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# **South Africa's Troubled Royalty**

## **Traditional Leaders after Democracy**

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## Preface

The Law and Policy Papers series was established in 1994 by the Centre for International and Public Law in the Faculty of Law, The Australian National University. The series publishes papers contributing to understanding and discussion on matters relating to law and public policy, especially those that are the subject of contemporary debate. Since 1999 the papers have been published jointly by the Centre for International and Public Law and The Federation Press.

Professor Lindell commenced work on this study of British Tribunals of Inquiry and Australian Royal Commissions as a commissioned research paper for the Australian Commonwealth Parliamentary Library. The Australian National University's Centre for International and Public Law and Federation Press have been pleased to obtain the permission of the Library to publish the full version of the study as part of the Law and Policy Papers Series. For its part, the Library has been pleased to retain the right to publish a summary of the major findings of the study in its research paper series. This paper is the twenty-third in the series.

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# South Africa's Troubled Royalty: Traditional Leaders after Democracy

Christina Murray

## Introduction

In August this year, Leruo Molotlegi, was crowned king of South Africa's Royal Bafokeng nation. The media was full of the story of the coronation. The young king was filmed wearing a dark suit with a leopard skin draped over his shoulders, driving to his coronation on a donkey cart, past the luxury German cars of South Africa's new political elite. The Bafokeng are relatively wealthy – they own the world's richest platinum deposits – and King Molotlegi had chosen the symbol of the donkey cart with care. Drawing on two key values in South Africa's new Constitution, democracy and development, he said that it reflected his commitment to representing the ordinary people of his kingdom and his recognition of the need for development.<sup>1</sup>

The enthusiasm of the media for Molotlegi's coronation and various others in South Africa over the past three or four years suggests that South Africans thoroughly enjoy these royal moments. But, of course, the images of the Bafokeng king flashed across our television screen are incongruous in a constitutional system based on democracy and development. And, once the ceremonies are behind us, determining a role for traditional leadership in South Africa presents what sometimes seem to be insurmountable problems. The problems were anticipated by democrats fighting for South Africa's liberation from apartheid. For instance, the brief set of *Constitutional Guidelines for a Democratic South Africa* circulated by the exiled African National Congress in 1988, both hinted at the problems hereditary leaders pose and imagined a solution. They said: "The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic

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<sup>1</sup> 'New king warns Bafokeng of finite resources' *Sunday Independent* (17 August 2003) 1.

principles embodied in the constitution'.<sup>2</sup> This lecture describes South Africa's current attempts to accommodate traditional leadership.

The approach of the South African Constitution to race and culture is clear. It offers no political rewards to assertions of ethnic or cultural identity. Instead, cultural practices are protected by what Kymlicka has termed polyethnic rights.<sup>3</sup> The Bill of Rights protects both language and cultural rights.<sup>4</sup> It also establishes a language board<sup>5</sup> and a Cultural Commission.<sup>6</sup> But there is no special representation of any groups, no self-government rights and even South Africa's weak form of federalism does not recognise cultural or ethnic diversity in any meaningful way.<sup>7</sup> For traditional communities this approach means that the Constitution recognises the 'institution, status and role' of traditional leaders and confirms that customary law systems will continue to be recognised. On the other hand, traditional leaders have no constitutional role in government and all customary practices are subject to the Constitution and susceptible to amendment by Parliament.<sup>8</sup> The Constitutional Court has described this as 'recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences'.<sup>9</sup>

This constitutional framework, which hopes to separate politics and culture, was not accidental. It reflects the firm commitment of political leaders to displace apartheid's ethnic politics. The question that we now confront is whether current demands of traditional leaders threaten this model and whether the current proposals for accommodating them reflect compromises that undermine it. To use the language of the ANC, can the institution of hereditary rulers be transformed to serve the people in conformity with democracy?

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2 Paragraph (c).

3 See B Oomen, 'Group Rights in Post-apartheid South Africa: The case of the traditional leaders' (1999) 44 *Journal of Legal Pluralism* 73.

4 South African Constitution, 1996 ss 30 and 31.

5 Under s 6(5) of the Constitution national legislation must establish a Pan South African Language Board to promote the 11 official languages and certain other listed languages.

6 Section 185 of the Constitution establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

7 The electoral system is a possible exception. It is a closed list system of proportional representation and thus facilitates the formation of ethnically or culturally based parties.

8 Constitution s 211.

9 *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) para 195.

## The context

There seems to be no reliable information in South Africa about how many people are subjects of traditional leaders or live under customary law systems. Some claim that the majority of the population is part of traditional systems, others say 40 per cent. But the source of these figures is unclear and, perhaps more importantly, they fail to distinguish between people who return from urban centres to their rural 'homes' for rituals – much as non-practising Christians might nevertheless go to church at Christmas – and those, at the other extreme, who are subject to chiefly rule in their day-to-day lives. For this latter, largely rural group traditional leaders may determine where they live, where they collect their wood, how matrimonial disputes should be resolved, what taxes they pay and, in a case documented in Sekhukhuneland, whether women teachers should be allowed to wear trousers.<sup>10</sup> The issues discussed here matter mainly to this group, the people whose daily lives are subject to traditional leadership.

One might have expected the restoration of powers to traditional leaders and their communities to be a key goal of the process of liberation from oppressive rule. But, the fact that traditional leadership has survived at all is remarkable. As in other parts of Africa, South Africa's traditional leaders were co-opted by the colonial powers to govern rural areas.<sup>11</sup> Thus, Mahmood Mamdani's famous description of colonial tribal rule as rule by decentralised despots<sup>12</sup> fits the South African situation well. In particular, from the early 1950s under the apartheid government, the development of legislative and administrative structures in the Bantustans saw traditional leadership used in increasingly cynical ways and implicated chiefs ever more deeply in apartheid government. The central government's power of patronage was encapsulated in its power to depose and install chiefs and it was an effective tool in implementing apartheid policies in rural areas. Although there are accounts of leaders who resisted the demands of the central government, most did not. Under the corrupt apartheid system the rewards for compliance could be great. As Maloka and Gordon relate, in the Transkei, where 30 chiefs were deposed between 1955 and 1958 for resistance to

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10 B Oomen, *Tradition on the Move: Chiefs, democracy and change in rural South Africa* (2000) at 48ff.

