

## TOWARDS CONCLUSIONS

# Traditional leadership

## *South Africa's paradox?*

DINEO SKOSANA

Now that traditional leadership has made its unexpected comeback in post-apartheid South Africa, how do we explain the ways in which the institution has kept itself relevant? This book has addressed the different operative modalities of traditional leaders in the current democratic system. The survival tactics that have been employed by traditional leaders range from distortions of the history and identity of the formerly colonised to claims to custodianship of 'African culture', resistance to colonialism and the emancipation of African people and finally to their strategic positioning at the centre of a booming mining economy in the former bantustans. The ANC-led government has also provided conditions hospitable to the survival of traditional leaders through a series of laws (the Traditional Leadership Framework Act of 2003, the Restitution of Land Rights Amendment Act No. 48 of 2003, the Communal Land Rights Act of 2004, the Traditional Courts Bill of 2012, the Restitution of Land Rights Amendment Bill No. 48 of 2014), as well as the Commission on Traditional Leadership Disputes and Claims – colloquially known as the Nhlapo Commission.<sup>1</sup> The strategies and the conditions that make it possible to use such mechanisms point to the past, present

and future paradoxes of the post-apartheid state in South Africa.

This book highlights the conflicting binaries of what Richard Sklar (1994) calls ‘mixed governments’. In postcolonial Africa, mixed government, ‘... conserves traditional authority as a political resource without diminishing the authority of the sovereign state’ (Sklar, 1994: 2). The chapters illustrated the paradoxes as far as the country’s constitutional democracy is concerned: how the contradictions unfold from a legal point of view, as well as how these affect heterogeneous African communities at local levels. Insofar as these paradoxes continue to manifest, the continued salience of traditional leaders appears likely. To draw on a few overarching themes in the book, which reveal the contradictions in South Africa’s political system, let us turn to the tensions of a ‘modern’ constitution that provides for a society whose majority either subscribe to or reject the historically and contemporarily defined traditional identities and the politics thereof.

## The ‘traditional’ in the Constitution

In a country whose traditional identities became synonymous with colonial and apartheid modes of oppression (Kepe & Ntsebeza, 2011; Mamdani, 2013; Gibbs, 2014), it was not expected that traditional leaders would be recognised by Chapter 12 of the Constitution of the Republic of South Africa, 1996. Evidently, in accordance with the spirit of reconciliation during the country’s transition, there was no deliberation about what the acknowledgement of traditional leaders in the Constitution would involve. The failure of the government to reflect on this is articulated in Phathekile Holomisa’s chapter about the relevance of traditional leadership in democratic South Africa. Very little, if any, consideration was applied to a question like, ‘Should all traditional leaders – including those who were historically handpicked, the collaborators whose genealogy was altered by colonial and apartheid administrations and those who resisted oppression in one way or another – be recognised?’ Peter Delius captures this in his chapter in this book, in which he observes that South Africa missed a moment to deliberate on these set of questions. He notes that, ‘the

dramatic transition in the years after 1990 provided an opportunity to fundamentally rethink the nature of chieftainship and its potential role in a constitutional democracy. This was an opportunity that was far from fully exploited' (see page 45).

The incorporation of traditional leaders into the Constitution was not the genesis of the contradictory nature of the state in South Africa; rather it was the formal perpetuation of the paradoxes in the country's supreme law in the new political dispensation. The only limitation, as far as the recognition of traditional leaders is concerned, is reflected in the condition that they be subject to the country's customary law and that both be subservient to the Constitution of the Republic of South Africa, 1996 (Chapter 12: Section 211). The underlying assumption is that being subject to customary law and abiding to the Constitution cleanses traditional leadership of its chequered past and makes it function in harmony with a democracy, when in fact there are further contradictions that arise from this set-up.

Moreover, while bestowing recognition, insufficient consideration has been given to determining which aspects of 'tradition' are to be 'recognised' in the institution of traditional leadership – especially considering all that has been deemed 'traditional': for example, the law of primogeniture, succession laws, patriarchy and fixed ethnic identities were mechanised by colonial and later, apartheid administrations to oppress the black majority in the 'homelands'. The recognition of traditional leaders in the Constitution not only acknowledged some traditional leaders who were accomplices in the oppression of the rural population, but also embraced their construction of the institution, which was based on values that historically subjugated the black majority and are, therefore, contradictory to democracy. In accord with this line of reasoning, Delius once more draws our attention to the worry that, 'a co-opted institution, reconstituted to serve as an instrument of colonial control, and formed by fantasies about primitive and tribal Africa, has served as the primary template for chieftainship in postcolonial South Africa' (see page 45).

