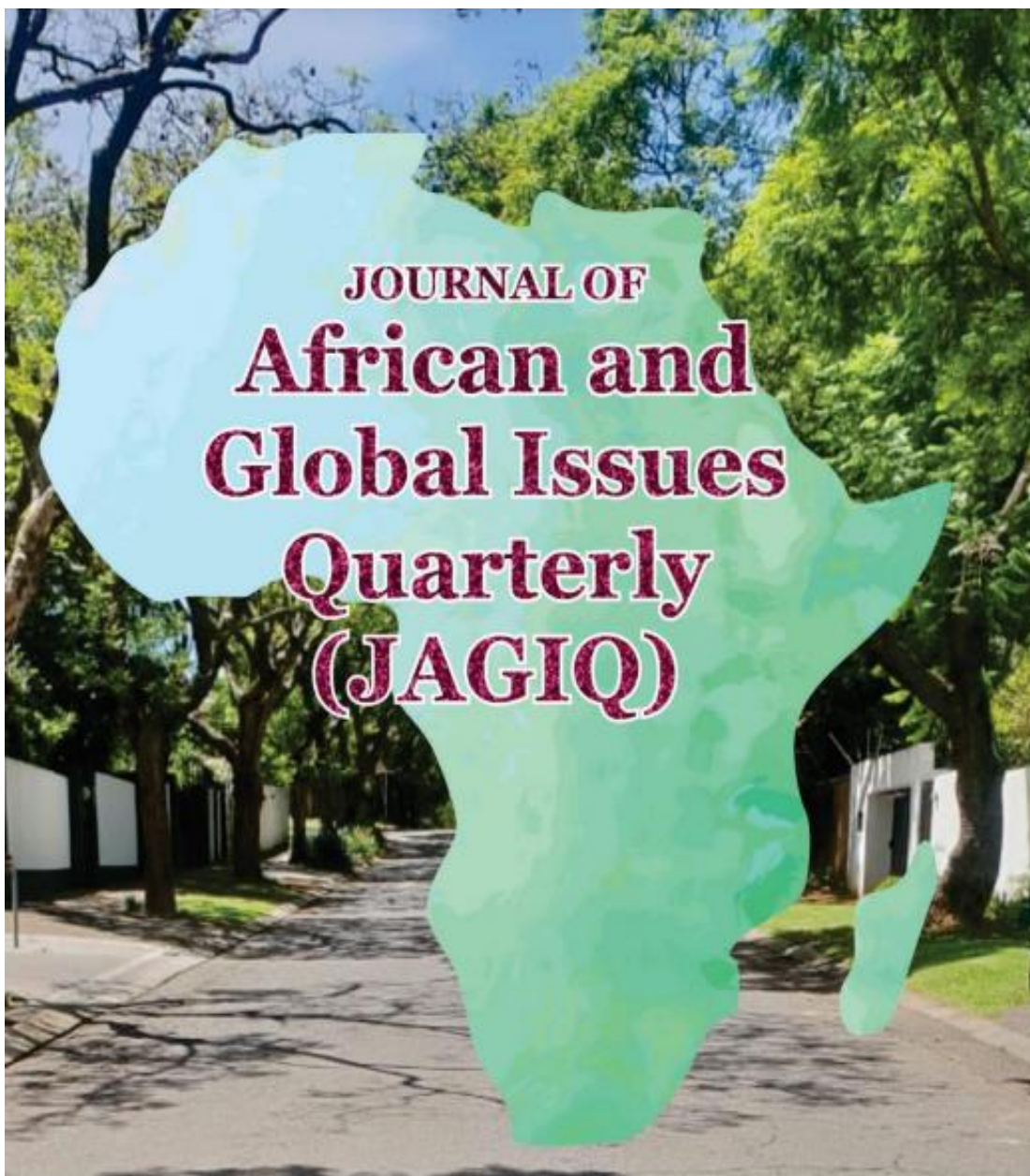




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Editorial Note

Indigenous Knowledge, Institutional Capacity, And Africa's Quest For Self-Determination

Welcome to the October 2026 issue of the African and Global Issues Quarterly. The collection of articles assembled here reflects the journal's enduring commitment to interrogating the multifaceted challenges and opportunities confronting the African continent and its place in the global order. The contributions in this volume share a common thread: a determination to look inward for solutions while engaging critically with external frameworks and legacies.

Several articles in this issue foreground the imperative of harnessing indigenous knowledge and frameworks as vehicles for progress. Nkemakolam and Amaechi propose "Igbozealotism" as an indigenous framework for socio-political and economic advancement, challenging scholars and policymakers to centre African philosophical traditions in contemporary governance discourse. Similarly, Mthethwa, Kolanisi, and Singh explore the repositioning of indigenous knowledge in fostering "studentpreneurship," while Mahlala and colleagues examine indigenous governance systems through a public administration lens. Kilonzo and her co-authors contribute a profile of indigenous banana cultivars, reminding us that agricultural biodiversity and traditional knowledge are integral to food security and rural livelihoods. These contributions collectively affirm that sustainable development in Africa must be rooted in, rather than detached from, local epistemologies and practices.

The issue also engages critically with questions of institutional effectiveness and the delivery of public goods. Lamidi and Hofisi examine the implementation gap in South African public service delivery, highlighting the centrality of bureaucratic capacity. Malope's study of community health worker programmes illuminates the intersection of recruitment, governance, and the democratisation of public administration. These articles underscore that institutional strengthening is not merely a technical exercise but a deeply political one, requiring accountability, inclusivity, and responsiveness to community needs.

