A missing link in the Traditional Courts Bill 2017

Evidence obtained through human rights violations

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The issue of admission of evidence obtained through human rights violations is central to a criminal justice system as a mechanism through which to prevent overzealous prosecution by the state and ensure protection of human rights. As such, any court that deals with criminal cases has to evaluate evidence before it is admitted. This article argues that the Traditional Courts Bill (TCB)[1] does not provide for a mode of dealing with evidence obtained as a result of human rights violations. To substantiate this argument, the article reviews the current Bill, and reflects on the challenges that arise with regard to evidence obtained in this way. The article contextualises section 35(5) of the Constitution of the Republic of South Africa, and discusses the practical difficulties of applying it under the current Bill. The article concludes with recommendations for measures that can ensure that accused persons are not prejudiced when appearing before the court.

Much has been written on the Traditional Courts Bill (TCB), focusing in particular on the need to balance the law and tradition, as well as issues of legal pluralism in South Africa, and offering a comparative analysis of various aspects of traditional leaders' role in justice and crime prevention.[2] There is a wealth of literature on the application of section 35(5) of the Constitution of the Republic of South Africa, yet insights on its application to traditional courts remain a grey area.[3] The attempts by the Executive to formalise the operation of traditional courts, and use the Bill of Rights as a foundational principle, point to the need for a clear framework on how to deal with evidence obtained as a result of human rights violations.

Jurisprudence on the application of section 35(5) of the Constitution requires that the collection of evidence before a trial meet certain criteria. For instance, an accused should be informed of the right to legal representation before s/he is charged.[4] Furthermore, s/he should not be subjected to torture or inhuman treatment to extract evidence.[5] The right to a fair trial has constitutional safeguards that include an accused's right to be informed promptly of the charge against him or her,[6] the right to remain silent,[7] and the consequences of not remaining silent.[8] In addition, s/he should not be compelled to make a confession or admission

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that could be used in evidence against him or her,[9] s/he should be brought to court within 48 hours,[10] and be presumed innocent until proven guilty.[11] It follows that if an investigating authority disregards these safeguards while collecting evidence, a violation of the constitutional rights of the accused occurs. The problem with the TCB in its current formulation (as will be shown later) is that the traditional courts will not adjudicate cases investigated by the police. This sets up an environment for the violation of an accused's rights by any person or entity involved in the pre-trial investigations before s/he is brought to a traditional court.

If the pre-trial investigations are not placed into perspective, the TCB's objective to apply the Bill of Rights in traditional courts is defeated. There is no available literature on how the existing or revised (prospective) traditional courts will deal with admission of evidence that has not been collected by a formal investigative agency such as the police. The human rights of an individual have to be respected, and as such, how evidence was collected during the pre-trial stage should be scrutinised.[12] This article evaluates how the TCB deals with evidence obtained through human rights violations in relation to section 35(5) of the Constitution.

The TCB's formulation of the operation of traditional courts contains a number of key points. Firstly, the parties that seek to appear before the traditional courts need to do so voluntarily and with consent.[13] Secondly, the traditional courts should incorporate the notion of living customary law, which is developed by the people who practise it and live by its norms.[14] Thirdly, the TCB should protect against discrimination by encouraging full participation of all members of a community, regardless of gender.[15] The defining feature of these arguments is the need for a progressive development of customary law through a traditional court's jurisdiction in the cases it adjudicates.

Much of the current debate about traditional courts has been centred on whether these courts should have jurisdiction over both criminal and civil cases, and the jurisdictional boundaries of individual courts.[16] However, commentators have not yet addressed the issue of admission of evidence that is obtained unconstitutionally. The fact that the traditional courts have criminal jurisdiction subjects them to section 35(5) of the Constitution. We therefore urgently need a conversation about the admission of such evidence as part of the deliberations on this Bill.

