Traditional Leadership in South Africa: A Critical Evaluation of the Constitutional Recognition of Customary Law and Traditional Leadership

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Declaration

I declare that **Traditional Leadership in South Africa: A Critical Evaluation of the Constitutional Recognition of Customary Law and Traditional Leadership** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Name: Brian Ashwell Hugh October 2004

Signed…….

Dedication

I dedicate this work to my wife Kristina, and daughters Melisa and Melese.

Acknowledgements

I give praise and thanks to **GOD the Almighty** who gave me the strength and wisdom to complete this study as well as my masters programme despite some obstacles that got in my way during the course.

A very special thanks goes to my wonderful and understanding wife and children for their support and motivation throughout my studies.

Thanks to my supervisor Professor FA De Villiers (a valuable asset to the university) for his guidance, patience and tolerance throughout the study. I know I can rely on him in the future.

A special word of thanks to the National House of Traditional Leaders, in particular to Kgosi SV Suping.

A special word of thanks to all the people who supported me throughout my studies.

Abstract

This mini-thesis deals with the constitutional recognition of customary law and traditional leadership in South Africa. The study evaluates critically and analyses these two concepts.

Both the interim Constitution and the final Constitution recognise the right to culture and traditional leadership. Other laws had recognised customary law and traditional leadership prior to 1994, but it is the first time in the South African history that any constitution recognises traditional leadership.

South Africa is a nation diverse in its culture. It is therefore important to recognise the different parts of our legal system. The Constitution recognises customary law as part of our legal system, subject to the Constitution and any other law. Although customary law discriminates directly and indirectly, it is possible to apply customary law in a constitutional democracy.

Since 1994, legislation has been passed to bring the customs of the indigenous people in line with the Constitution. Traditional leaders have realised that it would be impossible for people to practise their customs in a traditional manner in a democratic South Africa without changes. The founding provisions of the Constitution are important because human dignity is the cornerstone of our democracy. These emphasise the importance of law reform in regard to certain customs and traditions. At this stage it is impossible to guarantee the future existence of customary law. Although there are those people who believe in the future existence of customary law, it is only possible to speculate on this future existence. Not only has the legislature reformed certain areas of the customary practices, the court has also declared some of the customary practices unconstitutional.

It is impossible to recognise customs without having people, or a structure, as custodians of these customs. It is the responsibility of traditional leaders to be the custodians. Traditional leaders play an important role in the lives of the people who stay in traditional communities. Traditional leaders have been the statesmen of their people even after the first annexation of the Cape by the Dutch. However, colonial powers changed the traditional role of traditional leaders to enforce their colonial policies.

The institution of traditional leadership is transforming itself from having been a male dominated institution. Constitutionally women are permitted to be traditional leaders. Although traditional leaders fulfil traditional functions, they also fulfil certain modern functions in terms of legislation. Some of the laws concerned with their modern role date back to before the 1994 democratic elections, but the most important laws are those passed since 1994. The laws passed, show us that it is impossible for any part of the nation to operate in isolation. The Constitution is the supreme law of the country and any role or action will be measured against it.

The institution of traditional leadership faces many challenges. The most important challenge is the future relationship with government. It is important for traditional leaders to have a healthy relationship with all levels of government, national, provincial, and local government. It is at national level where it is important to have that special relationship because, if not, it may be impossible to work together with municipal structures to deliver services to rural communities at local level.

Although legislation limits the representation and powers of traditional leaders on local government level, traditional leaders need to perform well at this level. Service delivery is more important to the people than other issues. The study illustrates the importance of

proper training for those traditional leaders who represent their people in municipal structures.

The constitutional recognition of traditional leaders implies more than their being merely the custodians of tradition. As with the relationship with government structures, it is important to have a healthy relationship with the people they lead. Accordance with modern practice requires the people to decide who must lead them (an illustration of the deviation from the traditional way of succession in office). People need the reassurance that they can trust their traditional leader with their affairs (It is important to note that people still go to the chief first before they go to any government institution).

Traditional leadership is important to unify the African people. Therefore it is important to operate within the ambit of the Constitution and other institutions that foster human rights.

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Traditional Leadership in South Africa: A Critical Evaluation of the Constitutional Recognition of Customary Law and Traditional Leadership.

Chapter One: Structure of the entire discourse

1. Background to the study

South Africa's ten years of constitutional democracy and political freedom constitute a relatively young democracy compared to some of its neighbouring countries and the more distant African countries. Both the 1993 and 1996 Constitutions of the Republic of South Africa recognise customary law and traditional leadership in South Africa. In this study, the researcher analyses critically and evaluates the constitutional recognition of customary law[1] and traditional leadership. The study focuses mainly on the importance, role, functions, future and effectiveness of traditional leaders in South Africa's constitutional democracy. The researcher decided to evaluate the recognition of customary law together with traditional leadership because it is impossible to discuss or argue the recognition of traditional leadership without referring to customary law as a basis for such a discussion and argument. Therefore it is important to discuss and evaluate both constitutional recognitions to come to a conclusion whether customary law and traditional leadership have a place in South Africa's constitutional democracy.

[1]The term 'Customary Law' appears in both the 1993 and 1996 Constitutions.

2. Statement of the problem

Custom and customary law are much wider and broader terms than we first envisaged. Before the colonial era, the different customary laws were the law of the country and the different traditional leaders with their own substructures were the custodians and enforcers of law.[2] Until the advent of a new constitution in 1993, customary law had never been fully recognised as a basic component of the South African legal system. Times have changed rapidly in South Africa since the first recognition of customary law and traditional leadership. With these changes have come new laws with their democratic institutions to enforce the laws of the country. Thus it is from the perspective of a new legal environment that it is important to do a critical evaluation. Regrettably however in this evaluation, we can only speculate on the future of customary law and the role traditional leaders will play in our constitutional democracy.

3. Objectives of the study

The main objectives of this study are to identify the role that customary law and traditional leadership can play, without compromising their current positions or future recognition through legislation, in creating a better life for their constituents. The study analyses diverse issues such as legislative reform (since the first recognition of traditional leaders by colonial law), the future role and functions of traditional leaders, training needs of traditional leaders, and the impact of a possible lack of commitment by national

[2] Deputy President Jacob Zuma, at the opening of the Royal Chambers and the Multipurpose Community Centre in Lusikisiki in the Eastern Cape on the 9 May 2003. The Deputy President stated that this position will remain because government had no intention to do away with traditional leaders.

and provincial government on the training of traditional leaders to fulfil their functions within the ambit of the Constitution.

4. Significance of the study

The significance the study seeks to establish is that customary law and traditional leadership will remain part of the South African legal system and structures because of the diversity in culture and tradition within South Africa. Since 1994, we have seen several laws and court decisions that have had an impact on the development of customary law. The impact of these developments is that they do have an influence on the role of traditional leaders. See, for example the Recognition of Customary Marriages Act 120 of 1998, the Communal Land Rights Act 11 of 2004, Moseneke v The Master of the High Court 2001 (2) SA 18 (CC); 2001 (2) BCLR 103(CC).

5. Methodology

Besides a literature survey, the researcher relied on unstructured and structured interviews with academics and members of the National House of Traditional Leaders, on website research, on a conference organised by the Faculty of Law at the University of the Western Cape, and on questionnaires.

6. Limitations of the study

Financial constraints affected the study, for example travel expenses and photocopying during the research. The researcher would have preferred to visit one or two rural communities in the Eastern Cape or Limpopo Province. Another limiting factor the

researcher experienced was non-cooperation from some of the sources. Some of the experts on the subject refused to answer any questions, and did not respond to any e-mails or telephone calls. Although the researcher had the opportunity to meet members of the National House of Traditional Leaders, the researcher was limited to speaking to the Deputy Chairperson only, to answer any questions -- the explanation was that the response to questions is that of the National House and not a personal response of an individual member.

7. Organisation of the study

The study is divided into five chapters.

Chapter One highlights the structure of the entire discourse.

Chapter Two entails the dialectical discussion of the history of customary law and traditional leadership, up to the constitutional recognition of customary law and traditional leadership. The study explains the concept of 'custom' and how the courts interpreted the right to practice custom. The study addresses the relationship between traditional leaders, government, and the people traditional leaders serve.

Chapter Three focuses on legislative reform since 1994. The most important legislation is: Council of Traditional Leaders Act 31 of 1994 and Act 10 of 1997, Local Government: Municipal Structures Act 117 of 1998, Recognition of Customary Marriages Act 120 of 1998, Traditional Leaders and Governance Framework Act 41 of

2003, Customary Law of Succession Bill 109 of 1998, and the Communal Land Rights Act 11 of 2004.

Chapter Four is a comparative study between South Africa and some of the Southern African countries – Swaziland, Lesotho, Namibia, and Zimbabwe.

Chapter Five consists of the conclusions drawn from all the discussions, recommendations made by the author, and a bibliography of literature consulted.

Chapter Two: Dialectical discussion of the history of customary law and traditional leadership.

1. Introduction

This chapter deals with the constitutional recognition of both customary law[3] and traditional leadership in South Africa. In my view it is not possible to analyse traditional leadership on its own without referring to customary law and the role of customary law in our legal system.

The chapter is divided into two parts. Part A of the chapter deals with the recognition of customary law (including the history), its role in a democratic society, the responsibility to develop customary law to give effect to its recognition, and the future of customary law in a democratic South Africa. Part B of the chapter deals with the constitutional recognition of traditional leadership, the effect of recognition, traditional leaders' contribution to democracy, relationship with government structures, and the effect of recognition with regard to the African Union.[4]

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[3] Section 1(4) of the Law of Evidence Amendment Act 45 of 1988 referred to customary law as 'indigenous law'. The section defined it as 'the Black law or customs applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic.'

[4] See Chapter One for the purpose of the study. This second part of the chapter is actually the important part because it contains the main focus of the study, why it is a necessity that traditional leadership has full recognition.

Part A

1. THE HISTORY OF THE RECOGNITION OF CUSTOMARY LAW

a) Recognition of customary law at the Cape from 1652 to 1895

Customary law[5] had never been fully recognised as a basic component of the South African legal system prior to 1993.[6] Roman-Dutch law was treated as the common law of the land. Non-recognition of indigenous laws started as early as 1652 with the settlement by the Dutch at the Cape.[7] In 1685 the Dutch established the 'Raad van Justisie' as the highest court.[8] The problem with these courts was that laymen staffed them with inexperienced lawyers.[99] This in itself created a problem because of the unequal treatment of indigenous laws at the time. No attention was paid to the administration of justice in the interior and there was no question of recognition of the indigenous laws observed by

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[5] 'During the existence of the pre-colonial sovereign Black states, customary law was an established system of immemorial rules which had evolved from the way of life and natural wants of the people, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their sons' sons, until forgotten, or until they became part of the immemorial rules. Customary law is a system of law of ancient origin, apparently, for there is described in the Book of Ruth, chapters III and IV, a usage bearing a distinct similarity to the practice of ukungena.' Bekker JC (1989) *Seymour's Customary Law in Southern Africa* p.11

[6] Bennett, T.W. (2004) *Customary Law in South Africa* p.34

[7] My opinion is that indigenous people were forced to accept Dutch Law as the law of the colony.

[8] Van Niekerk, G.J. 'Legal Pluralism' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.1 at 7

[9] [10] Van Niekerk, G.J. 'Legal Pluralism' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.1 at 7

the Bantu- speaking people.[10] The situation continued until 1814 when the Netherlands formally ceded its rights to Britain.[11]

The ceding of rights to Britain did not bring about recognition of indigenous law. The laws of indigenous people continued to be unrecognised for some time. However, the local laws of new colonies were retained in force, provided that they were suitably civilised. Roman-Dutch law was maintained as the basic law of the colony because it was considered a civilised system at the time.[12] The effect of not recognising indigenous laws was that indigenous cultures of the region began to die out fast.[13] Consequently, this lack of recognition helped the British to establish only one system of law.

In 1828, the British passed Ordinance 50 of 1828. This was in fact a formal way of non-recognition of indigenous law. The purpose of the act was to refuse to make any provision at all for the laws of indigenous people. Indeed, any other law was deemed discriminatory.[14]

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[10] Van Niekerk, G.J. 'Legal Pluralism' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.1 at 7

[11] Bennett, T.W. (2004) *Customary Law in South Africa* p.35

[12] Bennett, T.W. (2004) *Customary Law in South Africa* p.35

[13] Bennett, T.W. (2004) *Customary Law in South Africa* p.35. The KhoeKhoe were few in number and dispersed over a large area. The British totally undermined their customs and disregarded them as an autonomous group. Those who did not want to work on the farms were forced into the interior. The end result was that there was no law to recognise.

[14] Bennett, T.W. (2004) *Customary Law in South Africa* p.35

By the middle of the nineteenth century, South Africa was divided into various autonomous areas. The Cape and Natal were British colonies and Transvaal and the Orange Free State as the Boer Republics. Indigenous kingdoms populated some of the areas with the Zulu and Basuto being the largest.[15]

After 1845[16], the British reserved the area between the Kei and Keiskama rivers for the indigenous population. State-law pluralism was introduced when the government allowed indigenous people to administer their own indigenous laws and practise their customs, subject to the revision of colonial officials.[17] Resistance by the indigenous people forced the British government to start recognising indigenous law.

The British government did not allow the inhabitants of the Kei and Keiskama region to practise all their customs and traditions. At a special meeting held with the chiefs of the territory, the government explained to the chiefs that the indigenous people must stop practising witchcraft in any form, acknowledge the Queen of England and her representative only, and abolish the tradition of 'buying wives'.[18]

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[15] The population consisted of about 300 000 Europeans and 2 to 3 million indigenes. The situation brought a change in political thinking – indigenous laws were recognised. Where an indigenous law was recognised, it was subject to the strict application of a repugnancy clause.

[16] All treaties which governed the control of indigenous people through their chiefs in this area, were abolished.

[17] Van Niekerk, G.J. 'Legal Pluralism' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.3 at 8

[18] Brookes, E.H. (1927) *The History of Native Policy in South Africa 1830 to the Present Day* p.33.

In 1864, the British government passed two important pieces of legislation, which explicitly recognised certain indigenous institutions.[19] This small concession was a step in the right direction.

Between 1877 and 1894, the whole of the Transkeian territory was brought under colonial rule.[20] The problem for the colonial government was that the Transkei was too remote from centres of colonial government. The Transkei had a sizeable population that had not yet been completely subjugated or demoralized by colonial rule. The result was that the colonial government was forced to adopt a new policy.[21] The new policy permitted the colonial courts to apply customary law, subject to certain limitations. The application of customary law was subject to an overriding provision that it was compatible with the general principles of humanity observed throughout the civilised world.[22]

The Cape colonial government appointed a Commission of inquiry to collect data on customary law. In 1883 the government published a Report on Native Laws and

[19] Cape Native Succession Act 10 of 1864 and the British Kaffaria Native Succession Ordinance of 1864

[20] The colonial government introduced limited administrative control over the Transkeian territories. Pondoland was the last territory to be under British rule.

[21] Brookes, E.H. (1927) *History of Native Policy in South Africa 1830 to the Present Day* p.108

[22] Section 23 of Proclamations 110 and 112 of 1879 as referred to by Bennett (2004) in footnote 15 p. 36

Customs.[23] The commission felt that the ultimate aim should be assimilation with the common law.[24]

The British government declared Southern Bechuanaland a crown colony and northern Bechuanaland a protectorate in 1885. In these two areas, the colonial rulers allowed traditional rulers to continue administering customary law. In 1885, the colonial government formally recognised this regime by proclamation.[25] Traditional rulers were given exclusive civil and criminal jurisdiction. However, the jurisdiction given to traditional leaders excluded certain serious crimes. In this way colonial courts dealt with these indigenous peoples to ensure peace was preserved, or for the prevention or punishment of acts of violence to persons or property.[26]

The recognition of customary law continued after southern Bechuanaland was incorporated into the Cape in 1895. The above happened in terms of the Annexation Act 41 of 1895. No attempts were made by the colonial government to impose the policy of non-recognition as was the position in the Cape.[27]

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[23] Kerr, A.J. (1986) '*The Cape Commission on Native Laws and Customs (1883)*' Transkei Law Journal

[24] Bennett, T.W. (2004) *Customary Law in South Africa* p.37

[25] Section 31 and 32 of Proclamation 2 of 1885 as referred to by Bennett (2004) in footnote 20 p.37

[26] Section 8 of Order in Council of 10 June 1891 as referred to by Bennett (2004) footnote 21 p.37

[27] Bennett, T.W. (2004) *Customary Law in South Africa* p.36

b) Recognition of customary law in Natal

Britain annexed the Republic of Natalia in 1843. Roman-Dutch law was retained as the law of the country. A large number of black people returned to the colony. This created a problem for the government and something had to be done. For the government it was important to control this large number of African people. The government then decided to gather all these people in locations for black people and place them under supervision of government officials. Due to a lack of funds and officials, the plan could not be carried out.[28]

The Diplomatic Agent and Secretary of Native Affairs, Theophilus Shepstone decided to co-opt the services of traditional leaders.[29] The incorporation of traditional leaders had the effect of the government recognising customary law. The advantage for the indigenous people was that the colonial government allowed the courts to apply customary law providing it was not repugnant to the general principles of humanity observed throughout the civilised world.[30]

The problem with Shepstone's scheme was that it did not really advance Britain's mission of civilization. To rectify the situation the government introduced an exemption

[28] Bennett, T.W. (2004) *Customary Law in South Africa* p.37

[29] Shepstone dominated Natal's African policy from 1845 to 1875. In 1883, when he gave evidence to the Cape Commission on Native Laws and Customs, he argued that customary law should be recognised to ensure control of the Blacks and because it will give government greater power of introducing civilised ideas.