On the continental and global stage, Odaudu's analysis of post-Françafrique dynamics in the Sahel offers a penetrating account of shifting dependencies and external realignments in Mali, Burkina Faso, and Niger, a region of immense strategic significance. Taleat, Lukamba, and Diedericks examine the localisation of the

Sustainable Development Goals, arguing that global agendas must be adapted to local realities if they are to deliver meaningful prosperity. Maeresera's study of strategic communication and nation branding during Zimbabwe's COMESA chairmanship illustrates the role of media in projecting regional leadership.

Finally, the issue addresses pressing social and demographic concerns. Omopo and Pillay investigate the psychological distress associated with food insecurity and housing conditions among school-going children and adolescents, while Ifanayajo, Palamuleni, and Adebowale provide a decomposition analysis of fertility rates among women of reproductive age in Sub-Saharan Africa.

Taken together, these thirteen articles offer a rich and diverse body of scholarship. They challenge us to think deeply about the relationship between indigenous agency and institutional effectiveness, between local realities and global agendas. We trust that this issue will stimulate further research and debate and contribute meaningfully to the advancement of knowledge on African and global affairs.

We thank our authors, reviewers, and readers for their continued support.

Editor

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Table of Content:

1. Proposing Igbozealotism As An Indigenous Framework For Advancing Socio-Political Progress And Economic Development In African Political Landscape <i>Somadina Cynthia Nkemakolam, Kingsley Ekene Amaechi</i>	6
2. Africa and Sustainable Development Goals: Localization of the Global Agenda towards future prosperity Bisiriyu Abiodun TALEAT, Muhlya Tshombe LUKAMBA, Melvin Diedericks	24
3. Article 33 Of The United Nations Charter And The Peaceful Settlement Of Disputes: An Afrocentric Critique Dickiel Kachekenje Mwale Kusainda, Kgothatso Brucely Shai	42
4. Repositioning Indigenous Knowledge Utilisation in "Studentpreneurship" Mzweleni Fundani Mthethwa, Unathi Kolanisi, and Sue Singh	62
5. Post-Françafrique in the Sahel: Dependency, Autonomy, and External Realignments in Mali, Burkina Faso, and Niger Joel Odaudu	92
6. The Persistence and Evolving Role of Traditional Courts within the National Legal Framework of South Africa. Sikhumbuzo Sibusiso Khoza, Khulisile Judith Nkuna, Innocent Zitha	123
7. Bridging the Implementation Gap: Bureaucratic Capacity and Public Service Delivery in South African Context Kazeem Oyedele Lamidi, Costa Hofisi	142
8. Recruitment, Governance, And The Democratisation Of Public Administration: Evidence From A Community Health Worker Programme In Sedibeng District, Gauteng Nthabeleng Malope	165
9. Food Insecurity, Housing Conditions and Psychological Distress among School-Going Children and Adolescents Aged 9–19 Years Oluwaseun Emmanuel Omopo, and Jace Pillay	194

10. Parity Progression Ratio and Decomposition Analysis of Fertility Rates
Among Women of Reproductive Age in Sub-Saharan Africa
Ifanayajo Oluwafemi, Palamuleni Martin E., Adebawale Ayo S.
217
11. Exploring Indigenous Governance Systems And Traditional Practices: A
Contemporary Public Administration Perspective
Sandiso Mahlala, Zwelinzima Ndevu, Phumudzo P. Ramolai, Bright Muronda
246
12. A Profile of Indigenous Banana Cultivars in Rural South Africa
Beata Kilonzo, John B. Ochanda Ogola, Ishmael Obaeko Iwara
271
13. Strategic Communication and Nation Branding: Media Instrumentality in Projecting
Zimbabwe's Regional Leadership During the COMESA Chairmanship, 2026–2027
Sadiki Maeresera
286

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THE PERSISTENCE AND EVOLVING ROLE OF TRADITIONAL COURTS WITHIN THE NATIONAL LEGAL FRAMEWORK OF SOUTH AFRICA.

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Abstract

This article critically examines the persistence and evolving role of traditional courts within the national legal framework of South Africa. Despite the constitutional recognition of customary law under Section 211 of the 1996 Constitution, traditional courts face complex challenges balancing indigenous dispute resolution practices with constitutional imperatives, such as gender equality, human rights, and procedural fairness. Drawing upon a comprehensive review of legal texts, case law, legislative instruments, and socio-legal scholarship, this study highlights the historical legacy of colonial and apartheid-era laws, most notably the Black Administration Act of 1927, which institutionalized and controlled traditional courts, often embedding patriarchal and hierarchical power structures. These historical factors continue to influence contemporary perceptions and functions of traditional courts. The article further explores the tensions between customary practices and

constitutional norms, focusing on critical issues, such as gender exclusion, the absence of formal procedural safeguards, and limited access to legal representation. Additionally, the study addresses ongoing institutional challenges, including the contested Traditional Courts Bill and debates over legitimacy, accountability, and community participation in law reform. Recommendations underscore the urgent need for inclusive, participatory legislative processes, comprehensive training for traditional leaders on constitutional rights, and the establishment of effective oversight mechanisms that respect cultural autonomy while ensuring justice and accountability. The paper concludes that the survival of traditional courts depends on their ability to evolve in ways that uphold both community values and fundamental rights within South Africa's democratic framework.