Review of the Traditional Courts Bill in relation to evidence obtained through human rights violations

The current TCB does not contain any clause that determines how evidence should be collected or admitted. The clause that most closely addresses evidence states that '[t]he customary law of procedure and evidence applies in traditional courts'.[17]

This provision sets out the law of evidence and procedure as customary law, but does not articulate what the content of such customary law is. This poses a danger, as the application of customary law is consequently left open to the subjective definitions of a given community.[18]

The complexities of customary law arguably stem from the system of legal pluralism.[19] South Africa has various customary laws for its diverse groups of people.[20] While this clause ensures the applicability of different customary laws in different communities, its subjectivity also presents some dangers in application.

Because the TCB has no provision for dealing with evidence obtained through human rights violations, it raises questions as to how section 35(5) would be applied. This section provides:

> 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.[21]

This section presents a constitutional directive that requires a court to exclude evidence obtained through human rights violations, subject to either of two conditions: firstly, where this admission renders a trial unfair, and secondly, where it leads to a maladministration of justice.[22] The court only exercises its discretion not to admit evidence after subjecting it to these two conditions, which provide objective criteria that are used to interpret this provision.[23]

The clause in the TCB that requires application of the customary law of procedure and evidence in traditional courts requires a traditional leader to subject the pre-trial facts to the objective criteria under section 35(5). The challenge is that under the current formulation of the TCB, the traditional court neither adjudicates cases investigated by the police nor offers any alternative option for conducting investigations. As such, a traditional leader may depart from the objective criteria under section 35(5) because there is no investigative body that will be subjected to this inquiry.

The subjective application of customary law, when viewed against the objective criteria under section 35(5), is bound to violate the right to equality.[24] This violation occurs when customary laws are applied differently to similar facts, just because those facts are presented before different traditional courts in different communities. Consider a hypothetical situation, where different communities apply different consequences for theft or assaults. The severity of these consequences may differ greatly, illustrating how inequalities may result from different customary laws being applied.

The universal application of section 35(5) is bound to curb the discretion that the traditional leaders in these community courts currently use in settling issues. As such, we can see how a subjective application of section 35(5) on communities violates the right to equality.[25]

The memorandum of the TCB sets out that the guiding principles for the proposed court require an interpretation of the Bill of Rights in a manner that promotes the values that 'underlie an open and democratic society, based on human dignity, equality and freedom'.[26] To make this principle real in criminal cases would require that the subjective variability of customary law be tempered through the application of the more objective criteria under section 35(5) of the Constitution.

Another guiding principle in the memorandum requires that the traditional courts interpret 'any legislation; and when developing the common law or customary law', promote the spirit, purport and objects of the Bill of Rights.[27] While the development of common law is beyond the scope of the proposed courts, the development of customary law under this new genre of formal courts must provide clarity on the admissibility of evidence obtained through human rights violations. This involves developing normative rules in the TCB that ensure that there is a proper process of investigating cases that upholds the right to a fair trial. Customary jurisprudence that engages the objective criteria under section 35(5) should also be developed organically. Where such clarity cannot be given, the basis for the development of living customary law is not adequately grounded.[28]

The requirement that the traditional courts do not adjudicate cases that have been investigated by the police creates grounds for the possible violation of an accused's pre-trial rights.[29] The lack of clarity on how such cases

are investigated exacerbates the problem. While the TCB seeks to uphold the spirit of the Bill of Rights, its lack of insight on how the traditional courts will deal with issues around the collection and admission of evidence poses a potentially dangerous predicament. As such, it is hard to guarantee that the admissibility of evidence obtained through human rights violations will be minimised.[30] The subjective application of a customary law procedure would likely be in conflict with the application of the objective criteria under section 35(5).

