discussed in turn.

4.3.2.1. The right of equality before courts and tribunals

The right to equality before the courts and tribunals encompasses the right of equal access to the courts, the right to equality of arms and the right to non-discrimination. This signifies, first, that all persons, without discrimination, must be granted the right of equal access to a court or tribunal. Article 14(1) applies to both criminal and civil matters, a principle that is often overlooked by State Parties, as their reports tend to focus predominantly on criminal matters.⁴⁷¹ Charges are considered to be criminal in nature when, regardless of their classification under domestic law, they have sanctions that ‘are penal because of their purpose, character or severity’.⁴⁷² Criminal matters, therefore, do not only refer to acts declared punishable by domestic law but also to acts declared criminal under international law.

⁴⁶⁷ Article 2.3.

Each State Party to the present Covenant undertakes:

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

⁴⁶⁸ Article 2.3 Each State Party to the present Covenant undertakes:

To ensure that the competent authorities shall enforce such remedies when granted.

⁴⁶⁹ Article 26 reads, ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

⁴⁷⁰ Article 14.1.

⁴⁷¹ UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation XXX on Discrimination Against Non Citizens*, (2002) UN Committee on the Elimination of Racial Discrimination.

⁴⁷² *Perterer v Austria* 2004 (1015/2001) UN DOC CCPR/C/81/D/1015/2001 (Merits), para 9.2.

The determination of rights and obligations ‘in a suit at law’, by contrast, is more complex. Actions include ‘judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts[delict] in the area of private law’⁴⁷³ and similar actions in the area of administrative law such as ‘the determination of social security benefits’,⁴⁷⁴ ‘the pension rights of soldiers’,⁴⁷⁵ or ‘procedures regarding the use of public land’.⁴⁷⁶ The range of actions that ‘a suit at law’ encompasses under the ICCPR is left open as the HRC has directed that it may ‘cover other procedures which, however, must be accessed on a case by case basis in the light of the nature of the right in question.’⁴⁷⁷ Article 14.1 thus provides for a general right of access to the courts and tribunals irrespective of the nature of the proceedings before them, which includes administrative action.⁴⁷⁸ Moreover, this right does not apply to courts and tribunals only, but ‘must be respected whenever domestic law entrusts a judicial body with a judicial task’.⁴⁷⁹ The Human Rights Committee therefore advised that,

‘this guarantee also prohibits any distinctions regarding access to the courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds’.⁴⁸⁰

Adjudicating mechanisms that were not established by law are therefore not exempt from Article 14. Instances where an individual’s attempts to gain access to competent courts and tribunals are frustrated de jure or de facto, are considered to fall foul of the guarantee of article 14.1.⁴⁸¹ These rights are also not limited to citizens of States Parties but apply to all individuals, regardless of their nationality or statelessness.⁴⁸² The scope of application of article 14 also extends to all courts and tribunals whether ordinary, specialised, civilian or military.⁴⁸³

The awarding of cost orders, for example, may de facto prevent indigent parties from accessing justice.⁴⁸⁴ Hence, the Human Rights Committee advised that,

⁴⁷³ *Casanovas v France* 1994 (441/1990) UN DOC CCPR/C/51/D/441/1990 (Merits), para 5.2.

⁴⁷⁴ *García Pons v Spain* 1995 (454/1991) UN DOC CCPR/C/55/D/454/1991 (Merits), para 9.3.

⁴⁷⁵ *Y. L. v. Canada* 1986 (A/41/40) UN DOC 40 (112/1981).

⁴⁷⁶ *Äärelä and Näkkäläjärvi v Finland* 2001 (779/1997) UN DOC CCPR/C/73/D/779/1997 (Merits), paras 7.2-7.4.

⁴⁷⁷ HRC General Comment no. 32 (2007), para 16.

⁴⁷⁸ HRC General Comment no. 32 (2007), para 3.

⁴⁷⁹ *Perterer v Austria* (2004), para 9.2.(disciplinary proceedings against a civil servant)

Everett v Spain, Admissibility, Communication No 961/2000, UN Doc CCPR/C/81/D/961/2000, (2004), para 6.4. (extradition).

⁴⁸⁰ HRC General Comment no. 32 (2007), para 9.

⁴⁸¹ HRC General Comment no. 32 (2007).

⁴⁸² HRC General Comment no. 32 (2007).

⁴⁸³ HRC General Comment no. 32 (2007), para 22.

⁴⁸⁴ *Lindon v Australia* 1998 (646/1995) UN DOC CCPR/C/64/D/646/1995 (Admissibility), para 6.4.

‘a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them’.⁴⁸⁵

The right of access to the courts, entrenched in article 14.1, is in essence confined to procedures of first instance and is silent on the issue of appeal.⁴⁸⁶

Furthermore, this right is often linked to the prohibition on discrimination on listed grounds contained in article 26 of the ICCPR and discussed within the context of criminal proceedings.⁴⁸⁷ As a result, the second component of this feature, namely, the promise of equality between the parties, referred to as ‘equality of arms’ within the context of civil proceedings, traditionally received less attention.

The right of equal access to the courts also safeguards equality of arms between the defence and the prosecution in criminal cases and the disputing parties in a civil matter. The ICCPR requires parties, at the very least, to be treated in a manner ensuring their procedurally equal position during the course of a trial. States Parties may deviate from this principle if their domestic law allows for it. However, this deviation is subject to justification on objective and reasonable grounds which do not include ‘disadvantage or unfairness to the defendant’.⁴⁸⁸ Jurisprudence emerging from the HRC supports this view.⁴⁸⁹

Moreover, the right to equality of arms sets a pivotal benchmark for the credibility of the courts and tribunals established by law. The absence thereof, calls into question the impartiality of the tribunal, as

⁴⁸⁵ *Äärelä and Näkkäläjärvi v Finland* (2001), para 7.2.

⁴⁸⁶ *IP v Finland* 1993 (450/1991) UN DOC CCPR/C/48/D/450/1991 (Admissibility), para 6.2.

⁴⁸⁷ Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide - Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, (2014) New York, U.S.A: Office of the High Commissioner of the United Nations; Conte, A, *Legal Digest of International Fair Trial Rights*, (2012) Warsaw, Poland: OSCE Office for Democratic Institutions and Human Rights (ODIHR).

⁴⁸⁸ *Dudko v. Australia* 2007 (1347/2005) UN DOC CCPR/C/90/D/1347/2005, para 7.4.

⁴⁸⁹ *Quliyev v Azerbaijan* 2014 (1972/2010) UN DOC CCPR/C/112/D/1972/2010. The HRC ruled this to be a violation of equality of arms.

Valentin Evrezov, Vladimir Nepomnyaschikh, Vasiliy Polyakov, Valery Rybchenko v. Belarus 2014 (1999/2010) UN DOC CCPR/C/112/D/1999/2010 (Human Rights Committee).and *Oleg Volchek v. Belarus* 2014 (1991/2010) UN DOC CCPR/C/111/D/1991/2010.– The accused was not informed of the time of the hearing and the HRC ruled this to be a violation of Article 14(1).

García Bolívar v. Bolivarian Republic of Venezuela, 2014 (2085/2011) UN DOC CCPR/C/112/D/2085/2011 (Human Rights Committee).– The undue delay in paying social benefits violated article 14(1)

Dudko v. Australia (2007).

Griffiths v Australia 2014 (1973/2010) UN DOC CCPR/C/112/D/1973/2010. Extradition procedures were ruled to fall within the purview of article 14(1) of the ICCPR, in particular the right to equality which means that the principles of impartiality, fairness and equality must be respected.

the balance of power may be skewed heavily in favour of the most powerful, leaving the vulnerable at a distinct disadvantage. Various barriers to access to procedural justice impacts on the capacity of a litigant to put his/her case forward. Such inequality of arms requires that this right be extended beyond procedural(formal) equality (merely providing equal opportunity) and encompass substantive equality(equity). Accessibility often necessitates, especially in the case of vulnerable communities, a form of legal assistance, including free legal representation under certain circumstances. The right to legal representation will be discussed in Chapter 6.

4.3.2.2. Fair and public hearing

Fairness and publicity are features of article 14.1 that must be adhered to with regards to the publication of the findings as well as during the hearing. In an open and democratic society, this right is bestowed not only on the parties to the dispute but also on the general public. This right guarantees procedural fairness only, which entails ‘the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive’.⁴⁹⁰ Expediousness is a key feature of fairness of a hearing and is addressed expressly in the ICCPR in matters of a criminal nature.⁴⁹¹ However, the HRC has directed that delays in matters of a civil nature that are not justifiable by the ‘complexity of the case or the conduct of the parties’ do not sit well with article 41.1. It specifically advised that, ‘to the extent possible’, additional financial resources should be allocated to the administration of justice where lack of resources .and chronic under-funding are prevalent. Although the HRC has directed that the deviation from the key principles of a fair trial is prohibited at all times, insofar as it relates to disputes of a civil nature it appears to be subject to the available resources of the Party State.⁴⁹²

All trials, irrespective of their nature, must, as a matter of principle, be conducted orally and in public. It safeguards the transparency of the proceedings and protects the interests of the individual and broader society. It is a requirement of article 14.1 that the judgement is made public. This includes the findings, evidence as well as the legal reasoning, barring exceptions. This right may be limited under exceptional circumstances as reflected in the ensuing discussions.

4.3.2.3. Competent, independent and impartial tribunal established by law

This feature requires access to an independent authority empowered by its competence and by legislation to adjudicate the dispute in an impartial manner. There are three main considerations that

⁴⁹⁰ HRC *General Comment no. 32* (2007), para 25.

⁴⁹¹ HRC *General Comment no. 32* (2007), para 27

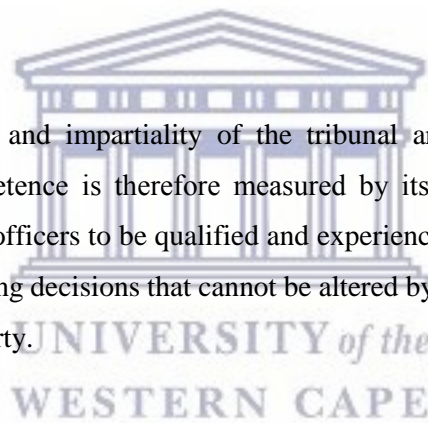
⁴⁹² UN Human Rights Committee (HRC), *General Comment NO. 29: Article 4: Derogations during a State of Emergency*, (2001) CCPR/C/21/Rev.1/Add.11 United Nations.

inform this right, namely, the tribunal must be established by law, it must be competent and it must be independent and impartial. A tribunal so established must emanate from ‘the legislature in compliance with the legal requirements for its composition’.⁴⁹³ In other words, it must be established by a regular law-making body clothed with the authority to enact statutes or an unwritten form of common law. The United Nations Human Rights Committee (HRC) advised that the concept of a tribunal

‘designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.’⁴⁹⁴

The failure on the part of a State Party to create and allow access to a tribunal so described would be a violation of article 14 unless domestic legislation expressly limits this right or, such tribunals are not necessary for the proper administration of justice, the limitation is authorised by exceptions from jurisdiction derived from international law or if the access would defeat the very substance of the right.⁴⁹⁵

The competence, independence and impartiality of the tribunal are absolute and not capable of limitation.⁴⁹⁶ A court’s competence is therefore measured by its judicial officers as well as its jurisdiction. It requires judicial officers to be qualified and experienced to act in that capacity and the tribunal must be capable of making decisions that cannot be altered by a non-judicial authority to the detriment of an individual party.



Independence refers to both the presiding officer of the tribunal insofar as it relates to his or her appointment, as well as freedom from political interference by the executive and/or to a certain degree, from the legislature.⁴⁹⁷ The judiciary must be institutionally protected from undue influence by and interference from state institutions, parties to the proceedings, as well as third parties, for example, the media.⁴⁹⁸ The independence of the tribunal is further based on the manner of appointment of presiding officers, their security of tenure, the level of protection afforded to the tribunal and its members against external influence.⁴⁹⁹ State Parties are required to take legislative measures to guarantee the

⁴⁹³ Counter-Terrorism Implementation Task Force (2014).

⁴⁹⁴ HRC *General Comment no. 32* (2007), para 18.

⁴⁹⁵ HRC *General Comment no. 32* (2007).

⁴⁹⁶ HRC *General Comment no. 32* (2007), para 19.

⁴⁹⁷ HRC *General Comment no. 32* (2007).

⁴⁹⁸ HRC *General Comment no. 32* (2007).

⁴⁹⁹ HRC *General Comment no. 32* (2007).

independence of the judiciary and to protect judicial officers from political interference.⁵⁰⁰ Legislative measures must specifically address the procedures and criteria for appointment of judicial officers, remuneration, term of office, promotion, suspension, dismissal and disciplinary sanctions.⁵⁰¹ Judicial officers may only be dismissed on the ‘grounds of incompetence and or misconduct, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law’.⁵⁰² The HRC therefore advised that a

‘... situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal’⁵⁰³

Impartiality in this context has two features. The judicial officer must exercise his/her functions with subjective impartiality, in other words, without personal bias, prejudice or preconceived perceptions about the dispute, nor should they promote the interest of one party over another.⁵⁰⁴ Secondly, it refers to whether the tribunal acts in a manner with objective impartiality, in other words, does it act in a manner that offers sufficient guarantees to exclude any legitimate doubt of impartiality.⁵⁰⁵ The tribunal must therefore be impartial in the eyes of the reasonable observer.

The sovereignty of State Parties empowers them to give recognition to courts based on customary law or religious courts, entrusting these with certain judicial responsibilities. However, State Parties have a general obligation to protect the rights of individuals guaranteed under the ICCPR when these are affected by these courts.⁵⁰⁶ They are therefore required to ensure that these courts are only authorised to hand down binding judgements once specific criteria have been met, notwithstanding the aforementioned general obligation.⁵⁰⁷ These include, judgements limited to minor civil and criminal matters, judgements that meet the fundamental criteria for a fair trial and other relevant guarantees provided for in the ICCPR.⁵⁰⁸ Such judgements must be validated by the conventional State courts

Also see United Nations Congress on the Prevention of Crime and the Treatment of Offenders, “Basic Principles on the Independence of the Judiciary”, (1985), available at: *United Nations Human Rights* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. (accessed 7 October 2016)

⁵⁰⁰ HRC *General Comment no. 32* (2007), para 19.

⁵⁰¹ *UN Human Rights Committee: Concluding Observations of the Human Rights Committee*, (1997) CCPR/C/79/Add.79 Slovakia: United Nations, para 18.

⁵⁰² HRC *General Comment no. 32* (2007), para 20.

⁵⁰³ *Oló Bahamonde v Equatorial Guinea* 1993 (468/1991) UN DOC CCPR/C/49/D/468/1991 (Merits).

⁵⁰⁴ HRC *General Comment no. 32* (2007), para 21.

⁵⁰⁵ HRC *General Comment no. 32* (2007).

⁵⁰⁶ HRC *General Comment no. 32* (2007).

⁵⁰⁷ HRC *General Comment no. 32* (2007).

⁵⁰⁸ HRC *General Comment no. 32* (2007).

applying the guarantees set out in the ICCPR.⁵⁰⁹ Parties must also be allowed to challenge these judgements in accordance with the procedural safeguards provided by article 14 of the Covenant.⁵¹⁰

4.3.2.4. Limitations of the right to a procedural remedy

Article 4(2) of the ICCPR does not confer non-derogable status on the right to a fair trial. However, the HRC has consistently regarded this right as one that may not be subjected to derogation where this would thwart the protection that non-derogable rights guarantee.⁵¹¹ Prohibitions on access to the courts and other tribunals must be based on law and justified on objective grounds. A State Party's obligation in respect of the right to a fair trial, and the right to equality as entrenched in the ICCPR, is immediate, and for the most part, absolute.⁵¹² However, certain features of the right to a fair trial are subject to limitation under exceptional circumstances. These restrictions are classified as specific, general or implied.

4.3.2.4.1. Specific limitation

The guarantee of publicity of court proceedings contained in article 14.1 of the ICCPR is expressly limited on account of national security, public order, public morals and where it is deemed necessary in a democratic society.⁵¹³ A trial may thus be closed to the media and the public. The HRC allowed a certain margin of discretion to State Parties where rights were restricted on the basis of national security, in recognition of the diversity of cultures and various jurisdictions reflected across the different continents.⁵¹⁴ However, their response to human rights violations for the purpose of national security, which has become a common feature among State Parties, has a corollary of accountability under the ICCPR. A restriction of this right, therefore, cannot simply be applied on an arbitrary basis. It must comply with the principles of an open and democratic society, so that the arbitrariness of closing trials to the public is curtailed. Therefore, even where the derogation from article 14 is permissible, there has to be adherence to the fundamental requirements of a fair trial.

The publication of judgements is also restricted. However, this limitation is narrowly defined and relates only to matrimonial disputes, the guardianship of children and where it is required by the interest of juveniles.

⁵⁰⁹ HRC *General Comment no. 32* (2007).

⁵¹⁰ HRC *General Comment no. 32* (2007).

⁵¹¹ Counter-Terrorism Implementation Task Force (2014) p. 8.

⁵¹² HRC *General Comment no. 32* (2007).

⁵¹³ Article 14.1

‘...when the interest of private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice;...’.

⁵¹⁴ Tyagi, Y (2011) p. 654–657.

4.3.2.4.2. General limitation

Article 5.1 of the ICCPR contains a general limitation on the rights contained in it. This general restriction is intended to serve as protection against the misinterpretation and misuse of any provision of the ICCPR by both State and non-State entities.⁵¹⁵ This article has been acknowledged for its clear purpose but the formulation thereof has received criticism for its vagueness. Concern has been expressed that this vagueness allows for a wide interpretation by States Parties which would enable them to restrict almost every right in the ICCPR. States Parties therefore have a margin of discretion in the interpretation and application of this article which limits the discretion of the HRC.

4.3.2.4.3. Implied limitations

The sovereignty of a state implies that it has an inherent right to regulate the rights of those within its borders. However, the margin of discretion of States Parties to limit the right to a fair trial is narrower under implied than specific limitations.⁵¹⁶ Various implied restrictions on the right to a fair trial have emerged in practice. These relate to the use of language, duration of proceedings and summoning of witnesses.⁵¹⁷ The margin of discretion of States Parties is narrower under implied restrictions than specific restrictions. Implied restrictions must adhere to substantive and procedural fairness and are subject to oversight by the HRC.⁵¹⁸

Although article 14 is not included in the list of non-derogable rights of the ICCPR, where such derogation occurs, in particular in the case of public emergencies, the State Parties are required to ensure that it does not 'exceed those strictly required by the exigencies of the actual situation'.⁵¹⁹ The interpretation of the ICCPR can therefore not be left to the sole discretion of the domestic law of the States Parties.⁵²⁰ This article contains guarantees that State Parties are obliged to respect, irrespective of their legal traditions and/or domestic law.

Article 14 is regarded as manifestly complex in nature as it combines the various guarantees contained in it with the different scopes of application.⁵²¹ It would therefore appear that '(i)n the body of the

⁵¹⁵ Tyagi, Y (2011).

⁵¹⁶ Tyagi, Y (2011).

⁵¹⁷ Tyagi, Y (2011) p. 667.

⁵¹⁸ Tyagi, Y (2011).

⁵¹⁹ HRC *General Comment no. 32* (2007), para 1.

⁵²⁰ HRC *General Comment no. 32* (2007).

⁵²¹ HRC *General Comment no. 32* (2007), para 3.

ICCPR, rights constitute the visible tip above, and restrictions form the invisible mass below'.⁵²² In the current international environment with refugee crises and terrorist attacks abound, the 'age of rights' at a normative level has its corollary in the 'age of restrictions' in State practice.⁵²³

Article 40 of the ICCPR requires States Parties to submit reports to the United Nations Secretary-General on the measures that they have adopted to give effect to the rights contained in the Covenant.⁵²⁴ South Africa took 14 years to submit its initial report,⁵²⁵ an action that did not escape mention by the United Nations Human Rights Committee (HRC), the committee that monitors the implementation of the ICCPR by its States Parties.⁵²⁶ South Africa's report on article 14 in particular and the HRC's concluding comments will be considered next.

4.3.2.5. Initial reports of States parties due in 2000: South Africa⁵²⁷

In respect of articles 14 and 26 of the ICCPR, the Report makes mention of the constitutional guarantees of access to procedural justice contained in section 9(1)⁵²⁸ and section 34⁵²⁹ of the Constitution. The Report states that this 'guarantee is available for all within the Republic including refugees, asylum seekers and all foreigners lawfully within the Republic'.⁵³⁰ This claim is indeed correct in theory, as the barriers to access to justice preclude the majority of citizens from making these constitutional guarantees a reality. In the Report the State acknowledges the challenges to procedural justice, in particular, the lack of access to procedural justice for persons of colour, the complexity of the legal system and the prohibitive cost of litigation.⁵³¹

The Report highlights the various measures taken to ensure access to justice for those within its borders, such as the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) and various small claims courts as well as the drafting of the Traditional Courts Bill. These measures are

⁵²² Movchan, AP, *Human rights and international relations*, (1988) Moscow, Russia: Progress Publishers.

⁵²³ Tyagi, Y (2011) p. 681.

⁵²⁴ Article 40.

The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
Within one year of the entry into force of the present Covenant for the States Parties concerned;
Thereafter whenever the Committee so requests.

⁵²⁵ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant, Initial reports of States parties due in 2000*, (2015) South Africa.

⁵²⁶ UN Human Rights Committee (HRC), *Concluding observations on the initial report of South Africa*, (2016) CCPR/C/ZAF/CO/1, para 2.

⁵²⁷ UN Human Rights Committee (HRC) 2015.

⁵²⁸ This section guarantees equality before the law.

⁵²⁹ This section guarantees the right of access to the courts and other dispute resolution fora.

⁵³⁰ At para 156.

⁵³¹ At paras 157-158.

indeed commendable. In reality, the original Traditional Courts Bill has lapsed at the time and barriers to access are prevalent in all dispute resolution fora in the country.⁵³² The State further acknowledged the human and infrastructure challenges with the small claims courts and advises that it has formulated a National Action Plan to re-engineer these courts.⁵³³ The report did not provide further detail on the intended measures in this National Action Plan and how they will assist in bridging the gap between the law and the people, other than ‘ensuring that Small Claims Courts systems are accessible, inexpensive and understandable by all’.⁵³⁴

Specific reference is made of Justice Vision 2000 and its vision for a transformed justice system and the Report claims that there are measures underway to bridge the gap between the law and the people. These measures include a ‘cost-effective and equitable framework for state legal aid’, which will be discussed in Chapter 4 and ‘increased access to lawyers’, which will be discussed in Chapter 5.⁵³⁵ These measures are in essence justice sector focused and lawyer-centred. No mention is made of paralegals or community-based advice offices and how the State can include these to assist with making the law more accessible to the marginalised and the poor. The Report further focused on a fair and public hearing in criminal matters and the impartiality of the judicial officers.

The HRC, in its concluding observations, did not make mention of the above aspects of South Africa’s initial report. However, it advised that the State ‘tak(es) measures to give full legal effect to the Covenant under domestic law’ and make ‘more vigorous efforts to raise awareness about the Covenant and the Optional Protocol among judges, lawyers, prosecutors and the public at large’.⁵³⁶ It further advised the State to ensure that persons whose rights guaranteed by the Covenant have been violated, have access to an effective remedy under domestic law. In other words, they should have, at the very least, access to a procedural remedy.⁵³⁷ The extent to which there will be adherence to these directives is unclear as the HRC raised concern about the State’s non-compliance with domestic court decisions with specific reference to the Al Bashir debacle.⁵³⁸

⁵³² See the discussions in Chapter 7.

⁵³³ At para 159.

⁵³⁴ At para 159.

⁵³⁵ At para 157.

⁵³⁶ At para 7.

⁵³⁷ At para 7.

⁵³⁸ At para 8.

4.3.3. The African Charter on Human and People's Rights

The ACHPR is similar to other instruments in existence in Europe⁵³⁹ and the Americas⁵⁴⁰ and is at the heart of the human rights system on the African continent. South Africa has qualified its accession of the Charter with the reservation that the African Charter aligns itself to the United Nations resolutions regarding the characterization of Zionism. The ACHPR contains a range of universal civil and political rights,⁵⁴¹ economic, social and cultural rights⁵⁴² and duties.⁵⁴³

The right to a procedural remedy is not expressly provided for in the African Charter on Human and People's Rights. However, this Charter requires Member States to 'undertake to adopt legislative or other measures to give effect' to the rights, duties and freedoms contained in it.⁵⁴⁴ It imposes a general obligation on States Parties to recognise these rights and failure to adopt measures to give effect to them constitutes a violation of article 1 of the Charter.⁵⁴⁵ In fact, the African Commission on Human and People's Rights has stated emphatically that a finding of a violation of *any* of the rights in the ACHPR constitutes a violation of article 1 thereof.⁵⁴⁶



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⁵³⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

⁵⁴⁰ *American Convention on Human Rights "Pact of San Jose"* (1970)

⁵⁴¹ Right to freedom from discrimination (articles 2 and 18(3))

Right to equality (article 3)

Right to dignity (article 5)

Right to freedom from slavery (article 5)

Right to freedom from cruel, inhuman or degrading treatment or punishment (article 5)

Rights to due process concerning arrest and detention (article 6)

Right to a fair trial (article 7 and 25)

Right to freedom of religion (article 8)

Right to freedom of information and expression (article 9)

Right to freedom of association (article 10)

Right to freedom of assembly (article 11)

Right to freedom of movement (article 12)

Right to freedom of political participation (article 14)

Right to property (article 14).

⁵⁴² Right to work (article 15)

Right to health (article 16)

Right to education (article 17)

Right to life (article 4)

Right to development (article 22)

⁵⁴³ Article 29.

⁵⁴⁴ Article 1.

⁵⁴⁵ *Jawara v The Gambia, Communications 2000 AHRLR 107 (ACHPR 2000) 147/95 and 149/96*, para 46.

⁵⁴⁶ *Kenneth Good v Republic of Botswana 2010 (313/05) AHRLR 43 (ACHPR 2010)*, para 242; *Gunme and Others v Cameroon 2009 (266/03) AHRLR 9 (ACHPR 2009)*, para 213. (own emphasis added).

The ACHPR expressly guarantees the enjoyment of the rights contained in it by every individual without distinction.⁵⁴⁷ This is a fundamental principle in international human rights law. The criteria for determining whether this guarantee has been violated have been developed in international jurisprudence.⁵⁴⁸

The Charter furthermore expressly guarantees the right to equality before the law⁵⁴⁹ and equal protection of the law.⁵⁵⁰ It enshrines the right to have access to ‘competent national organs’ in the event of a violation of a fundamental right recognised by law.⁵⁵¹ The Charter also places an obligation on Member States to guarantee judicial independence and to ‘allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter’⁵⁵². The African Commission on Human and Peoples’ Rights (African Commission) highlights the interconnectedness of Article 7 and 26, stating:

‘... While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual’s right against the abuses of State power.’⁵⁵³

Both these articles constitute ‘the source of the guarantee of sound justice’ and give rise to two types of obligations, namely, access to ‘appropriate justice’ and ‘independence of justice’.⁵⁵⁴ These two obligations are regarded as the ‘bedrock of a sound justice delivery system’.⁵⁵⁵ The African Commission also considers the right to a fair trial to be the corollary of the right to appropriate justice and as a consequence, it is imperative that one’s case be heard by an efficient and impartial court.⁵⁵⁶

⁵⁴⁷ Article 2 reads, ‘(e)very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status’.

⁵⁴⁸ The criteria include the following:

equal cases are treated in a different manner;

a difference in treatment does not have an objective and reasonable justification; and

if there is no proportionality between the aim sought and the means employed.

⁵⁴⁹ Article 3(1).

⁵⁵⁰ Article 3(2).

⁵⁵¹ Article 7.

⁵⁵² Article 26.

⁵⁵³ *Avocats Sans Frontières (on Behalf of Gaëtan Bwampamye) v Burundi* 2000 (231/99). in African Commission on Human and Peoples’ Rights, *14th Annual Activity Report*, (2001) Addis Ababa, Ethiopia.

⁵⁵⁴ *Wetsh’okonda Koso and Others v Democratic Republic of the Congo* 2008 (281/2003) AHRLR 93 (ACHPR 2008), para 76.

⁵⁵⁵ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* 2013 (323/06) IHRL 3805, para 195. in African Commission on Human and Peoples’ Rights, *29th Annual Activity Report*, (2011) Addis Ababa, Ethiopia.

⁵⁵⁶ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013).

The right to a procedural remedy is vaguely enshrined in the right to a fair trial which is expressed in broad terms in the ACHPR. Article 7(1) reads;

(e) every individual shall have the right to have his cause heard.

This comprises the right to:

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

The State's obligation under the ACHPR is absolute and immediate and this right, like all rights in the ACHPR, is regarded as non-derogable.⁵⁵⁷

The 'right to have his cause heard' in essence constitutes a general guarantee to a hearing and for access to the courts and tribunals established by statute or the common law for every individual, regardless of the nature of the proceedings.⁵⁵⁸ This right grants individuals 'unfettered access to a tribunal with competent jurisdiction to hear the case'.⁵⁵⁹ Mass expulsions following arrest and detention without having recourse to the courts, for example, constitute a violation of this guarantee.⁵⁶⁰ The African Commission noted that the scope of article 7 is not limited to the protection of the rights of arrested and detained persons only, to the contrary, it extends to every individual the right to approach the relevant and competent judicial bodies for adequate relief.⁵⁶¹ The Commission therefore stated that, '[i]f there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard'.⁵⁶² Where an individual is not precluded from accessing the courts but the jurisdiction of the courts to hear the matter is ousted, the right to access the courts is considered to be illusory and constitutes a violation of article 7.⁵⁶³

⁵⁵⁷ Sieghart, P, *The International Law of Human Rights*, (1983) Oxford: Clarendon Press.
Commission nationale des droits de l'Homme et des libertés / Chad, Communication No. 74/92, (1995). in African Commission on Human and Peoples' Rights, 9th Annual Activity Report, (1996).

⁵⁵⁸ *Kenneth Good v Republic of Botswana* (2010), para 171.

Rencontre africaine pour la défense des droits de l'Homme (RADDHO) / Zambia, Communication No. 71/92, (1997).
Zimbabwe Human Rights NGO Forum v Zimbabwe 2006 (245/2002) AHRLR 128 (ACHPR 2006).

⁵⁵⁹ *Kenneth Good v Republic of Botswana* (2010), para 170.

⁵⁶⁰ *Rencontre africaine pour la défense des droits de l'Homme (RADDHO) / Zambia, Communication No. 71/92* (1997).

⁵⁶¹ *Kenneth Good v Republic of Botswana* (2010).

⁵⁶² *Kenneth Good v Republic of Botswana* (2010), para 171.

⁵⁶³ *Kenneth Good v Republic of Botswana* (2010), para 180.

Article 7 further includes the right of an accused to be presumed innocent, have legal representation and to have the trial concluded within a reasonable time. Article 7 confines the right to legal representation to criminal matters only, fails to adequately guarantee the core feature of access to procedural justice, namely, the right to a fair hearing, and does not address the right to a public hearing at all. It thus falls short of the international standards on a fair trial as expressed in the ICCPR and its European and American counterparts.

It further outlaws the retrospective effect of the Charter, confining the application thereof to offences committed after it came into effect.⁵⁶⁴ However, the jurisprudence from the African Commission suggests otherwise. It held that,

‘violations that occurred prior to the entry into force of the Charter shall be deemed to be within the jurisdiction *ratione temporis* of the Commission, if they continue, after the entry into force of the Charter’.⁵⁶⁵

The African Commission relied on international precedent to refine this right and to bring it in line with international human rights standards.⁵⁶⁶ It thus expressed the following view,

‘Neither the African Commission nor the Commission’s Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples’ rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aid General Comment 13 of the UN Human Rights Committee on the right to a fair trial.’⁵⁶⁷

In spite of the parsimony that characterised the right to a fair trial in the ACHPR, the African Commission, from the outset, thus measured the right to a fair trial according to international human rights standards. In doing so, it considered objective criteria such as the right to equal treatment before

⁵⁶⁴ Article 7.2.

⁵⁶⁵ *Gunme and Others v Cameroon* (2009), para 96.

⁵⁶⁶ *Media Rights Agenda and Others v Nigeria* 2000 (231/99) AHRLR 200 (ACHPR 1998) 105/93, 128/94, 130/94, 152/96, para 66 in; African Commission on Human and Peoples’ Rights 2001 African Commission on Human and Peoples’ Rights (2001).

⁵⁶⁷ *Media Rights Agenda and Others v Nigeria* (2000), para 66.

the law, the right to legal representation where the interest of justice requires it and stressed the importance of adherence to and conformity with international human rights standards.⁵⁶⁸ In one of its earliest resolutions, it bolstered the right to a fair trial as contained in the ACHPR by laying down specific guidelines.⁵⁶⁹ The guidelines addressed core features such as access to and equality before the courts, regardless of the nature of the proceedings, and due process in criminal matters, which will be discussed below.

Prior to the adoption of the abovementioned guidelines the African Commission provided useful guidelines on the independence of presiding officers by adopting the Resolution on the Respect and the Strengthening of the Independence of the Judiciary.⁵⁷⁰ In its preamble this Resolution recognised justice as an integral part of human rights and a necessary condition for democracy. The Resolution called upon State Parties to abolish all legislation that conflicts with the independence of the judiciary and to incorporate international standards of judicial independence into domestic legal systems.⁵⁷¹ This relates in particular, to the appointment of judges, the provision of adequate resources to perform their duties, decent living and working conditions, security of tenure and to refrain from measures that could threaten the independence of judges and magistrates.⁵⁷²

The African Commission adopted the most significant resolution related to procedural justice, namely, the Resolution on the Right to a Fair Trial and Legal Assistance in Africa.⁵⁷³ This Resolution formally adopted the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration). It provided the Working Group on Fair Trial with a mandate to prepare draft principles and guidelines on a fair trial and legal assistance under the African Charter. As a consequence, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The African Principles and Guidelines) were developed and subsequently adopted at the African Union Heads of State and Government Summit in Maputo, Mozambique in August 2012. The African Principles and Guidelines is regarded as part of a body of soft law. However, having been adopted by the Heads of State of the African Union renders it with significant influence and the African Commission has relied on these Principles in a number of cases related to a violation of articles 7 and 26 of the ACHPR since its adoption, albeit within the context of criminal proceedings.⁵⁷⁴

⁵⁶⁸ *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* (2000).

⁵⁶⁹ African Commission on Human and Peoples' Rights, *Resolution on the Right to Recourse and Fair Trial*, (1992).

⁵⁷⁰ African Commission on Human and Peoples' Rights, *Resolution on the Respect and the Strengthening on the Independence of the Judiciary*, ACHPR/Res.21(XIX)96 (1996).

⁵⁷¹ ACHPR/Res.21(XIX)96 (1996), para 1

⁵⁷² ACHPR/Res.21(XIX)96 (1996).

⁵⁷³ African Commission on Human and Peoples' Rights, *Resolution on the Right to Fair Trial and Legal Aid in Africa*, ACHPR/Res.41(XXVI)99 (1999).

⁵⁷⁴ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013).

The African Principles and Guidelines contains general principles applicable to all legal proceedings, be it criminal, civil, administrative or military.⁵⁷⁵ The right to an effective remedy is expressly provided for by the Principles.⁵⁷⁶ It guarantees the right to an effective remedy by ‘competent national tribunals’ in the event of a violation of rights guaranteed by domestic law or the Charter,⁵⁷⁷ which includes, among others, the right of access to justice.⁵⁷⁸ It imposes an obligation on State Parties to ensure that any individual whose rights have been violated has an effective remedy,⁵⁷⁹ the violation shall be determined by ‘competent, judicial, administrative and legislative authorities,⁵⁸⁰ ‘enforced by competent authorities’⁵⁸¹ and obeyed by organs of state against whom a judicial order has been granted.⁵⁸² It expressly states that the granting of amnesty to perpetrators of human rights violations constitutes a violation of the right to an effective remedy.⁵⁸³

Principle A of The African Principles and Guidelines provides extensive detail on the right to a fair and public hearing⁵⁸⁴ before an independent and impartial tribunal.⁵⁸⁵ These core features of the right to a fair trial will be addressed below.

4.3.3.1. Fair hearing

The Resolution on the Right to a Fair Trial and Legal Assistance in Africa requires that all persons have access to procedural justice without discrimination regardless of the nature of the proceedings.⁵⁸⁶ The African Principles and Guidelines therefore expressly grants individuals the right to a fair and public hearing.



The African Commission directed the respondent state to, among others, ‘harmonize the State Security Emergency Laws with a view to bringing it in conformity with the Charter and other international legislations and regional norms and standards’ (at para 233(b)V)

Working Group on Strategic Legal Cases v. Democratic Republic of Congo 2015 (259/02) (ACHPR 2015). -

The African Commission relied on what it called the Directives and Principles on the Right to a Fair Trial and Judicial Assistance in Africa (2001), in support of articles 7(1)(a) and (c) of the ACHPR at paras 75, 81 and 82. These Directives are the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo 2013 (274/03) ACHPR 28. -

The African Commission invoked the African Principles in support of articles 6, 7(2), 7(1)(a), (c) and (d) of the ACHPR, paras 66, 69, 70, 77, 79 and 80.

⁵⁷⁵ Principle A.2.(a).

⁵⁷⁶ Principle C.

⁵⁷⁷ Principle C(a).

⁵⁷⁸ Principle C(b)1.

⁵⁷⁹ Principle C(c)1.

⁵⁸⁰ Principle C(c)2.

⁵⁸¹ Principle C(c)3.

⁵⁸² Principle C(c)4.

⁵⁸³ Principle C(d).

⁵⁸⁴ Principle A. 1-3.

⁵⁸⁵ Principle A. 4-5.

⁵⁸⁶ Principle 2 (a) All persons shall have their course heard and shall be equal before the courts and tribunals in the determination of their rights and obligations.

The elements that make up the notion of a fair hearing under the ACHPR are clearly identified in Principle A of The African Principles and Guidelines. Respect for the inherent human dignity of participants in the proceedings, especially women, forms an inherent part of this right. The key elements to a fair hearing are equality of access and due process. The principle of equality of access is ensured when all persons have equal access to adjudicating mechanisms and are regarded as equal before the judicial body without distinction on listed and other grounds.⁵⁸⁷ The grounds listed in the Principles are therefore non-exhaustive.⁵⁸⁸ The Principles expressly requires equality of arms between the parties to the proceedings, regardless of the nature of the proceedings before it.⁵⁸⁹ The Principles recognises that equality of arms may require some form of representation at any stage of the proceedings and makes express provision for it.⁵⁹⁰

It further recognises that poverty and language may present a barrier to meaningful participation in the proceedings and provides for the right to an interpreter as well as free legal assistance for indigent parties in both criminal and civil matters if the interest of justice so require.⁵⁹¹

The right to a fair hearing also denotes procedural fairness. The Principles requires that a party to the proceedings be given adequate time to prepare their case and lead and challenge evidence⁵⁹² and that the final decision of the judicial organ be made without undue influence⁵⁹³ and expeditiously, detailing the reasons for the decision.⁵⁹⁴ Express provision is made for the right of appeal to a higher judicial body, which applies to both criminal and civil matters.⁵⁹⁵ Jurisprudence from the African Commission renders this right a fundamental component of the right to a fair trial.⁵⁹⁶

⁵⁸⁷ Principle 2.(b) and (c).

⁵⁸⁸ *Gunme and Others v Cameroon* (2009), para 121.

⁵⁸⁹ Principle A.2.(a).

⁵⁹⁰ Principle A.2.(f).

Principle G. (a) – (c).

⁵⁹¹ Principle H (a) – (k).

⁵⁹² Principle A.2.(e).

⁵⁹³ Principle A.2.(h).

⁵⁹⁴ Principle A.2.(i).

⁵⁹⁵ Principle A.2.(j).

⁵⁹⁶ *Working Group on Strategic Legal Cases v. Democratic Republic of Congo* (2015).

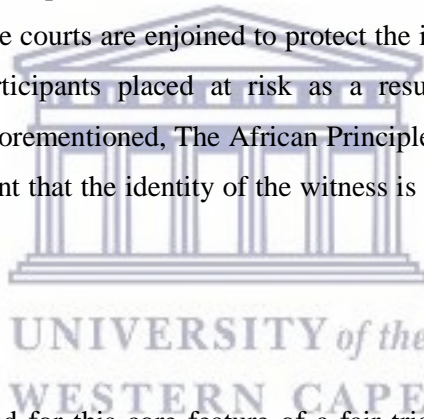
Women's Legal Aid Center (on Behalf of Moto) v. Tanzania Communication 2004 RADH 120 (ACHPR 2004) 243/2001, para 47.

International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on Behalf of Ken Saro-Wiwa Jnr.) v Nigeria 2000 RADH 217 (ACHPR 2000) 137/94, 139/94, 154/96, 161/97, para 88. 91-93. in African Commission on Human and Peoples' Rights, 12th Annual Activity Report, (1999) Algiers, Algeria.

4.3.3.2. Public hearing

Although neither the ACHPR nor the Resolution on the Right to Recourse Procedure and Fair Trial provides for the right to a public hearing, the African Commission relied on international precedent and ruled that all trials should be public and that a limitation on the publicity of trials be allowed only under exceptional circumstances.⁵⁹⁷

The African Principles and Guidelines now expressly provides for a public hearing as well as the publication of the findings following the judicial proceedings.⁵⁹⁸ Where the authorities failed to provide the plaintiffs with a copy of the judgment of a military tribunal that presided over a criminal matter, the African Commission ruled it to be in violation of this core feature.⁵⁹⁹ Detail regarding the sitting of the judicial organs and the venue where proceedings will be conducted must be publicised.⁶⁰⁰ State Parties are also required to provide adequate facilities for public attendance and may not place limitations on the categories of persons that may attend the proceedings.⁶⁰¹ The public and the media may only be excluded from hearings under exceptional circumstances.⁶⁰² The limitation on public attendance mirrors that of the ICCPR and the courts are enjoined to protect the identity and dignity of victims of sexual violence as well as participants placed at risk as a result of their participation in the proceedings.⁶⁰³ In spite of the aforementioned, The African Principles and Guidelines does not allow anonymous witnesses to the extent that the identity of the witness is concealed from both the defence and the presiding officer.⁶⁰⁴



4.3.3.3. Independent tribunal

Extensive guidelines are provided for this core feature of a fair trial in The African Principles and Guidelines.⁶⁰⁵ The independence of both the judicial organ as well as the judicial officers is regarded as imperative. The tribunal is regarded as independent if it is established by law,⁶⁰⁶ guaranteed by the

⁵⁹⁷ *Media Rights Agenda and Others v Nigeria* (2000) p. 293.

⁵⁹⁸ Principle A.3.

⁵⁹⁹ *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (2008).

⁶⁰⁰ Principle A.3.(a).

⁶⁰¹ Principle A.3.(c). and (d).

⁶⁰² These include:

In the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence (Principle A.3.(f).1.)

For reasons of public order or national security in an open and democratic society that respects human rights and the rule of law. (Principle A.3.(f).2.).

⁶⁰³ Principle A.3.(g).

⁶⁰⁴ Principle A.3.(i).

⁶⁰⁵ Principle A.4.(a). – (v).

⁶⁰⁶ Principle A.4.(b).

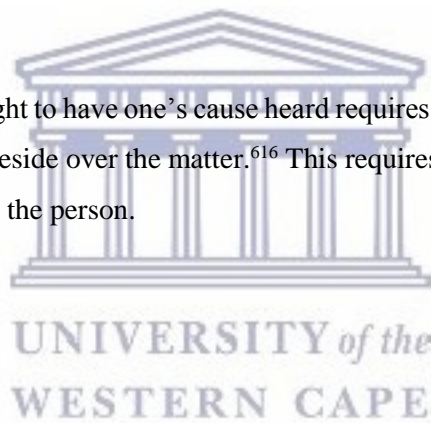
constitution and the domestic legal order,⁶⁰⁷ independent from the executive,⁶⁰⁸ respected by the State and its agencies⁶⁰⁹ and free from inappropriate and unwarranted interference.⁶¹⁰ Military tribunals are not allowed to oust the jurisdiction of the courts so established.⁶¹¹

The judiciary is granted exclusive authority to determine the justiciability of a matter.⁶¹² Specific guidelines are prescribed for the appointment, training, security of tenure, remuneration, term of office and disciplinary and other conditions of service.⁶¹³ States are required to provide adequate resources to enable the courts and tribunals to perform their functions.⁶¹⁴

It is furthermore equally important for the tribunal to be competent. The African Commission held that the

‘... definition of the word ‘competence’ is particularly sensitive since ... depriving courts of qualified staff to guarantee their impartiality, infringes on the right to have one’s cause heard by competent organs... constitutes a violation of articles 7(1) (d) and 26 of the Charter.’⁶¹⁵

It has consistently held that the right to have one’s cause heard requires that the matter be brought before a tribunal authorised by law to preside over the matter.⁶¹⁶ This requires the tribunal to have jurisdiction over the subject matter as well as the person.



⁶⁰⁷ Principle A.4.(a).

⁶⁰⁸ Principle A.4.(g).

⁶⁰⁹ Principle A.4.(a).

⁶¹⁰ Principle A.4.(f).

⁶¹¹ *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (2008); *Gunme and Others v Cameroon* (2009); *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013), paras 195–200., 10th Extraordinary Session) paras 195 – 200.

⁶¹² Principle A.4.(c).

⁶¹³ Principle A.4.(h) – (v).

⁶¹⁴ Principle A.4.(v).

⁶¹⁵ *Amnesty International and Others v. Sudan, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93* (1999). 1999 AHRLR 297 (ACHPR 1999) 48/90, 50/91, 52/91, 89/93.

⁶¹⁶ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe* 2009 (284/2003) AHRLR 235 (ACHPR 2003).

Zimbabwe Lawyers for Human Rights (on Behalf of Meldrum) v Republic of Zimbabwe 2009 (284/04) AHRLR 235 (ACHPR 2009), paras 103–108.

Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. The Sudan 2009 (279/03-296) (ACHPR 2009), paras 180–185.

Kenneth Good v Republic of Botswana (2010).

4.3.3.4. Impartial tribunal

A tribunal is considered to be impartial if it bases its decision solely on the evidence presented before it without undue influence, direct or indirect, from any quarter.⁶¹⁷ Parties to the proceedings are empowered to challenge the impartiality of the judicial body where it can be established that the tribunal or presiding officer's fairness appears to be in doubt.⁶¹⁸ Three relevant facts determine the impartiality of the judicial body⁶¹⁹ and the Principles lists specific instances where the judicial officer would be required to step down.⁶²⁰

Military tribunals are required to be just, fair and impartial and where such tribunals preside over offences that fall within the jurisdiction of the normal courts, it would constitute a violation of Article 7.⁶²¹

A substantial vacuum in the regional legislative framework with regards to the right to a procedural remedy has been filled by these Principles. Article 62 of the ACHPR requires States Parties to submit reports every two years on the measures that they have adopted to give effect to the rights contained in the Charter.⁶²² As with the reports to the United Nations on the measures taken to implement the ICCPR, the reports to the African Union on the measures taken to implement the ACHPR, were equally sparse. The first periodic report was submitted in 2005 and the second in 2015. However, this must be viewed against the backdrop of a general failure of African countries to submit these reports and the fact that the record shows that South Africa is one of only eight (8) countries that are up to date with their reports to the African Union.⁶²³

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⁶¹⁷ Principle A.5.(a).

⁶¹⁸ Principle A.5.(b).

⁶¹⁹ Principle A.5.(c). 'The impartiality of a judicial body could be determined on the basis of three relevant facts: that the position of the judicial officer allows him or her to play a crucial role in the proceedings; the judicial officer may have expressed an opinion which would influence the decision-making ; the judicial official would have to rule on an action taken in a prior capacity'.

⁶²⁰ Principle A.5.(d). 'The impartiality of a judicial body would be undermined when:

a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;

a judicial official secretly participated in the investigation of a case;

a judicial official has some connection with the case or a party to the case;

a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down'.

⁶²¹ *Gunme and Others v Cameroon* (2009); *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013).

⁶²² 'Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.'

⁶²³ See the States Reporting Map African Commission on Human and Peoples' Rights, "State Reports and Concluding Observations", (2017), available at: <http://www.achpr.org/states/reports-and-concluding-observations/>. (accessed 5 May 2017).

In its reply to the First Periodic Report, the African Commission on Human and Peoples' Rights expressed concern over the fact that South Africa's Report was submitted almost four (4) years after it was drafted and that most of the information was outdated by the time that the Commission examined it.⁶²⁴ This study will therefore only consider the Second Periodic Report and the concluding observations and recommendations by the African Commission on the First Periodic Report as the concluding observations on the Second Periodic Report are not available yet.⁶²⁵

4.3.4. The African Commission's concluding observations and recommendations on the First Periodic Report of the Republic of South Africa

The concluding observations of the African Commission did not specifically address articles 7 and 26 of the ACHPR although there are generic aspects raised that relate to the rights contained in the Charter in general. The African Commission praised South Africa for, among others, its legal reforms and for the fact that in some instances, the rights guaranteed in the Constitution of the Republic of South Africa exceed those contained in the ACHPR.⁶²⁶ It nevertheless raised concerns over the outdated Report submitted by the State⁶²⁷ and the one-sided nature of the Report.⁶²⁸ It mentions in particular, the lack of State involvement in promoting civil, political and socio-economic rights, the lack of civil society participation in the preparation of the Report, the failure to share the Report with all sectors of society thus failing to solicit their contribution and response⁶²⁹ and the lack of awareness of the ACHPR among the South African public.⁶³⁰ It further expressed concern over the Report's emphasis on legislative measures taken to ensure compliance with particular aspects of the ACHPR without indicating how these measures contributed to enhancing the rights of the persons in the country.⁶³¹

The Commission therefore recommended, among others, that the State collaborates and interacts with civil society organisations and the international community for the effective implementation of the country's National Plan of Action on Human Rights, escalates its efforts to implement the ACHPR and raise awareness and understanding of it among the population.⁶³²

⁶²⁴ At para 16.

⁶²⁵ Submitted 1st of February 2016 and considered at the 58th Ordinary Session of the African Commission on Human and Peoples' Rights but concluding comments have not been reported on yet.

⁶²⁶ The African Commission specifically mentions the right to sports and leisure but made no further reference to other instances. (para 14).

⁶²⁷ At para 16.

⁶²⁸ At para 17.

⁶²⁹ At para 17.

⁶³⁰ At para 17.

⁶³¹ At para 18.

⁶³² At para 26-28.

4.3.5. The Second Periodic Report under the African Charter on Human and People's Rights

The Second Periodic Report was not only a combination of the third, fourth, fifth and sixth reports⁶³³ but was also merged with the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa. The State acknowledged the delay in the Report⁶³⁴ and mentioned that an 'Inter-departmental Committee has been established to ensure enhanced compliance with treaty and reporting obligations'.⁶³⁵ It specifically addresses the above recommendations made by the African Commission in the First Periodic Report. The Report noted that the State has solicited the views of national institutions on human rights and civil society organisations and incorporated these where appropriate.⁶³⁶ However, unlike the State's Report under Article 40 of the ICCPR, no shadow reports accompanied this Second Periodic Report to the African Union and no further clarity was provided on the nature and extent of the consultation process with civil society.

The Second Periodic Report specifically addresses article 2 and 3 of the ACHPR.⁶³⁷ The State responded to the recommendations made by the African Commission following the First Periodic Report by not only focusing on the legislative framework⁶³⁸ but also the institutions, infrastructure⁶³⁹ and strategic measures aimed at implementing the principles of the Charter.⁶⁴⁰ It further proceeded to use statistical evidence in support of the Report.⁶⁴¹

The State first highlighted the prominence of the equality clause in the Constitution of the Republic of South Africa.⁶⁴² It further proceeded to emphasise a number of statutes that are intended to give effect to the right to equality and non-discrimination under the domestic legal order, in particular, the Employment Equity Act,⁶⁴³ Civil Unions Act,⁶⁴⁴ and the Promotion of Equality and the Prevention of Unfair Discrimination Act.⁶⁴⁵ Reference is also made to proposed legislative measures to prevent and

⁶³³ At para 3.

⁶³⁴ At para 5.

⁶³⁵ At para 7.

⁶³⁶ At para 4.

⁶³⁷ Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

Every individual shall be equal before the law.

Every individual shall be entitled to equal protection of the law.

⁶³⁸ At para 13-15 and 19.

⁶³⁹ At para 15-17 and 21-25.

⁶⁴⁰ At para 20.

⁶⁴¹ At para 18.

⁶⁴² At para 13.

⁶⁴³ *Employment Equity Act*, 55 of 1998.

⁶⁴⁴ *Civil Unions Act*, 17 of 2006.

⁶⁴⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000).

combat hate crimes and hate speech, the promulgation of Regulations for the Equality Courts and the development of a National Plan of Action in consultation with human rights institutions and civil organisations.⁶⁴⁶

The Report pointed out that access to procedural justice is promoted through awarding jurisdiction on matters related to equality not only to the Equality Courts but also Magistrates Courts and High Courts.⁶⁴⁷ It emphasises that access to the Equality Courts is enhanced by the relaxed rules and procedures, support by the clerk of the court and the support by the South African Human Rights Commission and the Commission for Gender Equality. It is purportedly further enhanced by the fact that that legal representation is not a requirement for access to the Equality Courts and access is free.⁶⁴⁸ The Report further pointed out how the courts have guarded the right to equality consistently and that these court decisions informed government policy.⁶⁴⁹ The State nevertheless acknowledged that the Equality Courts are under-utilised.⁶⁵⁰ The Report was vague on the 'programmes (undertaken) ... to raise human rights awareness, provide constitutional education and advance social cohesion'.⁶⁵¹

The State further reported on the measures taken to ensure the right to a fair trial although the focus was predominantly on criminal justice. Mere mention is made of the right of access to procedural justice contained in section 34⁶⁵² of the Constitution and specific emphasis is placed on alternative dispute resolution mechanisms, diversion⁶⁵³ and legal aid.⁶⁵⁴ The Report briefly addresses measures to ensure the right to equal protection of the law by mentioning the guarantee contained in section 9(1) of the Constitution and briefly focuses on how women have benefitted from the legal reforms and court decisions.⁶⁵⁵

As was the case in the Initial Report to the Secretary-General of the United Nations, this Report does not address paralegal service with the exception of paralegals employed by Legal Aid South Africa.

⁶⁴⁶ At paras 19-20.

⁶⁴⁷ At para 16.

⁶⁴⁸ See the discussion on institutions that support access to justice in Chapter 7.

⁶⁴⁹ At para 21-25.

⁶⁵⁰ At para 18.

⁶⁵¹ At para 26.

See the discussion on the research conducted on human rights awareness in South Africa in Chapter 7.

⁶⁵² At para 143.

⁶⁵³ At para 146.

See the discussion on these mechanisms in Chapter 6

⁶⁵⁴ The legal aid aspects of the report will be discussed in Chapter 6

⁶⁵⁵ At paras. 232-235.

4.4. CONCLUSION

South Africa became a member of the international community through its re-admission to the United Nations and its admission to the Organisation of African Unity in 1994. This membership and South Africa's ratification and accession to a range of treaties and protocols created, among others, a human rights ecosystem which required the coexistence of the domestic, regional and global human rights frameworks, requiring clarification of the nature of the relationship between these institutional frameworks. The Constitutional Court has held consistently and definitively that the interrelationship between domestic law and international law in South Africa is a matter of domestic law and the starting point for that enquiry is the Constitution of the Republic of South Africa which enjoys supremacy in the national hierarchy of norms. The manner of incorporation of international law reflects a blend of monism and dualism.

Customary international law has been incorporated into the domestic legal order in the monist tradition through an incorporation clause. Section 232 of the Constitution confers the status of national law upon customary international law, rendering it directly applicable within the domestic domain, barring conflict with an Act of Parliament or the Constitution. In the event of conflict, the courts have opted for a harmonising interpretation of the conflicting instruments.

Section 231 of the Constitution incorporates treaty law into the domestic legal order in the dualist tradition. It prescribes a three step process, each with distinct legal consequences. The three steps entail first, negotiating and signing the international agreement, secondly, ratification by Parliament and thirdly, domesticating the international agreement by enacting it into national legislation.

The right of access to dispute resolution fora is considered to be a pivotal precept of the right to procedural justice without which the guarantees and protections contained in human rights instruments would be worthless. The core features of the right to procedural justice that emerge from the international arena include the right to equality before the courts and tribunals, a fair and public hearing and a competent, independent and impartial tribunal. These guarantees apply to both criminal and civil proceedings. The ICCPR does not confer non-derogable status on the right to procedural justice. However, the obligation of the State Party in respect of a fair trial (hearing) and the right to equality is immediate and, for the most part, absolute. There are nevertheless certain features of the right to a fair trial that are subject to specific, general or implied limitations.

Although the ACHPR does not entrench the right to procedural justice to the same extent as the ICCPR, this statutory vacuum has been supplemented by the adoption of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, an extensive set of directives for member states.

These directives give express recognition to paralegals and codify their role as facilitators of access to justice on the African continent. A Party State's obligation under the ACHPR is immediate and non-derogable.