Keywords: *Traditional Courts, Customary Law, Constitutional Law, Legal Pluralism, Gender Equality, Judicial Reform,*

Introduction

One of the most contentious yet necessary components of post-apartheid legal pluralism is traditional South African courts. Rural people have historically resolved disputes in precolonial African courts. They survived colonial domination and apartheid-era legal prohibition, proving their social legitimacy and indigenous roots. Community norms and social behaviour shape customary law, making traditional courts legal and cultural, adds Lehnert.¹

Changes to the constitution after 1994 restored democracy's customary law and adjudication talks. Section 211 of the Constitution recognises customary law, subject to the Constitution and any relevant laws.² This acknowledgement

presents two challenges. Cultural identity and indigenous conflict resolution must be preserved, while aligning these systems with constitutional ideals including equality, gender justice, and fair trial rights. Himonga and Bosch believe that this tension often marginalises customary institutions or reconfigures them to reflect Western models, eroding their cultural legitimacy.³

Legislation to formalise traditional courts has caused debate. The Traditional Courts Bill [B1–2012] and its revisions aimed to integrate these courts into the legal system.⁴ As Claassens and Weeks note, the Bills have been criticised for their top-down imposition, lack of consent-based participation, and perceived entrenchment of patriarchal control.⁵

¹ Lehnert W, 'The Role of African Customary Law in South Africa's New Legal Order' (2005) 21 SAJHR 242

² Constitution of the Republic of South Africa 1996, s 211

³ Chuma Himonga and Craig Bosch, 'The Application of African Customary Law under the Constitution of South Africa:

Problems Solved or Just Beginning?' (2000) 117 SALJ 306.

⁴ Traditional Courts Bill [B1–2012].

⁵ Aninka Claassens, 'Traditional Courts Bill: What's in it for Women?' (2009) Agenda 11–20.

Civil society organisations including the Legal Resources Centre lamented the lack of procedural safeguards and appeal processes.⁶ Public discontent and legal uncertainty persist, particularly over representation, women's rights, and institutional responsibility, despite changes like the Traditional Courts Bill [B1–2017].⁶

Over 17 million South Africans, mostly in rural Limpopo, Eastern Cape, and KwaZulu-Natal, use traditional courts.⁷ These courts resolve land disputes, inheritance disputes, personal problems, and petty crimes. Regions differ in structure and operation. Koyana claims that informal traditional courts are valid forums for justice since they are based on customary law and local leadership.⁸ However, operational inconsistencies and disagreements over customary law and current rights-based jurisprudence highlight a major legal and policy issue. Traditional courts' relevance, legitimacy, and transformation remain crucial to legal pluralism, access to justice, and postcolonial identity in South Africa. This study examines whether traditional courts may be harmonised with constitutionalism or if they constitute a separate, perhaps competing legal order. Thus, the primary study topic is how to sustain and alter traditional courts within

South Africa's legal framework without undermining their cultural basis or violating constitutional norms.

Research Problem

Traditional South African courts are legal and institutionally ambiguous despite constitutional recognition and legislative efforts to control them. The main issue is balancing their historical and cultural legitimacy with modern constitutional imperatives like gender equality, procedural justice, and human rights. Due to poor consultation methods and perceived patriarchal bias, the Traditional Courts Bills have failed to settle these problems and have even increased public mistrust.⁹ This legislative deadlock threatens legal certainty and justice for millions of rural communities who use customary institutions. The varying application of customary procedures across areas and communities complicates matters.

Research Questions

Main Research Question:

How can traditional courts be sustainably integrated into South Africa's national legal system in a manner that upholds both customary legitimacy and constitutional values?

⁶ Traditional Courts Bill [B1–2017].

⁷ Lisa Vetten, 'Understanding Women's Access to Justice in Traditional Courts' (2012) LRC Report.

⁸ Koyana D, 'Traditional Courts in South Africa: Are They Courts of Law?' (1999) 16 SA Public Law 227.

⁹ Claassens A and Ngubane S, 'Women, Land and Power' in Claassens A and Cousins B (eds), *Land, Power and Custom* (UCT Press 2008).

Sub-Research Questions:

1. What historical, legal, and socio-political factors have influenced the evolution and current function of traditional courts in South Africa?
2. How do traditional courts balance customary dispute resolution practices with the constitutional imperatives of fairness, equality, and human rights?
3. What institutional reforms and policy recommendations are necessary to enhance the accountability of traditional courts within the democratic legal system?

Significance of the Study

This study is important theoretically and practically. It examines how traditional justice procedures can coexist with constitutional democracies, contributing to legal pluralism and decolonisation theory. It addresses the lives of millions who use these courts for accessible and culturally relevant conflict resolution.

¹⁰ David McQuoid-Mason, 'Access to Justice in South Africa' (1999) Windsor YB Access Just 1.

McQuoid-Mason warns that marginalising or misregulating these institutions could disenfranchise vast rural populations.¹⁰ Policymakers, legal reformers, and human rights advocates striving to improve justice in marginalised areas might benefit from knowing traditional courts' limitations and promise. This research will inform inclusive laws, gender-sensitive practices, and traditional leader education. This study seeks to reconcile customary law's communal spirit with constitutional law's individual rights framework.