In this regard, Sindiso Mnisi Weeks, in chapter 7, illustrates how the laws passed by the democratic government, such as Traditional Leadership and Governance Framework Act No. 41 of 2003

(TLGFA), Communal Land Rights Act No. 11 of 2004 (before it was struck down) and Traditional Courts Bill B15-2008/B1-2012 (and, now, the TCB B1-2017), undermine the power that women were able to acquire through the Constitution's equality clause. Fani Ncapayi, in chapter 9, shows the continuous contestation over the imposed, unelected headman in the Eastern Cape's Cala Reserve. Both chapters flag the tensions between the Constitution and legislative frameworks<sup>2</sup> whose foundations interpret customs in rigid ways, often drawing on notions of customary law that were applied during colonial and apartheid South Africa (Claassens & Cousins, 2008). Ncapayi's chapter illustrates the contradictions in the Constitution, its impact on communities and the resistance thereto, all of which produce a socio-political condition in which communities are 'neither citizens nor subjects' (Ntsebeza, 2005: 295). This is a condition, in other words, in which rural South Africans living under traditional leaders are legally subjected to authoritarian rule and so denied the realisation of the rights enjoyed by urban South Africans (see Claassens, chapter 4, for example).

One of the high-profile people to be caught in the inherent contradictions between the South African Constitution and customary law, is the jailed abaThembu King, Buyelekhaya Dalindyebo. He has been sentenced to 12 years in prison for crimes committed against his 'subjects', including kidnapping, arson and defeating the ends of justice, while applying his notion of customary law in his traditional court (Evans, 2013).

Reflecting on the case, Makhubu (2016) writes that the conviction and sentencing of Dalindyebo 'sparked a debate on social media among some Swazis, particularly lawyers, who were astounded that a king could be jailed. One asked on Facebook: "... how do you reconcile kingship (and the traditional law associated with that institution) with the concept of a republic? Last time I checked, kings operate within kingdoms and a legislative framework that entrenches certain fundamentals inherent in the institution.' The Facebook user in question is correct to point out that in South Africa's pluralistic form of law, traditional leaders operate within a framework of customary law that is recognised in Chapter 8 of the Constitution of

the Republic of South Africa, 1996. However, there is not a ‘textual connection in the definition of customary law to the communities recognised in section 31(1)’ (Nwauche, 2015: 575). The application of African customary law is subject to the Constitution, as well as to any legislation that specifically deals with it (Nwauche, 2015: 575). Claassens, in chapter 4, argues that these legislations, including the Mineral and Petroleum Resources Development Act No. 28 of 2002, fundamentally betray the promise of a unitary, democratic South Africa. The logic of Claassens’s argument is that the paradoxes in the legislation pertaining to the Constitution and post-apartheid traditional leadership foster a dual dispossession in which the black majority who were marginalised during colonial and apartheid South Africa continue to be treated unjustly in the new political era. The workings of these conflicting binaries (between ‘constitutionality’ and ‘custom’), sometimes obvious and sometimes inconspicuous, are carefully explored in different parts of this book to show how historical and emerging contradictions in the country’s hybrid government system hinder communities’ potential to fully enjoy the benefits of being democratic citizens.

### The modern and traditional: Sometimes in collaboration but mostly in contestation

The relationship between the traditional and the modern is often discussed as divergent in the linear theory of social change (Gusfield, 1967), when in fact the institutions and processes attributed to both continuously overlap, particularly in the context of South Africa (Skosana, 2013). For example, in her chapter, Skosana has shown that mission schools that sought to civilise the children of chiefs unintentionally bred ‘politically conscious militants’, who merged traditional and nationalist politics. The post-apartheid overlaps between traditional and elected government institutions were highlighted, for example, when I asked the residents of Magongwa (Mokopane) about their support for traditional leadership in a country that is democratic. Anna Phago, an old resident in Magongwa, replied:

Chieftainship is good to safeguard culture. It is also good in rural areas where the majority are unemployed and uneducated. Parents hardly have money to pay for school fees, water and electricity. However, if it were the municipality which was directly involved we would have problems because they privatise services [...] the existence of chiefs makes it possible to stay in areas for free.<sup>3</sup>

Anna made a point, which I explore later, about how traditional leadership steps in for the failings of local government. The more she elaborated her views, the more she pointed to a fundamental problem about ‘mixed governments’, namely the ‘chiefing’ or ‘traditionalising’ of democracy and, vice versa, the democratisation of chiefs. In other words, government begins to function in ways that are not formal and inclusive of the majority’s interests, whereas chiefs begin to be bureaucratic and to operate formally in matters where they would normally be impromptu (which works for some communities). This is a recurring issue highlighted by different chapters in this book.

In another local-level example, during my field work on chieftaincy in Mokopane (Skosana, 2012), one resident in Magongwa, Andries Matshotshwane, mentioned that he supports traditional leadership, but his reasons for doing so were slightly different from others. He said:

Chieftainship should continue to exist. Without chiefs we cannot succeed in instances where we have to deal with the mines. If the mines could only come through local government, then it would be worse. When the government has taken a decision, it is final, but chiefs and headmen are usually accessible and open to negotiation.<sup>4</sup>

Of course, such responses must be contextualised and cannot be generalised. But, in this instance, chiefs were found to be more likely to uphold democratic principles than democratically elected officials.

Indeed, it is noteworthy that those Magongwa residents who spoke against traditional leadership’s tendency to be corrupt, authoritarian

and irrelevant in a democracy pointed to identical ills in democratic institutions, leaving us with questions about whether South Africa's democracy is fragile because of chieftaincy, or whether the country's democracy might have been fragile anyway, without chieftaincy. Postcolonial societies have had to adapt to a governing system that emerged and developed in a European context.

## Chieftaincies: Sites of consumption?

The mechanisms of the global political economy, which foster the interconnectedness of states and operate under the conditions of a global free market, partly explain the convergence of modern and traditional institutions (Comaroff & Comaroff, 2009). Oomen (2005: 6) adds that broader global developments have fragmented nation states and national identities, and the result has been the emergence of alternative politics that operate locally, transnationally and internationally to deal with the challenges of modernity. What became more evident in the post-Cold War era was that all that is 'traditional' would not wither away in the mist of modern capitalist developments. If anything, all that is 'traditional' would be reconfigured to cohabit with modernity.

What we then began to witness in the 21st century in South Africa, amid the workings of the global economy, was the boom of the mining economy in the former bantustans (Capps, 2012a, 2012b; Manson & Mbenga, 2014). Traditional leaders, as noted in Sonwabile Mswana's chapter and Aninka Claassens's chapter, have positioned themselves at the centre of growing local economies in the former bantustans. It is, therefore, appropriate to conclude that chieftaincies are sites of consumption in post-apartheid South Africa. However, this is not a new trajectory in politics. Traditional leaders have continuously been able to accumulate, at least in the form of offerings from their subjects. This comes with their divine status<sup>5</sup> (Gluckman, 1965). Those who were appendages of colonial and apartheid administrations were also well rewarded by the regimes then in power (Davenport, 1987).

To explain how traditional leaders have crafted their way to the centre of mining economies, Capps (2012a) shares the view

that the tribal trust property (a type of black minerals ownership), predominantly found in the late 19th and early 20th centuries in the former Bophuthatswana and the Transvaal, endowed 'tribal authorities' with far greater autonomy over mining activity than their counterparts on state land. In those two regions, land was historically purchased by Africans and subsequently registered to a state official 'in trust' for a recognised 'chief and his tribe' (Mnwana, chapter 5). Although the mineral rights were often severed from tribal trust land after some time, they remained attached in some cases (Capps, 2012a: 71–75).

In post-apartheid South Africa, Capps (2012: 5) writes that:

The minerals held by the former homeland governments reverted to the (new) national government. The Department of Minerals and Energy ... and all tribal and state land (including ex-South African Development Trust land) was thus unified under the trusteeship of the Minister of Land Affairs. The Lebowa Minerals Trust was exempted from the new pattern of state trusteeship and instead placed under the administration of the (new) Minister of Minerals and Energy in 1996, pending specific legislation for its abolition at a future date (DME 2000).