The effective enjoyment of the right of access to justice as contained in treaty law or customary international law is generally curtailed in two ways.⁶⁵⁶ The conflicting norms and standards of international law and specific domestic legislation place constraints on the right of access to justice. Article 8 of the UDHR, for example, enables this restriction as it provides for an effective remedy for 'acts violating the fundamental rights granted him by the *constitution and by law*'.⁶⁵⁷ The international standards and norms are thus inadvertently shifted from the international domain to the domain of the respondent state, where it may or may not meet these international standards.⁶⁵⁸

Both the ICCPR and the ACHPR require member states to report on measures taken to give effect to the guarantees contained in these instruments under the domestic legal order. However, it is clear that the capacity of the of international and regional human rights monitoring bodies to ensure compliance with these human rights instruments is challenged when States Parties do not comply with reporting standards and the lack of awareness among beneficiaries of the rights conferred by these instruments persists.

The Reports submitted by South Africa to date related to the right of access to procedural justice highlight the extensive legal reforms on which the country has embarked. However, the gap between the law and the people remains. The measures taken to enhance access to justice also remain justice sector-focused, lawyer-centred and skewed towards criminal justice. Reference to the paralegal is absent from these reports but for the service that they render under Legal Aid South Africa. This is of particular concern given the international recognition of the South African community-based paralegals for the socio-legal service that they render to the poor and the marginalised in the country and the express codification of the role of the paralegal by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

The aforementioned norms and standards, to a greater or a lesser extent, have been incorporated into the domestic legal order in the country through the enactment of the Constitution. Not only has the

⁶⁵⁶ Francioni, F, *Access to Justice as a Human Right*, (2007), Francioni, F (ed.) Oxford, UK: Oxford University Press.

⁶⁵⁷ (own emphasis added)

⁶⁵⁸ *Access to Justice as a Human Right* (2007).

right to procedural justice been codified, the Constitutional Court has also protected it jealously.⁶⁵⁹ South Africa is thus bound by these international and regional norms and standards to the extent that the Constitution prescribes. These norms and standards of procedural justice in civil matters as contained in section 34 of the Constitution of the Republic of South Africa and its related provisions will be examined in Chapter 5.

Having examined the State's obligation to provide access to procedural justice in civil matters under treaty law, Chapter 5 will proceed to examine its obligation under section 34 of the Constitution of the Republic of South Africa.



⁶⁵⁹ However South Africa, like in many countries across the world, not only on the African continent, increasingly faces the challenge of the enforcement of the remedies prescribed by the courts. A case in point is the hasty departure of President Al Bashir from the Sudan from South Africa while the Supreme Court of Appeal deliberated over the arrest warrants issued for him by the International Criminal Court. The State thus managed to circumvent the enforcement of the remedy prescribed by the court, which was to arrest Al Bashir. The State has served notice to the International Criminal Court of their intention to withdraw as a member but has since revoked that notice following a Constitutional Court challenge to the withdrawal.

Furthermore, in *Modderklip* the State has failed to implement the remedy prescribed by a lower court, resulting in the matter ending up in the Constitutional Court where it was ordered to comply. (*Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).).

CHAPTER 5

SECTION 34 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

5.1. INTRODUCTION

The fundamental right of access to the courts and other dispute resolution mechanisms (access to procedural justice) is the instrument that enables anyone to enforce a substantive right to which they have a claim. This right, in a sense, is therefore related to all rights contained in the Bill of Rights. However, the focus in this study is on the matrix of constitutional provisions most closely related to the right of access to procedural justice.

The substantive legal framework of access to justice in South Africa is informed by a mandate of social transformation with the central focus on making the law work for everyone but especially the poor and the marginalised. Section 34 of the Constitution contains the general right of access to procedural justice in civil matters. However, it does not function in isolation but in collaboration with a series of other constitutional provisions. This chapter will first examine section 34 and its key constitutional provisions and secondly, examine the nature, content, application and limitation of this right as interpreted in academic literature and through the courts.

5.2. SECTION 34 AND KEY CONSTITUTIONAL PROVISIONS

The substantive legal framework of access to procedural justice spans a network of constitutional provisions and related national legislation. However, this study focuses on the fundamental right of access to procedural justice contained in section 34 of the Constitution which reads,

‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.’

Due to the pivotal nature of this right of access to the courts and other tribunals and fora, it is related to all provisions in the Bill of Rights. However, there is a range of key provisions that have particular relevance for access to procedural justice. The matrix of constitutional provisions most closely related

to the right of access to the courts include provisions on arrested, detained and accused persons, standing, customary law and other leverage rights.⁶⁶⁰ These will be discussed below.

5.2.1. Section 34 and arrested, detained and accused persons

Sections 34 and 35⁶⁶¹ do not govern the same legal space nor do they intersect, as the former relates to civil and the latter to criminal matters. Section 34 is nevertheless regarded as the ‘twin’ of section

⁶⁶⁰ Woolman, S, Bishop, M, Chaskalson, M, et al 2006 Woolman, S Bishop, M Chaskalson, M et al (2006); Cheadle, H & Davis, D, *South African Constitutional Law: The Bill of Rights*, (2005) Johannesburg, South Africa: LexisNexis.

⁶⁶¹ 35.

- (1) Everyone who is arrested for allegedly committing an offence has the right—
 - (a). to remain silent;
 - (b). to be informed promptly—
 - (i). of the right to remain silent; and
 - (ii). of the consequences of not remaining silent;
 - (c). not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d). to be brought before a court as soon as reasonably possible, but not later than—
 - (i). 48 hours after the arrest; or
 - (ii). the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - (e). at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f). to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right—
 - (a). to be informed promptly of the reason for being detained;
 - (b). to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c). to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d). to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - (e). to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - (f). to communicate with, and be visited by, that person’s—
 - (i). spouse or partner;
 - (ii). next of kin;
 - (iii). chosen religious counsellor; and
 - (iv). chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right—
 - (a). to be informed of the charge with sufficient detail to answer it;
 - (b). to have adequate time and facilities to prepare a defence;
 - (c). to a public trial before an ordinary court;
 - (d). to have their trial begin and conclude without unreasonable delay;
 - (e). to be present when being tried;
 - (f). to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g). to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h). to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i). to adduce and challenge evidence;
 - (j). not to be compelled to give self-incriminating evidence;
 - (k). to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (l). not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

35.⁶⁶² It has been argued with authority that ‘given the contextual proximity [of] and the relationship [between]’ the two rights, some of the sub-rights explicitly conferred by section 35 are also conferred by section 34, albeit implicitly.⁶⁶³ These sub-rights include the right to a fair trial, more specifically, the right to receive adequate notice, the right to have proceedings commence and conclude without undue delay, the right to present and challenge evidence and most importantly, the right to legal representation, including representation at the expense of the State under certain circumstances. Other sub-rights conferred by section 35, such as the right to be presumed innocent and to remain silent, clearly do not apply to section 34. Therefore, to take the initial analogy further, section 34 and 35 could very well be regarded as fraternal⁶⁶⁴ and not identical⁶⁶⁵ twins insofar as it relates to the right to a fair hearing.

5.2.2. Section 34 and standing

An enquiry into the justiciability of a dispute requires an examination of both procedural and substantive justiciability. Substantive justiciability involves an enquiry into whether the subject-matter of the dispute falls within the jurisdiction of the courts at all, whereas standing, ripeness and mootness are three fundamental principles that fortify the doctrine of procedural justiciability.

Standing refers to the relationship between the applicant in a case and the relief sought. It entails an enquiry into whether the person who approaches the court is the appropriate person to present the matter to the court for adjudication.⁶⁶⁶ Ripeness, on the other hand requires that a dispute should not be brought before the court prematurely, in other words, before the prejudice, or the threat of prejudice, has materialised.⁶⁶⁷ Mootness, in contrast, involves an enquiry into whether the dispute has been brought for adjudication after the matter has been resolved between the parties and the prejudice, or the threat

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- (m). not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (n). to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o). of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

⁶⁶² Brickhill, A & Friedman, J, 'Access to Courts' in *Constitutional Law of South Africa* (2006) Juta p. 5.

⁶⁶³ Brickhill, A & Friedman, J (2006) p. 6.

⁶⁶⁴ These share the genetic similarity of siblings which is approximately fifty percent (50%).

⁶⁶⁵ These have the same genetic origin and can often not be told apart.

⁶⁶⁶ Loots, C, 'Access to the Courts and Justiciability' in Chaskalson, M, Woolman, S & Roux, T (eds) *Constitutional Law Of South Africa* (1999) Pretoria, South Africa: Juta.

⁶⁶⁷ Loots, C (1999).

of prejudice, no longer exists. This means bringing the matter before the court when it is too late to adjudicate the matter.⁶⁶⁸

There is a distinct difference between the common law approach to standing and that of the Bill of Rights. Under the common law standing is very narrowly interpreted in that the applicant is required to have a direct interest in the subject matter of the dispute before the court to the extent of being personally and negatively affected by the alleged infringement.⁶⁶⁹ The much broader approach to standing under the Bill of Rights, contained in section 38,⁶⁷⁰ stands in sharp contrast with the common-law approach.⁶⁷¹

The Constitutional Court has accorded a generous interpretation to section 38, in that anyone would be afforded standing provided that

- there is an allegation that a right in the Bill of Rights has been violated or threatened
- the applicant has sufficient interest in the remedy sought as per the listed categories for which own interest is not a requirement.⁶⁷²

It is not a requirement that there is an allegation of infringement of or threat to the fundamental right of the *persons listed* in section 38. It is sufficient to allege that, objectively speaking; a fundamental right has been infringed or threatened. This is a significant development for poor and marginalised communities as case law shows that this section has widened the access to adjudicating mechanisms for many, who would otherwise not have had access.

Section 38 explicitly links the right to a procedural remedy to the right to a substantive remedy. This section, therefore, expressly confers the right to have an alleged breach of a fundamental human right heard and decided by the courts (the right to a procedural remedy) and connects that right to the outcome of the proceedings, which refers to the relief sanctioned by the court (substantive remedy). This

⁶⁶⁸ Loots, C (1999).

⁶⁶⁹ *Jacobs En 'N Ander v Waks En Andere* 1991 (113/1990) ZASCA 152 (AD), para 533J–534E.

⁶⁷⁰ 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) Anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest; and
- (e) An association acting in the interest of its members'.

⁶⁷¹ *Lawyers for Human Rights and Other v Minister of Home Affairs and Other* 2004 (CCT18/03) ZACC 12 (CC), para 14; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* (1995).

⁶⁷² *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* (1995).

connection has been consistently applied by the Constitutional Court.⁶⁷³ The Supreme Court of Appeal reiterated the refrain of the Constitutional Court and held that the courts ‘have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.’⁶⁷⁴

Section 38(a) confers standing on ‘anyone acting in their own interest’. The whole of section 38 has to be read within the context of increasing access to procedural justice as a constitutional imperative. However, although jurisprudence involving the Interim Constitution suggested that the person acting in his or her own interest did not have to have suffered the infringement of the constitutional right or made an allegation to that effect,⁶⁷⁵ the wording of section 38(a) of the Final Constitution suggests otherwise. The phrase ‘anyone acting in their *own* interest’⁶⁷⁶ seems to require that the *applicant* claims an infringement of or a threat to a fundamental right to which he or she has a claim.

The Constitution also makes provision for a person or persons to act on behalf of another who is unable to seek relief in his or her own name.⁶⁷⁷ Case law suggests that section 38(b) has been applied rather parsimoniously⁶⁷⁸ and is considered to be the ‘poor relation’ of sections 38(c) and (d).⁶⁷⁹ Representative standing is provided for in sections 38(b) - (e) and litigants who are able to rely on section 38(b) are often able to claim relief through sections 38(c) and (d).⁶⁸⁰

The Constitution also introduces class actions into South African law by expressly giving recognition to them through section 38(c). Such actions empower ‘one or more claimant [to] litigate against a defendant not only on their own behalf but on behalf of all claimants’.⁶⁸¹ All members of the class, whether joined in the action or not, stand to benefit from and are bound by the outcome of the litigation unless they opt out by invoking prescribed procedures. This provision has been interpreted very narrowly initially⁶⁸² but the courts have subsequently taken into consideration the prevailing barriers to

⁶⁷³ *Fose v Minister of Safety and Security* 1997 (CCT14/96) ZACC 6, para 102.

⁶⁷⁴ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* (2004), para 42.

⁶⁷⁵ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995); *Port Elizabeth Municipality v Various Occupiers* (2004).

⁶⁷⁶ Own emphasis added.

⁶⁷⁷ Section 38(b).

⁶⁷⁸ *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Mohlomi v Minister of Defence* 1996 (CCT41/95) ZACC 20; *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzo and Others* 2001 (493/2000) ZASCA 85.

⁶⁷⁹ Plasket, C, ‘Representative standing in South African Law’, (2009), 62, *The Annals of the American Academy of Political and Social Science*, pp. 256.

⁶⁸⁰ Plasket, C (2009).

⁶⁸¹ Plasket, C (2009) p. 19.

⁶⁸² *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* (1999).

access to justice in the country⁶⁸³ which militates against a positivist approach. The dictum of Didcott J, formulating the first major precedent on the right of access to the courts in South Africa, captures the view of the Constitutional court as follows:

‘[The dispute] must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the main stream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.’⁶⁸⁴

Very little has changed for the majority of South Africans since.⁶⁸⁵ Class actions were therefore allowed in a range of disputes which include,

- class actions brought by a number of individuals belonging to a particular class of persons;⁶⁸⁶
- class actions brought by unincorporated voluntary associations;⁶⁸⁷ and
- a class action brought by an individual belonging to a class of persons.⁶⁸⁸

The Constitutional Court has drawn criticism for its ‘most unfortunate’ and ‘vague’ approach to the interpretation of this sub-section as it opted not to endorse the set of guidelines laid out by the Supreme Court of Appeal and as such ‘eschewed the need’ for these guidelines.⁶⁸⁹ The Supreme Court of Appeal in *Trustees of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd*⁶⁹⁰ introduced criteria

⁶⁸³ *Mohlomi v Minister of Defence* (1996), para 14.

⁶⁸⁴ *Mohlomi v Minister of Defence* (1996).

⁶⁸⁵ See the following surveys conducted:

The South African Human Rights Commission Economic and Social Rights Report of 1998

The Foundation for Human Rights CASE Survey 1998

National Institute for Public Interest Law and Research Study 2000

Human Science Research Council 2001 Public Opinion Survey

Survey on Protection of Human Rights: Perceptions and Awareness 2004

Kimmie, Z & O’Sullivan, G (2015).

⁶⁸⁶ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* (2001); *Rail Commuters Action Group and Others v Transnet Ltd T/a Metrorail and Others* 2006 (8232/2005) ZAWCHW 69 (C).

⁶⁸⁷ *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T); *Rail commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* (2006).

⁶⁸⁸ *Coetzee v Comitit and Others* 2001 (1) SA 1254 (C).

⁶⁸⁹ Cheadle, H & Davis, D (2005).

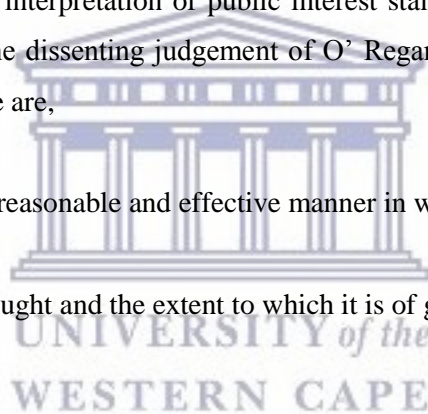
⁶⁹⁰ *Trustees for the time being of Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (2012).

which are considered by some to be useful for the ‘shaping of a coherent jurisprudence of class actions in the future’.⁶⁹¹ However, the Constitutional Court relied upon its inherent jurisdiction⁶⁹² and declared ‘the interests of justice’ as the criteria for certification.⁶⁹³ In the author’s view, the notion that the absence of a set of constitutionally endorsed guidelines for certification could lead to ‘(in)coherent jurisprudence’ is ‘most unfortunate’. The Constitutional Court deemed it wise not to confine itself to a predetermined set of guidelines for certification. This would be out of sync with the broad approach to standing endorsed by the court thus far and would not be the interest of justice, especially in view of the context framed by Didcott J above.

Class actions are also provided for in terms of section 38(d) which allows a public interest litigant to bring an application on a matter claimed to be of public interest. Such actions refer to ‘a limited (although not necessarily small) number of similarly situated claimants being represented by one of their number or another person’.⁶⁹⁴

After an initial false start to the interpretation of public interest standing by the lower courts,⁶⁹⁵ the Constitutional Court endorsed the dissenting judgement of O’Regan J⁶⁹⁶ and set out the criteria for public interest standing.⁶⁹⁷ These are,

- whether there is another reasonable and effective manner in which the challenge may be brought;
- the nature of the relief sought and the extent to which it is of general and prospective application;



The court held as follows:

Litigants representing a class should apply to court for authority to bring the class action.

The court would be required to certify the action as a class action.

Upon classifying the class action as such, the court would consider ,

-the definition of the class;

-the identification of the common claim or issue that can be determined by the class action; and

-prima facie evidence of the existence of a valid cause of action

- satisfaction that the representative is suitable to represent the members of a class
- whether the class action is the most appropriate procedure under the circumstances. (at paras. 35-43)

⁶⁹¹ Davis, D, 'Enforcement of Rights' in Cheadle, H & Davis, D (eds) *South African Constitutional Law: Bill of Rights* (2005) Durban, South Africa: LexisNexis South Africa, para 32.3.

⁶⁹² Section 173.

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. [S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012.].

⁶⁹³ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (CCT131/12) ZACC 23.

⁶⁹⁴ *Plasket* (2009).

⁶⁹⁵ *Prior v Battle and Others* 1999 (2) SA 850.

Maluleke v Member of the Executive Council, Health and Welfare, Northern Province (1999).

⁶⁹⁶ *In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995).

⁶⁹⁷ *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (2004).

- the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court;
- the degree of vulnerability of the people affected;
- the nature of the rights said to be infringed; and
- as well as the consequences of the infringement.⁶⁹⁸

A litigant, claiming public interest standing therefore, must do so genuinely and the court must satisfy itself objectively that the proceedings are in the public interest and not merely abstract. However, if it is in the public interest that the matter be heard, regardless of its abstract nature, it would constitute an exception to the abstract limitation.⁶⁹⁹ In spite of the criteria that the Constitutional Court has endorsed, it nevertheless has adopted a broad approach to public interest litigation.

Section 38(e) appears to be the least controversial of sub-sections. In a departure from the common law position, it expressly confers standing on an association to litigate on behalf of one, some or all of its members. The fact that the standing of associations in a number of cases was accepted without argument, renders the principle well settled.⁷⁰⁰

Whether section 38 pertains to a wider range of actions than the relief claimed for an infringement of a fundamental right, remains to be seen. Section 38 confers standing on a broad range of litigants but seems to do so within the confines of violations or threatened violations of fundamental rights only. The phrase, 'alleging that a right in the Bill of Rights has been infringed or threatened, supports this view. However, the opinion has been expressed that it should not be confined to fundamental rights only⁷⁰¹ and a number of rulings have already alluded to the liberalisation of the common law principles of standing.⁷⁰² In two of these cases the common law approach to the standing of unincorporated voluntary associations was disregarded as these associations sought not only to enforce particular provisions contained in the Bill of Rights but also the general values entrenched therein.

⁶⁹⁸ *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (CCT1/06) ZACC 5 (CC), para 21.

⁶⁹⁹ *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (2004), para 18.

⁷⁰⁰ *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (CCT21/96) ZACC 22.

⁷⁰¹ Loots, C, 'Standing, ripeness and mootness' in Woolman, S & Bishop, M (eds) *Constitutional Law Of South Africa*, 2nd ed (2014) Juta.

⁷⁰² *Wildlife and Environment Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 462 (Tk); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* (2002).

The alignment of the common law with the spirit, purport and objects of the Bill of Rights is a constitutional imperative.⁷⁰³ It is my view that section 34 could very well assist in providing an avenue for access to the courts in cases where access is still restricted by the common law principles on standing. Such a view has already been expressed by Klaaren⁷⁰⁴ who claims that ‘One interpretation of s 34 would grant the person whose non-Chapter 2 right was violated a Chapter 2 remedy as part of that person’s s 34 right of access to the court.’⁷⁰⁵

5.2.3. Section 34 and customary law

The extent to which customary law should exercise an influence on South Africa’s constitutional democracy has been a subject of much debate. The Bill of Rights, on the one hand, expressly gives recognition to customary law whereas, on the other hand, it renders it subject to the Constitution. This debate reflects, in many instances, the tension between the rule of law(yers) and traditional forms of dispensing justice.

The incorporation of customary law into the legal system of the country must be viewed against the backdrop of the subjugation of indigenous cultures in the country through imperialism, colonialism and apartheid and must be measured against our constitutional imperatives. The preamble to the Cultural Charter for Africa⁷⁰⁶ recognises this and states,

‘cultural domination led to the depersonalization of part of the African peoples, falsified their history, systematically, disparaged and combated African values, and tried to replace progressively and officially, their languages by that of the colonizer.’

Any attempt to overcome the barriers and increase access to justice in South Africa with its pluralistic legal system inevitably will have to include measures to incorporate customary law into the conventional legal system. The Constitution makes express provision for it. Hence the importance of

⁷⁰³ Section 39(2).

⁷⁰⁴ Klaaren, J, 'Administrative justice' in *Constitutional Law Of South Africa*, 5th ed (1999) Juta 1.

⁷⁰⁵ Klaaren, J (1999) p. 25.

⁷⁰⁶ Organization Of African Unity, *Cultural Charter for Africa*, (1990).

sections 30⁷⁰⁷ and 31⁷⁰⁸ read with sections 39(3),⁷⁰⁹ 211⁷¹⁰, 212⁷¹¹ and the transitional arrangements in Schedule 6.⁷¹² These provisions, read collectively, firmly entrench customary law as an integral part of our legal system.

Section 30 guarantees the right of the individual to language and culture and it is reinforced by section 31 which guarantees the rights of the collective to their culture, religion and language. Although these two provisions do not expressly make reference to customary law, they support the incorporation of customary law into the Constitution as they provide South Africans, individually and collectively, with the right to enjoy and participate in a cultural life of their choice. Section 39(3) expressly confirms that persons may rely on rights conferred by customary law as long as it is in harmony with the Bill of Rights.

⁷⁰⁷ ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’.

⁷⁰⁸ Section 31

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

⁷⁰⁹ Section 39.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;...
- (2) When interpreting any legislation, and when developing the common law or *customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (own emphasis added)
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, *customary law* or legislation, to the extent that they are consistent with the Bill.

⁷¹⁰ Section 211.

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

⁷¹¹ Section 212.

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law— (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
- (3) national legislation may establish a council of traditional leaders.

⁷¹² Section 16. Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of legislation applicable to that office, subject to-

- (a). Any amendment or repeal of that legislation; and
- (b). Consistency with the Constitution.

Chapter 12 of the Constitution gives express recognition to the institution of traditional leaders⁷¹³ and the role that it plays in matters affecting local communities.⁷¹⁴ The Constitution uses permissive language when it provides for the enactment of national legislation that entrenches the role of traditional leaders.⁷¹⁵ It thus provides the State with a margin of discretion. However, it uses peremptory language when enjoining the courts to apply customary law subject to the Constitution and other relevant laws.⁷¹⁶ In this instance, the incorporation is a constitutional imperative. However, the distinction might very well be purely academic as the role of traditional leaders and customary law appear to be inextricably linked in practice, although traditional leaders are not regarded as the custodians of customary law by some.⁷¹⁷

To date, the focus has been on the conventional courts and the efforts to comply with the constitutional imperative of incorporating traditional forms of justice encountered various obstacles. Attempts have been made by the State to establish the substantive legal framework that would pave the way for the incorporation of traditional systems of dispute resolution into the conventional mould following the submission of the Law Commissions Report.⁷¹⁸ Three key legislative developments are; the Traditional Leadership and Governance Act,⁷¹⁹ the Communal Land Rights Act⁷²⁰ and the Traditional Courts Bill.⁷²¹

However, this ‘marriage’ has proven to be much more of a challenge than anticipated as some of these reforms do not sit well with core constitutional imperatives. The South African Human Rights Commission has therefore introduced its commentary on the Traditional Courts Bill as follows:

‘Now African customary law within our new African constitutionalism will need to face the challenge of recognition alongside all other laws and procedures and survive the test of constitutionality to remain part of our democratic constitutional state founded upon values of human dignity, the achievement of human rights and freedoms, non-racialism, non-sexism and the supremacy of the constitution.’⁷²²

⁷¹³ Section 211.

⁷¹⁴ Section 212.

⁷¹⁵ Section 212.

⁷¹⁶ Section 211(3).

⁷¹⁷ Council for the Advancement of the South African Constitution (CASAC).

⁷¹⁸ South African Law Commission, *Traditional Courts and the Judicial Function of Traditional Leaders: Discussion Paper 82 (Project 90)*, (1999) Pretoria, South Africa: Department of Justice and Constitutional Development.

⁷¹⁹ *Traditional Leadership and Governance Act*, 41 of 2003.

⁷²⁰ *Communal Land Rights Act*, 11 of 2004.

⁷²¹ *Traditional Courts Bill [B1-2012]* (2012).

⁷²² Para 3 (footnotes omitted).

The long title of the Traditional Courts Bill affirmed a traditional justice system that is based on restorative justice and conciliation, seeking to enhance customary law.⁷²³ The Traditional Leadership and Governance Framework Act has been criticised for perpetuating apartheid boundaries and the Traditional Courts Bill met with severe resistance. Resistance to the Bill emanated from various quarters, including the South African Human Rights Commission, The Law Society of South Africa, Council for the Advancement of the South African Constitution and the Minister of Women, Children and People with Disabilities.⁷²⁴ The resistance exposed the tension between the institution of traditional leaders and the sovereignty of the Constitution. The Bill came under fire for being unclear on the nature of the judicial structure that it aimed to establish, centralising too much executive, legislative and judicial decision-making power in traditional leaders, perpetuating patriarchal values that permeated traditional communities, perpetuating apartheid boundaries, failure to allow for an opt-out clause, compelling persons who do not recognise a traditional leader as legitimate to submit to his authority for dispute resolution, bestowing powers on traditional leader to remove people's property rights as punishment and perpetuating the legal segregation and second-class citizenship imposed by the Bantustans.⁷²⁵

The South African Human Rights Commission raised a number of constitutional concerns about the Bill.⁷²⁶ The first relates to the nature of the adjudicating mechanism described as 'traditional courts'. The lack of clarity as to whether these structures were courts as described by Chapter 8 of the Constitution or other tribunals or fora⁷²⁷ raised questions about the constitutionally recognised rights of parties to the proceedings in these fora. The right to legal representation, for example, was expressly outlawed by the Bill.⁷²⁸ It also raised the question as to whether these 'courts' had to meet the same constitutional standards and norms for adjudicating bodies such as the right to a fair and public trial.

The second concern relates to the language and the framework of the Bill which makes it susceptible to Roman-Dutch, British and more recent constitutional transplants. The Commission advised that these transplants distort the traditional system that the Bill seeks to entrench and may result in constitutional

⁷²³ 'To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law and the customs of communities observing the system of customary law; and to provide for matters connected therewith'.

⁷²⁴ Aninka Claassens, *Summary and Analysis of the Traditional Court Bill [B 15 – 2008]*, (2008) Cape Town, South Africa: University of Cape Town.

⁷²⁵ Aninka Claassens (2008).

⁷²⁶ *Traditional Courts Bill [B 1—2012]*.

⁷²⁷ As provided for in section 34.

⁷²⁸ Clause 9 (3) (a) No party to any proceedings before a traditional court may be represented by a legal representative.

guarantees being ignored or denied.⁷²⁹ A further concern has been expressed by the Commission that the sanctions are too broad and may involve violations of fundamental rights such as the right against forced labour.⁷³⁰ It also advised that the rights of children are not adequately protected.⁷³¹

It was therefore clear that the Bill would not pass constitutional muster and it ultimately lapsed. However, the matter did not end there as the Department of Justice and Correctional Services commenced a new round of consultations on the Traditional Courts Bill in 2015.⁷³² The most significant development for the paralegal is the insertion of clause 17.(1)(k) which empowers the Minister of Justice and Correctional Services to enact legislation that allows for the functioning of paralegals in the traditional courts.⁷³³ This signifies that there is the realisation on the part of law makers that the alignment of customary forms of dispute resolution with the Constitution in theory and in practice will not be achieved without some form of legal assistance. Traditional dispute resolution fora are particularly prevalent in the rural areas. One of the barriers to access to justice is the concentration of lawyers in the urban areas while the rural areas remain underserved. The community-based paralegal has filled part of the gap in the delivery of access to justice in rural areas, and should the Bill be passed in its current form, paralegals will be given express recognition as practitioners of the law in South Africa.⁷³⁴

Moreover, Langa DCJ in *Bhe v Khayelitsha Magistrate*⁷³⁵ captured the view of the Constitutional Court in respect of customary law as follows:

‘The Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.’⁷³⁶

⁷²⁹ Para 22.

⁷³⁰ Para 31.

⁷³¹ Paras 43,44,74.

⁷³² Policy Dialogue on Traditional Courts Reform Advancing Restorative Justice 4 December 2015 Birchwood Hotel, Boksburg.

⁷³³ *Traditional Courts Bill [Bill-2017]*.

⁷³⁴ See Chapter 9.

⁷³⁵ *Bhe and Others v Khayelitsha Magistrate and Others* (2004).

⁷³⁶ At para 41.

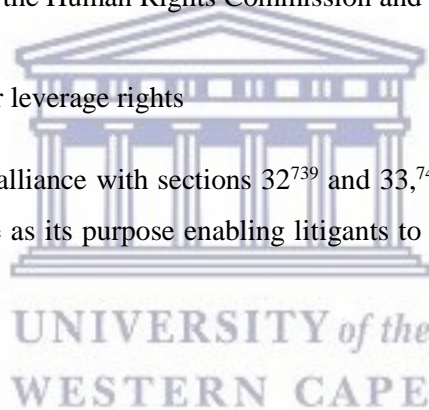
In addition, the South African Human Rights Commission stated emphatically that it ‘recognises the institution, status and the role of customary law’.⁷³⁷ It clarified its comments on the Traditional Courts Bill as follows:

‘The current debates around the Bill are thus not about the integrity and/or legitimacy of the traditional court system but rather to determine the manner in which this recognition should be reflected in legislation within our constitutional democracy’.⁷³⁸

There is therefore no question that the traditional dispute resolution mechanisms will be introduced into the South African legal system. It is essential to bridging the gap between the law and the people. If done so properly, South Africa would once more establish itself as a contender on the African continent for its creative and bold way in which it marries the contradictions that make up the rich tapestry of its rainbow nation in order to deliver access to justice. Considering the role that the community-based paralegal could play in providing safeguards in the traditional courts may very well address some of the constitutional concerns raised by the Human Rights Commission and others.

5.2.4. Section 34 and other leverage rights

Section 34 is also in a tripartite alliance with sections 32⁷³⁹ and 33,⁷⁴⁰ which are all considered to be leverage rights. Such rights have as its purpose enabling litigants to enforce the substantive rights to which they have a claim.



⁷³⁷Traditional Courts Bill [B1 – 2012] SAHRC Submission to the National Council of Provinces, 15 February 2012, (2012) Braamfontein: South African Human Rights Commission p. 6.

⁷³⁸ *Traditional Courts Bill [B1 – 2012] SAHRC Submission to the National Council of Provinces, 15 February 2012* (2012).

⁷³⁹ Section 32

- (1) ‘Everyone has the right of access to-
 - (a). any information held by the state; and
 - (b). any information that is held by another person and that is required for the exercise or protection of any rights
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state’

⁷⁴⁰ Section 33

- (1) Everyone has the right to administrative action that is lawful, reasonable and
 - (a). procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has
 - (a). the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
 - (a). provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b). impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c). promote an efficient administration.’

The Constitution firmly entrenches a distinct right of access to information. The inclusion of this right in the Bill of Rights must be viewed, on one level, against the backdrop of the transition from an authoritarian State that exercised its power brutally and arbitrarily, to a democratic order in which government is required to act in a transparent manner and held accountable for its actions. Section 32 provides individuals with an unfettered right of access to information held by the State subject only to the limitation clause.⁷⁴¹ It thus imposes a greater burden on the State than on private entities. Section 32 therefore has vertical application as it applies to all public institutions, including private entities that exercise public power or perform public functions on behalf of the State.⁷⁴²

On another level, the lack of access to information on matters that directly affect the rights of an individual has a disempowering effect and places that individual at a distinct disadvantage. This information is not only held by the State but also by private individuals. Section 32 assists in levelling the playing field. In this regard, it has horizontal application as it provides for access to information held by private individuals and entities.⁷⁴³ This right is subject to the qualification that such information is required to enable the requestor to enforce or protect his or her rights. The Constitution therefore expressly commands the enactment of legislation to give effect to this right. Hence, the Promotion of Access to Information Act⁷⁴⁴ has been enacted and implemented.

The long history of abuse of power by the State also necessitated the entrenchment of fundamental principles of administrative law with the aim to prevent a repeat thereof. The right to procedurally fair administrative action is therefore contained in section 33(1).⁷⁴⁵ This provision entrenches the common law rules of natural justice which are given expression through the maxims *audi alteram partem* and *nemo iudex in sua causa*. It is considered to ensure procedural fairness when administrative decisions are made that affect other substantive rights. It is therefore the legality and not the wisdom of the conduct that the adjudicator determines.⁷⁴⁶

Lawfulness requires that administrators comply with the law and derive their authority for their decisions from the law. Section 33(1) outlaws the ousting of the court's constitutional jurisdiction or its review function over the lawfulness of administrative action. It further alters the common law position which hampered the review of unreasonable administrative action in the past. It thus

⁷⁴¹ Section 32(1)(a).

⁷⁴² Section 1 of the *Promotion of Access to Information Act*, 2 of 2000.

⁷⁴³ Section 32(1)(b).

⁷⁴⁴ *Promotion of Access to Information Act*, 2 of 2000.

⁷⁴⁵ Section 33(1).

⁷⁴⁶ Woolman, S, Bishop, M, Chaskalson, M, et al 2006 Woolman, S Bishop, M Chaskalson, M et al (2006).

introduced a ‘full-blown rationality review’.⁷⁴⁷ Moreover, an enquiry into the reasonableness of an administrative decision doesn’t require the court to determine whether the decision was correct or not but whether the decision was justifiable.⁷⁴⁸ Section 33(2) confers the right on persons to compel the State to provide written reasons where an administrative action has affected their rights adversely. This right, like the right to information, is regarded as a substantive rights-determining tool and is available to anyone whose rights have been adversely affected by the administrative action.⁷⁴⁹ This provision further directs the State to enact legislation to give effect to the rights contained in it⁷⁵⁰ and requires legislation so enacted to provide for judicial review of administrative action.⁷⁵¹ Enacted legislation must also serve to promote an efficient administration.⁷⁵² Hence, the Promotion of Administrative Justice Act (PAJA) has been enacted.⁷⁵³

Although these leverage rights mainly constitute a procedural remedy, together they are designed to ensure meaningful access to procedural and substantive justice. However, the lack of awareness of key human rights-related legislation such as PAJA among respondents in the AJCPR Baseline Survey raises serious concerns.⁷⁵⁴ This points to a complete disconnect between these components of the statutory framework of access to justice and its intended beneficiaries, in other words, between the law and the people, which is a gap that cannot be left unattended.

5.3. THE NATURE AND APPLICATION OF THE RIGHT OF ACCESS TO THE COURTS, TRIBUNALS AND OTHER DISPUTE RESOLUTION FORA

The right of access to the courts and other dispute resolution mechanisms constitutes the fulcrum on which the protections and guarantees provided for in the Bill of Rights turn. This right is not only limited to disputes related to human rights but also, in the case of section 34, all (civil) disputes that can be settled by application of law. It is thus intended to protect the individual against the capricious and subjective decision making and conduct of an adversary and the injustice that may ensue as a result.

Section 34 first, confers upon everyone the right to have disputes settled before a court. Secondly, it expressly guarantees the right to a fair and public hearing. Thirdly, it provides for the option to have

⁷⁴⁷ De Waal, J, Currie, I & Erasmus, G, *The Bill of Rights Handbook*, 6th ed, (2013) Cape Town, South Africa: Juta p. 55.

⁷⁴⁸ De Waal, J, Currie, I & Erasmus, G (2013).

⁷⁴⁹ Section 33(2).

⁷⁵⁰ Section 33(3)(b).

⁷⁵¹ Section 33(3)(a).

⁷⁵² Section 33(3)(c).

⁷⁵³ *Promotion of Administrative Justice Act*, 3 of 2000.

⁷⁵⁴ Only a small minority(10%) was able to identify this statute (Kimmie, Z & O’Sullivan, G (2015) p. 12.).

the right to a fair and public hearing exercised in an independent and impartial tribunal. Finally, it confers the right of appropriate relief, which will not be discussed in this study as the focus is on a procedural remedy and not a substantive one.⁷⁵⁵

Upon considering the application of this right, the first query that arises is, who are the beneficiaries and who bear the responsibilities that are imposed by the right. This triggers a number of questions relating to, among others, the nature of the right, the standing of the different bearers of this right, whether it applies to criminal matters and whether it applies exclusively to disputes capable of resolution by the application of law. Each of these aspects will be examined below.

5.3.1. The nature of the right

Section 34 imposes a range of positive and negative obligations on the State, and limited negative obligations on private persons. The State has a positive obligation to protect, promote and fulfil the right of access to the courts imposed by section 34 and does so primarily by establishing the substantive legal framework and the institutions, human resources and infrastructure. However, this obligation extends beyond the mere provision of dispute resolution mechanisms. The State has an obligation to provide an effective remedy and ensure enforcement thereof, in other words, meaningful access to the dispute resolution mechanisms and reparation.⁷⁵⁶ This positive obligation extends to an obligation to provide legal assistance under certain circumstances.⁷⁵⁷

The State's negative obligation in essence encompasses the duty to refrain from restricting access to the courts. As a result, the State is required to refrain from interfering with the independence of the judiciary and enacting legislation that ousts the jurisdiction of the court in a manner that cannot be permitted. The query into whether access to the courts has been limited, has consistently, albeit at times only in theory, been regarded as distinct from the justification for the limitation.⁷⁵⁸ Section 34 contains no inherent limitation to access other than that of 'any dispute that can be resolved by the application of law'. Hence, the right of access to the courts is by and large, unfettered, and may only be limited in accordance with section 36 of the Constitution. However, this does not apply to appeals as the Constitutional Court has ruled that,

⁷⁵⁵ Although it may be argued that a procedural and substantive remedy are inextricably linked.

⁷⁵⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).

⁷⁵⁷ See Chapter 6.

⁷⁵⁸ Bilchitz, D, 'How should rights be limited?: regspraak', (2011), 3, *Tydskrif Vir Die Suid-Afrikaanse Reg*, pp. 568–579.

‘whatever the scope of section 22 [the predecessor of section 34], it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court.’⁷⁵⁹

Section 34 also has horizontal application in that it imposes, in some instances, a negative obligation on private persons to respect the right of access to the courts and not to interfere with the fairness of judicial proceedings.

5.3.2. The bearers of the right

Section 34 expressly confers the right of access to the courts upon “Everyone” and natural persons are the universal holder of this right. However, whether a juristic person is the bearer of this right was not clear from the outset.

5.3.2.1. Natural persons

Section 34 extends the right of access to the courts to every person within the jurisdiction of the courts, regardless of his or her status. This includes citizens, residents, visitors and undocumented migrants.⁷⁶⁰ The entitlement of natural persons to this right has been well settled in jurisprudence from the outset and doesn’t require further discussion. However, this has not been so for juristic persons.

5.3.2.2. Juristic persons

Section 34 read with section 8(4) of the Constitution makes it clear that the Constitution intended for this right to be conferred on juristic persons on merit. Section 8(4) provides that ‘a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’. This in essence indicates that the application of section 34 to juristic persons will be determined through an interlocking enquiry into the nature of the juristic person and the nature of the substantive right that has allegedly been violated.

It is self-evident that there are some rights that cannot be exercised by a juristic person due to the nature of the right and the manner in which it is formulated.⁷⁶¹ On the other hand, there is constitutional

⁷⁵⁹ *Besserglik v Minister of Trade Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (CCT34/95) ZACC 8.

⁷⁶⁰ *Tetty and Another v Minister of Home Affairs and Another* 1999 (1) BCLR 68 (D).

Mohamed and Another v President of the Republic of South Africa and Others 2001 (CCT17/01) ZACC 18 (CC).

⁷⁶¹ Cheadle, H & Davis, D (2005), para 3.6.2.

justification for the recognition of juristic persons as bearers of the right to equality, privacy, freedom of religion, belief and opinion, freedom of assembly, property, education, access to information, freedom of expression, association and labour relations, just administrative action and, most importantly, access to the courts and the right to a fair hearing.⁷⁶²

Bearing in mind that the right of access to the courts is the fulcrum for the enforcement of all other rights, a blanket denial thereof in the case of juristic persons will not withstand constitutional scrutiny. There is support in foreign law for the principle that all public and private juristic entities are entitled, at the very least, to the protection of certain procedural guarantees such as the right to access to the courts and a fair hearing.⁷⁶³

Although the Constitution does not define the concept 'juristic person', section 8(4) applies, as a matter of principle, to all entities that have juristic personality in South African law. It would therefore, in the first instance, apply to all private juristic entities.⁷⁶⁴ However, the view has been expressed that public juristic entities that exercise only public power cannot benefit from the rights in the Bill of Rights in their relations with private persons (natural and juristic) or among themselves.⁷⁶⁵ The reason advanced for this is that they are the primary institutions against which the Bill of Rights provides protection. Nevertheless, an enquiry into the nature of the public entity and the nature of the right might very well result in a finding that the entity is indeed the bearer of the right at issue. Examples of this include, among others, the right to freedom of expression to which a public broadcaster is entitled and the right to just administrative action at the hands of provincial and national government, to which a municipality is entitled.⁷⁶⁶

Moreover, the courts have ruled consistently that juristic persons are entitled to the rights in the Bill of Rights taking into consideration the nature of the right and the nature of the juristic person.⁷⁶⁷ The

These include the right to human dignity, life, freedom and security of the person, protection against slavery, servitude and forced labour, political rights, citizenship rights, environmental rights and the rights to housing, health care, food, water, social security and children.

⁷⁶² Cheadle, H & Davis, D (2005).

⁷⁶³ Cheadle, H & Davis, D (2005), para 1A80.1.

⁷⁶⁴ Cheadle, H & Davis, D (2005), para 1A21.

⁷⁶⁵ Cheadle, H & Davis, D (2005).

⁷⁶⁶ Cheadle, H & Davis, D (2005), para 3.6.2.

⁷⁶⁷ *Government of the Republic of South Africa v "Sunday Times" Newspaper 1995 2 SA 221(T)* 1995 (2) SA 221 (T). (the right to freedom of speech and expression).

Ynuico Ltd v Minister of Trade and Industry and Others 1996 (CCT47/95) ZACC 12. (the right to free economic activity)

Bernstein and Others v Bester NO and Others 1996 (CCT23/95) ZACC 2, paras 69, 85.

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (2000), para 18. (right to privacy)

Constitutional Court in essence settled the matter when it ruled that the failure to extend constitutional rights to juristic persons ‘undermine(s) the very fabric of our democratic state.’⁷⁶⁸ Hence, a refusal to allow a juristic person to be represented in court by its alter ego,⁷⁶⁹ was ruled to amount to a denial of the right of the entity to be heard.⁷⁷⁰

The principle that the right of access to the courts and a fair hearing applies to juristic entities is thus well settled in our law. Juristic persons, as a result, have the right to legal representation, which may include, in certain circumstances, the right to legal assistance at the expense of the State.

5.3.3. Section 34 and criminal matters

In *S v Pennington*⁷⁷¹ the court indicated that criminal proceedings are generally not regarded as ‘disputes’. Such proceedings are thus excluded from the ambit of section 34. It is argued that section 35 governs the criminal proceedings related to the arrest, detention, conviction or sentence of an accused person.⁷⁷² Other matters that may be classified as ‘any dispute’ are governed by section 34.⁷⁷³

5.3.4. Disputes that can be resolved by the application of law

The fact that the disputes must be capable of being resolved by the application of the law is the only internal requirement imposed on the right of access to the courts in terms of section 34. The final Constitution altered the wording of the interim Constitution⁷⁷⁴ which referred to ‘justiciable disputes’.⁷⁷⁵ However, the opinion has been expressed that the alteration is in all probability a reflection of the policy of the drafters to use ordinary language rather than to move away from the restrictive effect of justiciability.⁷⁷⁶ Therefore, in essence, only one question needs to be answered, namely, ‘whether legal

First National Bank of SA Limited T/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited T/a Wesbank v Minister of Finance 2002 (CCT19/01) ZACC 5, paras 44–45. (right to property)

National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others 2002 (CCT2/02) ZACC 27, paras 38–39. (right to fair labour practices)

Manong and Associates (Pty) Ltd v City Manager, City of Cape Town and Another 2008 (9934/2005) ZAWCHW 62, para 31. (right to equality).

⁷⁶⁸ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (2000), para 18., cited with approval in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (2002).

⁷⁶⁹ In casu, the sole member of the close corporation.

⁷⁷⁰ *Navy Two CC v Industrial Zone Ltd* 2005 (293/2004) ZASCA 92 (SCA).

⁷⁷¹ *S v Pennington and Another* 1997 (CCT14/97) ZACC 10.

⁷⁷² Brickhill, A & Friedman, J (2006) p. 14,15.

⁷⁷³ For example extradition cases.

⁷⁷⁴ *Constitution of the Republic of South Africa*, 200 of 1993.

⁷⁷⁵ Section 22 read, ‘[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial tribunal’.

⁷⁷⁶ *Loots, C* 1999 *Loots, C* (1999).

rules exist in terms of which disputes concerning enforceability, justifiability and pre-existing rights may be resolved'.⁷⁷⁷ The parties must therefore satisfy the court that there are established legal rules which can be used to resolve the dispute.⁷⁷⁸ Due to the interrelatedness between this inherent requirement and the key feature of access to the courts, further discussion on this is reserved for when the content of the right of access to the courts is discussed below.

5.4. THE CONTENT OF THE RIGHT OF ACCESS TO THE COURTS, TRIBUNALS AND OTHER DISPUTE RESOLUTION FORA

Section 34 contains four inherent components, namely, the right of access to the courts, the right to a fair public hearing before such courts, the right, where appropriate, to have one's dispute resolved in another independent and impartial tribunal and forum, and the right to enforcement of an effective remedy. This section is regarded as 'an express constitutional recognition of the importance of the fair resolution of social conflicts by impartial and independent institutions'.⁷⁷⁹ Each of the four inherent components will be examined below.

5.4.1. Access to the courts

The guarantee that complainants may bring their dispute before an adjudicating body is considered to be the most prominent feature of section 34.⁷⁸⁰ This right is unfettered but for the limitations permitted by the limitation clause. It therefore stands to reason that where the State does not fulfil the right of access to the courts in the case of justiciable disputes, it is 'prima facie in breach of its duties under the Constitution' and will have to justify this breach.⁷⁸¹ A right without a remedy is illusory as it is reduced to a mere privilege and in our democratic order section 34 is the leverage that the individual has to make that right a reality. Mokgoro J espoused the Constitutional Court's view as follows:

'A trial or hearing is not an end in itself. It is a means of determining whether a legal obligation exists and whether coercive power of the state can be involved to enforce an obligation or prevent an unlawful act being committed.'⁷⁸²

⁷⁷⁷ Cheadle, H & Davis, D (2005), para 1A80.1.

⁷⁷⁸ Brickhill, A & Friedman, J (2006).

⁷⁷⁹ *Zondi v MEC for Traditional and Local Government Affairs* 2004 (CCT73/03) ZACC 19 (CC), para 61.

⁷⁸⁰ Woolman, S Bishop, M Chaskalson, M et al (2006), pt II. The Bill of Rights para 59.4 (a).

⁷⁸¹ Budlender, G, 'Access to courts', (2004), 121(2), *The South African Law Journal*, pp. 339–358.

⁷⁸² *Lesapo v North West Agricultural Bank and Another* (1999), para 11.

She further held that access to the courts serves a purpose beyond the above, in that it ‘institutionalises the resolution of disputes’ and ‘prevents remedies being sought through self-help’⁷⁸³

Ngcobo J also highlighted the importance of access to the courts and held:

‘S34, therefore, requires not only that individuals should not be permitted to resort to self-help, but it also requires that potentially divisive social conflicts must be resolved by courts or other independent and impartial tribunals. Section 34 recognises that it is important to do so to ensure that orderly and fair solutions to such conflicts are found, to promote social cohesion and to avoid the exacerbation of divisions and unfairness.’⁷⁸⁴

In essence, a litigant must be given an ‘adequate and fair’ opportunity to approach the courts or other fora for relief.⁷⁸⁵ Accordingly, a denial of such opportunity would amount to a denial of the right of access to the courts. However, this does not mean that the applicant can approach just any court for relief. This requirement is satisfied if the applicant had a ‘real and fair’ opportunity to approach ‘a court of competent jurisdiction in the hierarchy for relief.’⁷⁸⁶

A rather curious development occurred in *Zondi* when Ngcobo J by stating the following, went beyond emphasising the pivotal nature of the right of access to the courts by introducing criteria for access that are neither expressly, nor implicitly, contained in section 34:

‘Determining whether it is *necessary* for such conflicts to be brought before courts will require a consideration of the *potential for social conflict* in relation to the particular matters concerned, the *equality of arms of the parties* that are likely to be involved in the conflict, and the *practicalities of requiring such matters to be resolved by courts*, among other things.’⁷⁸⁷

Section 34 does not require applicants to convince the court that a claim is ‘enforceable’ or ‘justifiable’ or that it is based on a ‘pre-existing right’.⁷⁸⁸ On the contrary, the only requirement for access to the

⁷⁸³ *Lesapo v North West Agricultural Bank and Another* (1999).

⁷⁸⁴ *Zondi v MEC for Traditional and Local Government Affairs* (2004), para 63.

⁷⁸⁵ See the discussion on the ‘fair and adequate’ opportunity test under Limitations below.

⁷⁸⁶ *Dormehl v Minister of Justice and Others 2000* (CCT10/00) ZACC 4 (CC).

⁷⁸⁷ At para 63 (own emphasis added).

⁷⁸⁸ *Contra Road Accident Fund v Makwetlane 2005 4 SA 51* (SCA), paras 45–47.

Engelbrecht v Road Accident Fund and Another 2007 (CCT57/06) ZACC 1 (CC), paras 21–24.

courts is that the dispute must be capable of resolution by application of law. Considering the above dictum of Mokgoro J, the criteria identified by Ngcobo J are clearly not pre-requisites for determining access to the courts and other fora. The primary purpose for seeking access is for a competent, independent and impartial tribunal to determine whether a legal right exists and/or whether there is a breach thereof and, if there is, whether there is any justification for the breach, if not, to prescribe a remedy that is enforceable.

The importance of having access to adjudicating mechanisms that have the necessary authority to settle disputes in a fair manner, is beyond dispute. A limitation of this right will therefore have to withstand the constitutional scrutiny of the limitation clause. The key feature of fairness will now be considered.

5.4.2. Fair hearing

Section 34 expressly guarantees the right to a public hearing that is qualified by the fairness thereof. However, although fairness is a central theme of the South African constitution, what constitutes fairness varies, depending on the nature of the proceedings.⁷⁸⁹ The decision in *Bernstein v Bester*⁷⁹⁰ implied that the absence of any reference to the right to a fair hearing in the Interim Constitution signalled the intention of the drafters not to constitutionalise the right to a fair *civil* hearing. This was remedied in the final constitution as section 34 expressly introduces fairness and publicity into the nature of the proceedings. The Court in *Mohlomi v Minister of Defence* ruled that a party to the proceedings must be 'afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them.'⁷⁹¹ The court found that where the claimants were left with inadequate time within which to give the requisite notices and to sue, their rights in terms of section 22 of the Interim Constitution were infringed.⁷⁹² *Barkhuizen v Napier* re-affirmed the 'adequate and fair' opportunity test formulated in *Mohlomi* and held that '...the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy.'⁷⁹³

Fairness, under section 34, has both a substantive and procedural component. In *Van Huysteen and Others NO*⁷⁹⁴ the court held that the right to a fair public hearing requires 'procedures...which in any particular situation or set of circumstances, are right and just and fair.' Also, in *De Lange v Smuts NO*

⁷⁸⁹ See sections 9, 23, 33 and 35 of the Constitution of South Africa, 1996.

⁷⁹⁰ *Bernstein and Others v Bester NO and Others* (1996).

⁷⁹¹ *Mohlomi v Minister of Defence* (1996), para 14.

⁷⁹² *Mohlomi v Minister of Defence* (1996).

⁷⁹³ *Barkhuizen v Napier* 2007 (CCT72/05) ZACC 5 (CC), para 52.

⁷⁹⁴ *Van Huysteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (CPD), para 304 G-H.

*and Others*⁷⁹⁵ the Constitutional Court stated that ‘[a]t the heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision’ and that ‘...any procedure that touches on a vital human interest...points in the direction of a violation’.⁷⁹⁶

Fairness, at a most basic level, must comply with a minimum standard of justice if it is to serve as a safeguard against injustice.⁷⁹⁷ This minimum standard of justice include

‘equal treatment before the courts during a hearing, that the decision-maker should not be a judge in her own cause, should not be actuated by bad faith, improper motive or preconceived view, adherence to *audi alteram partem*, the provision of proper notice to a person of the allegations against her, the right to legal representation, or at least adequate representation of an equivalent nature’.⁷⁹⁸

The right to equality is therefore at the heart of the fairness requirement in section 34. The equality clause in the Constitution expressly guarantees, among others, the right to equality before the law, the right to be equally protected by law, the right to equally enjoy the benefits of the law, and the right not to be unfairly discriminated against on grounds including those listed.⁷⁹⁹ The preamble and founding provisions super-entrenches this right. Fairness within this context therefore encompasses the right to equal access to and treatment by the courts, including procedural fairness and expeditiousness, the right to legal advice and representation, publicity of proceedings and its results, independence and impartiality. Individuals must therefore be afforded an ‘adequate and fair’ opportunity to enforce their rights. Any form of discrimination on listed and other grounds that prevent access to the courts and are not justifiable under the Constitution, should therefore not be tolerated. Equality before the courts also implies that a litigant is entitled to meaningful participation in the proceedings, which may, under certain circumstances give rise to the right to legal assistance at the expense of the State.

Albertyn and Goldblatt argue that equality of the legal process is not rationality but fairness. As a consequence, a finding of unfairness would preclude a justification enquiry.

Section 34 also entrenches the principles of natural justice. The *audi alteram partem* principle requires that both parties to the dispute must be given a fair opportunity to be heard. Parties must therefore be

⁷⁹⁵ *De Lange v Smuts NO and Others* 1998 (CCT26/97) ZACC 6, para 131.

⁷⁹⁶ *De Lange v Smuts NO and Others* (1998).

⁷⁹⁷ Beinart, B, De Vos, W, Price, TW, et al, *Acta Juridica*, (1962) Cape Town, South Africa: University of Cape Town p. 118–120.

⁷⁹⁸ Cheadle, H & Davis, D (2005), para 28.3.

⁷⁹⁹ Section 9.

given adequate time to prepare, lead and challenge evidence. The courts therefore have extensive rules on service and notice relating to civil proceedings. Non-compliance with these rules has a bearing on the fairness of the subsequent proceedings and may constitute an unfair limitation on the right to a fair and public hearing.⁸⁰⁰ The Constitutional Court in *De Lange* highlighted the importance of this principle of natural justice saying that,

‘(e)veryone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance’.⁸⁰¹

Where a party, therefore, whether by design or default, was not represented at a hearing that affects his or her rights, it implicates the right of access to the court. The Constitutional Court thus considered reasonable notice to be a requirement for a fair hearing⁸⁰² and disallowed *ex parte* applications where it unjustifiably did not give effect to the audi alteram partem principle.⁸⁰³ The other aspects of fairness, namely, publicity of the hearing and independence and impartiality of the tribunal, will be discussed next.

5.4.3. Public hearing

Section 34 imposes no inherent limitation on the right to a public hearing, which includes both publicity of the hearing as well as the publication of the outcome of the hearing. This implies that any limitation to this right must survive a section 36 scrutiny. The right to a fair public hearing in section 34 as well as a public trial in section 35 gave rise to the principle of ‘open justice’ which enjoys Constitutional Court endorsement.⁸⁰⁴ The Constitutional Court advised that

⁸⁰⁰ The court emphasised the pivotal nature of the audi alteram partem principle to the extent that it considered it inappropriate to review a decision of a lower court without notice to all parties, including the magistrate of the court a quo (*Davids and Others v Van Straaten and Others* 2005 (901/05) ZAWCHW 16 (C).)

The Constitutional Court ruled that the substantive and procedural fairness requirement of the right to a fair public hearing has not been satisfied as a ruling has been handed down to party who was not cited as a responded to the proceedings. (*Stopforth Swanepoel and Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2014 (CCT63/14) ZACC 26 (CC).)

