Historical Milieu of Tribunals in South Africa: The Role of Church Tribunals

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Abstract

The historical evolution of tribunals in South Africa is important in understanding the stratagem of present-day tribunals. This article attempts to take the reader on a journey from before colonisation to during and after that era. The aim is to address the historical journey of tribunals from a South African perspective, and to analyse Church tribunals regarding their functions, characteristics and daily operations through certain profound cases.

Keywords: church, cases, tribunals, South Africa

INTRODUCTION

The word 'tribunal' is a Western term, with the inception of this particular form of adjudication arising from the governance of ancient Greece.[1] In an African context, however, the term was not employed in indigenous traditional systems, which relied on a practice known as *makgotla* (meeting), which fostered the principles of *ubuntu*.[2] *Ubuntu* encourages the nurturing of community development with this development being accomplished by recognising an ethical standard of common humaneness.[3] The practice of ubuntu espouses alternative dispute resolution (ADR) mechanisms in the mediation of disputes.[4] It is apparent that 'At the heart of African adjudication lies the notion of reconciliation or restoration of harmony.'[5] However, although the term 'tribunal' is not used in the oral tradition of indigenous communities, it is evident that there were indeed structures akin to tribunals to resolve disputes. This article therefore focuses on the historical journey of tribunals from a South African perspective, and analyses Church tribunals regarding their functions, characteristics and daily operations.

It is a fact that the very idea of society would not have been possible without a minimum level of order and agreements to regulate human relationships and settle disputes. These agreements were originally achieved through what is known as the social contract, as theorised by Locke, Rousseau and Hobbes.[6] Historically, the beginnings of tribunals can be traced back to the ancient Greek and Roman civilisations in the era before Christ, both of which were the founders of legal systems.[7] The earliest documented tribunals – the Athenian tribunals – were held in Koresos in 402 BC.[8] These tribunals deliberated upon matters in a speedy manner, which is a common characteristic of present-day tribunals.[9] Furthermore, in the first millennium BC, marketplaces on the Greek mainland and islands became known as the arena where 'community leaders – tribal kings or princes, or priests, or elders renowned for their oratory and practical reason-gathered to dispense advice and adjudicate disputes'.[10] In the Roman republic there is reference to the plebeians (the common people of Rome) appearing before a tribunal to settle disputes.[11] This Roman

tribunal was a forum for the disputes of the common people, where the tribunes resolved such matters rapidly.[12] These characteristics are important, because the same ones were maintained within a South African context. Thus it is apparent that tribunals have always existed in all shapes and forms as an alternative to the judicial system.

HISTORICAL TRIBUNAL PERIODS IN SOUTH AFRICA

The history of tribunals in South Africa can be divided into three significant periods, namely the pre-colonial era, during colonisation and after colonisation, which is the present-day democracy. The significance of these periods illustrates the evolution of tribunals in a South African context.

Tribunals in the pre-colonial era

During the pre-colonial era in South Africa (before 1652), the indigenous people were governed by indigenous law, customs and practices.[13] There is evidence that a variety of indigenous tribes inhabited the territory of southern Africa.[14] During this period, law was communicated orally and not in writing.[15] Three approaches to analysing indigenous law were developed, namely the trouble-case method, the rules-centred approach and the contextual approach. The trouble-case method focuses on case studies and the daily life of communities. The rules-centred approach consists of the use of Western concepts and frameworks to explain indigenous law. The contextual approach aims to identify the storyteller, who gives the story context, power and meaning.[16]

The first approach, the trouble-case method, is used to explain the way of life of the different tribes as well as their characteristics and powers.[17] Tribal governance systems varied: the Cape Khoi and San tribes were nomadic hunter-gathers who lived off the land in harmony with the environment and laid no proprietary claim to territory.[18] At a later time, the Griquas, Xhosas and Zulus, as well as other tribes, settled in the area.[19] The Zulus (in what is now KwaZulu-Natal) and the Xhosa (in what is now the Eastern Cape) were governed under kingship. [20]The elders of the tribe advised the king on issues of governance, and there were also the chiefs and headsmen of the respective kraals.[21] When conflicts arose, they would be resolved through ADR methods of negotiation and mediation, as well as through what amounted to a tribunal system.[22] The indigenous system of settling disputes was cast in endogenous knowledge, which consists of both indigenous and cultural knowledge, which are alive and influenced by the surroundings and the people, which are ever-changing and adapting to the environment.[23]