Capps (2012a: 5) concludes, however, that, 'the platinum industry's juridical control over the mineral resources of the former Lebowa and Bophuthatswana territories would remain untouched, thus, safeguarding the essential condition of an accumulation strategy for chiefs' (in the contemporary environment).

Recently, in October 2018, the Constitutional Court passed a highly significant judgment in favour of the Lesetlheng community in the Bakgatla Ba Kgafela region, where land has historically been held 'in trust'. The judgment, which unsettles the power of traditional leaders over land, is likely to give rise to future contest as the role of traditional leaders in land reform continues to be negotiated, at both national and local level. In the context of gains from local mining economies, as well as the ongoing power of recognised chiefs over land, this book draws attention to what William Ellis, in his chapter, calls 'situational leadership'. His argument acknowledges that the

KhoiSan were historically marginalised and are, therefore, justified in making claims to recognition and legitimacy in the post-apartheid era. However, Ellis also points to the ways in which many of those who have emerged in the KhoiSan revival make claims to traditional leadership in a manner that is dynamic, creative and responsive to a moment that requires situational leadership. His notion of 'situational chiefs' perhaps also explains, in part, the increased relevance of headmen. Sindiso Mnisi Weeks, chapter 7, argues that these headmen carry the everyday burdens of rural communities in South Africa, more so than senior traditional leaders.

To assess the increased claims of 'situational leaders' to 'senior' traditional leadership or headmanship, the Nhlapo Commission, which was established by the Traditional Leadership and Governance Framework Act No. 41 of 2003, lays out guidelines for the recognition of traditional leadership and attempts to cleanse the institution of its chequered past (Buthelezi & Skosana, 2018: 114). However, not only did the Nhlapo Commission enact the ethnological approach of the Bantu Affairs Department when it became embroiled in matters of chieftaincies, the Commission has also perpetuated some of the practices of the apartheid regime by applying rigid genealogical customary rules to determine the rightful incumbents to office (Peires, 2014). Those traditional leaders who convincingly recount their genealogy in accordance with the customary law of succession gain political recognition within a democratic space. In such instances, as we have seen in this book, traditional leadership is a source of political power (Skosana, 2013: 8). By gaining recognition, traditional leaders accrue a stake in the country's democracy, because recognition provides successful traditional claimants with the material and political resources to which only officially recognised leaders can gain access (Buthelezi & Skosana, 2018: 8).

## Will traditional leadership eventually become extinct?

Traditional leadership will remain a competing government system for as long as the democratic system is not effectively established in

rural parts of South Africa. This is because in some rural communities where local government has not entrenched itself, traditional leadership is an alternative form of government (Oomen, 2003; Williams, 2004). Oomen (2003) observes that, in those instances that traditional leadership was not favoured, in some areas of Sekhukhune for example, it was not because of abhorrent feelings towards the institution, but rather a dislike of a particular style of leadership (see this also in Sithandiwe Yeni's chapter). In those areas of Sekhukhune where there was support for chieftainship, Oomen illustrates that this was largely issue based; the reasons to appeal to chiefs ranged from land allocation and dispute resolution, to their administrative function in initiation schools (Oomen, 2003). In areas where the functions of traditional leaders have been completely replaced by democratic structures, traditional leaders have positioned themselves as influencers of politically binding decisions about who gets to mine their mineral-rich areas and who gets to benefit. Although we cannot make conclusive generalisations, based on the rich case studies presented in this book, it is evident that traditional leaders are here to stay.

Some may ask whether the institution of traditional leadership might self-annihilate, since it has diverted from its conventional founding principle that, '*kgosi ke kgosi ka batho*', (a chief is the chief through the people). But this is unlikely when legitimation, as in colonial and apartheid South Africa, is awarded by state institutions and consolidated through post-apartheid legislation (including the Traditional Leadership Framework Act of 2003), which have sought to re-establish chiefly authority in rural parts of the country.