⁸⁰¹ At para131.

⁸⁰² *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2001 (CCT59/00) ZACC 9 (CC).

⁸⁰³ *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (CCT44/02) ZACC 4 (CC).

⁸⁰⁴ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2006 (CCT58/06) ZACC 15 (CC).

‘(c)ourts should in principle welcome public exposure of their work in the courtroom, subject, of course, to their obligation to ensure that the proceedings are fair. The... values of accountability, responsiveness and openness...underpin both the right to a fair trial and the right to a public hearing. The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness’.⁸⁰⁵

This dictum was subsequently reaffirmed when the Constitutional Court struck down a provision in the Criminal Procedure Act⁸⁰⁶ which allowed for criminal appeals to be held in chambers. Yacoob J articulated the view of a unanimous court as follows:

‘It is important that this deviation from the rule of law, fairness and justice be fully understood. The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public...Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself...Closed court proceedings carry with within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based’.⁸⁰⁷

This principle, in essence, constitutes a cluster of rights, namely the right to a fair trial, freedom of expression and the right of access to the courts.⁸⁰⁸ In a prologue to the much publicised criminal trial of the paralympian, Oscar Pistorious, the principle of ‘open justice’ was pushed to new limits when media organisations for the first time were allowed to broadcast a criminal trial live in South Africa.⁸⁰⁹

Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others 2014 (10193/2014) ZAGPPHC 37.

⁸⁰⁵ *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* (2014), para 32.

⁸⁰⁶ *Criminal Procedure Act*, 51 of 1977.

⁸⁰⁷ *S v Shinga (Society of Advocates (Pietermaritzburg)) as Amicus Curiae*, *S v O’Connell and Others* 2007 (CCT56/06) ZACC 3 (CC), para 25.

⁸⁰⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In Re: Masetlha v President of the Republic of South Africa and Another* 2008 (CCT38/07) ZACC 6.

⁸⁰⁹ *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* (2014).

In arriving at this ground breaking decision, Mlambo JP performed a balancing act between the paralympian's right to a fair trial, the right of the media organisations to freedom of expression and the interest of justice.⁸¹⁰ It was clear from the outset that the public's right to access the proceedings was uncontested. The judge indicated that

'...it is necessary to keep in mind that in the open democratic society envisaged by our Constitution and "in which the public have a right of access to the workings of the judicial system", the issue is not *whether* the electronic, broadcast or print media - *should* be allowed to cover court proceedings, "but *how* guarantees can be put in place to ensure that the public is indeed well informed about how the courts function" when dealing with proceedings before them.'⁸¹¹

The right to a fair trial and freedom of expression are competing rights that affect the principle of 'open justice' with mutually limiting effects on each other. The court applied the following test formulated in *Midi Television Pty Limited v Director of Public Prosecutions*:⁸¹²

'Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36.'⁸¹³

This test calls for a harmonising interpretation of the right to freedom of expression and the right to a fair trial, taking into consideration the surrounding circumstances and the limitations imposed on both rights by the limitation clause. Hence the Judge President ruled that,

⁸¹⁰ At paras 6-18.

⁸¹¹ At para 20 (own emphasis added) (footnotes omitted).

⁸¹² *Midi Television T/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56 2007 (100/06) ZASCA 56 (SCA).

⁸¹³ At para 9.

‘[a]t this day and age I cannot countenance a stance that seeks to entrench the workings of the justice system away from the public domain. Court proceedings are in fact public and this objective must be recognized.’⁸¹⁴

Jurisprudence therefore shows that the likelihood of an infringement of this right being tolerated by the courts would be rare and under extreme circumstances as the public’s access to the proceedings is an important factor in building credibility in the judiciary. The court in *S v Mamabolo*⁸¹⁵ thus stated that ‘...informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important attributes prescribed for the judiciary by the Constitution.’⁸¹⁶ Instances under where this right may be limited include ‘the testimony of child witnesses, sensitive family matters, confidential information implicating national security or public security interests and criminal matters involving sexual offences.’⁸¹⁷

The publicity of a trial is therefore inextricably linked to ensuring that a perception of bias is not fuelled by secrecy and that the workings of the judiciary are subjected to public scrutiny. The Courts therefore set a premium on public access to its proceedings and will not limit this lightly.

5.4.4. Another independent and impartial tribunal

Section 34 expressly makes provision for access to adjudicating bodies other than conventional courts, by providing, ‘where appropriate’, for the alternative of ‘another independent and impartial tribunal’. The question as to where a tribunal may be appropriate has been considered by the Constitutional Court.⁸¹⁸ The Court has ruled it inappropriate for a tribunal that is not presided over by a judicial officer to be authorised to rule on matters where a person’s liberty is affected.⁸¹⁹ It thus struck down section 66(3) of the Insolvency Act⁸²⁰ as it impugned section 34. It has therefore been established that criminal as well as administrative proceedings (with the exception of ouster clauses) fall outside the purview of section 34 as these are governed by sections 33 and 35.

⁸¹⁴ At para 22.

⁸¹⁵ *S v Mamabolo* 2001 (CCT44/00) ZACC 17.

⁸¹⁶ At para 29.

⁸¹⁷ Brickhill, A & Friedman, J (2006).

⁸¹⁸ *De Lange v Smuts NO and Others* (1998).

⁸¹⁹ *De Lange v Smuts NO and Others* (1998).

⁸²⁰ 24 of 1936.

Section 34 allows for specialist tribunals and other fora to be established and the state has given effect to it over the years in order to increase access to the ‘courts’, especially in civil matters.⁸²¹ The proceedings at these tribunals also need not mirror those of a court of law and are thus more flexible. Hence an internal disciplinary hearing, for example, was permitted to be held in camera⁸²² and it was stated that a greater range of evidence, including hearsay, is permitted in, for example, commissions of inquiry.⁸²³ However, bearing in mind that the right of access to the courts is part of the wider principle of the rule of law, these fora must nevertheless meet the minimum standards of justice, otherwise their operations might not pass constitutional muster. The High Court in *Magidiwana v President of the Republic* applied this principle to a commission of inquiry and held that the functions of the commission, whether judicial, quasi-judicial or not, did not by itself preclude or permit the application of section 34 under the circumstances.⁸²⁴ The court per Makgoka J stated that ‘the fact that the Marikana commission only investigates and reports, possibly with recommendations, is not in and of itself, the reason for s 34’s non-applicability’.⁸²⁵ This principle was endorsed by the Constitutional Court.⁸²⁶ Jurisprudence shows that commissions must nevertheless meet the requirement of fairness, both procedural and substantive.⁸²⁷ Makgoka J further indicated that,

‘[i]n the context of the present application, it is of no consequence that the commission is not of a judicial or quasi-judicial nature. That does not, in the author’s view, place the Commission outside the scope of s 34 of the Constitution. At a conceptual level, the general proposition that the proceedings of commissions of inquiry fall outside the scope of s 34 at the outset, is to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the commission.’⁸²⁸

The court thus considered factors such as the complexity of the dispute before the commission, whether constitutional rights are involved and whether the findings of the commission would prejudice these constitutional rights of the parties before it.⁸²⁹

⁸²¹ See Chapter 7.

⁸²² *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2000 (384/2000) ZASCA 44.

⁸²³ *Mbebe and Others v Chairman, White Commission and Others* 2000 (7) BCLR 754 (TK).

⁸²⁴ *Magidiwana and Another v President of the Republic of South Africa and Others* 2013 (37904/201) ZAGPPHC 292. The dispute involved the right to legal representation before a commission of inquiry.

⁸²⁵ At para 33.

⁸²⁶ *Legal Aid South Africa v Magidiwana and Others* 2015 (CCT188/14) ZACC 28 (CC).

⁸²⁷ *Grundling v Van Rensburg NO* 1984 (4) SA 680 (W); *Du Preez and Another v Truth and Reconciliation Commission* 1997 (426/96) ZASCA 2 (SCA).

⁸²⁸ At para 37.

⁸²⁹ At para 38.

It is clear from the wording of section 34 that where a tribunal or other forum is tasked with the responsibility of adjudicating a justiciable dispute, that it has to meet the criteria of independence and impartiality. These are key features of the right of access to the courts and are expressly included in section 34. Key indicators of the independence of the courts include the process for the appointment of judicial officers,⁸³⁰ the judicial oath,⁸³¹ security of tenure,⁸³² financial security⁸³³ and the limitation of civil liability of judges.⁸³⁴

The independence of the courts is also bolstered by section 165 of the Constitution which provides that ‘the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.⁸³⁵ Section 165 also places a prohibition on any interference with the functioning of the courts by anyone.⁸³⁶

The lack of impartiality on the part of a presiding officer provides a constitutional basis for his or her recusal. The Constitutional Court in *De Lange* made it clear that the

‘... time-honoured principles that *no-one shall be a judge in his own cause* and that the other side should be heard aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law’.⁸³⁷

In *President of South Africa v South African Rugby Football Union (SARFU II)* ⁸³⁸ the Constitutional Court emphatically directed that,

‘... it must never be forgotten that an impartial judge is a fundamental pre-requisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there

⁸³⁰ Section 174 of the Constitution of South Africa, 1996.

⁸³¹ Item 6(1) of Schedule 2 to the Constitution of South Africa, 1996.

⁸³² Section 177 of the Constitution of South Africa, 1996.

⁸³³ Section 176(3) of the Constitution of South Africa, 1996.

⁸³⁴ Section 25(1) of the Supreme Court Act 59 of 1959

Penrice v Dickinson 1945 AD 6; *May v Udwin* 1981 (1) SA 1 (A); *Soller v Honourable President of the Republic of South Africa and Others* 2006 JOL 17425 (T).

⁸³⁵ Section 165(2) of the Constitution of South Africa, 1996.

⁸³⁶ Section 165(3) of the Constitution of South Africa, 1996.

⁸³⁷ At para 131.

⁸³⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (CCT16/98) ZACC 11.

are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not and will not be impartial.’⁸³⁹

The Constitutional Court in *S v Basson*⁸⁴⁰ re-emphasised the importance of the impartiality of the judicial officers and considered it acutely linked to the independence of the courts and essential to a constitutional democracy. It reaffirmed the ruling in *SARFU II* in which the Constitutional Court held that,

‘(a) judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such Judge might be biased, acts in a manner that is inconsistent with s 34 of the Constitution, and in breach of the requirements of s 165(2) and the prescribed oath of office’.⁸⁴¹

The Constitutional Court in *SARFU II* formulated the test for recusal as follows:

‘The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not and will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel’.⁸⁴²

It further defined the test for the reasonableness of the apprehension and held that it must be ‘assessed in the light of the oath of office taken by Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.’⁸⁴³

The Court thus preferred the ‘reasonable suspicion or apprehension of bias’ approach to that of the ‘real likelihood of bias’, substituting the former with the phrase ‘reasonable apprehension of bias’.⁸⁴⁴ This approach doesn’t signify that the subjective opinion of the litigant constitutes the measure for determining the existence of bias on the part of the judicial officer. On the contrary, the Constitutional Court stated clearly that there exists a presumption in favour of the impartiality of the court with which

⁸³⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (1999), para 48.(own emphasis added).

⁸⁴⁰ *S v Basson* 2005 (CCT20/2003) ZACC 10 (CC).

⁸⁴¹ *S v Basson* (2005), para 30.

⁸⁴² *S v Basson* (2005), para 48.

⁸⁴³ *S v Basson S v Basson* (2005).

⁸⁴⁴ *S v Basson* (2005), para 36.

the court cannot easily dispense without coherent and persuasive evidence.⁸⁴⁵ The fairness of a hearing is therefore influenced by the extent to which the tribunal and its presiding officer(s) are free from direct or indirect influence.

5.5. SECTION 34 AND THE LIMITATION CLAUSE (SECTION 36)

Section 34 is not included in the list of non-derogable rights in the Constitution of South Africa. However, the State has a fundamental obligation not to restrict access to the courts which is imposed by international and regional instruments that it has signed, ratified and acceded. This obligation has further been entrenched in our domestic legal order by our Constitution. As a consequence, the State is obliged to establish courts and other adjudicating fora, ensure its efficient and effective functioning, and to protect bona fide litigants.⁸⁴⁶ Any limitation of unfettered access to the courts and the ousting of the jurisdiction of the courts in justiciable matters will be invalid unless it withstands the interrogation of the limitation clause in the Constitution.⁸⁴⁷ The dictum of the Constitutional Court in *Road Accident Fund v Mdeyide*, albeit within the context of ‘time bars’, reflects the balancing act that the courts must perform.⁸⁴⁸ Van der Westhuizen J, for the majority, expressed the view that ‘[t]here are ... no hard and fast rules, each case must be judged on its own circumstances and it is a matter of degree’.⁸⁴⁹ Froneman J expressed a similar view, stating that,

‘[t]here is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. It depends upon whether the limitation affords litigants an adequate and fair opportunity to exercise the right to judicial redress’.⁸⁵⁰

⁸⁴⁵ *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing 2000* (CCT2/00) ZACC 10.

⁸⁴⁶ *Bernstein and Others v Bester NO and Others* (1996), para 51.

De Lange v Smuts NO and Others (1998), para 312.

Beinash and Another v Ernst & Young and Others 1998 (CCT12/98) ZACC 19, para 17.

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (2005), paras 41–43.

⁸⁴⁷ Section 36.

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

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

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

⁸⁴⁸ *Road Accident Fund and Another v Mdeyide* 2010 (CCT10/10) ZACC 18 (CC).

⁸⁴⁹ At para 69.

⁸⁵⁰ At para 102.

An application of the limitation clause triggers a two stage enquiry.⁸⁵¹ Stage one involves two enquiries, namely, determining the boundaries of the right and ascertaining whether the law crosses that boundary.⁸⁵² The Constitutional Court has endorsed a broad approach to the first enquiry of stage one, which entails an analysis of the text within its context, taking into consideration the foundational values of our constitutional order rather than a literal interpretation of the text.⁸⁵³ The view has been expressed that the rights analysis under our Constitution ‘should not be a proxy for the limiting of rights’.⁸⁵⁴ This would run the risk of a conflation of the two-stage enquiry into the limitation of the right by inserting the proportionality enquiry into stage one. Stage one of the enquiry entails an analysis of the nature, content and application of the right to the given circumstances. This is informed by the constitutional values entrenched in our legal order.

The judgment in the *Road Accident Fund v Mdeyide*⁸⁵⁵ is therefore a curious development in our constitutional jurisprudence and has been labelled ‘an explicit doctrinal shift concerning the two stages of a rights enquiry’.⁸⁵⁶ In the majority judgement delivered by Van der Westhuizen J the court acknowledges the two stages of the rights enquiry,⁸⁵⁷ recognises the confusion created by Didcott J in *Mohlomi*⁸⁵⁸ but nevertheless proceeded to conflate the two stages. The court stated that,

‘it is clear from the judgements of this court that although a two-step approach is appropriate, the questions raised and the standards applied may sometimes overlap and be applicable to both. It is not always practical to rigidly separate the two stages of the enquiry’.⁸⁵⁹

The majority court found the infringement by the impugned provision justifiable.⁸⁶⁰ However, the minority judgement delivered by Froneman J, came to a different conclusion, having applied the two-

⁸⁵¹ *S v Makwanyane and Another* 1995 (CCT3/94) ZACC 3, paras 100–102.

⁸⁵² Woolman, S & Botha, H (2014).

⁸⁵³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995).

⁸⁵⁴ Cheadle, H & Davis, D (2005), para 30.3.1.

⁸⁵⁵ *Road Accident Fund and Another v Mdeyide* (2010).

⁸⁵⁶ Bilchitz, D (2011), para 571.

⁸⁵⁷ At para 56.

‘Because the Constitution recognises specific rights in Chapter 2 and provides for the limitation of rights by way of a general limitation clause, a two-stage enquiry is necessary. The process of interpreting the right is different from that of considering the limitation of the right. Two questions have to be asked. The first is whether the right is limited and, if it is, the second is whether the limitation is constitutionally permissible.’

⁸⁵⁸ At para 56.

‘A two-step analysis was undertaken in *Mohlomi*... However, some of the considerations taken into account during the first phase of the enquiry, could have been relevant in the second as well. The finding that the claimant was not afforded an adequate and fair opportunity to seek judicial redress, could have been made at the end of the second stage of the enquiry, as it was at the end of the first’.

⁸⁵⁹ *Road Accident Fund and Another v Mdeyide* (2010), para 59.

⁸⁶⁰ Section 23(1) of the *Road Accident Fund Act*, 56 of 1996.

stage enquiry instead of a broad overarching analysis.⁸⁶¹ It would therefore seem that the two-stage enquiry ensures that fundamental rights are better protected.

Chaskalson P in *S v Makwanyane* recognised the importance of the two-stage enquiry for a number of reasons. First, the court is allowed to accord a broad and generous interpretation of the right during the first stage of the enquiry. This is particularly important bearing in mind the urgent need for redress in the country and it is in accordance with an approach to statutory interpretation that is consistent with a paradigm of transformative constitutionalism. Secondly, the two-stage enquiry might produce a different outcome. The conflation of the two stages results in the enquiry into the justification for the infringement being conducted in a manner that encourages a consideration of multiple competing factors instead of those outlined in the limitation clause.⁸⁶² This could clearly affect the outcome of a dispute as *Mdeyide* demonstrated.

A finding of an infringement of a constitutional right triggers stage two of the enquiry, which involves the justification for the infringement.⁸⁶³ This is followed by an exercise in proportionality during which the limitation clause is applied to the infringing law. Proportionality involves an enquiry into the manner in which a right is limited and not whether it should be limited at all.⁸⁶⁴ The Constitutional Court has cautioned against a technicist approach during this exercise, stating that '(i)n essence, the court must engage in a balancing exercise and arrive at a global judgment in proportionality and not adhere mechanically to a sequential check-list'.⁸⁶⁵

Any infringing law has to meet the criteria of reasonableness and justifiability. The enquiry into whether these criteria have been met must be conducted within the context of an open and *democratic society* based on *human dignity, equality and freedom*, considering all relevant factors, including those listed.⁸⁶⁶ These Constitutional values, which are super-entrenched by the preamble and founding provisions, are explicitly invoked in this section. This implies that any limitation of the right of access to the courts will have to be measured against these values.

⁸⁶¹ At para 141.

'The difficulty with the provision is the absence of a knowledge requirement, combined with the absence of a condonation provision. It is this that renders the provision too inflexible to be justified.'

⁸⁶² Bilchitz, D (2011).

⁸⁶³ Section 36 (1).

⁸⁶⁴ Cheadle, H & Davis, D (2005).

⁸⁶⁵ *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (CCT25/99) ZACC 5 (CC), para 32.

⁸⁶⁶ Section 36(1).

Section 34 enables individuals to challenge legislation that prevents or limits the judicial resolution of a dispute and, as such, impede their constitutional right to have disputes resolved.⁸⁶⁷ A number of statutes have been challenged using section 34 and its predecessor, section 22 of the Interim Constitution.⁸⁶⁸ These include statutory provisions imposing ‘time bars’ for the commencement of civil actions,⁸⁶⁹ provisions that limit the access to the courts of persons regarded as vexatious litigants in terms of the Vexatious Proceedings Act 3 of 1956,⁸⁷⁰ rules of court requiring applicants to furnish security for costs as a pre-requisite for making an application,⁸⁷¹ provisions requiring a dispute to be referred to an administrative tribunal,⁸⁷² provision precluding appeals against the outcome of an arbitration tribunal unless otherwise agreed by the parties,⁸⁷³ ouster provisions aiming to place issues beyond judicial scrutiny,⁸⁷⁴ prescription periods⁸⁷⁵ and civil immunity in terms of amnesty.⁸⁷⁶ A range of statutes that contained provisions that permitted legal disputes to be resolved without recourse to the courts, were also challenged.⁸⁷⁷ These ‘implied ouster clauses’ had in common the limitation of the right of the aggrieved party to approach the courts for relief. Although these provisions did not expressly oust the jurisdiction of the courts, it nevertheless had the same effect. Jurisprudence shows that the greater the potential for social conflict, the greater the likelihood that a particular measure infringes the right of access to the courts. Ngcobo J expressed the view of the Constitutional Court as follows:



⁸⁶⁷ Loots, C (1999).

⁸⁶⁸ Interim Constitution 1993.

⁸⁶⁹ *Mohlomi v Minister of Defence* (1996).

Baldeo v Minister of Safety and Security 1997 (12) BCLR 1728 (D).

Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another 2008 (CCT19/07) ZACC 8.

Barkhuizen v Napier (2007).

Engelbrecht v Road Accident Fund and Another (2007).

⁸⁷⁰ *Beinash and Another v Ernst & Young and Others* (1998).

⁸⁷¹ *Mthethwa (Khoza) and Others v Diedericks & Others* 1996 (4) SA 381 (N).

⁸⁷² *Carephone (Pty) Ltd v Marcus NO & Others* 1999 (3) SA 304 (LAC).

Baramoto and Others v Minister of Home Affairs and Others 1998 (5) BCLR 562 (W).

⁸⁷³ *Patcor Quarries CC v Issroff & Others* 1998 (4) SA 1069 (SE).

⁸⁷⁴ *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C).

⁸⁷⁵ *Road Accident Fund and Another v Mdeyide* (2010).

⁸⁷⁶ *Azanian Peoples Organisation (AZAPO) AND Others v The President of the Republic of South Africa* 1996 (4) SA 671 (CC).

⁸⁷⁷ *Zondi v MEC for Traditional and Local Government Affairs* (2004).

Armbruster and Another v Minister of Finance and Others 2007 (CCT59/06) ZACC 17 (CC). (KwaZulu-Natal Pound ordinance that allowed a landowner the seizure of livestock that trespassed onto his land)

Metcash Trading Limited v Commissioner for the South African Revenue Service and Another 2000 (CCT3/00) ZACC 21 (CC). (Value Added Tax Act that had a ‘pay now, argue later’ approach, having the effect of a civil judgment, ruled permissible limitation)

Senwes Ltd v Muller 2002 (4) SA 134 (T). (perfection clause creating a notarial bond, entitling the creditor to unilaterally to determine if default has occurred)

Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd 2001 (1) SA 251 (E). (perfection clause creating a notarial bond).

‘...The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish [or survive], that disputes are resolved by courts [and other independent tribunals and fora]’⁸⁷⁸

Furthermore, the more drastic the impact on the interests of the applicant, the more likely the court would be to find a limitation of section 34.

Case law reflects a broad spectrum of positions insofar as the limitation of the right of access to the courts is concerned. On the one end, there is a complete annihilation of the right which undermines its very purpose.⁸⁷⁹ These include limitations that allow self-help which militates against the right of access to the courts. Such limitations would require exceptional motivation.⁸⁸⁰ Mokgoro J articulated the view of the Constitutional Court as follows:

‘The right of the access to the court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes...As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.’⁸⁸¹

The courts have therefore not hesitated to strike down prescription periods and statutory time bars that limited the right of access to the courts.⁸⁸² The Constitutional Court, in examining the justification for time bars that imposed a limitation on this right, introduced an ‘adequate and fair opportunity’ test. It is clear from the dicta of the Court that an applicant must be given a ‘real and fair’ opportunity to enforce his or her rights. In *Mohlomi* the Court reiterated that,

⁸⁷⁸ *Zondi v MEC for Traditional and Local Government Affairs* (2004), para 61.

⁸⁷⁹ *Azanian Peoples Organisation (AZAPO) AND Others v The President of the Republic of South Africa* (1996).the court ruled that extraordinary circumstances justifies the limitation of the right of access.

Lesapo v North West Agricultural Bank and Another (1999).

Zondi v MEC for Traditional and Local Government Affairs (2004).

In both instances the court found the seizure of property without the court’s intervention an unjustifiable limitation of the right of access to the courts.

⁸⁸⁰ Brickhill, A & Friedman, J (2006).

⁸⁸¹ *Lesapo v North West Agricultural Bank and Another* (1999), paras 1644–1645.

⁸⁸² *Mohlomi v Minister of Defence* (1996).

Potgieter v Lid van Die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng En Andere 2001 (CCT26/01) ZACC 4.

Moise v Greater Germiston Transitional Local Council 2001 (CCT54/00) ZACC 21 (CC).

Zantsi v Council of State, Ciskei and Others 1995 (CCT24/94) ZACC 9 (CC).

Luitingh v Minister of Defence 1996 (CCT29/95) ZACC 5.

Mthethwa (Khoza) and others v Diedericks & others (1996).

Bellocchio Trust Trustees v Engelbrecht NO 2002 (3) SA 519 (C).; *Brümmer v Minister for Social Development and Others* 2009 (CCT25/09) ZACC 21 (CC).

‘the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of the case in question, to a *real and fair* one.’⁸⁸³

Likewise, when the Court had the opportunity subsequently to consider this key feature of procedural justice,⁸⁸⁴ it relied on the above dictum of *Mohlomi* and stated the following: ‘However, in enacting a statutory limitation, the legislature must allow a *real and fair opportunity* to a party aggrieved by actions of the state or those of its employees to enforce his or her rights.’⁸⁸⁵

The Constitutional Court considered this feature more recently and consistently held that an applicant must be afforded a ‘real and fair’ opportunity to access the court.⁸⁸⁶ This test allows the court to consider the circumstances of each case in order to arrive at a just and equitable decision.

The Constitutional Court further reinforced the right to a public trial,⁸⁸⁷ struck down a provision that ousted the discretionary power of the court,⁸⁸⁸ refused to condone an unreasonable delay with an application for leave to appeal,⁸⁸⁹ and did not tolerate the failure on the part of the State to enforce a remedy.⁸⁹⁰

On the other hand, where limitations themselves facilitate greater access, the courts have displayed a greater tolerance for the infringement,⁸⁹¹ although the minority judgement in two of such cases expressed views to the contrary.⁸⁹² It therefore ruled a limitation justifiable where it involved a vexatious litigant,⁸⁹³ screening process for leave to appeal,⁸⁹⁴ and mandatory warrant of arrest.⁸⁹⁵

⁸⁸³ At para 12 (own emphasis added).

⁸⁸⁴ *Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en andere* (2001).

⁸⁸⁵ *Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en andere* (2001), para 6. (footnotes omitted).

⁸⁸⁶ *Engelbrecht v Road Accident Fund and Another* (2007), para 31.

Brümmer v Minister for Social Development and Others (2009).

⁸⁸⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* (2008).

⁸⁸⁸ *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa T/a The Land Bank and Another* 2011 (CCT68/10) ZACC 2 (CC).

⁸⁸⁹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2005 (CCT59/2004) ZACC 14 (CC).

⁸⁹⁰ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005).

⁸⁹¹ *Beinash and Another v Ernst & Young and Others* (1998).

Road Accident Fund and Another v Mdeyide (2010).

Barkhuizen v Napier (2007).

⁸⁹³ *Beinash and Another v Ernst & Young and Others* (1998).

⁸⁹⁴ *Besserglik v Minister of Trade Industry and Tourism and Others (Minister of Justice intervening)* (1996).

⁸⁹⁵ *Omar v Government of the Republic of South Africa and Others* 2005 (CCT47/04) ZACC 17 (CC).

Jurisprudence thus reflects that the Constitutional Court, in accordance with its constitutional mandate as the custodian of the transformation agenda in the country, has been instrumental in dismantling the remnants of a statutory framework designed to disempower and impoverish.

5.6. CONCLUSION

The substantive legal framework of the right to procedural justice is designed to ensure access to substantive justice. However, '[s]ubstantive justice is an ever-elusive goal for constitution-makers'.⁸⁹⁶ It is therefore bound to fall short of aspirations and the goals will almost always be met imperfectly.

Access to the courts and other dispute resolution fora is an important element of a well-functioning justice system. The substantive human rights framework of access to procedural justice in civil matters in South Africa spans an impressive network of constitutional provisions and related legislation. The right to access to the courts and other dispute resolution fora is contained in section 34 of the Constitution. It constitutes the fulcrum for the protections and guarantees in the Bill of Rights and is regarded as the 'bulwark against vigilantism' and the 'guarantee against partiality'. In its absence, the constitutional protections and guarantees are worthless. Read with this network of constitutional provisions, this section is designed to ensure meaningful access to procedural as well as substantive justice.

Section 34 first, confers upon everyone the right to have disputes settled before a court. Secondly, it expressly guarantees the right to a fair and public hearing. Thirdly, it provides for the option to have the right to a fair and public hearing exercised in an independent and impartial tribunal and, finally, confers the right of appropriate relief.

The first key feature, the right of access to the court, is unfettered but for the limitations permitted by section 36. Therefore, if the State does not fulfil the right of access to the courts, it would constitute a prima facie breach of its constitutional obligation which it will have to justify.

The second feature, the right to a fair hearing, requires an adequate and fair opportunity to seek relief. The right to equality is at the heart of this feature and it entrenches the principles of non-discrimination and natural justice, in particular, the audi alteram partem principle. The equality clause in the Constitution expressly guarantees, among others, the right to equality before the law, the right to be

⁸⁹⁶ Christiansen, EC, 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice', (2010), 13, *Journal of Gender, Race & Justice*, pp. 575–614. p. 575.

equally protected by law, the right to equally enjoy the benefits of the law, and the right not to be unfairly discriminated against on grounds including those listed.

Fairness also gives rise to other key features of the right to procedural justice, namely publicity of the hearing and its outcome, as well as independence and impartiality of the dispute resolution mechanism. The right to a public hearing resulted in the development of the doctrine of ‘open justice’ which enjoys Constitutional Court endorsement. The other key features, those of independence and impartiality, require all dispute resolution fora to meet the minimum standards of justice and entrenches the second principle of natural justice, namely *nemo iudex in sua causa*.

The right of access to procedural justice, like any other right in the Bill of Rights, may be limited by section 36 of the Constitution, known as the limitation clause. Although recent Constitutional Court decisions have conflated the two-stage enquiry into the limitation, there is consensus that a limitation of the right to procedural justice would require exceptional motivation. Jurisprudence shows that the greater the potential for social conflict, the greater the likelihood that a particular measure infringes the right of access to the courts. Moreover, the more drastic the impact on the interests of the applicant, the more likely the court would be to find a limitation of section 34.

Case law reflects a broad spectrum of positions insofar as the limitation of the right of access to the courts is concerned. On the one end, there is a complete annihilation of the right which undermines its very purpose, which will hardly be tolerated by the courts. On the other end, where limitations themselves facilitate greater access, the courts have displayed a greater tolerance for the infringement.

The courts have applied an ‘adequate and fair opportunity test’ to examine the justification for the infringement. However, no principles have emerged from these decisions as there seems to be consensus that no hard and fast rules exist for determining whether the infringement is consistent with the Constitution. The Constitutional Court, nevertheless, in accordance with its constitutional mandate as the custodian of the transformation agenda in the country, has been instrumental in dismantling the remnants of a statutory framework designed to disempower and impoverish.

South Africa is not immune to the malaise of many other countries, where the legal reforms fall short of expectations, either due to shortcomings in their design and/or problems in its implementation. The substantive legal framework of access to procedural justice falls short of the transformative constitutional agenda in a number of ways. Section 34, unlike its counterpart in criminal law, section 35, fails to codify the right to a fair civil hearing in sufficient detail. This leaves it up to the courts to formulate the key features of the right, drawing upon related constitutional provisions and international precedent.

This framework does not preclude alternative paradigms for the delivery of access to procedural justice, such as customary practices and paralegal assistance. However, efforts have fallen short of implementation. These shortcomings result in a disconnect between the law and its intended beneficiaries. As a result, disadvantaged communities are not empowered to take advantage of the legal reforms that are intended to ensure greater access to justice for everyone but especially the marginalised and the poor. This requires a paradigm shift in the delivery of access to justice and the multipronged, multilevel approach of legal empowerment presents an alternative in which the paralegal has a key role to play. This will be addressed when the right to legal assistance, including the right to legal representation, is discussed in Chapter 6.



CHAPTER 6

SECTION 34 AND THE RIGHT TO LEGAL ASSISTANCE IN CIVIL MATTERS

6.1. INTRODUCTION

The previous chapter examined the content, nature and application of the right of access to procedural justice. The conclusion was reached that this right imposes an obligation on the State to provide the necessary adjudicating mechanisms to resolve civil disputes amongst and between citizens and the State. Making these adjudicating mechanisms available without the means to access them and/or enable meaningful participation in their proceedings undermines the legitimacy of these mechanisms and calls the outcomes of its proceedings into question. The right to legal assistance,⁸⁹⁷ including legal representation in an adjudicating forum,⁸⁹⁸ is therefore pivotal to enable this access, while all service providers, particularly the narrow legal profession and the paralegal profession, have an essential role to play. As a consequence, the right to legal assistance at the expense of the State (legal aid), where the interest of justice so require, becomes a key contributor to making access to justice a reality for poor and marginalised communities.

Given the fact that the South African Constitution is informed by an international and regional human rights framework, this chapter examined the right to legal assistance in civil matters under this international and regional human rights framework. The focus was on the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). This chapter also examines the right to legal assistance under section 34 of the Constitution of South Africa.

In addition, legal assistance, in this thesis, is expressed as a continuum of services that are not only confined to legal representation in a judicial or quasi-judicial forum. The focus of this enquiry is therefore not only on the right to legal representation, but what this study considers to be a human right to *legal assistance*, including *legal representation*, which under certain circumstances, may include *legal aid*. The author, therefore, advocates for the recognition of a human right to legal assistance and not only legal representation.

Most of the academic literature and the few available court decisions on the right to legal assistance in civil matters in South Africa are centred on access to *legal representation* during complex judicial,

⁸⁹⁷ Legal assistance as defined in Chapter 2.

⁸⁹⁸ Legal representation as defined in Chapter 2.

quasi-judicial proceedings or non-judicial proceedings.⁸⁹⁹ This right to legal representation at the expense of the requestor in a court of law has always been recognised under common law in South Africa,⁹⁰⁰ albeit indirectly in civil matters.⁹⁰¹ The rules of the various courts make express provision for it.⁹⁰² Disputes that involve the right to legal assistance in civil matters mainly concerned itself with legal representation in fora other than courts of law.⁹⁰³ In these disputes, an *expectation* of legal representation in quasi-judicial fora was almost always contrasted with an *entitlement* to legal representation in a conventional court of law. However, there is no judicial precedent in South Africa for the right to comprehensive *legal assistance*, whether at the expense of the requestor or the State. The right to legal assistance has also barely been considered in academic literature. The court decisions would thus aid the discussion on the right to legal assistance and the role of the paralegal in providing that assistance to a limited extent.

Section 34 of the Constitution, unlike sections 28 and 35, does not *expressly* confer the right to legal assistance, whether at the expense of the State or not. The Constitution provides expressly for the right to *legal representation* at the expense of the State in criminal matters for persons of all ages, and civil matters, which involve persons younger than 18.⁹⁰⁴ In both instances this right has an inherent limitation, embodied in the phrase ‘if substantial injustice would otherwise result’, which is given effect through a means and/or merit test.⁹⁰⁵



⁸⁹⁹ See the ensuing discussions.

⁹⁰⁰ *S v Mabaso and Another* 1990 (60/89) ZASCA 24 (AD); *S v Seheri* 1964 (1) SA 29 (A); *S v Baloyi* 1978 (3) SA 290 (T).

⁹⁰¹ *Goldberger v Union and South West Africa Insurance Co Ltd* 1980 (1) SA 160 (E); *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2000); *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2005 (2) SA 479 (SCA); *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* 2013 (005/13) ZASCA 118 (SCA).

⁹⁰² See Chapter 7.

⁹⁰³ *Goldberger v Union and South West Africa Insurance Co Ltd* (1980); *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2000); *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2005); *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (2013); *Legal Aid South Africa v Magidiwana and Others* (2015).

⁹⁰⁴ Section 28(1)(h) reads:

‘Every child has the right: ...

To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.’

The relevant parts of section 35 read:

(2)(c) ‘Everyone who is detained, including every sentenced prisoner has the right –

...to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.’ and

(3)(g) ‘Every accused person has a right to a fair trial, which includes the right –

to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly’.

⁹⁰⁵ Section 28(h) and 35(2)(c) and 35(3)(g).

This study argues that the right to *legal assistance* in civil matters is *derived* from the *express* right⁹⁰⁶ to a fair hearing, which is a fundamental component of the right of access to the courts and other dispute resolution fora contained in section 34 of the Constitution. For the criteria of fairness to be met, one party to the proceedings may require legal assistance in the form of legal information,⁹⁰⁷ the other may require legal advice,⁹⁰⁸ while another may require legal support;⁹⁰⁹ and another legal representation. The right to *legal representation*, as a type of *legal assistance*, is thus derived from the right to a fair hearing, which is expressly provided for in section 34.⁹¹⁰ It is this distinction between an express and derivative right⁹¹¹ to *legal representation* that has fuelled the debate on whether the right to *legal aid* in civil matters for indigent persons, 18 years and older, is envisaged by the Constitution.

Academic writers express conflicting views on whether the Constitution provides for the right to legal representation in civil matters at the expense of the State.⁹¹² Where the courts have had the opportunity to rule definitively that such a right indeed exists beyond the express constitutional imperatives,⁹¹³ it was confined to a particular category of persons⁹¹⁴ or limited to the unique circumstances of the matter at hand.⁹¹⁵

Denialists advance two arguments against an interpretation of section 34 in a manner that includes the right to legal representation at the expense of the State in civil matters. The first is that section 34 confers no express right to legal representation and the second argument is based on the fact that the limited resources of the State will discourage such an interpretation. Their arguments are either characterised by a positivist approach to the interpretation of section 34,⁹¹⁶ or a conflation of the two stage enquiry into the limitation of the right.⁹¹⁷ Neither approach assists in protecting the primary non-derivative right of access to procedural justice in section 34.

⁹⁰⁶ An express right is one that is explicitly outlined in the text.

⁹⁰⁷ As defined in Chapter 2.

⁹⁰⁸ As defined in Chapter 2.

⁹⁰⁹ As defined in Chapter 2.

⁹¹⁰ See Chapter 5.

⁹¹¹ A deferred right is one that is inferred from the text.

⁹¹² Brickhill, A & Friedman, J (2006); De Waal, J, Currie, I & Erasmus, G (2013).

⁹¹³ S 28(h) and 35(2)(c) and (3)(g).

⁹¹⁴ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2001 (LCC10/01) ZALCC 31 (LCC).

⁹¹⁵ *Magidiwana and Others v President of the Republic of South Africa and Others* 2013 (CCT 100/13) ZACC 27 (CC).

⁹¹⁶ Nkabinde J in *Legal Aid South Africa v Magidiwana and Others* (2015).

Mcquoid-Mason, D, 'Access to Justice in South Africa: Are there Enough Lawyers?', (2013), 3(3), *Oñati Socio-Legal Series*, pp. 561–579.

⁹¹⁷ De Waal, J, Currie, I & Erasmus, G (2001).

Legal assistance in criminal matters is required from the moment of arrest and this action puts into motion a process which, in the majority of cases, requires adjudication by a court of law. It is, therefore, not surprising that the right to legal assistance in criminal matters mostly require legal representation by the narrow legal profession. The focus of legal assistance in criminal matters is thus mainly on the courts and the narrow legal profession.

However, for civil matters, 'justice is served in many rooms, not just in the court room'.⁹¹⁸ The phrase, 'tribunal or other dispute resolution forum' reflects this feature. Moreover, there is an overwhelming need for legal assistance (information, advice, support) and not only legal representation in civil matters. Legal assistance in civil matters thus stretches beyond litigation in a conventional court of law or other dispute resolution forum. It is axiomatic that legal representation cannot be the focal point of a strategy to alleviate poverty. The nature of legal services is determined by the types of legal problems that services intended to help resolve. These matters vary in nature and complexity; hence the 'one size fits all' solution, which applies to criminal proceedings, is not suitable. This is where the problem with provision of legal assistance in civil matters, particularly legal aid, arises and where the solutions rest.

Figure 1⁹¹⁹ illustrates that the exclusive focus on legal representation in a court of law and the narrow legal profession for the purpose of providing access to civil justice is wholly inappropriate. Paradoxically, by focusing on providing access to justice at one narrow end, justice is denied at the other much broader end, where the needs are concentrated.

Examination of the right to legal assistance, not only legal representation in a judicial or quasi-judicial forum, is thus justified. This chapter first examines the international and regional human rights framework of the right to legal aid in civil proceedings. Secondly, it presents a challenge to a possible positivist interpretation of the derivative right to legal representation, as implied by section 34. Thirdly, this chapter examines the right to legal representation in civil proceedings before the courts and other dispute resolution fora and the State's obligation to fund that representation. Finally, the argument is advanced for a human right to legal assistance beyond the courts and other dispute resolution fora.

⁹¹⁸ Galanter, M, 'Justice in many Rooms: Courts, Private Ordering, and Indigenous Law', (1981), 13(19), *The Journal of Legal Pluralism and Unofficial Law*, pp. 1-47. p. 1.

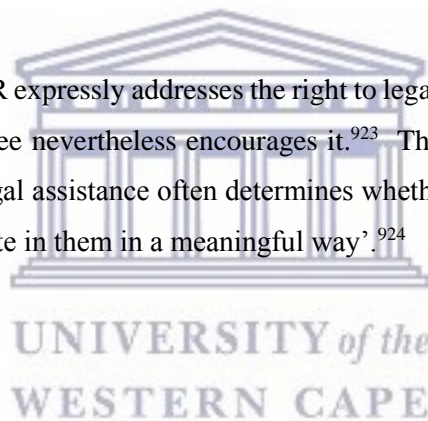
⁹¹⁹ See page 42.

6.2. THE RIGHT TO LEGAL ASSISTANCE UNDER THE UNITED NATIONS HUMAN RIGHTS FRAMEWORK

A number of international and regional human rights instruments recognise the right to free legal assistance (legal aid) as an essential component of the right to a fair trial, which was discussed in the preceding chapters.⁹²⁰ The right to free legal assistance is also entrenched in a range of other United Nations legal instruments.⁹²¹

However, this right is mainly confined to criminal matters. The conventional model to resolve disputes in criminal matters reflects a predictable path. Those who stand accused may be arrested, detained, brought before a court of law, incarcerated or fined if found guilty, or released, if not. Legal assistance is very often guaranteed throughout this linear process and requires the assistance of a practitioner of the law, particularly a lawyer. However, the immense power of the State is not only confined to criminal law. Yet, in spite of the prevalence of civil legal needs, many citizens do not have equal access to the civil justice system.⁹²²

Neither the UDHR nor the ICCPR expressly addresses the right to legal aid in civil matters. The United Nations Human Rights Committee nevertheless encourages it.⁹²³ The Committee acknowledged that ‘the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way’.⁹²⁴



⁹²⁰ Article 14(3)(d) of the ICCPR

A person charged with a criminal offence has the right ‘to defend himself in person or through legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he doesn’t have sufficient means to pay for it.’

Article 18(3)(d) of the UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, A/RES/45/158, 2220 U.N.T.S. 39481 (2003). contains an almost identical formulation to the above.

Articles 37(d) and 40(2)(b)(ii) and (iii) of the GA Res. 44/25 (1990) makes reference to ‘legal and other appropriate assistance’ and the Committee on the Rights of the Child has ruled that this assistance should be provided free of charge.

Article 6(3)(c) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950). (includes the right of the accused to free legal assistance as one of the ‘minimum rights’ of the accused, subject to a merit and means test.

⁹²¹ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11 (1977), para 93; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), s 17 para 2.

UN General Assembly, *Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), s 6.

Principle 18(a) of the *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (2013)

⁹²² Kaman, C Radday, A & Stanzler, C (2012).

⁹²³ HRC *General Comment no. 32* (2007), para 10.

⁹²⁴ HRC *General Comment no. 32* (2007), para 10.

The Special Rapporteur, therefore, advises:

‘In accordance with jurisprudence of existing human rights treaty bodies...the notion of beneficiaries of legal aid should be extended *to any person who comes in contact with the law and does not have the means to pay for counsel.*’⁹²⁵

The Report of the Special Rapporteur states that the beneficiaries specifically include: ‘[a]ny person whose rights have been violated by an omission or commission by a State actor’ and ‘[a]ny person whose rights and obligations are determined through a judicial or extrajudicial process in a civil matter’.⁹²⁶ The Report therefore does not make a distinction between criminal and civil matters insofar as it relates to the provision of legal aid and advises that this aid is extended beyond the conventional courts.

Although there is no explicit international statutory right to legal assistance at the expense of the State in civil matters, equal access to legal aid is fundamental to the promise of protection under the rule of law, and is essential for the enforcement of a number of substantive human rights. While it is true that the poor cannot ‘eat due process’,⁹²⁷ fair adjudicating mechanisms are critical for the enforcement and protection of substantive human rights, while the right to legal assistance helps to protect fundamental rights against standard threats.⁹²⁸ Individuals do not only require knowledge of the law but also effective access to it. This requires governments to provide the necessary resources for their citizens to be informed of and gain access to the law.

Moreover, authority for the extension of legal aid to civil matters is drawn from jurisprudence, which emanates from various jurisdictions, including two court decisions predating article 14 of the ICCPR.⁹²⁹ In *Arey v Ireland*, the European Court of Human Rights interpreted the right to a fair hearing in civil matters as having effective access to the courts.⁹³⁰ It thus held that legal assistance at the expense of the State should be provided to indigent civil litigants where the interest of justice requires it. This decision stands as the authority for approximately forty-five nations across Europe. Prior to the decision in *Arey v Ireland* the German Constitutional Court ruled that the State’s constitutional guarantee of a fair hearing in civil cases may require free legal representation for the poor, where the laws of the

⁹²⁵ Report of the Special Rapporteur on the independence of judges and lawyers (2013) p. 7.(own emphasis added)

⁹²⁶ Report of the Special Rapporteur on the independence of judges and lawyers (2013).

⁹²⁷ Haney, C, 'The Fourteenth Amendment and symbolic legality', (1991), 15(2), *Law and Human Behavior*, pp. 183–204.

⁹²⁸ Luban, D, 'Is There a Human Right to a Lawyer?', (2014), 17(3), *Legal Ethics*, pp. 371–381.

⁹²⁹ Decision of June 17, 1953

Judgment of October 8, 1937

⁹³⁰ *Airey v. Ireland* 1979 (A/32) ECHR 3 (6289/73).

country do not.⁹³¹ Sixteen years earlier, the Swiss Supreme Court also stated emphatically that the poor could not be equal before conventional courts unless they had legal representation, like the rest of the citizenry.⁹³²

The right to equality before the law and by the law, including the prohibition of discrimination, is considered in international legal circles as being essential to international peace and security and a precondition for the enjoyment of all human rights, whether civil, political, economic, social or cultural.⁹³³ The ICCPR expressly provides for equality before the law; equality under the law; equal protection of the law; and equal benefit of the law.⁹³⁴ This denotes both formal⁹³⁵ as well as substantive equality.⁹³⁶ There is thus the international realisation that institutional structures impact differently on various communities and that the systemic abuse and disempowerment that vulnerable communities experience cannot only be met by ensuring formal equality.

The Report of the Special Rapporteur notes that a failure to provide legal assistance where a person's financial position is such that he/she cannot meet the cost of litigation is considered to be a form of discrimination.⁹³⁷ It violates that person's right to equality before the law and equal protection of the law. Mere formal equality renders the right of access to the courts illusory, while substantive equality, in most cases, would require legal assistance to facilitate access to the legal process.⁹³⁸

In many of the cases, which involve the right to legal representation in criminal matters, the HRC has applied the general principle of 'equality of arms', emphasising its importance as an essential component of a fair trial.⁹³⁹ The principle of 'equality of arms' is violated when disparity in the power relationship between the parties to the legal proceedings is so great that it compromises the fairness of the proceedings.

⁹³¹ Decision of June 17, 1953.

⁹³² Judgment of October 8, 1937.

⁹³³ Office of the High Commissioner, *Human Rights in the Administration of Justice: A Facilitator's Guide on Human Rights for Judges, Prosecutors and Lawyers*, (2011) Geneva, Switzerland: United Nations, ch 13.

⁹³⁴ Articles 14 and 26

⁹³⁵ Formal equality refers to the application of the law

⁹³⁶ Substantive equality refers to the result and benefits of applying the law

⁹³⁷ Report of the Special Rapporteur on the independence of judges and lawyers (2013).

⁹³⁸ Leslie, L, *The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*, (2014), Davidson G & Morris C (eds.) Vancouver: Lawyers Rights Watch Canada.

⁹³⁹ Nowak, M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (2005) Kehl am Rhein, Germany: N.P. Engel Publishers. Found in Danielsen, D, Davis, M, Anders, P, et al, *In The Interest of Justice: Human Rights and the Right to Counsel in Civil Cases*, (2006) Northeastern University School of Law.

The ICCPR, which binds South Africa as a matter of treaty law at an international level, places an obligation on the State to take positive steps to ensure the enjoyment of all rights that are contained in the Covenant.⁹⁴⁰ These steps include modifying the domestic laws in compliance with the State's international legal obligations and ensuring the effective implementation thereof by all the relevant institutions.⁹⁴¹ The Guiding Principles on Extreme Poverty and Human Rights require states to:

‘... establish effective, affordable and accessible procedures, including non-formal dispute resolution mechanisms, in accordance with human rights standards, to support persons living in poverty seeking justice, taking into account the specific barriers that they face accessing justice’.⁹⁴²

These Guiding Principles further require the State to provide ‘high-quality legal aid systems’ and ‘expanded legal services’ for those who are without the means to pay for it in both criminal and civil matters.⁹⁴³ The Report of the Special Rapporteur specifically advises that the benefits of a legal system based on support for paralegals should not be underestimated.⁹⁴⁴ Paralegals are therefore pivotal in ensuring fair, accessible and affordable civil justice systems, especially in states where the overwhelming majority of the population suffers various degrees of poverty and its capacity to deliver access to justice is hampered by limited resources.

The HRC reminded State Parties that Article 14 applies to criminal as well as civil proceedings. It noted that,

‘[i]n general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations *in a suit at law*’.⁹⁴⁵

The United Nations Human rights framework prioritises legal aid for women and children. The Committee on the Elimination of Discrimination against Women (CEDAW) determined that states must ‘ensure that women have recourse to affordable, accessible and timely remedies, with legal aid

⁹⁴⁰ Article 2.

⁹⁴¹ Office of the High Commissioner (2011).

⁹⁴² At para 68.

⁹⁴³ Office of the High Commissioner, *Guiding Principles on Extreme Poverty and Human Rights*, (2012).

⁹⁴⁴ Report of the Special Rapporteur on the independence of judges and lawyers (2013).

⁹⁴⁵ HRC *General Comment no. 13* (1984), para 8. (own emphasis added).

and assistance as necessary⁹⁴⁶ and that ‘a crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law’.⁹⁴⁷

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985) call on states to ensure that ‘throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.’⁹⁴⁸ The Committee on the Rights of the Child subsequently addressed children’s rights in juvenile justice proceedings and held that a child in conflict with the law ‘must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence,’ and indicated that such assistance must be free.⁹⁴⁹

In its Initial Report to the United Nations Secretary-General under article 40 of the ICCPR, the State highlighted the statutory measures taken by South Africa to comply with the right to legal aid.⁹⁵⁰ The Report nevertheless acknowledged the resource constraints of the State, the fact that legal aid in civil matters lags behind, and the reality that the Legal Aid Board is unable to meet all the legal representation needs of the South African society.⁹⁵¹ It further acknowledged the ‘middle gap’, whose members are unable to afford legal representation but fail the means test for legal aid.⁹⁵² The HRC did not pass concluding remarks on this aspect of South Africa’s Report as it would not be appropriate for international monitoring bodies to meddle in the resource allocation of a sovereign state.

It is clear that although the international statutory framework on human rights stops short of providing for an express right to legal aid in civil matters, there is little doubt that, in terms of international standards, the State has a fundamental obligation to ensure legal aid in some form or another, where the interests of justice so require. The right to legal aid in civil matters, therefore, according to these standards, is materialising as a fundamental human right⁹⁵³ and, where the resources of the state limit this right, the paralegal is emerging as a central role player, especially on the African continent.⁹⁵⁴

⁹⁴⁶ UN Committee *General Comment no. 13e on the Elimination of Discrimination against Women, General recommendation no. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para 34.

⁹⁴⁷ UN Committee on the Elimination of Discrimination against Women, *General recommendation on women’s access to justice*, (2015) CEDAW/C/GC/33, para 1.

⁹⁴⁸ Rule 15.1.

⁹⁴⁹ UN Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice*, (2007) CRC/C/GC/10, para 49.

⁹⁵⁰ HRC *General Comment no. 13* (1984), para 160.

⁹⁵¹ At para 161.

⁹⁵² At para .160.

⁹⁵³ Danielsen, D Davis, M Anders, P et al (2006).

⁹⁵⁴ See Chapter 9.

6.3. THE RIGHT TO LEGAL ASSISTANCE UNDER THE REGIONAL HUMAN RIGHTS FRAMEWORK

The ACHPR has been even less forthcoming with the entrenchment of the right to legal aid than its regional counterparts and the ICCPR. Article 7(1)(c) states that, '[e]very individual shall have the right to have his cause heard. This comprises: ... (c) the right to defense, including the right to be defended by counsel of his choice...'.⁹⁵⁵

The ACHPR does not recognise the right to legal aid, whether in criminal or civil matters, and confines the right to legal representation to criminal matters only. It nevertheless entrenches the principles of equality before the law and equal protection of the law, albeit in the absence of the phrase 'without discrimination', which accompanies this principle in international and many other human rights instruments.⁹⁵⁵ The obligation of the State in respect of these rights is absolute, immediate and non-derogable. Moreover, under Article 1, member states are obliged to '... recognize the rights, duties and freedoms enshrined in [the Charter]' and 'undertake to adopt legislative or other measures to give effect to them'.

The African Commission on Human and Peoples Rights has initially filled this vacuum in the regional statutory human rights framework by relying on HRC Comment 13. The conduct of the State Parties was therefore measured against norms and standards as they emerged from the international community. The African Committee advised that:

'... the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, *as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all*'.⁹⁵⁶

Domestic legal systems and adjudicating mechanisms are thus expected to adhere to international standards of a fair hearing. These international standards include the right to legal aid, regardless of the nature of the proceedings, where the interest of justice so require.

⁹⁵⁵ Article 3.

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.

⁹⁵⁶ *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* (2000). (own emphasis added).

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is the most significant regulatory development for legal assistance (including legal aid) and the paralegal on the African continent.⁹⁵⁷ These Principles codify the principle of ‘equality of arms’ regardless of the nature of the proceedings⁹⁵⁸ and the right to legal representation in judicial proceedings.⁹⁵⁹ It gives express recognition to the right to an effective remedy,⁹⁶⁰ equal access to lawyers of the accused’s choice and parties to the proceedings,⁹⁶¹ access to legal services without discrimination, regardless of the nature of the proceedings,⁹⁶² and the right to legal aid and assistance in both criminal and civil matters, which are assigned by the State subject to a means and a merit test.⁹⁶³ It provides guidelines to the legal profession on the rendering of legal services under a legal aid scheme. The most significant development for the purpose of this study is the codification of the role of paralegals.⁹⁶⁴

Although the Principles does not offer a definition of legal services or legal aid, it qualifies the right to legal aid and assistance, which is assigned by the State by subjecting it to a means and merit test. The African Commission on Human People’s Rights have not had the opportunity to consider what the means test implies in practice, while the Principles merely states that a person would qualify if ‘he or she doesn’t have sufficient means to pay for it’.⁹⁶⁵ However, this would clearly be up to the individual states to determine. The Principles does, however, provide some guidelines in respect of the merit test. It provides for the right of access to legal aid in a criminal and civil matter, ‘where the interest of justice so require’.⁹⁶⁶ In the case of civil matters, the following factors should considered:

- the complexity of the case and the ability of the party to adequately present himself or herself;
- the rights that are affected and
- the likely impact of the outcome of the case on the wider community.⁹⁶⁷

Most importantly, the Principles requires that states should acknowledge the role that paralegals could play in the provision of legal assistance, whilst providing an enabling legal framework for this service,

⁹⁵⁷ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ACHPR 33, DOC/OS(XXX)247, Int’l Hum. Rts. Rep. 1180 (2005) (2003).

⁹⁵⁸ Principle A.2(a) and 6(a).

⁹⁵⁹ Principle A.2(b) and G(a) – (c).

⁹⁶⁰ Principle C (a) – (d).

⁹⁶¹ Principle G (b).

⁹⁶² Principle G (a) – (c).

⁹⁶³ Principle H (a) – (k).

⁹⁶⁴ Principle H (g) – (k).

⁹⁶⁵ Principle H (a).

⁹⁶⁶ Principle H (a).

⁹⁶⁷ Principle H.(b)

and its recognition in their domestic legal order.⁹⁶⁸ It further places an obligation on the participating governments to professionalise this paralegal service by establishing ‘training, the qualification procedures and rules governing the activities and conduct of para-legals’.⁹⁶⁹ This should be done in collaboration with the legal profession and non-governmental organisations. Once recognition is given to paralegals, the State must ensure that they are granted ‘similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence’.⁹⁷⁰

The Principles declares the right to a fair trial, which includes the right to ‘equality of arms’ and the right to legal representation, regardless of the nature of the proceedings, non-derogable under any circumstances.⁹⁷¹ The failure, therefore, to provide legal assistance, including legal aid, to an individual who meets the means and the merit test, would constitute a violation of the right to a fair trial. Failure to provide access to legal representation, which, at the least constitutes representation by a paralegal, under these circumstances, would do likewise.