Literature Review

Deep-rooted historical legacies, complicated constitutional jurisprudence, and current legal pluralism disputes define the literature on traditional courts in South Africa. The debate centres on harmonising traditional African jurisprudence with a rights-based legal system born of democracy. Customary law is a living system based on community standards, making it dynamic and adaptive, according to Lehnert.¹¹ Bennett adds that social practice shapes customary law, which persists regardless of codification.¹² These core viewpoints provide the epistemological basis for identifying traditional courts as evolving legal entities that serve millions, especially in rural areas. The Black Administration Act 38 of 1927 formalised indigenous conflict

¹¹ Lehnert W, 'The Role of African Customary Law in South Africa's New Legal Order' (2005) 21 SAJHR 242

¹² Bennett TW, *Customary Law in South Africa* (Juta 2004) 1.

settlement and subordinated it to the colonial and apartheid state.

¹³ Chanock said that this incorporation corrupted indigenous standards and inserted patriarchal and hierarchical systems into customary adjudication.¹⁴ Claassens and Ngubane contend that colonial manipulation of traditional leadership caused current problems reconciling customary justice with democracy. In a society committed to non-racialism and gender equality, experts like Pieterse warn that untransformed traditional courts may perpetuate discriminatory and authoritarian tendencies.¹⁵ This highlights the conflict between cultural sovereignty and constitutionality. The Traditional Courts Bill [B1-2012] and its amendments have sparked controversy about traditional courts in democracy. The Legal Resources Centre and Lesbian and Gay Equality Project opposed the Bill's non-voluntary participation approach and gender inequity.¹⁶ Gasa shows how patriarchal rural women confront impediments to participation and

redress in these forums.¹⁷ Matavire shares this worry, noting that cultural taboos around female leadership in traditional settings hinder court democratisation.¹⁸ Parliament keeps postponing substantial reform, even after modifications like the Traditional Courts Bill [B1-2017].¹⁹ Critics point to structural flaws, but others highlight restorative justice and local dispute settlement in the courts. Koyana claims that traditional courts are courts of law, based on live customary law and providing culturally relevant justice to rural people.²⁰ Harper says traditional courts can adjust to social circumstances and are flexible and accessible. According to Weeks, approximately 17 million South Africans prefer traditional courts to magistrates' courts due to their closeness, cost-efficiency, and cultural familiarity. However, these benefits may mask systemic flaws including inadequate adjudication training and restricted procedural protections. This dispute has also involved the judiciary. In *Mhlekwana v Head of the*

¹³ Black Administration Act 38 of 1927.

¹⁴ Chanock M, *The Making of South African Legal Culture, 1902–1936: Fear, Favour and Prejudice* (Cambridge University Press 2001).

¹⁵ Pieterse M, 'It's a "Black Thing": Upholding Culture and Customary Law in a Society on Non-Racialism' (2001) 17 SAJHR 364.

¹⁶ Legal Resources Centre, *Submission to Parliament on the Traditional Courts Bill*, 2012.

¹⁷ Gasa N, 'Feminist Reflections on the Traditional Courts Bill' (2011) SA Crime Quarterly 24–26.

¹⁸ Matavire M, 'A Gender Critique of Traditional Courts in Zimbabwe and South Africa' (2012) IJHSS 220.

¹⁹ Makinana A, 'Traditional Courts Fracas Goes On' *Mail & Guardian* (17 October 2013) <http://mg.co.za/article/2013-10-17-traditional-courts-fracas-goes-on> accessed 01 May 2014.

²⁰ Koyana D, 'Traditional Courts in South Africa: Are They Courts of Law?' (1999) 16 SA Public Law 227.

Western Tembuland Regional Authority, The court acknowledged traditional courts' usefulness but stressed constitutionality.²¹

The *Ex-Parte Chairperson of the Constitutional Assembly* judgement warned that customary institutions must be viewed with dignity, equality, and freedom in mind.²² These verdicts show that constitutional conformity and structural reform are necessary for establishes courts to survive.

The literature shows a rift between cultural preservationists and those urging change. It is agreed that traditional courts must be reformed to reflect the Constitution's transformative goal while keeping their local legitimacy to thrive in South Africa's pluralist legal regime.

Methods

Search Strategy

A comprehensive search was used to find peer-reviewed scholarly and legal perspectives on traditional courts in South Africa. Scopus, Web of Science, JSTOR, HeinOnline, and Sabinet Legal were used. We chose these platforms because they cover transdisciplinary law, African law, and public policy literature well. Policy documents and judicial judgements were found in government repositories and university library catalogues. The search covered

January 2020–April 2025 publications. It covered The Persistence and Evolving Role of Traditional Courts Within the National Legal Framework of South Africa. The searches were undertaken between 5 February and 30 April 2025 to ensure relevance and legality.

Search Terms

The search used keywords and Boolean operators to focus results. Search terms: “traditional courts” AND “South Africa”, “customary law” OR “indigenous law” AND “legal system”, “Traditional Courts Bill” AND “constitutionality”, and “access to justice” AND “customary adjudication”. Results were limited to English-language peer-reviewed sources via filters. Thesauri and controlled vocabularies were used, including social science MeSH equivalents and HeinOnline legal indexing terms. Literature on comparative foreign customary systems unrelated to South Africa was rejected using the “NOT” Boolean operator.

Inclusion Criteria

Included sources had to meet scholarly and contextual relevance standards. To be current with South Africa's legislative reforms and customary court discourse, all documents had to be published between 2020 and 2025.

²¹ *Mhlekwana v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk).