11 See, for example, T Maloka and D Gordon, 'Chieftainship, Civil Society, and the Political Transition in South Africa' (1996) 22 *Critical Sociology* 37 and L Bank and R Southall, 'Traditional Leaders in South Africa's new Democracy' (1996) 37-38 *Journal of Legal Pluralism* 407.

12 See generally M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).

the demands of the apartheid government, 'Kaiser Matanzima of the lesser Thembu royal house won the favour of the apartheid authorities and later became president of the Bantustan. Similarly, in Bophuthatswana, Lucas Mangope, a minor chief, used the hard-line stance adopted against the recalcitrant Hurutse paramount chiefs to install himself as an alternative'.<sup>13</sup> Mangope later became president of the 'independent' homeland, Bophuthatswana. In the Ciskei, Lennox Sebe created a chieftaincy for himself and subsequently became president.<sup>14</sup>

Colonial and then apartheid structures also meant that chiefs increasingly turned to the government rather than their subjects for support. Van Kessel and Van Oomen say: '[S]tate recognition [became] more vital for the chieftaincy than popular support. Chiefs had become civil servants, to be hired, fired, paid and, if necessary, created by the government'.<sup>15</sup> Expected to deliver services with no real sources of income, they used some of apartheid's most vicious laws to support their enterprise. For instance, under apartheid's system of migrant labour, African men recruited from rural areas to work on the mines had to have their 'passes' and permits renewed annually in their home village. Chiefs administered the pass book system and ran the labour bureaux where permits were renewed – and they received a 'registration fee' for their efforts.<sup>16</sup>

The Draft White Paper on Traditional Leadership and Government issued by the national Department of Provincial and Local Government in 2002 sums up the situation that developed in South Africa from the 1950s starkly and accurately as one of 'increased oppression, where control over rural local government was the sole preserve of traditional leaders, most of whom eagerly complied with any government policy'.<sup>17</sup>

After protests in the 1950s and early 1960s, open opposition to the enlisting of chiefs to conduct the business of apartheid government declined until the late 1980s. Ironically, the relaxation in 1986 of the notorious 'pass laws' which controlled the movement of African people led chiefs to become more, not less,

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13 Maloka and Gordon above n 11 at 40.

14 Maloka and Gordon above n 11 at 40. See also I van Kessel and B van Oomen, "'One Chief, One Vote": The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96 *African Affairs* 561 at 563.

15 Van Kessel and Van Oomen above n 14 at 564.

16 Van Kessel and Van Oomen above n 14 at 563 and 566.

17 Department of Provincial and Local Government *Draft White Paper on Traditional Leadership and Governance* (October 2002) at 16. See also E Maloka, 'Traditional Leaders and the Current Transition' (1995 Second Quarter) *The African Communist* 34.

authoritarian. Once the rural population could work in cities without passes, chiefs lost the substantial source of revenue provided to them by the registration system. They replaced this loss of income with increased 'tribal levies'. Sometimes these were for public services such as building a school or clinic but often they were to benefit the chief. For instance, Van Kessel and Van Oomen document a case in which a levy paid for nappies for the chief's children.<sup>18</sup> Not unexpectedly, then, following the growing political anger and resistance to apartheid in the townships, as political protests against apartheid grew massively in rural areas chiefs found themselves one of the main targets. Maloka and Gordon describe the situation:

Unlike the 1950s-60s revolts, those of the period 1985-1990 were led by the youth and civic/resident associations against chiefs. These organs of civil society challenged the legitimacy and authority of these chiefs, demanding their resignation from Bantustan structures. Many villages consequently fell under the control of the youth and civic organisations, in line with the countrywide strategy of the ANC-aligned political organisations to render apartheid structures unworkable and create organs of "peoples' power" as an alternative. Thus many chiefs fled from their villages, governing from "exile".

At this time the attitude of South Africa's internal resistance movement, the United Democratic Front, was clear: 'Chiefs must go and the people must run the villages'.<sup>19</sup> But the chiefs fought back and in September 1987, 38 'progressive' chiefs met to form the Congress of Traditional Leaders of South Africa (CONTRALESA).<sup>20</sup> It was to be an ANC-aligned organisation.

CONTRALESA's Constitution states that it 'aims to unite all traditional leaders in the country; to take up the "demands of our communities jointly with them"; to "fight for the eradication of the bantustan system and restore South African citizenship to all our people"; to "school the traditional leaders about the aims of the South African liberation struggle and their role in it"; ... to win back "the land of our forefathers and share it among those who work it in order to banish famine and land hunger" and to fight for a unitary, non-racial and democratic South Africa'.<sup>21</sup> Van Kessel and Van Oomen comment that 'CONTRALESA emerged on the political scene couched in the discourse of

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18 Van Kessel and Van Oomen above n 14 at 567.

19 Van Kessel and van Oomen above n 14 at 568. Van Kessel and Van Oomen provide a fuller description of this period. The United Democratic Front was aligned to the banned African National Congress.

