JSAS Special Edition

Citizenship and Accountability: Customary Law and Traditional Leadership under South Africa's Democratic Constitution

Introduction

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The legal framework for South Africa's democracy is provided by the widely lauded Constitution of the Republic of South Africa, 1996, ("the Constitution") which was adopted in the context of deep racial inequality and injustice that were the legacy of half a century of apartheid and several centuries of colonialism. One of the core elements of that legacy was the racial dispossession of land.

The process of colonial dispossession of land took much of the nineteenth century, giving rise to resistance and, at times, wars. It was followed by the establishment of small and overcrowded 'native reserves', to which defeated African groups were consigned in the 18th and 19th centuries. The boundaries of these 'reserves' were largely confirmed by the adoption of the Native Land Act in 1913,[1] which together with the Native Land and Trust Act

[1] Act 27 of 1913.

of 1936[2] preserved 87% of South Africa's land for ownership and occupation by white people.

During the 1950s and 1960s a central plank of grand *apartheid* policy was to consolidate these reserves into ten 'homelands' or *bantustans* delineated according to the main African language groups in South Africa – Zulu, Xhosa[3], Ndebele, Swazi, Sotho, Tswana, Pedi, Tsonga and Venda. Over three and a half million South Africans were forcibly removed from the 'white' 87% heartland of South Africa, into the black periphery of the *bantustans* between the 1960s and 1980s[4] and the terms of black entry and residence in 'white' South Africa was regulated by strictly enforced pass and migrant labour laws.[5]

Apartheid policy thus denied Black South Africans land and citizenship rights in 'white' South Africa on the basis that they had citizenship rights in the *bantustan* associated with their mother tongue. The policy encompassed all black South Africans, including people who had lived in urban areas for generations and who had no existing connections to any *bantustan*. The *bantustans* were made up of 'tribal' units governed by 'bantu' authorities, created in terms of the much resisted[6] Bantu Authorities Act of 1951. These authorities were headed by government-appointed traditional leaders who made up 60% of the membership of homeland legislatures.

While the former homelands were 'reincorporated' into a unitary South Africa in 1994, the legacy of landlessness, spatial apartheid and inequality is with us still and its persistence has sparked a vigorous debate about the worth of the constitutional project itself.[7] Relevant to this legacy are the provisions of one of the shortest chapters in the Constitution, Chapter

[2] Act 18 of 1936. This brought additional land into the reserves bringing the 7% set aside by the 1913 Land Act up to 13% in 1936.
[3] There were two Bantustans for Xhosa speakers: the Ciskei, south and west of the Kei river and the Transkei, north and east of the Kei river.
[4] L. Platzky and C. Walker, *The Surplus People: Forced Removals in South Africa* (Ravan Press, 1985).
[5] M. Horrell, *Legislation and Race Relations* (South African Institute of Race Relations, 1971).
[6] Rebellions against the Bantu Authorities Act are described in books by Albert Luthuli, *Let my people go* (Collins, 1962); Govan Mbeki, *South Africa, The Peasants Revolt* (International Defence and Aid Fund, 1964); and Charles Hooper, *Brief Authority* (David Philip, 1989).
[7] For example, the special issue of the South African Journal of Human Rights *Conquest, Constitutionalism and Democratic Contestations* (2018), *SAJHR*, 34(3), particularly J. Modiri, "Conquest and Constitutionalism: first thoughts on an alternative jurisprudence" (2018), *SAJHR*, 34(3), pp. 300–25; T. Madlingozi, "South Africa's First Black Lawyers, AmaRespectables and the Birth of Evolutionary Constitution – A review of Tembeka Ngcukaitobi's *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism*" (2018), *SAJHR*, 34(3), pp. 517–29; and E. Zitzke, "A Decolonial Critique of Private Law and Human Rights" (2018), *SAJHR*, 34(3), pp. 492–516.

12, which is entitled Traditional Leaders. It contains two clauses. The first provides that the "institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution"[8] and that "courts must apply customary law when that law is applicable subject to the Constitution".[9] The second provides that national legislation may provide for "a role for traditional leadership as an institution at local level on matters affecting local communities"[10] and that national legislation may establish houses of traditional leaders and a council of traditional leaders.[11]

Chapter 12 thus preserves the institution, status and role of traditional leadership "subject to the Constitution", a constitution whose first clause proclaims South Africa to be "one, sovereign, democratic state" founded on the values of, amongst others, "the supremacy of the Constitution and the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness". The Constitution thus appears to embed a contradiction or ambiguity between the founding principles of democracy and equality, and the recognition of the role and institution of traditional leadership, particularly given the role of traditional leaders in the *bantustans*, and the significance of the *bantustans* in the political project of racial segregation and grand *apartheid*.

It is not unusual for constitutional texts to contain ambiguities and contradictions that are in some manner reflective of the social, political, cultural and economic conflicts that exist within the societies they seek to govern.[12] Such ambiguities and contradictions provide opportunities for state actors, including legislators, bureaucrats and courts, as well as other social, economic and cultural forces within a society to assert interpretations of the Constitution that draw on the ambiguities within it. As Jacobsohn has argued:

> "… a vital component of the disharmony of the constitutional condition consists of identifiable communities of meaning within which dissonance and contradiction play out…"[13]

[8] Constitution of the Republic of South Africa, 1996, S 211(1).
[9] Ibid. S 211(3).
[10] Ibid. S 212(1).
[11] Ibid. S 212(2).
[12] G.J. Jacobsohn, *Constitutional Identity* (Harvard, 2010), p. 4.
[13] Ibid.

This is reinforced by Sally Falk Moore's observation that even in the absence of legislative (or constitutional) ambiguity "innovative legislation or other attempts to direct change often fail to achieve their intended purposes: and even when they succeed wholly or partially, they frequently carry with them unplanned and unexpected consequences. This is partly because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws".[14]

In South Africa, the interpretation of the Constitution's ambiguities and contradictions in relation to customary law and traditional leadership has been debated in a range of fora over the past 25 years: in parliament, in rural communities and in courts. This contestation has largely been concerned with three key issues: the role, authority, succession and accountability of traditional leaders in South Africa's constitutional democracy;[15] questions relating to the nature and content of customary rights to land and natural resources, including security of tenure and questions relating to resource extraction;[16] and questions pertaining to the status and integration of customary law that affects the intimate daily lives of those for whom its processes and principles are meaningful and an important part of how their family relationships are structured.[17]

These contestations matter: more than 18 million South Africans live on land that falls within the jurisdiction of traditional authorities, which coincides almost exactly with the geographic boundaries of the former *bantustans*. These areas remain starkly the poorest and most deprived in South Africa, where access to basic necessities, such as water, electricity and food is woefully inadequate and where social services such as education and healthcare are generally of poor quality and scarce.[18]

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[14] S. F. Moore, *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul, 1978), p. 58.
[15] B. Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (James Currey, 2005).
[16] A. Claassens and B. Cousins, *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT, 2008).
[17] A. Claassens and D. Smythe, *Marriage, Law and Custom: Essays on Law and Social Change in South Africa* (Juta, 2013); C. Himonga and E. Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living customary law and social realities* (Juta, 2015).
[18] M. Noble, W. Zembe and G. Wright, *Poverty may have declined but deprivation and poverty are still worst in the former homelands* (South African Social Policy Research Institute (SASPRI), 2014) Available at https://cisp.cachefly.net/assets/articles/attachments/49773_noble_et_al_2014_former_homelands_final.pdf Accessed 5 October 2020.