[30] Natal Ordinance 3 of 1849 as referred to by Bennett (2004) p.38

procedure in 1864.[31] The procedure allowed Africans, who met the stringent criteria for proving that they were suitably detribalised, to petition the governor to be exempted from the rule of traditional and customary law. This procedure enabled the governor to divide the indigenous people. However, I believe that some of the people took the opportunity to move away from their traditional way of living to a more civilised way of living and that this helped the government to control Africans who would then become fully subject to colonial legislation.

In 1869,[32] the government reduced some of the systems of customary law in the colony to a written code. Shepstone and the native administrators opposed this codification idea at first.[33] What the government did was to change and codify customs relating to marriage and divorce. The idea was to bring these customs in line with government requirements. In terms of the requirements, all marriages had to be registered, a limit was placed on the amount of lobolo, and the consent of the wives was made an essential requirement of marriage.

c) Recognition of customary law in the Transvaal

In 1885, the Zuid Afrikaanse Republic (later the Transvaal) government passed a law[34] that was designed to bring black people under government control. This law also made

[31] Bennett, T.W. (2004) *Customary Law in South Africa* p.38

[32] Law 1 of 1869 of Natal as referred to by Bennett (2004) p.38

[33] See footnote 30 in Bennett's *Customary Law in South Africa* p. 38

[34] Law 4 of 1885 of ZAR as referred by Bennett (2004) *Customary Law in South Africa* p.39

provision for the establishing of courts to deal with the civil disputes amongst black people. The law also made provision for the appointment of native commissioners with judicial powers to adjudicate over matters between 'natives'. Where none had been appointed, the local landdrost became native commissioner ex officio.[35] The Superintendent of Natives functioned as a court of appeal for 'native' matters.[36]

As with the other laws mentioned above, courts were allowed to apply customary law, and customs and habits of 'natives' were to remain in force. Section 5 contained a special proviso, that customary law might not be applied if it occasioned injustice or conflicted with accepted principles of natural justice. The result of Law 4 was that customary marriages and lobolo agreements were denied effect on the ground that polygamy and 'bride-purchase' were uncivilised.[37]

In 1907, after the abolishing of the judicial function of the superintendent, 'natives' were allowed to appeal to the Supreme Court.[38] In 1924, people were allowed to appeal through traditional courts to commissioners' courts. Traditional courts and commissioners' courts could only apply customary law. If an individual wanted to litigate

[35] See footnote 34 in Bennett (2004) *Customary Law in South Africa* p.39

[36] See footnote 39 in Bennett (2004) *Customary Law in South Africa* p.39

[37] Bennett, T.W. (2004) *Customary Law in South Africa* p.39

[38] Act 29 of 1907 of the Transvaal

under the common law, an action had to be brought before the magistrates' court or the Supreme Court.[39]

d) Recognition of customary law in the Orange Free State

According to Brookes,[40] the Orange Free State did not have any consistent policy on customary law. Indigenous people in the Orange Free State did not enjoy the same rights as far as the recognition of their customs and traditions is concerned. Only certain customs were recognised – in the Thaba 'Nchu Reserve, customary marriages were recognised, and in the Witzieshoek Reserve, traditional rulers enjoyed minor civil jurisdiction with an appeal to the commandant. Until 1899, customary marriages were not recognised in the rest of the Orange Free State outside the Thaba'Nchu Reserve.[41] From 1899 onwards however, there was a change in terms of the law, the offspring from customary marriages had a right of inheritance, as if they were legitimate children, and the father had parental power over his children.[42]

e) Recognition of customary law after South African became a Union

[39] See footnote 42 in Bennett (2004) *Customary Law in South Africa* p.40

[40] Brookes, E.H. (1927) *History of Native Policy in South Africa 1830 to the Present Day* p.162

[41] Law 26 of 1899

[42] See footnote 45 of Bennett (2004) *Customary Law in South Africa* p.40

By 1910, customary law was recognised in all four of the areas which were to constitute the Union of South Africa (the Union).[43] The problem for the Union was that there was no conformity in the laws that regulated the black people. As discussed above, each colony had its own set of laws regulating indigenous affairs and exercising control over black people. Because it would have been difficult, if not impossible, for the Union to discontinue certain sections of customary law previously recognised by the different colonies, the Union promulgated laws to control 'native' affairs. In 1913, the Union government promulgated the Native Land Act.[44] In terms of this law, black people were prohibited from buying or leasing land outside certain areas.

The most significant piece of legislation, in my opinion, was the promulgation of the Black Administration Act 38 of 1927.

f) Recognition of customary law under the Black Administration Act 38 of 1927 (the Act)

The Union government introduced this act as part of its programme to re-establish traditional authorities. The significance of the act was that it brought about uniformity in the recognition of customary law in the four provinces of the Union. The act allowed customary law to be applied in a separate system of courts. Traditional leaders and native

[43] Van Niekerk, G.J. 'Legal Pluralism' in Bekker et al (2002*) Introduction to Legal Pluralism in South Africa* p.1 at 8

[44] Act 27 of 1913

commissioners were appointed as presiding officers of their respective courts. Courts of the traditional rulers could only apply customary law.[45]

In terms of the act, only black people qualified to take a civil or criminal matter to the traditional tribunals or the native commissioner.[46] Other groups could not take a civil matter to the native chief tribunals. It thus seems to me that although the act recognised customary law, the act discriminated against the white people and other groups.[47]

g) Recognition of customary law under the Law of Evidence Amendment Act 45 of 1988

The act is an illustration of the government's intention to continue with the recognition of customary law. As already explained, the Law of Evidence Amendment Act had its introduction after the appointment of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts.[48] The act deleted any mention of race from the terms for recognising customary law. The deletion had the result that any court could apply customary law.[49] The problem was that the recognition of customary law and the application thereof continued along racial lines and were treated as a subordinate element

[45] Bennett, T.W. (2004) *Customary Law in South Africa* p.41

[46] Section 35 of the Act

[47] The discrimination against other groups continued until the government appointed the Hoexter Commission to investigate the 'structure and functioning of the courts'. The aim of the commission was to remove the racial stigma. The result of the commission was the introduction of the Law of Evidence Amendment Act 45 of 1988.

[48] See footnote 59 in Bennett (2004) *Customary Law in South Africa* p.42

[49] See footnote 61 in Bennett (2004) *Customary Law in South Africa* p.42

of the legal system. The recognition of customary law under the Law of Evidence Amendment Act did not mean the exclusive application of customary law where the litigants were black people. The thinking on the subject began to change only in 1993 with the constitutional negotiations for a democratic South Africa. I shall now discuss the recognition of customary law under the Constitution.

2) THE RECOGNITION OF CUSTOMARY LAW UNDER THE 1993 CONSTITUTION[50]

a) Multi party negotiations at Kempton Park

From the discussion above, it is clear that no constitution of South Africa,[51] before 1993, gave constitutional recognition to customary law. The constitution of 1993 was, in the words of Kgosi S.V. Suping, 'the rising of the sun for customary law'.[52]

I consider that the negotiations took place at a stage in South African history when the country was politically very unstable. The political changes started by the then President F.W. De Klerk, had the result of South Africa needing a constitution with a bill of rights to give effect to the changes. Indeed, it would not have made sense to start political changes without rewriting the constitution. One should remember that at that time, the

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[50] Act 200 of 1993

[51] Bennett, T.W. (1999). South Africa's Interim Constitution described itself as 'an historic bridge', one leading from a past of prejudice and apartheid to a future of democracy and ubuntu p.181

[52] Deputy Chairperson, National House of Traditional Leaders. I had an interview with him on the 18th of May 2004 in Cape Town at the Holiday Inn.

Constitution was not the supreme law of the country. Parliament was regarded as the supreme institution and because of that the Constitution was subject to the decisions of parliament.

Based on this, it is important to look critically at the recognition of customs and traditions as stated in the interim Constitution. The question one should ask is: What is the real meaning and significance of that constitutional recognition, and what does it mean for customary law itself?

According to Kgosi Suping, when the constitution and the bill of rights came to be drafted, customary law was ignored. When the negotiations for a democratic South Africa started, some of the groups[53] felt that it was unnecessary to give customary law constitutional recognition. According to Kgosi Suping, the feeling was that there is enough legislation protecting customary law.[54]

The African National Congress (ANC) held the view of a unitary state and a single national identity, to be underpinned by norms of equality and non-discrimination. The ANC's draft bill of rights (the Bill)[55] made no mention of culture other than the freedoms to speak a language of choice and to pursue artistic, sporting or recreational activities.[56]

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[53] The Women's National Coalition and the Rural Women's Movement

[54] Also see the South African Law Commission (SALC) Interim Report on Group and Human Rights (1991). The SALC recommended the inclusion of a right to culture in the Constitution.

[55] ANC Constitutional Committee Revised Draft Bill of Rights (1992)

[56] According to Article 5 of the Bill 'No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, or creed, political or other opinion, birth or status.'

The draft bill for the Constitution differed from the Freedom Charter of 1955. The Freedom Charter had firmly rejected apartheid but upheld the right of all national groups to use their own language and to develop their own folk culture and customs. The Freedom Charter recognised customary law as part of South Africa's legal system.

The opinion of traditional rulers was that customs and traditions should be constitutionally recognised. In August 1993, the negotiators gave customary law the necessary attention after the intervention of the traditional rulers. The result of the negotiations was that the parties came to an agreement to include a section in the Constitution to recognise the customs and traditions of African people. Clause 32 of the draft constitution made the application of customary law a constitutional right in pursuance of the freedom to associate with a community observing that legal regime. The inclusion of customary law brought it on the same terms as Roman-Dutch common law as part of our legal system.[57] Section 31 of the interim Constitution gave further substance to the recognition of customary law

b) Section 31

i) A right to recognition

Section 31 states that:

[57] Bennett is of the opinion that the inclusion of only a section in the Constitution, the position of customary law did not change. See Bennett (1999) *Human Rights and African Customary Law under the South African Constitution* p.182

'Every person shall have the right to use the language and to participate in the cultural life of his or her choice'

Because the Constitution recognised customs and traditions, it is my opinion that this makes the state, especially the courts, obliged to apply customary law where necessary. My view is that the purpose of the right is to enrich an intellectual tradition and to safeguard the rights of the initiators and consumers of cultural, artistic, and scientific creativity. A right to culture means that people can perform or practise their traditions and customs within a democratic South Africa.[58]

According to Bennett,[59] the term 'culture' in section 31 which incorporates customary law 'receives adventitious support from the specific recognition given to other systems of personal law in the Constitution'. According to Bennett, section 14(3) provides that nothing in the chapter on fundamental rights precludes legislation recognising a system of personal and family law adhered to by persons professing a particular religion.

My criticism of section 31 is that it gives no guarantee to an individual that customary law must be applied in legal proceedings where the litigants are both black. My interpretation of the section is that it only guarantees a person a right to participate in his or her cultural activities, and that the individual can demand admission to a cultural

[58] According to Kgosi Suping

[59] Bennett, T.W. (1995) *Human Rights and African Customary Law under the South African Constitution* p.24

group.[60] By implication, section 31 means that the state must maintain African culture, not interfere with an individual's right to participate in cultural activities, and to permit the existence of institutions necessary to sustain the culture concerned.

With reference to the above, it is important to take note of the Constitutional Principles. Principle XI stipulates the acknowledgement and protection of cultural diversity, and in addition, it requires that conditions for promoting different cultures be encouraged.[61] Principle XIII (1) is clearer than section 31 on the application and recognition of customary law by the courts. In terms of the said principle, courts must recognise and apply customary law.[62]

According to Bennett[63], the right to culture also entitles a group of people collectively to maintain and assert their special identity. It is important to note that the individual's right to pursue a culture of choice presupposes the existence of a cultural community. The community's rights first have to be secured for an individual's right to have any substance. Bennett argues that a person's right to have customary law applied to a dispute, rests on membership of a group, which has a prior claim that the state recognises and thereby enforces its law.

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[60] Also see Article 17(2) of the African Charter who makes provision for cultural rights.

[61] The Principles were contained in Schedule 4 and their operation was governed by chapter 5 of the interim Constitution, which dealt with the writing and adoption of the final Constitution.

[62] See the amendment to the interim Constitution, Section 2 of Act 3 of 1994.

[63] Bennett, T.W. (1999) *Human Rights and Customary Law under the South African Constitution* p.24

ii) Customary law as a right

Section 31 converts the freedom of customary law into a right to customary law.[64] My opinion is that there is a difference between a right and a freedom. If we treat customary law as a 'right', it will have juridical parity with the other fundamental rights and any conflicts with them will have to be resolved by the usual techniques of constitutional law.[65]

The distinction between freedoms and rights lies in the generality of 'freedoms' and specificity of 'rights'.[66] A right to customary law obliges a court to apply customary law in order to reach its decision. Rights imply corresponding duties whereas freedoms have no consequent duties.[67]

3) THE RECOGNITION OF CUSTOMARY UNDER THE 1996 CONSTITUTION[68]

a) Introduction

[64] Bennett, T.W. (1999) *Human Rights and Customary Law under the South African Constitution* p.25

[65] Under this section of the Constitution, freedoms may be limited by rights, but rights cannot be limited by freedoms. See Kauesa v Minister of Home Affairs 1995 (1) SA 51 (Nm) p. 66

[66] See footnote 118 in Bennett (1999) *Human Rights and African Customary Law under the South African Constitution*

[67] Bennett, T.W. (1999) *Human Rights and African Customary Law under the South African Constitution* p.26

[68] Act 108 of 1996

It would be pointless even to look at the constitutional provisions in sections 30 and 31 without referring to the preamble and founding provisions of the final Constitution. The preamble is important because it sets out the basis and objectives of the Constitution.

The preamble states that: We believe that South Africa belongs to all who live in it, united in our diversity.

We therefore…adopt this Constitution as the supreme law of the Republic so as to –

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law

Build a united and democratic South Africa. . .'

The founding provisions states that:

'The Republic of South Africa ……founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b. Non-racialism and non-sexism.

c. Supremacy of the constitution and the rule of law.'

I include only those parts of the preamble and founding provisions, which, in my opinion, are relevant to the study, especially to the discussion on the scope of rights. In

my discussion on customary law and discrimination, I refer to the founding provisions again.

b) Sections 30 and 31

The content of section 31 of the interim Constitution does not differ much from that of section 30 and 31[69] of the 1996 Constitution. However, it is important to analyse sections 30 and 31[70] of the 1996 Constitution.

Section 30 states that:

'Everyone has the right to use the language and to participate in the cultural life of his or her choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

Section 31 states that:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -

a. to enjoy their culture, practise their religion and use their language; and

[69] Note to sections 30 and 31: Chapter 9 section 185 authorises the establishment of a Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities.

[70] See section 235: 'The right of the South African people as a whole to self-determination, as manifested in the Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language, within a territorial entity in the Republic or in any other way, determinate by national legislation.'

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.[71]

The inclusion of these two sections in the final Constitution has resulted in Roman-Dutch law and customary law now being treated as equal partners. The recognition of these two 'rights' brought along the constitutional recognition and application of customary law. The 'rights recognised' are a significant element of African cultural tradition.[72] My opinion is that the two sections establish a 'human right' of both the individual and the group to which an individual belongs. I shall now briefly discuss the source of these two rights in international and foreign law.

c) International and foreign law as a source of customary law

According to Bennett,[73] the right to culture must be read against the background of public international law. The right to culture in international law has three sources, namely the International Covenant on Civil and Political Rights (1966), self-determination, and the

[71] Both sections contain limitation clauses, which will be dealt later in this chapter.

[72] See Bennett, T.W. (2004) *Customary Law in South Africa* p.78. See also footnote 18 on p. 78.

[73] Bennett, T.W. (2004) *Customary Law in South Africa* p.84

emerging doctrine of aboriginal rights. In this regard, it is important to take note of Article 27 of the International Covenant[74]. Article 27 provides that:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The article emphasizes the 'right' of minority groups. Although Article 27 protects minority rights, the concept of political independence is a broad concept, it also includes a right to cultural development. The important part, for African customary law, is the doctrine of aboriginal rights.[75] As an aboriginal group, the African population, the majority group in South Africa, was politically disadvantaged. As mentioned above, Article 27 protects the right to political independence. One must remember that during the pre-colonial era, the family was the foundation of the African social order.

The African population qualifies as an aboriginal group because they had already been living in South Africa before the arrival of the colonialists. The recognition of both international law and foreign law[76] as a source of customary law, implies that South

[74] Bennett, T.W. (2004) footnote 63 p.84 In 1992, this article was supplemented by a General Assembly Declaration 47/135 on the Rights of Persons Belonging to National Ethic, Religious and Linguistic Minorities.

[75] See Lerner: *Group Rights and Discrimination in International Law* 103ff for a history of aboriginal rights in international law.