20 Maloka and Gordon above n 11 at 42.

21 *Race Relations Survey 1987/88* (1988) C Cooper et al (eds) at 922.

liberation politics'.<sup>22</sup> It also grew rapidly. Maloka and Gordon note that, by June 1989, more than 80 per cent of the chiefs in the Transkei and 50 KwaZulu chiefs were members of CONTRALESA. The participation of KwaZulu chiefs was particularly significant. Buthelezi (a minor chief) was Chief Minister of the Bantustan and, particularly after being condemned by the ANC in the early 1980s as 'an enemy of the people', he was heavily dependent on apartheid structures to maintain his power and ambitions. He viewed CONTRALESA as a threat to his power and warned KwaZulu chiefs against joining.<sup>23</sup> The stakes were high. In *Ethnicity and Politics in South Africa*, Gerhard Mare links the assassination of a prominent anti-Inkatha KwaZulu chief, Chief Mhlabunzima Maphumulo, to his membership of CONTRALESA.<sup>24</sup>

### **Traditional leaders and the transition to democracy**

The first tangible moves towards liberation were made in South Africa in 1990 when the apartheid government lifted the banning orders on the present government, the ANC, and other political organisations and famously announced Nelson Mandela's imminent release. This also spelt the end of the Bantustans and, perhaps seeing the writing on the wall, increasing numbers of chiefs joined CONTRALESA.<sup>25</sup> For the ANC, which was then unaware of its own massive support in rural areas, these chiefs represented an important rural support base. It was quick to capitalise on the prospect of their support and Maloka and Gordon comment that 'the first phase of the transition was characterised by enthusiasm and co-operation between the ANC and chiefs'.<sup>26</sup> ANC leaders had to deal with the antagonism of the rural youth and many stalwart ANC activists<sup>27</sup> who, along with many others, were aware that many of the chiefs 'joined CONTRALESA with the intention of using it as a power base against local democratic forces'.<sup>28</sup>

Nevertheless, in seeking to rehabilitate chieftaincy in some way, the ANC also struck a chord with those for whom traditional leaders either in fact or through folklore symbolised the dignity of their community and culture. Mandela

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22 Van Kessel and Van Oomen above n 14 at 569.

23 Maloka and Gordon above n 11 at 43.

24 (1993) at 70.

25 Van Kessel and Van Oomen above n 14 at 571.

26 At 44.

27 Van Kessel and Van Oomen above n 14 at 571.

28 Maloka and Gordon above n 11 at 44.

captured this aspect of traditional leadership when he was released from prison. Then he 'explicitly greeted the traditional leaders, "many of whom", he said, "continue to walk in the footsteps of great heroes like Hintsa and Sekhukhune".<sup>29</sup> A speech from the dock in 1962 also gives a taste of Mandela's relationship to tradition – and that of many South Africans. On this occasion he described his boyhood experience of traditional authority in the Eastern Cape in reverential terms concluding:

In such a society are contained the seeds of revolutionary democracy in which none will be held in slavery or servitude, and in which poverty, want and insecurity shall be no more.<sup>30</sup>

Oomen captures a similar sentiment when she quotes a Sepedi saying: 'Without a traditional leader we are like leaves flowing free in the wind'.<sup>31</sup>

The tension between those who support some role for chiefs and those who believe that it is incompatible with democratic government was clear. Both amongst ANC members who were urbanised and amongst those living under traditional rule, strong opposition to traditional leadership remained. Yet, for others, the end of apartheid promised an opportunity to return to the perceived stability of a traditional way of life.

Towards the end of 1991, negotiations for the transfer of power in South Africa became more formal. Traditional leaders demanded unsuccessfully to be included in the first set of negotiations. They were successful in this demand in 1993. Participation in 1993 at Kempton Park proved critical in the campaign of traditional leaders for a place in the new democracy for it was here that negotiators set out the framework for the new constitutional order. Under the agreements reached at Kempton Park, after the first elections the country was to be governed by a pre-prepared interim Constitution until a 'final' Constitution could be adopted by a democratic constitutional assembly. The interim Constitution reflected the agreement of the negotiating parties on the process by which the final constitution was to be drafted but also, importantly, provided a set of Constitutional Principles with which the new Constitution was to comply. These Principles required the new constitution to incorporate many generally accepted principles of constitutional democracy. They also stipulated that:

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29 Oomen, *Tradition on the Move* above n 10 at 12-13.

30 Nelson Mandela, *No Easy Walk to Freedom* (1965) quoted in Andrew Nash 'Mandela's Democracy' in S Jacobs and R Calland (eds), *Thabo Mbeki's World: The Politics and Ideology of the South African President* (2002) 243 at 244.

31 Oomen, *Tradition on the Move* above n 10 at 63.

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.<sup>32</sup>

To tide over the transition period until the adoption of the final Constitution, the Interim Constitution set out powers of traditional leaders and these reflected the fact that the position of chiefs had been significantly strengthened at Kempton Park. Although a powerful and articulate women's lobby ensured that chiefs lost the battle to insulate customary law from the new bill of rights, the Interim Constitution provided that an existing traditional authority would 'continue to exercise and perform the powers and functions vested in it'.<sup>33</sup> This meant that both the customary and statutory powers of traditional rulers were preserved.<sup>34</sup> Traditional leaders were also given *ex officio* membership of the elected local government within whose jurisdiction they fell and were entitled to be elected to 'any office' of a local government.<sup>35</sup> In addition, the Interim Constitution gave them a role beyond the essentially local role they had fulfilled in the past. It established 'houses' (or councils) of traditional leaders at both national and provincial level.<sup>36</sup> Through these, traditional leaders were to have a formal opportunity to advise the national and provincial governments on matters of concern to them. The Interim Constitution set out the powers of the national and provincial houses in some detail and required legislatures to refer any Bill that concerned matters related to traditional authority to the relevant House. Thus, although they could not veto new laws, they could delay them.

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32 Constitutional Principle XIII, Schedule 4, Interim Constitution Act 200 of 1993.

33 Section 181 Interim Constitution Act 200 of 1993.

34 Section 181 Interim Constitution.

35 Section 182 Interim Constitution.

36 Under s 183 of the Interim Constitution, each province with traditional authorities was obliged to establish a Provincial House of Traditional Leaders. Section 183(1)(b) stipulated that this had to be done within six months of the election of the first provincial premier and in consultation with the traditional authorities resident in the province. Section 184 stipulated that there should be a national Council of Traditional Leaders. This body was to consist of a chairperson and 19 representatives elected by traditional authorities. The Council had to be established within six months of the commencement of the Constitution. It was not.