In the Second Periodic Report under the Banjul Charter, the State highlighted the ‘sterling work done [by Legal Aid South Africa] in advancing access to justice for indigent persons in need of legal representation’.⁹⁷² The Report also draws attention to international interest in and regard for the measures taken by the Legal Aid Board.⁹⁷³ It nevertheless acknowledges that the demand outweighs supply.⁹⁷⁴ The statistics for 2012/2013, which the Report presents, highlight the State’s efforts, although less than 1.5% of a population of approximately 54 million have received legal aid during this period.⁹⁷⁵ Specific reference is made to the assistance provided by paralegals, although this assistance seemed to be confined to providing advice.⁹⁷⁶ The concluding comments of the African Commission on this Report had not been published by the time the dissertation was submitted, although the Report was considered at the 58th Ordinary Session of the Commission in April 2016.⁹⁷⁷

Despite the aforementioned international and regional support for the right to legal assistance, particularly legal aid, it is important to note that these instruments can never be regarded as replacements for well-functioning domestic legal systems. International and regional remedies are a last resort, when

⁹⁶⁸ Principle H (g) and (h).

⁹⁶⁹ Principle H (h).

⁹⁷⁰ Principle H.(k)

⁹⁷¹ Principle R.

⁹⁷² At para 155.

⁹⁷³ At paras 157-158.

⁹⁷⁴ At paras 157-158.

⁹⁷⁵ At para 156.

⁹⁷⁶ At para 156.

⁹⁷⁷ African Commission on Human and Peoples’ Rights, *Final Communiqué of the 58th Ordinary Session of the African Commission on Human and Peoples’ Right*, (2016) Banjul, Islamic Republic of the Gambia.

the domestic mechanisms designed to ensure the protection of human rights standards have failed. Therefore, the right to legal assistance in civil matters in South Africa will be examined next.

6.4. A RIGHT TO LEGAL ASSISTANCE UNDER SECTION 34 OF THE CONSTITUTION OF SOUTH AFRICA

A legal positivist interpretation of the right to legal assistance under section 34 of the Constitution is not complicated. Such an examination will first show that there is no express right to *legal assistance* contained in section 34 and, secondly, find that the courts are reluctant to recognise the existence of a general right to *legal representation* beyond the proceedings in a conventional court of law, whether at the expense of the individual or the State.⁹⁷⁸

The notion that the non-derivative (express) right to procedural justice in civil matters does not include a derivative (implied) right to legal assistance is, in the author's view, irrational. Admittedly, there is an absence of the codification of the right to legal assistance, including legal aid in civil matters, beyond the express constitutional right to legal representation.⁹⁷⁹ This may be regarded by some legal scholars and jurists as an invitation to interpret section 34 in a manner that reduces this right to a mere moral background claim. This is tantamount to suggesting that the right to the political franchise of Black voters prior to 1994 was such a claim, as no law at the time made express provision for it.

A consequence of reducing the right to legal assistance in civil matters for persons 18 years and older to a moral background claim renders the enjoyment of this derivative right dependent upon an express codification thereof through policy (legislation), executive and administrative action (practice) and litigation (adjudication). This places the onus on the poor and the marginalised to advocate, litigate and/or agitate for change in policy or practice.

In the absence of an express constitutional right to legal assistance in civil matters for persons 18 years and older, litigation is hardly an option unless these individuals or groups are assisted legally. Advocating for change in policy and practice requires a level of legal literacy to exercise influence over administrative and legislative procedures. This requires legal assistance. Agitating for change involves activities such as demonstrations that must occur within the confines of the law. Knowledge and understanding of these laws is essential for obedience to them, which may require legal assistance. This

⁹⁷⁸ *Legal Practice Act* (2014); *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2000); *Magidiwana and Others v President of the Republic of South Africa and Others* (2013); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* 2015 (CCT223/14) ZACC 35 (CC); *Legal Aid South Africa v Magidiwana and Others* (2015).

⁹⁷⁹ See sections 35 and 28 of the *Constitution of the Republic of South Africa*, 1996.

presents a peculiar conundrum. In order for the poor and the marginalised to enjoy the right to legal assistance in civil matters, they must advocate, litigate and/or agitate for its express codification in policy or through practice, *within* the confines of the law, *without* legal assistance. If they indeed had the agency to do so, they would not need the legal assistance. The irrationality of this state of affairs requires no further exposition.

The Constitution expressly recognises the right to legal representation in criminal matters⁹⁸⁰ as well as civil matters which involve persons younger than 18.⁹⁸¹ This study, therefore, argues that without the derivative right to legal assistance, the non-derivative right of access to procedural justice, and as a consequence substantive justice, cannot be protected. The protection of the right of access to justice may require legal assistance in the form of legal aid.

6.5. SECTION 34 AND THE RIGHT TO LEGAL REPRESENTATION

Section 34 of the final Constitution has a drafting history. Its predecessor, section 22 of the Interim Constitution did not contain the right to a fair hearing. Section 22 read: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.' The absence of express reference to a fair hearing led to the conclusion by the court in *Bernstein v Bester* that it was doubtful whether this section conferred the right to a fair hearing in civil matters. However, the wording was altered in section 34 of the final Constitution which now makes express provision for a 'fair and public hearing'. This provision was not subjected to challenge during certification of the Final Constitution, which indicates that the various parties reached consensus that the right to a fair hearing is an essential component of the right of access to the courts and other dispute resolution fora.⁹⁸² The constitutional right to legal representation in civil proceedings before a judicial or quasi-judicial forum is inescapably linked to the right to a fair hearing. Jurisprudence shows that a distinction is drawn between the right to legal representation in a court of law and other fora.

6.5.1. The right to legal representation in a court of law

The right to legal representation in civil matters in a court of law is not expressly provided for in section 34. The rules of the various conventional courts and other adjudicating mechanisms, including commissions of enquiry, nevertheless make express provision for it.⁹⁸³ However, it is trite that this

⁹⁸⁰ Section 35.

⁹⁸¹ Section 28.

⁹⁸² *In Re: Certification of the Amended Text of the Constitution of The Republic Of South Africa 1996* (CCT37/96) ZACC 24 (CC).

⁹⁸³ See Chapter 7 for a more detailed discussion.

provision in the Bill of Rights did not alter the common law position in respect of this right, but entrenched it implicitly as a fundamental right. In *Goldberger v Union and South West Africa Insurance Co Ltd*,⁹⁸⁴ Howie J stated that:

‘When the claimant tells his story at the trial in the course of evidence he enjoys the protection of the Court and the questioning and cross questioning are regulated by rules of evidence and procedure. If the claimant is entitled to legal representation in those circumstances then by all that is fair and just he should be entitled to it where he is obliged to undergo extracurial questioning without those advantages and restraints.’⁹⁸⁵

Since then the right to procedural justice was entrenched in both the Interim Constitution (IC) and the Final Constitution of South Africa (FC). Neither section 22 of the IC nor section 34 of the FC makes express reference to the right to legal assistance in the form of legal representation in civil proceedings. However, there is jurisprudence that supports the view held in this thesis that section 34 of the FC contains a derivative right to legal representation in a court of law. In a decision that was handed down involving the right to legal representation under section 22 of the Interim Constitution, Mdlanga J expressed the position of the court as follows:

‘I accept ... that, even though there be no specific mention of the right to legal representation in civil cases, the right of access to court and of having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of civil proceedings, it were to be held that there is no constitutional right to legal representation. ... even the best educated lay people need the assistance of professional legal representation to exercise their right to access to court in a meaningful way. This applies with more force in respect of the vast numbers of uneducated and illiterate people of this country. ... [Such a conclusion] accords with an interpretation that views the Constitution for what it is - a living document.’⁹⁸⁶

A party to civil proceedings in a court of law thus has an unqualified constitutional right to legal representation. Any limitation of this right will have to be subjected to the scrutiny of the limitation clause. This is not the position in other dispute resolution fora.

⁹⁸⁴ *Goldberger v Union and South West Africa Insurance Co Ltd* (1980).

⁹⁸⁵ Page 165.

⁹⁸⁶ *Bangindawo and Others v Head of the Nyanda Regional Authority and Another; Hlantlala v Head of the Western Tembuland Regional Authority and Others* 1998 (3) SA 262 (TK) p. 277.(own emphasis added).

6.5.1.1. The right to legal representation in another independent and impartial tribunal or forum

The common law position on the right to legal representation in fora other than courts of law, for the most part, remained consistent.⁹⁸⁷ Malan J reaffirmed the common law position in *CCMA v Law Society, Northern Provinces*, and held that '[t]he courts have consistently *denied entitlement* to legal representation as of fora other than courts of law'.⁹⁸⁸ The court cited with approval the earliest views expressed by Innes CJ almost a century ago: 'No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none.'⁹⁸⁹ Needless to say, much water has flowed under the bridge since. For the purpose of this study, the most relevant is the enactment of South Africa's Constitution.

Malan J nevertheless noted that the common law recognises the 'right to a *procedurally fair hearing* in *civil and administrative matters*'.⁹⁹⁰ He conceded that, as a consequence, 'the circumstances of the case [may] require recognition of the right to *legal representation*'.⁹⁹¹ The current position in South Africa is thus that there is no *unqualified* constitutional right to legal representation in fora other than courts. This was confirmed by the Constitutional Court in *Legal Aid South Africa v Magidiwana and Others*. Assuming that this is indeed the correct view, the question arises as to whether a party to the proceedings before a judicial, quasi-judicial or non-judicial forum, who is entitled to legal representation, has the right to this representation at the expense of the State. This requires an examination of the right to legal representation at the expense of the State in a judicial, quasi-judicial and non-judicial forum.

6.5.1.2. The right to legal representation at the expense of the State in a court of law

A number of academic writers have expressed the opinion that owing to the limited resources of the State it is improbable that section 34 will be interpreted in a manner that places a positive obligation on the State to provide legal aid in civil matters.⁹⁹² De Waal, Currie and Erasmus opined that:

'(s)uch an interpretation would mean that individuals are entitled to financial assistance from the state to have their disputes resolved by a court or another forum, and to legal representation in some cases. The reality of the limited state resources is likely to

⁹⁸⁷ *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2000), para 5; *MEC Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2005), para 11; *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (2013), para 19; *Dabner v South African Railways and Harbours 1920 AD 583 1920 AD 583*.

⁹⁸⁸ At para 19. (own emphasis added)

⁹⁸⁹ *Dabner v South African Railways and Harbours 1920 AD 583* (1920) p. 598.

⁹⁹⁰ At para 19.

⁹⁹¹ At para 19. (own emphasis added)

⁹⁹² De Waal, J, Currie, I & Erasmus, G (2013); Mcquoid-Mason, D (2013).

discourage such an interpretation of s 34. This is unfortunate, since the single biggest impediment to access to justice is the prohibitive cost of litigation'.⁹⁹³

The authors are indeed correct in concluding that an entitlement will ensue from such an interpretation. However, there is a fundamental flaw with the rest of the opinion expressed above. First, section 34 imposes a constitutional obligation on the State to provide access to procedural justice. This section contains no inherent limitation. A denial of the means to access the courts and other dispute resolution fora for those who are not by the means to do so, amounts to a limitation of the right of access to procedural justice, which triggers the scrutiny of section 36 of the Constitution.

Secondly, the authors conflate the two stage enquiry into the limitation of the right. Stage one determines the existence of the right; in other words, its scope, meaning and the conditions for its application. Once these have been established, the enquiry shifts to determining whether there has been a limitation of the right. A finding of a limitation of the right triggers stage two of the enquiry, which determines whether there is justification for the limitation taking into consideration listed and other factors. The authors have incorporated a factor that influences justification for the limitation of the right⁹⁹⁴ into stage one of the enquiry, concluding that it is unlikely that the right will indeed be deemed to exist. The existence of the right is not dependent on the resources of the State, while its limitation might be, although the State's action would be subjected to a further enquiry into less restrictive means to limit the right.

Thirdly, the authors may revise their position slightly following the decision of the Constitutional Court in *Legal Aid South Africa v Magidiwana and Others*, which will be discussed below.⁹⁹⁵

Brickhill and Friedman also criticised this view, albeit for a slightly different reason.⁹⁹⁶ They advised that the authors 'confuse the content of the right with the remedy that the court should (or is likely to) grant on the basis of the right'.⁹⁹⁷ They claim that the mere fact that section 34 does not *expressly* include the right to legal representation does not preclude the courts from interpreting section 34 in a manner that indeed includes such a right.⁹⁹⁸

⁹⁹³ De Waal, J, Currie, I & Erasmus, G (2013).

⁹⁹⁴ Stage 2 of the enquiry.

⁹⁹⁵ *Legal Aid South Africa v Magidiwana and Others* (2015).

⁹⁹⁶ Brickhill, A & Friedman, J (2006).

⁹⁹⁷ At page 68.

⁹⁹⁸ Own emphasis added.

Once a party to civil proceedings has an entitlement to legal representation before a court of law, it follows that there will be circumstances under which the State will be obliged to fund that legal representation. LASA (Legal Aid South Africa) acknowledges this, and has recently included section 34 as part of their constitutional mandate.⁹⁹⁹ LASAA (Legal Aid South Africa Act) expressly makes provision for it by mandating LASA to ‘... provide legal representation to persons at state expense’.¹⁰⁰⁰ LASAA draws no distinction between civil and criminal matters. LASA is, therefore, mandated to provide legal representation at the expense of the State, on merit, regardless of the nature of proceedings.

The policy framework for dispensing legal aid contained in the Legal Aid Guide¹⁰⁰¹ expressly provides for legal aid to ‘a litigant who is indigent in a civil matter...if the matter has prospects of success on a balance of probabilities’.¹⁰⁰² The Legal Aid Guide further states that LASA grants legal aid to ‘[a]ll children resident in [South Africa]’ and ‘[a]ny indigent person who qualifies for legal aid under [the] guide’, provided that such person is ‘physically resident’ in the country and ‘a citizen or permanent resident’ of South Africa.¹⁰⁰³ The constitutional right to legal aid for legal representation in civil proceedings in a court of law in South Africa, where the interests of justice so require, is thus not in dispute.

However, the Constitution does not provide for an *unqualified* right to legal representation at the expense of the State, whether in civil or criminal proceedings.¹⁰⁰⁴ The right to State-funded legal representation is qualified by the phrase ‘if substantial injustice would otherwise result’.¹⁰⁰⁵ This qualification is given expression through a means and merit test, which is detailed in the Legal Aid Guide. The recent Constitutional Court enquiry into the right to legal representation before a forum other than a court of law yielded an interesting outcome and will be examined next.

6.5.1.3. The right to legal representation at the expense of the State in a quasi-judicial and non-judicial forum

The author contends that *Legal Aid South Africa v Magidiwana and Others* currently stands as the authority for the right to legal representation at the expense of the State in fora other than a court of law. The court cautioned that the factors that were taken into consideration are context-specific, and that ‘it

⁹⁹⁹ Legal Aid South Africa, *Integrated Annual Report 2015-2016*, (2016) .

¹⁰⁰⁰ Section 3 of the Legal Aid South Africa Act *Legal Aid South Africa Act* (2014).

¹⁰⁰¹ Legal Aid South Africa (2014)..

¹⁰⁰² Chapter 2.4, Outcome 1.

¹⁰⁰³ Legal Aid South Africa (2014).

¹⁰⁰⁴ Sections 28(h), 35(2)(c) and (g).

¹⁰⁰⁵ Sections 28(h), 35(2)(c) and (g).
Legal Aid South Africa (2014).

is therefore not feasible, nor desirable to lay down an inflexible list of such considerations'.¹⁰⁰⁶ Inasmuch as the Constitutional Court was at pains to confine the ruling to the particular case at hand, the minority judgement of Nkabinde J highlights the far-reaching legal consequences of the court's decision.¹⁰⁰⁷ The majority found that circumstances existed which necessitated legal representation at the expense of the State even though the tribunal in question was not of a judicial or quasi-judicial nature.

The author is persuaded by the opinion expressed by Nkabinde J. She argued that the claim by the majority that the decision of the court is confined to the unique circumstances before the court and will therefore have no practical effect, will not pass muster. A decision of the court is not without practical effect because the court claims that it is so. At the time when the appeal was heard by the Constitutional Court, LASA had already agreed to fund the applicants, while the Legal Aid Guide was subsequently adapted to include commissions of enquiry as fora where legal representation at the expense of the State may be required.¹⁰⁰⁸ A further consequence is that an additional group of persons are now entitled to place demands on the limited resources allocated to LASA. This is the practical effect of the High Court's ruling in favour of the requestors for legal aid. LASA's inability to meet the need of those who already qualified prior to this application is a matter of public record.¹⁰⁰⁹

Nkabinde J points out that the principles of judicial precedent and equality in the legal process militate against the constitutional endorsement of the High Court's view that the decision has narrow application.¹⁰¹⁰ *Magidiwana* thus stands as authority for the following principles:

- (i) Section 34 applies to non-judicial fora where express provision is made for legal representation; and
- (ii) Section 34 obliges LASA as the vehicle through which the State dispenses legal aid to fund legal representation for parties in civil proceedings before a non-judicial forum who meet the criteria set out by the court.

The court's dismissal of LASA's concern over the practical effect of extending the right to legal aid to a new category of persons, followed by an emphasis on the narrow application of section 34 to

¹⁰⁰⁶ At para 38.

¹⁰⁰⁷ At paras 83-84

¹⁰⁰⁸ At para 4.20.

¹⁰⁰⁹ Legal Aid South Africa, *Annual Report 2013-2014*, (2014) ; Legal Aid South Africa, *Annual Report 2014-2015*, (2015).

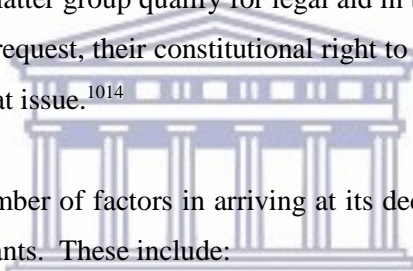
¹⁰¹⁰ At para 83 – 84.

In spite of this caveat, the court nevertheless endorsed a list of considerations that will stand as the benchmark against which future applications will be measured.

non-judicial fora, amounts to closing the stable doors after the horses have bolted. This decision has implications for quasi-judicial fora. Section 34 makes express reference to ‘courts and *other dispute resolution fora*’,¹⁰¹¹ not non-judicial bodies and Nkabinde J was swift to point out that the court’s interpretation of section 34 was ‘too novel’ and ‘expansive’.¹⁰¹² Yet, a purposive interpretation of section 34, through the prism of the triumvirate of democratic values, which are guided by the constitutional waymarks, resulted in the conclusion that the right to legal representation under section 34 includes non-judicial fora. Such a reading of section 34 was aided by the fact that the terms of reference of the Marikana Commission, as amended, made express provision for legal representation of a party to the proceedings.¹⁰¹³

It is, therefore, reasonable to conclude that, where similar factors exist for a party before a *quasi-judicial forum*, LASA would have an obligation to fund legal representation. This follows after the highest court in the land ordered LASA to do so for parties who were witnesses in proceedings before a non-judicial body, and not opposing parties to an adversarial process in a judicial or quasi-judicial forum. Should parties that belong to the latter group qualify for legal aid in terms of the criteria set out by the court, and denied legal aid upon request, their constitutional right to equality before the law and equal benefit of the law would then be at issue.¹⁰¹⁴

The High Court considered a number of factors in arriving at its decision to order LASA to fund the legal representation of the applicants. These include:

- 
- (a) substantial and direct interest of the applicants in the outcome of the Commission;
 - (b) the vulnerability of the applicants as participants in the proceedings of the Commission;
 - (c) the complexity of the proceedings and the capacity of the applicants to represent themselves;
 - (d) the procedures adopted by the Commission;
 - (e) equality of arms; and
 - (f) the potential consequences of the findings and recommendations of the Commission for the applicants.¹⁰¹⁵

¹⁰¹¹ Own emphasis added.

¹⁰¹² At para 33.

¹⁰¹³ Regulation 8 of the regulations adopted pursuant to the Terms of Reference provided that ‘[a]ny person appearing before the Commission may be assisted by an advocate or an attorney’.

¹⁰¹⁴ Section 9(1).

¹⁰¹⁵ At para 38.

Makgoka J concluded that these factors 'locate the commission squarely within the purview of section 34 of the Constitution' as they call for fairness and equality of arms.¹⁰¹⁶ Fairness, as imprecise as it may be, is thus central to an inquiry into the right to legal representation in adjudicating fora and equality is at the heart of that fairness inquiry. The court held that the constitutional rights of indigent and vulnerable applicants were implicated in the proceedings and threatened by the outcome of the proceedings. Having concluded that section 34 confers a constitutional right to legal representation before the commission, the court concluded that the rule of law and the interest of justice required that the State is obliged to fund the legal representation.¹⁰¹⁷ The right to a fair hearing in section 34 has been read in *Magidiwana* as giving rise to a qualified right to legal representation at the expense of the State before a dispute resolution forum other than a court of law.¹⁰¹⁸

This study acknowledges that there is no unqualified constitutional right to legal *representation* in fora other than courts in South Africa. It also acknowledges that there is no unqualified constitutional right to *legal representation at the expense of the State* in a court of law or other dispute resolution fora. However, this does not imply that there is no need for other forms of *legal assistance* such as information, advice and support in fora which preclude legal representation or where parties to the proceedings represent themselves. Certain courts and tribunals are already making provision for such assistance and LASA has recently introduced an information service as part of its legal services.¹⁰¹⁹ It must be stated though that this form of assistance at quasi-judicial fora is no replacement for the agent who acts for and on behalf of the party to the proceedings, whether the agent is a legal or a paralegal practitioner.¹⁰²⁰

A lack of legal assistance where legal representation is not provided for, may impact in equal measure on the fairness of the proceedings before the adjudicating mechanism. This is available to those parties who can afford to consult a practitioner of the law. However, the limitation of the right to free information, advice and support for those who cannot afford it prior to and during civil proceedings before an adjudicating forum, may impact on their right to equality in the legal process and thus compromise the fairness of the proceedings and the outcome.

¹⁰¹⁶ At para 66.

¹⁰¹⁷ At para 68.

¹⁰¹⁸ This qualified right is determined upon consideration of the aforementioned factors set out by the court.

¹⁰¹⁹ Examples include the equality courts, small claims courts and the CCMA.

¹⁰²⁰ See the reference to the results of the effectiveness of ADR in the credit industry in Chapter 7.

6.5.2. Limitations to the right of legal representation at the expense of the State

Jurisprudence recognises the existence of an implied, qualified constitutional right to legal representation in civil proceedings before judicial, quasi-judicial and even non-judicial fora. LASA has the unenviable task of allocating the limited resources that the State provides for legal aid. LASA, therefore subjects applications for legal aid in civil matters to two levels of qualification. The first involves a screening to determine whether the matter falls under one of the approved categories¹⁰²¹ or the exclusions listed in the Legal Aid Guide.¹⁰²² The second level of qualification is a means and a merit test, which is embodied in the phrase, ‘if substantial injustice would otherwise result’. According to the Legal Aid Guide, an application may nevertheless be declined owing to the limited resources of the State.¹⁰²³ The first level of qualification mostly involves the prioritization of the needs of the most vulnerable members of society and this prioritisation is therefore not at issue. The ensuing discussion focuses on the second level of qualification and the limitations of legal aid based on the limited resources of the State. LASA’s means and merit test and the limited resources of the State will thus be considered next.

6.5.2.1. LASA’s means and merit test

LASA qualifies access to legal aid by subjecting it to a means and merit test in most cases to determine whether ‘substantial injustice would otherwise result’, as expressly required by the Constitution in some instances,¹⁰²⁴ and implied in another.¹⁰²⁵ The Legal Aid Guide contains a set of criteria in civil matters that defines ‘substantial injustice’ in practice which is more stringent than the criteria in criminal matters. The criteria, which are listed in the Legal Aid Guide include,

- (a) The seriousness of the issue for the person, for example, if the person’s constitutional rights or personal rights are at risk;
- (b) The complexity of the relevant law and procedure;
- (c) The ability of the person to represent himself or herself effectively without a lawyer;
- (d) The financial situation of the person;
- (e) The person’s chances of success in the case; and
- (f) Whether the applicant has a substantial disadvantage compared with the other party in the case.¹⁰²⁶

¹⁰²¹ At paras 4.9.2 – 4.20.

¹⁰²² At paras 4.9.1 a) – q).

¹⁰²³ At paras 4.1 and 4.9.

¹⁰²⁴ Sections 28 and 35.

¹⁰²⁵ Section 34.

¹⁰²⁶ At para 4.9.

The Legal Aid Guide further states that, '[w]here these criteria are met, the applicant should get legal aid as long as Legal Aid SA has the necessary resources and the other requirements of the Guide are met'.¹⁰²⁷ The criteria listed contain features of a means and a merit test, which determines whether legal aid should be granted. The means test is reflected by the criterion labelled: 'The financial situation of the person' and determined by a formula that is reviewed on a regular basis by LASA.¹⁰²⁸ The rest are features of a merit test and include the seriousness of the outcome for the applicant,¹⁰²⁹ the complexity of the proceedings¹⁰³⁰ and the probability of success.¹⁰³¹ LASA further seeks guarantees for applications in civil matters¹⁰³² and requires evidence of inequality of arms¹⁰³³ that are not required for legal aid in criminal matters. The Legal Aid Guide states clearly that:

'A litigant who is indigent in a civil matter will only be granted legal aid if the matter has prospects of success on a balance of probabilities. This depends on the resources where substantial injustice would result.'¹⁰³⁴

Therefore, even when the above criteria have been met, the civil matter may nevertheless fall outside the approved categories or are included in the list of exclusions. Furthermore, according to the Legal Aid Guide, even if the applicant has passed the screening process, the limited resources of the State may merit exclusion. If this interpretation of the Legal Aid Guide is correct, this limitation, as well as 'the limited resources of the State', could constitute an infringement of the right to equality and the right to a fair hearing, which would invite a section 36 enquiry into the infringement.

6.5.2.2. The limited resources of the state as a barrier to legal assistance

LASA functions within a budget that is determined by the State. LASA, by default, and the State, by design, introduces a limitation upon a first generation right,¹⁰³⁵ which the Constitution only imposes on second generation rights.¹⁰³⁶ Inasmuch as the courts are at pains to maintain the separation of powers and will not dictate to the State how it should allocate its resources, the Constitutional Court, as the custodian of the Constitution, would be remiss in its obligation should it endorse this limitation.

¹⁰²⁷ At para 4.9.

¹⁰²⁸ Legal Aid South Africa (2014), para 4.9(d).

¹⁰²⁹ At para 4.9(a).

¹⁰³⁰ At para 4.9(b).

¹⁰³¹ At para 4.9(c).

¹⁰³² At para 4.9(e).

¹⁰³³ At paras 4.9(c) and (f).

¹⁰³⁴ At para 4.1 (own emphasis added).

¹⁰³⁵ Right to procedural justice.

¹⁰³⁶ Socio-economic rights.

In determining the validity of the funding policy of the State to private Child and Youth Care Centres, the High Court applied the following test:

‘The test is whether the policy is *a reasonable measure to the maximum extent of available resources or within available resources* to achieve the progressive realisation of the rights. The test is not whether the policy is the best or most desirable measure possible. *Availability of resources is therefore an important factor in determining what is reasonable, but lack of funds cannot be used as a lame excuse.* Resources must be provided as far as reasonably possible. Reasonableness must also be understood in the context of the Bill of Rights as a whole. Whilst the very nature of progressive realisation of rights entails that full realisation will only be achieved in time, *those whose needs are the most urgent should not be ignored in the policy, nor should a significant segment of society be excluded.*’¹⁰³⁷

Although the above dictum was delivered within the context of the progressive realisation of second generation rights, it nevertheless finds application here. The prioritisation of the needs of certain categories of vulnerable communities (minors, women, the elderly, and the deeply poor) by LASA cannot be faulted, as these constitute the most vulnerable members of South African society. However, the excessively skewed ratio between the legal aid budget allocated to criminal matters compared to civil matters, is cause for concern.¹⁰³⁸ The prison population comprises less than 0.3% of the South African population, which includes trial awaiting prisoners.¹⁰³⁹ Even if the number of accused who are not remanded equals ten times those who are incarcerated, it is still clear that the greater portion of legal aid resources are concentrated on a minute percentage of the population,¹⁰⁴⁰ whereas the majority of the country’s citizens do not have their primary legal needs met. LASA thus prioritises the possibility of physical incarceration over the possibility of incarceration by poverty.

More importantly, comparative studies have shown that there is an economic rationale for taking legal aid to scale, which casts doubt on the State’s reliance on its limited resources to limit access to legal

¹⁰³⁷ *National Association of Welfare Organisations and Non-Governmental Organisations and Others v Member of the Executive Council for Social Development, Free State and Others* 2014 (1719/2010) ZAFSHC 127, para 13. (own emphasis added).

¹⁰³⁸ See the discussions in Chapter 2 on the Republic of South Africa, *Second Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa*, (2015) .

Legal Aid South Africa (2015). shows that 88 percent of LASA’s budget is spent on criminal matters compared to 12 percent on civil matters.

¹⁰³⁹ Walmsley, R, *World Prison Population List*, 11th ed, (2016) World Prison Brief..

¹⁰⁴⁰ LASA allocated 88 percent of the legal aid budget to criminal matters and 12 percent to civil matters in the 2014/15 financial year.

assistance. In the submissions to the Public Commission on Legal Aid in British Columbia, it was pointed out that ‘short-changing legal aid is a false economy’.¹⁰⁴¹ First, the legal problems of those who are unable to access the system do not disappear, but are rather compounded by the inaction. The expenditure related to this legal problem for the Department of Justice and Correctional Services is thus merely shifted to other departments such as Social Development and Health.

Secondly, those who access the system but are unrepresented, add to court delays. Agents who are employed to serve public interest such as the police and social workers are caught up in these delays, which impede on them performing their primary function within communities. These delays add to the expense of the hearing, as facilities and human resources have to be provided for each sitting.

Thirdly, those who are represented and are granted legal aid receives this assistance at the apex of the dispute, where it is the most burdensome on the State’s resources. Furthermore, where primary legal aid is absent there is no screening device for civil disputes with the result that the courts become the frontline hospital theatres for some of these disputes. This increases the pressure on the courts at a level where the dispute becomes most complex and most expensive on the parties and the State.

Statistics that have been gathered from the United States of America, Australia and the United Kingdom show that legal aid more than pays for itself. For every dollar (\$1) spent on legal aid, the State managed to save between \$1,60 and \$30.¹⁰⁴² This is a powerful motivation for the State to provide primary legal aid in civil matters even if its constitutional obligation does not move it to do so.

Most significantly, establishing a comprehensive, integrated primary legal assistance system has the potential for job creation by the State as well in the private sector as it would give rise to a para-profession that fills the justice gap that exists currently in South Africa. This para-professional is the paralegal. Bearing in mind that the current unemployment rate in the country now stands at 26,5 percent, more qualitative and sustainable job opportunities should be created.¹⁰⁴³ This means that in the

¹⁰⁴¹ Matthews, S, *Making the Case for the Economic Value of Legal Aid - Briefing Note*, (2011) .

¹⁰⁴² PriceWaterhouseCoopers, *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, (2009) Australia: National Legal Aid; Richardson, JA & Heidelberg, RL, *Legal Services Programs in Louisiana: Their Economic Impact on the State of Louisiana*, (2011) Louisiana, US p. 5; Feelhaver, R & Deichert, JA, *The Economic Impact of Legal Aid of Nebraska 2007*, (2008) Nebraska, US p. 14; Florida TaxWatch, *The Economic Impact of Legal Aid Services in the State of Florida*, (2010) ; The Task Force to Expand Access to Civil Legal Services ion New York, *Report to the Chief Judge of the State of New York*, (2010) New York, USA p. 14; The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential*, (2009) Texas, USA; Citizens Advice, *Toward a Business Case for Legal Aid*, (2010) p. 2; Granberry, Phillip Albelda, R, *Assessing the Benefits of Provision of Legal Services through the Disability Benefits Project*, (2006) Boston, USA p. 11.

¹⁰⁴³ Statistics South Africa, “Quarterly Employment Statistics Q4 2016”, (2017), available at: *Media Release* <http://www.statssa.gov.za/?p=9769>. (accessed 5 May 2017)

services sector, service providers will have to develop the capacity to respond to and provide for the changing needs of clients. The well-trained paralegal has the potential to be such a service provider. LASA is not only empowered to employ legal practitioners and candidate attorneys but most importantly, paralegals too. Moreover, bearing in mind that the right to legal aid in civil matters is limited by the State's resources, it is even more important to re-define legal services and determine which of these can be rendered more cost effectively by paralegals. This casts doubt on the State's limited resources as a justification for limiting the right to civil legal aid.

The Law Commission proposed in 1997 already that primary legal services which paralegals render should be recognised and that the State should assume full responsibility for providing funding for this service.¹⁰⁴⁴ If the State is committed to establishing an egalitarian and just society, it has to add legal assistance alongside the other pillars, namely education, health care and social assistance.¹⁰⁴⁵

However, neither LASAA nor the Legal Aid Guide 2014¹⁰⁴⁶ provides any definition for legal aid, legal advice or legal representation. There is, therefore, a conflation of primary and secondary legal services with the focus on legal services that the narrow legal profession provides. The justice sector and the narrow legal profession, therefore, have to re-define legal services and re-imagine the agents that deliver these services.

In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*¹⁰⁴⁷ the indispensability of the right to procedural justice in South Africa, especially for the marginalised and the poor, and its derivative right to *legal assistance*, not only *legal representation*, including *legal aid*, was most aptly demonstrated.¹⁰⁴⁸ It showed that the dignity of the vulnerable remains up for barter through predatory practices in the commercial sphere, while the

¹⁰⁴⁴ South African Law Commission, *Simplification of criminal procedure: Discussion Paper 96 (Project 73)*, (2001) South African Law Reform Commission p. 47.

¹⁰⁴⁵ Doust, LT, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia*, (2011) Vancouver, Canada: Public Commission on Legal Aid.

¹⁰⁴⁶ Section 24 of LASAA directs the board to compile, update and approve a Legal Aid Guide.

¹⁰⁴⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others* (2016).

¹⁰⁴⁸ One of the applicants is a farmworker, the sole breadwinner, who earned R2 450 per month. The deductions on his salary, including a garnishee of R600, totalled R1 194. This left him with a net salary of R1 263 with which he had to support a family of seven. He applied for a loan and was granted the loan based on the assessment done in terms of section 81(2) of the National Credit Act by the credit grantor. According to this assessment he apparently spent only R50 per month on food. He approached the credit grantor for a second loan to purchase a Blackberry smartphone which was also granted. The phone was stolen, which he reported and he requested a replacement phone from the credit grantor, which was declined. The applicant then changed banks and ceased payment to the credit grantor. The credit grantor allegedly used documents on which the applicant's signature was forged to obtain default judgements and an emoluments attachment order against the applicant. The applicant's employer who was requested to give effect to the emoluments attachment order demanded the documentation. This is how the matter came to light.

applicants, in the absence of legal assistance, would have continued to suffer injustice at the hands of non-State actors who use their knowledge of the legal system to wield the law as an instrument of exploitation.

This simply serves to confirm the need for *legal assistance* in South Africa, whether in a judicial or quasi-judicial forum, or beyond, and the need for *legal aid* for those who cannot afford such assistance. Without legal assistance, the majority of citizens in the country may not even be aware of their rights, let alone be aware that their rights have been violated and, therefore, may not have the agency-freedom or the option-freedom to claim, defend and enforce their rights. This study therefore advocates for the human right to legal assistance beyond legal representation in a court or other dispute resolution forum.

6.6. THE RIGHT TO LEGAL ASSISTANCE BEYOND LEGAL REPRESENTATION IN A COURT OR ANOTHER DISPUTE RESOLUTION FORUM

Barriers to access justice result in a need for legal assistance beyond the conventional courts and other dispute resolution fora. The author advances the argument that a legal empowerment agenda depends on it and the social contract embodied in the Constitution demands it.

6.6.1. Legal empowerment and the right to legal assistance

The shortcomings of the rule of law orthodoxy, as a developmental paradigm, is summarised by the following statement made by a Dean of a university law school¹⁰⁴⁹ in one of the wealthiest countries in the world:¹⁰⁵⁰

‘Inequalities of wealth and power undermine a system based on the rule of law; legal complexities cannot be navigated without competent representation; and legal representation is often unavailable to people with limited [or no] wealth or knowledge about the system’. Unmet need for legal services for both poor and moderate-income people [in the United States] is vast.’¹⁰⁵¹

¹⁰⁴⁹ Edwin W. Hadley Professor at Law at Northeastern University School of Law (July 2002 – August 2012)

¹⁰⁵⁰ The United States of America is ranked in 13th position on the list of the richest countries in the world with a GDP of \$53,001 based on PPP (Knoema, “World GDP per Capita Ranking 2016 | Data and Charts | Forecast”, (2016), available at: <https://knoema.com/sijweyg/world-gdp-per-capita-ranking-2016-data-and-charts-forecast>). (accessed 5 January 2017).

¹⁰⁵¹ Spieler, EA, 'The Paradox of Access to Civil Justice: The 'GLUT' of New Lawyers and the Persistence of Unmet Need', (2013), 44, *University of Toledo Law Review*, pp. 365–403. p. 366.

Across the Atlantic Ocean, in a country, which is rated as having the second most unequal society in the world,¹⁰⁵² former Constitutional Court Judge and struggle icon Albie Sachs, in similar fashion, issued a stark reminder of the disempowering effect of the inequalities within the South African society:

‘The poor are as frequently oppressed by the law as they are freed by it. They are frequently unaware that they indeed do have rights, and even more in the dark as to how they can enforce it.’¹⁰⁵³

It is clear from the aforementioned statements that, where inequality persists, vulnerable communities in wealthy and not-so-wealthy nations share similar challenges in respect of access to justice. The poor and the not-so-poor do not have their legal needs met, and this undermines the legitimacy of the rule of law. In economically developing and developed countries alike, the laws that are intended to benefit the poor often exists on paper only, unless the poor insists that these laws are practiced. In view of the skewed power relationships brought on by the disadvantage that the poor suffer, they require assistance.

However, the poor are not passive recipients of the benevolence of benefactors. This assistance cannot only be ‘top down’ and State-centred, nor should it only focus on law reform and government institutions, particularly judiciaries.¹⁰⁵⁴ The establishment of business-friendly legal systems that encourage poverty alleviation requires a multi-pronged, multi-level approach with the poor at the centre.¹⁰⁵⁵ This is a core reality that the rule of law orthodoxy overlooks.

The rule of law orthodoxy, and its lack of success to bring about a transformation in these unbalanced power relationships within society, prompted the consideration of the legal empowerment paradigm in the international developmental agenda.¹⁰⁵⁶ The rule of law orthodoxy was challenged, not for its political and economic goals, but for its ‘questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged’.¹⁰⁵⁷ The disadvantaged must be legally empowered to use the law, legal systems and alternative dispute resolution systems to improve and transform their

¹⁰⁵² South Africa has a GINI index of 6.1 and is ranked in 2nd position

South Africa is also in 87th position on the list of richest and poorest countries in the world with a GDP of \$13,078.00 (Gregson, J, “The Richest Countries in the World”, (2017), available at: *Global Finance* <https://www.gfmag.com/global-data/economic-data/richest-countries-in-the-world?page=12>.) (accessed 15 March 2017).

¹⁰⁵³ Public Interest Law Institute, *Making Legal Aid a Reality: A Resource Pook for Policy Makers and Civil Society*, (2009) Budapest, Hungary: Public Interest Law Institute p. 7.

¹⁰⁵⁴ Golub, S (2003).

¹⁰⁵⁵ Golub, S (2003).

¹⁰⁵⁶ Golub, S (2003).

¹⁰⁵⁷ Golub, S (2003) p. 3.

social, political and/or economic situations. In so doing, rights holders are able to hold State and non-State power holders and duty bearers to account, and hence contest unjust power relations.¹⁰⁵⁸

Legal empowerment is not a magic elixir to alleviate poverty but it provides a comprehensive strategy to develop poor and marginalised communities, which reaches beyond the justice sector and the narrow application of the rule of law. It employs legal assistance as an intervention to enable vulnerable individuals and communities to alter unjust power relations within society. Throughout the literature, it is clear that the community-based paralegal is a key role player in the facilitation of that legal empowerment.¹⁰⁵⁹

Legal assistance in South Africa, as a measure to enhance access to justice, had traditionally been equated with legal representation by an advocate or attorney. Jurisprudence bears testimony to this fact.¹⁰⁶⁰ However, a range of factors demands a shift in this conventional practice. First, South Africa has a democratically elected government that subscribes to a human rights-based approach to access justice. This approach is given effect through a progressive Constitution, which aims to address the vast inequalities that persist in the country. Exclusive reliance on the rule of law(yers) to address these inequalities has, to date, not had the desired effect, as the inequalities in the country have persisted¹⁰⁶¹ while multiple barriers to access to justice prevent vulnerable communities from claiming the protection of the law. These barriers need to be systematically identified and removed so that these individuals and communities are empowered firstly, to influence, access and use the mechanisms which are designed to improve their lives and secondly capacitated to claim, enforce and defend their rights in their daily interaction with State and non-State actors alike. A pro-poor approach to access justice therefore requires a shift in the conceptual framework from the rule of law orthodoxy to legal empowerment.

Secondly, this human rights-based approach requires the legislative framework in the country to be aligned to its grundnorm, namely South Africa's Constitution. The State, albeit through the prompting of the courts in some instances, has embarked on a systematic dismantling of the legislative framework that was inconsistent with the Constitution, replacing it with one that reflects the values and attitudes

¹⁰⁵⁸ Domingo, P & O'Neil, T (2014) p. 1.

¹⁰⁵⁹ See Chapter 9.

¹⁰⁶⁰ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (2015); *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (2013); *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2000); *Magidiwana and Others v President of the Republic of South Africa and Others* (2013).

¹⁰⁶¹ Lehohla, P, *Census 2011: Income dynamics and poverty status of households in South Africa*, (2015) Pretoria, South Africa.

of the new democratic legal order more accurately.¹⁰⁶² The purpose of these legal reforms in the main, as aligned to its grundnorm, is to empower the poor and the marginalised.¹⁰⁶³ The legal reforms created a new order of citizen entitlement and State responsibilities. This resulted in an evolution of and an increase in the legal needs of individuals and communities. These legal needs are not only of a criminal nature but are also administrative and civil, and are concentrated at a primary level. There is thus a need for information, advice, support and even representation beyond the conventional courts and other adjudicating fora.

Multiple barriers impact on the capacity of vulnerable communities to claim these entitlements. Legal services and thus legal assistance, as an intervention to enhance the capacity of these beneficiaries to claim and enforce their rights, therefore, need to respond to the increase in and evolution of their legal needs. A legal assistance strategy, as an intervention in the country, must capacitate the disadvantaged. It must have due regard for the needs and preferences of the poor, and incorporate domestic ideas and initiatives. It must focus beyond the justice sector, involve societal, legal and administrative actors, and support civil society. This is the legal empowerment paradigm. Legal services should thus include the continuum of services, which are identified in Figure 1,¹⁰⁶⁴ and should include practitioners other than attorneys and advocates. The contribution of community-based paralegals to the legal empowerment of the poor, even in South Africa, has been recognised internationally.¹⁰⁶⁵

Thirdly, the Constitution imposes an obligation on the State to provide access to procedural justice. The State has complied with its constitutional obligation by creating the required infrastructure and institutions, endorsing private institutions and by providing the necessary human resources.¹⁰⁶⁶ Key institutions that provide legal assistance include LASA, which discharges this obligation on behalf of and at the expense of the State, and the private (narrow) legal profession, that offers this service for the most part at the client's expense. The State has acknowledged that its capacity to provide legal assistance in civil matters for vulnerable communities falls short of meeting the demand for *secondary* legal services owing to financial constraints.¹⁰⁶⁷ Conversely, the private legal profession provides *secondary* legal services primarily for gain. Yet, the majority of civil legal needs are basic and require early intervention before it escalates into a dispute that requires intervention by a court of law or another dispute resolution forum. Hence, there is a disconnect between the legal needs of the citizens and the legal services that are provided.

¹⁰⁶² See Chapter 5.

¹⁰⁶³ See discussions on the preamble in Chapter 3.

¹⁰⁶⁴ Page 42.

¹⁰⁶⁵ United Nations Development Programme (2008).

¹⁰⁶⁶ See Chapters 7 and 9.

¹⁰⁶⁷ See the Periodic Reports submitted to the United Nations and the African Union.

LASA and the private legal profession have barely addressed the demand for *primary* legal services. The South African Law Commission identified this justice gap in primary legal services almost two decades ago. It discovered the following:

‘Primary legal service is that which none of the practising lawyers, magistrates, prosecutors have provided except by way of advice offices and public interest legal service organisations...This is the broadest, primary area where legal services are needed - but has no state budget, no private sector involvement and very few academics interested.’¹⁰⁶⁸

Little has changed since then, as LASA, in spite of extending legal services to include advice, seems to have no State budget for comprehensive primary legal services, while the focus of legal aid remains mainly on secondary legal services. The paucity of academic literature on the legal needs of the poor and the paralegal in South Africa bears testimony to the interests of academics.

Conversely, the private legal profession, in the first instance, is not oriented to provide primary legal services and, secondly has a conflict of interest, since its existence depends on providing legal services for gain. It is also not appropriate for the courts to be frontline hospital theatres for civil disputes. This calls into question the exclusive dependence on the narrow legal profession to deliver legal services in the country, whether at the expense of the person desiring it, or at the expense of the State. The State cannot afford comprehensive legal services for vulnerable communities, where these are exclusively rendered by the narrow legal profession. Moreover, this does little to empower communities and individuals to apply the law themselves in order to claim, enforce and advance their rights and interests as citizens and economic actors. Legal empowerment provides a more comprehensive approach while the use of paralegals presents a viable option.

The need for legal services, and hence legal assistance, including legal aid, extends beyond legal representation, whether in a court of law, another dispute resolution forum, or beyond. A narrow confinement of the definition of legal services to legal representation by an advocate or attorney entrenches the notion that knowledge of the law and its application is the exclusive domain of the justice sector and the narrow legal profession, which are made available through rendering a service to those who can afford it, or at the benevolence of the State, non-profit organisations and the legal profession. This is the conventional rule of law orthodoxy paradigm. A justice system in South Africa that renders the right of access to justice exclusively dependent on access to the narrow legal profession, fails to

¹⁰⁶⁸ South African Law Commission (2001).

empower its citizens, entrenches their inequality, impairs their dignity and curtails their freedom. The current demand for legal aid under this conventional model is one that the State cannot possibly meet which results in a justice gap. The State, therefore, has to find innovative ways to bridge this justice gap.

Hence, this study proceeds from the premise that the State, as the primary regulator of the conduct of all citizens, has a moral and a constitutional obligation to provide legal assistance, and not only legal representation, to vulnerable communities in civil matters. The obligation is derived from the social contract between the State and its citizens, which gave rise to the right to procedural justice as contained in section 34 of the Constitution.

6.6.2. The social contract and the right to legal assistance

The law does not function distinct from, or in isolation of, its social context. The right of access to justice demands that all role players in the justice system know and understand the law and its context, particularly those who have to oversee its implementation. The Twenty Year Review of South Africa¹⁰⁶⁹ reported as follows:

‘In South Africa, the normal difficulties of accessing justice are exacerbated by *gross inequalities*, the *high cost of legal services* and the *remoteness of the law* from people’s lives...the *demand for [legal aid]* has escalated prodigiously and the cost of providing these services far outstripped [LASA’s] annual allocation from government.’¹⁰⁷⁰

The Review acknowledged that in spite of the progress made by government since 1994, there are still serious challenges that remain in respect of the transformation of the judicial system, improving access to justice, and bringing about economic transformation. Government attempts are hampered by:

‘... the reality ... that South African society is still characterised by poverty and illiteracy, and is bound by the differences of culture and language, and many persons are either unaware of or poorly informed about their legal rights and what they should do to enforce them, while access to professional [legal] advice and assistance is still difficult for financial and geographical reasons.’¹⁰⁷¹

¹⁰⁶⁹ The Presidency of the Republic of South Africa, *Twenty Year Review*, (2014) The Republic of South Africa.

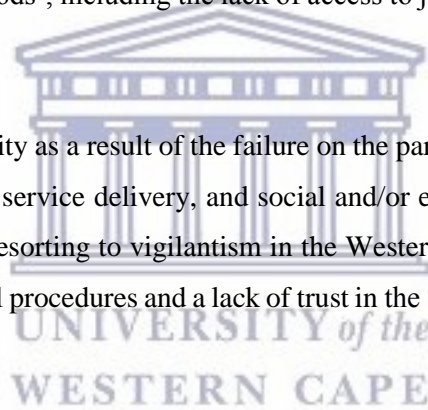
¹⁰⁷⁰ The Presidency of the Republic of South Africa (2014).(own emphasis added).

¹⁰⁷¹ The Presidency of the Republic of South Africa (2014).

These conditions have a serious impact on power relations within society. In the absence of legal assistance, the law, by default, cements the legal isolation of the poor,¹⁰⁷² perpetuates discrimination, and hence facilitates the disempowerment of marginalised communities. The disempowered react to this power imbalance by resorting to self-help, with serious implications for peace and security in the country. The Marikana tragedy, with its resultant loss of life reverberated across the world,¹⁰⁷³ while the Civic Protest Barometer recorded 218 protests in 2014. Most of these protests (80%) were characterised by violence on the part of the authorities or the participants.¹⁰⁷⁴ The 2015/2016 academic year was characterised by the ‘#Feesmustfall’ movement, with increasing levels of violence displayed by protesters, police and private security.

Interestingly, the suggestion that these protests constitute an uprising of those who lack material goods only, was not supported by empirical evidence.¹⁰⁷⁵ The researchers found that 81 percent of protests could not be explained by poverty alone and advised that other factors that may ignite these protests needed to be considered. This ‘uprising of the poor’ is nevertheless real and redefining poverty as ‘lack of intangible assets and social goods’, including the lack of access to justice, might assist in finding the root causes of these protests.¹⁰⁷⁶

Häefele identified a lack of security as a result of the failure on the part of law enforcement agencies to protect communities, poor or no service delivery, and social and/or economic dissatisfaction as some of the reasons for communities resorting to vigilantism in the Western Cape.¹⁰⁷⁷ This is compounded by a lack of knowledge of judicial procedures and a lack of trust in the State’s law enforcement agencies and the judicial system.¹⁰⁷⁸



¹⁰⁷² Note the definition of poor in Chapter 2.

¹⁰⁷³ Kekana, M, 'Lonmin has lost R40m over Makiraka protests' of May 12, 2017, *Eyewitness News*, online: <<http://ewn.co.za/2017/05/12/lonmin-has-lost-r40m-over-marikana-protests>>; Marinovich, G, 'The murder field of Marikana. The cold murder fields of Marikana' of September 8, 2012, *Daily Maverick*, online: <<https://www.dailymaverick.co.za/article/2012-08-30-the-murder-fields-of-marikana-the-cold-murder-fields-of-marikana#.WRo9t-uGPRZ>>; Mkhize, J, "Police fire on Marikana miners, several dead", (16 August 2012), available at: *Sowetan Live* <http://www.sowetanlive.co.za/news/2012/08/16/police-fire-on-marikana-miners-several-dead>. (accessed 17 May 2017)

¹⁰⁷⁴ Page 5.

¹⁰⁷⁵ Powell, DM O'Donovan, M & De Visser, J (2015).

¹⁰⁷⁶ Such as legal identity, good health, physical integrity, freedom from fear and violence, organisational capacity, the ability to exert political influence and the ability to claim rights and live in respect and dignity.

Also see Department of Community Safety 2013 Department of Community Safety (2013); Swanepoel, M, Duvenhage, A & Coetzee, T, 'Vigilantism: A theoretical perspective as applied to people's courts in post-1994 South Africa', (2011), 36(1), *Journal for Contemporary History*, pp. 114–133.

¹⁰⁷⁷ Häefele, B (2006) p. 5–6.

¹⁰⁷⁸ Häefele, B (2006).

The State, with the consent of its citizens, regulates their conduct through an extensive array of statutes, regulations and policies. Failure on the part of the State to provide access to procedural justice, which includes legal assistance and, in some instances, legal aid regardless of the nature of the proceedings, constitutes a breach of the social contract. In addition, the Constitution demands adherence to the rule of law. Everyone, but particularly vulnerable communities, who are left unprotected by the rule of law in their daily interaction with the law have to be informed, advised and supported so that they can claim the protection of the law. A failure to do so may result in citizens no longer considering themselves bound by their undertaking to submit to the authority of the State. Ackerman J in *S v Makwanyane* alluded to this 21 years ago by stating the following:

‘... in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in a constitutional state compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights.’¹⁰⁷⁹

In the United States of America, Chief Justice George, in his State of the Judiciary Speech, highlighted the consequences of the disparities in society as follows: ‘If the motto, “and justice for all” becomes “and justice for those who can afford it,” we threaten the very underpinnings of our social contract’.¹⁰⁸⁰ This social contract is breached when its dispute resolution fora favour one citizen over another. Confronted with such inequality, legal assistance, in general (including legal representation), and legal aid, in particular, have become essential elements of a fair and efficient justice system, which was founded in the rule of law. It is critical to restore and maintain the balance of power, not only procedurally, but also substantively and as such ensuring both formal and substantive equality.

A commitment to and compliance with its obligation under the social contract is a fundamental requirement for the continued existence of elected governments in modern constitutional democracies. However, more than that,

‘a working legal and judicial system based on the rule of law – including accessible courts that have the confidence of the population...[is not only a]... pre-condition for

¹⁰⁷⁹ *S v Makwanyane and Another* (1995) p. 168.

¹⁰⁸⁰ September 2001.

political stability [but] essential to the economic and social welfare of a society and its members'.¹⁰⁸¹

A State that meets the justice needs of its citizens not only employs smart politics, but contributes to the economic and social wellbeing of the nation. The social contract gives rise to two fundamental rights, which are expressly guaranteed by the South African Constitution, namely the right to a fair hearing¹⁰⁸² and the right to equality.¹⁰⁸³ As the focus here is not on legal assistance in proceedings before adjudicating mechanisms, only the right to equality is addressed below.

6.6.3. Legal assistance and the right to equality

Equality as an aspirational ideal finds expression in the substantive right to equality, which is contained in section 9 of the Constitution. Section 9(1) declares 'everyone equal before the law' and confers 'the right to equal protection and benefit of the law' on everyone.¹⁰⁸⁴ The right to equality finds application, among others, in the principle of 'equality of arms'.¹⁰⁸⁵ This principle, which can be applied to all adjudicating mechanisms, is violated where an imbalance is so great that it threatens the fairness of the proceedings. A narrow interpretation of this principle that focuses on legal representation in a judicial or quasi-judicial forum only models the needs of the poor and marginalised on those who can afford to pay for legal services. The fundamental flaw in this is highlighted by Gilles, who noted that the economically disadvantaged are more vulnerable to exploitative practices in the marketplace and the workplace.¹⁰⁸⁶

This finds particular application in South Africa, as demonstrated by recent class action.¹⁰⁸⁷ The unequal distribution of wealth and poverty, with its distinctly racial bias, continues to characterize the South African social landscape. Deeply ingrained disparities manifest in barriers, which result in unequal access to justice for the majority of the country's citizens. Smith states that '(b)arriers to access to justice harms the poor and allows their oppressors to wield the legal system as a weapon against

¹⁰⁸¹ Bårdsen, A, *Reflections on "Fair Trial" in Civil Proceedings According to Article 6 § 1 of the European Convention on Human Rights*, Scandanavian Studies in Law Series (2012) Stockholm, Sweden.

¹⁰⁸² Section 34.

¹⁰⁸³ Section 9.

¹⁰⁸⁴ Section 9(1) of the Constitution of South Africa, 1996.

¹⁰⁸⁵ *Legal Aid South Africa v Magidiwana and Others* (2015); *Magidiwana and Others v President of the Republic of South Africa and Others* (2013).

¹⁰⁸⁶ Gilles, M, 'Class Warfare: The disappearance of low-income litigants from the civil pocket', (2016), 65(6), *Emory Law Journal*, pp. 1531–1568.

¹⁰⁸⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others* (2016).

them'.¹⁰⁸⁸ The poor and vulnerable have low bargaining capacity, poor credit history, limited options, and find it difficult to process information.¹⁰⁸⁹

However, this exploitation is not only confined to the market place, the workplace and non-State actors, as it also extends, among others, to administrative action by the State. The poor and the vulnerable are more likely to have their statutory rights violated. The *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* is a text book example. Cameron J summarised the effect of the exploitation as follows:

'Primarily, the debtor's section 34 right of access to court is breached by an execution process not sanctioned by a court. Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing, food and health care)'.¹⁰⁹⁰

The institutionalisation of discrimination, the abuse of power and economic exploitation were endemic in South African society under the apartheid regime. It was deeply embedded in the very fabric of society. The assumption that this has changed because the law demands it and the conventional courts will enforce it, is unwise. The applicants in this case suffered disadvantage from the outset owing to the multiple barriers to access justice.¹⁰⁹¹ This is the daily struggle for dignity, equality and freedom that all disempowered face when confronted with practices that militate against the values that assumedly define contemporary South African society. These practices are perpetuated by State and non-State actors alike.