[76] Section 39 of the Constitution allows the courts to consider foreign law when construing the Bill of Rights. See also sections 231(4) and 232 of the final Constitution.

African courts should respect African culture and, by implication, customary law as an aboriginal right.

d) Scope of the right

In terms of section 39 of the Constitution, the court must first determine the scope of the right in order to decide whether it covers the facts of a case whenever application of a constitutional right is an issue. When interpreting culture, the scope of the right is virtually limitless because culture embraces such a wide variety of human activities.[77]

A study of the fundamental rights led me to the conclusion that there are two restrictions that apply to most of these rights: the interests of the state and the fundamental rights of others. Sections 30 and 31 themselves contain limitation clauses. Both sections state explicitly that 'the right to culture may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' My opinion is that the limitation placed on these two sections is aimed at preventing communities from privatising offensive practices and at excluding the oppressive features of certain cultural traditions.[78]

In Christian Education South Africa v Minister of Education 1999 (4) SA 1092 (SE), the High Court maintained that section 31 could not be read to permit practices that are specifically excluded, in casu by the policy and legislation on corporal punishment. The interests of the state in this case were that it is the responsibility of the state to secure the

[77] See footnote 96 in Bennett TW (2004) *Customary Law in South Africa* p.89

[78] See Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC) paragraph 26. This approach is consistent with that taken by the UN Committee on Human Rights General Comment 23 paragraph 6.2 towards article 27 of the International Covenant on Civil and Political Rights.

individual's right to human dignity and to freedom and security of the person. The court maintained that the freedom to culture and religion could not be interpreted to include corporal punishment.[79] My opinion is that the right to culture and religion is both a right and a freedom as discussed earlier on in this chapter.[80]

e) Limitation of the right to culture

The discussion has so far shown that the Constitution recognises customary law as part of the South African legal system. The fact that customs and traditions enjoy recognition as 'rights' does not mean that they are absolute rights. Very few of the fundamental rights are 'absolute'. The enforceability of any right depends on other rights and the legitimate needs of society. From the discussion above, it is clear that the right to practice one's customs and traditions is not an absolute right. As demonstrated above, sections 30 and 31 contain a limitation clause.

However, if the right to practise one's culture survives the limitation clause stipulated in the 'right' itself, and this right is found to have been violated, the violation may still be justified under the general limitation test. In this regard, section 33 of the interim Constitution and section 36 of the final Constitution are applicable.

[79] This case is an illustration of the difference between a right and a freedom.

[80] See the discussion on the limitation of rights for further elaborations.

Although section 36 gives details of the various provisions made to accommodate customary law, the most important test in practice is the proportionality test,[81] or a balancing of rights and interests.[82] The problem with customary law is that there are many instances where it is in conflict with other laws and rights in the Bill of Rights.

In the case of Christian Education in South Africa, the freedom of culture and religion was in conflict with a law prohibiting corporal punishment[83] in institutions. The court maintained that the prohibition was reasonable and justifiable under section 36. The view of the court was that children's rights to dignity, freedom and security of the person outweighed their parents' rights to culture and religion.[84]

Prince v President of the Law Society of the Cape of Good Hope & Others[85] is another example where the court allowed the infringement of the appellant's right to practice his culture and religion. The court maintained that the infringement was justifiable because there were no less restrictive ways to prevent drug abuse.

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[81] See S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), which was the basis for the limitation clause in the Final Constitution.

[82] Bennett, T.W. (2004) *Customary Law in South Africa* p.95

[83] Section 10 of the South African Schools Act 84 of 1996

[84] Bennett, T.W (2004) *Customary Law in South Africa* p.95 - 96

[85] Prince v President of the Law Society of the Cape of Good Hope & Others 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC)

The next discussion will show that it is important to limit some of the cultural rights because of the discriminatory effect on people of the groups who exercise their customs. In Chapter Three it will become clearer to us why legislative reform was necessary to bring customary law in line with our democracy.

4) Customary law and discrimination

Although the Constitution recognises customary law as part of our legal system, it does not mean that customary law has no discriminatory effect. Research has shown us that customary law discriminates against some of the people practising it. For example, it discriminates against women when it concerns succession and the right to land. I am of the opinion that this is still the case today. The only difference between prior 1994 and today is that the new Constitution and other laws prohibit discrimination. I am not convinced by the arguments of Kgosi Suping. He agreed with me that the current manner in which succession takes place is discriminatory against women.[86]

My opinion is that some customs and traditions infringe on the right to human dignity and equality. My view is that males and females are not treated equally. The Constitution states that 'every one has inherent dignity and the right to have their dignity respected and protected.'[87] The Constitution states in section 9 that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) in this regard is important because it prohibits unfair discrimination.

[86] See Chapter Three for the legislative reform on the customary law of succession.

[87] Section 10 of the final Constitution.

Section 1 of the Constitution, the founding provision, states that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. In my view, Section 1 is of particular significance because it includes the vulnerable groups of our society, namely women and children. This is highly relevant in this context because according to customary law, women and children are subject to cultural practices. In everything concerning customs, males are the central figure and everybody else is subject to their authority.

In State v Makwanyane 1995 (3) SA 391 (CC) paragraph 144, the Constitutional Court describes the right to dignity and the right to life as the most important human rights. The court further prompts that the right to dignity is intricately linked with other human rights.[88] Chaskalson, P. held in Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), at paragraph 28, that the right to dignity is a cornerstone of our Constitution.

The leading decision on gender discrimination in customary law has been Mtembu v Letsela and another 1997 (2) SA 936 (T). The case illustrates my argument that customary law discriminates against people who practise it. The case dealt with the question of inheritance. According to customary law, the only person in casu qualified to inherit, was the applicant's deceased father. My opinion is that this is in direct conflict with the constitutional provisions discussed above. Although this case seemed a clear example of gender discrimination, the objection was dismissed because J. Le Roux found that, 'while the estate devolved upon a male heir, customary law required him to support the surviving widow and dependants'. The rules of customary law state that a widow

[88] O'Regan, J. paragraph 328

remains at the deceased homestead where she could continue to benefit from the estate, and the heir could not eject her. The court ruled that customary law does not prejudice women because it gives them rights to maintenance.[89]

5) The responsibility to develop customary law

In a constitutional democracy, no legal system can remain unchanged. Some laws need to be amended, others to be repealed or developed. My opinion is that customary law is in the same position as other laws. Customary law also needs to be developed to promote the spirit and purport of the Constitution. For any law or legal system to survive democracy, I contend that change is necessary. If not, the Constitutional Court will declare that law or legal system as invalid. Kgosi Suping agrees with me that customary law needs to be developed. The question that needs to be answered is who is responsible for that? Is it the court's duty or the legislature's? According to Kgosi Suping the answer lies in the consultative processes between the relevant stakeholders, namely the people who practise their customs, the legislature, and the courts.

According to Kgosi Suping, the people who practise customary law will need the courts to assist them. It is normally the courts that deal with issues relating to customs. After the courts' rulings, the government must start with a consultative process with the people who practise tribal customs. The suggestion is that people who have the necessary knowledge of customs and traditions must assist the courts. This is not the position today. The problem is that most of the judicial officers lack the knowledge needed to understand

[89] In Mtembu v Letsela 2000 (3) SA 867 (SCA) the court held that children were never left destitute simply because they were illegitimate. The children belonged to the maternal grandfather who was obliged to maintain them.

customs. Suping recommends that those judicial officers, who lack knowledge, should be trained, and those who are currently studying must study customary law as a compulsory subject. He suggests that customary law-related cases should be referred to magistrates or judges with the necessary knowledge and experience.

6) The future of customary law

The future of customary law in South Africa depends on a number of issues. First, traditions and customs need to be reconciled with democracy. Effect should be given to the true objectives of ubuntu and maintenance duties placed on family heads and traditional leaders. Second, the future of customary law will depend on the legislatures and courts to provide the official version of customary law. Knoetze[90] is of the opinion that the living law will in fact survive, keeping in mind the number of people practising it. Knoetze is also of the opinion that customary law must have some unification with the common law in some areas, e.g. in succession and inheritance. However, the potential reform in one area may inadvertently impact on other areas such as delicts, contract and property without a holistic reform approach.

Kgosi Suping is of the opinion that customary law will still be practised over the next hundred years. It will entirely depend on the people who practise customs. His argument is that customary law has survived colonialism and apartheid so it will not be too difficult for it to survive democracy as long as the stakeholders follow the reform processes as discussed above.

[90] Associate Professor at the University of Port Elizabeth

I consider that both these statements are valid. My view too is that customary law will survive democracy. It is important to note that it is not only the South African Constitution that recognises customary law; other instruments also recognise customs and traditions, such as the Constitutive Act of the African Union.[91]

7) Conclusion

To conclude, I would like to stress that one of the most important challenges for the new constitutional order has been to re-establish respect for human dignity by addressing the inequities and unfair discrimination of the past. I want to emphasize that the challenge includes the reform of customary law too because it is necessary to develop customary law in such a manner as to be acceptable in a constitutional democracy. If customary law does not develop in such a manner, the Constitutional Court will be forced to intervene in customary- law- related matters, and I do not think that is what we would like to see. There will of course, always be those who will challenge certain customs and traditions, especially the feminist groups.[92]

Kgosi Suping is of the opinion that the future of customary law depends on the people who practise it and not the government or the courts. His reason is that South Africa is so rich in culture and diversity that it would be impossible to disregard totally customary law as part of our law.

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[91] Article 14(1)(g) and Article 22(2). These two articles imply that Africa recognises customs and that they it should be practised within the framework of the law of each member state.

[92] They will base their challenges on the grounds of discrimination and the founding provisions of the Constitution. I think that the argument will be that to allow the continueing practice of customs, is not in the spirit and purport of the Constitution.

I believe there is a possibility that urbanization may result in a situation where the youth of today reject their customs and live a more westernised lifestyle. I think that we all, including Kgosi Suping, can only speculate on the future of customary law.

Part B

1) Introduction

This part of the study analyses the constitutional recognition of the institution of traditional leadership.[93] It explains why it is important first to discuss the recognition of customary law and then traditional leadership because it is impossible to discuss the one without referring to the other. Traditional leadership is an important part of customary law. The study shows that it is indeed the responsibility of traditional leaders to be the custodians of Africa's culture and heritage, and not the government's. The study shows that they have long been the people's voice. The question this study tries to answer is what the relevance of traditional leadership is in a democratic South Africa is. Therefore it is important to refer to statements made by political leaders in that regard.

Deputy President Jacob Zuma, on the 9th of May 2003, at the opening of the Royal Chambers and the Multipurpose Community Centre in Lusikisiki in the Eastern Cape, said that the government regards traditional leaders as the custodians of the moral values, cultural and social systems of many people in the country.[94] The deputy president stated

[93] Traditional leadership is not defined in the Constitution. See section 1 of the Remuneration of Traditional Leaders Act 29 of 1995.

[94] Zuma, J: Traditional leaders here to stay. Article accessed on 5th March 2004. www.polity.org.za/speeches

in clear terms that the government had no intention of doing away with traditional leadership.[95] Following this, to demonstrate further the government's intention and serious light in which it held traditional leadership, President Thabo Mbeki[96] offered an 'olive branch' to traditional leaders.[97] The president said that if necessary the Constitution should be amended to ensure that the chiefs kept control of their communities. These statements by the most senior officials in government underline the constitutional recognition of traditional leadership. I shall briefly discuss the emergence of traditional leadership before the 1993 constitutional provisions.

2) Historical background

Before the colonial era, there was a special relationship between traditional leaders and their followers.[98] According to Bekker, customary law was an established system of immemorial rules, which had evolved from the way of life and natural wants of the people.[99] According to Motitsoe, African leadership is rooted in the profound expression of communal and humble humanity, inspired through collective thinking, doing and living of all the people.[100] During those pre-colonial times, various forms of government,

[95] Legislation promulgated shows the intentions of government in their recognition of traditional leadership – see Chapter Three for legislative reform.

[96] Address to the National House of Traditional Leaders on 30th July 2003 in Pretoria.

[97] Story from AFP Copyright 2003 by Agence France-Press (via ClariNet)

[98] Kgosi Suping as referred to earlier.

[99] Bekker, J.C. (1989) *Seymour's Customary Law in South Africa* p.11

[100] Motitsoe, B. (2004) 'Indigenous African Leadership' *Leadership*, July 2004 p.58

ranging from empires to tribal states, were instituted.[101] The head of the empire or tribal state was at the apex of the power hierarchy. Subordinate leaders, referred to as 'ward heads', supported these heads. After them followed the patriarchal heads of households.[102]

The problem for traditional leaders started when the colonialists took away their sovereignty and transformed them into government functionaries.[103] The effect of the transformation process was that people could no longer move freely from one territory to another. The drawing of regional and national boundaries was the order of the day.

The situation continued until 1927. The Black Administration Act 38 of 1927 re-organised traditional courts into government institutions. In terms of section 1 of the act, the Governor-General acted as the Supreme Chief. The result of such a provision was that it allowed the 'super chief' to divide and rule as he deemed fit. The supreme chief had to study the cultures and traditions of the indigenous people. Section 2(7) gave the supreme chief the authority to appoint anybody as a chief or headman. The provision took away the will of the people to decide who must be their chief. It also took away the traditional way of succession, where a male descendant succeeds in office as a chief.

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[101] Vorster, L.P. 'The Institution of Traditional Leadership' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.127- 128

[102] Bennett, T.W. (1995) *Human Rights and African Customary Law under the South African Constitution* p.66

[103] Bennett, T.W. (1995) *Human Rights and African Customary Law under the South African Constitution* p.68

Sections 12 and 20 of the Black Administration Act limited the jurisdiction of traditional courts. The jurisdiction of traditional was curtailed and subjected to appeal and revision by specially created 'commissioners courts'. The effect of these two sections, for traditional leaders, was that traditional courts could no longer exercise their powers according to traditional customary law.

3) Traditional leadership under the South African Constitution[104]

In 1994, the homelands were abolished and reincorporated into South Africa. The process of incorporation did not go smoothly, as was predicted by politicians. Certain homeland leaders did not want to be part of South Africa. The homeland governments of Bophuthatswana and Ciskei took a decision to resist incorporation. People died because of the resistance. The situation created a dilemma for the main parties, namely the National Party (NP) and the African National Congress (ANC). The Afrikaner Weerstandsbeweging (AWB) made it clear what they thought of the negotiations by causing damage to the buildings in Kempton Park where the parties were busy with negotiations.[105]

[104] Discussion includes both the 1993 and 1996 Constitutions.

[105] SABC2 / FOCUS 13/06/2004 19:30. Freek Robinson's interview with Eugene Terreblanche

a) Multi-party negotiations

According to Bennett,[106] all the conflicts and inconsistencies that beset traditional leadership under colonialism and apartheid have been transferred to the new democratic dispensation. As already stated above, the drafting process of the 1993 Constitution ignored customary law as a system of law. According to Kgosi Suping, traditional leaders could not allow the adoption of the Constitution without any reference to customs or traditional leaders. The situation forced traditional leaders to intervene and to ensure the inclusion of customary law and traditional leadership.

In 1991, the South African Law Commission (SALC) published a report[107] on group and human rights. According to the report, the country had no statutorily defined groups with statutorily defined rights. The SALC held that the needs of individuals who are members of different linguistic, cultural and religious group, would be adequately protected by the usual individual rights. The draft bill only guaranteed 'every person's right, individually or collectively, to speak the language or to practise the culture and religion of their choice.[108] As stated earlier, at the Convention for a Democratic South Africa (CODESA)

[106] Bennett, T.W. (1999) *Human Rights and African Customary Law under the South African Constitution* p.70

[107] Interim Report on Group and Human Rights (1991) p. 670-680

[108] Article 21 of the Interim Report

negotiators reached an agreement to include a provision to recognise traditional leadership in the interim Constitution.[109]

Section 181 of the interim Constitution recognised traditional rule. It is important to note that traditional rule, during that time, was regarded as systems of law in the homelands and in South Africa. Section 182 of the interim Constitution gave traditional leaders ex officio membership of the governmental structures in their areas. Section 183 stipulated that a House of Traditional Leaders had to be established in consultation with the traditional authorities and residents within the province concerned. These provisions gave these new bodies the power to advise and make proposals to provincial legislatures or the national parliament on matters concerning traditional authorities and customary law. Any ills on these topics had to be referred to them. These concessions seem to me to be in conflict with the principles of democracy. What is important is that the concessions were the result of political bargains between traditional leaders and the parties because the negotiators were under pressure and could not allow an unstable political situation. Part of the deal was that the interim Constitution must guarantee the status of traditional leaders and that the final Constitution must give protection to their status. Principle XIII of the interim Constitution stipulated that the institution of traditional leadership, as determined by indigenous law, was to be recognised and protected. According to Kgosi Suping, the introduction was necessary in order to win the co-operation of the IFP in the 1994 elections.[110]

[109] Constitutional Principle XIII read together with section 71(1) (a) of the Interim Constitution.