One may argue that traditional courts should be bound to the same rules as any other court and as such, pre-trial investigations do not necessarily protect an accused's pre-trial rights and the subsequent admission of evidence. While this may be true, the accused in a traditional court hearing might only receive protection once a superior court such as the High Court reviews the judgment of the traditional court – which might only be established after an innocent person's time has been wasted and his or her resources squandered, or credit injured.[31] Principles that are developed by the traditional courts on how to deal with evidence obtained through human rights violations may be subjected to review by the High Court,[32] which will create greater case backlogs in the already stretched high courts across South Africa.[33]

The reference to the application of the Bill of Rights by the traditional courts is based on two key considerations: firstly, that women are accorded full and equal participation when they are before the court,[34] and secondly, that there should be no discrimination against vulnerable persons such as children, the elderly, youth, the indigent and persons with disabilities, or on the basis of sexual orientation or gender identity.[35] However, applying the Bill's current general procedural and substantive aspirations, without considering the nature of the evidence that is being admitted, will result in further discrimination, because such evidence violates one's right to a fair trial under section 35(5) of the Constitution.

Technical aspects such as evidence obtained through human rights violations, which would normally be picked up by a lawyer, are not easily identified in the traditional court environment because of the exclusion of legal representation in the proposed courts.[36] Subjecting traditional courts to the same rules as common law courts fails because of peculiarities such as these, for example the lack of legal representation and the fact that cases are adjudicated by untrained officers. Jurisprudence, however, indicates that customary law should not be recognised at the expense of human rights violations.[37] The tensions inherent in the technical aspects of trials in traditional courts can only be resolved if both these courts and contemporary courts are required to apply the Bill of Rights consistently.

As noted earlier, the application of section 35(5) of the Constitution requires a practical evaluation of how unconstitutionally obtained evidence affects the fairness of a trial of an accused, or impacts the court's administration of justice.[38] With the Bill of Rights as the foundation of the application of the TCB, section 35(5) requires that a framework be provided under the TCB to speak to the collection and admission of evidence. These principles are easily resolved in other courts because investigation processes routinely question how evidence is collected and then subsequently admitted in court.[39] An example of such a procedure is a trial within a trial, which tests the voluntariness of the collection of the evidence. This kind of mechanism is not evident in the TCB.[40]

Evidence that is obtained through human rights violations likely does not fit within the larger framework that guides the operation of the proposed traditional courts under the TCB.

The drafters may also have had no intention to apply section 35(5) to the traditional courts. But these two arguments point to a dangerous predicament.

Firstly, there will be a selective application of the Bill of Rights by the traditional courts. This will defeat the purpose of the TCB, which seeks to eliminate any abuse in the prospective traditional court process, to protect the public interest, and to ensure accountability.[41] These kinds of abuses of the traditional courts were illustrated in the case of *Buyelekhaya Dalindyebo v S*,[42] where the king of the abaThembu, Dalindyebo, was sentenced to 12 years' imprisonment for crimes he committed against his subjects in the former Transkei. Dalindyebo claimed that he was exercising his authority as the king in enforcing law and order.[43] Consider a hypothetical where Dalindyebo presided over these criminal cases in a traditional court under the TCB. An application of section 35(5) of the Constitution would expect that Dalindyebo (as the investigator) would be questioned as to how he had collected the evidence and adduced it in the traditional court. Furthermore, he would have to make a decision with regard to the admissibility of this evidence by scrutinising its effect on the fairness of a trial or the disrepute on the administration of justice.

The introduction to the *Dalindyebo* appeal in the Supreme Court of Appeal is instructive in how it shows a distaste for the violation of civil liberties that the case illustrated:

> Imagine a tyrannical and despotic king who set fire to the houses, crops and livestock of subsistence farmers living within his jurisdiction, in full view of their families, because they resisted his attempts to have them evicted, or otherwise did not immediately comply with his orders. Imagine the king physically assaulting three young men so severely that even his henchmen could not bear to watch. Imagine the same king kidnapping the wife and children of a subject he considered to be a dissident in order to bend the latter to his will.[44]

The Supreme Court of Appeal's confirmation of the convictions is evidence that constitutional values cannot be sacrificed at the altar of customary expedience.