After the April 1994 elections, work on a final Constitution began in the newly constituted Constitutional Assembly. The Assembly consisted of all members of the national Parliament. Traditional leaders had no formal presence amongst these elected representatives. However, as part of an ambitious program of consultation, in May 1995 they were invited to present their views to the Assembly. The attendance was impressive: 6 kings from the Eastern Cape, 3 paramounts, 7 princes, 64 chiefs, and various others. There were 178 in all, resplendent in traditional costume, amongst them just 15 women. However, as Davenport notes, the glamour of the occasion could not hide the tensions between KwaZulu-Natal traditional leaders closer to the ANC's approach and those supporting the opposition Inkatha Freedom Party position, which was to give significant power to traditional royalty.<sup>37</sup>

The absence of traditional leaders from the Constitutional Assembly, the relative weakness of the Constitutional Principle concerning traditional leadership, and the general antipathy of elected representatives to the institutions of traditional leadership combined to result in provisions in the final constitution that were weaker than those in the 1993 Constitution.

The Assembly delayed hugely in drafting these provisions. Draft after draft of the new Constitution appeared with the chapter headed 'Traditional Leadership' blank. As difficult details in other areas were filled in, traditional leaders were left untouched. The final text appeared towards **[sense?]** in the process while attention was focused on the major disagreements that threatened the success of the process. It simply sought to capture the spirit of the Constitutional Principle and no more.

The result, now Chapter 12 of the Constitution, consists of two brief sections. They recognise 'the institution, status and role of traditional leadership', and state that 'the courts must apply customary law when that law is applicable'. Each provision carefully and rather repetitiously subjects traditional leadership and customary law to the Constitution and to future legislative control. The provisions also refer to provincial and national houses of traditional leaders but, unlike their counterparts in the interim Constitution, they do not require such houses to be established and give them no right to advise on Bills.<sup>38</sup>

These provisions reflect the general antipathy of the majority of elected representatives to traditional leadership. However, they would almost certainly

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<sup>37</sup> TRH Davenport, *The Transfer of Power in South Africa* (1998) at 70.

<sup>38</sup> Section 143(1) incorporates the requirement that traditional monarchs should be recognised.

have been stronger had Buthelezi's KwaZulu-Natal based Inkatha Freedom Party participated in the Assembly. The IFP had always been a difficult partner in the negotiated transition. It was persuaded to participate in the 1994 elections through last minute amendments to the Constitutional Principles that included the addition of a specific Principle concerning traditional monarchs. But ongoing disputes about pre-election agreements led it to boycott the Constitutional Assembly. Although relatively small – it won just 11 per cent of the vote – the IFP represents the most demanding traditional leaders. Its absence from the Assembly in effect left these issues unresolved.

The provisions were unsuccessfully challenged by a CONTRALESA delegation to the Constitutional Assembly in April 1996, just weeks before the deadline for the adoption of the Constitution. They were challenged more formally during proceedings related to certifying the Final Constitution. The unusual requirement that a newly approved Constitution should be certified by a court was the security given to the outgoing regime that the Principles agreed to in pre-election negotiations would be honoured. The IFP used them to argue that the new Constitution failed to implement the Kempton Park agreement concerning traditional leadership. The Constitutional Court's judgment rejecting this argument contains the clearest formal statement of the tension between the claims of traditional leadership and the values of the new constitutional **[Constitution?]** yet made. It says:

In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorisation for the recognition of indigenous law, the principle of equality before the law ... could be read as presupposing a single and undifferentiated legal regime for all South Africans with no scope for the application of customary law – hence the need for expressly articulated CPs [Constitutional Principles] recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.<sup>39</sup>

Thus, because traditional leadership is at odds with republican democracy, a special exception was needed for it to survive. The Court reminds us that, although the Kempton Park agreement required the Constitution to recognise a degree of cultural pluralism, it did not require traditional leaders to be given a role in government.

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<sup>39</sup> *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) para 195.

Now the Constitution does not assure traditional leaders powers beyond those that they exercise by virtue of their traditional role as bastions of traditional culture. Their constitutional role has been reduced at every level of government. As I have already mentioned, houses of traditional leaders at national and provincial level are optional.<sup>40</sup> Chiefs have no constitutionally guaranteed role in local government and they have lost their controversial right to voting membership of councils.<sup>41</sup>

However, while the Constitutional Assembly might have been resolute in limiting real grants of power to traditional leaders in the final Constitution, in practice it has proved much more difficult to reach a workable arrangement between traditional leaders and the government. The importance that the national government attaches to traditional leadership was brought starkly to public attention in 1995 when a national statute put all chiefs on the national government's payroll.<sup>42</sup> Until then provinces were expected to pay chiefs and this statute was an undisguised move to reduce the power over chiefs of the IFP government of the province of KwaZulu-Natal. Now, the October 2002 *Draft White Paper on Traditional Leadership and Governance* reports that the national government has 12 kings and queens on its payroll. In total it pays 2,426 kings, queens, chiefs and headmen.<sup>43</sup>

Many traditional leaders claim that their powers should remain intact and protest vigorously about any perceived curtailment of their powers. The issue is especially complicated because the exact extent of their powers is difficult to define. Some specific powers are listed in old apartheid legislation<sup>44</sup> but, as Bennett describes, under traditional systems the powers of traditional leaders were not circumscribed. He says:

[I]n the eyes of his people, the chief was the most important and powerful member of his nation. Chiefly authority was described in the idiom of kinship. Thus, a ruler was talked about as the father of his subjects, and his great wife the

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40 The requirement that certain legislation be referred to Houses of traditional leaders has not been retained.