[110] Kgosi Suping.

b) Section 211 of the Final Constitution

The Final Constitution recognised the institution[111], status and role of traditional leaders subject to the Constitution.[112] According to Vorster[113], the Constitution qualifies the recognition of the institution of traditional leadership in two important respects. The recognition must be in accordance with customary law and is subject to the Constitution. The Constitution does not define customary law. Section 211(2) makes reference to a system of customary law, including amendments to, or repeal of, legislation and customs. This section indicates a version of customary law as it has been transformed over time by legislation and court decisions. This would imply that the institution of traditional leadership according to customary law would also include the provisions of the Black Administration Act 38 of 1927[114] and Black Authorities Act 68 of 1951.

Section 211 cannot be read in isolation. Other sections of the Constitution must be read together to give effect to the recognition. Section 8(1), which makes the Bill of Rights applicable to all law, including customary law, and which binds all organs of state, including traditional authorities. Section 9 forbids the unfair discrimination by the state and private persons on the grounds of race, gender, disability, culture and birth. Section

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[111] Institution is not defined in the Constitution. Vorster LP (1999) ' Traditional Leadership in South Africa, marriages and succession.' Obiter, Volume 20, Issue 1 p.76. One meaning of institution refers to established law, custom, or practice.

[112] Section 211(1) of the Constitution

[113] Vorster, L.P. 'The Institution of Traditional Leadership' in Bekker et al (2002) *Introduction to Legal Pluralis*m p.125 at 130

[114] Section 2(7)

39(2) binds courts in their development of customary law to the promotion of the spirit, purport and objects of the BOR. Section 40 and 41 provides for co-operative government on all levels of government, in particular also between municipalities and traditional authorities at a local level. Section 151 limits the local sphere of government to municipalities. This puts a question mark on the scope of section 211 that provides for the continued existence of traditional authorities on a local level of government. Section 212 allows for national legislation to make provision for a role for traditional leadership as an institution at local level on matters affecting local communities.

I consider that to give effect to the recognition enjoyed, traditional leaders must exercise their powers within the ambit of the Constitution. The sections mentioned above have the effect that any decision taken will be measured against the founding provisions of the Constitution. Every decision taken must promote the spirit and purport of the Constitution. It is pleasant to be recognised but it is not so pleasant to be limited in one's jurisdiction. This is the case with traditional leadership. According to Kgosi Suping, to be a traditional leader today, one must know the law, especially the Constitution.

c) Section 212 of the Final Constitution

Section 212(2) repeats sections 183 and 184 of the interim Constitution. The Constitution provides for the establishment of provincial houses and a national house of traditional leaders. These new institutions extend the role of traditional leaders beyond their traditional areas of jurisdiction. Section 212(2) states:

The role of traditional leaders is 'To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.'

Although the Constitutional Court[115] accepted the final Constitution, the IFP argued that section 211 and section 212, failed to realise the constitutional principles, because the powers of traditional leaders had been subjected to national legislation and not customary law.[116]

The question one should ask is 'what is the effect of the Constitution on traditional leaders?' The answer lies in the way Chapter XII is structured. In terms of Chapter XII the institution, status and role of traditional leadership are recognised subject to the Constitution. Traditional leaders must observe applicable legislation and customs and must not apply customs that have been amended or repealed. This can be explained by referring to the bogadi custom. If the custom is seen as a violation of human rights and contrary to the spirit and purport of the Constitution, and is thereupon repealed by legislation, traditional leaders are immediately constrained to ensure that the bogadi custom is no longer applied in their areas and in the customary courts over which they preside because it will then be a custom that has been repealed. Naturally, such an enactment would be a cause for conflict between traditional leaders and democratic structures of governance because the bogadi custom is a great unifying force in a customary law community. The problem is that the Constitution creates a possibility for

[115] Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)

[116] Bennett, T.W. (1999). *Human Rights and African Customary Law under the South African Constitution* p.210

conflict. My opinion is that the Constitution, in the case of a conflict, will then water down the role of traditional leaders because through their courts they feature prominently in preserving the unifying role of the custom.

I contend that the purpose of section 212 is to give effect to the recognition given to customary law as discussed above. Indeed, one wonders who will be the custodians of tradition without the recognition of traditional leadership.[117]

4) Traditional leadership and issues of discrimination

Among the Bantu-speaking people of South Africa, traditional leadership is a patriarchal social system. The position of traditional leadership is limited to male members of the family.[118] Kunene wrote in 1995 that if a girl were to be considered as an inkosi, it would disturb the whole cultural structure.[119] The normal position is that the eldest son of the principal wife is the successor. This position in itself is discriminatory. The traditional system of succession excludes women. In most cases of succession, only males have the opportunity to be traditional leaders. Traditional leaders are not elected by the people, but acquire their positions mainly on kinship grounds.[120] However, now it appears that the practice of male succession to the position of traditional leader constitutes unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair

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[117] See Chapter Three for further discussion on the role and functions.

[118] Kunene, P. (1995) ' Exploring traditional leadership', *Agenda*, Issue 26 p.35

[119] Kunene, P. (1995) 'Exploring traditional leadership', *Agenda*, Issue 26 p.35

[120] Vorster, L.P. (1996) 'Tradisionele leierskap in Suid-Afrika' *SA Journal of Ethnology* 19 (2&3) p.77

Discrimination Act.[121] Pieterse argues that once the act comes into full operation, the act will have far-reaching consequences for the continued existence of indigenous law.[122] Kerr argues that should that be the case, the political background to the negotiation about the constitutional recognition of the institution of traditional leadership belongs to the history.[123] Succession in office also discriminates against younger sons or the eldest son of a wife who is not the principal wife. Discrimination is not only based on gender, but also on status.

The status of the principal wife, gender, the firstborn son, and physical ability are the factors to be taken into consideration in the appointment of a successor. At the time of succession, the successor is perceived to represent the most senior living link with the ancestral world of the ruling family.[124]

The position has not really changed even though the Constitution forbids gender discrimination.[125] Kgosi Suping is now in the process of training his son, who is an admitted attorney, to succeed him as a traditional leader. This is clearly an example of the male dominance of traditional leadership. His view is that although they respect the

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[121] The act was promulgated in terms of section 9(4) of the Constitution which determines that national legislation must be enacted to prevent or prohibit unfair discrimination.

[122] Pieterse, M. (2000) 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Coffin in the Customary Law Coffin?' *SA Law Journal* p.627

[123] Kerr, A.J. (1994) 'Customary law, fundamental rights, and the Constitution' *SA Law Journal* p.728

[124] Vorster, L.P. 'The Institution of Traditional Leadership' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* 125 at 131

[125] See section 9(2) of the Constitution. Also see sections 1-4 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Constitution as supreme law, they will not allow a position in which the state decides who is appointed as traditional leader. However, at this very moment there is already a change in the traditional way of succession. According to Suping, among the Lovedu of the Northern Province, only women may become heads of a community. Men can only be appointed as ward heads. The system allows women to act as regents if a successor is under age or not able to succeed immediately.

Suping believes that the National House of Traditional Leaders (NHTL) will not make serious objection if it happens that a female is appointed as a traditional leader. It will be acceptable if and only if the people of the traditional authority want it to be so. I agree with him, as long as the system allows the community to decide who must be appointed. I believe however, that there is a danger of traditional leaders who prefer a certain person unduly influencing people. If this were to happen, would that not justify state intervention?

5) The functions of traditional leaders[126]

As already stated above, in section 212(2), the Constitution provides for the establishment of provincial houses and a national house of traditional leaders.[127] The houses set up in the provinces under the interim Constitution continue to function, but, Bennet warns that because their powers were not specifically guaranteed in the final

[126] See Black Administration Act 38 of 1927; Black Authorities Act 68 of 1951; and Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen No 110 of 1957. See also chapter three for the functions of traditional leaders as provided for in the National House of Traditional Leaders Act 10 of 1997.

[127] Act 10 of 1997

Constitution, they may, presumably, be reduced or removed.[128] We have seen since this statement by Bennett, promulgation of legislation to guarantee the powers and functions of traditional leaders. These houses ought to play a meaningful role in being the custodians of traditions. The houses should also play a meaningful role in promoting democracy amongst their communities. I believe that traditional leaders should not limit themselves to the functions provided for in the National House of Traditional Leaders Act.[129]

6) Traditional leaders and their relationship with government

My view is that constitutional recognition implies that there must be a relationship between traditional leaders and the government. Channels of communication must be available between the two parties and other stakeholders. Without a relationship between traditional leaders and the government, the recognition will not really serve the purpose it is supposed to serve, namely, to promote democracy, human dignity and equality.

According to Suping, the relationship is now much better than it was. The traditional leaders' relationship with the present government started with the compromises made during the negotiations for a democratic South Africa. The traditional leaders were a bit

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[128] Bennett, T.W. (1999). *Human Rights and African Customary Law under the South African Constitution* p.211

[129] The Black Authorities Act 68 of 1951 gave traditional authorities extensive powers. These powers are now the responsibility of the national and provincial governments and may be assigned to municipalities under section 156 of the Constitution. The powers of traditional authorities overlap with those of elected local government. Mr. R Mnguni, Municipal Manager of the Empangeni Municipality confirmed this statement when he delivered his paper 'The Municipal Scene' at the ' Conference on Legal and Cultural Pluralism in South Africa' sponsored by the Nelson Mandela Chair in Humanities grant from the Netherlands at the University of the Western Cape held on the 16th and 17th July 2004.

sceptical but expectations were high. At that time, a decision was taken to work together with government in realising its goals for the people. The decision could only be to the advantage of traditional leaders. The decision was necessary to show government that traditional leaders are not only interested in their own positions but also in the well-being of their communities.

The 'diversity of the nation' implies that co-operation with government is an essential element of our democracy. Today, there is an established relationship with government. The president's office is at all times available for consultation on matters relating to customary law and traditional leadership. The president addresses the NHTL on mutual agreement between the presidency and the NHTL. The relationship does not only concern customary issues, but general issues affecting the people of South Africa. The well-being of the nation is a matter of interest for traditional leaders. The relationship with government does not mean that the NHTL will never criticise government. The opinion is that government should be accountable to the people and act in the interests of the people. If not, the NHTL will not sit back and allow the government to treat them unfairly. Suping is of the opinion that it is useless only criticising and not doing anything or not suggesting something in place of what is disagreed with. The general observation is that the relationship between government and traditional leaders has gone well until now, but time will tell whether it will remain so.[130]

[130] Although the parties had disagreements in the past, Suping did not elaborate on the issues nor give any examples of disagreements. My personal observation was that, my asking him to elaborate and mention some instances where the NHTL differed with government made me a relative outsider, and it would not make sense to discuss the differences with me.

Traditional authorities that traditionally observe a system of customary law in the areas of a municipality may participate through their leaders in those municipalities.[131] Although traditional leaders have representation, they cannot vote on any issue no matter whether the issue in question affects them. My concern is that the 'no vote' may have a negative influence on service delivery to such a traditional authority. This is a change in position from prior to 1994. As we know, most of the representatives on local government councils are elected politicians, whereas the traditional leaders were appointed through their own systems. Because of this, there are differences between those elected and those appointed. According to Suping, the general view is that traditional leaders look after the interests of their people only. Although there are differences, parties do their best to work together to create and promote a better life for the people. Relationships will depend on the government's political will to transform and recognise traditional leadership.

Coupled with the question on the relationship with government, I asked Suping what the NHTL's opinion was on the government's progress made since 1994. The general view is that government has done a good job in improving the well-being of the people in the past ten years. There are certain areas that need attention. Some of the municipalities are very poor, especially those of small towns in rural areas. Traditional authorities form part of these areas. The issue of adequate housing remains a concern because most of the people lack this basic need. Other social needs of the people such as adequate healthcare facilities in rural areas, schools, running water, proper roads to rural areas, and electricity need attention. Unemployment in rural areas is a matter of great concern. The NHTL

[131] See Chapter Three for discussion of the Municipal Structures Act 117 of 1998.

believes that job creation will at the same time address other issues particularly crime. Job creation will also help people create a better life for themselves.

7) Traditional leaders and their relationship with their people

It is at the grassroots level that the effectiveness of traditional leaders is really tested. Constitutional recognition implies that traditional leaders must be at the service of the people they represent. It is here at this level that one can discern whether the recognition given is really to the benefit of the people.

Manduleli Mzeyiya's[132] view is that the relationship between traditional leaders and their people depends on a number of issues. First, a sound and good relationship depends on the capability and capacity of the traditional leader to lead his people. The chief in Mzeyiya's village is a former school principal. The problem for the people in the village is that the chief lacks the necessary experience to lead his people. Because he is the eldest son, in terms of tradition, he took over from his father when his father died. Although he is well-educated, he does not have the necessary skills to lead as a traditional leader.

Second, a good relationship depends on the respect of the people for the chief. In rural areas, the elderly respect the chief for his office, regardless of the capabilities of the leader. The problem for the chiefs is the younger generation. The youngsters have a tendency to move away from traditions.[133] When it comes to issues such as circumcision,

[132] Manduleli Mzeyiya is resident in the Ntsito village in the Tsomo district of the Eastern Cape. Chief Mphumzi Mashiyi is the traditional leader of the area. I had the opportunity to interview Manduleli Mzeyiya on an informal basis on the 28th May 2004.

[133] Youngsters go to cities and then back to the villages. The problem is that these youngsters want to adopt western culture and introduce it to the elderly.

the people first go to the chief. If the chief says that the person cannot go for circumcision, they respect that decision.[134]

Third, a good relationship depends on one's personal relationship with the chief. If one is related to the chief, the general impression of the people is that the chief gives special treatment to his relatives. Thus as Mzeyiya makes clear, there is mistrust and jealousy amongst the people, of which outsiders are unaware.

There are no proper roads in the Ntsito Village. The only proper road is the one to the chief's residence. The village lacks facilities for the youth. The lack of facilities and roads is an illustration of the chief's inability to lead. A further problem is that traditional leaders cannot compete with elected representatives. Elected representatives know how to deliver because some of them are well trained to do their job. It is the opposite with traditional leaders. The impression is that the chief of the Ntsito Village wants to be an effective leader but lacks the 'know how'. Service delivery is the biggest challenge for the chief in his area.[135]

8) Traditional leadership and the judiciary

Conventionally, traditional leaders acted as judicial officers over matters dealing with customary law. The position changed in 1927 with the promulgation of the Black Administration Act. The Black Administration Act gave the minister the power to allow a

[134] According to Manduleli Mzeyiya, outsiders will not readily understand the respect people have for chiefs. He suggests that the best way to understand the relationship between chiefs and their subjects would be to live amongst them for some time.

[135] SABC Focus, 19:30 on the 6th June 2004. There is a lack of facilities in most of the remote areas of the Eastern Cape.

traditional leader to constitute a court of a chief or headman.[136] The act prescribed the powers of jurisdiction of such courts. In terms of section 20 of the act, the court heard civil claims arising out of Black law and custom brought before it by Blacks against Blacks. The act also allowed criminal prosecutions where the accused was a Black person.

Section 16(1) of Schedule 6 of the final Constitution provides for the continued operation of traditional courts. Bennett[137] argues that, as judges, traditional leaders are neither independent nor impartial, as is required by section 165(2) of the final Constitution. In 1998, in the case of Bangindawo & Others v Head of the Nyanda Regional Authority & Another 1998 (3) SA 262 (Tk); 1998 (3) BCLR 314 (Tk), the applicants used the same argument as Bennett. The applicants objected to the Transkeian Regional Courts, which are statutory tribunals, but constituted by traditional rulers. The court maintained that the idea of judicial independence denoted no reasonable apprehension of bias. The court used the reasonable person's test – 'the reasonable person would consider the judiciary independent if it were free from interference by either the executive or the litigants.' The court followed the Canadian decision in R v Valente (1986) 24 DLR (4^{th}) 161 at 169-70 and 172-3. The court continued 'no African would perceive bias on the part of traditional leaders merely because they exercise executive functions.' In this case, Regional Authority Courts landed in trouble because of no legal representation at that level, but Chiefs' Courts were defended.

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[136] Section 12(1) of Black Administration Act 38 of 1927

[137] Bennett, T.W. (2004) *Customary Law in South Africa* p.127

In Mhlekwa v Head of the Tembuland Regional Authority; Feni v Head of Western Tembuland Regional Authority 2001 (1) SA 574 (Tk); 2000 (9) BCLR 979 (Tk), the court disagreed with the ruling on regional authority courts. The court maintained that some of the functions involved controversial public issues and might therefore lead to the perception of an unduly close relationship with the executive. In paragraphs 616-7 and 1017-18 the court held that traditional leaders do not enjoy the security of tenure guaranteed other judicial officers by section 177 of the final Constitution.

The Mhekwa case did not overrule the Bangindawo case, which was concerned only with jurisdiction over civil matters. According to Bennett this result is correct because in civil cases, the question of compatibility with the Constitution must be weighed against considerations of access to justice. To annul the judicial powers of traditional rulers would be to deprive the rural population of local courts in which they usually litigate their disputes.