Secondly, the prospective traditional courts are not expected to handle cases that are being investigated by the police. The relevant clause provides that 'a traditional court may not hear and determine a dispute which … is being investigated by the South African Police Service'.[45]

However, under the TCB these courts may handle common criminal cases such as theft, breaking and entering, assaults, receiving stolen property and malicious damage to property.[46]

This indicates a lack of clarity about how traditional leaders should handle these kinds of cases. A literal interpretation shows that the investigation of a case by the police neutralises the jurisdiction of the traditional court. Where the traditional court handles a case that has not been subjected to any investigation, two scenarios arise. On the one hand, a traditional leader may apply local traditional law subjectively and based on local practice, using his discretion to decide on the fate of an accused in a case before him without paying regard to any particular rules or principles.[47] The alternative, objective approach would require that the traditional leader uses established rules (for example under section 35[5]) to evaluate the facts before exercising discretion to admit the evidence. Under the Bill's current formulation, both decisions are improper. While the subjective application likely leads to the absence of a fair trial, the objective application of the criteria under section 35(5) may erode the integrity of the customary law of a given community.

The TCB's current formulation advocates for the subjective approach. However, an objective approach would improve the quality of decisions because it would contextualise the traditional courts' collection, and subsequent admission, of such evidence. The current Bill does not offer a framework for such an approach. The lack of an investigative mechanism for the investigation of cases (such as the police) affects the ways that courts can use the evidence that is collected, because it may be prejudicial to the accused.[48]

Thirdly, under the proposed TCB the courts may only exercise their jurisdiction where the parties consent to it. Where the voluntariness of such consent is not adequately evaluated, the Bill does not offer a sufficient measure to deal with possible abuse of the court process. It may be that the traditional leader, as a presiding officer, is involved both in the investigation of the allegations and in decisions around the admission of evidence.[49] Although his engagement may be well intentioned, his involvement may create the perception of an unfair trial for the accused. This is in contrast to the contemporary judicial system that does not allow judicial officers to investigate and adjudicate a case. The customary practice opens the risk that traditional courts may admit evidence that is unfairly obtained.

In essence, then, the traditional leader may act as investigator and judge in the same case. This creates a possibility of bias on his part. Since he is not an investigative entity like the police, he runs the risk of acting like a vigilante.[50] In such cases, it makes it harder to use the objective criteria under section 35(5).

The traditional court's exercise of its jurisdiction does not draw a clear line between the investigation and adjudication of cases. Consequently, cases that are not investigated by the police will most likely be adjudicated by the traditional courts, with no formalised rules or principles. As such, there may well be a possible admission of evidence that violates the rights of an accused. Although the TCB envisages traditional courts presiding over cases such as assaults and petty thefts, even these 'simple' cases have real effects on individuals. It may be that a result is viewed as synonymous with a conviction, even though it is intended to be of a reconciliatory or compensatory nature.

The context of section 35(3) of the Constitution

Section 35(5) presumes that evidence is admissible unless it renders a trial unfair, or is detrimental to the administration of justice.[51] Jurisprudence on this section has developed around issues of pointing out suspects, illegal searches, illegal surveillance, autoptic evidence, and evidence obtained through the improper treatment of witnesses.[52] The violation of these rights is most often perpetrated by the police or investigative bodies that are involved in the collection of evidence.[53] The question here is how evidence obtained through human rights violations fits into the bigger picture of how the proposed traditional courts operate under the TCB.

The Bill of Rights underscores rights such as the right to freedom and security of the person, privacy, expression and movement, and the right to a fair trial.[54] An accused may also exercise the right to remain silent once s/he has been informed of the charge against him or her.[55] Other guarantees include the right not to be compelled to make a confession or admission that could be used in evidence against an accused; the right to be brought to court within 48 hours; and the right to be presumed innocent until proven guilty.[56] All of these protections safeguard against the violation of an accused's rights.