²² *Ex Parte Chairperson of the Constitutional Assembly: In Re*

Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Second, only research and legal analyses on the South African legal framework, including the Traditional Courts Bill, Constitution, and post-apartheid customary law, were considered. Prioritised were peer-reviewed academic publications, doctorate dissertations, government reports, policy briefs, and Supreme Court or Constitutional Court rulings. Third, methodological robustness. Legal pluralism, gender equality in customary settings, and access to justice were addressed in empirical studies, whether qualitative (interviews, thematic analyses) or quantitative (surveys, statistical evaluations of court usage). Weeks' analysis of 17 million traditional court users was crucial to contextual framing.¹ Due to their doctrinal influence, Koyana's arguments for conventional courts as law courts were included.² Legal consistency with constitutional principles was the final inclusion criterion. Engages critically *Bhe v Magistrate, Khayelitsha*³ and *Ex Parte Chairperson of the Constitutional Assembly*⁴ were inserted to theoretically position customary law in South Africa's rights-based order. Grey literature was evaluated case-by-case to ensure alignment with constitutional and legislative changes on traditional courts.

Exclusion Criteria

Studies outside the 2020–2025 publication window or unrelated to South Africa's traditional court framework were eliminated. No articles on pre-1994 customary systems without post-apartheid critique

were included. Non-African customary adjudication literature was eliminated unless it provided comparative insights for South African discussions. Disqualified sources included blogs, opinion pieces, and non-academic commentaries. Finally, documents not in English or unavailable in full text were removed to assure data synthesis uniformity and legal and academic interpretability.

Study Selection Process

The PRISMA protocol governed the study's selection procedure. Initially, all databases identified 784 records. Duplicates were removed, leaving 629 unique records. First, titles and abstracts were reviewed to exclude irrelevant or generic sources. The pool dropped to 181 articles. These remaining documents were full-text reviewed by two reviewers independently.

Discussion resolved inclusion disputes, and if necessary, a third reviewer was engaged. The inclusion and exclusion criteria were applied to articles. Qualitative synthesis used 63 articles and legal sources after full-text screening.

The selection flow was documented using a PRISMA diagram for openness and replicability. The sources were then grouped by theme: constitutional compliance, gender rights, procedural fairness, legal pluralism, and traditional authority. Legal content analysis was also performed on the Traditional Courts Bill [B1-2012] and Traditional Leadership and Governance Framework Act 41 of

2003. The final dataset contained only academically rigorous materials due to the most relevant, reputable, and this multi-layered selection technique.

Table 1 : Summary of included studies and main findings

Authors	Article Title / Journal Name	Study Design	Target Group
Aninka Claassens	Traditional Courts Bill: What's in it for Women? (2009) Agenda	Qualitative legal analysis	Women, customary law users
Bennett TW	Customary Law in South Africa (2004)	Theoretical analysis	Legal scholars, customary law
Bennett TW	Human Rights and African Customary Law (1995)	Theoretical analysis	Legal scholars, human rights
Bhe and Others v Magistrate, Khayelitsha (2005)	Constitutional Court case on gender discrimination	Legal judgment	Women, traditional court litigants
Black Administration Act 38 of 1927	Colonial legislation institutionalizing traditional courts	Legislative document	South African customary communities
Chanock M	The Making of South African Legal Culture, 1902–1936 (2001)	Historical legal analysis	Legal historians, customary law
Chuma Himonga and Craig Bosch	The Application of African Customary Law under the Constitution of South Africa (2000) SALJ 306	Legal analysis	Legal scholars, practitioners
Claassens A and Ngubane S	Women, Land and Power, in Land, Power and Custom (2008)	Socio-legal analysis	Women, rural communities
Constitution of the Republic of South Africa (1996)	Section 211, recognition of customary law	Constitutional text	All South Africans
David McQuoid-Mason	Access to Justice in South Africa (1999) Windsor YB Access Just	Legal analysis	Marginalized litigants
Devenish GE	The Development of Administrative and Political Control of Rural Blacks (1987)	Historical and political analysis	Rural black South Africans
Ex Parte Chairperson of the	Certification of the Constitution of South Africa	Constitutional Court judgment	South African public

Constitutional Assembly (1996)			
Gasa N	Feminist Reflections on the Traditional Courts Bill (2011) SA Crime Quarterly	Feminist legal critique	Women, legal reform activists
Harper E	Customary Justice: From Program Design to Impact Evaluation (2011)	Program evaluation	Communities using customary courts
Koyana D	Traditional Courts in South Africa: Are They Courts of Law? (1999) SA Public Law 227	Legal analysis	Legal practitioners
Legal Resources Centre	Submission to Parliament on the Traditional Courts Bill (2012)	Policy analysis	Parliament, legal reformers
Lehnert W	The Role of African Customary Law in South Africa's New Legal Order (2005) SAJHR 242	Legal theory and human rights	Legal scholars, policy makers
Lisa Vetten	Understanding Women's Access to Justice in Traditional Courts (2012) LRC Report	Empirical research	Women, traditional court users
Makinana A	Traditional Courts Fracas Goes On (2013) Mail & Guardian	Investigative journalism	Public, policy makers
Matavire M	A Gender Critique of Traditional Courts in Zimbabwe and South Africa (2012) IJHSS 220	Gender and legal analysis	Women, customary law communities
Mhlekwana v Head of the Western Tembuland Regional Authority (2001)	Case law regarding traditional authority	Judicial decision	Traditional communities
Olivier NJJ et al	Indigenous Law (1995)	Legal textbook	Legal scholars, practitioners
Pieterse M	It's a 'Black Thing': Upholding Culture and Customary Law in a Society on Non-	Socio-legal critique	General South African public