The Mhlekwa case confirmed the South African Law Reform Commission's opinion on Chiefs Courts and the judicial function of traditional leaders in its Discussion Paper[138], with regard to criminal jurisdiction of traditional courts. The Commission favoured the preservation of traditional courts. The Commission considered that perceptions of impartiality and independence were less important than the fact of freedom from executive interference. This is a problem that is especially acute in criminal cases, where

[138] 82 of 1999 Project 90: Harmonisation of the common law and indigenous law: Traditional Courts and the functions of traditional leaders.

presiding officers could scarcely be considered impartial when, at one and the same time, they are complainant, prosecutor and judge.[139]

9) The position of the traditional leader over land[140]

Traditionally, all land occupied by a tribe was vested in the chief and was administered by him as head of the tribe.[141] The chiefs regulated the distribution and use of land in their respective areas.[142] The land did not belong to the chief; he only administered the land on behalf of his people. The chief could only dispose of land to members of his own tribe.[143]

The chief allotted land to people after consultation with his council.[144] After the chief allotted land to a family head, the latter required access to natural resources on the commonage, for instance grazing land and game land.[145] The family head had no right to

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[139] Paragraph 42 of the Discussion Paper.

[140] See Chapter Three for the discussion on the Communal Land Rights Act 11 of 2004.

[141] Legislation had been passed to provide for the acquisition, use and disposal of land in certain areas set aside for the occupation by blacks in South Africa. E.g. Land Act 27 of 1913 and Development Trust and Land Act 18 of 1936, the latter of which was repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

[142] Mabutla, F.G. (2001) 'The Fate of Traditional Leaders in Post-Apartheid South Africa' A paper delivered at the Spring Meeting of the Southeastern Regional Seminar in African Studies, held at Northern Kentucky University on the 6th and 7th April 2001.

[143] Kgosi Suping. The Cape Commission on Native Laws and Customs of 1883 indicates that although land belongs to the traditional leader, such leader is, in relation to the community, a trustee holding it for the people who occupy and use it on socialist principles.

[144] Maithufi, I.P 'The Law of Property' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.51 at 57

[145] Schapera, (1938) *A Handbook of Tswana Law and Custom* p.207-213

sell or hire out the land; only the enjoyment and use vested in the family. The right to enjoy and use the land could be transferred in terms of customary law, viz by inheritance.

The chief had the authority to terminate the individual's right to land according to customary law.[146] If the chief terminated the right to land, in consultation with the council, the chief had the responsibility to give land to the family elsewhere if the land the family occupied was needed for general public purpose. Land could also be taken away if the landholder committed a serious offence. Land could only be taken away after the chief had consulted with his/her council and the chief followed the rules of natural justice.

In 1991, the government promulgated the Upgrading of Land Tenure Act 212 of 1991. The act brought a change in the land system. The main purpose was to provide for a procedure both to upgrade quitrent and to provide permission to occupy to full ownership. According to Maithufi,[147] any right relating to occupation of land according to customary law may be converted into ownership by registration in the deeds office.[148] Although this is contrary to Kgosi Suping's view, I am of the opinion that the act took the powers of traditional leaders away, in relation to the allotment and termination of land. Now people can become owners of the land they occupy.[149]

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[146] Maithufi, I.P. 'The Law of Property' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.51- 57

[147] Maithufi, I.P. 'The Law of Property' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.51 at 59

[148] Section 3(1) of Act 212 of 1991

[149] See Chapter Three for developments after 1994. E.g. Interim Protection of Informal Land Rights Act 31 of 1996

According to Van der Walt and Pienaar[150], the system of land allocation changed with regard to unmarried and divorced women.[151] Divorced and unmarried women are also entitled to land if they are heads of households.[152] The change in the traditional way of allocation terminated the discrimination in status and gender. The change brought along equal treatment between men and women, and also divorced and unmarried women. Van der Walt and Pienaar[153] comment as follows in their discussion on the effect of the Constitution on this:

'This might mean that certain aspects of customary law, such as the inequality and the relatively poor position of women might have to be amended, in view of the principle of equality which is guaranteed by the Constitution. At the moment, it is still uncertain how the courts will approach and interpret this apparent conflict between the application of customary law and the guarantee of equality.'[154]

10) Traditional leadership and the African Union (the AU)

In spite of wishes to the contrary, colonialism in Africa failed to completely destroy traditional institutions, even though it managed to discredit them in the eyes of some.

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[150]Van der Walt, A.J. & Pienaar, C.J. (1999) *Introduction to the Law of Property* p.395

[151] A deviation from the traditional way of land allocation.

[152] Van der Walt, A.J. & Pienaar, C.J. (1999) *Introduction to the Law of Property* p.395

[153] Van der Walt, A.J. & Pienaar, C.J. (1999) *Introduction to the Law of Property* p.395

[154] This is an illustration of the changes in tradition. Customary law is not static and changes in accordance with changing conditions. Also see the decisions in Mabena v Letsoalo 1998 (2) SA 1068 (T); Zondi v President of the Republic of South Africa 2000 (2) SA 49 (N)

According to Kgosi Suping, postcolonial governments of Africa have generally failed their people, particularly rural citizens, partly because of their inability to give recognition to indigenous systems of governance and the African way of life. They have preoccupied themselves with filling the shoes of their former colonial masters in government, in the industrial and commercial sectors of the economy, and even in their social and cultural lifestyles.

According to Kgosi Suping, the New Partnership for Africa's Development (NEPAD) and the African Union are the vehicles on which the success of the African Renaissance depends. Kgosi Suping argues that the founding documents of both NEPAD and the AU promote the same systems of governance that have failed and hardly make reference to the role traditional institutions can play in promoting its ideals. If NEPAD is meant to fight for the eradication of poverty and the upliftment of the socio-economic conditions of the masses, its protagonists must take it to the rural areas. The view of the NHTL is that traditional leaders and their structures must be taken on board. Their special status in African life must be used to enhance the legitimacy of development projects.

According to Kgosi Suping, people tend to be more willing to import their indigenous knowledge and lend their support when they are dealing with people who enjoy the support and respect of their traditional leaders. His view is that environmental degradation can be halted if traditional leaders are empowered to enforce the tried and tested ways of environmental protection. NEPAD and AU structures, such as the Pan African Parliament and various commissions, should provide for the participation of traditional leaders, which should not be along party political lines.

South Africa is a member state of the African Union. As mentioned above, the Constitutive Act of the African Union provides for the establishment of 'Specialised Technical Committees' of which one is for Education, Culture and Human Resources. It further provides for an 'Economic, Social and Cultural Council.'

When the AU was established, a continent-wide house of traditional leaders was overlooked. President Thabo Mbeki said that he planned to lobby the AU to set up a continent-wide house of traditional leaders.[155] The move signals a shift in the government's approach towards the institutions and traditional leadership and their role. The president of the Congress of Traditional Leaders of South Africa (Contralesa), Nkosi Patekile Holomisa, responded by saying that the cabinet has finally come to terms with the political reality of Africa. Although people appreciated democracy, they expected it to accommodate their traditional leadership – precisely what I've argued under the heading 'The future of customary law'.

My opinion is that the recognition given by the Constitution goes beyond the South African context. Traditional leadership is not a South African concept only. Most African countries practise customs and have traditional leaders.[156] The role of traditional leaders must not, and cannot, be limited to South Africa only.

Kgosi Suping is of the opinion that traditional leaders in South Africa should play a more meaningful role in Africa's development because traditional leaders have the capacity to guide, mobilise and inform their people of the government's proposals on sustainable

[155] Radebe, H. 'Mbeki wants chiefs represented in AU.' *Business Day* 9th October 2003, p. 3

[156] See Chapter Four for further discussion on customary law and traditional leadership in Southern Africa.

development and economic development. His opinion is that the continent's cultural custodians should play their part as understood and expected by their people.

11) Conclusion

The study has shown that it is the first time in South Africa's history that traditional leadership is constitutionally recognised. The study has shown that traditional leaders cannot be ignored. The institution of traditional leadership plays an important role in South Africa because of the country's diversity in traditions and customs. From a political perspective, it is difficult to say whether the constitutional negotiators took the right decision to recognise traditional leadership. From a legal perspective, the constitutional recognition given to the institution of traditional leadership was necessary in terms of the constitutional principles of the interim Constitution, as well as the entrenched rights to culture and diversity.

Traditional leadership in South Africa is important because traditional leaders can guide, inform, mobilise and educate their people on the government's commitment to promote the well-being of the people. Traditional leaders play a meaningful role in local government structures. What we should understand is that it is at local government level that people in traditional authorities need service delivery from government. This is the level of government where representation should be more than 20%. The geographical size of the traditional authority should be the determining factor in allocating representatives to local government structures. In some areas the 20% representation is acceptable.

The general view of the NHTL is that they would welcome representation, as the 'House', in provincial and national government structures. The opinion of the NHTL is that in most of the provinces, there are people living under the jurisdiction of traditional authorities. Kgosi Suping argues that it will be in the interest of the people to have representation at provincial government level.

At the moment some members of the NHTL are members of parliament.[157] The problem is that they represent political parties and not the NHTL. The view from the 'national house' is that they would welcome participation in parliament as the 'house' and not as members. A situation as the one on local government level would be acceptable.

Traditional leaders know that there will always be those groups who will oppose their recognition. A number of civil society organisations argue that traditional leaders rule without accountability.[158] Rugege quotes one of the commentators who said:

'Traditional leaders used to instruct their subjects to pay levies and could sell sites. They see their powers slipping through their fingers and they are putting up a tough fight to preserve their hereditary right to rule without first testing the will of the ruled.'[159] Traditional leaders are well aware that they face many challenges as long as there are

[157] BBC News: *Should traditional rulers be in government*. http://news.bbc.co/uk/1/hi/world/africa/3473501.stm Article accessed on 26 March 2004. In Ghana chiefs are not allowed to participate in politics.

[158] Rugege, S. The Institution of Traditional Leadership and Its Relation With Elected Local Government www.kas.org.za/publications/SeminarReports/Constitution Article accessed on 26 March 2004.

[159] Mamaila, K. Traditional leaders fear local councils are taking over. *The Star* 4th September 2000, p. 9

groups arguing that traditions and customs cannot be reconciled with democracy, not only in South Africa, but also in the rest of Africa.

Chapter Three: Legislative reform on customary law and traditional leadership since 1994.

1) Introduction

Since the first constitutional recognition of customary law and traditional leadership in South Africa, a number of laws have been passed, relevant to the two issues discussed in Chapter Two the recognition of traditional leaders and customary law. The chapter discusses acts and bills dealing with customary law and traditional leadership. The purpose of this chapter is to examine how the legislature responded to the development of customary law-related issues. In Chapter Two, the study deals with the discriminatory effect of customary law as well as traditional leadership and issues of discrimination. According to Kgosi Suping, traditional leaders knew from the beginning (when the negotiations started for the interim Constitution) that there were certain practices that needed to be reformed and brought in line with the Constitution.[160] The interim Constitution and the final Constitution did not mention explicitly what the role and functions of traditional leaders should be. Section 181 states that: 'A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution shall continue as such an authority, and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.' However, both Constitutions made provision for

[160] We should note that the inclusion of customary law and traditional leadership was in the first place based on the compromises made by the negotiating parties, especially compromises made with the feminist groupings.

legislation to be adopted to define the role and functions of traditional leaders. The powers of the Houses were laid down in the interim Constitution.

2) Council of Traditional Leaders Acts 31 of 1994 and 10 of 1997[161]

Both the 1993 and 1996 Constitutions provide for the establishment of Provincial Houses and a National House of Traditional Leaders. These institutions extend the role of traditional leaders beyond their traditional areas of jurisdiction. The purpose of the Council of Traditional Leaders Act is to 'provide for the composition of, the election of representatives to and the powers and functions of the Council of Traditional Leaders; for procedures according to which such powers and functions have to be exercised and performed; and to provide for matters incidental thereto.'

The act provides in section 7(1) for the objectives and functions of the Council -[162]

a. to promote the role of traditional leadership within a democratic constitutional dispensation;

b. to enhance unity and understanding among traditional communities; and

c. to enhance co-operation between the Council and the various Houses with a view to addressing matters of common interest.

[161] The Council of Traditional Leaders Act 10 of 1997 repealed Act 3 of the 1994. In 1998 the name changed to National House of Traditional Leaders Act 85 of 1998. See section 1(b) of the 1998 Act.

[162] Act 10 of 1997

(2) The Council-

a. may advise the national government and make recommendations relating to any of the following:

i. Matters relating to traditional leadership;

ii. the role of traditional leaders;

iii. customary law; and

iv. the customs of communities observing a system of customary law;

b. may investigate and make available information on traditional leadership, traditional authorities, customary law and customs;[163]

c. shall, at the request of the President, advise him or her in connection with any matter referred to in this section; and

d. shall present an annual report to Parliament.'

The problem for traditional leaders is that the act does not oblige parliament or the president to seek advice. If advice has been sought and given, the president or parliament is not obliged to take account of it. The problem for the NHTL is that they play an

[163] I regard subsections (a) and (b) as the principal functions of the NHTL.

advisory role only. According to Kgosi Suping, the same thing happened in parliamentary committees on matters concerning traditional leadership and customary law.

In relation to their respective advisory position, the Provincial Houses enjoy a greater power than the National House. Provincial legislatures refer bills to the Provincial House on matters concerning customary law or traditional leadership.[164] Within thirty days the Houses must comment on the bill. Although the Houses may raise objections, the provincial legislatures are not obliged to take account of comments or objectives. Section 4(1) of Act 7 of 1994 (KwaZulu-Natal) gives the House the power to comment on a bill or executive action that may have a bearing on customary law and traditional authorities, even if the bill is not referred to them. Section 6(1)(a) of Act 12 of 1994 (North West) allows the House to propose legislation to the provincial legislature.[165]

In terms of section 13 of Act 10 of 1997, traditional leaders are entitled to remuneration paid from the national treasury fund.[166] The remuneration of traditional leaders has provoked considerable controversy. The Remuneration of Traditional Leaders Act 29 of 1995 gave national government the responsibility for paying salaries and allowances to traditional leaders. This act created a problem for the Inkatha Freedom Party (the IFP). The IFP felt that they could lose their power over traditional rulers in KwaZulu-Natal. The constitutional court held in In re KwaZulu-Natal Amakhosi and Iziphakanyiswa

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[164] See section 6(2) of Act 12 of 1994 (North West), Section 8(2) of Act 6 of 1994 (Limpopo), Section 8(2) of Act 4 of 1994 (Mpumalanga). The NHTL can only make submissions to the national parliament on matters concerning customary law or traditional leadership.

[165] The latter shows the difference in power in the different Provincial Houses.

[166] Each of the provincial acts contains a similar provision.

Amendment Bill of 1995[167] that the payment of traditional leaders fell within the functions of provinces too. The situation was resolved by section 5(1) of the Remuneration of Public Office Bearers Act 20 of 1998. In terms of this act, the president may, in consultation with provincial premiers, determine the salaries and allowances of traditional leaders.

3) Interim Protection of Informal Land Rights Act 31 of 1996 (the Act)

The purpose of the act was to provide for the temporary protection of certain rights to, and interests in, land, which is not otherwise adequately protected by law; and to provide for matters, connected therewith.

In terms of the act, any right traditional leaders may have had to evict occupiers of land are thus restricted by the act.[168] The act further provides that where land is communally owned and the community decides to dispose of the land, provision must be made for appropriate compensation to any person who is deprived of an informal right to land by such disposal.

4) Local Government: Municipal Structure Act 117 of 1998 (the Act)

In terms of Section 81 of the act, traditional authorities may participate in municipal structures through their leaders. The act allows traditional leaders to attend and

[167] 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) at paragraph 22.

[168] This act strengthened my argument raised with Kgosi Suping, when I asked him whether traditional leaders can still terminate a person's right to a piece of land that a person occupies.

participate in meetings of the municipal council.[169] Regardless of the size of the municipality, traditional leaders can only be 20 percent[170] of the municipal council. For example, if a council consists of ten members, only one traditional leader can be a member of the council.[171]

The MEC for local government[172] in a province has the duty to identify the traditional leaders who may participate in the proceedings of the municipal council.[173] In terms of the act, traditional leaders who participated in the proceedings of a municipal council are subject to the Code of Conduct for municipal councillors in terms of item 15 of Schedule 1 to the Act.

The problem for traditional leaders is that they may attend and participate in council meetings, but they have no voting rights on matters to be decided by the council. Unfortunately traditional leaders cannot participate in the committee meetings of the council. In terms of section 1 of the Act,[174] read together with section 157 of the Constitution, only elected members can participate in committee meetings. Traditional leaders are not elected members of the municipal council. Deliberations on executive

[169] Section 81(1) of Act 117 of 1998

[170] The Municipal Structures Amendment Act 33 of 2000 changed the percentage from ten to twenty.

[171] The fact that other members must be elected and traditional leaders not, is an illustration of the discussion in Chapter Two under the heading 'The relationship of traditional leaders and government'

[172] The powers of local authorities are specified, in the first instance, by the Constitution (section 156); in the second, by the Local Government: Municipal Structures Act section 83(1) of Act 117 of 1998; and the Municipal Systems Act section 8(1) of Act 32 of 2000

[173] Section 81(2) of Act 117 of 1998

[174] Defines what is meant by a 'council'.

decisions are taken in committees. Section 81(3) allows a traditional leader to be heard on matters that directly affect the area of a traditional authority. However, although the act allows for a right to be heard, it does not mean that the council is bound by the view of the traditional leader.