The police, as the chief investigating authority, are expected to respect these safeguards. Case law shows that section 35(5) extends to

other individuals in a similar capacity. Two cases illustrate this position. *S v Songezo Mini and 4 others (Mini)* subjected the evidence obtained by security officers to scrutiny in terms of section 35(5) before admitting it.[57] In *S v Hena*, the court held that section 35(5) also applies to situations where the police abdicate their statutory duty to investigate crimes by sub-contracting the task to anti-crime committees that gather evidence by seriously and deliberately violating the constitutional rights of an accused person.[58] Research has also shown that vigilantes are used in this way, in other words, to take on the role of the police to collect evidence or investigate cases.[59] Taken together, these cases show that other groups, whether lay persons or security operatives (like guards), have to ensure that the law is not abused. Traditional leaders who collect evidence in the course of presiding over a traditional court, may act, or be at risk of being viewed, as vigilantes in doing so. They must therefore be subject to the same constraints on their methods.

The laws of procedure should not be limited to customary law, but to other laws of evidence, civil and criminal procedure where applicable. As noted earlier, the current formulation of the TCB does specifically mandate that section 35(5) should apply in customary courts because it only requires that the customary law of procedure shall apply to traditional courts.[60] The TCB therefore provides an enabling environment for the traditional courts to disregard the police in the investigation of cases. The possible rights violations that may result must be carefully considered.

The process of admission of evidence is a technical aspect of the administration of justice, and requires that traditional leaders appreciate these concepts. In *S v Zuko*,[61] the court provided four factors that may form the basis for refusing to admit certain evidence. These are: a lack of good faith on the part of vigilantes; an inability to justify their conduct in terms of public safety or emergency; the seriousness of the violation of the appellants' rights to privacy, freedom and security of person and dignity; and, finally, the availability of lawful means to acquire the evidence. Since these factors enhance the right to a fair trial right from the pre-trial stages,[61] the persons collecting evidence should be able to appreciate the consequences that arise from their actions. As such, if an individual is going to collect evidence, s/he ought to know that failing to follow the required procedure, and violating the provisions in the Bill of Rights in the course of collecting evidence, will lead to its probable exclusion.

Conclusion and recommendations

The failure to create a framework for the collection and admission of evidence in the TCB dents the proposed fusion of the Bill of Rights as the cornerstone to the proposed law. In the long run, empirical research on the rules governing the collection and admission of evidence in criminal cases is needed to establish how traditional courts fare in this regard, and how a fusion of section 35(5) may be applied.

In the interim, if the quality of evidence that is admitted in the traditional courts is to match the constitutional directive under section 35(5), criminal cases should be left to the normal courts, unless the parties categorically wish to use the traditional courts. For this to happen, both parties have to be willing to use the traditional courts. However, customary law at times requires that a person follow it, regardless of his perceptions. Consider a hypothetical where A is wrongly accused of malicious damage to the property of B. As such, A is required to come to the traditional court for either reconciliation or paying compensation, as a way of averting possible imprisonment in the magistrates' court. The evidence used to incriminate A may violate his rights to a fair

hearing and the presumption of innocence. Such a scenario illuminates a consent that may be obtained through undue influence by B – perhaps facilitated or supported by the traditional court. This position pits A against the desires of B, in a court they would not have originally gone to. As a result, the outcome of the matter in the traditional court is, to a great extent, based on evidence obtained through human rights violations.

If criminal cases are to be handled by the traditional courts, the police should play an oversight role to ensure that the evidence used is properly obtained and admitted – albeit in an informal manner. Traditional leaders ought to have some training on how to interrogate the nature of the evidence that is brought before their courts, to ensure that the protections against discrimination extend to ensuring that evidence that is admitted is properly collected.