The mandate to transform society expressed in the preamble of the Constitution requires all stakeholders to weed out these practices and to weave the values of equality, dignity and freedom into the fabric of contemporary South African society. Inasmuch as the courts have a crucial oversight role to play, these institutions are removed from the daily lives of the disempowered and are not intended to be the frontline hospital theatres for civil disputes. The transformation of society requires that all members of South African society, and not only the State, should assume collective responsibility for the material conditions of agency within society.

¹⁰⁸⁸ Smith, R, *Justice and the Poor*, reprint 3 ed, (1972) Glen Ridge, USA: Patterson Smith p. 81.

¹⁰⁸⁹ Gilles, M 2016 Gilles, M (2016).

¹⁰⁹⁰ At para 15.

¹⁰⁹¹ These include lack of education, poverty and geographical location.

The Constitution imposes a positive obligation on the State, in particular, to promote the achievement of equality,¹⁰⁹² and to take legislative and other measures to protect and advance persons and categories of persons that are disadvantaged by discrimination. The Constitution further places a negative obligation on the State to refrain from discrimination on listed and other grounds. Section 9(1), read with section 9(2), confers a clear constitutional mandate upon the State to ensure that substantive equality is achieved. However, extending mere formal equality to individuals without taking into account the vast social and economic disparities between groups and individuals is a denial of substantive equality. The State, therefore, fails to meet its constitutional obligation when it presents LASA with a budget for legal aid that covers mainly criminal matters and secondary legal services in certain civil matters. This constitutional obligation is not only imposed by section 9, but also by the preamble, the founding provisions, the substantive right to human dignity¹⁰⁹³ and freedom,¹⁰⁹⁴ as well as other waymarks that entrench the triumvirate of values that were identified in Chapter 3.

Although ‘equality of arms’ is used exclusively in relation to legal representation, there is clear evidence that it extends beyond adjudicating fora.¹⁰⁹⁵ The National Credit Regulator reported the lack of education and knowledge as one of the challenges with alternative dispute resolution (ADR), which made the engagement between the ADR agent and the consumer mainly one way, leading to misunderstandings. Inequality of arms, in the commercial sphere, for example, presents at the negotiation stage of the contract long before a dispute emerges and this inequality subsequently manifests throughout the dispute resolution process, calling into question the fairness of the outcome for the disadvantaged in respect of the contract and the dispute.¹⁰⁹⁶ Sachs J in *Barkhuizen v Napier* alluded to this.¹⁰⁹⁷

It is unimaginable that the average consumer in the country would be able to afford a consultation with a lawyer on every standard contract that he or she concludes. Add to this other barriers such as a lack of education and it makes for a recipe pregnant with injustice. This inequality does not only manifest

¹⁰⁹² Section 9(2).

¹⁰⁹³ Section 10 of the Constitution of South Africa, 1996.

¹⁰⁹⁴ Section 12 of the Constitution of South Africa, 1996.

¹⁰⁹⁵ National Credit Regulator, *Final Report: Investigation on the Effectiveness of the Alternative Dispute Resolution in South Africa*, (2012) South Africa: Department of Trade and Industry. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others* (2016).; *Barkhuizen v Napier* (2007).

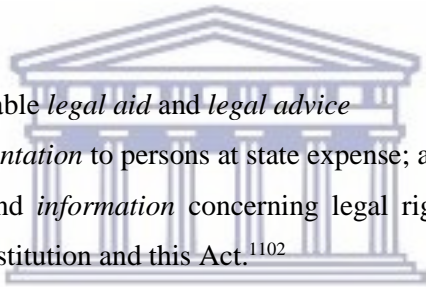
¹⁰⁹⁶ See the reference to ADR in the credit industry in Chapter 7.

¹⁰⁹⁷ ‘Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a “take-it-or-leave-it” basis... Standard form contracts are thus ordinarily the product not of negotiations but of the employment of legal teams by sellers of goods and services to serve their interests. In a business context, such a standard form contract preserves the wisdom of the in-house lawyers about the best way in which to handle recurrent problems of negotiation and performance... The process often resembles an imposition of will rather than mutual consent to an agreement.’ At paras 136-138.

in the commercial sphere but in the private and public spheres as well. Froneman J, in a minority judgement in *Mdeyide*, reiterated the dictum of Didcott J in *Mohlomi*¹⁰⁹⁸ fourteen years later and concluded the following:

‘[I]t is true that it is the commitment of our Constitution and public authorities to alleviate and if possible eradicate that state of affairs, and that much has been done in that regard since then. I believe, however, that it is unrealistic to think that for a substantial portion of our population things have changed that much.’¹⁰⁹⁹

The recent class action proves that not much has changed for the majority of citizens in the country.¹¹⁰⁰ Contrary, the suspicion settles that more than twenty years later, these conditions have been substantially reduced, if not eradicated, which is indeed not so. This requires intervention. LASA is statutorily obliged to provide *legal assistance* by rendering or making available a continuum of services as reflected in Figure 1, regardless of the nature of the proceedings.¹¹⁰¹ The objects of LASA are as follows:

- 
- (a) render or make available *legal aid* and *legal advice*
 - (b) provide *legal representation* to persons at state expense; and
 - (c) provide *education* and *information* concerning legal rights and obligations, as envisaged in the Constitution and this Act.¹¹⁰²

This has particular relevance for the community-based paralegal as this continuum of services spans primary and secondary legal aid. The use of lawyers to provide primary legal aid is not only unrealistic nor cost effective but also inappropriate as they are not trained to do so. LASA need not re-design their structures or their services to accommodate comprehensive primary legal services to communities. These services are already being offered, to a certain extent, by community-based paralegals in the community-based advice offices with the aid of donor funding and volunteerism.¹¹⁰³ Incorporating

¹⁰⁹⁸ *Mohlomi v Minister of Defence* (1996) p. 14.

‘[W]here poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons’.

¹⁰⁹⁹ At para 115.

¹¹⁰⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others* (2016).

¹¹⁰¹ Page 42.

¹¹⁰² Section 3 of the *Legal Aid South Africa Act* (2014).

¹¹⁰³ See Chapter 9.

these services into the legal aid fold, as is the current movement across the African continent, would thus assist.¹¹⁰⁴ The State has a constitutional obligation to provide funding for these services and should fund LASA accordingly.

6.7. CONCLUSION

Treaty law does not contain an express right to legal aid in civil matters. However, a body of ‘soft law’ has developed that requires legal aid where the interests of justice so require. The provision of legal aid is intricately linked to the right to a fair hearing and the right of equality in the legal process. Failure to provide legal aid where the interests of justice so require, therefore, compromises the fairness of a hearing and violates the right of equality in the legal process.

The international and regional human rights monitoring bodies acknowledge that the provision of legal aid places a burden on the state’s limited resources. They therefore recommend the use of paralegals where parts of the population are poverty-stricken and the State’s resources are limited. The role of paralegals on the African continent has now been codified in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Reports submitted by South Africa to the HRC and the African Commission on Human and Peoples’ Rights detail the State’s efforts to provide legal aid to those within its borders. However, the State has acknowledged its inability to provide legal aid to all those who qualify, especially in civil matters. The reports are also vague on the use of paralegals as a means to close the justice gap for the country’s poor and marginalised.

There is no express constitutional right to legal assistance in civil matters for persons who are eighteen (18) years and older in South Africa. The right to legal assistance in civil matters for this category of persons, including the right to legal representation and legal aid, is therefore derived from the social contract between citizens and the State, international and regional human rights instruments and jurisprudence, and the right to a fair hearing contained in section 34 of the Constitution of the Republic of South Africa.

A lack of legal assistance in the face of inequality of arms renders the right to procedural justice meaningless. Inequality of arms presents before a dispute reaches a court of law or another dispute resolution forum and calls into question the focus on secondary legal services. The overwhelming need

¹¹⁰⁴ See Chapter 9.

in the country is for primary legal services and, in the presence of multiple barriers to access justice, there is a need for legal assistance at this level, which is where the paralegal is most needed and effective.

Nevertheless, the right to legal assistance, whether express or implied, is not unqualified and may be limited in accordance with section 36 of the Constitution. LASA mainly provides legal assistance in criminal matters for persons of all ages and to minors who are involved in civil matters. It places a plethora of limitations on the right to legal aid in civil matters, most of which are not requirements in criminal matters. The Legal Aid Guide states that the provision of legal aid is subject to the State's limited resources. Thus, according to the guide, should the application for legal aid in a civil matter survive the layers of restrictions, legal aid may nevertheless be declined as a result.

The reliance on the limited resources of the State as justification for the limitation of the right to legal aid is called into question by comparative studies conducted in other jurisdictions. These studies have shown that investing in legal aid could be a cost saving exercise. Furthermore the extremely skewed allocation of legal aid resources in favour of criminal matters invites a section 36 scrutiny into the limitation of the right of access to procedural justice under section 34.

LASA is authorised by statute to employ paralegals, who, once adequately trained, are more cost effective, as they focus on areas where the need is greatest, which is primary legal services; hence there is an economic rationale for providing legal and paralegal assistance. Greater recognition of traditional and informal non-state justice systems, especially in informal settlements and rural areas, is also required.

In contemporary, highly regulated South African society, it is imperative for every citizen to have a basic understanding of the law, and to obey it or rely on it for protection. However, to date, knowledge of the law has been considered to be the exclusive domain of the narrow legal profession and those in the justice system. The lack of knowledge of the law deprives it of its deterrent effects, leaves citizens without redress and undermines the country's new democratic order. In the absence of meaningful access to adjudicating mechanisms, the impression settles in the minds of the marginalised and the poor that the law is the problem, with serious consequences for peace and stability in the country.

The State has a constitutional obligation to correct this near monopoly on legal knowledge and legal services by embarking on a purposeful process of legal empowerment to ensure access to justice. This constitutional obligation is questionably limited by a lack of resources. In the face of this lack of resources, alternative and creative means should be sought to ensure access for vulnerable communities. A lawyer-driven litigation model is simply not a sustainable mechanism for providing legal assistance

to those in need, even in South Africa. The paralegal, as a tool to ensure legal empowerment, can complement the role of the narrow legal profession and there is precedent on the African continent, including South Africa. Having examined the right to legal assistance in civil matters in South Africa, Chapter 7 will proceed to briefly examine the adjudicating mechanisms provided by the State.



Part IV

The Institutions that Support Access to Justice in South Africa



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CHAPTER 7

COURTS AND OTHER DISPUTE RESOLUTION FORA

7.1. INTRODUCTION

Chapter 6 examined the right of access to legal assistance in civil matters. This chapter examines, in brief, the extent to which the legal framework of the courts and other dispute resolution fora create scope for paralegal representation. The brevity of this part of the investigation is as a result of the fact that most of these institutions focus on *secondary* legal services and the involvement of practitioners of the law would mainly centre on legal *representation* by an advocate and attorney.

The absence of an institutional framework, in particular judicial organs, to give effect to the normative human rights and other national frameworks of access to justice would render that normative framework meaningless. The Constitution makes provision for an institutional framework of access to procedural justice that spans a network of courts and tribunals, State institutions supporting constitutional democracy, alternative dispute resolution fora and commissions of enquiry. The State therefore has an obligation to create this institutional framework and provide the necessary human resources and infrastructure to the extent allowed by its resources.

The focus in this study is on Chapters 8 and 9 of the Constitution. Chapter 8 deals with the courts and the administration of justice and Chapter 9 with state institutions that support democracy. The purpose of this enquiry is to determine the scope for paralegal representation in these fora. The range of institutions that support access to justice represent the transformative aspects of our constitutional democracy and will be discussed below.

7.2. COURTS

The judicial authority in South Africa is vested in the courts, which are independent and subject only to the Constitution and the law.¹¹⁰⁵ No person or organ of state may interfere with the functioning of the courts, and an order or decision of a court binds all organs of state and people to whom it applies. The Constitution imposes a positive duty on these organs of state to support and protect the ‘independence, impartiality, dignity, accessibility and effectiveness of the courts’.¹¹⁰⁶ It also declares the Chief Justice the head of the judiciary, tasked with the responsibility of establishing and monitoring the norms and

¹¹⁰⁵ Sections 165(1)-(3) and (5).

¹¹⁰⁶ Section 165(4).

standards that govern the judicial functions of all courts.¹¹⁰⁷ This signalled a shift away from parliamentary sovereignty which was the dispensation under the apartheid regime, to a constitutional democracy.

Chapter 8 provides for a hierarchical courts structure with the Constitutional Court at the apex.¹¹⁰⁸ The Supreme Court of Appeal ranks next in the hierarchical order,¹¹⁰⁹ followed by the high courts¹¹¹⁰ and magistrates courts.¹¹¹¹ The Constitution also makes provision for any other court established or recognised in terms of an Act of Parliament.¹¹¹² Any court so established includes courts of a status similar to that of a high court or magistrates court.

The government has discharged its constitutional obligation to provide the necessary adjudicating mechanisms¹¹¹³ by establishing an extensive system of conventional judicial organs of state.¹¹¹⁴ A number of special courts have also been established. These are income tax courts, the Labour Court, the Labour Appeal Court, the Land Claims Court, the Competitions Appeal Court, the Electoral Court, divorce courts, small claims courts, 'military courts' and equality courts. Section 166(e), as amended, specifically opened the door for the expansion of the judicial structure as our constitutional democracy evolves.¹¹¹⁵ This has particular significance for a legal empowerment agenda as the focus to date has been predominantly on the conventional structures that support the rule of law.¹¹¹⁶

The Rules of the Constitutional Court precludes representation by any party who is not entitled to appear in the high court unless the Chief Justice directs otherwise.¹¹¹⁷ The Constitutional Court is the most significant institutional transformative development to date and is the custodian of the transformation agenda in South Africa. It has, for the most part, been living up to that mandate since its establishment.¹¹¹⁸ However, the likelihood of the Chief Justice directing that a party be represented by

¹¹⁰⁷ Section 165(6) [inserted by the Constitution Seventeenth Amendment Act *Constitution Seventeenth Amendment Act* (2012).].

¹¹⁰⁸ Section 166(a).

¹¹⁰⁹ Section 166(b).

¹¹¹⁰ Section 166(c).

¹¹¹¹ Section 166(d).

¹¹¹² Section 166(e).

¹¹¹³ As per the record of the "The Department of Justice and Correctional Services", available at: <http://www.justice.gov.za/>. (accessed on 15 April 2017)

¹¹¹⁴ A Constitutional Court and Supreme Court of Appeal, 13 high courts, six specialist high courts, 714 magistrates courts, 345 small claims courts and 13 community courts.

¹¹¹⁵ Section 166. The courts are- ...

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

¹¹¹⁶ See discussion on the Traditional Courts Bill in Chapter 5

¹¹¹⁷ Republic of South Africa, 'GNR 1675 (GG 25643)' of October 31, 2003, *Government Gazette*, 2–54. (Rule 6)

¹¹¹⁸ See the reference to Constitutional Court rulings throughout this dissertation.

a paralegal in the Constitutional Court, even if permitted by law, is for all intents and purposes zero due to the complexity of the proceedings and the subject matter.

The legal framework of the conventional courts¹¹¹⁹ makes no provision for legal representation other than representation by an advocate, attorney or 'articled clerk' (candidate attorney). The Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal refer to representation by a legal practitioner, who is an advocate or attorney.¹¹²⁰ The Uniform Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa also only makes provision for representation by an advocate or attorney.¹¹²¹ The definitions clause of the Magistrates' Court Act defines a practitioner as '...an advocate, an attorney, an articled clerk such as is referred to in section 21 or an agent such as is referred to in section 22 ...'. Section 22 does not define an agent. It is therefore unclear who would qualify to represent a party as an agent. This Act therefore only makes provision for representation by a *legal* practitioner and *paralegal* representation does not feature.

The special courts that have been established are modelled, for the most part, on the conventional courts, although a number of them allow for representation by practitioners other than advocates or attorneys. The Labour Relations Act¹¹²² does not expressly provide for representation by paralegals in the Labour Court and the Labour Appeal Court.¹¹²³ It defines a 'legal practitioner' as 'any person admitted to practise as an advocate or an attorney in the Republic'.¹¹²⁴ However, a paralegal may indirectly qualify under sections 161(b) to (e). Furthermore, although the Small Claims Court Rules does not make provision for any form of legal representation, paralegals (legal assistants) and clerks at the court assist litigants free of charge but do not represent the litigants.

¹¹¹⁹ Constitutional Court, Supreme Court of Appeal, high courts and magistrates courts.

¹¹²⁰ 'Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa (R. 1523)' of November 27, 1998.

¹¹²¹ Rule 16.

¹¹²² *Labour Relations Act*, 66 of 1995.

¹¹²³ Section 161. In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by –

- (a) a legal practitioner;
- (b) a director or employee of the party;
- (c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation;
- (d) a designated agent or official of a council; or
- (e) an official of the Department of Labour.

¹¹²⁴ Section 213.

Section 20 of PEPUDA¹¹²⁵ is also couched in wide enough terms to include paralegal representation in the Equality Court.¹¹²⁶ This court has simplified its proceedings and provides assistance (in the form of information and advice on the proceedings) to litigants. However, the results of the Access to Justice and Promotion of Constitutional Rights Baseline Survey¹¹²⁷ show that awareness of equality courts is extremely low as only 3% of respondents were aware of their existence and function. This occurred in spite of the central role that these courts play in the promotion of equality and the prohibition of unfair discrimination, hate speech and harassment.¹¹²⁸

In the absence of comprehensive primary legal services, the courts become the frontline hospital theatres for civil disputes for those who can afford it and those who meet the stringent requirements set by LASA. The Department of Justice and Correctional Services reports on an annual basis on the administration of justice which includes the courts. The Department claims that it is winning the battle against the backlog in the courts.¹¹²⁹ However, given the fact that the majority of poor civil litigants do not have access to these courts, the Department may be winning this battle but it is losing the war against the lack of access to procedural justice for civil litigants. The State therefore needs to redirect its efforts to primary legal services with the focus on prevention and early intervention before the dispute requires adjudication in a court of law. This is where the paralegal has proven itself pivotal in the international arena and where the interventions of the Department of Justice and Correctional Services fall short.

For the most part, the proceedings in some of the aforementioned courts are complex and even representation by a newly admitted attorney or advocate would constitute a risk to the client. Representation by paralegals, regardless of their training and experience, would and should therefore not be a consideration. Nevertheless, if parties to the proceedings in these conventional courts are unable to afford legal representation, regardless of the nature of the proceedings, there are few options available to them. They may, for example, apply for legal aid.¹¹³⁰ However, if legal aid is not provided, they either have to abandon their claim or defense, represent themselves or appeal for pro bono assistance from a member of the legal profession. A lack of legal assistance in these conventional courts constitutes a miscarriage of justice, regardless of the nature of the proceedings. Moreover, there are proceedings in the lower courts in civil matters for which paralegal representation could be appropriate,

¹¹²⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000).

¹¹²⁶ Section 29(1)(b) allows 'any person acting on behalf of another who cannot act in their own interest' to institute proceedings in the Equality Court.

¹¹²⁷ Kimmie, Z & O'Sullivan, G (2015).

¹¹²⁸ Kimmie, Z & O'Sullivan, G (2015) p. 19..

¹¹²⁹ Department of Justice and Constitutional Development, *Annual Report 2015/2016*, (2016) ; Department of Justice and Constitutional Development, *Annual Report 2014/2015*, (2015) Pretoria, South Africa.

¹¹³⁰ This would mean that the prospective civil litigant must appeal for, among others, pro-bono assistance from a member of the legal profession or legal aid.

for example, an application for the rescission of an administrative order that is unopposed. In addition to the courts, the State has also established a number of tribunals.

7.3. TRIBUNALS

A range of specialist tribunals have been established by statute. These include the Competition Tribunal of South Africa,¹¹³¹ the Rental Housing Tribunal,¹¹³² the National Consumer Tribunal,¹¹³³ the Companies Tribunal,¹¹³⁴ the Water Tribunal¹¹³⁵ and the Commission for Conciliation, Mediation and Arbitration (CCMA).¹¹³⁶ The Companies Tribunal is relatively new and has not yet published rules relating to its proceedings. The CCMA is arguably the leading tribunal in respect of the volume of referrals but the matter of representation in this forum is not without controversy. The conflict revolves around Rule 25 of the Rules for the Conduct of Proceedings before the CCMA. This rule excludes legal practitioners (advocates and attorneys) from conciliation proceedings and allows legal representation in arbitration proceedings under limited circumstances. A High Court challenge to this rule decided in favour of the Law Society of the Northern Provinces¹¹³⁷ was overturned on appeal and this CCMA rule was affirmed by the Supreme Court of Appeal.¹¹³⁸ Rule 25 was subsequently amended to the extent that it precludes any person other than a legal practitioner from charging a fee for representing a party to the proceedings.¹¹³⁹ This effectively rules out paralegal representation as the concept legal practitioner denotes an advocate or an attorney. All other tribunals make provision for representation by persons other than attorneys and advocates, which includes paralegals.¹¹⁴⁰ These tribunals therefore, are more accessible than the courts.



¹¹³¹ Established in terms of section 26 of the *Competition Act*, 89 of 1998.

¹¹³² Established in terms of section 7 of the *Rental Housing Act*, 50 of 1999.

¹¹³³ Republic of South Africa, 'GN 769 (GG 30225)' of August 28, 2007, *Government Gazette*, 3–90.

¹¹³⁴ Established in terms of sections 193 and 195 of the *Companies Act*, 71 of 2008.

¹¹³⁵ Established in terms of section 146(1) of the *National Water Act*, 36 of 1998.

¹¹³⁶ Established in terms section 112 Part A of the Labour Relations Act *Labour Relations Act* (1995).

¹¹³⁷ *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (2013).

¹¹³⁸ *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (2013).

¹¹³⁹ Amended Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) were promulgated on 17 March 2015 and will come into effect on 1 April 2015. GG 38527.

¹¹⁴⁰ Rule 33 of the Rules for the Conduct of Matters before the National Consumer Tribunal.

Rule 44 of the Procedural Regulations, 2008 pursuant to the Rental Housing Act 50 of 1999.

Rule 8 of the Water Tribunal Rules (Republic of South Africa, 'GN 926 (GG 28060)' *Government Gazette* (2005) 4.)

Rule 44 of the Rules for the Conduct of Proceedings before the Competition Tribunal.

7.4. STATE INSTITUTIONS SUPPORTING DEMOCRACY

Chapter 9 of the Constitution of the Republic of South Africa makes provision for various independent and impartial State institutions tasked with strengthening the country's constitutional democracy.¹¹⁴¹ The Constitution endeavours to ensure the independence of these institutions by rendering them subject only to the Constitution itself and the law¹¹⁴² and making them accountable to the National Assembly where they have to report at least on an annual basis.¹¹⁴³ Furthermore, organs of state have a positive constitutional obligation to protect the independence, impartiality, dignity and effectiveness of these institutions¹¹⁴⁴ and no one, whether State or citizen, may interfere with their functioning.¹¹⁴⁵

This Chapter expressly calls into life the office of the Public Protector,¹¹⁴⁶ South African Human Rights Commission,¹¹⁴⁷ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,¹¹⁴⁸ Commission for Gender Equality,¹¹⁴⁹ Auditor-General¹¹⁵⁰ and Electoral Commission.¹¹⁵¹ It provides specific guidelines for the functions of each and requires legislation to be enacted to regulate these functions.¹¹⁵²

The Constitution confers specific authority on the Public Protector to investigate and report on improper conduct on the part of the State and its organs with the exclusion of court decisions and to take remedial action.¹¹⁵³ The Public Protector complied with its constitutional mandate by 'acting as a buffer between the state and disgruntled citizens while seeking to improve good governance and service delivery in the public sector'.¹¹⁵⁴ The number of cases dealt with is testimony to the efforts of this office and the nature of these cases reveals a genuine attempt to be accessible to the poor and marginalised.¹¹⁵⁵ These cases

¹¹⁴¹ Sections 181 – 194.

¹¹⁴² Section 181(2).

¹¹⁴³ Section 181(5).

¹¹⁴⁴ Section 181(3).

¹¹⁴⁵ Section 181(4).

¹¹⁴⁶ Section 181(1)(a).

¹¹⁴⁷ Section 181(1)(b).

¹¹⁴⁸ Section 181(1)(c).

¹¹⁴⁹ Section 181(1)(d).

¹¹⁵⁰ Section 181(1)(e).

¹¹⁵¹ Section 181(1)(f).

¹¹⁵² Section 182-190.

¹¹⁵³ Section 182(1)(a)-(c).

¹¹⁵⁴ Public Protector South Africa, *Annual Report 2009/2010*, (2010) Cape Town, South Africa p. 11.

¹¹⁵⁵ Public Protector South Africa, *Annual Report 2010/2011*, (2011) Cape Town, South Africa p. 3.

'We continued to give priority to bread-and-butter matters, bringing relief to many destitute persons whose lives had come to a standstill due to service failure relating to identity documents, social grants, government employee pensions, Unemployment Insurance Fund and Workers' Compensation matters, among others. Our strategic plan requires that we resolve bread-and-butter matters within a day to three months'.

show a clear overlap between the work of the Public Protector and that of the Community Advice Offices (CAOs).¹¹⁵⁶

The 2009/2010 Annual Report of the Public Protector shows that the most complaints received involved the Department of Justice and Constitutional Development¹¹⁵⁷ and in 2013/14 the Department of Justice and Correctional Services, as it is now called, was among the top ten (number six) offenders.¹¹⁵⁸ This is disconcerting. If the State department mandated to oversee the administration of justice is one of the leading offenders in respect of compliance, the need for the legal empowerment of citizens and the accessibility to and efficacy of the Public Protector become imperative. The Public Protector acknowledged that its constitutional mandate is hampered by resource constraints as it is not possible to be accessible to all who require its services.¹¹⁵⁹ In view of this and bearing in mind that its case load has been increasing year on year, resulting in an increase in cases being carried over,¹¹⁶⁰ it is imperative that this office considers collaboration with other institutions such as CAOs. The paralegals that staff these CAOs may perform an important screening function and apply 'first aid' to the legal problem. In so doing, they may assist in reducing the workload of the Public Protector's office.

The Constitution further empowers the Human Rights Commission to investigate and report on the observance of human rights, secure appropriate redress for human rights violations, conduct research and educate citizens on human rights.¹¹⁶¹ It also mandates the Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.¹¹⁶² The Commission for Gender equality is empowered to do likewise in respect of matters concerning gender equality.¹¹⁶³ The fundamental powers of the Auditor-General¹¹⁶⁴ and the basic functions of the Electoral Commission are also prescribed by the Constitution. All of the above institutions report on a regular basis on their activities and successes and in some instances independent surveys are conducted.

¹¹⁵⁶ See the discussion on the community-based paralegal in Chapter 9.

¹¹⁵⁷ Public Protector South Africa (2010) p. 41.

¹¹⁵⁸ Public Protector South Africa, *Annual Report 2013/2014*, (2014) Cape Town, South Africa.

¹¹⁵⁹ Public Protector South Africa (2010) p. 7.

¹¹⁶⁰ Public Protector South Africa (2010).

Public Protector South Africa (2011).

Public Protector South Africa (2014).

¹¹⁶¹ Section 184(2)(a)-(d).

¹¹⁶² Section 185(2).

¹¹⁶³ Section 187(2).

¹¹⁶⁴ Section 188(1) and (2).

The extent to which these institutions contributed to increased access to justice for vulnerable communities was called into question by the results of the Access to Justice and Promotion of Constitutional Rights Baseline Survey.¹¹⁶⁵ The survey revealed that there is a very low awareness of these Chapter 9 institutions as only 10% of respondents knew them and only 1% could correctly identify them.¹¹⁶⁶ The survey further found low levels of awareness of the Constitution, the Bill of Rights and human rights legislation and this was strongly linked to certain barriers to access, namely, low levels of education, socio-economic status and lack of access to information.¹¹⁶⁷ Less than 10 percent of the respondents have read the Constitution or had it read to them. The dictum of Froneman J in *Mdeyide* captures the consequences of this state of affairs:

‘Knowledge of the facts that give rise to justiciable claim is a necessary pre-condition for the exercise of the right of access. Without that knowledge the right of access means nothing; it remains abstract and illusory.’¹¹⁶⁸

In addition, public ignorance of the law increases the risk of functional lawlessness characterised by violence and arbitrariness when citizens take matters in their own hands.

The respondents nevertheless showed a fairly high level of knowledge of some of the substantive rights contained in the Bill of Rights such as the right to join a trade union, the right to basic health care, food, water and social security, the right to basic education, including basic adult education and their rights in respect of evictions. The importance of this awareness can never be underestimated and is by and large as a direct result of the socio-legal function performed by the community-based paralegals in the field.

However, this simply serves to amplify support for the conclusion that the efforts to deliver access to justice to the deeply poor are still mainly on welfare and not on legal empowerment, thus not enabling these individuals and communities to become economic actors. This, in the author’s view, reduces their option-freedom and curtails their agency-freedom.

¹¹⁶⁵ Kimmie, Z & O’Sullivan, G (2015).

¹¹⁶⁶ Page 19.

¹¹⁶⁷ Page 12.

¹¹⁶⁸ At para 100.

7.5. COMMISSIONS OF INQUIRY

It is a well-established practice in South Africa¹¹⁶⁹ and a constitutional prerogative of the President of the Republic¹¹⁷⁰ and Premiers of Provinces¹¹⁷¹ to establish commissions of inquiry to investigate matters that are of public and national interest. This practice has led to South Africa being labelled as, arguably, the Commission of Inquiry capital of the world¹¹⁷² and is caustically referred to as ‘Commissions of Omissions.’¹¹⁷³ The number of commissions that have been established in South Africa has not been investigated but those that drew public attention are numerous.¹¹⁷⁴

The Commissions Act has as its purpose the appointment of a commission to investigate matters of public concern. It provides for the terms of reference of a commission to be published in the Government Gazette.¹¹⁷⁵ It also makes express provision for the proceedings of the commission to be conducted in public.¹¹⁷⁶

Dissatisfaction with commissions has led to numerous challenges in the courts in the past, at present and will certainly in the future.¹¹⁷⁷ Whether these commissions are effective in delivering greater access to justice to vulnerable communities or whether they are, like sporting events, merely the panacea of the masses will remain a matter of public debate. Nevertheless, at a very basic level, their purpose is to investigate matters of public and national interest, whether the overwhelming majority of the public have an interest in it or not. Paralegal representation, although not outlawed, does not feature in these commissions in so far as it could be ascertained.

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¹¹⁶⁹ This is an aspect of English law dating back to the 12th century and its enabling legislation is the *Commissions Act*, 8 of 1947.

¹¹⁷⁰ Section 84(2)(f).

¹¹⁷¹ Section 127(2)(e).

¹¹⁷² McKinley, DT, “Commissions of Inquiry or Omission?”, (2015), available at: *The South African Civil Society Information Service* <http://sacsis.org.za/site/article/2347>. (accessed 7 February 2016)

¹¹⁷³ McKinley, DT (2015).

¹¹⁷⁴ Examples include the Commission of Inquiry into Higher Education and Training, 2016, Cassim Inquiry, 2015, ‘Marikana’ Commission, 2012, Seriti Commission, 2011, Donen Commission, 2011, Ginwala Enquiry, 2008, Khampepe Commission, 2008, Hefer Commission, 2004, Commission of Inquiry into the Rapid Devaluation of the External Value of the Rand, Commission on the Ellis Park Disaster, 2001 and Nel Commission, 2001, the White Commission, 1995 and the Truth and Reconciliation Commission, 1995.

¹¹⁷⁵ Section 1.

¹¹⁷⁶ Section 4.

¹¹⁷⁷ *Mbebe and others v Chairman, White Commission and Others* *Mbebe and others v Chairman, White Commission and Others* (2000).

Bongoza v Minister of Correctional Services and Others 2002 (6) SA 330 (TKH); *Azanian Peoples Organisation (AZAPO) AND Others v The President of the Republic of South Africa Azanian Peoples Organisation (AZAPO) AND Others v The President of the Republic of South Africa* (1996).

The cost of litigation also resulted in alternative dispute resolution increasingly making its way into the dispute resolution arena as a precursor and/or an alternative to litigation. This development will form the focus of discussion below.

7.6. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

ADR has made particular inroads into three key areas of the law, namely, family law, labour law¹¹⁷⁸ and commercial law. The Constitution itself also provides expressly for mediation in the event of an impasse between the National Assembly and the National Council of Provinces when legislation is to be passed.¹¹⁷⁹

A number of statutes make provision for compulsory ADR. The Commission on Gender Equality is by law obliged to resolve gender-related issues or complaints through the process of mediation.¹¹⁸⁰ Professional boards in the health sector, likewise, are tasked with mediating minor transgressions by health professionals.¹¹⁸¹ In addition, a Community Forestry Agreement is by law required to provide for dispute resolution through informal mediation or arbitration.¹¹⁸² Furthermore, parties to existing government transport contracts that cannot reach consensus on amendments or inclusions to the contract, are obliged to refer the matter for mediation.¹¹⁸³ The pro forma founding agreements for transport authorities are also by law required to refer related disputes to mediation¹¹⁸⁴ and mediation is specifically provided for in respect of the pension-related disputes of postal employees.¹¹⁸⁵

A range of statutes also provide for mediation as a voluntary ADR tool. These include 'victim offender mediation',¹¹⁸⁶ mediation voluntarily sought by a consumer,¹¹⁸⁷ co-operation between civil society and the National Consumer Commission¹¹⁸⁸ and mediation services rendered by a provincial consumer protection authority.¹¹⁸⁹ It further includes referrals to mediation by experts, appointed officials and a tribunal established for the purpose of dealing with the development of land.¹¹⁹⁰ The National Energy

¹¹⁷⁸ The CCMA has been addressed in the previous paragraph.

¹¹⁷⁹ Section 76(1)(d).

¹¹⁸⁰ Section 11(1)(e) of the *Commission on Gender Equality Act*, 39 of 1996.

¹¹⁸¹ Section 42 of the *Health Professions Act*, 56 of 1974.

¹¹⁸² *The National Forests Act*, 84 of 1998.

¹¹⁸³ Section 46(2) of the *National Land Transport Act*, 5 of 2009.

¹¹⁸⁴ Sections 6 and 7 of the National Land Transport Regulations on Contracting for Public Transport Services, 2009 (Republic of South Africa, 'GNR 877 (GG 32535)' of August 31, 2009, *Government Gazette*.)

¹¹⁸⁵ *Post Office Act*, 44 of 1958.

¹¹⁸⁶ *Child Justice Act*, 75 of 2008.

¹¹⁸⁷ Section 70 of the *Consumer Protection Act*, 68 of 2008.

¹¹⁸⁸ Section 85 of the *Consumer Protection Act* (2008).

¹¹⁸⁹ Section 77 and 84(b) of the *Consumer Protection Act* (2008).

¹¹⁹⁰ Section 4(2)(c)(i) and 16(b)(iii) of the *Development Facilitation Act*, 67 of 1995.

Regulator, or a person so appointed, is also enjoined to act as a mediator to settle related disputes.¹¹⁹¹ Disputes related to security of tenure¹¹⁹² and those involving financial services providers,¹¹⁹³ schemes established by financial institutions,¹¹⁹⁴ water affairs,¹¹⁹⁵ infringements of language rights, policy, practice and legislation,¹¹⁹⁶ ‘petroleum-related matters’,¹¹⁹⁷ evictions,¹¹⁹⁸ unfair discrimination,¹¹⁹⁹ tenant and landlord¹²⁰⁰ and civil matters.¹²⁰¹ The law also confers on the Public Protector discretionary powers to settle disputes or rectify acts or omissions through mediation, conciliation or negotiation.¹²⁰²

The extent of the research conducted in South Africa prior to the establishment and implementation of these adjudicating mechanisms has not been investigated in this study. This study is therefore unable to state with a degree certainty whether the beneficiaries, especially the poor and marginalised, have been consulted in the process or not. However, if the purpose of these mechanisms is to increase access to justice, it raises the question, ‘Access for whom?’ Given the fact that the majority of the people in the country are poor and often function outside the formal legal system, the extent to which they benefit from these measures is currently unclear. Many of the barriers that prevent access to the conventional courts also manifest in the ADR fora. The extent to which these ADR measures address the day to day and primary legal needs of the poor and overcome barriers to access, is therefore uncertain. This requires research to be conducted.

The final report on the investigation into the effectiveness of the ADR market in the credit industry in South Africa which was commissioned by the National Credit Regulator¹²⁰³ indicates that the legal needs of the cohort varied by social status¹²⁰⁴ with the profile of credit users heavily skewed towards the black population.¹²⁰⁵ This holds particular significance of the type of intervention and assistance that is required. The consequences of a dispute, therefore, that remains unresolved or an outcome that does not favour the credit user manifests differently for high income than low income earners. High

¹¹⁹¹ Section 42(1) and (2) of the *Electricity Regulation Act*, 4 of 2006.

¹¹⁹² Section 21(1) and (4) of the *Extension of Security of Tenure Act*, of 1997.

¹¹⁹³ Section 5(a) of the *Financial Advisory and Intermediary Services Act*, 37 of 2002.

¹¹⁹⁴ Section 1 of the *Financial Services Ombud Schemes Act*, 37 of 2004.

¹¹⁹⁵ Section 150(1)-(4) and 7 of the *National Water Act* (1998).

¹¹⁹⁶ Section 2 and 11(5) of the *Pan South African Language Board Act*, 59 of 1995.

¹¹⁹⁷ Section 4(d), 30(1) and 2 of the *Petroleum Pipelines Act*, 60 of 2003.

¹¹⁹⁸ Section 7(1), (2) and (5) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*, 19 of 1998.

¹¹⁹⁹ Section 21(4)(b) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000).

¹²⁰⁰ Section 13(2)(c) of the *Rental Housing Act* (1999).

¹²⁰¹ Section 2(1), 3(1) and (2) of the *Short Process Courts and Mediation in Certain Civil Cases Act*, 103 of 1991.

¹²⁰² Section 6(4)(b)(i) of the *Public Protector Act*, 23 of 1994.

¹²⁰³ National Credit Regulator (2012).

¹²⁰⁴ Disputes referred by high income earners relate to mortgage and secured loans, whereas those referred by low income earners relate to personal unsecured loans and credit facilities.

¹²⁰⁵ The overwhelming majority (94%) of the credit users of the cohort were black.

income earners may suffer a mere lowering of their social status, whereas a middle to low income earner may suffer a severe infringement of their right to a minimum standard of living.

The results of the survey also indicated that the lack of commitment on the part of the consumer to the duration of the process and drop-out by consumers were also prevalent. The study found service providers inaccessible due to their geographical location and the manner of delivery of service presented barriers to access as walk-ins are discouraged. Institutional barriers to access to justice thus present itself even in these adjudicating mechanisms that are supposed to provide greater access.

The survey found that consumers had a fundamental problem with the role of the ADR agents as the expectation was that the agent will 'take over their case' and 'take their side'. This begs the question for the consumer, 'Who is in my corner?' The importance of some form of assistance and representation, even in ADR fora, is clear from these results. Given the fact that such assistance, in many instances, hardly warrants the attention of an attorney, paralegal assistance becomes a more viable option.

De Waal, Currie and Erasmus highlighted the fact that the legislature proceeded to increase the accessibility of the courts and other dispute resolution fora by providing the statutory framework for it.¹²⁰⁶ The State has also made attempts to comply with its positive obligation to establish the infrastructure such as court buildings, offices, libraries and human resources.¹²⁰⁷

However, some of these measures fall short of ensuring access in one fundamental way. There is the underlying presumption that an unrepresented party regardless of circumstances will be able to navigate these proceedings without challenge. This assumption fails to take into consideration the multiple vulnerabilities of its intended beneficiaries. The fact that access is free suggests that the lack of material goods as a barrier is the main consideration. Given the multiple barriers to access to justice and the extent of the vulnerability of many of the parties to these proceedings, such a presumption is indeed highly detrimental to providing access to justice. Those with or without the material means to access these adjudicating mechanisms might nevertheless suffer other barriers to access.

Access to these mechanisms and the fairness of these proceedings thus may require legal assistance which in some instances, has to take the form of legal representation at the expense of the State. The

¹²⁰⁶ De Waal, J , Currie, I & Erasmus, G (2013) p. 715.

¹²⁰⁷ The Presidency of the Republic of South Africa (2014).

right to legal assistance by a legal or paralegal practitioner may thus be a pre-condition for the fairness of the proceedings in the aforementioned adjudicating mechanisms, if the interest of justice so require.

In this regard the author concurs with the sentiments expressed by Didcott J, 22 years ago in *S v Khanyile and Another*¹²⁰⁸. The judge quoted with approval from Acta Juridica when he concluded that the guidance the magistrate provided to the unrepresented accused was no substitute for the professional help they missed:

“Of all false and foolish dicta, the most trite and the most absurd is that which asserts that the Judge is counsel for the prisoner.... The Judge cannot be counsel for the prisoner, ought not to be counsel for the prisoner, never is counsel for the prisoner,”¹²⁰⁹

This might have been applied to criminal proceedings but holds equally true for civil proceedings. Many civil proceedings are, by their very nature adversarial. The adjudicating body, whether a superior court, the CCMA, a lower court or tribunal must nevertheless comply with the fundamentals of a fair hearing as discussed in the preceding chapters. That in essence means that whether the proceedings are inquisitorial or accusatorial in nature, both the adjudicating body and the presiding officer must adhere to the principles of fairness, impartiality and independence as per section 34 of the Constitution. This does not mean that these rights cannot be limited in terms of section 36. The fact of the matter is that the denial of legal assistance, including legal or paralegal representation where required, has a bearing on the fairness, not only of the proceedings but also the outcome. The institution charged with providing legal assistance at the expense of the State is Legal Aid South Africa (LASA) and has been doing so sparingly in civil matters.¹²¹⁰ To date, the justice gap left by the inability of the State to provide comprehensive legal assistance in civil matters has barely been addressed by the uncoordinated efforts of a patchwork of non-government service providers. One of these service providers is the CAOs whose community-based paralegals have rendered a free socio-legal service to communities since before 1994.

7.7. CONCLUSION

The South African institutional framework that supports access to justice spans a network of courts, tribunals, commissions, state institutions supporting constitutional democracy and alternative dispute resolution mechanisms. These institutions allow for paralegal representation to varying degrees.

¹²⁰⁸ *S v Khanyile and Another* 1988 (3) SA 795 (N), para 798.

¹²⁰⁹ At para 798.

¹²¹⁰ See Chapter 6.

The nature of the disputes and the proceedings in conventional courts, for the most part, are complex. Paralegal representation would therefore not be appropriate and the rules of the conventional courts thus do not allow for paralegal representation in these courts. This does not mean that there are no proceedings in the lower courts for which paralegal representation might be appropriate. The absence of any legal assistance presents litigants with limited options. They either have to abandon their claim or defense altogether or represent themselves. This amounts to a denial of the right of access to procedural justice.

There are a number of specialist tribunals and courts, such as the equality courts, that allow representation by persons other than an attorney or an advocate, which includes a paralegal. In spite of this, the Access to Justice and Promotion of Constitutional Rights Baseline Survey reported low awareness of the equality courts. This calls into question the reliance on these courts as primary adjudicating mechanisms. Moreover, the amendment of Rule 25 of the Rules for the Conduct of Proceedings before the CCMA effectively precludes paralegals from charging a fee when representing a party to the proceedings. The constitutionality of this rule will still be tested in the Constitutional Court. The Department of Justice and Correctional Services claims that it is winning the battle against the backlog in the courts. However, given the multiple barriers to access to these courts that confront the poor and the marginalised, the Department might very well be losing the war against the lack of access to procedural justice in civil matters.

Other State institutions supporting democracy have been established to strengthen the democratic order. Yet, preliminary research conducted suggests that there is a low awareness of these institutions among citizens which increases the risk of functional lawlessness. Collaboration between these institutions and CAOs staffed by community-based paralegals may assist in bridging the gap between the law and the people.

Insufficient research has been conducted into the effectiveness of ADR mechanisms but results from the credit industry suggest that the barriers to access prevail even in these fora. There is the expectation on the part of consumers that these adjudicating mechanisms should represent them, which highlights the need for legal assistance. In the presence of the various barriers to access to justice, the right to legal assistance has become a pre-condition for the fairness of proceedings not only in courts and tribunals but also other adjudicating fora. LASA discharges the obligation to provide legal assistance at the expense of the State on its behalf. The inability of the State to provide legal aid in civil matters to all those who qualify, is a matter of international record.

There are key agents who provide this legal assistance. To date, the focus has mainly been on the narrow legal profession and the paralegal profession has received very little attention. Having identified

the scope for and shortcomings with regards to paralegal representation in the aforementioned institutions, the focus will be on the legal and the paralegal profession and its contribution to and potential for enhancing access to justice for vulnerable communities will therefore be examined next.



PART V

The Human Resources that Support Access to Justice in South Africa



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CHAPTER 8

THE LEGAL PROFESSION IN SOUTH AFRICA

8.1. INTRODUCTION

In the preceding chapters the values, substantive legal framework and institutions that support access to justice in civil matters in South Africa were examined. This chapter focuses on the human resources that support access to justice, in particular the legal profession. Justice Vision 2000 considered the transformation of the legal profession to be an indispensable part of the transformation of the administration of justice. The purpose of this transformation was to grant all persons equal and fair access to justice and to protect the dignity, rights and security of every person. The paralegal practitioner featured prominently in Justice Vision 2000 as a role player in making justice more accessible to the poor and the marginalised in the country.

This chapter commences with an examination of what constitutes the legal profession and its transformation and reviews the rationale for the transformation. It tracks the legal reforms in the legal profession and evaluates the extent to which these reforms facilitate procedural justice in civil matters and safeguard the dignity, rights and security of the poor and marginalised in the country. This chapter further examines the scope that the legal reforms provide for the paralegal practitioner to enhance access to procedural justice in civil matters for vulnerable communities.

8.2. THE LEGAL PROFESSION DEFINED

The generic distinguishing features of a profession include advice and service to the community in a specialised field of training, a governing body that represents, controls, disciplines and sets minimum standards for entry and education, continuous update of education and training and a standard of ethical conduct and performance.¹²¹¹ To date, there has been a tendency in the country to adopt a narrow definition of the legal profession which includes attorneys and advocates in the private sector and state attorneys, state advocates, magistrates and judges in the public sector. The right of appearance in a court of law and the authority to preside over a matter in a court of law were the key features that distinguished this cohort from other 'legal practitioners'.

¹²¹¹ Cowley, JI, *A comparative study of paralegalism in Australia, the United States of America and England and Wales* (Southern Cross University, 2004) p. 224.

However, legal administration in South Africa comprises more than just court officers in the private and public sector, it includes administrative officers under various governmental departments, other officials in the administration of justice in the public service, top ranking officials in the South African Police Services, law commissions and institutions offering legal aid and advice. The myriad of administrative officers and clerks involved in legal administration is a clear indication that there are legal and quasi-legal functions being performed by various persons who may or not be members of the narrow legal profession. Furthermore, there is a host of legal and quasi-legal services being rendered by, for example, community-based paralegal practitioners and employees and practitioners in various business sectors without this service being recognised or regulated. Legal process services (LPS), for example, includes legal and quasi-legal activities that are for the most part disguised in ‘managed services’ environments and are routinely performed by non-lawyers.¹²¹²

In the Transformation of the Legal Profession: Discussion Paper it was further pointed out that some prosecutors, especially those who serve in the lower courts, were not recognised as a fully-fledged branch of the practising legal profession. Moreover, lawyers who opted to be employed by the corporate sector, government departments and non-governmental agencies were not recognised or regulated by statute as members of the practising legal profession. More importantly, it was noted that paralegal practitioners were also not recognised or regulated by statute. However, Justice Vision 2000 did not particularly focus on defining constructs.

8.2.1. Justice Vision 2000

Justice Vision 2000 did not address an expanded definition of the narrow legal profession directly nor did it define the legal profession. It nevertheless turned its focus particularly on the narrow legal profession in addressing the issue of transformation. Here Justice Vision 2000 developed three strategic goals, which are:

- develop[ing] a profession which is accessible and reflects the diversity of the South African society

¹²¹² These activities vary from ‘low-level tasks (transcriptions, form fill, collections *etc*) to mid-level tasks (claims management, e-discovery, contract management, *etc.*) through to high level, very complex tasks such as due diligence, compliance and specialised contracting’. (Channel Consult, *Legal Process Services*, (2015) Cape Town: Business Process Enabling South Africa p. 13.).

They vary from back-office assistance for legal firms to pure legal process or tasks. It is estimated that approximately 10 000 seats support domestic legal tasks or processes in South Africa and this has tremendous potential for growth (Channel Consult (2015).)

- promoting a legal profession which is affordable to the broader segments of South African society
- maintain[ing] a high level of professional standards without unduly hampering the process of transforming the profession.¹²¹³

No reference was made to the paralegal under the recommended strategies for the transformation of the legal profession. However, reference was made to the paralegal practitioner under the theme ‘Access to Justice for All’, together with increased access to the legal profession and legal aid. The intention to expand the legal profession by including paralegal practitioners had to be inferred from the strategies to professionalise paralegal practice and the earlier drafts of the Legal Practice Bill.

8.2.2. The Legal Practice Bill 2000

In the Important Notice Concerning the Draft Legal Practice Bill 2000 that accompanied the Draft Bill it was stated that the National Legal Forum on Legal Practice reached consensus that all legal practitioners and paralegal practitioners should be regulated by one statute and one statutory regulatory body. It further included paralegal practitioners in its recognition of the freedom of practitioners of the law to practice as members of professional voluntary associations. There is therefore no doubt that it was the intention from the outset for the paralegal practitioner to be included as a member of the legal profession. Although this Draft Bill does not contain a definition of a legal or a paralegal practitioner, a reading of the text made it clear that the paralegal practitioner was indeed considered to be part of the legal profession. The Bill was ‘...to provide for the registration of *paralegal practitioners*...’¹²¹⁴ among other things. Specific provisions within the Bill detail the registration of paralegal practitioners¹²¹⁵ and the recognition of their membership of voluntary associations.¹²¹⁶ The Draft Legal Practice Bill 2000 was followed by the Task Team Proposal on the Legal Practice Bill 2002.

8.2.3. Legal Practice Bill 2002 (Task Team Proposal)

Both the long title and the purpose statement of the Task Team Proposal on the Legal Practice Bill indicated that legal as well as paralegal practitioners would be governed by the same statutory body and the same statute. The long title reads,

¹²¹³ Pages 40-41.

¹²¹⁴ *Legal Practice Bill 2000*.

¹²¹⁵ Clause 11(4).

¹²¹⁶ Clause 11(5).

‘[t]o provide for the establishment of the Legal Practice Council of South Africa; the admission and enrolment of legal practitioners and *paralegal practitioners*; the regulation of legal services; and to provide for matters connected therewith’.¹²¹⁷

The purpose statement, likewise, indicates that paralegal practitioners would be regarded as an integral part of an expanded legal profession.¹²¹⁸ The definitions clause of the Bill gives recognition to the paralegal practitioner by defining a legal practitioner as ‘a person admitted as such in terms of section 25(1) and for the purposes of Chapter 5 and 6 includes a *paralegal practitioner and practice*’.¹²¹⁹ It further defines a paralegal practitioner as a person who may render legal services as contemplated in terms of section 43.¹²²⁰ The Bill further makes provision for the establishment of a Paralegal Committee that would advise on paralegal matters.¹²²¹

¹²¹⁷ own emphasis added.

¹²¹⁸ 2. The purpose of this Act is to—

- (a) regulate the rendering of legal services;
- (b) create a framework for—
 - (i). the effective rendering of legal services;
 - (ii). the development and maintenance of appropriate norms and standards for the rendering of legal services by legal practitioners and *paralegal practitioners*;
 - (iii). the regulation of the admission and enrolment of legal practitioners and *paralegal practitioners*;
 - (iv). the development of adequate training programmes for candidate legal practitioners and *candidate paralegal practitioners*;
 - (v). engendering public confidence in legal practitioners and *paralegal practitioners*;
 - (vi). participation of all legal practitioners in the legal profession;
- (c) enhance access to justice; and
- (d) provide a fair and effective procedure for the resolution of complaints against legal practitioners and *paralegal practitioners*.

¹²¹⁹ own emphasis added.

¹²²⁰ Section 43.

- (1) The Minister may, after consultation with the Council and the Paralegal Committee, make regulations to regulate the rendering of legal services to the public by paralegal practitioners.
- (2) The Minister may, after consultation with the Chief Justice and in consultation with the Council and the Paralegal Committee, by notice in the Gazette, authorise paralegal practitioners to appear in courts, subject to such conditions as he or she may determine.
- (3) In deciding whether to grant the authority referred to in subsection (2), the parties concerned must have regard to—
 - (a). the need to ensure that persons appearing in court are represented, where the interests of justice so require; The GCB view is that the tests cannot be applied to a company prior to incorporation, and that the better option would be to require the company to apply for a certificate of consent from time to time.
 - (b). the need to ensure that such representation is adequate and competent;
 - (c). the availability of registered legal practitioners to represent persons in particular courts and in particular areas; and
 - (d). other aspects of the public interest.
- (4) The authority or consent referred to in subsection (2) may be given in respect of a stipulated area, court, class or type of case, and period.

¹²²¹ Section 44

The view of the Task Team was therefore clear, that the paralegal practitioner was to be regarded as a member of an expanded legal profession. The Task Team Proposal was followed by various drafts of the Legal Practice Bill including the Law Society of South Africa's own version thereof.

8.2.4. Legal Practice Bill 2002 (Law Society of South Africa)

The definitions clause of the Law Society of South Africa's version of the Legal Practice Bill 2002 also contains a description of a practitioner which 'includes legal and para-legal practitioner'. This section also defines, 'paralegal practitioner',¹²²² and the Bill makes provision for the establishment of a 'Para-legal Executive Committee',¹²²³ and a 'Para-legal forum' as opposed to a Paralegal Committee as recommended by the Task Team Proposal.¹²²⁴ Its purpose statement also clearly stated that paralegals would be governed by this statute,¹²²⁵ thus considering them to be part of the narrow legal profession.¹²²⁶ The 2002 versions of the Legal Practice Bill were replaced by the first official draft of the Legal Practice Bill 2009.¹²²⁷

8.2.5. Legal Practice Bill First Working Draft 2009

The long title of this version of the Legal Practice Bill contained no reference to paralegal practitioners. It reads,

'[t]o regulate legal practitioners; to provide for the establishment, powers, functions and duties of the South African Legal Practice Council; to provide for the admission and enrolment of legal practitioners; to provide for the Legal Practice Fidelity Fund; to provide for the establishment of a Legal Services Ombud; and to provide for matters connected therewith'.

¹²²² 'means any person who is registered and enrolled to render legal services in terms of section 13 of this Act'

¹²²³ 'means the committee established in terms of section 82'

¹²²⁴ 'means the South African Para-legal Forum established in terms of section 79'

¹²²⁵ 2. Purpose of this Act

The purpose of this Act is to-

- (a) integrate, unify and regulate the affairs of persons engaged in legal practice;
- (b) to create a framework for the –
 - (i). increase in the entry of persons into legal practice;
 - (ii). development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal and *para-legal practitioners*;
 - (iii). engendering of public confidence regarding services to be rendered by legal and *para-legal practitioners*; and
 - (iv). participation of legal and *para-legal practitioners* in regulating the affairs of the legal fraternity;
- (c) enhance access to justice; and
- (d) promote and protect the public interest in respect of legal matters.

¹²²⁶ See the discussion in para below (lack of recognition of the paralegal).

¹²²⁷ *Legal Practice Bill: First Working Draft 2009*.

However, the Bill does make provision for the registration of paralegal practitioners although it contains no definition thereof.¹²²⁸ Chapter 4 expressly makes provision for the rendering of services by paralegal practitioners and the establishment of a ‘Paralegal Committee’. It would therefore seem that, in the absence of a definition of ‘legal practitioner’ mentioned in the long title, that the paralegal practitioner was to be included as a member of the legal profession. This version was replaced by the Legal Practice Bill 2012.

8.2.6. Legal Practice Bill 2012¹²²⁹

In this version of the Legal Practice Bill reference to the paralegal practitioner in the long title, the purpose statement and the definitions clause has disappeared completely. This version made it clear that only attorneys and advocates are considered to be members of the legal profession.¹²³⁰ The only reference to the paralegal practitioner is to be found in section 34 which reads,

(9) ‘(t)he Council must, within two years after the commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on—(b) the statutory recognition of paralegals.’

It is therefore clear that in spite of the fact that the long title of the Bill states that it is ‘(to) provide for a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives’, the drafters have retreated to the original, narrow definition of the legal profession which excludes everyone who has not been admitted as an advocate or an attorney, in particular, the paralegal practitioner. This Bill has suffered a further seven amendments before it was submitted for approval. President Zuma finally signed the Legal Practice Act into law on the 22 September 2014.