41 See Constitution s 157(1).

42 Remuneration of Traditional Leaders Act 29 of 1995.

43 At 39. The legislation governing the remuneration of traditional leaders by the national government was highly controversial and the subject of a Constitutional Court challenge by the KwaZulu-Natal government in 1996 (*In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 (7) BCLR 903 (CC)).

44 Black Administration Act 38 of 1927.

mother. Like the patriarchal head of a household, his powers were generalised and diffuse. He was expected to judge disputes fairly, to govern wisely, to provide for the needy and to tend to the welfare of his people.

Many of these powers derived from a belief that the ruler was a direct descendant of the founder of the nation. Hence, through a notionally unbroken tie of blood, he provided a channel of communication with the ancestors of his people. Because of this special relationship, he was imbued with the spiritual powers necessary to maintain the natural order. In particular, he was able to ensure good rains and fertile crops, and, for this purpose, he presided over the nation's principal rituals.

The ruler also had a range of powers and privileges of a more secular nature. He could order his subjects to work on his lands and provide labour for public works; he could levy taxes and demand tribute from the harvest or the hunt; he was entitled to choose the best land for his homesteads and he could demand that subjects plough and harvest his fields.<sup>45</sup>

Not only are the powers that Bennett describes diffuse and difficult to define, they are by and large powers used to govern local matters over the past century. Seen in this perspective and despite their limited constitutional role, in some ways traditional leaders have in fact greater powers than in the past as they have a presence in each of the three spheres of government – national, provincial and local.

First, the Houses of Traditional Leaders established under the interim Constitution still exist at national and provincial level. They are intended, among other things, to give traditional leaders an opportunity 'to promote the role of traditional leadership within a democratic constitutional dispensation'.<sup>46</sup> Inexplicably, little formal attempt seems to have been made to encourage these Houses to reflect democratic ideals in their composition. Members are, with one possible exception,<sup>47</sup> members of a ruling dynasty. No attempt has been made to

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45 TW Bennett, *Customary Law in South Africa* (forthcoming 2004). Footnotes omitted. Chiefs also bear responsibility for the customary law courts in their communities. These courts hear civil disputes arising out of customary law such as maintenance, guardianship, stray animals and the payment of bride price and have jurisdiction over minor criminal matters.

46 This wording is taken from s 7 of the National House of Traditional Leaders Act 10 of 1997 but it reflects the objectives of all the Houses. It is striking that among eight 'strategic goals and key success factors' the 2003 *Annual Report of the National House of Traditional Leaders* lists only one that focused on communities. All of the remaining seven are concerned with promoting the institution of traditional leadership.

47 The possible minor exception is in the North West. Here the provincial Executive Council may appoint four of the 24 members on the basis of their expertise in and

ensure that women are represented. Presently just one of the 18 members of the National House is a woman. There is a small number of women in the provincial houses.

The main concern of traditional leaders about these Houses is that their powers are not constitutionally secured. But there are also concerns about resources. For instance, the chairperson of the National House complains that they have no permanent chamber in which to meet and that they are underfunded and understaffed.

But, the most serious dissatisfaction is at local level. As already indicated, under apartheid traditional leaders were local government in many rural areas and, as Bennett suggests in the passage quoted above, the traditional role of chiefs has always been primarily local, revolving around land, production and the needs of families.

The exercise of local powers by chiefs has been thrown into doubt by the establishment of municipalities across the entire country. The introduction of democratic local government is a key element of the governing ANC's program of deepening democracy and much emphasis has been placed on local democracy. Two major issues have emerged in an emotional debate about the role of traditional leaders and local government: the demarcation of municipal boundaries and the alleged usurping by municipalities of functions customarily exercised by traditional leaders. On the first issue, traditional leaders claim with some justification that the contempt of the central government for traditional leadership is reflected in the fact that the boundaries of traditional communities were frequently ignored in the process of demarcating new municipalities.<sup>48</sup> The Demarcation Board has revisited some of these decisions but overall it has provided little explanation for its approach, merely saying bureaucratically that it had many factors to take into account. This is oddly reminiscent of the way in which Africa was carved up in the 19th century when the administrative and global interests of colonial administrations eclipsed local needs.

But it is the second concern, that of the usurping of traditional chiefly powers by local government, that dominates the current debate. This concern goes to the

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experience with customary matters and not on their gender or lineage (s 3(b) The House of Traditional Leaders for the Province of the North West Act 12 of 1994).

48 See, for example, Nkosi M B Mzimela, 'The Impact of the Demarcation Process on Traditional Leadership' *Local Government Election 2000 – From Transition to Consolidation Seminar Report* (2001) Konrad Adenauer Stiftung, Pretoria <[www.kas.org.za](http://www.kas.org.za)> accessed 8 August 2003.

heart of the new constitutional framework. Consistent with its commitment to democratic government, the Constitution assigns to local government many of the service delivery responsibilities that chiefs assume are theirs. To establish effective local government, clarity about its powers and those of chiefs is crucial. As the chiefs recognise, any enumeration and division of powers will inevitably limit their power.

To an important extent, the realities of the transition to democracy are in fact on the side of the chiefs. The new local governments have battled to get on their feet and in rural areas few have developed the capacity to provide services. They often have a single bare office and just one member of staff. In addition, the newly demarcated municipalities are huge, usually covering large areas and many communities. Traditional authorities, on the other hand, have what Oomen has described as ‘the material legacy of fifty years of governance-through-chiefs: large tribal offices, tribal cars, tribal secretaries and (as they are called) tribal cleaners’.<sup>49</sup> Stories abound of people appealing to the new officials to solve one problem or another and then, in the absence of a response, resorting, as in the past, to the traditional authority. Under these circumstances, it may be that the proposed co-operative relationship between traditional councils and local government discussed in the next section will in fact leave much power in the hands of chiefs.

Nevertheless, in the face of a strong constitutional commitment to developing democratic local government traditional leaders want something more concrete than the de facto power of their established positions. And so, perhaps predictably with elections in the offing, powers for traditional leaders are back on the political agenda.