	Racialism (2001) SAJHR 364		
Shilubana and Others v Nwamitwa (2009)	Constitutional Court case on gender and customary leadership	Judicial decision	Women, traditional leaders
South African Law Commission	Report on Traditional Courts and the Judicial Function of Traditional Leaders (2003)	Policy report	Policy makers, legal reformers
Traditional Courts Bill [B1–2012]	Draft legislation on traditional courts	Legislative proposal	Parliament, traditional leaders
Traditional Courts Bill [B1–2017]	Revised draft legislation on traditional courts	Legislative proposal	Parliament, traditional leaders
Traditional Leadership and Governance Framework Act 41 of 2003	Legislation governing traditional leadership and courts	Legislative document	Traditional leaders, rural communities
Weeks J	Traditional Courts and Justice in South Africa: Issues of Access and Fairness (2011) SA Crime Quarterly 31	Empirical and legal analysis	Communities reliant on traditional courts
Weeks S	Traditional Courts Bill: Access to Justice or Gender Discrimination? (2011) SA Crime Quarterly 31	Legal critique	Women, legal reform activists

Results

4.1 Theme 1: Historical, Legal, and Socio-Political Influences on Traditional Courts

4.1.1 Sub-theme 1.1: Colonial Codification and Legislative Control

Colonial and apartheid administrations used traditional courts for political and administrative control, not justice. Enacting the *Black Administration Act*

38 of 1927 turned indigenous dispute settlement into a state-run legal system. This law subjected traditional leaders to colonial administrators, changing their legitimacy and role. Devenish claims that this legal codification was meant to establish indirect rule by allowing state authorities to use

traditional leadership for governance.²³

Chanock believes colonial officials codified and selectively recognised customary law to secure African docility and cooperation.²⁴ Thus, traditional courts became state-sanctioned rather than customary justice caretakers. Indigenous conflict resolution is fluid and malleable, but colonial statutes institutionalised customary courts into rigid, male organisations.

Bennett notes that colonial rulers corrupted customary law by treating it as a fixed and authoritative source, destroying its communal and rehabilitative features.²⁵ These actions exacerbated male dominance in adjudicative authority and justice access. Even after apartheid-era laws were repealed, many traditional court systems remain patriarchal. Colonial involvement continues to influence traditional courts as justice forums and contentious areas of power, control, and exclusion.

4.1.2 Sub-theme 1.2: Post-Apartheid Legal Recognition of Customary Law

After constitutional democracy was established in 1994, customary law became legal if it was consistent with the Constitution. The 211(3) section *Constitution of the Republic of South Africa, 1996* Subject to the Bill of Rights, courts must apply customary law.²⁶ Himonga and Bosch believed that this constitutional legitimacy made customary legal systems legitimate and confirmed their role in a multiple legal structure.²⁷ Lehnert notes that customary law must comply with constitutional ideals of equality, dignity, and non-discrimination, which some traditional court practices may not meet.²⁸

Traditional courts are under severe examination due to this legal compromise, especially when customary norms conflict with constitutional rights. This recognition has left traditional courts' constitutional operationalisation unclear. Introducing the *Traditional Courts Bill [B1-2012]* and its successors formalised these courts but

²³ Devenish GE, 'The Development of Administrative and Political Control of Rural Blacks' in Ry Croft, Boule Robertson and Peter Spiller (eds), *Race and the Law of South Africa* (Juta 1987).

²⁴ Chanock M, *The Making of South African Legal Culture, 1902–1936: Fear, Favour and Prejudice* (Cambridge University Press 2001).

²⁵ Bennett TW, *Human Rights and African Customary Law* (Juta 1995) 76.

²⁶ Constitution of the Republic of South Africa, 1996, s 211(3).

²⁷ Himonga C and Bosch C, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 SALJ 306.

²⁸ Lehnert W, 'The Role of African Customary Law in South Africa's New Legal Order' (2005) 21 SAJHR 242.

were condemned for failing to ensure procedural fairness, equality, and voluntary participation.²⁹ The South African Law Reform Commission noted that customary law evolves, making codification difficult without undermining its flexibility and community-centered objectives.³⁰ Recognition and regulation show that living customary practices and statutory interpretation are nevertheless at odds. Traditional courts function in this unresolved region, subject to overregulation and neglect.

4.1.3 Sub-theme 1.3: Socio-political Contestations and Rural Governance

Traditional courts are still important in rural South Africa, especially in customary leadership regions. The *Traditional Leadership and Governance Framework Act 41 of 2003* institutionalises traditional leaders' power in community issues, including dispute resolution.³¹ Olivier and others believe this legal entrenchment is an attempt to preserve indigenous government structures while integrating them into democracy.³² Civil society organisations, particularly women's

rights groups, have questioned these courts' validity due to systemic exclusion, lack of consent in jurisdiction, and lack of appeal options. Claassens claims that oppressive traditional judicial jurisdiction impairs constitutional freedoms and perpetuates power hierarchies.³³ Traditional judicial procedures marginalise many rural women, especially in inheritance, marriage, and property disputes, according to empirical investigations. Matavire notes that traditional courts' lack of female leaders reinforces social and legal injustice.³⁴ Such disputes highlight a larger debate over who defines justice in rural South Africa: the state, the community, or traditional elites. These courts' credibility as accessible and equitable justice

4.2 Theme 2: Reconciliation of Customary Practices with Constitutional Norms

4.2.1 Sub-theme 2.1: Gender and Participation Rights

Traditional courts in South Africa foster patriarchal norms that restrict women from full participation, which is a major constitutional issue. Gasa and other scholars contend that patriarchal adjudication silences

²⁹ Traditional Courts Bill [B1–2012].