Despite the promise of the 1994 transition, processes of dispossession have accelerated with the expansion of mining in the former homelands. It is ironic that it is in these areas, to which people were consigned by centuries of segregation, and more recently by apartheid forced removals, that valuable deposits of platinum, chrome, vanadium, titanium, coal and iron ore exist. Mining in these areas has enriched corporate shareholders and some traditional leaders, but has by and large taken place without consultation with, consent of and adequate compensation for those whose land rights are directly undermined in the process.

These contestations matter too because many South Africans conduct their family relationships under the aegis of customary law and depend on it to regulate those relationships fairly and well (see **Thandabantu Nhlapo** in this volume). Moreover the land and natural resource rights of many black South Africans derive from customary law rather than statutory or common law, as statutory and common law rights were mostly withheld from Black South Africans during colonialism and apartheid (see **Michael Bishop** in relation to fishing rights and **Derick Fay** and **Wilmien Wicomb** in relation to land rights). The South African legal system has not yet fully acknowledged or integrated customary law rights and processes, rendering vulnerable those whose rights and relationships are governed primarily by customary law.

This special edition of the Journal of Southern African Studies examines how contestations among a range of actors in South Africa's constitutional democracy take place in the shadows of the apparent ambiguity embedded in Chapter 12 of the Constitution. It focuses on the three key areas mentioned above: the institution of traditional leadership, access to land and resources and customary law. And it explores these themes with a particular consideration of two key constitutional principles: citizenship and accountability. The edition is committedly multi-disciplinary and draws on the insights of historians, sociologists, anthropologists, and, unusually perhaps for this journal, lawyers.

The genesis of this edition was a conference co-hosted in June 2019 by the Bonavero Institute of Human Rights, the Programme for the Foundations of Constitutional Law and Government in Oxford and the Land and Accountability Research Centre at the University of Cape Town, with the title "Citizenship and Accountability: Customary Law and Traditional Leadership under South Africa's Democratic Constitution".

The conference was held at a pivotal moment, just after Parliament had enacted the controversial Traditional and Khoi-San Leadership Bill which is considered in several of the contributions here. In addition, a series of important court judgments concerning customary law, access to land and resources, and the role of traditional leaders under South Africa's democratic Constitution had recently been delivered.[19] At the same time, exposés by investigative journalists and reports by former Public Protector Thuli Madonsela had laid bare the scale of corruption and lack of accountability in South Africa more generally, resulting in 'state capture' public hearings by the Zondo Commission.

The papers in this special edition consider these and other examples of contemporary contestation.

In this introduction, we provide a brief historical framing for the contemporary debates. We then consider briefly the two key themes of the conference: accountability and citizenship. The introduction then provides an overview of the laws that Parliament has enacted since the beginning of the democratic era to address land tenure, land rights and land reform, as well as customary law and traditional leadership, as much of this legislation features in the contributions to this edition. It then provides a very brief overview of how the courts – particularly the Constitutional Court – have addressed challenges that have arisen in relation to customary law, land and resources in 'communal areas', and traditional leadership. Finally, we provide a brief overview of the individual contributions to this edition.

History

As Mamdani has argued, understanding the role of traditional leadership and customary law in contemporary African societies requires us to understand its history.[20] A brief account of that history will help to highlight key continuities spanning the colonial, *apartheid* and the

[19] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another ("Maledu")* [2018] ZACC 41; *Baleni and Others v Minister of Mineral Resources and Others ("Baleni")* [2018] ZAGPPHC 829 (22 November 2018) and *Gongqose v Minister of Agriculture, Forestry and Fisheries* [2018] ZASCA 87 ("Gongqose").

[20] M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, 2018).

post-*apartheid* era in relation to the place of customary law and the role of traditional leaders.

The contemporary roots of the relationship between the state, on the one hand, and traditional leadership and customary law on the other lie in an approach developed in Natal in the middle of the 19th century. Natal Ordinance 3 of 1849 instituted a framework which would be of enduring importance: it provided that the Lieutenant Governor of the Colony was to bear authority as the Supreme or Paramount Chief, with the authority to appoint all subordinate and other chiefs. It also confirmed the authority of chiefs to continue to apply customary law to the extent that it was not repugnant to "the general principles of humanity, recognised throughout the whole civilised world". This assertion of state authority over the succession of chieftainship, which authorised and regulated the application of customary law by chiefs and native courts, established the core elements of an approach to traditional leaders and customary law that was repeated and extended in the century that followed.[21]

The Union of South Africa Act, 1909, provided that the Governor-General in Council would exercise all the powers previously vested in the governors of colonies or exercised by them as supreme chiefs.[22] The later Native Administration Act, 1927,[23] provided in its first section that the Governor-General would be the Supreme Chief of all Natives in Natal, Transvaal and the Orange Free State and authorised the Governor General to recognise or appoint any person as a chief of a native tribe.[24] In 1951, in one of the first major pieces of *apartheid* legislation, the Bantu Authorities Act,[25] was passed to provide for the establishment of "bantu" authorities which were given quasi-governmental roles with coercive and punitive powers.

Davenport notes that this Act precipitated peasant resistance[26] to *apartheid* policies that were introduced after 1948 and describes it in practice as coming "to mean the

[21] Mamdani, *Citizen and Subject*, p. 65. Key moments for the extension of these principles were the adoption of the Constitution of the Union of South Africa, 1910, the enactment of the Natives Administration Act, 1927 and the Bantu Authorities Act, 1951.
[22] S 147, The Union of South Africa Act, 1909.
[23] Act 38 of 1927.
[24] S 2(7) of the Native Administration Act, 38 of 1927.
[25] Act 68 of 1951.
[26] Luthuli, *Let my people go*; Mbeki, *The Peasants Revolt*; Hooper, *Brief Authority*.

establishment of a system of indirect rule through the medium of subservient and sometimes well-rewarded chiefs, chosen for their preparedness to enforce government policy at the expense of their own popularity. Under this new machinery, taxes were harder to evade and consensus between chief and people in matters of local decision-making less likely to happen".[27] Writing about the Bantu Authorities Act in 1962 Nobel laureate and former traditional leader Albert Luthuli said:

> The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people.[28]

The continuities between the Natal Ordinance 3 of 1849 and the Bantu Authorities Act, 1951 are apparent. One of the themes of this edition is to explore the extent to which the relationship between the state and traditional leadership and customary law in the post-*apartheid* constitutional order has continued to display the patterns and habits developed in the colonial and *apartheid* periods.