8.2.7. The Legal Practice Act 28 of 2014

This Act confines the definition of a legal practitioner to ‘an advocate or attorney registered as such in terms of section 30’. Section 30 of the Legal Practice Act stipulates that a person duly admitted by the

¹²²⁸ Clause 14(10). A person duly qualified in terms of this Act must apply to the Council in the prescribed manner to be registered and enrolled as a paralegal practitioner.

Clause 14(11). Upon receiving the application in subsection (10), the Council must enter the name of the applicant on the roll of paralegal practitioners in the prescribed manner.

Clause 33. Any person, who has met the requirements as prescribed, may apply to the Council to be registered and enrolled as a paralegal practitioner.

¹²²⁹ Legal Practice Bill 2012 [B20B-2012] *Legal Practice Bill 2012 [B20B-2012]*.

¹²³⁰ Clause 1. ‘**legal practitioner**’ means an advocate or attorney registered as such in terms of section 30.

High Court as a legal practitioner must apply to the Legal Practice Council for registration as such and for enrolling his or her name on the Roll. Therefore, what constitutes the legal profession in South Africa has been settled by the Legal Practice Act. This statute governs advocates and attorneys. The National Forum on the Legal Profession drafted a code of conduct pursuant to section 97(1) (b) of the Legal Practice Act which extends the legal profession marginally to include ‘corporate counsel’.¹²³¹

The paralegal practitioner has for all intents and purposes been left out of the Legal Practice Act and all matters related to it deferred to the Legal Practice Council.¹²³² The Legal Practice Act therefore falls short of the transformative agenda of Justice Vision 2000 as given effect in the earlier drafts of the Act insofar as it relates to the paralegal practitioner. This Act nevertheless left the door open for the recognition of the paralegal practitioner and its scope of practice in a number of ways. The authority to render legal services as described in the Legal Practice Act is rendered subject to any other law¹²³³ and all paralegal-related matters are referred to the Legal Practice Council.¹²³⁴

8.3. THE TRANSFORMATION OF THE LEGAL PROFESSION

Pruitt declared that ‘South Africa, at the turn of the century, was a country awash with transformation – or at least the rhetoric about transformation...’.¹²³⁵ What exactly this means in theory is difficult to ascertain as a conceptual framework of transformation is absent from policy documents and has to be gleaned from the goals and the strategies that were adopted at the time. It therefore comes as no surprise that a definitive description of the ‘transformation of the legal profession’ in South Africa is lacking in policy documents and most commentary and research papers on the issue.¹²³⁶ Where a description is indeed offered, it is mainly viewed as a product and narrowly focused on what Klaaren refers to as ‘apartheid-era concerns.’¹²³⁷

¹²³¹ This refers to legal practitioners who are not in private practice.

¹²³² Clause 34(9)(b)

¹²³³ Clause 33(1).

¹²³⁴ Clause 34(9)(b).

¹²³⁵ Pruitt, LR, ‘No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession’, (2006), 23(3), *Michigan Journal of International Law*, pp. 545–676.

¹²³⁶ Centre for Applied Legal Studies & Foundation for Human Rights, *Transformation of the Legal Profession*, (2014) Johannesburg, South Africa: Foundation for Human Rights.

Transformation of the Legal Profession: Discussion Paper (1999).

Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000).

Department of Justice and Constitutional Development, *A Framework for the transformation of the State Legal Service*, (2012) Pretoria, South Africa.

¹²³⁷ The Centre for Applied Legal Studies defines transformation of the legal profession as ‘an open bias-free and non-hierarchical profession which sees the removal of prejudices so that talent can flourish, unhindered by assumptions that are often linked to the characteristics of racial, gender and sexual orientation, among others’.(Centre for Applied Legal Studies & Foundation for Human Rights (2014)).

The new democratic order in South Africa is a product of a negotiated settlement between the pre-1994 apartheid regime and a coalition of social forces and labour. The negotiators at the time adopted a symbiotic model of transformation that embraces a vision of symbiotic metamorphosis most closely associated with a social democratic political tradition. This model, ideally, allow coalitions of social forces and labour to use the state to bring about evolutionary adaptations in collaboration with the bourgeoisie.¹²³⁸

The transformation of the legal profession must be viewed against the backdrop of the transformation of the administration of justice in the country which has, as its purpose, effecting an ‘egalitarian, democratic social emancipation’.¹²³⁹ The Framework for the Transformation of State Legal Services describes ‘transformation’ as:

‘... the transformation of the administration of justice, which includes the restructuring of state legal services, as part of the broader societal transformation agenda aimed at fundamentally changing institutions of governance and society with a view to aligning all aspects of South African life with South Africa’s post-apartheid Constitution.’¹²⁴⁰

The post 1994 Draft Strategic Plan for the Transformation and Rationalisation of the Administration of Justice saw the light as Justice Vision 2000.¹²⁴¹ The draft strategic plan formed the preliminary framework for transforming the administration of justice in South Africa. In its introduction the Ministry of Justice acknowledged that the adversarial nature of the legal system had resulted in unequal access to legal services.¹²⁴²

Justice Vision 2000 proposed a holistic approach to the transformation of the administration of justice and identified critical strategic areas of intervention, namely, ‘transforming the department of justice, structures administering justice, crime, access to justice, the legal profession and training.’¹²⁴³ Constituted against a global context, this transformation is premised on the global drive for access to justice. The founding document for the transformation of the administration of justice made it clear that the ‘reform and transformation of the administration of justice is a fundamental pre-requisite to

¹²³⁸ Wright, EO, 'Elements of a theory of transformation' in *Envisioning Real Utopias* (2010) London, UK: Verso 191–214.

¹²³⁹ Wright, EO (2010).

¹²⁴⁰ Department of Justice and Constitutional Development (2012), para 4.

¹²⁴¹ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice* (2000).

¹²⁴² *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice* (2000). p. 1.

¹²⁴³ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice* (2000) p. 1.

give legitimacy to the new South Africa...and must be seen against transforming the entire South African society'.¹²⁴⁴ Justice Vision 2000 prioritised facilitative measures that would ensure affordable access to justice. It emphasised the importance of educational institutions in this transformation process. These institutions would shape the values of the new legal order and determine its efficacy. In so doing, it would strengthen the reform initiatives and ensure cohesion of the various parts of the transformation process.¹²⁴⁵ At the heart of this transformation is the dismantling of a regulatory and institutional framework which had as its fundamental purpose the reproduction of a society so unequal, that it was an affront to the very essence of humanity.

Justice Vision 2000 thus proposed an evolutionary process of reconstruction of the existing regulatory framework in order to guarantee access to a reformed institutional framework that gives effect to the values of a democratic and constitutional order centred on the social emancipation of its citizens. This mode of transformation reflects the characteristics of a symbiotic model of transformation although not explicitly communicated in policy documents. The transformation of the legal profession can therefore not be seen as distinct from the transformation of the administration of justice, which is central to achieving the ideal of an egalitarian society.

However, inasmuch as the Justice 'sector' is for practical purposes regarded as distinct from, among others, transport, energy and agriculture, it is not a stand-alone sector. Development is at the heart of the social emancipation of the disadvantaged and marginalised and spans all development sectors. Justice, therefore, arguably permeates almost every aspect of developmental activity. It was thus noted that:

'(e)very policy in every development sector, for example, is ultimately actionable, and enforceable to the extent that it is articulated in and supported by law and all behaviour-whether by individuals, groups or organisations is a function of a complex set of rules systems ranging from social norms to national constitutions.'¹²⁴⁶

Furthermore, although practitioners in the field observed that most development processes fail to even consider these rules systems,¹²⁴⁷ it is my view that where they do, there is gravitation towards the

¹²⁴⁴ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice* (2000).

¹²⁴⁵ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice* (2000). p. 3.

¹²⁴⁶ Sage, C, Menzies, N & Woolcock, M, 'Taking the Rules of the Game Seriously: Mainstreaming Justice in Development' in Golub, S & McInerney, T (eds) *Legal Empowerment: Practitioners' Perspectives* (2010) International Development Law Organisation 19–37 p. 22.

¹²⁴⁷ Sage, C Menzies, N & Woolcock, M (2010).

jurisprudential aspects thereof. The social context remains sadly neglected. Development, by its very nature, challenges the status quo and alters social relations, inevitably resulting in conflict. An understanding of the rules that govern everyday life provides insight into how conflicts arise, accelerate and are resolved. Legitimate and safe spaces must be created where members of society can negotiate their competing interests and expectations. At the risk of repetition, this enables justice to occur in many rooms, not only in a court room. A process of transformation that excludes the beneficiaries thereof runs the risk of being out of sync with the needs of those beneficiaries and has the potential to curtail its very purpose.

Klaaren¹²⁴⁸ argues that our knowledge of the legal profession has been distorted because it has been over-contextualised. He claims that the focus in the legal profession has been on representivity in respect of race and gender¹²⁴⁹ and on the role of law with respect to apartheid, which was mostly jurisprudential in nature.¹²⁵⁰ He attributes this to the gap in the literature as South Africa does not feature in the standard historical comparative literature on the legal profession. If this view is proven to be correct, it would apply even more so to the paralegal ‘profession’, which enjoys embryonic status compared to the narrow legal profession.

Transformation in the legal profession thus seemed to have very little to do with the emancipation of the poor and the marginalised in society and more with correcting the skewed racial and gender demographics of the profession and providing access to lucrative markets which are inaccessible to ‘outsiders’. This view is by no means intended to reduce the importance of correcting these skewed demographics nor is it an attempt to minimize the extent of the harm suffered by those professionals who have been subjected to these discriminatory practices. To the contrary, it serves as a reminder to the beneficiaries of the corrective measures that, by gaining access, they have become members of an elite class whose very existence depends on the reproduction of the dominant modalities in the legal profession, lest they forget.¹²⁵¹ The nagging perception remains that the narrow legal profession presents the greatest obstacle to its own transformation and an obstacle to the transformation in society, notwithstanding adjustments in respect of race and gender.

An examination of the rationale for the transformation of the legal profession and the response in respect of law reform therefore would assist in providing further insight.

¹²⁴⁸ Klaaren, J, *A Texture of Legality: The Legal Profession in South Africa* (2010) Madison, USA.

¹²⁴⁹ Pruitt, LR 2006 Pruitt, LR (2006).

Godfrey, S & Midgley, R, *Scarce and Critical Skills: Law Professionals*, (2008) Department of Labour.

¹²⁵⁰ Budlender, G (2004) p. 339.

¹²⁵¹ These dominant modalities are a fixation on the rule of law orthodoxy and the notion that legal systems are lawyer-centred and lawyer-driven.

8.4. THE RATIONALE FOR THE TRANSFORMATION OF THE LEGAL PROFESSION

The legal profession in 1994 was characterised by a divided narrow legal profession, fragmented education and training, extremely skewed racial demographics, uneven geographical distribution, high cost of legal services and lack of recognition of paralegal services.¹²⁵² These conditions show that the transformation of the legal profession entails much more than ensuring that the demographics in respect of race and gender reflect the diversity of the South African population, although the focus in the profession has primarily been on this aspect of transformation. Each of these conditions will be considered in turn.

8.4.1. A divided legal profession

South Africa has traditionally followed a divided private legal profession, with legal practitioners falling into one of two groups, attorneys or advocates. In addition to this divide, there were also different statutes governing each of these divisions of the narrow legal profession in South Africa.¹²⁵³ Section 1(xvi) the Attorneys Act¹²⁵⁴ defined a practitioner as an ‘attorney, notary or conveyancer’ and the Admissions of Advocates Act¹²⁵⁵ merely referred to an advocate as an ‘advocate of the Supreme Court [High Court]’.¹²⁵⁶

Justice Vision 2000 adopted Goal 2, namely, ‘promoting a legal profession which is affordable to the broader segments of the South African Society’. It proposed three strategies to achieve this goal which included conducting research to determine the feasibility of a single unified legal profession and examining the impact of such a profession on governance, professional standards, legal education and access to legal services.¹²⁵⁷ The extent to which this research has been conducted is uncertain.

The Legal Practice Act has repealed the range of statutes that governed attorneys and advocates in the territory of South Africa, including former homelands of Transkei, Ciskei, Venda and Boputhatswana. It nevertheless retained the divide in the legal profession.¹²⁵⁸ However, all legal practitioners will be governed by the Legal Practice Council and matters relating to the paralegal ‘profession’ have been

¹²⁵² *Transformation of the Legal Profession: Discussion Paper* (1999).

¹²⁵³ See Schedule to the *Legal Practice Act* (2014).

¹²⁵⁴ *Attorneys Act*, 53 of 1979.

¹²⁵⁵ *Admissions of Advocates Act*, 74 of 1964.

¹²⁵⁶ Section 1

¹²⁵⁷ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)* p. 40.

¹²⁵⁸ Section 119.

deferred to this Council. If the intention is to professionalise the paralegal sector, it would create a third division of the legal profession which runs contrary to the intention to unify the profession.

8.4.2. Fragmented legal education and training

One of the aspects identified in the Discussion Paper was the inequality within the legal profession in respect of the requirements for admission to legal practice and the accompanying perception of a hierarchy of practitioners.

South African universities at the time offered a number of different degrees serving different purposes.¹²⁵⁹ This fragmented approach to legal education was subsequently consolidated with the introduction of the four-year LLB degree.¹²⁶⁰ The LLB Curriculum Research Report 2010 highlights the concerns raised by traditional universities over the poor throughput rates and the under-preparedness of candidates entering the LLB programme, with the resultant poor readiness of many LLB graduates exiting the programme.¹²⁶¹ This has led to a review of the four year LLB and the launch of a standard setting framework exercise for the LLB by the Council for Higher Education.¹²⁶² During this review, the articulation from the paralegal sector into the narrow legal profession, in accordance with international precedent, was completely disregarded.

Formal education and training for practitioners of the law was not always a requirement for legal practice and the authority for the admission of attorneys resided with the executive.¹²⁶³ The Law Certificate was the earliest formal qualification which was informally taught by practitioners of the law.¹²⁶⁴ The Attorneys, Notaries and Conveyancers Admissions Act¹²⁶⁵ regulated practical legal training for attorneys and it was subsequently repealed by the Attorneys Act.¹²⁶⁶ By this time the fragmentation of legal education reflected the profession's divided practice of the law as well as the public/private divide of the law.

¹²⁵⁹ They were, B.Iuris (for public prosecutors and magistrates), B.Proc (for attorneys) and the post graduate LLB (for all legal professions).

¹²⁶⁰ *Qualification of Legal Practitioners Amendment Act*, 78 of 1997. This Act amended s 3(2)(a)(i)(aa) of the *Admissions of Advocates Act* (1964). and s 2(1)(a) of the *Attorneys Act* (1979).

¹²⁶¹ Pickett, G (2010).

¹²⁶² Council on Higher Education, *Draft Qualification Standard for Bachelor of Laws (LLB)*, (2015) .

¹²⁶³ Wildenboer, L, 'The Origins of the Division of the Legal Profession in South Africa : a Brief Overview', (2010), 16(2), pp. 199–225. p. 219–220.

¹²⁶⁴ Greenbaum, Lesley; Rycroft, A, 'The development of graduate attributes : the Book of the Year project', (2014), 28(1), *South African Journal of Higher Education*, pp. 91–109.

¹²⁶⁵ *Attorneys, Notaries & Conveyancers Admission Act*, 23 of 1934.

¹²⁶⁶ *Attorneys Act* (1979)..

The three year *B.Iuris* degree became the minimum requirement for civil servants such as prosecutors and magistrates whereas the four year B. Proc degree was the minimum academic qualification required for admission as an attorney whose practice was in essence confined to the lower courts.¹²⁶⁷ The post-graduate LLB was the prescribed minimum academic qualification for practice as an advocate which qualified the practitioner to appear in higher as well as lower courts.¹²⁶⁸ A minimum three year first degree was a pre-requisite for admission to this LLB degree. Practical legal training for attorneys was two years of article clerkship culminating in an admissions examination set by the Law Society of South Africa. Admission to the General Bar Council as an advocate initially required serving pupillage for a period of six months culminating in an admissions examination set by the Council in the various provinces. LLB graduates who did not seek admission to the General Bar Council were permitted to practice following their admission by the High Court without serving pupillage and sitting for an examination.

The Discussion Paper raised this fragmented legal education as one of the areas to be addressed during the transformation of the legal profession. The Qualification of Legal Practitioners Amendment Act¹²⁶⁹ attempted to consolidate the fragmented approach by introducing the four year LLB degree at NQF level 8.¹²⁷⁰ However, lack of consensus on the generic nature of this degree nevertheless resulted in a fragmented implementation thereof with some universities retaining the LLB as a second degree preceded by a three year first degree. The new LLB presented a number of challenges for legal education and practice with the result that Council for Higher Education undertook the LLB Curriculum Project, with a view to '(1) assessing the extent and commonality of views about how effective the curriculum is in preparing graduates for the various career paths they follow, and the obstacles to their success; and (2) making suggestions for improvement'.¹²⁷¹

This report published a number of findings with regards to the new LLB curriculum. The data collected revealed that respondents were of the opinion that there was a disjuncture between the curriculum and the knowledge skills and competencies required for the profession.¹²⁷² They considered the curriculum to be mainly shaped by content, with superficial knowledge-based learning and very little emphasis on

¹²⁶⁷ *Attorneys Act* (1979).

¹²⁶⁸ *Admissions of Advocates Act* (1964).

¹²⁶⁹ *Qualification of Legal Practitioners Amendment Act* (1997).

Dugard, J & Drage, K (2013).

¹²⁷⁰ NQF refers to the National Qualifications Framework.

¹²⁷¹ Pickett, G (2010) p. 9.

¹²⁷² Pickett, G (2010).

the capabilities that the professions expected.¹²⁷³ The curriculum displayed a divide between legal education for professions and legal education as a ‘liberal arts’ education.¹²⁷⁴

Participants also found that in some instances that the curriculum was crammed and overburdened, with inappropriate scaffolding of subjects.¹²⁷⁵ Many universities exceeded the minimum 480 credits required for the LLB.¹²⁷⁶ The teaching skills of law lecturers differed across universities and deficiencies in the teaching skills of law lectures were noted.¹²⁷⁷ Respondents expressed diverse opinions on the role of professional training and highlighted the lack of articulation of the knowledge, skills and attitudes expected as outcomes of professional education.¹²⁷⁸ Very little to no career guidance was offered to graduates during the course of their study.¹²⁷⁹ Concerns were expressed over the duration of the programme yet respondents were divided over whether the lack of preparedness for the profession was as a result of the curriculum or other factors impacting on the preparation of the graduates, such as under preparedness for tertiary studies and the disadvantaged background of many of the students in the programme.¹²⁸⁰ The disparate resourcing at different universities was also noted.¹²⁸¹ Following the report, the Council on Higher Education conducted a review of law curricula across the country. The outcome of the review was that not a single university in the country had the re-accreditation for their LLB qualifications confirmed unconditionally.¹²⁸² The full report was not available at the time of the submission of this dissertation. This shows the extent of the crisis with legal education currently in the country.

The array of legal practitioners reflected in the Career Guide to the Legal Profession published by the Department of Justice and Correctional Services is testimony of the variety of services to be rendered. The Department acknowledged that:

‘Since people with legal qualifications are found in almost all sectors of employment, it will be impossible to discuss ALL the career possibilities available to them... This guide, therefore, is limited to the following careers available in the legal profession:

¹²⁷³ Pickett, G (2010) p. 164.

¹²⁷⁴ Pickett, G (2010) p. 52.

¹²⁷⁵ Pickett, G (2010) p. 164.

¹²⁷⁶ Pickett, G (2010) p. 64.

¹²⁷⁷ Pickett, G (2010) p. 44.

¹²⁷⁸ Pickett, G (2010) p. 92.

¹²⁷⁹ Pickett, G (2010) p. 27.

¹²⁸⁰ Pickett, G (2010) p. 41–59.

¹²⁸¹ Pickett, G (2010) p. 173.

¹²⁸² Council on Higher Education (2017).

attorneys' profession, the advocates' profession, the legal advisor and positions available in the Department of Justice.¹²⁸³

The diverse opinions on the purpose of the LLB among academics, begs the question as to what informs these curricula. It is clear that tension between the public and private sectors plays out in the curricula produced by universities. The four year LLB degree as an intervention to assist in the transformation of the legal profession may have contributed to the adjustment of the skewed racial and gender demographics in the narrow legal profession but did little to contribute to an overall transformation agenda. Prestigious law firms are held up by faculty as inspiration, influencing the aspirations of prospective practitioners, contributing to the establishment of a divide based on social status with access to justice as the casualty. It therefore comes as no surprise that the lack of access to justice for the poor and the marginalised persists in contemporary South Africa.

Moreover, one fundamental flaw with post-school legal education is its lack of coordinated, integrated higher education curriculum on a continuum, taking into consideration the comprehensive legal needs in the country. The main focus is on secondary legal services and fee paying clients leaving the needs of the majority of the citizens in the country unmet.

8.4.3. Racial and gender demographics pre - 1994

Deputy Minister Nel¹²⁸⁴ remarked that, 'the heavy onus of making the judiciary appear to resemble South Africa [in 1994] lay on the shoulders of three black men and two white women'.¹²⁸⁵ The Minister noted that 160 of the 165 judges on the bench at the time were white men. These skewed demographics were mirrored in the composition of the bar as the overwhelming majority of legal practitioners were white males.¹²⁸⁶ Statistics prior to 1994 paint a dismal picture. The profile of practitioners of the law was not by default but effected through a statutory and institutional framework designed with one single purpose in mind, namely to ensure the dominion of the white minority in the country over all.

The Extension of University Education Act¹²⁸⁷, for example, was enacted to restrict the admission of 'non-white' applicants into universities, segregating university education along racial lines. The long title of the Act read:

¹²⁸³ Department of Justice and Constitutional Development, "Career Guide to the Legal Profession", (2016), available at: *Justice College* <http://www.justice.gov.za/juscol/index.html> p. 5. (accessed 10 September 2016)

¹²⁸⁴ Deputy Minister of Justice and Constitutional Development (11 May 2009 – 09 July 2013).

¹²⁸⁵ Speech delivered to Black Lawyers Association (BLA) - Student Chapter held at the University of South Africa (UNISA) on 4 May 2013.

¹²⁸⁶ Pruitt, LR (2006).

¹²⁸⁷ *Extension of University Education Act*, 45 of 1959.

‘To provide for the establishment, maintenance, management and control of university colleges for *non-white* persons; ... for the limitation of the admission of *non-white* students to certain university institutions;...’¹²⁸⁸

Section 32 expressly prohibited the registration and attendance of persons of colour at universities other than the University of South Africa, with the exception of students attending Medical School and pipeline students. Black students who were already registered at these universities were at least allowed to complete their qualifications.¹²⁸⁹ Those who sought admission to a white university required a special ministerial permit certifying that no equivalent programmes were offered at black universities.¹²⁹⁰ This placed a severe restriction on the opportunities for black applicants compared to their white counterparts.

In addition, although newly established black universities started running law programmes, these universities were less favourably funded than their white counterparts.¹²⁹¹ The facilities and resources at white universities enabled them to comply with the State’s funding formula better.¹²⁹² Working conditions of staff at black universities were poorer than those of their white counterparts as the financial resources accumulated by the latter enabled them to augment the salaries of staff who possessed critical skills for the university.¹²⁹³ The Extension of University Education Act was ultimately repealed by the Tertiary Education Act¹²⁹⁴ which was subsequently repealed by the Higher Education Act.¹²⁹⁵

Moreover, although the practice of law was extended to all, in reality, a black lawyer had to obtain a permit to set up practice in the urban areas.¹²⁹⁶ The restrictions placed on the university education of

¹²⁸⁸ Own emphasis added.

¹²⁸⁹ Section 32(1) read, ‘As from the date to be fixed by the Governor-General by proclamation in the Gazette, no non-white person shall register with or attend any university established by Act of Parliament, other than the University of South Africa, as a student: Provided that the provisions of this sub-section shall not be construed as preventing any non-white person who is registered as a student at a university other than the University of South Africa, on the said date or who was so registered prior to the said date, from completing at that university the course of study or training for the degree, diploma or certificate for which he is or was so registered: Provided further that this sub-section shall not apply to non-white persons in respect of their registration and attendance as students at the Medical School’

¹²⁹⁰ Godfrey, S, ‘The legal profession: transformation and skills’, (2009), 126(1), *South African Law Journal*, pp. 91–123. p. 98.

¹²⁹¹ Ministry of Justice (South Africa), *Legal Forum on Legal Education proceedings: proceedings of the Legal Forum on Legal Education hosted by the Ministry of Justice in Cape Town on 21/22 April 1995.*, (1995) Cape Town, South Africa: Ministry of Justice.

¹²⁹² Ministry of Justice (South Africa) (1995).

¹²⁹³ Ministry of Justice (South Africa) (1995).

¹²⁹⁴ *Tertiary Education (Amendment) Act*, 3 of 1993.

¹²⁹⁵ *Higher Education Act*, 101 of 1997.

¹²⁹⁶ Pruitt, LR (2006).

the black population resulted in more whites graduating from law schools and entering the profession.¹²⁹⁷ White law firms dominated the profitable branches of legal practice whereas their black counterparts were in essence confined to criminal law and in some instances human rights law.¹²⁹⁸ Pruitt presented anecdotal evidence that black lawyers historically served individual clients while white lawyers tended to serve institutional clients. Not many black lawyers generated legal work of a commercial nature and thus did not gain sufficient commercial legal expertise.¹²⁹⁹ Justice Vision 2000 responded to these conditions by focusing on the narrow legal profession with no reference to how the paralegal ‘profession’ can contribute to this area of transformation.

Justice Vision 2000 adopted the following strategic goal in response to the skewed racial and gender demographics in the narrow legal profession, namely, ‘(to) develop a profession which is accessible and reflects the diversity of the South African society’.¹³⁰⁰ It suggested a number of strategies to give effect to this goal. Justice Vision 2000 proposed that research be conducted into the requirements for admission into the profession and the role of the profession in the transformation process. The research conducted to date was commissioned by the Department of Labour and focused on the scarce and critical skills in the legal profession.¹³⁰¹

8.4.4 Racial and gender demographics post -1994

There is a dearth of literature on the legal profession. Klaaren ascribed this to two main factors.¹³⁰² The first is the lack of state funding for empirical research on the administration of justice and the second is the lack of substantial and sustainable nationally focused socio-legal scholarship. Both factors have equally hampered efforts for the recognition of the paralegal practitioner as this would require a process-driven approach to transformation and development in the justice sector. Sage and others argue that such an approach ‘does not fit easily with the prevailing imperatives of most development institutions, which strongly prefer manageable inputs and knowable, predictable outcomes’.¹³⁰³ South Africa is no exception. Moreover, a lack of resources may impede such an approach as prioritising the development of local capacity to establish in-depth evidence as the foundation for reform has the potential to be resource intensive.¹³⁰⁴

¹²⁹⁷ Pruitt, LR (2006).

¹²⁹⁸ Pruitt, LR (2006).

¹²⁹⁹ Pruitt, LR (2006).

¹³⁰⁰ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)*.

¹³⁰¹ Godfrey, S (2009).

¹³⁰² Klaaren, J (2010).

Pruitt, LR (2006).

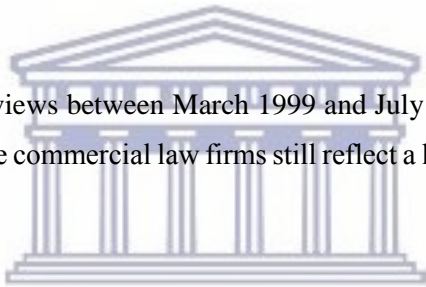
¹³⁰³ Sage, C Menzies, N & Woolcock, M (2010) p. 35.

¹³⁰⁴ Sage, C Menzies, N & Woolcock, M (2010).

Empirical studies on the narrow legal profession have only emerged recently. In a number of these studies the conditions that lead to Justice Vision 2000 were considered and in most instances it would seem that these conditions persisted throughout the first decade of democracy and are still with us today.¹³⁰⁵

AfriMAP reported that the skewed racial and gender demographics persisted throughout the first decade of democracy and that this was reflected in the judiciary as well as the private legal profession. Information provided by the Human Resource Directorate of the former Department of Justice and Constitutional Development confirms that white males still dominated the judiciary in the superior courts.¹³⁰⁶ The record reflected dismal figures for all females.¹³⁰⁷ The statistics on record in the Secretariat of the Magistrates Commission show similar trends in magistrates courts.¹³⁰⁸ These trends emanated from the bar from which most of these presiding officers were drawn. The General Council of the Bar reported a similar racial and gender bias and although the Law Society of South Africa did not offer a breakdown of the racial demographics at the time, it was concluded that it displayed a similar bias.¹³⁰⁹

Pruitt conducted a series of interviews between March 1999 and July 2000 which left her to conclude at the time that South Africa's elite commercial law firms still reflect a largely segregated labour market. She noted that,


'(a) decade after the dismantling of apartheid began and more than seven years after the first democratic elections, the impact of apartheid's structures on all aspects of South Africa's civil society, including the legal profession looms large'.¹³¹⁰

She stated that the racial and gender demographics of the private legal profession still did not reflect the diversity of the population, nor were the egalitarian values of a new democratic order reflected in the governance structures of these professions. This explains in part, the resistance from the narrow legal profession to the establishment of a Legal Practice Council by the Legal Practice Act which would

¹³⁰⁵ Godfrey, S (2009).

AfriMAP & Open Society Foundation for South Africa (2005).

Pruitt, LR (2006).

Pickett, G (2010).

Centre for Applied Legal Studies & Foundation for Human Rights (2014).

¹³⁰⁶ AfriMAP & Open Society Foundation for South Africa (2005) p. 61.

¹³⁰⁷ AfriMAP & Open Society Foundation for South Africa (2005).

¹³⁰⁸ AfriMAP & Open Society Foundation for South Africa (2005) p. 62.

¹³⁰⁹ AfriMAP & Open Society Foundation for South Africa (2005) p. 67.

¹³¹⁰ Pruitt, LR (2006).

in essence govern these professions.¹³¹¹ She further noted that, ‘the taxonomy of attorney practices’ during the apartheid period remains relevant in the post-apartheid legal marketplace.’¹³¹²

The study reported that, ten years into democracy, the top five commercial firms have tripled or quadrupled their intake of black candidate attorneys. However, it was noted that the numbers still were not representative of the demographics of the country.¹³¹³ Furthermore, she observed that the numbers declined sharply at the ranks of black professional assistants.¹³¹⁴ More importantly, the under-representation of attorneys of colour in the higher echelons of these law firms was indisputable.¹³¹⁵ She attributed this to the organisational structure of these firms and the historical and social context of their evolution.¹³¹⁶

The dismantling of the discriminatory statutory framework and State investment in infrastructure at historically black universities seemed to make a difference to the racial demographics in the profession. In March 2008 the Department of Labour commissioned research into scarce and critical skills of law professionals in the country. It was reported that in 2007 Africans made up the vast majority of first year registrations in law programmes in the country and the gender distribution of the first year entrants was approximately evenly balanced.¹³¹⁷ More African and female law students enrolled for the final year.

However, compared to their white counterparts, the enrolment was still not representative of the demographics of the country.¹³¹⁸ Although the number of female graduates overtook their male counterparts, there has been a decline in African and coloured graduates. White graduates exceeded their African counterparts and the reason for this trend has not been investigated.¹³¹⁹ This trend carried into the vocational training as more white candidates were registered for articles of clerkship in 2006 and General Council of the Bar reported that the majority of African pupils who sat for their examinations failed.¹³²⁰ There was nevertheless a rising trend in the admission to the attorneys’ profession of coloured and African applicants, although the private legal profession was still dominated by white attorneys and the uneven geographical distribution of legal services remained.¹³²¹

¹³¹¹ See Chapter 8.

¹³¹² Pruitt, LR (2006).

¹³¹³ Pruitt, LR (2006).

¹³¹⁴ Pruitt, LR (2006).

¹³¹⁵ Pruitt, LR (2006).

¹³¹⁶ Pruitt, LR (2006).

¹³¹⁷ Godfrey, S & Midgley, R (2008).

¹³¹⁸ Godfrey, S & Midgley, R (2008).

¹³¹⁹ Godfrey, S & Midgley, R (2008).

¹³²⁰ Godfrey, S & Midgley, R (2008).

¹³²¹ Godfrey, S & Midgley, R (2008).

The Centre for Applied Legal Studies (CALs) observed that the racial and gender composition in the senior ranks of the profession continues to display a marked bias towards white males.¹³²² CALs noted ‘a marked absence of diversity on the basis of race, gender and other marginalising characteristics’.¹³²³ However, the investigation found that the Constitutional Court over the past 20 years led the transformation in respect of race. The majority of judges are black and two are white. Yet the transformation in respect of gender is very slow as two female Constitutional Court judges served in 1994 and the numbers were the same in 2014.¹³²⁴ CALs reported that black women in particular face a range of barriers in their careers, namely:

... ‘shortage of jobs and few connections, offers from the corporate sector that cannot be matched by the legal profession, cultural alienation, bias based on the historical roles of black women, racism, sexual harassment, Briefing patterns, behaviour based on gender roles, lack of child care facilities and the trail blazer phenomenon’.¹³²⁵

CALs also reported on the dearth of literature on other sub-sectors of the legal profession, namely magistracy, prosecutors, other state lawyers, legal academics and paralegal practitioners.

In addition to the above, the Key Principles of the Legal Practice Act¹³²⁶ noted a scarcity of skills in certain areas of the law such as commercial law, constitutional law and interpretation among black practitioners, which contributes to the skewed racial demographics in the legal profession.¹³²⁷ These prevailing conditions informed the Legal Practice Act.

The Draft Report on Research Findings on the Distribution of Legal Work in the Legal Profession in South Africa¹³²⁸ highlights the contentious issue of the persistence of race and gender bias on the part of government departments and state owned enterprises (SOEs) when briefing the legal profession. Although the investigation shows that there is evidence of efforts on the part of these institutions to alter the apartheid era briefing patterns, in many instances it is confined to only a few black advocates and attorney firms.¹³²⁹ The gender imbalance in respect of these briefing patterns also remains.¹³³⁰ It

¹³²² Centre for Applied Legal Studies & Foundation for Human Rights (2014).

¹³²³ Centre for Applied Legal Studies & Foundation for Human Rights (2014).

¹³²⁴ Centre for Applied Legal Studies & Foundation for Human Rights (2014).

¹³²⁵ Centre for Applied Legal Studies & Foundation for Human Rights (2014).

¹³²⁶ Department of Justice and Correctional Services, “Key Principles Underpinning the Transformation of the Legal Profession”, available at: *Key Principles of the Legal Practice Bill* <http://www.issa.org.za>. (accessed 22 June 2015)

¹³²⁷ *Key Principles of the Legal Practice Bill*. p. 2.

¹³²⁸ Phooko, MR, *Distribution of Legal Work*, (2016) South Africa: Law Society of South Africa.

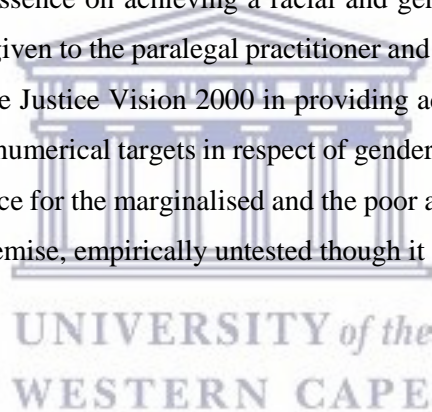
¹³²⁹ Phooko, MR (2016) p. 1–3.

¹³³⁰ Phooko, MR (2016).

is therefore clear that 16 years down the line, the beneficiaries of the legal reforms in the legal profession are few and that prejudices in respect of race and gender still persist in the briefing patterns.

The Legal Practice Bill 2012 was the first in a series of drafts to make specific reference to transformation in its long title.¹³³¹ This long title was adopted verbatim when the Legal Practice Act was enacted. The Legal Practice Act is intended, among others, to provide a statutory framework for the transformation and restructuring of the legal profession under a single governing body, bringing it in alignment with the Constitution, ensure that it reflects the demographics of the country and remove any unnecessary and artificial impediments to entry into the profession. The preamble to the Legal Practice Act specifically notes the lack of representivity of the narrow legal profession and the limited opportunities for entry.¹³³²

One of the objects of the Legal Practice Council is to, ‘promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;’ The focus of transformation, therefore, is in essence on achieving a racial and gender balance in the narrow legal profession. No consideration is given to the paralegal practitioner and a broader transformation agenda and the Act thus falls short of the Justice Vision 2000 in providing access to justice. The underlying assumption is that, by achieving numerical targets in respect of gender and race, this will automatically translate to greater access to justice for the marginalised and the poor and lead to social transformation. The literature shows, that this premise, empirically untested though it may be, is indeed not correct.



¹³³¹ The long title reads, ‘To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic;’

¹³³² The preamble to the Legal Practice Act reads,
AND BEARING IN MIND THAT—

- the legal profession is regulated by different laws which apply in different parts of the Republic and, as a result thereof, is fragmented and divided;
- access to legal services is not a reality for most South Africans;
- the legal profession is not broadly representative of the demographics of South Africa;
- opportunities for entry into the legal profession are restricted in terms of the current legislative framework;

AND IN ORDER TO—

- provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic’s demographics under a single regulatory body;
- ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- ensure that legal services are accessible;
- regulate the legal profession, in the public interest, by means of a single statute;
- remove any unnecessary or artificial barriers for entry into the legal profession;
- strengthen the independence of the legal profession; and
- ensure the accountability of the legal profession to the public.

8.4.5. The uneven geographical distribution of legal services

The Transformation of the Legal Profession: Discussion Paper reported that the distribution of lawyers who rendered a service to the public at the time was geographically skewed. Most of them ran practices in the urban areas, rendered a service to business entities and those who could afford their services.¹³³³ Attorneys who rendered a service in the rural areas were mostly white, male and Afrikaans speaking and they in essence rendered a service to white farmers and local businesses.¹³³⁴ Townships and rural settlements were hopelessly under serviced and the few attorneys that rendered a service there had poor resources.¹³³⁵

The increase in law graduates and admission into the profession did not translate into an adjustment of the uneven geographical distribution of law professionals in the country. In the Key Principles it was acknowledged that rural areas and historically black areas remain underserved by legal practitioners.¹³³⁶ The shortage of lawyers in the rural areas was noted by the Sector Education and Training Authority as well as the Scare and Critical Skills Report: Law Professionals.¹³³⁷ The Legal Services Charter also highlighted the challenge in delivering legal services to these communities. The Charter stated that, ‘the distribution of legal practitioners, particularly in the rural and historically black communities continues to affect the access of these communities to legal services adversely’.¹³³⁸ It is unlikely that these conditions will change without the systematic deployment of community-based paralegal services.

8.4.6. The cost of legal services

Legal services, when viewed as a commodity, have consumers and producers and are subject to demand and supply. Although the essence of this dissertation militates against commoditising legal services, this terminology is necessitated by the reality of the marketplace. There is a socio-economic rationale behind controlling the cost of legal services in the country and the cold facts thereof do not always feature in the debates on the issue.

¹³³³ Department of Justice and Constitutional Development, *Transformation of the Legal Profession: Discussion Paper*, (1999) .

¹³³⁴ Department of Justice and Constitutional Development (1999).

¹³³⁵ Department of Justice and Constitutional Development (1999).

¹³³⁶ *Key Principles of the Legal Practice Bill*. p. 2.

¹³³⁷ Godfrey, S & Midgley, R (2008); Safety and Security Sectoral Education and Training Authority, *Sector Skills Plan 2011-2016*, (2011) p. 23.

¹³³⁸ Chapter 2 para 2.2. (ii).

The dire socio-economic conditions in the country dictate that the transformation of any/our/a legal culture has to result in economic transformation of the poor. The National Credit Regulator (NCR) reported that South African consumers owed credit providers R1,55 trillion as at March 2014, amounting to an increase in the debtor's book of 6,9%.¹³³⁹ The demand for new credit has increased by 3,24%.¹³⁴⁰ Furthermore, although the number of consumers with impaired credit records by March 2014 decreased from the previous quarter, it totalled 9,93 million.¹³⁴¹ The number of impaired accounts has increased by 962,000 during the 2013/2014 financial year.¹³⁴²

Statistics South Africa¹³⁴³ reported that demand for social welfare has tripled which makes social assistance by government unsustainable. The General Household Survey¹³⁴⁴ shows that dependence on welfare continues to increase as 42,3% of households in South Africa receive social grants. Access to food has improved since 2002 but it has remained static since 2011.¹³⁴⁵ Although the percentage of individuals aged 20 years and older who attained Grade 12 as their highest level of education has increased to 28,7%, the low levels of literacy among this group remains a cause for concern.¹³⁴⁶ An official unemployment rate of 42,3% was reported for the fourth quarter of 2014¹³⁴⁷ and an expanded unemployment rate of 34,6% was recorded for the same period.¹³⁴⁸ Although this has been reduced to 26.5% in 2016, the unemployment rate remains high.¹³⁴⁹

Second generation human rights, in the form of socio-economic rights; acquire different proportions in South Africa when viewed within the context of rampant poverty, unemployment, the effects of HIV and inequality. The fact that poverty still has a distinctly racial bias is of particular concern, although inequality seemed to have shifted from race to class.¹³⁵⁰ Poor levels of literacy cement the legal isolation of the poor by presenting an insurmountable barrier both to legal literacy and access to justice. The above statistics lend credibility to the claim by the Foundation for Human Rights that poverty, unemployment and inequality remain the primary threats to South Africa's democracy, cementing the vulnerability of the poor and the marginalised; yet, the reforms within the legal profession focus on the narrow legal profession with scant regard for the legal empowerment of the poor. This is the area in

¹³³⁹ National Credit Regulator (2015) p. 34.

¹³⁴⁰ National Credit Regulator (2015).

¹³⁴¹ National Credit Regulator (2015) p. 37.

¹³⁴² National Credit Regulator (2015).

¹³⁴³ Statistics South Africa, *General Household Survey 2007*, (2011) .

¹³⁴⁴ Statistics South Africa, *General Household Survey 2014*, (2015) p. 11.

¹³⁴⁵ Statistics South Africa (2015) p. 14.

¹³⁴⁶ Statistics South Africa (2015) p. 11.

¹³⁴⁷ Statistics South Africa, *Quarterly Labour Force Survey: Quarter 4*, (2014) Pretoria, South Africa.

¹³⁴⁸ Statistics South Africa (2014). xiii

¹³⁴⁹ Statistics South Africa (2017).

¹³⁵⁰ Statistics South Africa (2014).

which paralegal practitioners are most needed. Despite the aforementioned, the potential role that the paralegal practitioners can play in improving access to justice has, to date, been largely ignored. The efforts to transform the legal profession, in part, resembles that of legal missionaries as the assumption is that the solutions lie outside of the very communities that the law is supposed to empower.¹³⁵¹

No national survey of household needs of legal services has been conducted in the country. However, there appears to be consensus that legal services are simply unaffordable for the majority of citizens in South Africa.¹³⁵² The Transformation of the Legal Profession: Discussion Paper cited the cost of legal services as one of the issues to be addressed during the transformation of the legal profession. It was noted that the broad middle class is not able to afford legal services and the indigent are not sufficiently serviced by legal practitioners.¹³⁵³

Justice Vision 2000 responded by focusing on legal fees and draws no direct link between the provision of paralegal services and its potential for reducing the cost of legal services. However, it emphasises the need for efficiency and cost effectiveness.¹³⁵⁴

8.4.6.1. Justice Vision 2000

Justice Vision 2000 recommended that, ‘facilitative measures that will ensure affordable access to the justice machinery and related institutions need to be given priority in the planning of [the] transformation [of the administration of justice]’.¹³⁵⁵ One of the proposed strategies to increase access to justice was controlling the fee structures of the narrow legal profession. Not much has changed since the adoption of Justice Vision 2000. Afrimap noted that:

‘... despite efforts to introduce small claims procedures, an active set of organisations involved in public-interest litigation and the expanding mandate of the Legal Aid Board to include civil cases, the financial cost of legal proceedings remains a significant barrier to realising equal access to justice. In particular, the cost of legal professional services remains unaffordable to the average South African...’.¹³⁵⁶

¹³⁵¹ Golub, S (2003).

Dunlap, B (2014).

¹³⁵² Department of Justice and Constitutional Development (1999).

AfriMAP & Open Society Foundation for South Africa (2005).

¹³⁵³ At para 3.4

¹³⁵⁴ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)* p. 1.

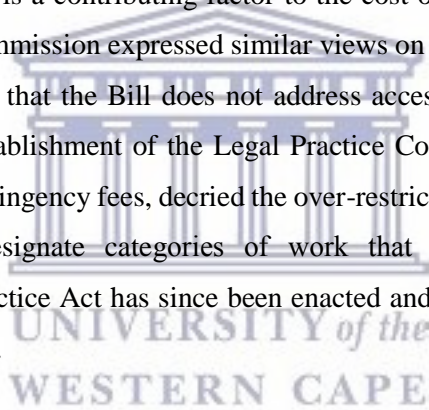
¹³⁵⁵ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)*.

¹³⁵⁶ Afrimap & Open Society Foundation for South Africa (2005) p. 2.

Afrimap concluded that ‘the average black household would take a week’s income to afford an hour-long consultation with an attorney’.¹³⁵⁷ The cost of legal services was also raised in the Key Principles when it acknowledged the unaffordability of legal services for poor communities, especially in civil matters and limited state-funded legal assistance provided in this area.¹³⁵⁸

The table below reflects the average fees for legal services rendered by the narrow legal profession and, as Klaaren pointed out, it is substantial.¹³⁵⁹ This is compounded by the underfunding of Legal Aid South Africa resulting in the unavailability of legal aid for most poor civil litigants and the exclusion of the ‘middle gap’.¹³⁶⁰ Access to civil justice, even today, is therefore primarily available to those who can afford it.

Moreover, the conflation of primary and secondary legal services, the failure to unbundle them in spite of international precedent and the lack of recognition of other producers of legal services, such as paralegal practitioners, contribute to the cost. The monopoly of the narrow legal profession over legal services in the country therefore is a contributing factor to the cost of these services and needs to be addressed. The Competition Commission expressed similar views on the Legal Practice Bill, although not in so many words. It stated that the Bill does not address access to the profession or access to justice.¹³⁶¹ It disparaged the establishment of the Legal Practice Council for legitimising cartel-like conduct, lamented uncapped contingency fees, decried the over-restrictive reserved work provision and proposed that the Minister designate categories of work that could be done by ‘non-legal practitioners’.¹³⁶² The Legal Practice Act has since been enacted and a number of provisions dealing with cost will now be considered.



¹³⁵⁷ AfriMAP & Open Society Foundation for South Africa (2005) p. 114.

¹³⁵⁸ *Key Principles of the Legal Practice Bill*. p. 2.

¹³⁵⁹

| Legal Practitioner | In training | Newly qualified | w/ 5 years' experience | w/10 years' experience | Senior |
|-----------------------|-------------|-----------------|------------------------|------------------------|--------------------|
| Advocate | n/a | R800/hr | R1200/hr | R2000/hr | R35000/R40000+/day |
| Attorney (Corporate) | R900/hr | R1100/hr | R2300/hr | R3000/hr | R4000/hr |
| Attorney (solo/small) | R400/hr | R500/hr | R600-900/hr | R700-1100/hr | R700-1200/hr |

Source: Klaaren, J, *The Cost of Justice*, (2014) Johannesburg, South Africa.

¹³⁶⁰ The middle gap is the category of persons who do not qualify for legal aid but cannot afford an attorney.

¹³⁶¹ Hawkey, K, 'Written submissions on the Legal Practice Bill', (2013), April (529), *De Rebus*, pp. 38–48. p. 23.

¹³⁶² Hawkey, K (2013).

8.4.6.2. The Legal Practice Act 2014

It must be stated in advance that none of these provisions relate to the paralegal practitioners and how they can contribute to reducing the cost of legal services, neither do they refer to the unbundling of legal services, which in the author's view is a pre-requisite for the lowering of these costs and the involvement of the paralegal practitioner. This discussion will therefore not embark on an analysis of the relevant provisions but merely state them briefly.

The Legal Practice Act makes specific provision for advocates and attorneys to practice for their own account and to charge a fee for their services. Currently fee tariffs are determined by the Rules Board for Courts of Law.¹³⁶³ The Legal Practice Act further allows for flexibility in respect of these tariffs by agreement between the client and the practitioner.¹³⁶⁴ The Legal Practice Act tasks the South African Law Reform Commission with investigating, reporting and making recommendations to the Minister on a range of matters related to fees.¹³⁶⁵ It further requires practitioners to provide clients with a 'cost estimate notice'.¹³⁶⁶

The Legal Practice Act further provides for community service as a pre-condition for continued enrolment as a legal practitioner¹³⁶⁷ and includes it as a component of the practical vocational training of candidate legal practitioners.¹³⁶⁸ The Law Society of South Africa (LSSA) has indicated that each of their 21 000 members is obliged to render 24 hours of pro bono services per year and the General Council of the Bar (GCB) confirmed that their members are committed to 20 hours.¹³⁶⁹ Law firms are also voluntarily providing these services free of charge and/or at low rates to the indigent and have established pro bono and public interest departments. This is a positive development in ensuring some level of service by the narrow legal profession to the poor and the indigent.

However, 20 to 24 hours of legal service by practitioners is not going to provide in all the legal needs of 54 million South Africans of which the overwhelming majority are poor. Neither will the compulsory community service by law interns ensure quality and competent service to these communities, especially in the townships and rural areas. This calls for an integrated and coordinated approach by

¹³⁶³ *Rules Board for Courts of Law Act*, 107 of 1985.

¹³⁶⁴ Section 35(3).

¹³⁶⁵ Section 35(4).

¹³⁶⁶ Section 35(7).

¹³⁶⁷ Section 29(1)(b).

¹³⁶⁸ Section 29(1)(a).

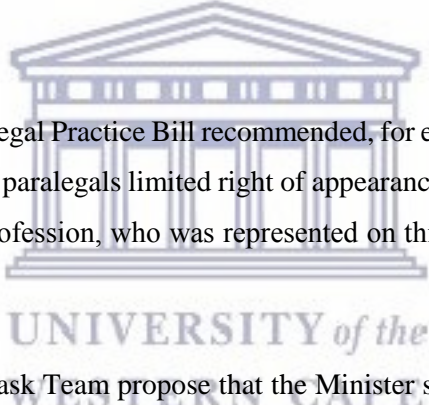
¹³⁶⁹ Hawkey, K (2013); General Council of the Bar of South Africa, "The GCB's submission on the 2012 Legal Practice Bill, to the Parliamentary Portfolio Committee", (2013), available at: *Politicsweb* <http://www.politicsweb.co.za/documents/the-gcbs-submission-on-the-legal-practice-bill>. (accessed 12 October 2016)

all practitioners and service providers. However, the lack of recognition given to the paralegal practitioner hampers this integrated approach and may be, in part, due to the resistance from the narrow legal profession.

8.5. RESISTANCE TO A PARALEGAL PROFESSION

AfriMAP reported, ‘...strong differences within the legal profession on a range of matters, including the recognition of paralegal practice...’¹³⁷⁰ This suggests that the narrow legal profession has been one of the stumbling blocks in the recognition of paralegal practitioners in the country. Benjamin has expressed a similar view, reporting reluctance on the part of the narrow legal profession to include paralegal practitioners in the regulatory framework of the narrow legal profession, citing concerns over regulation, professional practice and education and training.¹³⁷¹ Very little reference is made to the paralegal practitioner in commentary by the General Bar Council of South Africa and the Law Society of South Africa on policy reform in the legal profession. This practitioner has, for all intents and purposes, been ignored by the profession but for the protection of the ‘scope of practice’ of the attorney’s profession.

The Task Team Proposal on the Legal Practice Bill recommended, for example, that the Minister should be empowered to grant registered paralegals limited right of appearance in the courts.¹³⁷² However this was opposed by the attorney’s profession, who was represented on this Task Team. The report states that,



...[t]he majority of the Task Team propose that the Minister should be empowered to issue regulations with the consent of the Council, authorising registered paralegal practitioners to appear in specified courts, in specified areas, and in respect of specified matters. The purpose ... to enable poor people to obtain some representation where they would otherwise be unrepresented ... where the Minister and the Council are satisfied that a registered paralegal can provide adequate and competent representation. *The LSSA (Law Society of South Africa)/ (BLA (Black Lawyers Association)/ (NADEL (National Association of Democratic Lawyers) representatives oppose this proposal’.*¹³⁷³

¹³⁷⁰ AfriMAP & Open Society Foundation for South Africa (2005) p. 23.

¹³⁷¹ Benjamin, S, *Joining Forces for the Poor: Alliance-building for social justice in South Africa and the story of the National Alliance for the Development of Community Advice Offices*, (2012) South Africa: The Atlantic Philanthropies.

¹³⁷² Budlender, G, *Task Team on the Draft Legal Practice Bill*, (2002) South Africa: Department of Justice and Constitutional Development.

¹³⁷³ Budlender, G (2002). (own emphasis added)

In so doing, the narrow legal profession failed to acknowledge that a plural legal system exists in the country that militates against the narrow application of the rule of law and a lawyer-centred approach to access to justice. This opposition delayed access to civil justice for the marginalised and the poor indefinitely.

There is further evidence of the opposition of the narrow legal profession to the proposed transformation of the administration of justice.¹³⁷⁴ The Strategic Goals for the legal profession recommended by Justice Vision 2000 ultimately were reduced to Key Principles Underpinning the Transformation of the Legal Profession that formed the basis for consultation with the narrow legal profession. The Minister of Justice at the time considered this to provide ‘a platform for constructive engagement’ with the profession. In the document it was acknowledged that the impasse with the legal profession lasted 12 years and that the ‘stalemate ... had stifled progress in the finalisation of the Legal Practice Bill.’¹³⁷⁵ Principle XV recommended that paralegals should be regulated by separate legislation. The narrow legal profession thus prioritised their own regulation and addressing the urgent need for meeting the primary legal needs of the overwhelming majority of citizens in the country was thus relegated to an indeterminate time in the future.

The above situation is not unique to South Africa. A comparative study of civil process reform in 13 developed and developing countries was conducted.¹³⁷⁶ The study concluded that the opposition by the organised bar was the one recurring factor that hampered efforts to reform justice systems in both common and civil law countries.¹³⁷⁷ The fact that paralegals are still unrecognised, unregulated and that there is very little investment from government and the narrow legal profession in the sector, bear testimony to this resistance.

Missing theory hampers the understanding of stakeholders as to their respective roles in the transformation process causing delays in implementation which results in justice at best being delayed and at worst being missing. Neither the narrow legal profession nor the State offers any exposition of the theoretical framework of their relationship. It could be argued that in a constitutional democracy such as South Africa, a trusteeship model of the legal profession exists. Luban describes this model as follows:

¹³⁷⁴ *Key Principles of the Legal Practice Bill*.

¹³⁷⁵ *Key Principles of the Legal Practice Bill*. pp 2-3.

¹³⁷⁶ Zuckerman, AS (ed) , *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (2000) Oxford, UK: Oxford University Press.

¹³⁷⁷ Oxner, SE, *The Many Facets of Training*, (2000).

‘In effect, lawyers are like trustees- agents designated by a principal [collective political community] to administer a good [the law] that the principal has created for the benefit of a third party. The community compensates lawyers for their efforts as trustees of the law by granting them an exclusive license to charge money for dispensing legal representation, as well as by moulding the law to the special skills and training of lawyers, in effect giving lawyers an oligopoly on the provision of legal services’.¹³⁷⁸

Lawyers, therefore, have a fiduciary duty to enhance access to justice and protect human rights. The role of the political community in a democracy is considered to be mainly constitutive as this community creates the law that the lawyer dispenses. The political community is therefore justified in attaching reasonable conditions to the practice of law as it is supposed to benefit all the citizens of the community.¹³⁷⁹ The requirement to render *pro bono service to indigent communities is therefore not unreasonable and can be traced back through the centuries.*¹³⁸⁰

It is thus unclear on what basis the narrow legal profession can claim sole privilege to dispense the law and deny the State the right to grant other trustees, for example paralegal practitioners, the same privilege where it is unable and/or unwilling to do so. Opposition to the recognition of the paralegal practitioner by the narrow legal profession is thus in conflict with its own fiduciary duty and the State’s constitutional obligation to provide the necessary adjudicating mechanisms and human resources to ensure access to justice. As discussed in the preceding chapters, the State’s obligation stems from its social contract with its citizens and the Constitution, the supreme law of the land.

Golub cautions that the narrow legal profession is not entirely an objective party to the transformation process. He advises that they may lack development experience, have little insight into the failings of the legal system and fail to recognise that they are part of the problem. In a country such as South Africa, where the disparities run deep and wide, we cannot tolerate self-serving bar associations that ‘limit access to justice, work against social and economic equality, or subordinate the interests of the poor to those of attorneys and their (fee paying) clients.’¹³⁸¹ On the other hand, it must be stated that the public needs protection from a violation of their right to a fair hearing, which requires adequate and competent representation. Hodgson noted that,

¹³⁷⁸ Luban, D (2014).

¹³⁷⁹ Luban, D (2014).

¹³⁸⁰ See Chapter 2.