The second approach, the rules-centred approach, is summarised in the term *lekgotla* (also referred to as *inkundla*), the singular of the word *makgotla,* meaning the people's court.[24] The term is described by Blaine as 'open tribunals following unwritten law and custom having for precedents the judgments of past chiefs'.[25] It is important to observe that the word 'tribunal' is interchangeable with people's court. The *makgotla* did not function in the same manner as Western courts, because the whole community cross-examined the perpetrator or victim.[26] The people's court is best described for these purposes as a tribunal in both function and procedure, to circumvent any confusion. Thus the term was further expanded by Comaroff and Roberts, who define lekgotla as a body

of 'all advisors and headmen'.[27] This body met periodically to deal with policy and administration matters, as well as to settle disputes. Furthermore, 'The procedure tends to be quite flexible: the chief makes opening and closing statements. Free speech is encouraged, and the chiefly decisions, announced at the end, are expected to reflect the weight of all manifest opinion.'[28]

The third, contextual, approach is used to explain the principle of ubuntu in the following terms:

> In the traditional African view, human existence is seen as unified, interconnected, and integrated. This view recognizes the dialectics in any given system (union of opposites– i.e., the good *and* the bad). To be out of harmony is regarded as harmful to the well-being and survival of the whole. In the siNtu custom, ubuntu as a concept permeates the whole fabric of society, thus yielding 'both/and' conclusions, contrasted with the Christian idea of good or evil with its 'either/or' conclusions.[29]

The principle of *ubuntu*, which is believed to hold the African traditions and perspectives together, amounts to the 'collective personhood', or the 'art or virtue of being human'. In this regard, the principle encourages the resolution of disputes through forums such as *makgotla*, or tribunals, to engage with the community and the victims or complainants to resolve disputes among the tribe. The strategy adopted to resolve the dispute is to attain a win–win outcome for both parties (identified as collaboration in the Thomas–Kilmann model). This resolution mechanism aims to encourage the restoration of unity, as one break in the group causes a detrimental effect for everyone. The collective strength of a tribe is fostered through the principle of *ubuntu,* as encapsulated in the Nguni proverb '*umuntu ngumuntu ngabantu*' ('I am because we are'). This means that society consciously takes responsibility for its 'persons' product'.[30]

Masina provides a number of case studies that yield more insights:

> In some cases where *ubuntu* functioned in conflict resolution situations during precolonial times, differences of opinion were settled amicably by means of dialogue within the community under the leadership of an authority figure. The fine imposed was generally in the form of cattle; capital punishment was rare. In other cases, punishment was absolute and automatic because the offense was beyond the pale of acceptable behaviour. In a third group, conflict was unmanageable and carried out to its own resolution.[31]

Thus the role played by *ubuntu* was pivotal in the successful resolution of disputes. However, despite the relevance of the principle of *ubuntu* in fostering and building relationships, *ubuntu* does not guarantee resolution in all scenarios, and this may explain the emergence and development of tribunals during colonisation.

Tribunals during colonisation

The recognition of tribal practices and customary/indigenous law was marred by a history of oppression and strife.[32] The Dutch representatives of the East India Company arrived at the Cape in 1652 and brought with them Roman Dutch law.[33] The British took control of the Cape in 1814, as the right to the territory was ceded to them by the Dutch. Under British

rule, the laws of the colonies remained in force because Roman Dutch law was considered to be a civilised system. As a result, other practices (such as customary practices) were ignored or became established under a policy of non-recognition, which meant that tribal practices were ignored and their independence of leadership was not recognised. Ordinance 50 of 1828 enabled the thrust of the policy of non-recognition.