### **Pre-election deals**

South Africa’s fifth set of democratic elections (and its third national elections) are scheduled for sometime in the first half of 2004. As on each previous occasion, traditional leadership is suddenly back on the political agenda. Previously, elections were preceded by demands, meetings and promises but no action on the issue of the status of chiefs. This time it appears that the traditional leaders will not be fobbed off with protests by government that ‘an understanding’ is not ‘an undertaking’. They want something concrete and events of the past couple of months suggest that government is taking them very seriously indeed.

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49 Oomen *Tradition on the Move* above n 10 at 14.

Two important Bills are making their way through the national Parliament. One, the Traditional Leadership and Governance Framework Bill,<sup>50</sup> seeks to set out the relationship between traditional leaders and local government. The second, the Communal Land Tenure Bill,<sup>51</sup> is intended to realise the constitutional right to security of tenure for people living in traditional communities on so-called tribal trust land. Both Bills confer considerable authority on traditional leaders and both have been strenuously opposed by rural women's movements, amongst others.

The Traditional Leadership Bill seeks to settle the role of traditional leaders. It provides for the establishment of a body to settle competing claims of leadership status. Many of these are a result of the deposing and replacement of legitimate chiefs under apartheid – a case involving 46 unrecognised traditional leaders<sup>52</sup> indicates how many succession disputes there may be. The Bill also sets minimum requirements with which a council must comply if it is to be formally recognised and lists functions for traditional leaders and their councils.

The functions that the Bill sets out are generally soft, including, for instance, activities like 'facilitating', 'supporting' and 'promoting' various things. But they do include the broad function 'administering the affairs of the traditional community' and the important right to enter into 'service delivery agreements with municipalities'.<sup>53</sup> Currently, the legal basis for the exercise of powers by chiefs is the 1927 Black Administration Act,<sup>54</sup> a particularly despicable and compendious piece of racist legislation. Many people had hoped that the regime it represented would change entirely. Instead, although the Traditional Leadership Bill introduces changes, its adoption would also give the exercise of many of these powers a post-apartheid stamp of approval. It would also secure powers of hereditary rulers in post-apartheid South Africa.

The Bill does make certain concessions to democrats. Usually traditional councils are composed of members of the royal family and close friends of the chief. The Bill requires councils to include elected members alongside those

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50 Since this lecture was delivered the Bill has been passed by both houses of Parliament but it has not been assented to by the President (presidential assent is a formality).

51 This Bill was passed in the National Assembly in November 2003 but blocked by the National Council of Provinces. It will now be reconsidered in 2004.

52 *Unrecognised Traditional Leaders of the Limpopo Province v Minister for Local and Provincial Government of the RSA* 2003 (5) BCLR 563 (T).

53 Clause 5(1).

54 Act 38 of 1927.

selected in terms of custom. It also requires 30 per cent of the council to be women. Although there is at least one fully elected traditional council in the country and women participate in councils in some communities, for the vast majority, these provisions would represent huge change. But, as I shall explain in a moment, civil society is sceptical that the promised changes will address the real concerns of traditional communities.

The Communal Land Bill builds on the governance model in the Traditional Leadership Bill. To fulfil the constitutional guarantee of security of tenure, it proposes transferring land that is currently held in trust by the state to the communities that live and work on it. This in itself is controversial. A further concern relates to the management of the land once transfer has taken place. If it belongs to a traditional community, it appears that it will be the community's traditional council that will exercise all ownership rights.

Women from rural areas have objected to both Bills. In parliamentary hearings those few that could travel the long distance to Cape Town told stories of sustained oppression under traditional leadership. The general situation is starkly summed up in a list of problems drawn up at a consultative meeting in rural Mpindweni in the Eastern Cape. Here are just a few:

- Unmarried women are not allocated residential sites, except in the name of a male relative.
- When men re-marry the first wife and the children of the first marriage are left with nothing because the rights to the land and the house belong to the husband alone.
- When a husband dies, his male relatives take over the land and the house, and the widow and daughters are left with nothing. This problem is especially acute when there are no sons.
- Women have no right to talk in community meetings or customary courts where decisions are taken. They must be represented by a male relative. This impacts negatively on women and on girls who have no father or brother.
- Women are not treated as adults or equals to men.<sup>55</sup>

At the Mpindweni meeting and others like it around the country, men and women from traditional communities described a profoundly unequal system that often excluded them from decision-making.

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<sup>55</sup> A Claasens and S Ngubane, 'Rural Women, Land Rights and the Communal Lands Rights Bill' Women's Legal Centre Conference, Cape Town, 30-31 October 2003.

The concerns raised at these meetings explain why democrats are uncomfortable with the current rapprochement between traditional leaders and the South African government. Accountability, responsiveness and openness are included in s 1 of the national Constitution as founding values. But the model proposed for government by hereditary leaders in the new Bills seems to overlook these democratic values. Under the Bills, traditional leaders and their councils are fundamentally unaccountable.

Working at their best, pre-colonial systems of government in southern Africa did limit the power of traditional leaders. Bennett describes the situation well:

This form of government obviously differed markedly from a modern democracy. Traditional rulers needed no special training; they were qualified for office by their ancestry alone. According to a well known saying, *kgosi ke kgosi ka a tswetswe* [a king is a king because he is born to it]. The all-inclusive powers of government were not differentiated, in the western manner, into judicial, administrative and legislative categories, and rulers were not subject to the scrutiny of an independent judiciary. What seems an alarming concentration of power in one person was circumscribed, normatively, only by a duty to consult councillors and always to act for the benefit of the people.

The more significant limitation on the power of traditional rulers came from the reality of day-to-day politics. As the notion of tribe suggests, most precolonial African polities were poised halfway between being state and stateless societies. As a result, a ruler's hold on his office was seldom uncontested. Because he was constantly under threat, he had to take care to cultivate goodwill and appease hostile factions. The techniques for doing so obviously varied from people to people. Some rulers relied on control of ritual (as with the Swazi), others the military power of age sets (as with the Zulu), others marriage alliances (as with the Lovedu and Pedi) and others still (as with Moshoeshe) the patron-client relationship created by loans of cattle.