¹³⁸¹ Golub, S (2006).

... '[a] lawyer-led and law(yer)-centric approach to the transformation of legal culture [in South Africa] has resulted in an incomplete vision of what this entails but also what creating a culture of human rights and constitutionalism requires'.¹³⁸²

It therefore stands to reason that primary legal services and the role of the paralegal practitioner in rendering these services in the country would not feature high on the agenda of bar associations that are, for the most part, geographically, economically, socially and culturally removed from the daily struggles of the majority of citizens in the country. Ordinary citizens can, for example, simply not relate to the advocate's profession when it motivates for its separate and distinct existence based on, among others, 'influences and traditions at the Bar which never died'.¹³⁸³ These traditions are described first as:

'...thorough scholarship, pursuit of forensic excellence, capacity for rational thought, intense intellectual energy and unremitting discipline which barristers have always been expected to apply in the discharge of their briefs. There must be few endeavours in all civilization which can compare to the totality of commitment and the punctilious regard for detail which a competent and conscientious advocate harnesses in support of his or her case'.¹³⁸⁴

The second tradition cited by the General Council of the Bar relates to

'...a fierce independence and an uncompromising standard of intellectual integrity and capacity for objectivity which informs the best at the Bar. It was sometimes displayed with a towering magnificence, and with it came a depth of courage and a willingness to champion causes and litigants often unpopular in the public perception'.¹³⁸⁵

This 'magnificence' comes at a price and the above exposition begs the question, at whose disposal is it and how can mere mortals such as the marginalised and the poor communities gain access to it? Furthermore, where does legal empowerment of these communities feature in this grandiose mystique that is the advocates' profession? The narrow legal profession subscribes to the no dominance principle to ensure that neither advocates nor attorneys dominate the profession. The restriction of paralegal

¹³⁸² Hodgson, TF (2015).

¹³⁸³ General Council of the Bar of South Africa (2013), para 24.

¹³⁸⁴ General Council of the Bar of South Africa (2013).

¹³⁸⁵ General Council of the Bar of South Africa (2013).

services by the narrow legal profession must be viewed with a jaundiced eye lest the no dominance principle fails to be applied to a paralegal profession.

The reluctance on the part of the narrow legal profession to recognise the paralegal practitioner as a member of the legal profession can be reduced to two motives. The first is the desire to protect their 'scope of practice', in other words, prevent professional encroachment and the second is the need to protect the public from the unauthorised practice of the law. These two motives are interlinked and have to be thoroughly examined but the authenticity thereof will not be resolved here. In accepting either motive, the State must remain mindful of the self-interest of the profession, the rationale for the transformation, its obligation in terms of the social contract with its citizens and its legal obligation under the Constitution to provide access to justice. Furthermore, the community-based paralegal practitioner, in particular, is already discharging this duty on behalf of the State subjected to its limited resources and driven by the inability of the narrow legal profession to meet the primary legal needs of the citizen of the country.

8.6. CONCLUSION

Policy reform in the legal profession falls short of Justice Vision 2000, fails the paralegal profession and does not address the justice gap in the country comprehensively. There is the absence of a theoretical framework for the transformation of the administration of justice, in which the transformation of the legal profession forms an integral part. This shortcoming affects the transformation of the legal profession. Firstly, the nature of the relationship between the State and the narrow legal profession is not clearly articulated, resulting in a lack of understanding of the role of all stakeholders in the transformation process. Secondly, the lack of understanding of the role of the various stakeholders in the transformation of the legal profession gave rise to an incomplete vision of this transformation.

This lack of understanding and the incomplete vision is reflected in policy reform in a number of ways. There is a lack of recognition by the legal profession that it is a contributor to the lack of access to justice and the legal disempowerment of the poor and the marginalised, resulting in the transformation of the legal culture being lawyer-centred and lawyer-driven. Bar associations remain for the most part geographically, economically, socially and culturally disconnected from the daily struggles of these communities. Barriers to access to justice are therefore not addressed comprehensively. Skewed briefing patterns and racial and gender demographics at the bar thus take precedence over the broader, constitutionally endorsed, social transformation agenda.

Moreover, there is resistance to alternative or complementary paradigms such as paralegal practice. The narrow definition of the legal profession is therefore retained, which refers to admitted attorneys and advocates only. The recognition and regulation of the paralegal practitioner is relegated to a time in the distant future, perpetuating the dependence of community-based paralegal services on donor funding and volunteerism, compromising the sustainability of this essential service.

Furthermore, the much lamented legal education and training of law graduates is addressed in isolation of the macro policy framework of higher education in the country. There is no consideration of paralegal education and training as a means to strengthen and deepen legal education through seamless articulation. This contributes to systemic blockages caused by a lack of synergy between the various post-school sub-systems.

Policy reform therefore does not encourage a 'legal culture shaped by society and societal culture shaped by law', making improved access to justice, especially in civil matters, a casualty.

The reliance on community service by legal practitioners and law interns will not address the unmet primary legal needs of the citizens in the country; neither does it constitute a comprehensive strategy for reducing the cost of secondary legal services which are out of reach for the majority of citizens. It also does not address the unbundling of legal services which in this study is considered to be a prerequisite for the lowering of these costs and the involvement of the paralegal. The uneven geographical distribution of legal services in the rural areas and historically black areas has not been addressed adequately and these areas will remain underserved by legal practitioners without the systematic deployment of paralegal services.

The absence of a philosophical and theoretical framework and its resultant definitional vacuum play no small part in the shortcomings in the policy reforms. This study therefore offers a benchmark description for the transformation of the legal profession drawn from the goals and objectives of key policy documents. The transformation of the legal profession in South Africa reflects characteristics of a symbiotic model of transformation and could be described as an evolutionary process of reconstruction of the existing regulatory framework in order to guarantee access to a reformed institutional framework that gives effect to the values of a democratic and constitutional order centred on the emancipation of its citizens.

In addition, this study argues that a constitutional democratic order grants practitioners of the law trusteeship of the law. This trusteeship model of the legal profession allows the State to set reasonable conditions for the practice of the law in line with its obligation to its citizens and its duty under the Constitution.

A true commitment to the legal empowerment of the poor and the transformation of the legal profession requires an effort on the part of the members of the narrow legal profession to render themselves less indispensable, less superior and those who have managed to fortify themselves in the privileged existence of the four c's of social status (castle, cash, clothes and car), less affluent. Maru noted that '(w)e would underestimate the power of paralegalism ...if we were to conceive of paralegals only as good substitutes in the event that lawyers are not available'.¹³⁸⁶ Having identified the shortcomings in the legal reforms of the legal profession Chapter 9 will proceed to examine the community-based paralegal landscape in South Africa and the paralegal 'profession' in a number of foreign jurisdictions.



¹³⁸⁶ Maru, V (2006) p. 470.

CHAPTER 9

A COMMUNITY-BASED PARALEGAL PROFESSION IN SOUTH AFRICA

9.1. INTRODUCTION

The preceding chapters examined the existing human rights framework to determine whether it creates scope for the community-based paralegal to enhance access to procedural justice in South Africa. Having concluded that this framework both restricts and enables community-based paralegal practice, the focus turns to the community-based paralegal ‘profession’ in the country. This chapter tracks the evolution of community-based paralegal practice in South Africa and examines paralegal practice in a selection of foreign jurisdictions. The purpose of this examination is first, to determine the key features that currently characterise a community-based paralegal profession in South Africa.

Secondly, community-based paralegal practice in South Africa appears to be more readily recognised beyond the country’s borders.¹³⁸⁷ Despite South Africa, arguably, having led paralegal development within the African continent, there are lessons to be learned from other jurisdictions. The magnitude of a comprehensive comparative analysis would take this dissertation beyond its scope; hence, this investigation focuses on a brief evaluation of paralegal practice in a selection of countries against the conventional features of a profession. These features include, governance, regulation, certification, education and training and scope of practice.

South Africa is ranked as the second largest economy on the African continent.¹³⁸⁸ Due to the vast economic disparities in society, it displays features that compare with countries on both ends of the economic divide. An examination of paralegal practice in a selection of countries on both ends of this divide provides insight into the possibilities of developing a paralegal ‘profession’ in the country. The United States of America and England¹³⁸⁹ represent the more economically developed countries while Mozambique and Sierra Leone¹³⁹⁰ represent the economically developing countries.¹³⁹¹

¹³⁸⁷ Open Society Justice Initiative (2010).

Tanner, C & Bicchieri, M (2014).

¹³⁸⁸ Africa Ranker, “Top 10 Most Developed African Countries”, (2016), available at: *Africa Ranking* <http://www.africaranking.com/most-developed-african-countries/>. (accessed 23 February 2017).

¹³⁸⁹ The United States of America and the United Kingdom are currently ranked first and fourth respectively on the Statistics Times List of Countries by Projected GDP.

¹³⁹⁰ Mozambique and Sierra Leone are currently ranked 130 and 156 respectively on the Statistics Times List of Countries by Projected GDP.

¹³⁹¹ “List of Countries by Projected GDP”, (2017), available at: *Statistics Times* <http://statisticstimes.com/economy/countries-by-projected-gdp.php>. (accessed 12 May 2017)

9.2. THE COMMUNITY-BASED PARALEGAL IN SOUTH AFRICA

There is a dearth of available information on paralegal services in South Africa. This lack of information, partly, contributed to community-based paralegals not being recognised, irrespective of the fact that they have been the advance guard of civil justice for the poor and marginalised since the 1930's. 'Empirical' evidence, which relates to community-based paralegals, has surfaced relatively recently and shows that these paralegals 'regularly operate beyond the capacity, locality or comfort of the legal profession'.¹³⁹² Their 'practice' is characterised by a 'court room' that does not necessarily consist of four walls, while many of them received their education and training in advocacy and human rights protection in the school of life rather than through formal legal education. Paralegal practice has nevertheless provided the overwhelming majority of community-based paralegal practitioners with the attributes that the new democratic order demands from entrants into the legal profession, namely, among others, advocacy and active citizenship, emotional literacy, social intelligence and a human rights-based approach to access to justice.¹³⁹³

The lack of recognition of the paralegal in general in South Africa could be attributed to a number of factors. A comprehensive definition of a paralegal is absent.¹³⁹⁴ There is a lack of comprehensive empirical research on the role of the paralegal in South Africa. It is mostly seen as an adjunct to an attorney, which does not require specialist training, but for the superficial aspects of the law and administration. The service has not been professionalised to date; in other words, no standards, which relate to education and training, scope of practice, conduct or certification have been set.

The limited number of studies, which have been conducted, nevertheless provides insight into the development of community-based paralegals who continue to play a crucial role by providing access to civil justice for the poor and marginalised in the country. The heterogeneous nature of the scope of practice of this practitioner is reflected in the evolution of community-based paralegal services, pre- and post-1994.

¹³⁹² Dugard, J & Drage, K (2013).

Benjamin, S (2012).

Bodenstein, J, *Interim Report on the State of Community-based Paralegal Advice Offices in South Africa*, (2007) Sweden: National Steering Committee Institute for Criminal Justice.

Davids, YD & Verwey, L, *Towards a sustainable and effective CAO sector in South Africa: a cost-benefit and qualitative analysis*, (2014).

¹³⁹³ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)*.

¹³⁹⁴ See Chapter 2.

9.2.1. The community-based paralegal in South Africa prior to 1994

The South African community-based paralegal emerged in response to the introduction of an apartheid regime which was characterised by gross injustices, exclusion and brutal repression.¹³⁹⁵ Members of the community had a deep distrust of the legal system, as it was considered to form an integral part of the extensive apartheid machinery through which the State enforced its discriminatory policies. Community Advice Offices (CAOs) were established and formed the bases from which these communities could rally against injustice perpetrated by the regime. The CAOs provided the only form of legal assistance that most Black South Africans received at the time.

The Black Sash, a membership-based and membership-funded anti-apartheid volunteer activist organisation that ultimately evolved into a registered non-profit organisation, was a staunch supporter of the CAOs.¹³⁹⁶ The organisation established various CAOs and engaged in advocacy, public education and protest action, monitored and recorded, among others, arrests, detentions and deaths and provided free paralegal services, focussing on housing, unemployment, pensions, influx control and detention without trial.¹³⁹⁷ During the 1980s community leaders would establish CAOs in their own homes as the apartheid machinery sprang into action and they would tackle, for example, farm evictions and forced evictions that resulted from racial segregation.¹³⁹⁸ The array of problems that Black people¹³⁹⁹ experienced provided community-based paralegals with opportunities to acquire a range of skills, including trauma counselling and resource procurement.¹⁴⁰⁰

During the period of transition to a new democratic order,¹⁴⁰¹ the Black Sash shifted its focus to monitoring CODESA¹⁴⁰² negotiations and through the CAO network, provided voter education in preparation for the first democratic elections. The capacity of this CAO network and its community-based paralegals to respond to the ever-changing socio-legal needs of society distinguishes this practitioner from other legal practitioners.

¹³⁹⁵ Benjamin, S (2012); Dugard, J & Drage, K (2013); Bodenstein, J (2007).

¹³⁹⁶ Black Sash, "Our History: Standing for Human Rights", (2014), available at: *The Black Sash* <https://www.blacksash.org.za/index.php/our-legacy/our-history>. (accessed 15 April 2017).

¹³⁹⁷ Dugard, J & Drage, K (2013).

¹³⁹⁸ Dugard, J & Drage, K (2013).

¹³⁹⁹ Communities were confronted with the threat of removal, breakdown of family structures, detention and unemployment.

¹⁴⁰⁰ Dugard, J & Drage, K (2013).

¹⁴⁰¹ 1990 - 1994

¹⁴⁰² The Convention for a Democratic South Africa (CODESA) negotiations preceded the transition from the pre-1994 regime to the new democratic order.

9.2.2. The community-based paralegal in South Africa post 1994

The introduction of a new democratic order presented new opportunities for the community-based paralegal to facilitate access to justice for the poor and the marginalised. As the statutory framework of apartheid was being dismantled, the structural barriers remained and in many instances the State failed to deliver the most basic of legal services. The regulatory framework in the country was transformed in alignment with the Constitution, and as people's awareness of human rights increased, so did the demand for legal information, advice, assistance and representation. In the face of various barriers, which prevented access to this legal assistance, including geographical and financial barriers, the community-based paralegal acquired a new role, namely, to translate the Bill of Rights into reality and thus contribute to the social emancipation of the poor.¹⁴⁰³

A profile of the users of community advice offices shows that community-based paralegals deal with the most vulnerable communities. A substantial number of these users (48%) earn between R1001 and R3000 per month, and the majority merely have secondary education (38%)¹⁴⁰⁴ or no education at all (34%).¹⁴⁰⁵ Rural communities and townships remain segregated from more affluent suburbs. Poverty, geographical location, gender and education levels ensure that South Africa remains a deeply segregated society.¹⁴⁰⁶ As a consequence, access to both procedural and substantive justice remains an aspiration for the majority of citizens in the country. In the author's view this is the most serious fault line in contemporary South African society. Research, limited though it may be, shows that the community-based paralegal is at the coalface thereof.¹⁴⁰⁷

The community issues dealt with by these offices span a vast array of social and legal problems, and in many instances the community-based paralegal practitioner had to take ongoing carriage of the matter.¹⁴⁰⁸

The Transformation of the Legal Profession: Discussion Paper acknowledged the role that paralegals have played in delivering legal services to communities and noted the lack of recognition and regulation

¹⁴⁰³ Dugard, J & Drage, K (2013).

¹⁴⁰⁴ Davids, YD & Verwey, L (2014) p. 8.

¹⁴⁰⁵ Davids, YD & Verwey, L (2014).

¹⁴⁰⁶ Bodenstein, J (2007); Davids, YD & Verwey, L (2014).

¹⁴⁰⁷ Bodenstein, J (2007); Davids, YD & Verwey, L (2014).

¹⁴⁰⁸ Davids, YD & Verwey, L (2014).

These include unemployment, housing-related matters, refugee and migrant community-related matters, youth social challenges, high substance abuse, domestic violence, labour-related matters, poverty, general access to justice matters, property hijackings, financial issues, gross violations of human rights, consumer rights issues, service delivery, health issues and corruption.

of paralegals in South Africa. Justice Vision 2000 responded by linking the paralegal and legal aid to the theme of ‘Access to Justice for All’. However, State-initiated policy reforms in the paralegal sector have not resulted in the paralegal practice receiving formal recognition.

9.3. PARALEGAL POLICY REFORMS INITIATED BY THE STATE

To date, efforts on the part of the Department of Justice and Correctional Services, which is tasked with giving effect to the recommended strategies for paralegals contained in Justice Vision 2000, are yet to materialise. This is in spite of the fact that the Legal Services Charter expressly recognised community-based paralegal services and committed itself to ‘devising and implementing measures’ to ensure ‘access to affordable legal services for all people in South Africa’, particularly those in marginalised, poor and rural communities.¹⁴⁰⁹

9.3.1. Justice Vision 2000

The first strategic goal, which was adopted under the theme of ‘Access to Justice for All’ was ‘making legal advice and legal representation accessible to all who need it’.¹⁴¹⁰ The recommended strategies had three areas of focus, namely legal aid, access to lawyers, and making better use of paralegal structures. The strategies proposed for legal aid included evaluating the effectiveness of paralegal advice centres. This would provide relevant information on the extent of the legal services that these advice centres rendered, which, would inform policy in turn. The intention behind the recommended strategies for making better use of paralegal structures was clear. The sector would be professionalised. The recommendations were;

- i) [de]veloping a definition of what a para-legal is;
- ii) [c]ompiling manuals for training para-legals;
- iii) [g]ranted paralegals limited audience rights in the courts; and
- iv) [g]iving recognition to para-legals through standardisation, accreditation and certification.¹⁴¹¹

¹⁴⁰⁹ Para1.1.1 v)

¹⁴¹⁰ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)* p. 16.

¹⁴¹¹ *Justice Vision 2000: Draft Strategic Plan for the Transformation and Rationalization of the Administration of Justice (2000)* p. 16–17.

The first recommended strategy reveals the fundamental challenge with the recognition of the paralegal at the time, namely, the absence of a universal definition for this practitioner. This is not unique to the South African legal landscape.¹⁴¹² Attempts to codify the existence of the ‘home’ of the community-based paralegal, the community advice office (CAO), can also be traced back as far as the Task Team Proposal on the Legal Practice Bill (2002).

9.3.2. Legal Practice Bill 2002 (Task Team Proposal)

The Legal Practice Bill 2002 made express reference to the accreditation of legal advice offices.¹⁴¹³ It made provision for a legal entity registered as a non-profit organisation to apply for ‘accreditation to render legal services or any specialised legal service as a legal advice office’.¹⁴¹⁴ The criteria for accreditation was detailed in clause 48(3)(a)-(h). The Bill allowed for a charging of a fee for services that were rendered as determined by the Legal Practice Council,¹⁴¹⁵ the exemption from liability for any loss suffered in rendering a service in good faith¹⁴¹⁶ and practitioner-client confidentiality.¹⁴¹⁷ No reference to community-based advice offices has been made in subsequent drafts, nor is there any reference to them in the Legal Practice Act. Principle XV of the Key Principles nevertheless recognises other providers of legal services, including paralegals, and proposes that they should be regulated through a ‘separate legislative measure’.

The Task Team Proposal recommended that the Minister should be empowered, in consultation with the Legal Practice Council and the Paralegal Committee, to regulate the rendering of legal services to the public by paralegals. It further recommended that the Minister, in consultation with the Chief Justice, grant right of appearance to paralegals in court. It was, therefore, intended for the scope of practice of the paralegal to include representation in a court of law subject to conditions determined by the Minister. The link between the paralegal and access to justice was made clear, to ensure that litigants are adequately and competently represented, where the interest of justice so requires. Clause 47 detailed the scope of practice of the paralegal, which involves the full spectrum of legal services, namely inform,¹⁴¹⁸ advise,¹⁴¹⁹ assist¹⁴²⁰ and represent.¹⁴²¹

¹⁴¹² See the discussions on the definition of a paralegal in Chapter 2.

¹⁴¹³ Clause 48.

¹⁴¹⁴ Clause 48(1).

¹⁴¹⁵ Clause 48(7).

¹⁴¹⁶ Clause 48(8).

¹⁴¹⁷ Clause 48(9).

¹⁴¹⁸ Clause 47(a) and (f).

¹⁴¹⁹ Clause 47(d) and (f).

¹⁴²⁰ Clause 47(b).

¹⁴²¹ Clause 47(h).

The Task Team Proposal further set certain criteria for the qualifications of paralegals, combining academic and vocational education and training. Specific reference was made to communication and research skills. However, the Law Society of South Africa held its own views on the scope of practice of the paralegal, as their version of the Legal Practice Bill reflects.

9.3.3. The Legal Practice Bill 2002 (LSSA)

The fact that the scope of practice of the paralegal constitutes the battleground between the attorney's profession and the paralegal 'profession' is apparent from clause 29(2) of the LSSA version of the Legal Practice Bill. This clause proposed that the paralegal only practices under the supervision of a legal practitioner, which is defined as an advocate or attorney, in a law clinic or voluntary association that is accredited by the National Legal Practice Council, which was established by the statute. The National Council could exempt a paralegal from this restriction. In the LSSA's version of the Legal Practice Bill the paralegal was precluded from practicing for his/her own account¹⁴²² and from rendering 'a legal service in expectation of a personal fee, commission, gain or reward'. LSSA's intention was clear, any paralegal would be prohibited from competing with attorneys in respect of fee paying clients regardless of the nature of the service, whether the client could afford the services of an attorney and/or the limited resources of the State. The exemption provided for in the Bill had little significance, as the composition of the Council favoured the narrow legal profession by far.¹⁴²³

The Bill further made provision for the qualification and training of the paralegal to be determined by the Minister upon the advice of the same Council. Representation in a court of law was completely absent from the scope of practice and was replaced by a screening function.¹⁴²⁴ The intention on the part of the narrow legal profession to exercise control over the paralegal 'profession' was thus clear.

The 2009 version of the Bill deferred the regulation of the paralegal to the Legal Practice Council, which was tasked to submit proposals to the Minister, who would introduce the proposals for regulation in Parliament.¹⁴²⁵ The scant reference to the paralegal in the 2012 version of the Legal Practice Bill and the Legal Practice Act, has already been noted.¹⁴²⁶

¹⁴²² Clause 29(3)(a).

¹⁴²³ The Council was supposed to comprise of twenty-four (24) legal practitioners (Clause 63(1)(a)), two (2) paralegals (Clause 36(1)(b)), two (2) ministerial appointees (Clause 63(1)(d)), and the chairperson of the Council (Clause 63(1)(c)).

¹⁴²⁴ Clause 12(2)(e) 'understand the circumstances in which it is appropriate to refer matters to a legal practitioner'.

¹⁴²⁵ Clause 53.

¹⁴²⁶ See Chapter 8.

The Legal Aid South Africa Act (LASAA) expressly empowers the Legal Aid Board to employ paralegals who can provide legal services, representation and advice at the expense of the State. These paralegals operate under the supervision of and as an adjunct to an attorney. Community-based paralegal practice, therefore, does not feature. Reform initiatives by the community-based paralegal sector have overtaken the stalled efforts by the Department of Justice and Correctional Services.

9.4. REFORMS INITIATED BY THE COMMUNITY-BASED PARALEGAL SECTOR: THE COMMUNITY ADVICE OFFICE DRAFT BILL

The community-based paralegal sector has shown remarkable resilience over decades. It has, for example, established its own governance structures, seeking and coordinating training and pursuing policy reform with the exclusive aid of donor funding and volunteerism. Initiatives by the community-based paralegal sector to ensure the formal recognition of the community-based paralegal in South Africa predate the Legal Practice Act.¹⁴²⁷ These initiatives were largely unsuccessful.¹⁴²⁸ Following the relegation of paralegal matters to the Legal Practice Council, the Association of Community-Based Advice Offices of South Africa (ACAOSA) has taken the initiative to propose what is currently entitled the 'Community Advice Office Draft Bill' (CAO Draft Bill) which was submitted to the Department of Justice and Correctional Services in 2016.¹⁴²⁹ This is the most significant legislative development for the community-based paralegal to date. Each of these developments is discussed below.

The CAO Draft Bill attempts to address the strategic goals and strategies for paralegals, which are contained in Justice Vision 2000. It proposes a definition for the concept paralegal, as well as a community-based paralegal,¹⁴³⁰ codifies a governance structure for the community-based paralegal sector, formalises the existence of the CAO and makes proposals for the certification, education and training and scope of practice for paralegals.

It should be stated in advance that this CAO Draft Bill is in its embryonic stage and at the time when this work was submitted, it had the status of a concept document, which contained a number of proposals. It is the first attempt at codifying the practice of the community-based paralegal and, if the Legal Practice Act serves as an example, it will pass through various stages of drafting before it is accepted. Notwithstanding the title, this Draft Bill has the status of a discussion paper prior to submission to the South African Law Reform Commission. The evolution of the governance structures

¹⁴²⁷ See brief reference in Chapter 1.

¹⁴²⁸ See Chapter 1.

¹⁴²⁹ This document is in the possession of the author.

¹⁴³⁰ See the discussion on the definition of the paralegal in Chapter 2.

of the community advice offices, the home of the community-based paralegal, was not without their challenges, and the CAO Draft Bill is not without controversy.

9.4.1. Governance

The existing governance structure of the community-based paralegal evolved from the earlier Advice Centres Association¹⁴³¹ that was replaced by the National Community-Based Paralegal Association (NCBPA).¹⁴³² The latter constituted a network of nine (9) provincial paralegal associations that represented regional CAO and paralegal structures. The purpose of the NCBPA was to organise the community-based paralegal sector, raise funds for the sector, standardise the training and develop a code of conduct and ethics for the paralegals in this sector.¹⁴³³ The NCBPA also pursued government support for recognition of paralegals to ensure the sector's sustainability.

In 1999 the National Paralegal Institute was established as a project of the NCBPA. Its purpose was to provide education and training for paralegals in the sector. However, the CAOs suffered a set-back following the withdrawal of some donors owing to financial mismanagement in the sector, resulting in the new government viewing the sector's capacity with caution.¹⁴³⁴ Despite this, the majority of advice offices continued to function, giving new meaning to volunteerism. The importance of the service that community-based paralegals rendered prompted a multi-stakeholder discussion¹⁴³⁵ that resulted in a National Steering Committee for Community-Based Paralegals and Advice Offices in South Africa (NSC).¹⁴³⁶ The NSC evolved into the National Alliance for the Development of Community-Based Advice Offices (NADCAO), a non-profit organisation committed to the development of and sustainability of CAOs. Its objectives are to:

- Strengthen the CAOs;
- Conceptualise and develop ideas for the advancement of CAOs and community-based paralegals;
- Identify, influence and support initiatives and interventions that will ensure the sustainability of the sector;
- Facilitate the provision of relevant support and development services;

¹⁴³¹ 1986 -1993.

¹⁴³² 1995-2005.

¹⁴³³ Community Agency for Social Enquiry, *Paralegals And Advice Office: Progress And Challenges In The Development Of Access To Justice*, (2000) CS Mott Foundation.

¹⁴³⁴ Community Agency for Social Enquiry (2000).

¹⁴³⁵ These included the CS Mott Foundation, ICJS –S, Black Sash Trust, Social Change Assistance Trust, Foundation for Human Rights, Community Law and Rural Development Centre and the NCBPA.

¹⁴³⁶ Community Agency for Social Enquiry.

- Mobilise resources in the context of a newly-defined model of sustainability; and
- Articulate the issues of the sector within an authoritative national source.¹⁴³⁷

NADCAO facilitated the formation of a new membership organisation, which would serve as the national voice for the CAO sector.¹⁴³⁸ ACAOSA was launched. It is considered to be the ‘third rising’ of the CAO sector.¹⁴³⁹ ACAOSA, with the aid of NADCAO, is advancing the cause of the sustainability and capacity building of and policy reform in the sector.

ACAOSA submitted a concept document to the Department of Justice and Correctional Services in 2017 entitled the Community Advice Office Draft Bill (CAO Draft Bill). The CAO Draft Bill makes provision for the establishment of a South African Community Advice Offices and Community-Based Paralegals Council (‘the Council’).¹⁴⁴⁰ The objects of this Council are to advance access to justice for vulnerable communities, advance the development and sustainability of the sector and regulate CAOs and community-based paralegals.¹⁴⁴¹ The composition of the Council, is mostly, is modelled on the composition of the Legal Practice Council,¹⁴⁴² but adapted to the paralegal sector. However, the CAO Draft Bill, unlike the Legal Practice Act, does not make provision in its composition for a member of the academic fraternity.¹⁴⁴³ The education and training of the community-based paralegal has been neglected in the country and the regulation of this paralegal is intricately linked to education and training in this regard. Education and training is a key component of any profession and is central to the continued evolution of the paralegal sector. This omission is, therefore, unfortunate.

The CAO Draft Bill further makes provision for a representative from the Legal Practice Council to serve on the paralegal Council and confines this representative to a member of the National Association of Democratic Lawyers (NADEL) or the Black Lawyers Association (BLA). Given the fact that these two organisations opposed the granting of the right of limited appearance in the courts to paralegals in the negotiations which lead up to the enactment of the Legal Practice Act, the reasons for this development is the subject of speculation.

¹⁴³⁷ NADCAO, *National Alliance for the Development of Community Advice Office - brochure*, (2013).

¹⁴³⁸ NADCAO (2013).

¹⁴³⁹ NADCAO, “ACAOSA Launch: Official Press Release”, (2013), available at: <http://nadcao.org.za/acaosa-launch-official-press-release/>. (accessed 6 September 2016).

¹⁴⁴⁰ Clause 4 of the CAO Draft Bill.

¹⁴⁴¹ Clause 5 of the CAO Draft Bill.

¹⁴⁴² Established in terms of section 4 of the *Legal Practice Act* (2014).

¹⁴⁴³ Clause 6 of the CAO Draft Bill.

9.4.2. The standardisation, accreditation and certification of the paralegal service in South Africa

The CAO Draft Bill makes specific provision for a South African Community Advice Offices and Community-Based Paralegal Council. One of the objects of the Council is to regulate CAOs and community-based paralegals. The CAO Draft Bill empowers the Council to promulgate regulations that provide for the standardisation of accreditation and training, as well as the certification of community-based paralegals. It further sets out specific criteria for accreditation on a continuum.

The CAO Draft Bill recommends various levels of certification that ranges from Grade 0 to 3,¹⁴⁴⁴ and proposes that a Council should regulate accreditation and training, of the community-based paralegal.¹⁴⁴⁵ It is evident that the intention with this continuum of certification is to accommodate paralegals without formal qualifications, but who have extensive experience as paralegals in the field.

9.4.3. Education and training

The community-based paralegal sector's education and training has lagged behind mainly as a result of the narrow legal profession's monopoly over legal services in the country, and the lack of recognition of the contribution of the paralegal in filling part of the justice gap in the country. A scan of the programmes on offer for quasi-legal services in South Africa reveals a fragmented model, with most of its education and training being too specialised¹⁴⁴⁶ and/or falling outside of the National Qualifications Framework¹⁴⁴⁷ and few programmes certificated by the Higher Education Quality Committee (HEQC)¹⁴⁴⁸ or the Quality Council for Trades and Occupations (QCTO).¹⁴⁴⁹ This does not provide the requisite educational support for the professionalisation of the community-based paralegal sector. It is fragmented and is focused either on legal administration or narrow areas of the law, namely, labour, family and commercial law.¹⁴⁵⁰ This in itself proves to be highly problematic for those who advocate

¹⁴⁴⁴ Grade 0.

Grade 1.

Grade 2.

Grade 3.

¹⁴⁴⁵ Clause 25.

¹⁴⁴⁶For example, the National Certificate in Family Law Practice and Law Enforcement: Sheriffing.

¹⁴⁴⁷FET colleges also offer certificates or diplomas that are certificated by the college only, for example, the Senior Paralegal Diploma offered by the South African Paralegal School.

¹⁴⁴⁸The search on the SAQA website produced only 3 programmes accredited by the HEQC (accessed 31 August 2016).

¹⁴⁴⁹The search on the SAQA website produced only three paralegal programmes accredited by the QCTO (accessed 31 August 2016).

¹⁴⁵⁰ SAQA ID 50023 [NQF 5]: National Diploma: Legal Interpreting [Credits 240, NQF 5]

SAQA ID: LP 64269, QL 57712 [NQF 4]: National Certificate: Law Enforcement: Sheriffing.

SAQA ID: QL 97228, LP 49597 [NQF 5]: National Certificate: Paralegal Practice [Credits 131, NQF 5]

SAQA ID: 50265 [NQF 4]: National Certificate: Family Law [Credits 150, NQF 4]

National Certificate in Paralegal Practice NQF 5 128 credits

for the professionalisation of the paralegal sector, as education is one of the key elements of a profession.

Evidence of formal paralegal education and training is found in the prospectuses of various former Further Education and Training (FET) colleges, which are now known as Technical Vocational Education and Training (TVET) colleges¹⁴⁵¹ and the South African Qualifications Authority database.¹⁴⁵² The focus thereof is in essence on training for legal secretaries or legal assistants to lawyers, especially in commercial practice and the formal education and training of the community-based paralegal has lagged behind dismally to its 'commercial' counterpart.¹⁴⁵³ Formal paralegal education thus reflects the same public/private divide of legal education in the narrow legal profession, is lawyer-centric and focused on fee paying clients.

Comprehensive paralegal education to date was hampered by the lack of definition of the concept and uncertainty as to its scope of practice and the resultant lack of recognition of this practitioner. Due to the uniqueness of the community-based paralegal, most of its education and training is in-house. Compared to the 250 accredited paralegal programmes in the United States, for example, this is wholly insufficient to support the professionalisation of the paralegal sector.

Paralegal education and training assumed a different dimension when the Council on Higher Education granted accreditation to the Unit for Applied Law at the Cape Peninsula University of Technology to offer a Bachelor in Paralegal Studies degree. This degree was designed in consultation with NADCAO and ACAOSA.

National Diploma in Paralegal Practice NQF 5 240 credits.

¹⁴⁵¹ These were established in terms of the Continuing Education and Training Act 16 of 2006 and some of their qualifications offered are not accredited by the Quality Council for Trades and Occupations or the Council for Higher Education which are reflected on the SAQA database.

¹⁴⁵² South African Qualifications Authority, "SAQA", (2014), available at: <http://www.saqa.org.za/index.php>.

¹⁴⁵³ The Diploma: Paralegal (240 SAQA credits; NQF level 6) has as its purpose 'to provide qualifying learners with the skills and knowledge necessary to become a competent paralegal'. However, it in essence prepares learners to enter the market as legal assistants to a lawyer with the focus on commercial matters. The focus is therefore on Legal Office Practice Management, Civil Litigation, Debt Collecting, Wills and Estates and Property Law and Conveyancing

The National certificate: Paralegal Practice (131 SAQA credits; NQF level 5) has as its purpose 'to prepare qualifying learners for supervised practice as paralegal assistants in all sectors of the industry' which includes community-based paralegal advice offices, non-governmental organisations, public institutions, commercial institutions and private practices. However, its core and fundamental components are focused on administrative support.

The Higher Certificate in Paralegal Studies in Commercial Practice (120 SAQA credits; NQF level 5) has as its purpose to prepare those 'who have an interest in a career as a paralegal practitioner' for employment in 'law firms, sheriffs of the court, municipalities, law enforcement agencies, private companies, public institutions, credit bureaus, estate agents, etc.'. The qualification title of the programme is self-explanatory.

9.4.4. The scope of practice of the community-based paralegal and the limited right of appearance in the courts

The inability of LASA to meet the demand for justice, in general, and civil justice in particular, left a gap which the community-based paralegal has helped to fill. Even in the area of criminal justice, the role of the paralegal has shifted from monitoring the treatment of political prisoners to focussing on violence against vulnerable communities such as women and children.¹⁴⁵⁴ The diverse and flexible scope of practice of these practitioners thus enabled them to carve out a unique space in the ‘legal fraternity’.

Community-based paralegals initially supplemented the services of government departments such as Health and Social Services¹⁴⁵⁵ after 1994, but their roles have extended beyond these services. These practitioners dealt with employment issues, consumer matters, family matters, farm worker matters, issues related to small claims courts, and the Road Accident Fund.¹⁴⁵⁶ They also engaged in community education on a range of issues, including human rights education.¹⁴⁵⁷ Community-based paralegals contributed to community development by assisting with the registration of non-profit organisations, drafting constitutions and funding proposals and informing communities about project management.¹⁴⁵⁸ Those who benefitted the most from these efforts were vulnerable communities such as the youth and women.¹⁴⁵⁹ Community-based paralegals also performed a screening and referral function.¹⁴⁶⁰ These practitioners, therefore, attend to the full spectrum of primary legal services, as defined in Chapter 2.

The above exposition of the scope of practice of the community-based paralegal makes clause 23 of the Advice Office Bill a rather strange development in the regulation of the community-based paralegal. It proposes certain limitations related to the authorised practice as a community-based paralegal and reads; ‘[c]ommunity-based paralegals are not allowed to appear in any court or tribunal unless specifically provided for in law’.

This particular clause is in all probability informed by a number of factors, which have mostly been identified in the preceding discussions in this chapter. These include the current fragmented, jurisprudentially superficial and narrowly focused education and training of the community-based paralegal, the need to protect the public from unqualified practitioners, the importance of competent

¹⁴⁵⁴ Dugard, J & Drage, K (2013).

¹⁴⁵⁵ Bodenstein, J (2007). Community-based paralegals also dealt with matters related to HIV Aids and welfare.

¹⁴⁵⁶ Bodenstein, J (2007).

¹⁴⁵⁷ Bodenstein, J (2007).

¹⁴⁵⁸ Bodenstein, J (2007).

¹⁴⁵⁹ Bodenstein, J (2007).

¹⁴⁶⁰ Bodenstein, J (2007).

and quality legal representation, which is fundamental for a fair hearing, and the need to placate the narrow legal profession by avoiding professional encroachment. Most of these concerns present sound reasons for the limitation of the right of appearance of community-based paralegals. However, this limitation is problematic for a number of reasons.

The first three concerns can easily be dispensed with by prescribing minimum standards for education and training and adopting a code of ethics and conduct. Clause 24 of the CAO Draft Bill indicates that certification should be granted on various levels, while the scope of practice will be determined by the education and training of the paralegal, in accordance with international precedents.¹⁴⁶¹

In addition, ‘making legal advice and legal *representation* accessible to all who need it’, is the first strategic goal proposed in Justice Vision 2000 under the theme ‘Access to Justice for All’.¹⁴⁶² It has been argued in this thesis that the State has a constitutional obligation to provide legal assistance in civil matters to persons who are 18 years and older, if the interest of justice so requires. This includes legal representation. LASA has acknowledged its inability to give effect to its obligation to provide legal representation in civil matters to all who qualify under the current models of dispensing legal aid. Given the acknowledgement by LASA, the State has to find alternative means of dispensing justice, and making use of paralegals presents such an alternative.

Furthermore, the process of regulatory reform often manifests the same characteristics as ‘horse trading’.¹⁴⁶³ The CAO Bill acknowledges in its preamble that ‘access to legal services is not a reality for most vulnerable South Africans’. However, legal representation by a paralegal in an appropriate forum is restricted in advance. A negotiating party does not display shrewd negotiation skills in commencing the ‘horse trading’ by making concessions in advance. The narrow legal profession is an essential stakeholder but it is not the only stakeholder, hence its personal vested interest has to take second place to the unmet legal needs of the overwhelming majority of citizens in the country.

Moreover, the first part of the purpose statement of the CAO Bill reads: ‘to give effect to the right of access to justice under section 34 of the Constitution, particularly for marginalised and vulnerable communities’. Chapter 6 states that the right to legal assistance, as defined in Chapter 2, is derived from section 34 of the Constitution. Clause 23 contradicts the purpose statement of the CAO Draft Bill.

¹⁴⁶¹ See, for example, the reference to PPR certification in England above.

¹⁴⁶² Own emphasis added.

¹⁴⁶³ Horse trading is defined as ‘negotiation accompanied by shrewd bargaining and reciprocal concessions’ and is often used in a political context. (Merriam-Webster, “Horse Trade”, (2017), available at: *Dictionary* [\(https://www.merriam-webster.com/dictionary/horse+trade\)](https://www.merriam-webster.com/dictionary/horse+trade).(accessed 2 April 2017))

A consequence of this limitation of the scope of practice of the paralegal is that persons who qualify for legal assistance at the expense of the State are even denied access to paralegal services. This raises the question of the constitutionality of this limitation.

Adjudicating mechanisms vary in nature and complexity¹⁴⁶⁴ and there are institutional reforms underway such as the Traditional Courts Bill and regulatory reform in the lower courts.¹⁴⁶⁵ Access to justice requires that adjudicating mechanisms are accessible to all. This implies that, where needed, adequate and competent representation must be available to ensure meaningful access. Adjudicating mechanisms, in general, are not accessible, especially to the poor and marginalised in civil matters. Denying an unrepresented indigent litigant representation by an adequately qualified paralegal in an appropriate forum may compromise the fairness of the proceedings and thus the affected person's right to procedural justice.

Any meaningful exposition around the scope of practice of the paralegal practitioner can only materialise once the full spectrum of the need for legal services in the country has been researched and definitional issues, which relate to the construct 'paralegal', have been settled.

9.4.5. The cost of legal services

The CAO Draft Bill proposes that no community-based paralegal may render a service to a fee paying client¹⁴⁶⁶ and criminalises this act by proposing a sentence and permanent suspension.¹⁴⁶⁷ It further proposes that funding for these services should be obtained through a combination of donor and government funding. The community-based paralegal service is thus confined to a pro bono service and, in the absence of government and donor funding, this paralegal practitioner is reduced to a volunteer.

In light of the importance of the service that this practitioner renders, it is not advisable to subject the service to this level of restriction. It amounts to subjecting the right of access to justice for the poor and the marginalised to chance, which defeats the purpose of the battle for the recognition of the service. It is doubtful whether this provision would pass constitutional muster, as it may also constitute an unreasonable restriction on the right to trade, occupation and profession, as well as the right of equality before the law and equal protection and benefit of the law.

¹⁴⁶⁴ See Chapter 7.

¹⁴⁶⁵ See Chapter 7.

¹⁴⁶⁶ Clause 27.

¹⁴⁶⁷ Clause 37.

The preceding examination shows that there are a number of features that currently characterise community-based paralegal practice in South Africa. A consideration of community-based paralegal practice pre- and post 1994 reveals a flexible socio-legal service capable of responding to the changing needs of society and the social environment. The current shortcomings of community-based paralegal practitioners include, the lack of regulation, formal legal education and training and uncertainty around their scope of practice. These features are not unique to South Africa as the ensuing examination of paralegal practice in a selection of foreign jurisdictions will show. Proposed legal reforms in South Africa contains features of a practice that is intended to span the full spectrum of primary legal services (inform, advise, support and represent) as defined in Chapter 2. The ‘CAO Bill’ addresses the shortcomings of the practice as identified above, although it may be subjected to a number of constitutional challenges in its current form. An examination of paralegal practice in a selection of economically developed and economically developing countries may assist South Africa in the process of professionalising the community-based paralegal sector in the country.

9.5. THE PARALEGAL PROFESSION IN THE UNITED STATES OF AMERICA

Paralegalism in the USA was lawyer-driven and evolved following an increased need for access to justice, which was borne from dramatic policy reform in areas such as housing and education, as well as civil and political rights.¹⁴⁶⁸ The legal fraternity responded to this increased need for access to legal services on the part of all income groups, particularly amongst low-income groups by using non-licensed employees to assist in legal work, which made services less expensive and allowed attorneys to increase their case loads.¹⁴⁶⁹ Improving access to justice and reducing poverty, were thus key motivating factors for the establishment of a paralegal sector in the USA during the late 1960s.¹⁴⁷⁰

These practitioners assumed various titles, including legal assistant, lawyer’s aide, lawyer/attorney assistant, legal paraprofessional, lay assistant, legal technician, lay advocate and paralegal assistant.¹⁴⁷¹ These terms ultimately gave way to the term paralegal. Paralegals, by virtue of the fact that they were part of a team delivering legal services, were directly supervised by lawyers.¹⁴⁷²

¹⁴⁶⁸ Herard, GM, *The Paralegal Profession: An Examination of its History and Viability in the Current Job Market* DePaul University, 2011) 20.

¹⁴⁶⁹ Astl, C, *Behind the Bar: Inside the Paralegal Profession*, (2004) New York, USA: iUniverse, Inc.

¹⁴⁷⁰ McCabe, SM, 'A brief history of the Paralegal Profession', (2007), 86(7), *Michigan Bar Journal*, pp. 18–21.

¹⁴⁷¹ McCabe, SM (2007).

¹⁴⁷² McCabe, SM (2007).

The National Federation of Paralegal Associations¹⁴⁷³ recognises four categories of paralegals, namely, traditional paralegal,¹⁴⁷⁴ non-traditional paralegal,¹⁴⁷⁵ freelance/contract/virtual paralegal¹⁴⁷⁶ and the independent paralegal.¹⁴⁷⁷ The range of categories is testimony to the diversity and evolutionary nature of the practice. Statsky¹⁴⁷⁸ divides these into two main categories, namely, the traditional paralegal¹⁴⁷⁹ and the independent paralegal.¹⁴⁸⁰ The paralegal sector in the United States of America has evolved into an ‘industry’ that employs approximately 250 000 paralegals with various levels of qualifications and who perform a range of tasks in different settings.¹⁴⁸¹

9.5.1. Governance

The American Bar Association (ABA) formed the Special Committee on Lay Assistants for Lawyers (SCLA) in 1968, which was renamed the Special Committee of Legal Assistants (SCOLA) and subsequently the Standing Committee on Paralegals (SCOP).¹⁴⁸² The objects of SCLA were to ‘[m]onitor the use of non-lawyer assistants’, ‘[p]revent unauthorised practice of the law’ and ‘[r]ecommend standard of education and training’.¹⁴⁸³ SCOP constructed specific guidelines for



¹⁴⁷³ National Federation of Paralegal Associations, *Paralegal Responsibilities*, (2011) .

¹⁴⁷⁴ National Federation of Paralegal Associations (2011) p. 3. ‘A paralegal who works with supervision by and/or accountability to a lawyer in a law firm environment’ This is where most of the paralegals are employed and explains the lawyer driven nature of paralegal practice in the USA. The nature of this practice necessitated the establishment of a paralegal manager in many big law firms.

¹⁴⁷⁵ National Federation of Paralegal Associations 2011 National Federation of Paralegal Associations (2011). ‘A paralegal who works with supervision and/or accountability to a lawyer outside of a law firm environment’ This accounts for most of the employment growth in the profession. The paralegal practitioners are employed, for example, by corporations, insurance companies, financial institutions, medical corporations and research firms.

¹⁴⁷⁶ National Federation of Paralegal Associations (2011). ‘A paralegal who works as an independent contractor with supervision by and/or accountability to a lawyer’. These practitioners are self-employed and are retained by attorneys from both the public and the private sector on a case-by-case basis as needed and thus offers a cost-effective alternative to a full-time employee.

¹⁴⁷⁷ National Federation of Paralegal Associations (2011). ‘A paralegal who provides services to consumers with regard to the process in which the law is involved and for whose work no lawyer is accountable’. This category is a new development in the evolution of the paralegal profession in the USA and is defying the boundaries of the delivery of legal services as traditionally known. They provide a range of services directly to the public according to their specific area of expertise and their scope of practice ranges from preparing documents (scrivener services), representation when permitted by the court rules or law and informing the public about the legal system and *pro se* (*propria persona*/litigant in person) procedures in various courts. This category of practitioners include the following: the special advocate: ‘a paralegal authorised to participate in court proceedings involving specified classes of parties or cases’ also known as a ‘court appointed special advocate’ (CASA) and the agency representative: ‘a paralegal who is authorised by statute or agency rule to represent clients in agency proceedings, for example the Social Security Administration.’

¹⁴⁷⁸ Statsky, WP, *Introduction to Paralegalism: Perspectives, Problems and Skills*, 8th ed, (2016) New York, USA: Cengage Learning.

¹⁴⁷⁹ These are paralegals that are employed by attorneys.

¹⁴⁸⁰ These paralegals are self-employed and offer their services to attorneys and to the public.

¹⁴⁸¹ McCabe, SM (2007).

¹⁴⁸² Herard, GM (2011).

¹⁴⁸³ McCabe, SM (2007) p. 9.

colleges and vocational schools in respect of paralegals' education and training although service providers adhere to these guidelines on a voluntary basis.¹⁴⁸⁴

There are at least 14 categories of paralegal associations in the United States of America.¹⁴⁸⁵ A number of these professional bodies play an important role in the development of paralegal professionals and in the quality of services, which they render.¹⁴⁸⁶ The bodies advocate for increased use of paralegal services, negotiate on behalf of their members, offer continuous professional development, maintain paralegal websites, publish paralegal related research and literature, and require their members to comply with their codes of conduct.¹⁴⁸⁷ In this respect, the profession mirrors characteristics of the narrow legal profession.

9.5.2. Regulation

In 1985 the SCLA had the opportunity to consider the mandatory regulation for paralegals. It rejected the mandatory federal regulation of paralegals and issued an opinion that the mandatory regulation of paralegals should be left to the courts and legislature.¹⁴⁸⁸

There are no national standards, which regulate paralegal practice in the United States of America.¹⁴⁸⁹ Paralegal associations nevertheless adopt voluntary guidelines rather than mandatory regulation and support regulation only in respect of specific duties in areas of specialisation. The lack of mandatory regulation of paralegal services did not deter the sector's professionalisation.

9.5.3. Certification

In most American states paralegals do not require a license to practice.¹⁴⁹⁰ However, most paralegal associations in the USA promote the voluntary certification of paralegals.¹⁴⁹¹ Formal recognition

¹⁴⁸⁴ McCabe, SM (2007).

¹⁴⁸⁵ Statsky, WP (2016).

¹⁴⁸⁶ National Association of Legal Assistants (NALA)
National Federation of Paralegal Associations (NFPA)
National Association for Legal Professionals (NALS)
American Alliance of Paralegals, Inc (AAPI)
Association of Legal Administrators

International Paralegal Management Association

State Bar of Michigan Legal Assistants Section. (McCabe, SM (2007).).

¹⁴⁸⁷McCabe, SM (2007).

¹⁴⁸⁸ McCabe, SM (2007).

¹⁴⁸⁹ Statsky, W.B (2012).

¹⁴⁹⁰ Statsky, W.B (2012).

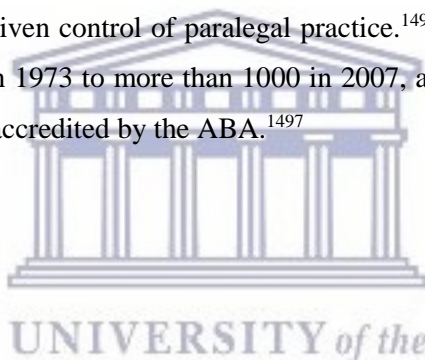
¹⁴⁹¹ NALA, which has a membership exceeding 18 000 paralegals and legal assistants, offers a voluntary certification examination for their members at two levels. The first is the entry-level certified legal assistant (CLA) examination or the certified paralegal (CP) examination. The second is an advanced level of certification for experienced paralegals who have passed the certified legal assistant specialist (CLAS) examination. Paralegals seeking certification must

entitles them to use the designated title, as bestowed by the association.¹⁴⁹² Certification is therefore not a pre-requisite for practising as a paralegal but sets a benchmark for professional standards within the paralegal sector.

9.5.4. Education and training

Paralegals or legal assistants initially had very little or no formal education and training. In essence, they were legal secretaries who received in-house training in order to increase their knowledge of the law and to develop skills that equipped them to perform intricate legal tasks.¹⁴⁹³ Since the first paralegal programmes were offered by the University of Denver's College of Law, the Law School of the University of Columbia and the College of Human Services, the demand for qualitative and more sophisticated paralegal education has increased.¹⁴⁹⁴

In 1974 the ABA adopted the Guidelines for the Approval of Legal Assistant Education Programmes.¹⁴⁹⁵ The ABA guidelines are not mandatory and there has been opposition from the paralegal sector to this lawyer-driven control of paralegal practice.¹⁴⁹⁶ Paralegal education has grown from 31 paralegal programmes in 1973 to more than 1000 in 2007, although only approximately 250 have been fully or provisionally accredited by the ABA.¹⁴⁹⁷



thus meet NALA's educational and experiential criteria, pass the certification examination, comply with its code of ethics and take part in its continuous professional development programmes. The certification lasts five (5) years. NFPA, which represents approximately 15 000 paralegals, also offers a voluntary paralegal advanced competency (PACE) examination, which entitles the successful candidate to use the designation Registered Paralegal after his or her name. NALS, which is considered to be the leading organisation for all professional legal support staff, also offers voluntary certification examinations, including the entry-level ALS and advanced PLS and professional paralegal (PP) examinations. The American Alliance Certified Paralegal (AACP) is offered by AAPI.

The Association for Paralegal Education (AAfPE), a national association for paralegal educators in the USA representing approximately four hundred (400) institutional members, was established in 1981. It has published the Core Competencies for Paralegal Education Programmes which contains the exit level competencies and its Statement of Academic Quality sets out minimum criteria for academic programmes relating to curriculum development, physical resources, faculty, marketing and promotion, instruction, qualifications of the head of the programme, student competencies and services.

¹⁴⁹² McCabe, SM (2007).

¹⁴⁹³ McCabe, SM (2007).

¹⁴⁹⁴ McCabe, SM (2007).

¹⁴⁹⁵ These guidelines require a paralegal programme to be taught at post-secondary level for a minimum of sixty (60) semester hours of which eighteen (18) must be allocated to legal speciality courses. The process of accreditation by the ABA involves a self-evaluation application by the institution seeking accreditation, an evaluation of the report by the ABA that may require further particulars, an on-site inspection of the institution by the ABA and a recommendation by the ABA following a review of the application and the on-site inspection.

¹⁴⁹⁶ Statsky, WP, *The Regulation of Paralegals: Ethics, Professional Responsibility, and Other Forms of Control*, (1987) New York, USA: West Publishing Company. cited in Tow, AM, 'Deconstructing ABA Approval', (1999), 15, *J. Paralegal Educ. & Prac.*, pp. 1–44. See also Tow, Allan M Flaherty, MM, 'AAfPE Accreditation and Academic Freedom', (2000), 16(1), *Journal of Paralegal Education and Practice 1*, pp. 1–22.

¹⁴⁹⁷ McCabe, SM 2007 McCabe, SM (2007).

The Position Statement of the American Association for Paralegal Education Regarding Educational Standards for Paralegal Regulation Proposals¹⁴⁹⁸ sets out minimum standards for education. It considers a paralegal to be qualified if he or she has an associate or baccalaureate degree or its equivalent course work, or a qualification in paralegal education¹⁴⁹⁹ from an institution, which is accredited by a nationally recognised agency.

AAfPE, in collaboration with the NFPA, NALA, the Legal Assistant Management Association, the Association of Legal Administrators and the Standing Committee on Legal Assistants of the American Bar Association, drafted the brochure entitled ‘Choosing a Quality Paralegal Education Programme’, which sets out the minimum educational requirements for entry-level paralegals.¹⁵⁰⁰ There are various academic routes by which a paralegal can be qualified and the content of these programmes varies, depending on their duration and intensity. However, most states do not have minimum educational requirements.¹⁵⁰¹

9.5.5. The scope of practice and the unauthorised practice of the law (UPL)

In the USA paralegals are employed mainly in law offices, but they also work for corporate legal departments, various departments in the public sector, not-for profit agencies and as independent contractors.¹⁵⁰² The nature of their duties spans administrative law, alternative dispute resolution, appeal matters, asbestos litigation, bankruptcy, corporate matters, collections, commercial litigation and collection, computer litigation support, construction, administration related to contracts, criminal matters, family law related matters, employee benefits, environmental law, foreclosure, immigration, intellectual property law, employment matters, landlord/tenant matters, litigation, personal injury/medical malpractice/product liability, probate and estate administration, public benefits, real property, securities and municipal bonds, tax, workers compensation and paralegal management and administration.¹⁵⁰³

The scope of practice of the paralegal is confined by the direct practice of the law, which the ABA defines as ‘the acceptance of case work on behalf of one’s employer, setting fees, providing legal advice that is not specifically dictated by an attorney, making a legal decision on a client’ behalf, or

¹⁴⁹⁸ Adopted by AAfPE in 2001 San Antonio Texas.

¹⁴⁹⁹ Associate degree, baccalaureate degree (major or minor), certificate or master’s degree.

¹⁵⁰⁰ National Federation of Paralegal Associations, “How to Choose a Paralegal Education Program - National Federation of Paralegal Associations”, (2016), available at: <https://www.paralegals.org/i4a/pages/index.cfm?pageid=3365>. (accessed 23 July 2016)

¹⁵⁰¹ Statsky, WP (2016).

¹⁵⁰² Statsky, WP (2016).