In 1846, after the War of the Axe, the non-recognition policy was abandoned, as the traditional rulers held authority over the subdivided areas of their people. In 1854, subjects within the dependency of Kaffraria were encouraged to relinquish tribal ways in favour of Christianity and the British notions of civilisation In 1864, the government passed the Native Succession Act 10, which allowed the courts to apply customary law in South Africa. Despite this legislation, Kaffraria was incorporated into the Cape, where the policy of non-recognition remained in force until 1927. From 1877 to 1894, the Transkei territories were brought under colonial rule. This resulted in a shift in certain policies, which until then had remained unchanged. As a consequence, the authorities in the Cape reconsidered their stand and allowed customary law to be applied in courts, though confining it to the following limitations: 'Specific practices, such as initiation dances general principles of humanity" observed throughout the civilized world.'[34]

In 1910, a few of the southern African colonies formed the Union of South Africa.[35] As time went by, people agreed to settle their disputes in an unconventional manner, which at the time was unrecognised and informalised. In other words, despite the presence of courts to address issues and resolve conflicts in society, the emergence of parallel structures to resolve conflict became noticeable. By 1960, the idea of tribunals had sufficiently evolved, as is evident in the following observation:

> The new interest in dispute processing in the 1960s led to a discovery that many if not most, disputes were being dealt with by unofficial tribunals to the apparent satisfaction of the parties concerned. And during the 1970s it became evident that in the urban areas of South Africa an amazing variety of tribunals was flourishing alongside the state courts.[36]

In 1927, the government introduced the Native Administration Act 38 to restore the full authority of customary law across the country. The Act also instituted a separate system of courts made up of traditional leaders and native commissioners. These two institutions had a distinct role. On the one hand, the courts of traditional leaders were assigned the responsibility to rule based on customary law only. On the other hand, the courts of native commissioners, along with the Appeal Court, could rule based on either customary law or common law in any 'suits or proceedings between Natives involving questions of customs followed by Natives'.[37] It is worth noting that sections 30 and 31 of the interim Constitution of 1993 set out the basis for the application of customary law, which recognised that customary law was no longer to be confined to race, thereby expanding its relevance. The interim Constitution further allowed and empowered litigants to demand respect for their culture.[38]

During the colonial period, the tribunal system was strongly developed within the Church through the establishment of Church tribunals. At the same time, the role of customary law

and ADR was also important. ADR was developed to settle categories of disputes that were not brought before either courts and tribunals. The idea of ADR was properly formalised around the 1960s in South Africa, with a strong emphasis on arbitration. In 1965, the Arbitration Act 42 was enacted to regulate ADR. In addition, in 1976 the country joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and issued the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Since then, foreign arbitration awards have been recognised and enforceable within South Africa.[39]

The ADR mechanisms in South Africa achieved a new dimension in the 1980s, with the establishment of non-governmental organisations that helped to enhance access to justice. Among them was the Independent Mediation Service of South Africa, which focused on resolving labour–management disputes. [40] Various other organisations were also set up with the aim of training, mediating and resolving tensions, conflicts and neighbourhood disputes among communities. These organisations include the African Centre for the Constructive Resolution of Disputes, the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust, the Institute for Multi-Party Democracy and the Community Peace Foundation.[41]

The inception and development of relationships between the Church and tribunals can be traced back to the beginning of Christianity. It is suggested that Jesus himself drafted the first procedural Church law.[42] As reported in Matthew 18:15–18:

> If your brother should commit some wrong against you, go and point out his fault, but keep it between the two of you. If he does not listen, summon another, so that every case may stand on the word of two or three witnesses. If he ignores them, refer it to the church. If he ignores even the church, then treat him as you would a Gentile or a tax collector.