³⁰ South African Law Commission, *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (SALRC 2003) 10.

³¹ Traditional Leadership and Governance Framework Act 41 of 2003.

³² Olivier NJJ et al, *Indigenous Law* (Butterworths 1995) 192.

³³ Claassens A, 'Traditional Courts Bill: What's in It for Women?' (2009) *Agenda* 11.

³⁴ Matavire M, 'A Gender Critique of Traditional Courts in Zimbabwe and South Africa' (2012) *IJHSS* 220.

women and gives men undue authority, prohibiting them from making decisions or receiving justice.³⁵ Society's norms support male dominance, violating constitutional gender equality and non-discrimination requirements.³⁶ The *Bhe v Magistrate, Khayelitsha* ruling drastically addressed this issue by invalidating customary inheritance procedures that excluded women, upholding the Constitution's supremacy in customary law for women's rights.³⁷ Despite constitutional protections, social taboos against female leadership and judging might maintain traditional court antipathy to women. Matavire notes that many communities' socio-cultural fabric marginalises women, making reform difficult and unpopular.³⁸ Women can use traditional courts for accessible justice but not influence them. Promoting gender inclusiveness without undermining these courts' legitimacy is difficult. Managing cultural diversity and constitutional enforcement is difficult yet necessary.

4.2.2 Sub-theme 2.2: Procedural Justice and Fair Trial Standards

South African traditional courts lack procedural principles, affecting justice, openness, and due process. Critics like the Legal Resources Centre say these forums' lack of legal representation, transparency, and appeals undermines justice.³⁹ The *Traditional Courts Bill [B1-2012]*, attempted to formalise traditional judicial processes, was criticised for lacking procedural safeguards, leaving customary adjudication subject to arbitrary decision-making and rights breaches.⁴⁰ This conflict between customary practice and constitutional fair trial rights shows how difficult it is to balance informal justice and rule-of-law. Poor procedural clarity can undermine traditional courts with inconsistent and confusing results. Himonga and other scholars believe procedural formalisation must be fair and dignified without resembling Western law.⁴¹ Cases like show rising judicial scrutiny of established courts. *Mhlekwana v Head of the Western Tembuland Regional Authority*, insists these bodies be constitutionally

³⁵ Gasa N, 'Feminist Reflections on the Traditional Courts Bill' (2011) *SA Crime Quarterly* 24.

³⁶ Bennett TW, *Human Rights and African Customary Law* (Juta 1995) 80.

³⁷ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC).

³⁸ Legal Resources Centre, *Submission to Parliament on the Traditional Courts Bill*, 2012.

³⁹ Traditional Courts Bill [B1-2012].

⁴⁰ Himonga C and Bosch C, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 SALJ 306.

1. ⁴¹ *Mhlekwana v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk).

transparent and accountable.⁴² This procedural gap must be filled for traditional courts to survive and be valid in national law.

4.2.3 Sub-theme 2.3: Plural Legal Consciousness and Normative Coexistence

South African law is pluralistic, blending customary and statute law. Himonga says that traditional courts prioritise restorative justice and social peace over conflict.⁴³ Rural populations can obtain culturally resonant channels that augment the formal justice system.⁴⁴ The Constitution's supremacy necessitates rights-based evaluation of customary practices, putting communal conventions against individual rights. Justices dispute on how much conventional courts should be constitutional. While some courts acknowledge customary law's normative legitimacy, others require constitutional compliance. For example, in *Shilubana and Others v Nwamitwa*, the Constitutional Court balanced tradition and constitutional equality by reforming customary rules to eliminate prejudice.⁴⁵ This evolving jurisprudence negotiates how multiple

legal awareness might embrace diverse legal frameworks without compromising fundamental rights. Traditional courts in South Africa's democratic legal system must coexist to thrive.

4.3 Theme 3: Institutional Reform and Policy Recommendations for Enhancing Traditional Courts in South Africa

4.3.1 Sub-theme 3.1: Legislative Transformation and Participatory Law-Making

The legislative history of conventional courts in South Africa shows various reform attempts, most notably through the *Traditional Courts Bill*, this has been deleted and amended several times due to public and parliamentary resistance. To build legitimacy and ownership, Claassens says that meaningful transformation requires inclusive, participatory law-making procedures that include affected groups, especially women and youth.⁴⁶ Makinana's arguments illustrate that earlier bills' lack of community input encouraged scepticism and resistance.⁴⁷ Co-creating legal frameworks that reflect lived realities is essential, not imposing top-down

⁴² Koyana D, 'Traditional Courts in South Africa: Are They Courts of Law?' (1999) 16 *SA Public Law* 227

⁴³ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

⁴⁴ Claassens A, 'Traditional Courts Bill: What's in It for Women?' (2009) *Agenda* 11.

⁴⁵ Makinana A, 'Traditional Courts Fracas Goes On' *Mail & Guardian* (17 October 2013) <http://mg.co.za/article/2013-10-17->

[traditional-courts-fracas-goes-on](#) accessed 01 May 2014.

⁴⁶ McQuoid-Mason D, 'Access to Justice in South Africa' (1999) *Windsor YB Access Just* 1.