Accountability and Citizenship

South Africa's democratic Constitution is an endorsement of both citizenship and accountability. Yet how democratic concepts of citizenship and accountability should articulate with customary law and traditional leadership is a question left open by the Constitution, an ambiguity at its core which can only be resolved by social, cultural, legal and political contestation. Before turning to those contestations, we briefly examine the twin themes of accountability and citizenship.

The concept of citizenship, which has a long philosophical pedigree,[29] has received renewed attention since the 1990s.[30] This has been driven in part by political events and in part by

[27] T. R. H. Davenport, *South Africa: A Modern History* 4th ed. (MacMillan, 1991) p. 347.
[28] Luthuli, *Let my people* go, p. 200.
[29] See, in particular, Aristotle's account in *The Politics,* Book III, Chapters 1–8. For a broader historical account of the concept of citizenship in Western and African political thought and practice, see J. Lonsdale, "Unhelpful pasts and a provisional present", in E. Hunter (ed), *Citizenship, Belonging, and Political Community in Africa: Dialogues between Past and Present* (Ohio University Press, 2016), pp. 17–40.
[30] See W. Kymlicka and W. Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994), *Ethics,* 104, pp. 352–381.

the work of theorists who have turned to the concept of citizenship to integrate theories of justice and community.[31]

Bellamy identifies citizenship as being based on membership of a political community. It is, he asserts, "a condition of civic equality … [and] consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis. This status not only secures equal rights to the enjoyment of collective goods provided by the political association but also involves equal duties to promote and sustain them – including the good of democratic citizenship itself".[32]

This self-consciously political definition emphasizes the principle of equality: the equal right to determine the terms of social co-operation, for example, through the right to vote; the right to equality before the law; and the equal rights to enjoy collective goods. It also emphasizes a second important aspect of citizenship – that citizenship in part depends on the actions of citizens: whether they act to assert their rights, and act to promote and sustain democracy. Citizenship is thus not simply conferred by the state, it must be claimed.

The significance of citizenship in Africa was explored in Mahmood Mamdani's acclaimed book *Citizen and Subject: Contemporary African and the Legacy of Late Colonialism.*[33] Mamdani argues that the character of the colonial state in Africa[34] was bifurcated: an urban state "that spoke the language of civil society and civil rights" available only to a limited class of people, prototypically white settlers, and a rural state based on community and custom "pledged to enforce tradition". This bifurcated state was premised on inequality and differentiation.

Mamdani argues that post-colonial African states have managed to deracialise the bifurcated state inherited from colonialism but have failed to democratise it,[35] resulting in subsequent economic failures and deepening inequality.[36] Key to these failures, he argues, is the choice of post-colonial African governments to retain colonial "native" authorities combined with state-enforced and administratively driven notions of customary law. As a

[31] Ibid. p. 352.
[32] R. Bellamy, *Citizenship: A Very Short Introduction* (Oxford, 2008), p. 25.
[33] M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, 2018).
[34] Ibid. p. 17.
[35] Ibid. p. 8.
[36] Ibid. p. 289.

result, people retain the status of ethnic 'subject' and the promise of citizenship is curtailed. Mamdani may draw too sharp a distinction between the urban and the rural, and may overlook material differences across some parts of Africa. But he provides a useful starting point for understanding the contemporary politics of traditional leadership and customary law in South Africa, particularly for drawing our attention to the concept of citizenship that is firmly embedded in South Africa's Constitution. Section 3 declares "a common South African citizenship" in which all citizens are "equally entitled to the rights, privileges and benefits of citizenship".[37]

This special edition's focus is on the tension which exists between recognition of the institution, status and role of traditional leadership by the Constitution and its assertion of democracy and equal citizenship. It examines not only whether the government and the courts are seeking an accommodation of traditional leadership that protects common citizenship and equal entitlement to the rights, benefits and privileges of citizens, but also whether South Africans themselves, particularly those who live under the authority of traditional leaders are engaging as civic actors, claiming their citizenship.

The second theme of this special edition is the concept of accountability, which the Constitution proclaims as one of its founding values.[38] The term has become something of a buzzword, widely used not only by political scientists,[39] but by development agencies[40] and,

[37] The Constitution, S 3(2).

[38] The Constitution, S 1(d) reads: "The Republic of South Africa is one, sovereign, democratic state founding on the following values: … (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness". Universal adult suffrage, a national common voters roll, regular elections and multi-party government are not values properly called, they are elements of a system of democratic government which the clause asserts "ensure" the process values of accountability, responsiveness and openness. The term is also found in a range of other parts of the Constitution. See also S 92(2) which stipulates that Cabinet members are collectively and individually accountable to Parliament; S 55(2) which provides that the National Assembly must provide mechanisms to ensure that the national executive is held accountable to it; and S 195(1)(f) which stipulates that the public administration must "be accountable", although it does not stipulate to whom or what, or how it should be held accountable.

[39] For example, M. Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007), *European Law Journal* 13*,* pp. 447– 468; Also R. Mulgan, "Accountability: an ever-expanding concept?" (2000) *Public Administration* 78*,* pp. 555–73.

[40] M. J. Dubnick, for example, provides a graph that shows the extraordinary increase in the frequency with which the work "accountability" was used in English language texts between 1800 and 2005. See M. J. Dubnick, "Accountability as a Cultural Keyword", in M. Bovens, R. E. Goodwin and T. Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford, 2014), pp. 23-4.

increasingly, constitutional scholars.[41] Yet, its meaning is contested.[42] For this introduction, we have adopted a working definition of accountability drawing on the literature that claims that the principle of accountability asserts a relationship between a person or institution that is being held to account, and those who are entitled to hold it to account. The mechanisms for holding a person to account may vary, but will often include a duty to disclose information and at times the capacity to impose sanctions, which could take different forms: political sanctions such as being voted from office and legal ones, such as civil or criminal liability.[43] Mechanisms of accountability will often coincide and reinforce one another. Accountability is clearly closely related to citizenship in that mechanisms for choosing governments, elections, are also mechanisms for ensuring political accountability.

Given that the Constitution contemplates that there should be mechanisms of accountability to hold those who exercise public power to account, two questions arise here: who may hold traditional leaders to account when they exercise forms of public power? And what mechanisms exist to ensure that they are held to account? This edition examines whether mechanisms may include customary law mechanisms, rules of constitutional and administrative law and political mechanisms.