During the colonial period, the Church in South Africa was very powerful, as it was subject to its own set of rules including those pertaining to dispute resolution. These rules were not issued by the secular authorities but were inspired by Christian teachings. It is submitted that the early Church followed that model for conflict resolution in the sense that St Paul regretted that there would ever need to be litigation among the followers of Jesus. In his second letter to the Corinthians and his first letter to Timothy (2 Corinthians 13:1 and Timothy 5:19), he emphasised the importance of having two or three witnesses.[43] The Church tribunals played an important role in freedom of religion, possessing 'an optimal degree of freedom and autonomy'.[44]

To allow this freedom, however, the high court held that the civil court's inter-vention was necessary should a tribunal's procedure be illegal.[45] This subjection of the decisions of the Church tribunals to judicial review is important. It was reaffirmed in a case where, owing to the circumstances of the illegality of the tribunal's procedure, it was held that the civil court's intervention was necessary. The civil court held that the offence with which a church member was charged was adultery, which was referred to as a 'spiritual censure that does not affect any civil or pecuniary rights of the applicant'. On that basis, the jurisdiction of the civil court was excluded.[46]

Judicial review provides a safety net guaranteeing the fairness of Church tribunals *vis à vis* the parties to a dispute. This means that, if for one reason or another, the tribunal fails to comply with its own rules and thereby infringes upon people's rights, the courts always have the power to review the whole case. This occurred in the case of Van Rooyen v Dutch Reformed Church Utrecht, where the court intervened following a decision by the voluntary association that was 'prejudicial to the complainant, by methods that are contrary to its own constitution and to the ordinary principles of justice'.[47] It was held in this case:

> that it is one of the most ordinary and elementary rules of administration of justice by any tribunal of this kind, whether legal or voluntary, that where a person is put upon trial, or where he is called upon to plead to any charge, he shall, first of all, have the fullest and fairest information as to what it is that he is called upon to meet.[48]

These decisions by the court define the parameters of judicial intervention and review. The above case did not contradict the autonomy of the Church tribunal and the powers and procedures governing it. This was reiterated in the case of *De Waal and Others* v Van der Horst and Others regarding the law applicable to voluntary associations.[49] The courts do not have the power to determine disputes among members of an association except 'for the enforcement of some civil or temporal right'.[50] Furthermore:

> These persons as members of the church may, within the law, agree on any constitution, and frame any rules they choose for the good government and discipline of the association and are also at liberty to establish any tribunals they please to decide questions that may arise within the association.[51]

A similar judgment regarding the internal autonomy of associations in enacting their own rules occurred in the case of *Long v Bishop of Cape Town*,[52] where it was stated that 'members of a religious body may adopt rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them'.[53] To further affirm this power, the court ruled that,

> when such a body has constituted a tribunal, the decisions of the tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms are prescribed, and if not, has proceeded in a manner consonant with the principles of justice.[54]

The court thus affirmed that it would not interfere with the rules and autonomy of the Church tribunal and its decisions.

> As was stated in the case of *Forbes v Eden*,[55] a court of law will not interfere with the rules of a voluntary association unless to protect some civil right or interest that is said to be infringed by their operation, and that least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests.[56]

The court will only intervene when there is an impairment of a civil right or interest. Judge De Villiers expanded on the authority of the court to intervene by stating that 'I have assumed above that this Court has the power of determining the true construction of the

rules and regulations of the Church'.[57] The judicial limitation was further emphasised by Judge McGregor, who argued that,

> If the matter is now in dispute, as it appears to be, a matter of internal doctrine, government or discipline, and not a matter where either proprietary or civil rights are involved, it seems to me, on the authorities which have been laid before us, that it is a matter where this Court should not interpose.[58]

In the same vein, the ability of a civil court to intervene was expanded on as follows in *Lucas v Wilkinson and Others*, where it was stated that

> the civil court can interfere only where something had been done which, though it may be within the rules of association, is contrary to the principles of natural justice; or where, though within the rules, the proceedings have not been *bona fidei* but fraudulent or malicious.[59]

The court held that the tribunal had been 'a full, fair, patient and impartial trial; conducted according to the rules of the association'.[60]