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Notes

1 Traditional Courts Bill of 2017 (B1-2017, or TCB).

2 The TCB has been introduced in Parliament four times since its inception in 2008. The most recent attempt was in December 2016 as B1-2017. Some of the emanating literature include P Holomisa, Balancing law and tradition: the Traditional Courts Bill and its relation to African systems of justice administration, *South African Crime Quarterly*, 35, 2011, 17–21; DS Koyana, *Customary law in a changing society*, Cape Town: Juta and Co Ltd, 1988; C Rautenbach, Deep legal pluralism in South Africa: judicial accommodation of non-state law, *The Journal of Legal Pluralism and Unofficial Law*, 42:60, 2010, 143–177; CB Soyapi, Regulating traditional justice in South Africa: a comparative analysis of selected aspects of the Traditional Courts Bill, *PER/PELJ*, 17:4, 2014, 1441–1469; B Tshehla, Here to stay: traditional leaders' role in justice and crime prevention, *South African Crime Quarterly*, 11, 2006, 15–20.

3 LT Andrew and N Susan, Improperly obtained evidence in the Commonwealth: lessons for England and Wales?, *International Journal of Evidence and Proof*, 11, 2007, 75–105; JD Mujuzi, The admissibility of evidence obtained as a result of violating the accused's rights: analysing the test set by the Hong Kong Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*, *International Journal of Evidence and Proof*, 16, 2012, 425–430 (the text states that there is a wealth of literature on the application of section 35(5) of the Constitution but this does not support that. Need South African literature to either support the claim or acknowledge the gap with regard to traditional courts).

4 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 35.

5 Ibid., section 35(3)a.

6 Ibid., section 11(2).

7 Ibid., section 35(3)h.

8 Ibid., section 35(1)a.

9 Ibid., section 35(b)a

10 Ibid., section 35(1)c.

11 Ibid., section 35(3)h.

12 This informs the need to evaluate the application of section 35(5) – a crucial section in the Bill of Rights.

13 T Duda, How MPs are pushing back against the Traditional Courts Bill, *BusinessDay*, 28 March 2018, https://www.businesslive.co.za/bd/opinion/2018-03-28-how-mps-are-pushing-back-against-the-traditional-courts-bill/, (accessed 7 September 2018).

14 R Griffin, The Traditional Courts Bill: are they getting it right?, Helen Suzman Foundation (HSF), Brief, 14 February 2017, https://hsf.org.za/publications/hsf-briefs/the-traditional-courts-bill-are-they-getting-it-right/, (accessed 7 September 2018).

15 T Memela, Traditional Courts Bill: Commission for Gender Equality submission; CGE submissions to Parliament, Parliamentary Monitoring Group (PMG), 20 March 2018, https://pmg.org.za/committee-meeting/26031/, (accessed 7 September 2018).

16 For a discussion of these issues see F Osman, Third time a charm? The Traditional Courts Bill 2017, *South African Crime Quarterly*, 2018, 64, 45–53.

17 TCB, clause 7(8).

18 Customary law is defined as a law that develops out of the social practices and customs of a particular group of people, which subsequently becomes legally obligatory to them. See L Meintjies-Van der Walt et al., *Introduction to South African law: fresh perspectives*, 2nd edition, Cape Town: Heinemann/Pearson Education South Africa, 2011, 111.

19 ES Nwauche, Affiliation to a new customary law in post-apartheid South Africa, *PER/PELJ*, 18:3, 2015, 569–592.

20 The TCB recognises that the applicable customary law to a given dispute shall have to be limited to the customs and traditions of a given people. This clause recognises the subjective nature of customary law to a given community. See YA Aiyedun, Fair trial and access to justice in South Africa: how traditional tribunals cater to the needs of rural female litigants, unpublished PhD thesis, University of Cape Town, 2013.

21 Constitution, section 35(5).

22 PJ Schwikkard and SE van der Merwe, *Principles of evidence*, 4th edition, Cape Town: Juta and Co Ltd, 2015, 230.

23 This objectivity is evaluated in detail in ibid., para 129, 1210–1210(6).

24 Section 9 of the Constitution comes into play.

25 An example is the Supreme Court of Appeal's distaste for a traditional leader's exercise of his discretion in adjudicating cases in violations of his subject's rights, in *Buyelekhaya Dalindyebo v S* [2015] 4 All SA 689 (SCA). See discussion on *Buyelekhaya Dalindyebo v S*.