Customary law, land and traditional leadership in the democratic parliament 1994–2020

The last quarter century has seen important legislation introduced by Parliament that addresses customary law, land and traditional leadership. In the first Parliament, from 1994–1999, a package of legislation relating to land rights was introduced. The first was the Restitution of Land Rights Act, 1994,[44] which established the Commission on Restitution of

[41] See, for example, C. Harlow, "Accountability and Constitutional Law", in Bovens, Goodwin and Schillemans (eds), *The Oxford Handbook*; C. Harlow, "Accountability as Value for Global Governance and Global Administrative Law", in G. Anthony (ed), *Values in Global Administrative Law* (Hart, 2011), pp. 167–185; N. Bamforth and P. Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford, 2013); A. Price, "State Liability and Accountability", in A. Price and M. Bishop (eds), *Transformative Justice: Essays in Honour of Pius Langa* (Juta, 2015) pp. 313– 335.

[42] For example, Bovens has commented that: accountability "… is one of those golden concepts that no one can be against. It is increasingly used in political discourse and policy documents because it conveys an image of transparency and trustworthiness. However, its evocative powers make it also a very elusive concept because it can mean many different things to different people, as anyone studying accountability will soon discover". Bovens, "Analysing and Assessing Accountability", pp. 42, 448.

[43] This definition draws on similar definitions developed by Bovens, in "Analysing and Assessing Accountability", p. 45; and Price and Bishop, *Transformative Justice,* pp. 4, 315.

[44] Act 22 of 1994.

Land Rights and the Land Claims Court to provide for restitution of land rights to those whose rights had been taken away as a result of racially discriminatory laws since 1913, when the Native Land Act was promulgated. It was followed by several pieces of legislation seeking to enhance insecure forms of land tenure: the Land Reform (Labour Tenants) Act 1996,[45] the Interim Protection of Informal Land Rights Act 1996 (IPILRA),[46] the Extension of Security of Tenure Act 1997 (ESTA),[47] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PIE).[48] All have strong roots in the Constitution, and particularly in Section 25(6) of the Constitution, which provides amongst other things that "[a] person whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided in an Act of Parliament, either to tenure which is legally secure or to comparable redress".

As its title suggests, the 1996 IPILRA was intended to provide temporary protection for those who had informal land rights not otherwise adequately protected by law. It originally applied for a period of eighteen months, but also provided that the Minister of Land Affairs could extend its provisions for up to twelve months at a time.[49] It has been extended each year since then. Its key provision requires that no person may be deprived of an informal land right without their consent,[50] a provision that was of central importance in two recent decisions of the courts which asserted that informal land rights could not be overridden by the grant of mineral rights.[51]

These early laws were in line with the 1997 White Paper on South African Land Policy.[52] A key provision of the White Paper was that post-*apartheid* land tenure reform must "recognise and accommodate *de facto* vested rights".[53] The early land tenure reform laws vested rights both in individuals and in communities and not in "traditional communities" or "tribes". Much of the early legislation relating to land was widely acclaimed and none of it

[45] Act 3 of 1996.
[46] Act 31 of 1996.
[47] Act 62 of 1997.
[48] Act 19 of 1998.
[49] S 5(2) of IPILRA, Act 31 of 1996.
[50] S 2(1), IPILRA.
[51] See *Maledu,* [2018] ZACC 41; and *Baleni,* [2018] ZAGPPHC 829.
[52] Published in April 1997. Available at https://www.gov.za/sites/default/files/gcis_document/201411/whitepaperlandreform.pdf. Accessed 30 September 2020.
[53] Ibid p. 16.

was subjected to constitutional challenge. Indeed, the enactment of the Restitution of Land Claims Act was greeted by a standing ovation in Parliament.[54]

During the first Parliament an important piece of legislation regulating customary law was also enacted – the Recognition of Customary Marriages Act, 1998 (the RCMA).[55] Its enactment followed a report by the South African Law Commission which had investigated the question carefully.[56] This Act, as its name suggests, sought to remedy the fact that prior to 1994, customary marriages or unions, as they were referred to, had been viewed as inferior to marriages that were in accordance with the Marriage Act, 1961.[57] Seeking to give proper recognition to customary marriages was consistent with the overall framework of the new Constitution which recognised that both common law and customary law are sources of South African law.[58] Although there have been constitutional challenges to the provisions of the RCMA, most have concerned its transitional provisions and not its substantive provisions.[59]

Legislation concerning the powers of traditional leaders has been far more contested. The earliest pieces of legislation concerning traditional leaders were the Council of Traditional Leaders Act, 1995,[60] which established and regulated the Council of Traditional Leaders, and the Remuneration of Traditional Leaders Act, 1995,[61] which provided that traditional leaders could be remunerated out of the National Revenue Fund as the President determined after consultation with the Council of Traditional Leaders.[62] These early pieces of legislation

[54] See B. Cousins and R. Hall, "Rural Land Tenure: The Potential and Limits of Rights-based Approaches", in M. Langford, B. Cousins, J. Dugard, and T. Madlingozi (eds), *Socio-economic rights in South Africa: Symbols or Substance* (Cambridge University Press, 2014).
[55] Act 120 of 1998.
[56] See South African Law Commission Project 90: The Harmonisation of the Common Law and Indigenous Law *Report on Customary Marriages* (August 1998).
[57] Act 25 of 1961.
[58] See, for example, S 39(2) of the Constitution which provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".
[59] See *Gumede (born Shange) v President of the RSA and Others* [2008] ZACC 23 and *Ramuhovhi and Others v President of the RSA and Others* [2017] ZACC 41.
[59] *Alexkor Ltd and another v Richtersveld Community and Others* [2003].
[60] Act 31 of 1994.
[61] Act 29 of 1995.
[62] The Council of Traditional Leaders was established in terms of S 184(1) of the interim Constitution (the Constitution of the Republic of South Africa Act, 103 of 1993).

perpetuate the close links between the state and traditional leadership which stretch back to the colonial era.

The state provides generous financial support to traditional leaders. As at 2018, then Minister Des Van Rooyen told Parliament that there were 14 traditional leaders who were recognised as Kings or Queens, each of whom were paid in excess of R1.2m per year. Recognition of seven of these traditional kingdoms would lapse after the current incumbent died. The state recognised and was also paying more than 800 senior traditional leaders a salary of just over R250 000 per year.[63]

In 2003 Parliament enacted the Traditional Leadership and Governance Framework Act, 2003 (TLGFA)[64]. The TLGFA provides for the recognition of traditional communities, traditional leaders and traditional authorities. A traditional community may be recognised under the Act if the community is subject to a system of traditional leadership in terms of its customs and if it observes a system of customary law.[65] The Act established a Commission on Traditional Leadership Disputes and Claims which investigates, among other things, disputes relating to the succession of traditional leaders and makes recommendations to the President or relevant provincial government.[66] The Commission, which is required to consider and apply customary law, has been inundated with disputes. By 2011 it had received 1322 claims, more than the total number of traditional leaders who are remunerated by the state.[67]