¹⁵⁰³ National Federation of Paralegal Associations 2011 National Federation of Paralegal Associations (2011).

representing a client in court.¹⁵⁰⁴ Yet, paralegals in the USA have become highly skilled over the years, which has warranted the use of billable hours to charge for their services in the private sector as their scope of practice in the public sector involves the full spectrum of legal services, barring representation in a court of law.¹⁵⁰⁵ They are nevertheless allowed to represent the poor and the indigent before a host of federal and state administrative agencies.¹⁵⁰⁶ This gives rise to the blurring of lines between the authorised and unauthorised practice of the law, although there is no clear definition of either concept.

The ABA has acknowledged that it is not in its best interest to define the unauthorised practice of the law.¹⁵⁰⁷ Generally, though, it is an offence for any person who is not admitted to the state's legal bar to render any type of legal assistance.¹⁵⁰⁸ The rationale behind the UPL, in the main, centres on the need to protect consumers from unqualified and incompetent practitioners of the law.¹⁵⁰⁹ Related to this is the protection of the effective administration of justice, the fact that lawyers are subject to strict ethical rules and discipline, and the need to minimise competition among practitioners of the law.

This rationale has been met with scepticism from various quarters.¹⁵¹⁰ Critics argue that these justifications are based on flawed and untested assumptions, including the notion that a lawyer is always more competent at a given task than a non-lawyer, and that consumers in a free market would choose incompetent non-lawyers.¹⁵¹¹ They further claim that consumer protection legislation is more effective at protecting consumers from incompetent and fraudulent service providers than UPL. It is of particular significance that there is empirical evidence that demonstrates that non-lawyers are equally effective as lawyers at resolving certain legal issues.¹⁵¹² Moreover, there is evidence, which supports the notion that a non-lawyer who is familiar with a specialised area of the law is more equipped as an advocate than a lawyer who has general knowledge of the law.

However, the UPL is far from having been settled. Recently enacted Connecticut Superior Court Rule 2-44A expresses the wide scope of the UPL restrictions.¹⁵¹³ It codifies the common law position on the

¹⁵⁰⁴ Herard, GM (2011) p. 6.

¹⁵⁰⁵ Statsky, WP (2016).

¹⁵⁰⁶ Statsky, WP (2016).

¹⁵⁰⁷ Longobardi, M, 'Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers', (2013), 35, *Cardozo L. Rev.*, pp. 2043–2078.

¹⁵⁰⁸ Longobardi, M (2013).

¹⁵⁰⁹ Denckla, DA, 'Nonlawyers and the unauthorized practice of law: An overview of the legal and ethical parameters', (1998), 67(5), *Fordham Law Review*, pp. 2581–2599.

¹⁵¹⁰ Christensen, BF, 'The Unauthorized Practice of law: Do Good Fences Really Make Good Neighbors—or Even Good Sense? 1', (1980), 5(2), *Law & Social Inquiry*, pp. 159–218.

Rhode, DL, 'Policing the professional monopoly: a constitutional and empirical analysis of unauthorized practice prohibitions', (1981), *Stanford Law Review*, pp. 1–112.

¹⁵¹¹ Rhode, DL (1981).

¹⁵¹² Rhode, DL, 'Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform', (1998), 11(4), *Georgetown Journal of Legal Ethics*, pp. 989–1018.

¹⁵¹³ *Connecticut General Statutes*, (2012) CT Gen Stat § 51-88.

practice of law, which reflects the case law from other jurisdictions.¹⁵¹⁴ This rule was implemented by the judiciary to reinforce the Connecticut General Statute, which criminalises the UPL. In brief, this statute places a prohibition on the practice of law by persons who are not admitted as attorneys in the state of Connecticut.¹⁵¹⁵

Paralegal practice in the USA has evolved into an extensive service, the ambit of which is impossible to ignore. Notwithstanding the challenges regarding the scope of practice and its lack of mandatory regulation, it would seem that paralegal practice as a profession in the United States is well settled. However, being lawyer-driven and justice-sector focused begs the question of the extent to which it contributes to greater access for the marginalised and the poor. The Civil Gideon movement is testimony to challenges regarding access to justice that remain in the United States of America. While paralegal services will undoubtedly play an essential role in fulfilling this unmet need.

9.6. THE PARALEGAL PROFESSION IN ENGLAND

England has a long history of reliance on solicitor's managing clerks, dating back to the late nineteenth century, although its existence is not well documented.¹⁵¹⁶ These paralegals formed an essential part of the private practice of a solicitor for centuries and the service was thus lawyer-driven.

However, the services of paralegals were extended beyond the solicitor's office to neighbourhood advice centres. The Community Advice Bureaux (CABx), charitable entities, which catered for legal services amongst low income citizens in the country, were established in 1939.¹⁵¹⁷ These CABx were funded by local authorities, businesses, charitable trusts and individual donations. Due to the fact that the solicitors and barristers held no monopoly over provision of providing legal advice, it became a thriving business by the mid-1970s.¹⁵¹⁸

The need to provide more cost-effective legal services to a geographically diverse community and to reduce government involvement in legal services necessitated an overhaul of the country's legal aid scheme, replacing it with the Legal Services Commission.¹⁵¹⁹ This scheme funded initial legal advice, which included certain services that non-lawyers provided.¹⁵²⁰ The title of solicitors' clerk has since

¹⁵¹⁴ Longobardi, M (2013).

¹⁵¹⁵ *Connecticut General Statutes* (2012).

¹⁵¹⁶ Flood, JA & Johnstone, Q, 'Paralegals in English and American Law Offices', (1982), 2, *Winsor Yearbook of Access to Justice*, pp. 152–190.

¹⁵¹⁷ Ash Citizens' Advice Bureau, *A History of the Citizens' Advice Bureau 1939-2009*, (2009) Ash, UK.

¹⁵¹⁸ Zander, M, *Legal Services for the Community*, (1978) London, UK: Temple Smith.

¹⁵¹⁹ Young Legal Aid Lawyers, *Legal Aid - An Introduction*, (2012) London, UK.

¹⁵²⁰ Cowley, JI 2004 Cowley, JI (2004).

been replaced by legal executive, but today the term paralegal denotes paralegal practice in many contexts, including legal advisor or assistant legal advisor, legal clerk, litigation executive, litigation assistant, claims handler, file handler, contracts reviewer, police station representative, crown or magistrates court clerk, case worker, trainee law costs draftsman and costs paralegal.¹⁵²¹

The Institute of Paralegals estimates that there are 60 000 paralegals in solicitors' firms in England, and that a further 250 000 persons outside of the legal profession have jobs that contain a substantial legal element, including caseworkers, housing advisers, contracts managers, HR professionals, compliance and regulatory staff and company secretaries.¹⁵²²

9.6.1. Governance

The first association of solicitors' managing clerks was established in 1892, named the Solicitors' Managing Clerks' Association.¹⁵²³ This association ultimately evolved into the Chartered Institute of Legal Executives (CILEx).¹⁵²⁴ CILEx is the professional regulatory body for legal executives, legal practitioners, legal secretaries and paralegals in England and represents approximately 20 000 trainee and Chartered Legal Executives.¹⁵²⁵ Its focus is primarily on law office practitioners.

The Institute of Paralegals is the oldest not-for-profit incorporated paralegal representative body, which was incorporated in 2003.¹⁵²⁶ It does not have a regulatory function, but sets competency standards for paralegals, including conveyancing paralegals, legal secretaries and legal assistants. These standards are not mandatory, but a mere professional development tool, which is intended to assist with the aforementioned practitioners' recruitment, training, evaluation and career development.

The National Association of Licensed Paralegals is also a non-profit paralegal membership body that is recognised as an awarding organisation by Ofqual.¹⁵²⁷ Its purpose is to provide for the qualification of its affiliate members as paralegals and for the career advancement of its qualified members, to oversee its system of self-regulation, disseminate information, represent, promote and express the collective interests of its members, act as a consultative body on all things concerned with the paralegal profession,

¹⁵²¹ Manchester Metropolitan University, "Work as a Paralegal", (2017), available at: www.mmu.ac.uk/careers/guides.

¹⁵²² Institute of Paralegals, "The New Paralegal Profession", (2017), available at: *The Job Market* <http://www.theiop.org/careers/become-a-qualified-paralegal/law-graduates.html>. (accessed 5 April 2017)

¹⁵²³ Flood, JA & Johnstone, Q (1982).

¹⁵²⁴ Arram, J, "History of CILEx", (2017), available at: *Who We Are*

http://www.cilex.org.uk/about_cilex/who_we_are/history-of-cilex. (accessed 5 April 2017)

¹⁵²⁵ Arram, J (2017).

¹⁵²⁶ Institute of Paralegals, "Who We Are", (2017), available at: *About Us* <http://www.theiop.org/about-us/introduction.html>. (accessed 5 April 2017)

¹⁵²⁷ Ofqual is the regulator of qualifications in England & Wales.

provide a forum for all matters, which affected the interests of its members, and to provide networking opportunities amongst its members. All these entities are voluntary self-regulating bodies and CILEX is the only entity that has a regulatory function.

9.6.2. Regulation

The paralegal profession in England is mostly unregulated. However, there are certain paralegal services that are subject to regulation by statute, whether the paralegal is employed by a solicitor or self-employed. Paralegals that are employed by solicitors are regulated by the Solicitors Regulation Authority by virtue of the fact that their employers are officers of the court. Paralegals who are not employed by solicitors are subject to a range of statutes, depending on the nature of the service that they render.¹⁵²⁸

The Professional Paralegal Register (PPR) is a recent development in the 'regulation' of paralegals in the country. It was established following recommendations made in the Legal Education & Training Review (LETR), which was published in June 2013.¹⁵²⁹ The PPR is a voluntary registered scheme, which promotes professional paralegals as a recognised fourth arm of the legal profession, and to enhance consumer choice and protection. It has a complaints procedure and compensation fund for clients of paralegals who have been awarded a Paralegal Practising Certificate.

Zander notes that '[t]he English legal profession, unlike its counterparts in some countries, enjoys no monopoly over the giving of legal advice'.¹⁵³⁰ Thus, barring the above statutory requirements for registration, and the limitations related to 'reserved work', which is governed by the Legal Services Act 2007, the services of paralegals are largely unregulated.

¹⁵²⁸ Those who engage in immigration practice must be registered with the Office of the Immigration Services Commissioner unless they are exempted from registration. (Office of the Immigration Services Commissioner, "How to become a regulated immigration adviser - GOV.UK", (2016), available at: *Guidance* <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser>. (accessed 3 May 2017)

Paralegals wishing to offer legal services related to claims involving personal injury, work-related injury, disease or disability, criminal injuries compensation, Industrial Injuries Disablement Benefit, employment, housing disrepair or financial products and services must be registered with the Claims Management Division of the Ministry of Justice under the Compensation Act of 2006. (Institute of Paralegals, "The regulation and professional conduct of paralegals", (2017), available at: *Regulation* <http://www.theiop.org/regulation.html>; Financial Conduct Authority, "FCA Handbook", available at: <https://www.handbook.fca.org.uk/handbook>.) (accessed 3 May 2017)

The Financial Services and Markets Act 2000 established a registration scheme managed by the Financial Conduct Authority for persons offering most types of financial advice, including mortgage and insurance related advice. (Institute of Paralegals 2017 Institute of Paralegals (2017); Financial Conduct Authority Financial Conduct Authority. Paralegals acting as police station representatives must obtain approval from the Solicitors Regulation Authority if they want to claim compensation for services rendered under the legal aid scheme. (Institute of Paralegals 2017 Institute of Paralegals (2017).)

¹⁵²⁹ Recommendation 23.

¹⁵³⁰ Zander, M (1978) p. 229.

9.6.3. Certification

The PPR provides for various categories of paralegals, according to their knowledge and experience.¹⁵³¹ This scheme awards Professional Paralegal Practitioner status to a paralegal who is regulated by the PPR and holds a current Professional Paralegal Practicing Certificate. Registration with the PPC is only a requirement when legal services are offered to the public.

9.6.4. Education and training

No minimum qualifications are generally prescribed for a person who wishes to perform a paralegal service in England. However, for the purpose of licensing, certification and rendering certain legal services, various levels of education and training are required. NALP offers a variety of diplomas, which range from level 3 and 4 diplomas for school leavers, to a Higher Diploma in Paralegal Practice for LLB undergraduates and a level 7 Diploma in Paralegal Practice for LLB graduates.¹⁵³² A number of skills courses are also offered. Its licencing criteria for awarding fellowship status to a member include a law qualification at minimum level 6 with three (3) years' experience, or a NALP level 4 diploma with 5 years' experience. CILEx also offers level 3 and 4 Legal Services qualifications for paralegals.¹⁵³³

9.6.5. Scope of practice and reserved legal activity

Paralegals in England usually render services wherever legal or quasi-legal work is undertaken, including solicitors' offices, charities, law centres, local authorities, central government departments and agencies, the court system, industry and commerce and private paralegal firms.¹⁵³⁴ Paralegals that

¹⁵³¹A trainee paralegal who is studying towards a level 3 qualification and has no or very little work experience is categorised under Tier 1. A paralegal who has obtained a level 3 qualification and/or has a minimum of two (2) years' experience in a particular area of practice is categorised as Tier 2. Tier 3 includes those paralegals who have obtained a minimum of a level 6 qualification (degree level) and have a minimum of two (2) years' qualifying experience. A paralegal who has obtained a level 6 qualification or above and has a minimum of four (4) years qualifying experience is categorised as Tier 4 (Professional Paralegal Register, "The Tiers Explained | PPR", available at: *Protected: Paralegals* <http://ppr.org.uk/paralegals/the-tiers-explained/>.) (accessed 10 March 2017)

¹⁵³²National Association of Licenced Paralegals, "About NALP", available at: *NALP* http://www.nationalparalegals.co.uk/about_nalp. (accessed 10 March 2017)

¹⁵³³Chartered Institute of Legal Executives, "Level 3 Certificate and Professional Diploma in Law and Practice", (2017), available at: *Stage 1 Training* http://www.cilex.org.uk/study/lawyer_qualifications/level_3_qualifications. (accessed 3 April 2017)

Chartered Institute of Legal Executives, "Level 4 Knowledge Qualification", (2017), available at: *Qualification Structure* http://www.cilex.org.uk/study/legal_services_qualifications/qualification_structure/level_4_knowledge. (accessed 5 April 2017)

Chartered Institute of Legal Executives, "Level 4 Competence Qualification", (2017), available at: *Qualification Structure* http://www.cilex.org.uk/study/legal_services_qualifications/qualification_structure/level_4_competence. (accessed 5 April 2017)

¹⁵³⁴Institute of Paralegals, "Paralegal Law Firms - Legal services run by non-lawyers", (2017), available at: <http://www.theiop.org/regulation/paralegal-law-firms.html>. (accessed 3 May 2017)

are employed in solicitors' offices perform a range of routine tasks, including legal research, drafting letters and documents, preparing briefing notes, document management, proof reading, instructing counsel, taking client statements and notes in court, attending various meetings, making court applications, pleadings, billing and general administration.¹⁵³⁵

Paralegal practice outside the traditional law office environment spans a range of advice centres, consumer agencies, claims companies that manage injuries, employment and other claims, and specialist advisors in areas such as immigration, divorce, debt and housing.¹⁵³⁶

The County Court (Rights of Audience) Direction¹⁵³⁷ permitted Fellows to appear in the County Court for matters which included certain unopposed applications and applications for judgment by consent. They could also appear in County Court arbitrations and before tribunals at the discretion of the court or tribunal.¹⁵³⁸

Legal reforms such as Section 11(1) of the Courts and Legal Services Act (CLSA) 1990 made inroads into legal services, which were traditionally reserved for solicitors and/or barristers.¹⁵³⁹ Non-lawyers could apply for right of audience in the courts in respect of debt, housing matters and small claims procedures provided that they met the criteria set out in section 17 of the CLSA. The Institute of Legal Executives took advantage of the legal reforms and passed the Legal Executives Order (1998), which granted Fellows right of audience in accordance with its status as an authorised body in terms of section 27 of the Courts and Legal Services Act (1990).

The need to provide more cost-effective legal services to a geographically diverse community and the desire on the part of government to decrease its involvement in legal services prompted the overhaul of the legal aid scheme, replacing it with the Legal Services Commission.¹⁵⁴⁰ This scheme allowed for the funding of initial legal advice, which included certain services that non-lawyers provided.

The Legal Services Act¹⁵⁴¹ subsequently repealed the CLSA and the right of audience for Fellows survived this repeal. However, agents who are not in the employ of a solicitor or barrister will only be

¹⁵³⁵ Manchester Metropolitan University (2017).

The University of Sheffield, *The Careers Service. Law Briefing: Working as a Paralegal*.

¹⁵³⁶ Institute of Paralegals 2017 Institute of Paralegals (2017).

¹⁵³⁷ The County Court (Rights of Audience) Direction 1978

¹⁵³⁸ The County Court (Rights of Audience) Direction 1978

¹⁵³⁹ Legal Services Institute, *The Regulation of Legal Services: Reserved Legal Activities - History and Rationale*, (2010).

¹⁵⁴⁰ The Legal Services Commission was established in terms of the Access to Justice Act 1999.

¹⁵⁴¹ *Legal Services Act* (2007).

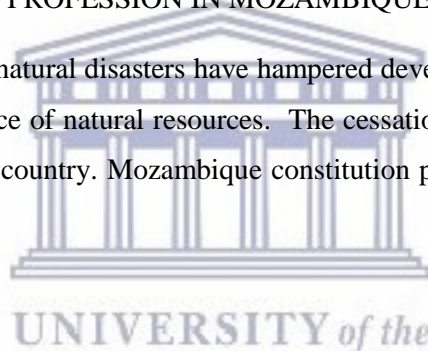
granted right of appearance on a case-by-case basis.¹⁵⁴² The Legal Services Act also provides for non-lawyers to own solicitors' firms, which are called alternative business structures.¹⁵⁴³ Section 12(1) of the Legal Services Act (2007) nevertheless lists six reserved legal activities, which are: the exercise of a right of audience;¹⁵⁴⁴ the conduct of litigation;¹⁵⁴⁵ reserved instrument activities;¹⁵⁴⁶ probate activities;¹⁵⁴⁷ notarial activities;¹⁵⁴⁸ and the administration of oaths.¹⁵⁴⁹ It has been pointed out that,

'(t)he definition of reserved legal services is relatively straightforward since those areas are contained in statute.... These areas could be termed the inner circle of legal services. In order to provide such services, a practitioner must be certified by a regulatory body which has itself been authorised so to do...¹⁵⁵⁰

It would appear that paralegal services in England are not only an integral part of conventional legal services, but have also evolved into a profitable commercial endeavour.

9.7. THE PARALEGAL PROFESSION IN MOZAMBIQUE

Poverty, civil war and recurring natural disasters have hampered development in Mozambique, which is a country that has an abundance of natural resources. The cessation of hostilities ultimately paved the way for legal reforms in the country. Mozambique constitution provides for the State to own the



¹⁵⁴² Hill, R, 'Right of audience' of September 23, 2010, *The Law Society Gazette*, online: <<https://www.lawgazette.co.uk/law/right-of-audience/57199.article>>. (accessed 5 December 2017)

¹⁵⁴³ Part 5 of the *Legal Services Act* (2007).

¹⁵⁴⁴ right to appear before and address a court, including the right to call and examine witnesses, except where, before the Act comes into force, there was no restriction (Schedule 2, para3); reserved, and therefore (subject to exemptions) can only be carried out by appropriately authorised persons, are set out in section 12(1) of the *Legal Services Act* (2007). and defined in Schedule 2.

¹⁵⁴⁵ the issuing, commencement, prosecution and defence of proceedings before any court in England and Wales, and the performance of any ancillary functions (such as entering appearances to actions) in relation to such proceedings, except again where, before the Act, there was no restriction (Schedule 2, para 4).

¹⁵⁴⁶ preparing any instrument of transfer or charge for the purposes of the *Land Registration Act*, of 2002., or making an application or lodging a document for registration under that Act; and preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales, or other instrument relating to court proceedings within England and Wales (except where, before the Act comes into force, there was no restriction relating to instruments relating to court proceedings) (Schedule 2, para 5(1) and (2)).

¹⁵⁴⁷ preparing any probate papers (that is, papers on which to found or oppose a grant of probate or of letters of administration) for the purposes of the law of, or in relation to any proceedings in, England and Wales (Schedule 2, para 6)

¹⁵⁴⁸ activities which, immediately before the Act comes into force, were customarily carried on by notaries in accordance with the "Public Notaries Act 1801", available at: <http://www.legislation.gov.uk/ukpga/Geo3/41/79/contents>.(see further, para2.6 below), though this is not taken to include reserved instrument or probate activities or the administration of oaths (Schedule 2, para7) (accessed 5 May 2017)

¹⁵⁴⁹ the exercise of the powers conferred on a commissioner for oaths by the *Commissioners for Oaths Act*, of 1889.and 1891 and section 24 of the *Stamp Duties Management Act*, of 1891.(Schedule 2, para 8).

¹⁵⁵⁰ Clementi, D, *Review of the Regulatory Framework for Legal Services in England and Wales*, (2004) London, UK: Department of Constitutional Affairs (Great Britain), ch E., para 14.

land, which cannot be bought, sold or mortgaged, and allows state agents to allocate *dereito de uso e aproveitamento de terra* (DUAT).¹⁵⁵¹ Mozambique's land policy reforms are considered to be the most progressive in Africa,¹⁵⁵² and gives legal recognition to the rights over land that was occupied on a 'historical and customary basis'.¹⁵⁵³ Prevailing conditions in respect of land in the country manifested in growing demand for land, 'weak public land institutions, unequal power relations and powerful people who do not accept the basic principles behind the 1997 Land Law'.¹⁵⁵⁴ The need, therefore, arose for the rights of vulnerable communities, including women, to be protected against the State and other powerful actors, such as investors and speculators. Paralegals performed a pivotal developmental role in informing these communities about their rights and empowering them to enforce these rights. A paralegal in Mozambique is, therefore, considered to be 'the link between communities and higher level professional and technical support...'¹⁵⁵⁵

9.7.1. Governance

Paralegals in Mozambique do not have a formal governance structure. Prior to the commencement of the CFJJ-FAO¹⁵⁵⁶ paralegal programme in 2006, 'legal technicians'¹⁵⁵⁷ and 'legal assistants'¹⁵⁵⁸ that were employed by the Institute for Promoting Access to Justice (IPAJ), provided legal assistance free of charge for the poor and the marginalised.¹⁵⁵⁹ The NGO, Liga Mocambicana dos Direitos Humanos (LDH), also employed a number of paralegals who deal with prison conditions and the treatment of those accused of crimes.¹⁵⁶⁰ Other organisations include Centro Terra Viva (CTV), a leading NGO that specialises in environmental and rural development issues, whose paralegals engage in rights training and civic education, the Organisation for Mutual Rural Assistance (ORAM), whose paralegals perform the dual role of legal advisors and community trainers, and Lupa, whose paralegals perform a similar function.¹⁵⁶¹

¹⁵⁵¹ Translated as 'the right to use and exploit the land' Linguee, "Dictionary Portuguese-English", (2017), available at: <http://www.linguee.com/portuguese-english/translation/direito+de+uso+e+a+aproveitamento+de+terra.html>. (accessed 10 January 2017)

¹⁵⁵² Tanner, C & Bicchieri, M (2014).

¹⁵⁵³ *Land Law*, of 1997.

¹⁵⁵⁴ Tanner, C & Bicchieri, M (2014) p. 24.

¹⁵⁵⁵ Tanner, C & Bicchieri, M (2014) p. 60.

¹⁵⁵⁶ CFJJ – Centre for Juridical and Judicial Training
FAO – Food and Agriculture Organisation of the United Nations

¹⁵⁵⁷ Law graduates.

¹⁵⁵⁸ Persons without a law degree but who have legal training recognised by government.

¹⁵⁵⁹ FAO – Food and Agriculture Organisation of the United Nations.

¹⁵⁶⁰ Tanner, C & Bicchieri, M (2014).

¹⁵⁶¹ Tanner, C & Bicchieri, M (2014).

9.7.2. Regulation/certification/licensure

Paralegals in Mozambique are currently not regulated; neither are they required to obtain some level of certification or have a license to render their paralegal service. They are also not legally recognised in the country.¹⁵⁶²

9.7.3. Education and training

There is strong collaboration between LDH and IPAJ over education and training for their paralegals, ‘legal technicians’ and ‘legal assistants’, as well as curriculum development for their training programmes.¹⁵⁶³ The education and training varies depending on the scope of practice. Legal technicians, who have right of appearance, are required to have a law degree.¹⁵⁶⁴ Legal assistants, who provide assistance in minor matters where there are no lawyers or legal technicians, are required to have some form of legal training that is recognised by the Ministry of Justice.¹⁵⁶⁵ The shortest formal training programme is offered by CTV-IDLO¹⁵⁶⁶ during which community-based paralegals receive only two days of training. This training focuses on community lands’ right delimitations and issues, which relate to women’s rights.¹⁵⁶⁷ Project professionals also provide in-service training to these paralegals.

9.7.4. Scope of practice

The scope of the paralegal practice in Mozambique is mainly, community-based and the role of the paralegal is developmental.¹⁵⁶⁸ They provide civic education and legal support, educate community leaders and individual households and thus enhance their negotiation power when entering into agreements.¹⁵⁶⁹ These practitioners also perform the functions of mediators and brokers, and their presence helps to level the playing field between the parties, resulting in more equitable outcomes.¹⁵⁷⁰ The paralegal in Mozambique is thus a powerful tool for legal empowerment. Their scope of practice covers a spectrum of legal services, which includes mobilisation, civic education, legal advice and legal support.¹⁵⁷¹ Currently, this scope of practice currently hardly threatens the narrow legal profession, thus

¹⁵⁶² Tanner, C & Bicchieri, M (2014).

¹⁵⁶³ Tanner, C & Bicchieri, M (2014).

¹⁵⁶⁴ Tanner, C & Bicchieri, M (2014).

¹⁵⁶⁵ Tanner, C & Bicchieri, M (2014).

¹⁵⁶⁶ Knight, R, Adoko, J, Auma, T, et al, *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda*, (2012) Rome, Italy: Namati.

¹⁵⁶⁷ Knight, R, Adoko, J, Auma, T, et al (2012).

¹⁵⁶⁸ Tanner, C & Bicchieri, M (2014).

¹⁵⁶⁹ Support for communities by paralegals employed by Centro Terra Viva (CTV), for example, was found to be most effective in proving and documenting their land rights. (Tanner, C & Bicchieri, M (2014).).

¹⁵⁷⁰ Knight, R Adoko, J Auma, T et al (2012).

¹⁵⁷⁰ Tanner, C & Bicchieri, M (2014).

¹⁵⁷¹ Tanner, C & Bicchieri, M (2014).

the unauthorised practice of the law or professional encroachment has not emerged as a bone of contention.

Although paralegal practice in Mozambique pales in comparison with its economically developed counterparts in this study in respect of size and number, its value as an essential service in the legal empowerment of the vulnerable in the country is indisputable.

9.8. THE PARALEGAL PROFESSION IN SIERRA LEONE

Brutal civil war ravaged Sierra Leone's landscape and carved deep scars into its society, which required extraordinary efforts to heal. The war has destroyed most of the country's social, economic and physical infrastructure, causing a complete breakdown of civil and political authority. It has been a daunting task to rebuild this infrastructure in order to ensure security and livelihood.¹⁵⁷² Therefore, it is no surprise that the promotion and protection of citizens' rights, especially those of women and children, have been challenging.¹⁵⁷³ Moreover, the legal aid system was decentralised and lacked clear criteria for eligibility.¹⁵⁷⁴

In the aftermath of the war, as justice facilitators, community-based paralegals, particularly in rural areas, were met with approval by the international donor community, as well as government. Paralegals who are employed by Timap for Justice are deployed across a bifurcated legal system and incorporated both the traditional and formal justice system in a pioneering endeavour to provide primary justice services in Sierra Leone. By 2012, 74 Timap paralegals were providing basic legal services in 33 locations across eight districts.¹⁵⁷⁵ Timap, together with a range of other organisations,¹⁵⁷⁶ assisted by providing these services to communities that would otherwise not have had access. Namati, an international group that supports the development of community legal services, Advocaid and Defence for Children, support women and children who are in conflict with the law, while the Network Movement for Justice and Democracy focuses on the mining sector, and Timap for Justice, Access to Justice Law Center (AJLC) and the Justice and Peace Commission (JPC), render more general legal services. Paralegals were initially referred to as 'human rights officers' but reference to these community activists has settled on the more generic term 'paralegal'.¹⁵⁷⁷

¹⁵⁷² The Republic of Sierra Leone, *Introductory Statement Consideration of the Combined Initial, 2nd, 3rd, 4th and 5th Periodic Report of the Republic of Sierra Leone in pursuance of its obligation under Article 18 of the Convention for the Elimination of All forms of Discrimination*, (2007) New York, USA.

¹⁵⁷³ The Republic of Sierra Leone (2007).

¹⁵⁷⁴ The Republic of Sierra Leone (2007).

¹⁵⁷⁵ The Law & Development Partnership Ltd (2015).

¹⁵⁷⁶ Brac, Advocaid, Access to Justice Law Centre and Justice and Peace Centre.

¹⁵⁷⁷ Sesay, D, *Community-based Paralegals in Sierra Leone*, (2014) Namati (Unpublished paper).

9.8.1. Governance

Timap for Justice works in collaboration with Community Oversight Boards (COBs) in each of the chiefdoms where they operate. Members of these COBs are selected in consultation with a range of stakeholders¹⁵⁷⁸ and COBs perform a dual function. They serve as a ‘cushion’ between the community and Timap, providing support in the event of unavoidable conflicts between certain traditional practices (and leaders) and Timap. They also assist with a community needs assessment, which helps to direct the service. Secondly, COBs play a pivotal role in ensuring sustained, thorough supervision of community-based paralegals. COBs provide regular feedback on paralegal performance to the programme directors.

9.8.2. Regulation

Paralegals in Sierra Leone were not regulated neither did rendering the service require certification. However, the Legal Aid Act (2012) provides for a mixed model of criminal and civil legal aid on a continuum of services from legal information and mediation services to legal representation in court.¹⁵⁷⁹ This institutionalised the role of the paralegal in Sierra Leone, as it recognised the role of the paralegal as an integral part of the legal aid framework. These services are provided through a public/private partnership of government and civil society.¹⁵⁸⁰ The Act established a Legal Aid Board (LAB), which is responsible for the administration, coordination and monitoring of the provision of criminal and civil legal aid.¹⁵⁸¹

The approval of a comprehensive National Land Policy by Sierra Leone’s cabinet paved the way for reforms in the country’s land tenure system in 2015.¹⁵⁸² The policy expressly provides for paralegals to assist communities in their interaction with would-be investors.¹⁵⁸³ Their services are paid for from a community justice fund, which is established from the contributions from large investors.¹⁵⁸⁴ The donor-funded Timap for Justice Programme is set to transition into part of a hybrid model of service delivery that will include Sierra Leone’s new Legal Aid Board. These legal reforms may necessitate the regulation and certification of paralegals in Sierra Leone.

¹⁵⁷⁸ These include paramount chiefs, other chiefs, local organisations, and community members.

¹⁵⁷⁹ Part VI of the *Legal Aid South Africa Act* (2014).

¹⁵⁸⁰ Dereymaeker, G, *Formalising the role of paralegals in Africa: A review of legislative and policy developments*, (2016) Cape Town, South Africa: Dullah Omar Institute (CSPRI).

¹⁵⁸¹ Part II of the *Legal Aid South Africa Act* (2014).

¹⁵⁸² Ministry of Lands Country Planning and the Environment, *Draft National Land Policy of Sierra Leone version 6*, (2015).

¹⁵⁸³ Davies, M, *Implementation of the Voluntary Guidelines on Responsible Governance of Tenure in the Land Legislation of Sierra Leone*, (2015) Rome, Italy p. 25.

¹⁵⁸⁴ Part V of the *Legal Aid South Africa Act* (2014).

9.8.3. Education and training

Paralegals in Sierra Leone receive two weeks of intensive on the job training in law, government processes and paralegal skills. All the paralegals have at least secondary education and some have university degrees.¹⁵⁸⁵ On the job training is continuous and paralegals are supervised by the Timap directors. Timap's paralegals are trained to mediate disputes, engage in advocacy and a certain level of litigation and conduct educational activities in the community.¹⁵⁸⁶

9.8.4. Scope of practice

The frontline service of Timap is rendered by community-based paralegals owing to the shortage of lawyers. These paralegals employ an assorted set of skills, which aids citizens to in address a range of justice problems.¹⁵⁸⁷ Paralegals provide information on rights and procedures, assist with government authorities and mediate disputes, which is the most common tool that is used.¹⁵⁸⁸ The range of justice problems include 'intra-community breaches of rights (e.g. a father refuses to pay maintenance, or a widow is wrongfully denied inheritance), as well as justice issues between people and their authorities (e.g. corruption, abuse of authority, failures in service delivery)'.¹⁵⁸⁹

The work of paralegals also includes dealing with domestic violence, child abandonment, economic exploitation, employment related matters, education and health.¹⁵⁹⁰ Anecdotal evidence also suggests that paralegals monitor and observe proceedings in court, advise and prepare clients for appearance in court, engage in post-war community peace building, are involved in outreach programmes, promote accountability and contribute to community empowerment.¹⁵⁹¹ The unauthorised practice of the law, which involves the paralegal, does not feature in any of the available literature. Professional encroachment is thus less of an issue in Sierra Leone than in the more economically developed countries.

Paralegalism in South Africa, with its dual legal system and a society that straddles the economic divide, displays some characteristics of the practice as it manifests in the more economically developed

¹⁵⁸⁵ Tanner, C & Bicchieri, M (2014).

¹⁵⁸⁶ Tanner, C & Bicchieri, M (2014).

¹⁵⁸⁷ Open Society Justice Initiative (2010).

¹⁵⁸⁸ Maru, V, 'TIMAP for Justice: A Paralegal Approach to Justice Services in Sierra Leone' in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) Chicago, USA: Penal Reform International 139–143; Dale, P, *Delivering Justice to Sierra Leone's Poor: An Analysis of the Work of Timap for Justice*, (2009) Sierra Leone: World Bank.

¹⁵⁸⁹ Maru, V (2007); Dale, P (2009).

¹⁵⁹⁰ Maru, V (2007); Dale, P (2009).

¹⁵⁹¹ Sesay, D (2014).

countries, as well as those on the African continent. The focus here is on community-based paralegals, who are the most closely associated with access to justice.

9.9. CONCLUSION

Notwithstanding the dearth of literature on the community-based paralegal practitioner in South Africa, there is clear evidence that these practitioners occupy a unique space in the South African legal 'fraternity', whether they are recognised or not. Community-based paralegal practice has evolved into a comprehensive primary socio-legal service without which many poor individuals and communities would have been unable to access, claim and enforce their rights. This practice spans the full spectrum of primary legal services as defined in Chapter 2, which is made possible with donor funding and volunteerism. Despite this, the paralegal policy reforms initiated by the State to date fall hopelessly short of Justice Vision 2000. None of the recommendations for paralegals contained in this blueprint were met and uncertainty remains around formal recognition of the paralegal practitioner.

The stalled legal reforms that the State initiated prompted the community-based paralegal sector to self-regulate in respect of governance and education and training and to pursue policy reform more robustly. The CAO Draft Bill, which was submitted to the Department of Justice and Correctional Services, represents a promising start towards policy reform. However, this study has serious concerns about the constitutionality of some of the proposals in the concept document. The proposed CAO Draft Bill, although still in its embryonic stage, is highly restrictive on the scope of practice of the paralegal and, as a result, detrimental to the right to equality in the legal process for all who need these services.

Paralegal services in the United States of America, England, Mozambique and Sierra Leone evolved, mostly, from the quest to meet the need for access to justice among the poor. There is a distinct difference between paralegal practices as they emerged in economically developed countries¹⁵⁹² and in those of economically developing countries.¹⁵⁹³ Meeting the conventional formalities of a profession is less of a concern among the economically developing countries than their more developed counterparts. Moreover, the community-based nature of the work of paralegals is a central feature within the African continent.

Paralegal 'professions' in the two African countries do not always strictly subscribe to the conventional features of a legal profession. These features include advice and service to the community in a specialised field of training, a governing body that represents, controls, disciplines and sets minimum

¹⁵⁹² United States of America and England.

¹⁵⁹³ Mozambique and Sierra Leone.

standards for entry and education, continuous update of education and training and a standard of ethical conduct and performance. The nature of the service is highly contextual, which renders its scope of practice heterogeneous and the nomenclature of the practitioner fluid. Paralegal practice, as it emerges from the countries under examination, can nevertheless be classified into the following broad categories:

- Paralegals who work in law firms, government departments and corporate entities, and who perform a support role for lawyers and professional teams
- Paralegals who run their own for profit paralegal practices;
- Paralegals who work in the non-governmental and non-profit sector in support of lawyers in the organisation; and
- Community-based paralegals who work with vulnerable communities in rural areas, townships and informal settlements.

The first two categories would cover the majority of paralegals in the United States of America and England. The last two categories reflect paralegal practices within the African continent, particularly in Mozambique and Sierra Leone.

Due to the nature of paralegal practice in the United States of America and England, self-governance, in the form of professional bodies that regulate, certificate and prescribe standards of education and training for paralegals, is prevalent. However, the voluntariness of the membership of these professional bodies remains a central feature.

In the USA rendering of paralegal services has been lawyer-driven and is thus closely connected to a law office environment. Its governance structures are well developed, albeit for the most part voluntary, while the practice involves legal advice and legal services, and there are minimum standards for entry and education, whether per market demand or voluntarily regulated, as well as standards of ethical conduct and performance. There is also evidence of opportunities for continuing professional development. Parts of paralegal practice in England share the above features of its counterparts in the USA, but a unique feature in England is the development of paralegal practice as a commercial endeavour. Paralegalism in these two countries has burgeoned into a well-established, recognised professional service to the public at large although resistance to certain features of a profession such as comprehensive regulation and licensure, is evident.

Paralegal practice in the African countries under review is driven by the developmental nature of the service, which reflects its socio-legal function and the community-based focus thereof. It does not fit

the conventional mould of a professional service in respect of conventional minimum standards for entry, as well as education and regulation. The practice has thus far mostly been project-based and dependent on donor funding and volunteerism. This did not render the service any less essential in these countries. Contrarily, in the absence of this service, many poor and marginalised individuals and communities would be unable to empower themselves as economic actors in their own countries. They would also be denied protection from abuse and unable to meaningfully participate in the developments that affect them directly. This practice involves legal advice and service that is rendered subject to standards of ethical conduct and performance. However, in Sierra Leone, for example, the recently enacted Legal Aid Act expressly recognises paralegal services and has incorporated these services under legal aid.

A lack of formal recognition in some instances affects the legitimacy of these practitioners although the professionalisation of the sector, in accordance with the conventional mould of the legal profession would not necessarily achieve that. Paralegal service on the African continent is diverse and the focus is not only on defending rights but more importantly, on empowering rights holders to claim and enforce their rights.

Community-based paralegal practice in South Africa will evolve constantly. At this stage of its evolution, access to justice is better served if the practice evolves from a *voluntary charitable* service, which is funded by donor funding *only*, to providing comprehensive primary legal assistance to communities and individuals as an antithesis to the almost unfettered power of the high end fee paying client. This should be funded from multiple sources which would lessen the financial burden on the State. In so doing, it will assist in mitigating the power imbalance between vulnerable communities and individuals on the one hand and conversely, powerful State and non-State actors.

South Africa has arguably led the institution of the paralegal on the African continent. However, it has recently fallen behind its African counterparts in respect of regulatory reform. Paralegalism in South Africa has the potential to span the practice as it manifests in the more economically advanced countries in the study, as well as in those on the African continent. Policy reform should have due regard for this unique feature of the South African paralegal landscape.

PART VI



Conclusion

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CHAPTER 10

CONCLUSIONS AND RECOMMENDATIONS

10.1. CONCLUSIONS

This study investigated whether the existing South African human rights framework creates scope for the paralegal to improve access to procedural justice in civil matters and, as a consequence, contribute to the transformation of the legal profession. It arrived at the conclusion that the human rights framework both restricts and enables the practice of the community-based paralegal in the country. The key challenge identified early in the study is the absence of a theoretical and philosophical framework, not only in academic literature, but also policy documents which would define the transformation of the administration of justice in the country. The literature and policy documents, therefore, did not contain a philosophical and theoretical framework. This resulted in a definitional vacuum in some instances and definitional ambiguity in others which this study first had to attempt to resolve.

The author's critical reading of the goals and strategies of the transformation of the administration of justice (Justice Vision 2000) and the mandate given to the State in the preamble to the Constitution concludes that a legal empowerment paradigm would best describe the philosophical underpinnings of the transformation of the administration of justice in South Africa. The various theories best aligned with the goals and strategies of the transformation of the administration of justice were identified from within this legal empowerment paradigm.

In a constitutional democracy such as South Africa, the relationship between the State and its citizens is defined by a social contract which is codified in the Constitution. The legal empowerment approach and the transformation agenda mandated by the Constitution assisted in addressing the definitional vacuum and ambiguity for the purpose of this study. Access to justice in South Africa thus denotes substantive as well as procedural justice and the latter is considered to be measured against the capacity of individuals and communities to pursue, claim and enforce their rights. Legal services are framed within the context of legal assistance and denote a continuum of services involving the provision of legal information, advice, support and representation that spans both primary and secondary legal services. These services could be rendered by a legal or paralegal practitioner, depending on the complexity of the matter or the risk to the client. The paralegal in South Africa is defined as a person with or without formal legal training, who renders basic legal and quasi-legal services with or without reward. Legal assistance at the expense of the State is regarded as legal aid.

The transformation of the legal profession was a key feature of the transformation strategy involving the administration of justice. The transformation of the legal profession reflects characteristics of a symbiotic metamorphosis and can therefore be described as an evolutionary process of reconstruction of the existing regulatory framework in order to guarantee access to a reformed institutional framework that gives effect to the values of a democratic and constitutional order centred on the emancipation of its citizens.

This study also considered a number of key features of access to justice in an attempt to answer the research question. It focused on the substantive legal framework that codifies access to justice, the institutions and human resources that support it and the values and attitudes that are conducive to access. In so doing, it endeavoured to determine the scope that currently exists for the paralegal to contribute to access to justice and the transformation of the legal profession in South Africa.

The triumvirate of interrelated values namely human dignity, equality and freedom animates the new democratic order in South Africa and shapes a human rights-based approach to access to justice. Each of these values, to a greater or lesser extent, permeates every right in the Bill of Rights. These values are also expressly entrenched in distinct waymarks in the Constitution and find expression in substantive provisions within the Bill of Rights. These interrelated values and related substantive rights inform the manner in which the Bill of Rights is interpreted.

The focus within the substantive legal framework of access to procedural justice in civil matters in this study is on section 34 of the Constitution of South Africa. This provision, like all other provisions in the Bill of Rights, is informed by an international and regional framework, embodied, among others, in the UDHR (Universal Declaration of Human Rights), the ICCPR (International Covenant on Civil and Political Rights) and the ACHPR (African Charter on Human and Peoples' Rights). The right of access to dispute resolution fora is considered to be a pivotal precept of the right to procedural justice without which the guarantees and protections contained in human rights instruments would be worthless. The core features of the right to procedural justice that emerge from the international and regional arena include the right to equality before the courts and tribunals, a fair and public hearing and a competent, independent and impartial tribunal. These guarantees apply to both criminal and civil proceedings. No direct reference to paralegals is made in these instruments but a body of soft law has developed that entrenches the role of paralegal practitioners in the delivery of access to justice for the marginalised and the poor.

Section 34 of the Constitution of South Africa contains the right to procedural justice in civil matters. It does not prohibit current community-based paralegal practice neither does it preclude an expansion of such a practice. To the contrary, where such practice results in removing barriers to access to justice

and improving access for all, but especially vulnerable communities, the practice would be in compliance with the transformation agenda of the Constitution and give effect to the substantive rights of human dignity, equality and freedom. However, South Africa is not immune to the malaise of many other countries, where the legal reforms fall short of expectations, either due to shortcomings in their design and/or problems in its implementation. Section 34 fails to codify the right to a fair hearing in civil matters in sufficient detail, leaving it up to the courts to formulate the key features of the right as and when the opportunity arises.

A key feature of the right to a fair hearing is the right to legal assistance. A critical reading of section 34 through the prism of the triumvirate of values that animate the new democratic order is guided by the constitutional waymarks that entrench these values. Such a reading invites the interpretation of section 34 to include the right to legal assistance, rendered by a legal or paralegal practitioner, where appropriate. The State, therefore, has a constitutional obligation to fund legal assistance where the interest of justice so requires. Although the ICCPR and the ACHPR stop short of expressly conferring the right to legal aid in civil matters under any circumstances, a body of soft law has developed that requires legal aid where it is required by the interest of justice.

Subsidiary constitutional legislation and related delegated legislation both enable and restrict the contribution of the paralegal to enhance access to justice in South Africa. LASAA (Legal Aid South Africa Act), for example, is couched in wide enough terms to include legal assistance as a continuum of primary and secondary legal services at the expense of the State. It also expressly makes provision for the employment of paralegals although their scope of practice is not defined. However, in practice, legal aid in South Africa is mainly centred on criminal matters, secondary legal services, the courts and the narrow legal profession. Limited provision is made for paralegal assistance and primary legal services, where the need is concentrated. The practice contradicts the statutory framework of LASAA and falls short of a legal empowerment paradigm that encourages paralegal assistance. The skewed allocation of the limited resources may be regarded as a breach of the social contract between the State and its citizens and an infringement of the right to equality and the right to a fair hearing. LASA (Legal Aid South Africa), has thus far not incorporated existing community-based services into the legal aid fold, as is the movement currently across the African continent.

The transformation of the legal profession is a central feature of the transformation of the administration of justice which is intended to facilitate the transformation of South African society by increasing access to justice. The legal reforms in the legal profession are therefore intended to aid that transformation. However, the Legal Practice Act falls short of this transformation agenda in respect of the paralegal. It relegates the formal recognition and the professionalisation of the paralegal to an indeterminate time in the future and defines the legal profession along conventional lines, restricting membership to advocates

and attorneys. This leaves community-based paralegals, who are at the coalface of the suffering of the poor and the marginalised, on the fringes of the 'legal fraternity' dispensing with an obligation that is essentially that of the State, namely, to make justice accessible to all. Comprehensive primary legal services are left dependent on donor funding and volunteerism.

The 'Community Advice Office Draft Bill' ('CAO Draft Bill'), proposed by the community-based paralegal sector, which is intended to codify the role of the community-based paralegal in South African society made a promising start towards the formal recognition of the paralegal practitioner. However, this concept document is more restrictive on the scope of practice of the community-based paralegal than the Legal Practice Act, which does not address the scope of practice of the paralegal practitioner at all. In the absence of donor and/or State funding, community-based paralegal services are reduced to a pro bono service under this 'CAO Draft Bill'. This has serious implications for the sustainability of the service and thus does not assist in enhancing access to justice for the marginalised and the poor, contrary to the purpose of the 'CAO Draft Bill'.

Chapters 8 and 9 of the Constitution also make provision for an institutional framework supporting access to justice that spans a network of courts, tribunals, commissions, state institutions supporting constitutional democracy and alternative dispute resolution fora. Most of the proceedings in conventional courts are complex and preclude paralegal assistance. Therefore, regulations such as the rules of the conventional courts confine legal representation mainly to representation by an advocate or attorney. The small claims courts, for example, preclude paralegal representation, even though paralegal assistance may be appropriate under the circumstances. In some instances, therefore, these restrictions are more onerous than its intended purpose and presents systemic barriers to access to justice by excluding the paralegal practitioner. However, there are a number of specialist tribunals, such as the CCMA (albeit indirectly), and courts, such as the labour courts and the equality courts, that permit representation by persons other than members of the narrow legal profession, which includes representation by paralegal practitioners.

Efforts to codify alternative models for dispensing justice such as the Traditional Courts Bill have also fallen short of implementation, resulting in a disconnect between the law and parts of the South African Society. These communities have suffered particular disadvantages under the previous regime.

Legal assistance is defined beyond legal representation in a judicial or quasi-judicial forum. In contemporary, highly regulated South African society, it is imperative for every citizen to have a basic understanding of the law to obey it or rely on it for protection. The lack of knowledge of the law deprives it of its deterrent effect, leaves citizens without redress and undermines the new democratic order. Where vulnerable communities function in the shadow of the law but the shadow function of the

law is inaccessible to them, the impression settles in the minds of the marginalised and the poor that the law is the problem, with serious consequences for peace and stability in the country.

The Access to Justice and Promotion of Constitutional Rights Baseline Survey found that the foundational values of human dignity, equality and freedom do not necessarily manifest in the attitudes of the citizens of the country whether they were historically disadvantaged or not. The apartheid dispensation prior to 1994 institutionalised discrimination, abuse of power and exploitation and wove it into the very fabric of South African society. Strategies to enhance access to justice lacks insight if they are informed by an assumption that these conditions have changed more than two decades into democracy because the substantive legal framework has been dismantled and the institutions have changed. The gap between the law and the people is real and reliance on the narrow legal profession and justice sector thus far failed to empower the disadvantaged and to entrench these foundational values.

The State has acknowledged that it will not be able to narrow this gap without the aid of civil society. Community-based paralegal practitioners who currently perform a socio-legal function within communities, are strategically positioned to assist in narrowing that gap. Their function is nevertheless hampered by their dependence on donor funding and volunteerism, the lack of formal recognition and the failure to incorporate these services into the statutory framework of legal services and legal aid within the country. The aforementioned conclusions thus lead to the following recommendations.

10.2. RECOMMENDATIONS

The State has committed itself to establishing a more egalitarian and just society. It is therefore axiomatic that addressing the justice needs in South Africa requires a multi-pronged, multi-level approach. To date, the State has involved three pillars extensively, namely, social assistance, health and education. Legal assistance in civil matters has been included to a limited extent. The right of access to procedural justice, which includes the right to legal assistance, is instrumental in bringing about substantive justice. The justice gap in South Africa has to be reframed as a social issue that extends beyond the legal system. Greater investment in this fourth pillar, namely, legal assistance, and integrating it with efforts in health, education, and social development, coupled with economic development may assist the State in meeting its commitment and will create scope for the paralegal practitioner as a facilitator of access to justice. The recommendations will therefore focus on the conceptual framework for the administration of justice; human resources, infrastructure and institutions; education and training; research and the paralegal profession.

10.2.1. A philosophical and theoretical paradigm for the transformation of the administration of justice

A paradigm for the transformation of the administration of justice has to be adopted which will clarify the theoretical and philosophical context that informs the transformation and define the nature of the relationship not only between the State and its citizens but also the State and the narrow legal profession. The State should therefore adjust its strategies for transformation in accordance with that theoretical and philosophical framework. Existing strategies and policies seem most closely aligned to the symbiotic metamorphosis model of transformation and policy documents need to reflect this more clearly.

It has been argued in this study and there is precedent within the country and beyond for a paradigm shift from the narrow interpretation of the rule of law(yers) to a legal empowerment paradigm that involves the paralegal. The adoption of this theoretical and philosophical paradigm may also assist in clarifying the roles and responsibilities of stakeholders in this transformation process. However, definitional ambiguity may persist in some instances.

10.2.2. The substantive legal framework and institutions that support access to justice

The Department of Justice and Correctional Services should reconsider its almost exclusive investment in secondary legal services and the expensive machinery that accompanies it. Redirecting its limited resources to primary legal services where the need is the greatest presents a more efficient and cost-effective way in meeting the State's obligation under the social contract and its constitutional obligation to provide access to procedural justice. LASA should thus expand the existing portfolio of legal services to include a financially sustainable, primary legal service model that can be taken to scale.

The patchwork of basic legal services that is currently rendered by non-government institutions with its exclusive dependence on volunteerism by paralegal practitioners and donor funding has to be transformed into a comprehensive, integrated government-funded initiative. Limited resources of the State may require funding on a continuum. Central to this initiative is the transformation of legal assistance. This transformation requires the unbundling of legal services so that the legal matter is directed to the most efficient and cost-effective service provider, which includes the paralegal.

The provision of legal assistance in civil matters on a case-by-case basis is not a feasible and sustainable model. This right has to be codified and expressed as a fundamental human right subject to similar criteria as the right to legal assistance in criminal matters and consideration should be given as to how paralegal services can provide a more cost effective alternative to those rendered by attorneys. The

codification of this right does not require constitutional amendment. It requires delegated legislation to reflect the criteria endorsed by the Constitutional Court and proposed by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

The potential of customary forms of justice needs to be unlocked and aligned to the new constitutional democratic order. The Traditional Courts Bill therefore needs to be aligned to the Constitution and enacted to give effect to the State's constitutional mandate. The value of the community-based paralegal practitioner in this process and the potential for meeting the justice needs of rural communities cannot be underestimated and needs further investigation.

The rules of the courts and other adjudicating mechanisms must be reviewed in order to determine to what extent these rules present systemic barriers to access to justice by precluding paralegal representation.

10.2.3. Legal education and training

Basic legal literacy should be included in the basic education curriculum and the educators that are involved in it should undergo basic training in legal education. Aspects that are fundamental to basic legal literacy include civics and human rights education, basic family law and consumer education.

Law faculties at universities need to re-imagine the role of law graduates in delivering access to justice and deans have an important leadership role to play in this regard. Law curricula need to be re-examined and focus beyond the narrow legal profession and academia. The cost of legal education has to be addressed and law faculties have to assist in creating employment opportunities for their own graduates.

Universities of Technology need to re-examine their curricula and bring paralegal education firmly into the domain of higher education. They further have to explore the use of technology in delivering access to justice more cost-effectively and efficiently.

Law faculties and departments at post school institutions should pay greater attention to the national policy framework on post school education which has as its focus one single, integrated post-school system. Articulation from the Occupational Qualifications Sub framework to the Higher Education Qualifications Sub framework should form an integral part of curriculum development in the legal sciences. This would enhance the education and training of the paralegal practitioner, assist in addressing the challenges in law curricula and create pathways for articulation on a continuum.

10.2.4. Research

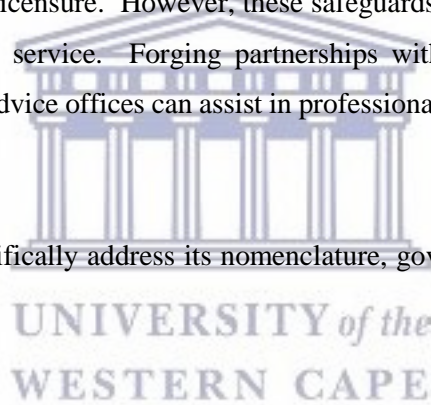
The State should redirect funding for research to evidence-based information on community-based strategies. Social impact research would enable decision makers to monitor and evaluate interventions such as taking basic legal services to scale and deploying paralegal practitioners. Determining the unmet legal needs of individuals and communities and the incidence of self-representation will assist in directing legal assistance where it is most needed.

There is therefore a need for applied and multidisciplinary research in alignment with Sustainable Development Goal 16.

10.2.5. The paralegal profession in South Africa

The State should maximise the potential of the paralegal practitioner as a tool for legal empowerment through express statutory recognition and funding. This may require safeguards in the form of registration, certification and/or licensure. However, these safeguards should not be so onerous that it defeats the very purpose of the service. Forging partnerships with existing structures within the community such as community advice offices can assist in professionalising the sector and taking basic legal services to scale.

Paralegal regulation should specifically address its nomenclature, governance, education and training and scope of practice.



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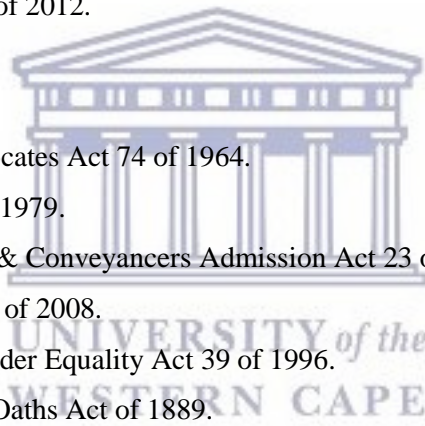


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ABBREVIATIONS

- AAfPE – American Association for Paralegal Education
- ABA – American Bar Association
- ACAOSA – Association of Community-based Advice Offices of South Africa
- ACHPR – African Charter on Human and Peoples’ Rights
- ADR – alternative dispute resolution
- AJLC – Access to Justice Law Center
- AU – African Union
- BLA – Black Lawyers Association
- CABx – Community Advice Bureaux (CABx)
- CAOs – Community Advice Offices
- CCMA – Commission for Conciliation, Mediation and Arbitration
- CEDAW – Committee on the Elimination of Discrimination against Women
- CFJJ – Centre for Juridical and Judicial Training
- CHE – The Council on Higher Education
- CILEx – Chartered Institute of Legal Executives
- CLE – community legal education
- CLEP – Commission on Legal Empowerment of the Poor
- CLSA – Courts and Legal Services Act
- COBs - Community Oversight Boards
- CODESA – Convention for a Democratic South Africa
- CTV – Centro Terra Viva (CTV)
- DUAT – allocate dereito de uso e aproveitamento de terra (the right to use and exploit the land)
- FAO – Food and Agriculture Organisation of the United Nations
- FET – Further Education and Training
- GCB – General Council of the Bar
- HEQC – Higher Education Quality Committee