A certain degree of political insecurity, nevertheless, explains why an African ruler's power could not, in the past, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession. The wise leader, therefore, did not dictate to his subjects. A common saying has it that *kgosi ke kgosi ka batho* [a chief is a chief through his people].<sup>56</sup>

These arrangements may not meet modern standards of accountable government but at some level chiefs had to take their subjects into account. As described, however, in many cases the relationship between chiefs and their subjects changed fundamentally under apartheid and the allegiance of chiefs shifted to the government. When, in 1995, new legislation that provided that

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<sup>56</sup> TW Bennett, *Customary Law in South Africa* (forthcoming 2004). Footnotes omitted.

traditional leaders would be paid by the national government<sup>57</sup> was adopted, a central element of the apartheid system was reaffirmed. Thus, as under apartheid, ultimately the position of traditional leaders is still secured by their recognition by the national government rather than acceptance by their communities. And their role is maintained primarily by their authority over the allocation and use of land and other scarce resources.

Of course, not all chiefs are the decentralised despots that Mamdani describes. Some listen carefully to their people; some have embarked on ambitious community betterment projects; as already mentioned, some have established elected councils. There are also senior chiefs who have appointed women to leadership positions. But, as the testimony from Mpindweni and many other similar places shows, many chiefs are perceived to distribute resources unfairly and to discriminate against women and their children. Thus, the problem is structural: at the heart of objections to the Bills is that they bolster a system of unaccountable government.

Of equal concern in this context is the fact that rather than encouraging the participation of citizens in democratic structures, entrenching the role of traditional leaders and their councils as representatives of their communities may limit the development of democratic citizenship. The Traditional Leadership Bill anticipates that traditional councils will represent their communities in many important dealings with municipal councils. This seems to establish traditional councils as gatekeepers between civilians and democratic structures.

The repeated protestation that it is inherent in the traditional system of government that 'the will and interests of the people are what guide decision-making processes'<sup>58</sup> is simply unconvincing in the face of evidence such as that from the meeting at Mpindweni that community decision making is far from egalitarian and that many leaders misuse their power. In fact, the silence of the Traditional Leadership Bill on community participation in decision-making is doubly curious: First, traditional leaders boast that it is intrinsic to traditional democracy that the voices of all members of the community are heard before decisions are made. Secondly, the national Constitution requires public participation in legislative processes at national, provincial and local level. It would seem an even more obvious requirement at community level.

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57 Remuneration of Traditional Leaders Act 29 of 1995.

58 Patekile Holomisa, 'Kings and Leaders were often imprisoned' *Business Day* (30 September 2002) 12. Holomisa is an ANC MP and chairperson of CONTRALESA.

In short, if, as rural communities have complained, the Communal Land Bill interposes traditional councils between the community and their land, the Traditional Leadership Bill risks interposing traditional councils between the community and their democratically elected representatives. From this perspective, the Bills seem to pander to the demands of chiefs without paying adequate attention to the need to strengthen our fragile new democracy – South Africa's royalty is not as troubled as it was when the title of this lecture was chosen.

### **Why is government conceding powers to traditional leaders?**

The question most widely asked thus remains: Why has the governing ANC, with a majority of over two-thirds in the National Assembly and massive majorities in all but two of the nine provinces, conceded as much as it has to the chiefs? After all, it is just seven years since reluctant negotiators at the Constitutional Assembly conceded as little as they could to traditional leaders. Now, these two new Bills seem to shore up chiefly powers and set out a role for traditional leaders that was unthinkable then. In particular, their role in managing access to land under the Communal Land Bill will often have developmental and policy implications that entrench governmental powers.

The respect for traditional leadership that Mandela captured in the passages that I quote earlier cannot provide the full explanation for these developments as commitment to democracy is still strong in many communities and the experiences of chiefly rule that I described earlier not forgotten. The current developments are perhaps best described as the unfinished business of the Constitutional Assembly. For many matters the Constitutional Assembly provided an almost cathartic opportunity. Issues were aired and different views considered seriously and in public. In these cases the result was that outcomes were robust even if they were perceived to support one or another side. The competing demands of traditional leaders and democrats were not worked through in this way in the Assembly. Instead, that process is taking place now – outside the often buoyantly idealistic atmosphere of the Assembly. The current negotiations are also unconstrained by the need of the negotiators in the Assembly to keep their eye on the bigger picture, always ensuring that one compromise on principle did not set the stage for others. Thus, the explanation for the ANC's current concessions to traditional leaders lies less in the principles of democratic transformation and more in a strategy of pragmatic accommodation.

Three interests seem to underlie the government's willingness to try to accommodate traditional leadership.<sup>59</sup> First, support of traditional leaders is perceived as important in maintaining peace in KwaZulu-Natal. Threats of violence in that province are never far away. The bloodshed of the late 1980s and 1990s was devastating and placating chiefs by securing a role for them in the affairs of their communities will usually seem a small price to pay for stability.

Secondly, traditional leaders are widely believed to command votes, bringing their community with them to any party they choose to support. Electoral strategy thus supports efforts to accommodate traditional leaders. This also, of course, explains why negotiations concerning the role of traditional leaders intensify as elections draw near.

Thirdly, and perhaps more recently, the urgent need to meet the high expectations of rural communities and to extend proper services to them has led the government to depend increasingly on chiefs. A realisation that new rural municipalities cannot instantly replace government-by-chiefs and some successes in improved service delivery through cooperative arrangements with chiefs have together persuaded government that it needs their support. For instance, schools, clinics, transport systems and pension payments often need the infrastructure chiefs can provide if they are to run effectively.