The TLGFA also requires traditional communities to "transform and adapt customary law and customs" so as to be compliant with the Bill of Rights.[68] Once a traditional community is recognised, the Act provides for the recognition of traditional leaders[69] and the establishment of traditional councils.[70] The Act states that 40% of members of the traditional council must be elected by members of the community and that a third of the

[63] *BusinessTech*, 6 August 2018. Available at https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/. Accessed 5 October 2020.
[64] Act 41 of 2003.
[65] S 2(1) of TLGFA.
[66] SS 22–25 of TLGFA.
[67] SA Government announcement, 19 April 2011. Available at https://www.gov.za/commission-traditional-leadership-disputes-and-claims-announcement. Accessed 6 October 2020
[68] S 2(3) of TLGFA.
[69] S 2 of TLGFA.
[70] S 3 of TLGFA.

members of the council must be women,[71] thereby building mechanisms of accountability and equal citizenship into the institution. However, the Act also contained transitional provisions which provided for the continued recognition of traditional communities, traditional leaders and traditional authorities that had been appointed in terms of previous legislation – including the Bantu Authorities Act, subject to certain qualifications.[72] As a result, tribal authorities that were set up in the 1960s and 1970s during the *apartheid* era are now deemed to be traditional authorities under the new constitutional framework,[73] without the mechanisms for accountability of the TLGFA.

In 2004, Parliament enacted the Communal Land Rights Act (CLARA)[74] which sought to provide for and regulate a system of communal land rights. But this was declared unconstitutional by the Constitutional Court in 2010 on the basis that its enactment had not followed stipulated procedures.[75] Opposition to CLARA was widespread and centred on the powers it conferred upon traditional leaders and councils, as well as the nature and content of communal land rights and gender equality.[76] These issues were not addressed in the Constitutional Court judgment, which addressed only procedural flaws.

Following CLARA, a Traditional Courts Bill (the TCB) was produced in 2008 but was never enacted. The Bill was rejected by traditional leaders because of its recommendation that people be allowed to opt out of customary courts and use other courts instead.[77] The 2008 version of the Traditional Courts Bill provided for traditional leaders to be the presiding officers of traditional courts, with far-reaching punitive powers including the power to strip litigants of customary entitlements such as land rights. It made it a criminal offence to refuse to appear if summoned by a traditional leader.[78] The memorandum to the Bill stated that it was drafted in collaboration with the National House of Traditional Leaders.[79]

[71] S 3(2) of TLGFA.
[72] S 28 of TLGFA.
[73] Cousins and Hall, "Rural Land Tenure", in Langford and others (eds), *Socio-economic rights.* p. 164.
[74] Act 11 of 2004.
[75] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10.
[76] Claassens and Cousins, *Land, Power and Custom*, p. 16.
[77] See South African Law Commission Project 90: Traditional Courts and the Judicial Function of Traditional Leaders (January 2003). p. 32.
[78] B 15-2008, clause 20(c).
[79] Memorandum attached to B 15-2008, p. 18.

Cousins and Hall have speculated that slow progress on the TCB can be attributed to government's caution in the light of the constitutional challenge to CLARA.[80] The 2008 version of the TCB was reintroduced in 2012 but it too lapsed after sustained opposition was voiced in provincial public hearings. A third version of the Bill was produced in 2017. At the time it was cautiously welcomed as an improvement on the prior version,[81] however the Portfolio Committee has subsequently adopted far-reaching amendments that reintroduce many of the contested features of the 2008 version of the Bill.[82]

More recently the government has enacted the Traditional and Khoi-San Leadership Act, 2019 (the TKLA).[83] While it is not yet in operation, it will replace the TLGFA. It too has been criticised for entrenching apartheid tribal boundaries and for centralising decision-making authority in traditional leaders. A 2019 amendment to the TLGFA again attenuates, at least for a time, the legal consequence of invalidity for traditional councils that fail, or refuse to conform to the 40% elected, and one third women composition requirements for traditional councils set out in the 2003 TGLFA.

This amendment paves the way for confirming the legal status of traditional councils whose capacity to sign investment contracts, including multi-million-rand mining deals, had previously been considered legally precarious, both by the state[84] and business[85]. It includes provisions for provincial Premiers to retrospectively review and approve agreements that Traditional Councils entered into before the amendment's enactment.[86]

One of the most controversial provisions of the TKLA is contained in Section 24. It authorises traditional councils to enter into agreements or partnerships with municipalities, government departments and external parties, including investors and mining companies. This power provides legislative impetus to what John and Jean Comaroff have called

[80] See Cousins and Hall, "Rural Land Tenure", in Langford and others (eds), *Socio-economic rights.* p. 164.
[81] See S. Mnisi Weeks, "South Africa's Traditional Courts Bill 2.0: improved but still flawed", *The Conversation,* 4 April 2017. Available at https://theconversation.com/south-africas-traditional-courts-bill-2-0-improved-but-still-flawed-74997. Accessed 20 September 2020.
[82] Zukiswa Pikoli "Traditional Court Bill Hearings Kick off in Gauteng", *Maverick Citizen*, 20 February 2020. Accessed 5 October 2020.
[83] Act 3 of 2019.
[84] The memorandum to the TLGFA Bill (Bill 8-2017) describes this at paras 1.4, 1.5, 1.6 and 1.7.
[85] Business Leadership and Business Unity South Africa, *Review of regulatory challenges and policy uncertainty impeding investment and employment in South Africa*, March 2017, pp. 42–46.
[86] See S 63(22) of TKLA.

"Ethnicity, Inc".[87] – the commercialisation of traditional groups. Before its enactment, the Bill – to widespread criticism – did not require either consultation with, or the consent of people whose customary rights would be directly affected. Apparently in response to the *Maledu* judgment,[88] a provision was added[89] to the Bill to provide for consultation with "the relevant community represented" by the traditional council, as well as requiring a majority vote of support by those communities in favour of the proposed partnership or agreement. This was ultimately included in the Act, but while it requires a decision in support of a partnership/agreement, it is not clear how this provision will work in practice. It is possible that the wording of Section 24(3) will undermine the consent provision in IPILRA, although IPILRA's clear roots in Section 25(6) of the Constitution may oppose such an interpretation.

The last-minute addition to Section 24(3) of the TKLA points to a key issue of contestation. Where is the locus of decision-making authority in respect of customary land rights? Does it vest in the traditional council acting on behalf of the 'tribe', or in the holders of customary land rights themselves?

Although land legislation in the first parliament of the constitutional era focused largely on securing the tenure of those whose tenure was precarious as a result of colonial and apartheid laws and practices, the last two decades have seen the enactment of legislation that affirms the authority of traditional leadership, entrenches the links between the state and traditional leaders and appears to weaken the mechanisms of accountability between communities and traditional leadership.