In terms of section 239 of the Constitution, municipalities are organs of state. Although the Constitution does not state that traditional authorities are organs of state, they are deemed organs of state because they exercise a public power or perform a public function in terms of legislation.[175] Section 40(2) of the Constitution requires that municipalities and traditional authorities must observe and adhere to the principles of co-operative government.[176] Section 41 refers to:

'(1)(e) respect for the constitutional status, powers and functions of government;

(g) the exercise of their powers and performance of their functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere;

(h) co-operation with one another in mutual trust and good faith.'

My critique of the act is that the act allows traditional leaders to participate in municipal structures. As already discussed in Chapter Two, elected representatives and traditional leaders need to co-operate in order to be of service to the people they are supposed to service. My objection to the act is that traditional leaders may participate in meetings but

[175] See paragraph (b) of section 239 of the Constitution.

[176] See section 41 for the principles of co-operative governance.

they cannot vote on any matter. It does not matter whether the issue is dealing with the affairs of the traditional authority in question. My opinion is that the recognition given by the Constitution to traditional leaders does not mean anything in real terms if an act of parliament withholds voting rights from traditional leaders in structures where decisions affecting them are to be taken.

The structure of the act puts into question the effectiveness of traditional leaders in local government structures. The fact that traditional leaders can express themselves on issues affecting their areas does not contribute to their effectiveness because the elected representatives are not obliged to implement what they have suggested.[177]

5) Recognition of Customary Marriages Act 120 of 1998[178]

The Recognition of Customary Marriages Act is the first piece of legislation dealing with the issue in the new South Africa. In the introduction, I explained the purpose of the laws discussed in this paper. Certain laws and customs had to be changed and developed and brought into line with the Constitution to give effect to the spirit and purport of the Constitution. The act changed some of the requirements that were traditionally regarded as essential to conclude a customary marriage.[179]

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[177] The question remains, what purpose does section 212 of the Constitution serve? It is at local government level where traditional leaders are expected to be the most effective. My contention is that traditional leaders are not part of municipal structures to serve their own interests, but to serve the people they are supposed to represent.

[178] Hereinafter referred to as the Act for this discussion.

[179] My opinion is that the exclusion of certain traditional requirements does have an effect on how people will practise their traditions in future.

The act provides for the recognition of customary marriages[180] validly concluded before the act and those entered into after the commencement of the act. The act recognises polygamous customary marriages entered into before the commencement of the act and for those concluded after the commencement of the act provided that they comply with the requirements of the act.[181]

The significance of the act is that both spouses are equal partners to the marriage. The act addresses discriminatory issues. In the past, a wife in a customary marriage was under the marital power of the husband and was regarded as a perpetual minor.[182] Now, the wife has full status and capacity, which includes the capacity to acquire assets and to dispose of them, to conclude contracts, and to litigate in addition to any rights and powers she may possess in terms of customary law.[183] The inclusion of section 6 is in line with the equality clause in section 9 of the Constitution as discussed in Chapter Two under the heading 'Traditional leadership and issues of discrimination'.[184]

In terms of the act, certain requirements[185] should be met before a marriage can be recognised as a valid customary marriage. The act requires that both parties must be 18

[180] A customary marriage is defined as a marriage concluded in accordance with customary law. Section 1 of the act implies that only African people can conclude a customary marriage.

[181] Section 2

[182] See section 11(3) of the Black Administration Act 38 of 1927.

[183] Section 6 of Act 120 of 1998

[184] Although husband and wife are now regarded as equal partners to the marriages, I came to the conclusion that the wives are still treated as minors when Kgosi Suping explained the significance of a customary marriage to me.

[185] Section 3 of Act 120 of 1998

years[186] and above, consent[187] to the marriage and the marriage must be negotiated and concluded according to customary law. The act makes no reference to lobolo[188] as a requirement for a valid customary marriage.[189] My view, and that of Kgosi Suping, is that because section 3(1)(b) requires the marriage to be negotiated and concluded according to customary law, it implies that the lobolo negotiations are not excluded.[190]

According to Kgosi Suping, the exclusion of lobolo as a requirement can create problems in cases where the bride's family requests that lobolo discussions should be part of the negotiations and the groom's family does not want lobolo to be part of the negotiations. According to Kgosi Suping, the general view of the NHTL is that it will depend on the families whether they want to include lobolo negotiations in their negotiations.[191]

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[186] Section 3(3) of the Act is in contrast with subsection (1)(a)(i) which provides that both parties must be 18 years. In terms of the common law a person below the age of 21 years is a minor.

[187] The inclusion of this requirement is to make sure that nobody can be forced into a marriage.

[188] The lobolo system was originally established to kindle a relationship between families who did not know each other at all. The lobolo system was not to buy the woman. Kunene, P. (1995) 'Exploring traditional leadership', *Agenda*, Issue 26 p.36

[189] Dlamini, C.R.M. 'Family Law' in Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p.35 at 42. All marriages concluded before 15 November 2000 required a lobolo agreement.

[190] According to Kgosi Suping, during the discussions of the Customary Marriages Act, some people felt that lobolo should not be included as a requirement because it implies that the bride's family is selling her to her husband. Others felt that it signifies respect for the spouse's ancestors and claimed that it dignifies the wife. Discussion Paper 74 of 1997, Harmonisation of the Common Law and Indigenous Law: Customary Marriage 38. According to Kgosi Suping, lobolo negotiations form part of the traditional requirements before a marriage can be concluded.

[191] He knows of cases where families refused to allow a marriage to be concluded because of the unwillingness to pay lobolo.

6) Traditional Leadership and Governance Framework Act 41 of 2003[192]

The Provincial and Local Governance Portfolio Committee met on the 28th October 2003 to finalise the Traditional Leadership and Governance Framework Bill.[193] The committee voted on the bill. The IFP and Democratic Alliance (the DA) abstained from voting. According to the minutes, some of the traditional leaders, who took part in the committee's public hearings, raised objections to the bill in the National Council of Provinces (the NCOP). The problem for traditional leadership was that only a few traditional leaders raised objections, and they cannot be regarded as the representatives of all traditional leaders.[194]

The bill did not specify any particular role for traditional leaders in land administration. The committee noted that the Communal Rights Bill contained a clause that provides for traditional councils to serve as land administration committees.

The purpose of the Traditional Leadership and Governance Act is 'to provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims;

[192] Hereinafter referred to as the Act for this discussion.

[193] The Parliamentary Monitoring Group minutes www.pmg.org.za Accessed on 31 March 2004.

[194] Kgosi Suping is of the view that the new Act is a step in the right direction.

to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.'

The significance of the act is that it restores the dignity of the institution of traditional leadership by integrating this institution with governance.[195] The act makes provision for legislation which impacts on traditional communities, traditional culture, and customary law to be referred to the House of Traditional Leaders, either at a national level or provincial level, depending where such legislation is being processed. The act also aligns the traditional institutions to the Constitution. The act prohibits discrimination on the basis of gender and upholds and defends the rights of women by prescribing that at least a third of the members of traditional councils must be women.[196]

The act puts the institution of traditional leadership at the centre of driving development. Traditional councils are expected to facilitate the involvement of traditional communities in the development or amendment of the integrated development plan of a municipality in which area the community resides. According to the act, the other roles and functions of traditional leaders are to promote the ideals of co-operative governance, integrated development planning and sustainable development.

I contend that this act is more to the advancement of traditional leaders and customary law in general than much of the other legislation concerned with traditional leadership. The act clearly redefines the role of traditional councils and traditional leaders in a

[195] Briefing Notes - Traditional Leadership www.anc.org.za/elections/2004/briefings/tradition.html Article accessed on 20 April 2004.

[196] See preamble to the Act

democratic and changing society. The act corrects some of the issues touched on earlier in the study. The act ensures that traditional leaders play an important role in the development of communities through partnerships with elected institutions and people.

The act recognises kingship, senior traditional leadership, and headmanship as leadership positions.[197] In sections 9 and 10 the act makes provision for the appointment and removal of kings and queens. As stated above, the act makes provision for the appointment of women as traditional leaders.[198]

In terms of the act, any parliamentary bill pertaining to customary law or customs of traditional communities must, before it is passed by the House of Parliament where it was introduced, be referred by the Secretary to Parliament to the NHTL for comments.[199]

In terms of section 19, a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation. Section 20 provides for guiding principles for the allocation of roles and functions for traditional leaders. Although the act redefines the role of traditional leaders, my problem with the act is that it allows legislatures to exercise their discretion when it comes to legislation to provide a role for traditional leaders. Section 20(1) states that:

[197] Section 8 of the Act

[198] Section 11 of the Act

[199] Section 18 of the Act. Provincial legislation and municipal by-laws should adopt the same procedure as in section 18(1).

'The National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of . . .'[200]

My view is that the fact that legislation decides on a role for traditional leaders has a negative impact on the effectiveness of traditional leaders. I believe that the 'a' part of section 20(2) allows an organ of state to decide when legislation should be passed to allocate a role for traditional leaders.

Subsection 20(2)(b) provides for consultation with the relevant structures of traditional leadership. The act refers to consultation, and not to consensus having to be reached by the parties (the state and the traditional leadership). My interpretation of this subsection is that although the act requires the organ of the state to consult with traditional leadership, the state is not obliged to consider any objections or even implement the proposals put forward by the traditional leadership. This is evident from the minutes of the Provincial and Local Government Portfolio Committee of 28 October 2003.

Subsection 20(3) requires the state to monitor the implementation of functions of traditional leaders and ensure that the implementation of functions is consistent with the Constitution and that the function is being performed. Where traditional leaders were themselves responsible for the monitoring and implementation of functions, it is now left to the state to monitor the implementation of functions. I consider that the legislature took the powers of traditional leaders away by making organs of state responsible for the monitoring process. According to Kgosi Suping, the NHTL raised objections in this

[200] See section 20(1)(a) – (n)

regard. The NHTL wanted responsibility to be allocated to them because they are of the opinion that they are the best structure to see that traditional councils and traditional leaders implement and perform their functions in accordance with the Constitution.

In terms of subsection 20(4), any resources given to a traditional council to perform any function may be withdrawn due to non-performance of functions allocated to them. For example, if a local government structure gave a traditional council an office with equipment to assist the municipality with housing matters, the municipality expects the traditional council to perform this function efficiently. If it does not, the act allows the municipality to withdraw all resources.

It seems to me that the act brought the functions of traditional leaders in line with the Constitution. I believe that what the legislature should have done was to allocate powers to the NHTL in order to monitor traditional councils. The NHTL could have implemented procedures and policies to make sure that traditional councils perform their functions allocated to them.[201]

7) Amendment of Customary Law of Succession Bill 109 of 1998 and the Draft Bill of 2000[202]

The customary law of succession and inheritance has been a contentious issue since the new human rights dispensation in South Africa. In 1999, the South African Law

[201] My opinion is that the act does have some influence on the effectiveness of traditional leaders. It seems as if traditional leaders are now relying on the state to give functions to them. If that is the case, those who oppose traditional leadership, do have an argument as to why the Constitution recognised traditional leadership.

[202] Hereinafter referred to as the Bill

Commission published The Harmonisation of the Common Law and Indigenous Law: Report on Conflicts of Laws (Project 90), and in 2000, the Customary Law of Succession (Discussion Paper 93, Project 90).[203] The 2000 Discussion Paper contains another Draft Bill for the Amendment of Customary Law of Succession. The South African Law Commission made the following observations in the Discussion Paper: 'this structure accepts the facts of legal and cultural diversity in this country, which is a reality that the Constitution demands we respect. What is more, any law reform that remains true to a living system of customary law has a far better chance of winning general acceptance'.

Section 2(4) of the 2000 Draft Bill recognises the distinction between succession to property and succession to status and explicitly excludes succession to the office of a traditional leader from the scope of the proposed Draft Bill. The bill further makes provision for all the spouses in a polygamous marriage and acknowledges the indigenous concept of an extended family by proposing an amendment of the Maintenance of Surviving Spouses Act 27 of 1990 to include within the definition of 'survivor', 'any child or other person related to the deceased who was in fact dependent upon the deceased for support prior to the deceased's death'.

The problem for traditional leaders is that section 5(c), read with section 2(4), substitutes the traditional concept of succession, which comprises the succession to the position of head of the household who manages the property on behalf of the family, with the individualistic Western concept of inheritance. If parliament is going to pass the bill in its current form, it will remove an indigenous institution founded upon the principles of

[203] This paper followed the Customary Law of Succession Bill 109 of 1998 that was introduced and withdrawn in 1998.

patriarchy. The result will be that the bill will then comply with the Promotion of Equality Act 4 of 2000.[204]

What has happened since 1998? In Moseneke v The Master of the High Court[205] the Constitutional Court gave the heirs a choice as to how the estate should be administered. If they choose the route of section 23 of the Black Administration Act and Government Notice R200 of 1987,[206] the estate will be administered by the local magistrate. Otherwise, the estate is administered in terms of the Intestate Succession Act.[207] The Moseneke case is an illustration of how the courts changed the traditional way of estate administration. The effect of the decision on customary law is that the decision gives those who practise customary law, the choice to administer their estate in terms of customary law, or to make use of the Western law procedures.

The South African Law Commission stated in its most recent report[208] that it is categorically clear that the living law reflecting the practices of Black peoples in South Africa has changed to such an extent that it first, necessitates the repeal of the statutory provisions governing the choice of law rules, and second, necessitates the repeal of the

[204] Section 8(d) of the Promotion of Equality Act forbids customary religious or other practices, which impair the dignity of women and undermine equality between men and women.

[205] 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC)

[206] The role of the magistrate is to supervise the winding-up of the estate. The magistrate may delegate his powers to a representative,, a kind of executor, who will be responsible for paying all the debts and collecting the assets.

[207] 81 of 1987.

[208] Project 90, Customary of Succession (dated March 2004, but not yet published)

amendment of the rule of male primogeniture that seems to discriminate on grounds of gender, age or birth in order to give the deceased's family more secure rights.[209]

The recommendations, in the latest South African Law Commission's report, followed from the decisions of the Cape Provincial Division in Bhe v Magistrate, Khayelitsha (2004) 1 BCLR 27 (C) and the Transvaal Provincial Division in Shibi v Sithole, Case number 7292/01 (unreported). In these two cases, the courts held that the legislation making provision for the choice of law rules is unconstitutional, infringing upon the rights to equality, dignity and the best interests of children.[210]

I suggest that if the bill becomes law, the act will address the imbalances between the customary law of succession and the common law. When Professor DS Koyana[211] visited UWC on the 8th October 2003, we debated the implications the act might have on customary law. One of the implications is that it addresses issues of discrimination. Husband and wife will be equal partners in the marriage, although it is a customary marriage. According to Kgosi Suping, the question of 'equal status' can create a problem, because the act will not allow the husband to let his assets be disposed of after his death as he would like them to be disposed of.[212]

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[209] Knoetze, E. Succession and Inheritance Systems, A Paper delivered at the 'Conference on Legal and Cultural Pluralism in South Africa' sponsored by the Nelson Mandela Chair in Humanities' grant from the Netherlands, held at the University of the Western Cape on 16th and 17th July 2004.

[210] See footnote 188

[211] Professor of Law at the University of Transkei.

[212] Prof. Koyana agreed with me that the Recognition of Customary Marriages Act had already dealt with the issue of equal partnership in a customary marriage. Therefore I argue that the objections raised by traditional leaders cannot be regarded as legitimate because the legislature had already made husband and

8) Communal Land Rights Act 11 of 2004[213]

The ANC-led government has embarked on a programme of land restitution, land redistribution, and land reform to address one of the major legacies of colonialism and apartheid.[214] The government introduced the draft bill in 2002. The act seeks to give land-owning communities land tenure rights, which are protected by law. The act gives communal land ownership to communities who have received land from the state.

According to Kgosi Suping, before the act, the land tenure rights of communities and individuals living on communal land were not recognised and protected by the law. As a result it is difficult for communities to raise finances for development in their areas. The problem of overcrowding of communal land leads to poor utilisation of the land and greater levels of poverty. There are conflicting tenure rights and interests in communal land, which leads to land disputes. Previous laws had no streamlining mechanisms to resolve the disputes. One of the problems was that women did not have secure rights and were excluded from participating in determining how the communal land should be used.

The Constitution requires the state to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis,[215] to provide secure tenure of

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wife equal partners. My view is that the Recognition of Customary Marriages Act does have an effect on the Customary Law of Succession Bill in so far as it concerns equal status.

[213] Hereinafter referred to as the act.

[214] Previous governments passed laws such as the Black Land Act of 1913 and laws such as the Group Areas Act.

[215] Section 25(5) of the 1996 Constitution

land to communities, individual households, and individual families whose land tenure is insecure as a result of the racially discriminatory laws of the past.[216] The act provides for democratic participation in the administration of communal land and recognises alternative dispute resolution mechanisms for the resolution of conflicts and disputes concerning communal land rights. The most significant thing is that the act provides for protection of fundamental human rights through upholding the right to equality, especially gender equality for ownership, allocation, use and access to land, the democratic right of a community to choose the appropriate land tenure system, community rules and administrative structures governing their communal land, and the right to democratic participation.

In my opinion, the significance of the act is that it gives meaning to the Freedom Charter[217] that states that 'the land shall be shared amongst those who work it'. The act represents the efforts of the government to ensure that the tenure of rights of communities, and individual families on communal land are legally secured.