The aspects of natural justice and the grounds of jurisdiction were set out to justify the court's intervention in tribunal decisions *in Du Plessis v The Synod of the Dutch Reformed Church*.[61] The court held that 'it is not for the civil court to decide whether the decisions on charges concerning heresy are right or wrong' but went on to argue that *mala fide* acts would require the court's intervention and determination in those circumstances.[62] The limitations of judicial interference in tribunal decision were similarly affirmed in *McMillan v Free Church*, where 'it was concluded that a civil court is entitled to interfere if it should be established that a church tribunal had acted irregularly, in excess of its powers and in violation of the contract between the members of the association'.[63]

The above developments convey the idea that judicial review was granted on a number of grounds, namely *mala fides* acts, irregular procedure and excess of powers–that is acting *ultra vires*, infringements of the principles of natural justice, and where there were concerns about civil rights protection. These parameters set the basis for the grounds of judicial review, including for present-day tribunals. In a nutshell, these cases reaffirm the autonomy and power of the Church, which has been able to enact its own rules and settle its disputes in an independent manner outside the processes and procedures of litigation that characterise the courts. Nonetheless, the churches' independence was restricted by the possibility that their acts and rules could be reviewed by the courts.

In 1948, there was an important change in the political structures of the country, with the National Party (who represented the Afrikaner people's rights) taking control of South Africa.[64] The National Party implemented the apartheid system, which comprised legal policies supporting and enforcing the segregation of people on the basis of race. This change in political power did not alter the judicial review process regarding the decisions of Church tribunals. The Union had maintained close ties with Britain as a result of the natural resources, precious metals and other raw materials that attracted European capital to South Africa.[65] The exploitation, management, contracts and deals around such resources naturally caused disputes and disagreements, and resorting to the institution of tribunals became unavoidable to settle disputes. Through case law, the courts developed and

pronounced the function of tribunals, which 'is to consider evidence and to decide whether in the public interest to grant a licence; its function is not primarily to adjudicate or to reconcile issues raised between individual litigants'.[66] The emergence of tribunals was an alternative to courts, as the latter still maintained the power to review the decisions of the former. This was exemplified in a two-stage inquiry that was set out to justify the judicial intervention in a tribunal decision in the review of *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein*.[67] In this case, it was held

> that the sheer transgression of the rules of a voluntary association is insufficient to justify the applicability of a court of law. Firstly, the aggrieved person must prove that he was disadvantaged and that he has a civil right or interest that is violated by such transgression. Secondly, clarity had to be gained concerning the issue whether the applicant had a sufficient civil right that merits protection from the courts of law.[68]

Judicial intervention in reviewing tribunals' decisions also occurred in *Odendaal v Kerkraad van die NG Bloemfontein-Wes*, which was about a deviation from the two-stage inquiry.[69] The court intervened on a new ground following the procedure's irregularity, and raised the reason for the deviation from the two-staged inquiry 'to matters concerning church disciplinary hearings, where it is clear that an irregularity in the disciplinary procedure has taken place that had caused the accused to be disadvantaged'.[70] Through this judgment, the court addressed the imbalance of power that may be caused by tribunal decisions.

Once again, the court intervened to review a tribunal decision on the grounds of a violation of the principle of natural justice. In *Odendaal v Loggerenberg en Andere* it was observed that 'the basic requirements for review of a quasi-judicial act is where there had been a violation of the church's rules or statutes or where the elementary principles of justice had been neglected and such neglect really disadvantaged the condemned person'.[71] Another instance of judicial intervention occurred in *Theron en Andere v Die Ring van Wellington van die Nederduitse Gereformeerde Sendingkerk*.[72] The requirement of reasonableness embedded in the Promotion of Administrative Justice Act constitutes one of the grounds for judicial review in current tribunals.[73] In this case,

> the Court of Appeal added to the formal measure, consequently increasing the jurisdictional area of the law courts on matters pertaining to ecclesiastical tribunals. Besides having to adhere to the requirements of the formal test, the presumption against unreasonableness and unfairness also had to be applied. Hereby the court has to investigate whether the decision of the tribunal was reasonable.[74]

As time went by, there was domestic and international pressure for the abolition of apartheid.[75] This resulted in Nelson Mandela being released from prison on 11 February 1990. The changes to the nature of the social, legal and political systems of the country were to be embedded within a new Constitution, which would guarantee the rights of citizens in a democratic South Africa.[76] The multiparty Congress for a Democratic South Africa (CODESA) was established. CODESA met on 20 and 21 December 1991, with good representation from the government and 19 political parties.[77] It led to the formation of five working groups; the most relevant for the purposes of the present discussion is working group 2, which dealt with proposals concerning general constitutional principles and a constitution-writing body/process.