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[87] See J. Comaroff and J. Comaroff, *Ethnicity, Inc.* (Chicago, 2009); and J. Comaroff and J. Comaroff, "Chiefs , Capital and the State in Contemporary Africa", in J. Comaroff and J. Comaroff (eds), *The Politics of Custom: Chiefship, Capital and the State in Contemporary Africa* (Chicago, 2018).

[88] *Maledu,* [2018] ZACC 41.

[89] Section 24(3) of the Bill was amended on 30 October 2018 (five days after the *Maledu* judgment was delivered) to read: "(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other national or provincial law –
…
(c) is subject to –
(i) a prior consultation with the relevant community represented by such council;
(ii) a decision in support of the partnership or agreement taken by a majority of the relevant community members present at the consultation contemplated in subparagraph (i); and
(iii) a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement; …"

Customary law, land and traditional leadership in the Constitutional Court 1994–2020

The Constitutional Court has considered a wide range of cases relating to customary law,[90] land and mining[91] and traditional leadership[92] in the last 25 years. Space does not permit a full survey of the jurisprudence, which has been explored in the literature.[93]

The most important of the early cases before the Court related to challenges to the 1996 drafting of Chapter 12,[94] and, in particular whether the chapter was consistent with Constitutional Principle XIII which provided that "[t]he institution, status and role of traditional leadership according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith". The objectors, who included the Congress of Traditional Leaders of South Africa, argued that Chapter 12 did not adequately protect the powers and functions of traditional leaders.[95] The Court rejected this argument, observing that the objectors' interpretation of Constitutional Principle XIII was incorrect, given that it did not

[90] *Moseneke and Others v Master of the High Court* [2000] ZACC 27; *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; *Gumede (born Shange) v President of the RSA and Others* [2008] ZACC 23; *Pilane and another v Pilane and another* [2013] ZACC 3; *Mayelane v Ngwenyama and Another* [2013] ZACC 14; *Ramuhovhi and Others v President of the RSA and Others* [2017] ZACC 41.

[91] *Alexkor Ltd and another v Richtersveld Community and Others* [2003] ZACC 18; *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* [2010] ZACC 26; *Maledu,* [2018] ZACC 41.

[92] See *Premier, KwaZulu-Natal and Others v President RSA and Others* [1995] ZACC 10; *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, 1995* [1996] ZACC 15; *Shilubana and Others v Nwamitwa* [2008] ZACC 9; *Sigcau v President of the RSA* [2013] ZACC 18; *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28; *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36 and *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50.

[93] See, for example, A. Claassens and G. Budlender, "Transformative Constitutionalism and Customary Law" (2014), *Constitutional Court Review 6,* pp. 75–104; C. Himonga and A. Pope, "*Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications"* (2013), *Acta Juridica,* pp. 318 –338; K. O'Regan, "Tradition and Modernity: Adjudicating a Constitutional Paradox" (2014), *Constitutional Court Review*, 6, pp. 105–126; R. Ozoemena, "Living Customary Law: A Truly Transformative Tool" (2014) *Constitutional Court Review*, 6, pp. 147–162; W. Wicomb, "The Exceptionalism and Identity of Customary Law under the Constitution" (2014), *Constitutional Court Review*, 6, pp. 127–146.

[94] The South African constitutional transition was a two-stage process: in the first stage, prior to the 1994 polls, the negotiating parties drafted an interim Constitution to regulate the period immediately after the elections. It provided that the new Parliament would sit as a Constitutional Assembly to draft a "final" Constitution. The interim Constitution contained a set of constitutional principles with which the "final" Constitution would comply. It was the task of the Constitutional Court to determine whether the new constitutional text did comply with the constitutional principles, including Constitutional Principle XIII relating to traditional leadership.

[95] See *Certification of the Constitution of the RSA, 1996* [1996] ZACC 26, para 189 and see list of objectors in Annexure 3 to the judgment.

speak of the powers and functions of traditional leaders. The court declined to interpret the words "institution, status and role" of traditional leaders, observing that "the Constitutional Assembly cannot be faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should developed and be interpreted, to future social evolution, legislative deliberation and judicial interpretation".[96] The Court thus anticipated that there would be ongoing engagement by the legislature, courts and, importantly, social actors in determining the role of traditional leaders. The contributions to this volume provide evidence of that engagement and the controversies and tensions that underlie it.

Claassens and Budlender argue that five principles can be discerned from the jurisprudence of the Constitutional Court on customary law: that customary law is subject to the Constitution; that it should not be viewed through a common-law lens; that it is "living law" – dynamic and always evolving; that, because of the dynamic character of customary law, reference to old cases and customary law textbooks as sources of authority requires caution; and that when applying and developing customary law courts one should take a contextual approach which should be rooted in an understanding of the circumstances in which people live, particularly astute to both poverty and inequality.[97]

Two particularly difficult challenges are apparent in the jurisprudence: the first is the difficulty courts experience when determining and applying customary law to avoid fundamentally altering its character by ossification,[98] as happened when colonial and *apartheid* officials and judges with little knowledge or understanding of custom developed and applied "official customary law".

Instead, the Constitutional Court has sought to identify "living customary law", borrowing from Eugen Ehrlich's[99] formulation in its approach. Given the rules of precedent and hierarchy upon which the Constitution is inevitably based, it is not clear that it is possible for the Court to avoid developing some modern avatar of "official customary law". The

[96] Ibid. Para 197.
[97] Claassens and Budlender, *Transformative Constitutionalism*, pp. 77–78.
[98] See Langa DCJ in *Bhe*, para 72 and paras 86–7, citing T. W. Bennett, *Human Rights and African Customary Law under the South African Constitution* (Juta, 1997), p. 64.
[99] See E Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge, Taylor and Francis, 2017, first publication 1936).

challenge, as several of the contributions to this edition make clear, is that we are not sure how courts should approach the phenomenon of living customary law, its adaptiveness, its disinterest in uniformity and abstraction, its lack of concern for hierarchy, without subjecting it precisely to the hierarchy and rigidity that characterises state law.

Secondly, courts need to develop a method for determining the rules of customary law they seek to apply. Given the fertile variation in living customary law, this is a problem not only of identifying authoritative sources but also of choice. Given the principle that customary law is subject to the Constitution and therefore rules or practices that are inconsistent with it must be rejected, that choice is constrained. It is noteworthy that most of the cases that have come before the courts have concerned the rights of women under customary law,[100] in which the Constitutional Court has taken care to assert the constitutional principle of gender equality and seek to apply or develop customary law rules and practices that are consistent with it.

In developing a method for determining the content of customary law, courts need to remember, as Mamdani reminds us that "[i]n pre-modern society, custom was part of community, not of political power. In the colonial modern, custom became an instrument of law; it became 'customary law'. … Custom lost its autonomy, and customary law became subordinate to civil law. … The transition from custom as socially observed to custom enforced as law – and thus a part of colonial power – became central to the stabilisation of colonialism".[101] In seeking a post-colonial and post-*apartheid* accommodation for customary law, courts need to seek ways to reinstate custom's autonomy and to recognises its roots in community practice, without sacrificing constitutional principle.