How are traditional leaders accommodated in this act? The act emphasises the democratic participation of all community members in the management of communal land and natural resources according to the rules agreed to by the community. Traditional leaders will not participate in the Land Administration Committees, which will be partly democratically elected by communities.[218] The act further stipulates, in section 26, that

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[216] See introductory statement to the act.

[217] 26 June 1955

[218] Section 22(2) of the Act

the minister may[219] appoint two members nominated by each Provincial House of Traditional Leaders to a Land Rights Board.[220] The problem for traditional leaders is that they will not have veto powers.[221]

Not everybody was comfortable with the land reform regarding communal land. Claassens,[222] who made a submission on behalf of the Programme for Land and Agrarian Studies (PLAAS) and the National Land Committee, commented on the bill before it became an act by saying that the bill has the sole support of the traditional leaders. She further commented that 'if all this is a ruse by the ANC to woo chiefs and secure the rural vote,[223] then it is a terrible miscalculation'.[224]

Cousins, Director of the Programme of Land and Agrarian Studies at the University of the Western Cape, commented by saying 'This Bill is so flawed that even radical amendments may not be sufficient to salvage it.'[225] Already in 2002 Cousins had been

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[219] My interpretation is that the act gives the minister the discretion to appoint traditional leaders or not. The act does not provide for mechanisms or procedures that traditional leaders can follow if the minister excludes them from the board.

[220] See Section 26 for the composition of the board.

[221] My question is what will the purpose be if traditional leaders have no veto powers? It cannot do justice to the constitutional recognition if such an important institution cannot have veto powers.

[222] Claassens, A. A Bouquet to woo the Traditional Leaders: Financial Mail 21 November 2003 p.4

[223] It should be noted that these comments were made just before the 2004 elections.

[224] In my opinion, it is purely speculation to say that the ANC wanted to secure the rural vote. I question the ability of traditional leaders to influence people on whom to vote for because voting is determined by each individual's own decision. According to Kgosi Suping, the only thing traditional leaders can do is to talk to their people, but people make their own choices.

[225] Cousins, B. Reforming communal land tenure in South Africa: Why the draft Communal Land Rights Bill is not the answer www.communitylawcentre.org.za/ser/esr2002/2002nov land.php Article accessed on 29 March 2004

very negative about the then bill.[226] According to him, the bill does not provide appropriate solutions. He argued that the bill adopts a wholly inappropriate approach to communal land tenure reform by placing undue emphasis on the issuing of land titles, either to groups or to individuals, after transfer of ownership from the state. Cousins argued that the implementation will not be effective because titling programmes in Africa have proved ineffective as they are costly, time-consuming, and make huge capacity demands on government.

Cousins identified some problems in the administrative steps to be followed. First, the then bill had set out a complex process involving some thirty administrative steps before land can be transferred from the state to a community or to individuals. Second, due to the staff shortage at the Department of Land Affairs, it will not be possible to process more than a hundred transfers per year. According to him, while this process is going on, the majority will continue to enjoy only the minimum recognition and protection of land rights afforded by the Interim Protection of Informal Land Rights Act 31 of 1996, which the bill seeks to make permanent.

Cousins wrote that the new legislation makes use of apartheid-era legislation and will deny rural people a say in how the land that they live on is administered.[227] He pointed out some similarities in the bill with apartheid laws. First, the old traditional authorities remain in place; and second, the law ring-fences and further isolates communal areas as

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[226] Cousins, B. Reforming communal land tenure in South Africa: Why the draft Communal Land Rights Bill is not the answer www.communitylawcentre.org.za/ser/esr2002/2002nov_land.php Article accessed on 29 March 2004.

[227] Cousins, B. (2003) 'Apartheid-like powers to chiefs: by invitation', *Farmer's Weekly*, 21 November 2003 p.8

islands of poverty. He described the bill as a draconian measure, without provision for community consultation and meaningful participation in decision making.

In his latest article[228], Cousins pointed out that the most controversial issue is the remaining of traditional authority and its role in communal tenure regimes. According to him, political deals may have informed the rapid progress of the Communal Land Rights Act through parliament, but the long-term prospects for chiefs and headman are not at all clear.

A number of NGO's raised objections to the bill.[229] They argued that the bill 'undermines the rights of rural women and is a draconian law that gives extraordinary powers and unlimited discretion to the Minister of Land Affairs. The NGO's further argue that the bill allows rural communities no choice about their land rights or land administration arrangements by giving control to un-elected chiefs'. Mr. Abbey Makoe, spokesperson for the Department of Land Affairs, reacted by saying that NGO's had sufficient time to make their concerns known before the bill was approved by cabinet. Makoe further stated what the bill seeks to achieve in terms of gender equality. It seeks to ensure that a specific percentage, about thirty percent, of those elected to the traditional councils, will be women. Makoe said that in South Africa there is enough room for municipalities and traditional leaderships. Makoe referred to the royal Bafokeng administration where the

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[228] Cousins, B. (2004) 'Communal Land Rights and Democracy in Post-Apartheid South Africa' A paper for a conference on 'The politics of socio-economic rights in South Africa: ten years after Apartheid", University of Oslo, June 2004

[229] Strong opposition to new communal land rights bill www.irinnews.org/print.asp?ReportID=37765 Article accessed on 29 March 2004.

administration operates smoothly alongside the local municipality of Rustenburg.[230]

9) Conclusion

The above discussion has shown that law reform does have an impact on customs and traditions. My view is that most of the legislation, promulgated since 1994, does have an effect on customary law and in particular, the role of traditional leaders in South Africa. The laws discussed illustrate that traditional leaders still have a role to play in South Africa. I base this argument on the fact that the ANC-led government already realised before 1994 that traditional leaders cannot be ignored. I agree with Kgosi Suping that both traditional leadership and the government can benefit from each other by working together on issues affecting traditional authorities.

The discussion also indicates that law reform was necessary to bring certain customs in line with the constitutional principles preceding the 1993 Constitution. The discussion also shows that certain people and organisations were not happy with certain laws promulgated and those still to be signed by the president. My opinion is that there will always be those who will raise objections to law reform pertaining to customary matters, whether they are from human rights organisations or from traditional leaders.

[230] See footnote 229

Chapter Four: A Comparative study of South Africa and some of the Southern African countries.

1) Introduction

This chapter deals with a comparative study of matters dealing with customary law and traditional leadership. The discussion in this chapter illustrates the differences in approach and application of customary law and the recognition of traditional leadership in Southern Africa. The importance of the chapter is to show how Southern African countries deal with customary law, whether it is through their constitutions or other forms of legislation. The discussion includes Swaziland, Lesotho, Namibia, and Zimbabwe.

2) Swaziland[231]

Due to continuing conflict with the Zulu nation, the Swazis moved northward in the early 1800s to what we know today as Swaziland.[232] The Swazi people had several leaders of whom the most important was King Mswati II. As history has taught us, the Swazis were not satisfied with the small piece of land they occupied at the time. Under the leadership of Mswati II, the Swazis expanded to the northwest in the 1840s and stabilised the southern frontier with the Zulus.

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[231] Today Swaziland has a population of one million people of whom the overwhelming majority are Swazis.

[232] History of Swaziland www.worldrover.com/history/swaziland_history.html Article accessed on 13 July 2004. This source serves as reference to all of the following under this discussion on the history of Swaziland.

The expansion to the north-west created more problems with the Zulus. The situation forced Mswati to ask the British authorities in South Africa to assist him against Zulu raids into Swaziland. The result of the assistance given by the British, was that the first whites settled in Swaziland. Following the death of Mswati, Swazi interests were administered by South Africa from 1894 until 1903, after which the British assumed control.[233]

The situation led to the establishment of the first legislative body in 1921. This body consisted of white elected representatives mandated to advise the British High Commissioner on non-Swazi affairs. In 1944, the British realised that the situation could not continue, and gave the king, as the native authority, legal powers to issue legally enforceable orders to the Swazis.[234]

In 1921, Sobhuza II became king of the Swazi nation after more than twenty years of ruling by Queen Regent Labotsibeni. The British intention was to incorporate Swaziland into South Africa. However, South Africa's racial discrimination after World War II made the British decided to prepare Swaziland for independence. The decision by Britain resulted in the formation of political parties. The traditional Swazi leaders, including King Sobhuza and his council, formed the Imbokodvo National Movement (INM). In 1964, the INM participated with four other parties in the national elections. The INM won all 24 seats in the legislative council. The INM incorporated many of the demands of

[233] Bennett. T.W. (1985) *Application of Customary Law in Southern Africa* p.55

[234]Evidently, the British decided to change the system due to resistance from the Swazi people. It became impossible to ignore the people any longer. So it was necessary to start recognising the traditional leaders of Swaziland.

the other parties, especially that of immediate independence. Discussions aiming at a new constitution started in 1966. The constitutional committee agreed on a constitutional monarchy for Swaziland, with self-government to follow parliamentary elections in 1967.[235] Swaziland became independent on 6 September 1968.[236]

Independence did not mean co-operation between the different parties in Swaziland. The conflict, after independence, between the different parties led to the repealing of the constitution and the dissolving of parliament by King Sobhuza on 12 April 1973. The king vested all powers of government in the monarch and banned all political parties and trade unions. The king justified his actions by saying that it was necessary because the unions and political parties practice systems that were incompatible with Swazi tradition.[237] In 1979 when the new parliament convened, the king showed his powers in the manner representatives were elected and appointed. The king appointed some of the members and the others were elected.

Queen Regent Dzeliwe became the head of state after the death of King Sobhuza in August 1982. The disputes amongst the Swazis continued, which led to the replacement of the prime minister by Queen Dzeliwe. Then the internal disputes led to the replacement of Queen Dzeliwe by Queen Regent Ntombi. The queen named her son Prince Makhosetive heir to the throne. Queen Ntombi demonstrated her powers by

[235] My opinion is that this happened after the British realised that tradition is deeply rooted in the people and it will not be easy to enforce a democratic system of government based on the Westminster system.

[236] With independence in 1968, the traditional institutions were preserved.

[237] The move by the king is an illustration of how the monarch protects the customs and traditions of the Swazi people. My view is that the monarch came under pressure from these institutions to reform or face a total disrespect of the monarchy. This would have led to democracy and the phasing out of the monarch.

dismissing the leading figures of the Liqoqo.[238] Prince Makhosetive returned from England to ascend the throne.

Prince Mkhosetive was enthroned as Mswati III in April 1986. Mswati abolished the Liqoqo and a new parliament was elected in November 1987. The King appointed Obed Dlamini, a former trade unionist as the prime minister in 1989. Internal disputes continued in Swaziland. The People's United Democratic Movement, an underground political party, criticised the king and his government and called for democratic reforms in Swaziland. This led to political reforms approved by the king and the preparations for national elections in 1993.

Today, King Mswati III is still the head of state with A.T. Dlamini the head of government. To keep control over the government, the king must approve legislation passed by parliament before it can become law. This is an indication that all power is still vested in the monarchy. The current situation makes the political reform started by Mswati and Obed Dlamini questionable.[239]

Mswati showed his powers with constant interference in the independence of the judiciary starting in late 2002.[240] The situation led to a situation where Swaziland functioned without a Court of Appeals. The government's refusal to abide by the court's

[238] During the regime of Queen Regent Ntombi the real power was concentrated in the Liqoqo, a traditional advisory body.

[239] Background note: Swaziland www.state.gove/r/pa/ei/bgn/2841.htm Article accessed on 13 July 2004

[240] Background note: Swaziland www.state.gov/r/pa/ei/bgn/2841.htm Article accessed on 13 July 2004

decisions in two important rulings, led to the court's resignation. The chief justice resigned from office and two other justices of the High Court were removed from office.

A draft constitution for Swaziland was released for comment in May 2003. This meant that Swaziland operated and still operates without a constitution. In terms of the draft constitution, the constitution will be the supreme law[241] of the country and the king will remain as head of state.[242] Chapter XV of the draft constitution recognises traditional leadership.

In an article released by Africa news[243] in January 2003, Phineas Magagula, President of the Swaziland National Association of Teachers, commented on the monarchy by saying that his organisation would like to see the king as a cultural symbol within a democratic political system like the crowned heads of Europe. Prince Mfanisibili Dlamini responded by saying that the word 'symbol' means nothing more than a powerless figurehead. The prince said that 80 percent of the Swazi people live as their ancestors lived, within chieftaincies headed by chiefs appointed by the king.[244]

What are the differences between South Africa and Swaziland? Government is vested in the monarchy in Swaziland. In South Africa, government is vested in a democratically elected government with the president as the head of state. In South Africa, the Constitution with the Bill of Rights is the supreme law of the country. Every law is

[241] Section 2 of the draft constitution.

[242] Section 5 of the draft constitution

[243] Hall, J: *Swaziland* www.globalpolicy.org/socecon/develop/ Article accessed on 13 July 2004.

[244] The King is the person who must look after Swazi culture.

subject to the Constitution and can be challenged to determine whether it is constitutionally acceptable. In Swaziland it is not possible to test the constitutionality of any law at the moment. The king does not only approve any laws, he is the person who will sign the law into power.

Tradition is deeply rooted in the people because the majority of the population are Swazis with a small percentage of Zulus. Swaziland's culture is intertwined with its political system. In addition, the monarchy's power is believed to be rooted in the ancestors. The Swazi traditional life is about collective beliefs shared by all, who agree to abide by the king's wisdom and do not dare question his authority. The effect of this is that the future of customary law is definitely guaranteed in Swaziland. Although I came to the conclusion in Chapter Two of my study that customary law will survive law reforms in South Africa, it will be a continuous struggle to retain constitutional recognition, as was indicated by the groups who opposed the initial recognition of the interim Constitution.

The same can be said with regard to traditional leadership. My view is that as long as government is vested in the monarchy, traditional leadership will remain part of government. The continued recognition of traditional leaders in Swaziland will depend on the effectiveness of traditional leaders themselves. The chiefs in Swaziland are responsible, through traditional powers vested in them by the king, for raising local resources and co-ordinating delivery and community maintenance of basic services. In South Africa that is the responsibility of local government. Traditional leaders participate through these legislative structures.

As an outsider, my view is that Swaziland should reform but I disagree with a total rejection of traditional beliefs. Traditional beliefs are too much part of the fabric of Swazi society to be wholly abolished.

3) Lesotho[245]

Lesotho[246] gained independence from the United Kingdom on 4th October 1966. The Lesotho Government is a parliamentary constitutional monarchy.[247] Constitutional government was restored in 1993 after 23 years of military rule. In 1998, violent protests and a military mutiny following a contentious election, prompting a brief but bloody South African intervention. Constitutional reforms have since restored political stability. Peaceful parliamentary elections were held in 2002.

The prime minister is the head of government and has executive authority. Unlike in Swaziland, the king[248] in Lesotho serves a largely ceremonial function. The king no longer possesses any executive authority and is prohibited from actively participating in political initiatives. Under traditional law, the college of chiefs has the power to determine who is next in line of succession, and who shall serve as regent in the event that the successor is not of a mature age.

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[245] History of Lesotho www.worldrover.com/history/lesotho_history.html Article accessed on 26 April 2004. This source serves as reference for the discussion on Lesotho unless indicated otherwise.

[246] Former Basutoland, now the Kingdom of Lesotho.

[247] The same as the United Kingdom with the queen as ceremonial head.

[248] King Letsie III – head of state since 7 February 1996.

The chiefs are well represented in legislative structures. The bicameral parliament consists of the senate, 33 members being principal chiefs and the other 11 appointed by the ruling party.

The constitution provides for an independent judicial system.[249] The judicial system is based on English Common Law and Roman-Dutch Law. The monarchy appoints the chief justice. The judicial system provides for traditional courts[250] that exist predominantly in rural areas.[251] The Basotho courts have no option but to apply customary law because 99.7% of the population are Basothos.[252]

What are the differences between South Africa and Lesotho? The kingdom of Lesotho recognises customary law as part of their system of law. The Lesotho customary law has been recorded and written down in several texts of which the earliest is probably the report of a Cape Commission on Laws and Customs of the Basutos of 1873. South Africa is a republic and Lesotho a parliamentary constitutional monarchy. The traditional way of life is deeply rooted in the population of Lesotho because of the high percentage of indigenous people practising their traditions and customs. Customary law in Lesotho enjoys a similar status as it does in Swaziland.

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[249] Bennett, T.W. (1985) *Application of Customary Law in Southern Africa* p52. Prior to independence, Lesotho shared a court of appeal with Swaziland and Bechuanaland, created by Section 1 of Order in Council 1369 of 1954.

[250] This provision indicates that Lesotho recognises customary law as part of their legal system.

[251] Bennett, T.W. (1985) *Application of Customary Law in Southern Africa* p.33. The first version of customary law was published in 1903 by the Basutoland National Council, which was a body of chiefs acting as an advisory organ of government without legislative powers.