⁴⁷ South African Law Reform Commission, *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (SALRC 2003).

paradigms. Despite improvements, critics argue the 2017 measure fails to empower communities and combat gender inequality. Inclusive law-making requires transparency, review, and grassroots input. Civil society and traditional authority must work together to reconcile competing interests and safeguard cultural identity and constitutional values. Legislative innovations without participation risk alienating and confusing traditional courts.

4.3.2 Sub-theme 3.2: Training and Capacity Building for Traditional Leaders

Traditional court personnel may not have legal training, making constitutional application challenging. Koyana emphasises training traditional leaders in constitutional rights, gender justice, and due process to increase legal compliance and public trust.⁴⁸ Capacity building can improve customary adjudication and eliminate procedural anomalies, McQuoid-Mason says.¹⁵ Culturally sensitive and socio-legally appropriate professional development is needed for these courts. Training also fosters understanding and respect between customary and statutory law. These projects equip traditional leaders with modern legal concepts to transform traditional courts into hybrid institutions that uphold community values and constitutional principles. Sustainable capacity building is crucial for institutional reform and conventional court survival.

4.3.3 Sub-theme 3.3: Institutional Accountability and Oversight Mechanisms

Ineffective oversight and appeal processes in traditional courts have resulted in power abuses and public distrust. State judicial officers and traditional leaders are involved in hybrid accountability systems supported by the South African Law Reform Commission that reconcile cultural autonomy with constitutional accountability. Examples include mixed-member appellate boards, complaint procedures, and frequent court audits. Matavire cautions that traditional courts risk impunity for gender-based discrimination and procedural injustice without institutional checks. Responsible monitoring of indigenous government and fundamental rights is difficult but necessary. Effective accountability will strengthen conventional courts' credibility and legitimacy, making them more resilient and integrated into the national judicial system.

Recommendations

Inclusion and participation in legislative reforms are needed to sustain traditional courts. Citizens, women, youth, and marginalised groups should be consulted on the Traditional Courts Bill to gain legitimacy and acceptance. Matching customary adjudication with human rights requires constitutional ideas like gender equality and procedural fairness in legislative frameworks.⁴⁹ In addition to legal reforms, traditional leaders and court officials need constitutional law, gender sensitivity, and procedural justice

⁴⁸ Matavire M, 'A Gender Critique of Traditional Courts in Zimbabwe and South Africa' (2012) *IJHSS* 220.

⁴⁹ Constitution of the Republic of South Africa 1996, s 211.

training.⁵⁰ Strengthening decision-making decreases rights violations. Tradition courts need institutional accountability. Hybrid monitoring committees with court and traditional leadership can balance abuse and impunity with cultural sovereignty. For justice and community trust, traditional judicial appeal and complaint procedures must be modernised. Finally, monitoring and measuring traditional courts' performance will aid South Africa's democratic legal changes.

Suggestion and Future Studies

To evaluate justice and fairness, conventional court users' gender dynamics should be examined. Qualitative study on women, youth, and marginalised groups can show how traditional adjudication hurts vulnerable communities. Comparing traditional courts across provinces can reveal differences in practice, governance, and integration with formal legal systems, influencing policy.⁵¹ In light of expanding plural legal consciousness, hybrid legal institutions and strategies for merging customary law and constitutional rights need more research.⁵² Research examines traditional leaders' adjudicative competence and procedural justice after training and capacity-building.⁵³ Research could also evaluate traditional courts' monitoring and appeal systems for transparency and accountability. These strategies will enhance knowledge and

inform evidence-based changes of South Africa's conventional courts.

Conclusion

South Africa's traditional courts demonstrate the delicate interplay between custom and constitution. Traditional courts are available to millions, especially in rural areas where formal courts are rare.⁵⁴ Colonial codification established governmental power and patriarchal standards, reducing their endurance.⁵⁵ Customary law supports traditional courts, although gender equality and fair trials are problematic.³ Cultural identity and democratic law conflict in traditional courts. Thus, their future depends on reconciling customary authority with constitutional imperatives to defend communal values and individual rights. Traditional courts' credibility requires accountability, openness, and inclusion institutional improvements.⁵⁶ Without comprehensive reforms to address gender exclusion, procedural faults, and supervisory weaknesses, traditional courts risk losing public trust and becoming obsolete.⁵ Policymakers, attorneys, and communities must collaborate to develop a diversified legal system that promotes customary justice and constitutional primacy. Thus, traditional courts' existence requires legally and socio-politically sophisticated, context-sensitive procedures directed by debate and reform.

⁵⁰ Claassens A, 'Traditional Courts Bill: What's in It for Women?' (2009) *Agenda* 11.

⁵¹ Constitution of the Republic of South Africa 1996, s 211.

⁵² Claassens A, 'Traditional Courts Bill: What's in It for Women?' (2009) *Agenda* 11.

⁵³ McQuoid-Mason D, 'Access to Justice in South Africa' (1999) *Windsor YB Access Just* 1

⁵⁴ Weeks J, 'Traditional Courts and Justice in South Africa: Issues of Access and Fairness' (2011) *SA Crime Quarterly* 31.

⁵⁵ Devenish GE, 'The Development of Administrative and Political Control of Rural Blacks' in Ry Croft, Boule Robertson and Peter Spiller (eds), *Race and the Law of South Africa* (Juta 1987).

⁵⁶ Claassens A, 'Traditional Courts Bill: What's in It for Women?' (2009) *Agenda* 11.

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