26 TCB, memorandum.

27 TCB, clause 3(2)a(1)-(2).

28 R Ozoemena, Living customary law: a truly transformative tool, *Constitutional Court Review*, 6, 2013, 147–164; AC Diala, The concept of living customary law: a critique, *The Journal of Legal Pluralism and Unofficial Law*, 49:2, 2017, 143–165.

29 TCB, clause 4(2)(b)(i).

30 While the TCB in clause 4(2)(b)(i) ousts the adjudication of cases investigated by the police, it does not offer options with regard to other investigative bodies.

31 See the discussion on vigilante evidence.

32 The High Court is empowered to review the decisions of the proposed traditional courts under clause 10(2)(b).

33 See F Hweshe, SA courts winning war against backlogs, *South African Government News Agency*, 7 June 2011, https://www.sanews.gov.za/south-africa/sa-courts-winning-war-against-backlogs (accessed 7 August 2018).

34 TCB, clause 7(3)(3)(i)-(ii).

35 Ibid., clause 7(3)(3)(i)-(ii).

36 Ibid., clause 7(4)(b).

37 See discussion on *Buyelekhaya Dalindyebo v S*.

38 Constitution, section 35(5).

39 The point of departure in the attempt by the legislature to embrace legal pluralism with regard to the application of customary law by the customary courts.

40 Compare this to the application of a trial within a trial in cases before the contemporary courts. *See S v Makhanya* 2002 (3) SA 201 (N), 201; *DPP Transvaal v Vijoen*, 2005 (1) SACR 505 (SCA), para 32, 187f-189g.

41 TCB, preamble, para 2.

42 *Buyelekhaya Dalindyebo v S* [2015] 4 All SA 689 (SCA).

43 Ibid., para 77.

44 Ibid., para 1.

45 TCB, clause 4(2)(b)(i).

46 Ibid, schedule 2.

47 The empirical study by Tshehla, Here to stay, 15–20, reiterates various challenges in this regard.

48 Statistics on assaults, malicious damage to property.

49 See the facts in *Dalindyebo*.

50 See discussion on vigilante evidence.

51 *S v Tandwa* [2007] SCA 34 (RSA), para 116; *Mthembu v S* [2008] 3 All SA 159 (W), para 25. For more insights on section 35(5), see RD Nanima, The legal status of evidence obtained through human rights violations, unpublished LLM thesis, University of the Western Cape, 2016.

52 DT Zeffert and AP Paizes, *The South African law of evidence*, 2nd edition, Durban: LexisNexis, 2008, 724, 725, 728, 731, 736.

53 Ibid., 724, 725, 728, 731, 736. Furthermore, South Africa also uses the common law exclusionary rule of evidence, which hinges on the discretion of the judiciary. There is, however, a distinction in the application of the common law exclusionary rule and the rule under section 35(5). It must be noted that the common law exclusionary rule applies to all cases, and not only criminal cases, while the statutory exclusionary rule applies only to criminal cases.

54 Constitution, sections 12, 14, 16, 21, 35.

55 Ibid., section 35(1) (a), (h).

56 Ibid., section 35(3) a, c, h.

57 *S v Songezo Mini and 4 others* unreported Case no. 141178 of 2015 (30 April 2015), para 20, 21, 22.

58 S v Hena 2006 2 SACR 33 (SE 40i-41b).

59 Empirical research from Limpopo shows that members and traditional leaders of a community join vigilante groups to fight crime in their communities. See B Tshehla, *Traditional justice in practice: a Limpopo case study*, Institute for Security Studies (ISS), Monograph 115, 2005, 45.

60 TCB, clause 7(8).

61 Unreported ECD case no. CA and R159 of 2001.

62 F Kayitare, Respect of the right to a fair trial in indigenous African criminal justice systems: the case of Rwanda and South Africa, unpublished LLM thesis, University of Ghana, 2004, on perceptions on the right to a fair trial in indigenous communities.