[252] Bennett,T.W. (1985) *Application of Customary Law in Southern Africa* p.53

In South Africa, the president is the head of state and the head of government. The president in South Africa, as the head of state, has executive authority, but the king in Lesotho does not. The king in Lesotho in conjunction with the chiefs is the guardian of tradition in Lesotho. In South Africa it is the opposite. In South Africa the kings and chiefs, who are not heads of state, are the guardians of tradition. Because of the difference in government between South Africa and Lesotho, the future of customary law in Lesotho is a bit more secure. I suggest that because of the way of life in Lesotho, the chiefs play a more meaningful role in the upliftment of their people than they do in South Africa. Because of the history of South Africa, the relationship between the monarchy, government and people in Lesotho is at a more advanced stage than it is in South Africa. Although Lesotho has a parliamentary government, it can be said that the traditional leadership will survive any political changes as long as the country recognises the monarchy as the titular head of state.

4) Namibia[253]

Namibia gained independence from South Africa on 21 March 1990 after seventy years of South Africa administrating South West Africa under the terms of Article 22 of the Covenant of the League of Nations and a mandate agreement by the League Council on 17 December 1920.[254] Namibians are of diverse ethnic origins, with the Ovambo, Kavango, Herero, mixed races, whites and Tswanas as the principal groups. About 87%

[253] Background note: Namibia www.state.gov/r/pa/ei/bgn/5472.htm Article accessed on 15 July 2004. This source serves as reference to the discussion on Namibia unless indicated otherwise.

[254] The League agreement gave South Africa full power of administration and legislation over the territory.

of the population is black, while 6% are white and 7% of mixed race. 50% of the population belong to the Ovambo ethnic group.

Namibia is a republic with the president as head of the state and government. The constitution with a bill of rights is the supreme law of the country. The Namibian Constitution recognises the right to culture. Article 19 states that:

'Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.'[255] The recognition given to culture implies the recognition of customary law because it is pointless to recognise culture without a legal system that must take note of customary law and apply it where necessary. The problem for the Namibian population is that the Constitution does not mention traditional courts.

The Namibian Constitution has a similar provision as the South African Constitution, regarding traditional leadership. In Chapter 12 section 5, the Namibian Constitution states that:

'There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilisation of communal land and all on such other matters as may referred to it by the President for advice.'

[255] My view is that it was necessary to recognise the right to culture in Namibia because of the diversity of the population of whom 87% are black people with distinct and different cultures.

The role of traditional leaders diminished substantially after independence. As with the case of many other African countries, the colonialists used traditional leaders to their own advantage. The colonialists used traditional leaders to implement their policies and enforce colonial laws. As a result of their collaboration with the colonialists, traditional leaders did not gain favour with the liberation movements such as the South West African People's Organisation (SWAPO).[256]

As already stated above, because of the absence of the referral to traditional courts, traditional leaders were stripped of most of their powers. For example, traditional leaders lost their jurisdiction over criminal matters. They could try only civil cases based on customary law. Traditional leaders also lost their powers of detention and the tribal police were disbanded.[257]

The Namibian Traditional Authorities Act 25 of 2000 does not improve the role of traditional leaders. The act restricts them to cultural or traditional matters and in assisting government in maintaining peace and order.[258] Unlike South Africa, the act does not give them any role in development and service delivery.

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[256] SWAPO assumed power at independence in 1990 with Sam Nujoma as President and Head of State.

[257] History of Namibia: www.worldrover.com/history/namibia_history.html Article accessed on 25 March 2004. Also see Keulder, C. *Traditional leaders and local government in Africa: Lessons for South Africa,* HSRC Publishers 1998.

[258] Section 3 of the act requires traditional authorities and their members to promote peace and welfare in the community and to supervise and ensure the observance of the customary law of the community by its members.

In terms of section 3(2) traditional leaders are required to assist the police and other law enforcement agencies in the prevention and investigation of crime and the apprehension of offenders. Traditional leaders in Namibia are allowed only to assist government in the implementation of policies and governmental programmes. Traditional leaders are not allowed to be in charge of these policies and programmes. As in South Africa, there is tension between traditional leaders and the elected councillors. The elected members, for instance do not approve of the charging for the use of communal land by traditional leaders.[259]

Part of the cause for the tension is that power has been taken from traditional leaders and vested in the elected leaders of government. According to Keulder, co-operation between traditional leaders and elected representatives in matters of development only exists in certain areas.[260]

Unlike in South Africa, traditional leaders in Namibia have no right to hold elected political positions while holding the position of chief or head of a traditional community.[261] However, there is nothing prohibiting traditional leaders from being elected to local authority councils and participating in decisions on development and other issues.

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[259] Keulder, C. (1998) Traditional leaders and local government in Africa: Lessons for South Africa p.61-62

[260] Keulder at p.62

[261] Section 156 of Act 25 of 2000. Once elected into a political office, leave of absence must be taken from the Office of the Chief or head of traditional community.

5) Zimbabwe[262]

Zimbabwe gained independence from Britain on 18 April 1980.[263] The Mashonas constitute about 75% of the Zimbabwean population. According to Zimbabwe's constitution, Zimbabwe is a republic with the president as the head of state and head of government. The judiciary is headed by the Chief Justice of the Supreme Court, who is appointed by the president on the advice of the Judicial Services Commission.

The Zimbabwean Constitution provides for the recognition and appointment of traditional leaders by the president giving due consideration to the customary principles of succession of the tribal peoples over whom the chief will preside.[264] The Council of Chiefs, elected by the chiefs in communal land areas, has only advisory powers, which is similar to the NHTL in South Africa. As in most of the African countries, independence brought along the marginalisation of traditional leaders on grounds of their alleged, or actual, collaboration with the colonialists. As in Namibia, 'chiefs' were regarded as the tools of the Rhodesian government and used by it to identify and hand over suspected freedom fighters.[265] During the struggle for liberation, guerrillas set up village

[262] Background note: Zimbabwe www.state.gov/r/pa/ei/bgn/5479.htm Article accessed on 19 July 2004. This source serves as reference to the discussion on Zimbabwe unless indicated otherwise.

[263] The country adopted a constitution on 21 December 1979 with a bill of rights.

[264] Section 11 of the Constitution.

[265] Rugege, S. The Institution of Traditional Leadership and its Relation with elected Local Government www.kas.org.za/publications/SeminarReports/Constitution% Article accessed on the 19 July 2004.

committees as local government structures that took over functions previously performed by chiefs.[266]

The Zimbabwean parliament passed the Traditional Leaders Act of 2000 that brought changes in the role of traditional leaders. In terms of section 5 of the Act, the first role is the performance of functions pertaining to the office of a chief as the traditional head of the community under his jurisdiction.[267] Second, traditional leaders must perform functions conferred on them in terms of the Customary Law and Local Courts Act. In terms of section 5, it is also the responsibility of the chiefs to oversee the collection of taxes, levies, rates and other charges payable under the Rural District Councils Act.

In terms of section 102 of the Zimbabwean Constitution, the Council of Chiefs advice the president on the control and utilisation of communal land. The Traditional Leaders Act is actually to the advantage of traditional leaders. The functions stated are an improvement on the functions allocated to traditional leaders by the constitution and other legislation up to the enactment of this act. In terms of section 37 of the act, the Council of Traditional Leaders makes representations to the Minister of Local Government and Housing concerning the needs and wishes of the inhabitants of communal and resettlement land. Furthermore, the Council of Traditional Leaders considers any representation made to it by the Provincial Assembly and, in its discretion, reports to the minister. Third, it considers and reports on any matter referred to it by the minister, and

[266] Keulder, C 181. At independence, elected village committees officially took over local government functions.

[267] Rugege, S. Functions dealing with customary law and culture.

fourth, it superintends the activities of ward assemblies and village assemblies and gives them such direction as it considers necessary.[268]

In terms of section 35 of the Traditional Leaders Act, the chiefs in each provincial assembly have a say in the implementation of local government policy and programmes. The main function of the assembly is to consider and report on matters referred to it by the minister, Council of Chiefs or a member of the provincial assembly and to bring to the notice of council or the minister, any matter which affects the inhabitants of the province concerned, or any part of the province.[269]

The difference between the South African traditional leaders and those of Zimbabwe, with reference to the Zimbabwean Traditional Leaders Act, is that it seems that the traditional leaders of Zimbabwe fulfil the role of civil servants[270] and not their traditional role as traditional leaders. The problem for traditional leaders of both countries is that they do not really have decision-making powers. Traditional leaders in both countries fulfil a mere advisory role on the structures of government in which they participate.

6) Conclusion

This study has shown that South Africa is not unique in Africa with respect to the position of its traditional leaders. In the first two countries discussed in this chapter, traditional leadership and customary law are deeply rooted because of these two nations'

[268] Rugege, as referred to above.

[269] Rugege, as referred to above.

[270] As seen above, traditional leaders must collect taxes and levies.

belief in their system where power is vested in the king and not in a democratically elected government. Although these two countries have governments, the king is the central figure in the government system. The king has the power to dissolve parliament. Because the king is the head of state and the head of government, it puts the traditional leaders of these two countries in a more advantageous position than those in South Africa. Traditional leaders do not fulfil an advisory function as they do in South Africa. They play a more active and meaningful role in governance. In these two countries people expect the monarchy to deliver the services a democratically elected government would have delivered.

In Namibia and Zimbabwe, we see a different approach to traditional leadership and customary law. Both these countries are now democratic states with a constitution as the supreme law of the country and a president as head of state and government. In Namibia and Zimbabwe, the role of traditional leaders has diminished to such an extent that it has become difficult for traditional leaders to fulfil their function as custodians of tradition. The study has shown that before independence in these two countries, the colonialists used traditional leaders to their advantage to implement colonial policies and procedures. Because of their obedience to colonial rulers, traditional leaders became unpopular amongst their own people. People saw traditional leaders as sell-outs. The result of their actions was that during independence, the democratically elected governments diminished the roles of traditional leaders to those of civil servants. This immediately throws into question the effectiveness of traditional leaders in these two countries. The question people ask now is: Who is now responsible for custodianship of tradition? The

Zimbabwean Traditional Leaders Act totally changed the role of traditional leaders as discussed above.

The situation in South Africa does not differ much from that in Zimbabwe or Namibia. Although the role of traditional leaders in South Africa is to a limited extent diminished, it is not at the same level as its counterparts, Namibia and Zimbabwe. What we should understand is that in South Africa many of our traditional leaders are members of political parties and the result of that is that traditional leaders use their political party to address issues of custom or tradition. The main difference is, that in South Africa, traditional leaders have a commitment from the national government that the institution of traditional leadership will remain part of our country and that there is no intention to do away with the institution or the 'African way of life'.

Chapter Five: Conclusion and Recommendations.

1) Conclusion

The 1993 and the 1996 Constitutions recognised the customs of the different indigenous peoples of South Africa. This study has shown that the effect of constitutional recognition is that customary law is part of our legal system. Traditional leaders have since time immemorial been custodians of customary law. The abrogation of customary law would mean the removal of the main pillar on which the institution of traditional leadership rests. This is evident from the cases and comments discussed. Because of the country's diversity and the role custom plays in 'African life', it can be argued that customary law will indeed survive calls for the abolition of it.

What the custodians of customs should realise is that there will always be those, especially feminist groups, that will call for the partial abolition of customary law. This study has shown that it is necessary for law reform to bring the practices of customs and traditions in line with democracy. It is not necessary to abolish some of the customs and traditions in their totality.

The National House of Traditional Leaders and the Provincial Houses of Traditional Leaders are constitutional institutions. They came into existence in terms of the 1993 Constitution and were perpetuated in terms of the 1996 Constitution. The study has shown that it is expected of these Constitutional institutions to function properly and effectively. That is, however, not the case with the National House and the various Provincial Houses of Traditional Leaders. This is mainly due to a lack of infrastructure

and the fact that budgets are inadequate for the proper performance of functions. These functions include their role in matters that concern their communities. Approximately 16 million people in South Africa live as members of traditional communities. It is important for these communities that there should be an effective way for them to express their views and to uphold their traditions and customs and also to ensure that they are not left behind in the development of the country.

Research has demonstrated unequivocally that people in the rural areas of South Africa are the poorest of the poor and the most vulnerable of our society. This is a result of, not only the former apartheid policy, but also of a lack of interest by former governments to invest in rural areas. Attention and investment has focused mainly on the development of modern authorities. Although traditional leaders were part of and still are part of rural areas, rural people had little or no voice. This study has demonstrated that it should be ensured that their comments on legislation are taken seriously. The 1996 Constitution gives traditional leaders this voice, but for the intended institutions to function properly, they need to be effective.

From the discussion on legislation it has become clear that law reform was necessary in order to give effect to the constitutional recognition given to traditional leadership. The most important piece of legislation is the Traditional Leaders and Governance Framework Act of 2003. This does not mean that the rest of the laws discussed in Chapter Three are not important. Each piece of legislation has its own purpose to serve. This Traditional Leaders and Governance Framework Act defines the role traditional leaders should play. The importance of the 2003 Act is that it brought certainty to what

the role of traditional leaders should be. Without the necessary law changes, traditional leadership could be regarded as an unnecessary institution.

This study has also revealed that traditional leaders should play a more meaningful role on all levels of government, especially on national government level. Although there are differences in opinion and approach, it is still possible that traditional leaders can work together with the elected representatives on local government level. It is actually on this level of government that rural communities would like to see the traditional leaders playing a more meaningful role when it comes to service delivery. Service delivery in rural areas will determine whether the people will start rejecting their traditional leaders. It is therefore important that traditional leaders should take note of their expanded roles. Their role nowadays is no longer only the guarding of custom Traditional leaders must offer their people more than this. The study has shown that it is at local government level that people will measure the effectiveness of traditional leaders.

2) Recommendations

The study has identified some areas where changes are necessary to give effect to the constitutional recognition.

The following are recommended:

1. Customary law should remain part of our legal system and so be constitutionally recognised. It is therefore recommended that Chapter XII should be revised to delete all traces of subjecting customary law and traditional leadership to the Constitution. It cannot be expected from a chief to know which of his customs is unconstitutional or not.

2. The courts, especially the Constitutional Court, should play a more meaningful role in guiding the legislature and the NHTL on the development of customary law.

3. Conflict between different systems of customary law: customary law should apply to litigants by reason of their cultural orientation, regardless of where they happen to be because of the element of personality in customary law.

4. Law reform on customary law should keep in mind the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Based on the above recommendations, the study recommends the following to give effect to Chapter XII.

1. All national and provincial draft bills dealing directly or indirectly with traditional and related issues should be referred to the NHTL. In the event of the proposals of the NHTL not being accepted by the Parliamentary Committee, provision should be made for consultation and mediation between the parties. Traditional leaders cannot effectively participate in law reform processes if they have to participate through public hearings and debates. It is therefore necessary that the submissions made by the NHTL and the provincial houses be considered.

2. Funds plus time should be made available to debate the impact of the proposed legislation on the communities. Traditional leaders will need the assistance of specialist advisors to advise them on the proposed legislation.

3. A special forum is necessary where traditional leaders, especially the NHTL, could have discussions on a regular basis with the president or minister(s) on matters of common concern to traditional communities. The importance of such a forum is that it can discuss solutions for the rural areas in South Africa on a policy level, making full use of the experience, wisdom and knowledge of the leaders.

4. For the benefit of the large number of people in rural areas, the chairperson of the NHTL should be allowed to address parliament at least once a year on issues that concern traditional communities. It is recommended that time should be allowed for questions.

5. Traditional leaders should be trained in service delivery on local government level. Institutions such as the School of Government at the University of the Western Cape could play a meaningful role in the training of traditional leaders so that they can be of assistance in their local municipalities. Because of their extended role, it is necessary that traditional leaders should be trained to make use of modern communication media (recommended by Kgosi Suping).

6. Representation on local government structures should be increased where the rural community constitutes more than 80% of the people within the boundaries of that specific municipality. It is therefore recommended that the Municipal Structures Act should be amended to increase the current 20% of representation to at least 40%. The current 20% representation seems to be to the disadvantage of rural communities. Traditional leaders are in the best position to know the needs of their people.

7. Houses of Traditional Leaders should be regarded as extensions of the National Council of Provinces or should at least have the same status.

8. A forum of chairpersons of the various Provincial Houses and the NHTL could be established. The idea is that the forum discusses matters of common concern on both a national and a provincial level. It is therefore recommended that the chairperson of the NHTL report to the National Council of Provinces on an annual basis.

9. The relationship between the NHTL and the Provincial Houses should be spelled out. Provincial Houses should be obliged to report to the NHTL on an annual basis. Members of the Provincial Houses who also have seats in the NHTL should be obliged to report to their Provincial Houses after each meeting of the NHTL. The full report of the meeting should also be made available to the other Provincial Houses.

10. In order that development planning could be closer to the acknowledged needs and aspirations of the people, it is expected to be a 'bottom-up' instead of 'top-down' exercise, and have the support of the local population. For ensuring this, traditional leaders can mobilise local opinion in favour of, and participation in, development plans, programmes and projects for development.

11. Combined with modern knowledge, traditional leadership can help to ensure a conservation and environmental equilibrium.

12. African society, even in rural areas, is undergoing major transformation, both positive and negative, on account of varied social and cultural influences. This is illustrated by the universal acceptance of the money economy, the growing role of the mass media and the

changing role of women and young people. Traditional leaders, working with local authorities, can serve to enhance the positive aspects of change and minimise its detrimental effects.

13. Advice can be provided to local authorities in urban areas in giving support to particular ethnic and tribal communities originating from their areas. This could aim at restoring traditional values so as to help counteract such social evils as children being forced to become street children and the exploitation of child labour.

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