One possible approach for courts is to seek to apply "core" principles, as Nhlapo argues in this edition in relation to marriage, and thus avoid ossifying and complicating the requirements of customary marriage. Given the processual and accommodating character of customary marriage, the "light touch" approach advocated by Nhlapo might suggest an appropriate way forward.

[100] See *Bhe and Others* [2004] ZACC 17; *Gumede (born Shange)* [2008] ZACC 23; *Mayelane* [2013] ZACC 14; *Ramuhovhi* [2017] ZACC 41.
[101] Mamdani, *Citizen and Subject.* p. xiii.

But it is important to remember too that custom is the source of rights as both the *Alexkor* and *Gongqose* judgments remind us: in *Alexkor* the Constitutional Court recognised the customary transhumance rights of the Nama people to the land at the mouth of the Orange River, and in *Gongqose*, the Supreme Court of Appeal recognised the fishing rights of the communities who live in the Dwesa-Cwebe reserve in the Eastern Cape, as Bishop explains in his contribution.

As Mamdani again argues in respect of the post-colonial state, it is important to recognise that "custom needed to be understood as contradictory: rather than embrace or distance oneself from the language of custom, one needed to acknowledge the dual use of custom: as a language of privilege by those exercising and benefitting from 'customary power' and as a language calling for equal treatment, i.e., rights, when used by victims of that power".[102] This important insight reminds us that the language of custom, much as the language of the law and constitutions, may be employed by different people for different purposes. Its malleable, responsive nature means that its development is not certain, but will be produced through a process of ongoing contestation.

Overview of contributions to this edition: Traditional Leadership and Accountability

There are several contributions that address issues in relation to traditional leadership and accountability. Wicomb has written a vivid account of the process and hearings of the Baloyi Commission of Enquiry into the affairs of the Bakgatla ba Kgafela near Rustenburg in the North West province. The Bakgatla have historical rights to land situated on one of the richest platinum reefs in the world. Billions of rand appear to have been paid either to traditional leaders or to the traditional council by mining companies, but the money cannot be accounted for. Community attempts to enforce accountability have been fierce.

Wicomb describes how the courts have been approached by both sides in battles over the scope of chiefly power on the one hand, and standards of customary, constitutional, legal and financial accountability on the other. Three disputes have made their way to the Constitutional Court.[103] Kgosi Nyalala Pilane has lost each time. The most recent judgment

[102] Ibid.

[103] See *Pilane and Another v Pilane and Another* [2013] ZACC 3; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25; and *Maledu,* [2018] ZACC 41.

was the October 2018 *Maledu* appeal[104] overturning a North West High Court order which had authorized the eviction of villagers to make way for mining.

The Eastern Cape disputes described by **Janine Ubink and Thiyane Duda** focus on the appointment of headmen in what was formerly the *bantustan* of Ciskei. These have been resisted by rural people who believe that they ignored long-existing customary practices of electing village headmen. The article describes the growing pattern of Xhosa royal families appointing 'royal' headmen for Mfengu groups who had previously elected their leaders. The disputes were sparked by a provision in the 2005 Traditional Leadership and Governance Act (Eastern Cape),[105] which the provincial government argues entitles Xhosa royal families to appoint headmen in the villages. The villagers argue that the appointment of headmen must be 'according to customary law'. The villagers have won important legal victories,[106] but the Province has been slow to enforce them, resulting in a continuing stalemate.

The article by **Peter Delius** illustrates the severe consequences of disputes over succession to traditional leadership positions. He notes that these disputes often disrupt, and in some instances destroy local development initiatives. Disputes may last for generations and result in high levels of violence, with a depth of contestation partly driven by the fact that the resolution of succession disputes often results in high reward for winners. The exploitation of valuable minerals in traditional areas has raised the stakes exponentially.

Delius contrasts the handling of succession disputes in the pre-colonial period with colonial, *apartheid* and post-*apartheid* practice. He discusses the history of the Pedi in depth, describing how in the past it was political contestation that most often determined the successor, rather than the rigid application of genealogical succession rules.

The genealogical approach to succession has proved to have a compelling appeal in post-*apartheid* South Africa, especially as evidenced by decisions from the courts and the Commission on Traditional Leadership Disputes and Claims.[107] The work of the Commission

See the discussion of the first two of these cases in Claassens and Budlender, "Transformative Constitutionalism", and O'Regan, "Tradition and Modernity".

[104] *Maledu* [2018] ZACC 41.

[105] Act 4 of 2005. S 18.

[106] *Kiva v Premier of the Eastern Cape Province and five others*, case no 662/15, EC High Court, Bhisho.

[107] Established by the TLGFA of 2003.

is examined and critiqued by Delius, Wicomb, and Ubink and Duda. Delius criticizes the decisions of both the Commission and the courts for paying scant regard to the available historical records of how succession disputes were managed in the pre-colonial era, and during colonialism and apartheid.

If a new mode of traditional leadership succession is to emerge, it will probably require that Parliament introduce law that provides for community input in succession processes, and limits the role of courts and commissions in reviewing such internal processes. Delius points to the potential inherent in the practices used by rural communities to hold traditional leadership to account during apartheid. Strong participation in succession processes was one such practice, as Ubink and Duda discuss. This is borne out by the 1962 account of inkosi Albert Luthuli.

> [A]lthough four out of Groutville's seven chiefs have been Luthulis, my family has never laid claim to hereditary rights. The people of Groutville have found democratic methods effective and satisfactory. They have used these practices not only to elect chiefs, but on two occasions to replace them when their rule was felt to be not in the community's interest. This has the advantage that the tribe need never chafe against rule, the standards of rule must be reasonably high, chiefs need not fear the more traditional elimination by assassination or revolt, and the people understand the process fully.[108]

If the constitutional imperatives of recognising traditional leadership and ensuring accountability are both to be met, a new approach to resolving succession disputes is urgently required.

Another issue explored in this edition is the expansion of roles conferred upon traditional leaders. **Monica De Souza Louw** notes that Chapter 12 of the Constitution contemplates that national legislation may provide for a role for traditional leadership as an institution at local government level, although as she notes the meaning of this provision is still uncertain.[109] She outlines the TLGFA provisions regulating traditional leaders and traditional

[108] Luthuli, *Let my people* go, p. 22.

[109] See also C. Murray, "South Africa's Troubled Royalty: Traditional Leaders after Democracy", in *Law and Policy Paper 23,* (Centre for International and Public Law, Australian National University, 2004); S. Rugege, "Traditional Leadership and its Future Role in Local Governance" (2003), in *Law, Democracy and Development,*

councils and then goes on to describe a range of little known legislative provisions that regulate or confer roles on traditional authorities. In all three spheres of government (national, provincial and local), roles or responsibilities are being conferred upon traditional leaders that are governmental or administrative in character. De Souza Louw queries whether this is constitutional, and, if it is, what mechanisms of accountability exist to monitor performance.