CODESA II was formed in 1992 because of the political impasse that had been reached. Eventually, on 28 November 1993, the interim Constitution was accepted with sufficient consensus.[78] With regard to dispute resolution, section 22 provides for a guaranteed right 'to have justiciable disputes settled by a court of law or where appropriate, another independent and impartial forum'. Ackermann further elaborated on the purpose of section 22, which is:

> to emphasise and protest generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts' . . . By constitutionalising the require ments of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate.[79]

Section 22 provides for the independence and impartiality of tribunals to make decisions of law without any undue influence to protect the right of access of citizens to 'justiciable decisions'. Prior to democracy, there had been limited access to tribunals, but now they were to be available to everyone, irrespective of race, colour, religion or ethnicity.

Tribunals after colonisation

Following the end of apartheid and colonialism, a new era emerged in South African history–one culminating in the advent of democracy. This new era was preceded by major international events, such as the fall of communism, the rise of liberalism and the collapse of the Berlin Wall in 1989. Four years after his liberation, and following general elections in 1994, Nelson Mandela became the first democratically elected president of South Africa.[80] Two years later, in 1996, the Constitution of the Republic of South Africa was promulgated and appeared to be one of the best in the world for innovating at many levels. With regard to the institution of tribunal systems, section 22 of the interim Constitution became section 34 of the final Constitution. The formulation was amended slightly, to read: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before courts or, where appropriate, another independent and impartial tribunal or forum.' Section 34 creates a constitutional obligation on the state to establish independent tribunals for the resolution of civil disputes. This was emphasised in Bernstein v Bester, which reiterated that 'in all democratic societies the state has the duty to establish independence for the resolution of civil dispute . . . in a constitutional state that obligation is a fundamental importance and it is clearly recognised as such in our constitution'.[81]

A period of creation and development of domestic tribunals followed.[82] Today, owing to the varied demography and the persistent tension and conflicting interests between people, and between people and their rulers, the modern state of South Africa is characterised by the coexistence of various institutions to settle disputes. These institutions include not only the classical courts generally referred to as the judiciary, but also ADR mechanisms, at times incorporated by tribunals.[83] The final Constitution of 1996 provided in section 211(3) that

'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'[84]

THE IMPORTANCE AND ROLE OF A UNIFIED TRIBUNAL SYSTEM

A unified tribunal system in South Africa is important to prevent different tribunals operating in a disconnected manner from each other. Church tribunals are an example of the ecclesiastical beginnings of the formation of tribunals, and the tribunals that were formed by indigenous people illustrate the establishment of such methods of adjudication through different eras. Church tribunals set the foundation for the independence and judicial review of tribunal decisions. It is evident that tribunals enhance access to justice in the utilisation of informal procedures, their relaxed mode of operation and the employment of ADR mechanisms. But a unified system is needed to address the shortcomings of tribunals by ensuring the rationalisation of rules for the tribunal system, instead of different sets of rules that are an unnecessary duplication of one another. This unified system should adopt ADR mechanisms, since not all tribunals currently utilise ADR techniques as a method to ensure the early resolution of disputes. The tribunal system must ensure that it has power and thrust to enforce its decisions, because it currently relies on the court system for that enforcement. Finally, the tribunal system should be tiered so that there are opportunities for a matter to be heard, referred to, reviewed and appealed, which will enable the system to be independent of the court system, thus easing the court load and not adding to the burden on courts.