So, issues of security, electoral strategy and access to services have combined to bolster the role of traditional leaders. Importantly, also, our experience of local government over the past 10 years shows vividly that effective democratic government can not be instantly achieved. Then, as I have already noted, traditional leadership is not only about bureaucracy and the ordering of the state. For many, despite their experience under apartheid, it is linked to their culture and identity. Admittedly, when traditional leaders themselves insist that their subjects want to live by the system of hereditary leadership which, they claim, offers a truly African form of democracy, one suspects a level of self-interest. But, many South Africans are in search of a political culture that feels less imposed than those inherited from the colonial rulers. With Mandela, they have searched for this in traditional African forms of government. And many people are not ready to abandon the way of life that traditional leadership symbolises. Thus, as the ANC recognised in 1988, South Africa cannot abandon traditional leadership but must find a way to incorporate the institution in its new system of government without inhibiting a gradual deepening of democracy.

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59 M Butler, *Traditional Authorities: Know where to Land* (2002) identifies similar reasons for the rapprochement between the ANC and traditional leaders.

### **Democracy and delivery: what does the future hold?**

The question, then, is whether this is possible. Can South Africa transform the institution of hereditary rulers and chiefs 'to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution' as the ANC proposed? As Oomen points out, the debate about traditional leaders and democracy is 'cast in dichotomies: African and western, rural and urban, modern and traditional. This', she continues, 'leads the importance of traditional authority either to be trivialised or romanticised. The trivialisers see ... traditional leaders as leftovers from a time that is swiftly fading. The romanticisers, on the other hand, nurture parochial images of traditional leaders as shepherds of coherent communities who still live off the land and follow traditional norms and customs'.<sup>60</sup> In a political context, the trivialisers may see themselves as idealists. Like the civics in the 1980s and the politicians in the Constitutional Assembly, they point to the principles of accountable democratic government and see no governmental role for traditional leaders.

The most prominent of the current romanticisers are perhaps better described as 'hard-line traditionalists'. They include many traditional leaders who are as unhappy with the new Bills as the rural women who came to Parliament to oppose their adoption. One chief, frustrated at the indirect role he saw for chiefs in the Traditional Leadership Bill, put their concerns succinctly in recent parliamentary hearings when he said: 'Enough of roles and functions, we want powers'. Proposals by chiefs would have traditional authorities replace municipal government in rural areas. On a more moderate view, traditional leaders would at least have 50 per cent of the vote on municipal councils.

But neither the position of the democratic idealist nor that of the traditionalist can prevail in South Africa today. We have to find a way of transforming traditional leadership without either destroying it or conceding too much. Recalling the poignant Sepedi saying that without chiefs we are like leaves floating in the wind, we need to recognise that a fundamental change in the forms of life, perceptions and cultural identities of many South Africans cannot happen instantly. But nor can the at best attenuated, at worst totally corrupted, forms of political and cultural organisation and exercise of power under traditional leadership be allowed to continue unchecked by modern principles of democratic accountability. The new Bills do not meet either of these requirements. They reflect too much bargaining on details – the government's approach seems to be 'how little can we give them and still keep them on board?'

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<sup>60</sup> Oomen, *Tradition on the Move* above n 10 at 16

and that of the chiefs ‘how much can we hold out for?’ This is an unpromising start for transformation.

Part of the solution is to be found in the title of Barbara Oomen’s book: *Tradition on the Move*. Through a fascinating study of a handful of traditional communities in Limpopo province, she emphasises their capacity for change. In some of the cases that she describes, democracy influences traditional processes; in others tradition displaces the democratic practices introduced in the political struggle of the 1980s. Certainly, one cannot assume that change will be progressive but, as her account and those of others shows, change cannot be evaded.

From this perspective, one problem with the new Bills is that they do not exploit the capacity of traditional communities to change. For instance, the Traditional Leadership Bill will change the composition of many tribal councils. But, like so much law, both Bills are static. They will change certain practices, but they do not offer an on-going program for change and, perhaps more importantly, they fail to suggest any way in which the capacity of communities to change could be harnessed to ensure that hereditary leadership indeed comes to ‘serve the interests of the people as a whole’ in a democratic way. They might, for instance, have given communities periodic opportunities to choose – and change – their form of government; they could require important decisions to be put to the vote, thus insisting on community engagement in civic decision-making. Instead, there is a real danger that the Bills will not only block change but be regressive by increasing the dependence of traditional leaders on government – thus reducing their responsiveness to their communities – and in fact limit changes in community practices to those that they explicitly demand. Here one feels the absence of the enthusiastic idealism of the members of the Constitutional Assembly and instead the harsh pressure for short-term solutions before an election.

Traditional leaders and their supporters are fond of reminding the public that Britain and other European democracies have monarchs. What they fail to acknowledge is that these monarchs do not govern – they reign but they do not rule.<sup>61</sup> They may command massive public support and respect and, for many citizens, they symbolise their nations. However, they do not exercise power. The exercise of power is reserved for representatives who are fundamentally and crucially accountable to the citizenry. To reign but not to rule must be the

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<sup>61</sup> I am indebted for this phrasing to HE Lieutenant-General John Sanderson, Governor of Western Australia.

appropriate role for South Africa's royalty too as in the long run hereditary leaders cannot exercise public power in a constitutional democracy.

It may be possible to marry the idealised notions of an older, different democratic order eulogised as an intrinsic part of an original, untainted, form of pre-colonial traditional leadership with the requirements of a modern, democratic state. But such an amalgamation should not be the product of either short-term horse trading or transparently sectional interests for whom tradition is little more than a shield from the demands of democratic accountability. We must guard against the possibility that a new order revelling in its emancipation from (neo)colonial rule will abrogate its responsibility to its citizens in the name of a new Africanisation. The danger is that settlement with the lobby of traditional leaders will be a smokescreen for the failure to implement democracy where it really matters: at grassroots, in the material conditions of the ordinary existence of women and men.