It is this question that **Michael Mbikiwa** considers in his contribution. He observes that when government makes administrative decisions these are subject to the principles of administrative law: it must act lawfully, procedurally fairly and reasonably.[110] He considers whether traditional leaders or traditional councils performing administrative roles should also be subject to the rules of administrative justice, and concludes that they should. He argues that subjecting decisions of traditional leaders and councils to administrative review would be consistent with the constitutional framework and would foster accountability and transparency.

Overview of contributions to this edition: Customary Law and Citizenship

There are three articles in this special edition which consider customary law directly: the first concerns customary marriage and the approach of the courts to it (Nhlapo) and the other two concern positive rights to natural resources conferred by customary law. These are Bishop's contribution that describes litigation in respect of fishing rights in Dwesa-Cwebe on the Eastern Cape's Wild Coast and Fay's paper about land complaints in Bizana, circa 1940–1963.

Nhlapo's contribution outlines the disarray that has emerged as courts struggle to identify the essential requirements of customary marriage in response to numerous challenges to their validity, many initiated by men. Some of the difficulties, he notes, arise from the language of the RCMA which requires that customary marriages must have been "negotiated and entered into or celebrated in accordance with customary law".[111]

7, p. 181; L. Kohn, "The Failure of an Arranged Marriage: The Traditional Leadership/Democracy Amalgamation made worse by the draft Traditional Affairs Bill" (2014), *Southern African Public Law,* 29, pp. 347–349.
[110] The Constitution, S 33; and the Promotion of Administrative Justice Act 3 of 2000.
[111] RCMA, S 3(1)(b).

Nhlapo argues that too sharp a focus on the detailed customs associated with customary marriage has meant that courts have overlooked the processual and accommodative character of marriage in customary law. He suggests that courts should recognize two core essentials for the validity of a customary marriage: the conclusion of *lobolo* discussions between the families of the bride and groom, and the integration of the bride into the groom's family.

His suggestions propose a way that courts can both recognize and respect customary law without denying it autonomy to develop.

Bishop tells the story of three men who were charged with fishing in the Dwesa-Cwebe Nature Reserve in breach of the Marine Living Resources Act, 1998,[112] which prohibited fishing in the reserve. The three raised as a defence their customary law right to fish in the reserve, which failed in the Elliotdale Magistrates' Court, and on appeal to the High Court, but which finally succeeded before the Supreme Court of Appeal.[113] Bishop argues that the judgment has profound consequences for the status of customary law rights in the South African legal system, making plain, as does Section 211(3) of the Constitution, that customary rights may not be overridden save explicitly in legislation.

Bishop acknowledges however that difficult questions remain: how can a court determine when a person is exercising a customary law right, rather than a cultural practice? In what way can legislation override such rights? How should courts seek to resolve any tension between customary law rights and environmental protection?

Fay's contribution describes how living customary law rules and practices were cited before state judicial officers long before the adoption of the Constitution. He examines archival records of disputes over land between approximately 1940 and 1964 in Bizana district. The notes of Native Commissioners provide insight into the nature of the land claims, and the justifications made to support them. The disputes were not considered legal disputes, for they were governed by administrative land regulations.

Of particular interest is evidence of ongoing land sales and leasing or swapping of land rights that took place without the approval of headmen or officials. The complaints also illustrate

[112] Act 18 of 1998.
[113] *Gongqose* [2018] ZASCA 87.

that people held different kinds of land rights (residential and arable) across administrative districts, which confounded the administrative principle that people should belong to one or other delineated administrative unit falling under the control of specific headmen.

Fay notes that many of the 'anomalies' described in the archival records survived the restrictive administrative frameworks of the period he reviews. His ethnographic research during the late 1990s and early 2000s includes similar examples of land rights spanning various administrative areas. Both the archival evidence and his ethnographic work illustrate the decentralised vesting and control of specific areas of land rights, in stark contrast to the assumption of undifferentiated 'communal areas' controlled by traditional leaders.

Fay points to the land complaint files as one of the few places in the archives that illustrates the impact of administrative restrictions on land claims and provides countervailing accounts, "offering insights, however incomplete and ambiguous, of a set of norms, often rejected or ignored by officials but still legitimate in the view of the complainants".

Conclusion

Recent Constitutional and Supreme Court of Appeal judgments have been firm on the need to protect informal land rights, assert gender equality, and generally insist on commitment to the constitutional principles of citizenship and accountability. This has provided some balance in societal struggles for recognition of natural resource rights and accountability which have been undercut by laws such as the TLGFA and lower court judgments that hark back to stubborn continuities and precedents from the *bantustan* era.

Alongside these important judgments have been a series of reports[114] by official Commissions highlighting the scale and seriousness of land dispossession arising from disputes involving traditional leaders. These reports draw attention to how the traditional leadership laws reinforce the legacy of structural inequality and spatial apartheid inherited

[114] *Report of the Motlanthe High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change,* November 2017. Available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf. Accessed 6 October 2020; Report of the South African Human Rights Commission, *National Hearings on the Socio-economic Challenges of Mining Affected Communities, 2018*. Available at *https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf*, Accessed 6 October 2020; and The Baloyi Commission discussed by Wicomb. This volume pp. ??–??

from colonialism and apartheid. Press reports and the Zondo Commission hearings have focused on the lack of accountability and on corruption favouring elite interests in South Africa more generally. As voter disillusionment grows, politicians appear to be making efforts to be seen to more seriously address corruption, perhaps as the local government elections in 2021 come into view. Hopefully problems arising from state support for unaccountable traditional leaders will be included in this frame of reference as instances are laid bare.

We started out by describing the tension between the short chapter on traditional leaders in the Constitution and other parts of the Constitution, highlighting particularly the constitutional principles of citizenship and accountability. Ambiguity within Constitutions is not uncommon and opens the door to contestations between the state, especially parliament and the courts, and civil society actors, in this case including rural people and traditional leaders as well as mining houses.

In 1996 the Certification judgment ruled that "the Constitutional Assembly cannot be faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should [be] developed and be interpreted, to future social evolution, legislative deliberation and judicial interpretation".[115]

More than 25 years later, our legislature appears to have continued the tradition that began in 1849 of relegating rural people to rule by state-appointed traditional leaders. Legislation in this period has, however, seen strong contestation from rural people asserting both their citizenship rights and their customary identities in demanding accountability. The possible futures framed by the ambiguous provisions of the Constitution do not depend on the state's legislative agenda alone. The future also stands to be determined by ordinary people's versions, values and claims in relation to customary law, citizenship and the meaning of the Constitution.

ANINKA CLAASSENS

[115] *Certification of the Constitution of the RSA*. Para 197.

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