CONCLUDING OBSERVATIONS ON THE HISTORICAL MILIEU OF TRIBUNALS

This article has examined the historical milieu of tribunals, tracing their beginnings within a South African context. Since their inception, tribunals have played a determining role in settling disputes among members of society. Their peculiarity in South Africa lies in the fact that they were developed alongside existing ADR mechanisms embedded in customary law, indigenous customs and the principle of *ubuntu*. Tribunals and the tribunal system have crossed time and space within the South African context, and their role is identifiable not only prior to the colonial period in the country, but also after colonisation, during the apartheid system and in the current democratic state. Several cases exemplify the relevance of tribunals, which, notwithstanding their independent status, remain subject to judicial review by courts, especially where it is believed that justice has not been not served. Nevertheless, we have seen the relevance of the tribunal system as an alternative to the classical form of dispute resolution provided by the courts.

Notes

1 MAustin and P Vidal-Naquet, *Economic and Social History of Ancient Greece: an introduction* (Berkeley and Los Angeles, 1977), p 297. See also R Carnwath,M Chitra, G Downes and P Spiller, 'An overview of the tribunal scenes in Australia, Canada, New Zealand and the United Kingdom', in R Creyke (ed), *Tribunals in the Common Law World* (Port Melbourne, Victoria, 2008), pp 1–26 at p 2. The term 'tribunal' comes from the Latin tribunus, referring to the tribune, the official who oversaw this court.

2 For the practice of *makgotla*, see R Choudree, 'Traditions of conflict resolution in South Africa', (1999) 1 *African Journal on Conflict Resolution* 9–27 at 23–25.

3 A Velthuizen, 'Applying endogenous knowledge in the African context', (2012) 42:1 *Africa Insight* 73–86 at 78–79.

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6 E Barker, 'Introduction', in E Barker (ed), *Social Contract: essays by Locke, Hume and Rousseau* (Oxford, 1966), pp v–lxi at pp xii–xvi.
7 S Letwin, 'Plato' and 'Cicero', in S Letwin, *On the History of the Idea of Law,* ed N Reynolds (Cambridge, 2008), pp 9–20 and 42–55.
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17 Ibid, p 209.
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19 Ibid, pp 35–36. See also Worden, *Slavery in Dutch South Africa*, p 42.
20 W Storey, *Guns, race, and power in colonial South Africa*, pp 35–36. See also Worden, *Slavery in Dutch South Africa*, pp 12, 125. F Kariuki, 'Conflict resolution by elders in Africa: successes, challenges and opportunities', pp 5–6, <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf>, accessed 19 October 2020.
21 Kariuki, 'Conflict resolution by elders in Africa', pp 5–6. See also A Ajayi and L Buhari, 'Methods of conflict resolution in African traditional society', (2015) 8:2 *African Research Review* 138–157 at 141.
22 Ajayi and Buhari, 'Methods of conflict resolution', p 141.
23 Velthuizen, 'Applying endogenous knowledge in the African context', pp 75–78.

24 N Masina, 'Xhosa practices of *ubuntu* for South Africa', in I Zartman (ed), *Traditional Cures for Modern Conflicts: African conflict 'medicine'* (London, 2000) pp 169–181 at p 171.
25 Cited in T Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town, 1991), p 91.
26 Masina, 'Xhosa practices of *ubuntu* for South Africa', p 171.
27 Cited in Bennett, *Sourcebook of African Customary Law for Southern Africa*, p 91.
28 Ibid.
29 Masina, 'Xhosa practices of *ubuntu* for South Africa', pp 169–170, emphasis in original.

30 Ibid, pp 170–171.

31 Ibid, p 172.
32 Ibid, p 169.
33 O Schreiner, *The Contribution of English Law to South African Law; and the rule of law in South Africa* (Cape Town, 1967), p 5. See also Worden, Slavery in Dutch South Africa, pp 2–3. The Dutch East India company ruled the Cape Colony from 1652 to 1795.

34 T Bennett, *Customary Law in South Africa* (Cape Town, 2004), pp 35–36. The approach taken by the Cape authorities was consistent with Ordinance 3 of 1849, which allowed customary law to apply, provided that it was not repugnant to the general principles of humanity as observed by the civilised world.
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