In the early days of South Africa's democratic transition, the alliance between the ANC-led government and traditional leaders was explainable by the ruling party's desire to gain the votes in rural constituencies, particularly KwaZulu-Natal, which was the Inkatha Freedom Party (IFP) stronghold (Van Kessel & Oomen, 1997). However, political dynamics in South Africa, and the political behaviour of voters, has since changed. One of the factors changing the political spectrum has been the growth of the Democratic Alliance (DA) and the emergence of the Economic Freedom Fighters (EFF). The EFF has gained the attention of the young electorate in some

provinces which were originally an ANC stronghold, including the Limpopo province (The Electoral Commission of South Africa, 2016).

Now that traditional leaders have an equivocal role in the county's electoral system, what else could be keeping them relevant? What if, among other things, it is nostalgia for imagined pre-colonial indigenous systems that has kept chieftaincy relevant? Can traditional leaders partly owe their continued existence to an association with a pre-colonial past that we have been eager to understand and reconnect to? Hence, there have been calls for 'decolonisation' (Mbembe, 2015). Traditional leaders are arguably symbolic of this pre-colonial past, despite this history also representing, at times, the atrocities of the colonial and apartheid governments.

Finally, the chapters in this book illustrate that one of the key reasons that traditional leaders remain relevant in post-apartheid South Africa is because of their historical role in the administration of land. Land and traditional leaders are historically entwined concepts, so much so that even when land is now 'owned' by the state, historically enduring titles such as 'land held in trust', discussed in chapters such as Mnwana's and Claassens's, allow some leaders to continue to sub-divide, and in some instances, sell farms to people in communities. If anything, the beginning of the process of transferring land to the state in the mid-1990s was, to traditional leaders, very ceremonial for the nationalist government and completely meaningless to traditional leaders. Traditional leaders did not see the transfer of land to the state as a paradigm shift – they continued in their respective communities with business as usual. This has given them the confidence to participate in the booming mining economies in the former homelands.

**Keep the institution of traditional leadership but resolve the paradoxes?**

Africa has always been, and continues to be, a continent of paradoxes. This book has shown these from a South African perspective. The conflicting binaries, such as mixed governments, customary and state

governance, as well as the modern and traditional, were perpetuated by colonialism and apartheid, in which traditional leaders were subjected to different kinds of administrative regimes. Taking this past into account, the role of traditional leaders in the country's democracy should not continue to be defined through ad-hoc legislation, passed by the governing elite for the rural poor. This perpetuates the paradoxes that are highlighted throughout this book. To remedy this, perhaps rural residents should be included more substantively in the process of negotiating and crafting the kind of traditional leadership they want, if any. For example, the passing of laws relating to customary law and traditional leaders should be a negotiated process that leaves room for altering or getting rid of the content in a proposed law, when need be. The consultation processes should not be merely a bureaucratic exercise. So far, the notorious laws that provide for traditional leaders and their subjects, such as the Traditional Leadership and Governance Framework Act No. 23 of 2003 and the Communal Land Rights Act No. 11 of 2004, seem as if they would have been passed anyway, because of the pressure of wanting to clarify the role of traditional leaders, despite public outcry (Claassens, 2009). What is a democracy then, if public consultations are a formality and not a part of a substantive negotiation process? If substantive negotiation takes place, then those who would want, for example, to use traditional courts, do so freely. The same applies for subjects who want to use civil courts of justice. Here, the state must make both court systems accessible to any persons and should not subjectify people by confining them to accessing traditional courts only, and therefore making modern justice systems unreachable. By doing so, rural people can choose moments in which they want to be subjects of traditional leaders and other moments in which they wish to enjoy the benefits of being citizens in the republic.

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## Notes

- 1 This is the Commission on Traditional Leadership Disputes and Claims,

- established by the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA).
- 2 For example, Restitution of Land Rights Amendment Act No. 48 of 2003, the Communal Land Rights Act No. 11 of 2004, and the Traditional Courts Bill of 2012
  - 3 Phago, M. and community members, interviewed by Dineo Skosana, Magogwa (Mokopane), 14 August 2011
  - 4 Matshotshwane, A. and community members, interviewed by Dineo Skosana, Magogwa (Mokopane), 14 August 2011
  - 5 Gluckman explains how, for example, traditional leaders were often assumed to be pre-ordained by God.