Protecting constitutional democratic values, traditional system and Institutions in the new South Africa

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Abstract

The recent case decided by the Constitutional Court (*Pilane and another versus Pilane and another*) has highlighted the constant clash between constitutional democratic values and the values embedded in the culture and traditions of the African people. In South Africa, the two sets of values continue to push the boundaries of each other to claim their rights before the highest Court in the land. For example, the court in the majority judgment in the *Pilane* case had to deal with the matter of a community seeking the right to self-determination (secession) from their recognised traditional authority. In terms of customary practices, the leader of a group seeking secession from a traditional authority invites ostracism from the traditional authority in violation of their constitutional right to freedom of association and right to self-determination under the South African Constitution. The case presents interesting development in our customary law system operating mainly in the rural communities where reverence to the office and leadership of the traditional leader is optimal to one where secession from a community is seriously contended. The role of traditional leaders in governance has become questionable in modern society and the undemocratic nature of the institution of traditional authority has been highlighted. The traditional institution is a social structure and so is well-positioned to drive social change, which is critical to the growth of society. In the same breath, has the use of legislation as a mechanism for affecting social change been appropriate in the South African context? This article examines recent developments with regards to governance and the role of traditional institutions in South Africa with a view to providing an understanding of a unique South African model of a "fused" legal system. Undoubtedly, since the attainment of democracy in South Africa, the recognition and role of traditional institution in deepening our democratic values

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have been somewhat incoherent. Has the traditional institutions coped with the development of the law or has the constitution provided the possible decimation of this institution? This question has become pertinent in view of the interpretation given by the Constitutional Court on matters of customary law, human rights and traditional institutions. How well is the balance being struck between constitutional values protecting the rights of individuals and the traditional institution as custodians of customary law; all subject to the constitution? On matters relating to traditional governance and constitutional rights in South Africa, Mogoeng CJ describes the traditional institution as one that is fragile and matters concerning it must be treated with sensitivity. That said, traditional institution must adapt to the constitutional imperatives, nevertheless, not in a manner that undermines the very institution that is supposed to be protected under the Constitution.

Introduction

The Constitutional Court has the mandate to promote and protect the values of equality, dignity and freedom as stipulated in the Constitution, hence, these values underlie every decision of that Court. The Constitution is the supreme law of the land and all other laws and regulation are subject to it including African customary law in terms of Section 2. According to section 211 of the Constitution, the role, status and institution of traditional leadership are recognised on the basis of the observance of customary law which is a source of law in the country. Prior to 1994, African customary law was distorted and the version that was observed and applied by the courts was not based on the living law of the people but on precedent and texts.[1] Most chiefs or traditional leaders at the time also, actively participated in creating distortions of their own law giving rise to caution and scepticism of the institution. So, the protection of customary law and the recognition accorded to traditional institutions in the 1996 Constitution were

[1] Himonga, C and Manjoo, R "What's is a Name? The Identity and Reform of Customary Law in South African Constitutional Dispensation" in Hinz, M (ed.) in Collaboration with HK Patemann Shades of New Leaves-Governance in Traditional Authority: A Southern African Perspective (2006) LIT, Centre for Applied Social Science (CASS), Namibia.

intended to transform the law and office of the these institutions. The manifestation of these changes in law and the values of equality and dignity in the South African society were what had been termed "transformative constitutionalism", a project designed to accomplish, not only 'social good', but a democratic, participatory and egalitarian society.[2]

During the apartheid era, constitutional law and administrative law were instruments used by the state to exercise its racist social engineering which today is being transformed by the Constitution.[3] The massive change desired in South Africa necessitated the need for 'living law' of the people. In other words, the customary law to be applied should reflect, not the distorted version but the law as lived in the communities. To this extent, the Constitutional Court has been at the forefront of driving this change through some of the cases it decided such as *Pilane versus Pilane and Another*. On the other hand, in the cases that have come before the Constitutional Court, Congress of Traditional Leaders of South Africa (CONTRALESA) has been very dismissive of the Court's interpretation of the customs and traditions of the people. This is evident in their view on the decision of the Court in *Shilubana.*[4] This article, therefore, deals with the recent developments regarding traditional governance particularly in light of the *Pilane* case. Has the Constitutional Court a proper understanding and appreciation of the nature of 'customary living law' particularly in instances where there are specific pieces of legislation that regulate these aspects of the lives of the people? For example, the Traditional Leadership Governance Framework Act was enacted to regulate the institution of Traditional leaders and bring it in line with the values of the Constitution.[5] This Act further recognises the different levels of leadership, with the traditional council as the operational body charged with the

[2] Klare, K "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188.
[3] Dugard, J "The South African Judiciary and International Law in the Apartheid Era" 1998, *SAJHR* 110 – 126.
[4] Ntlama, N "Stellenbosch Law Review 2013"
[5] Act 41 0f 2003.

day to day running of traditional communities.[6] The Traditional Councils have, however, witnessed chaotic situations where they have been unable to abide by the objectives of the pieces of legislation creating them.[7] This paper, therefore, examines the notion of 'customary living law' and how the Constitutional court has interpreted it in relation to customary law, traditional institution and governance. In the last twenty years, the Court has dealt with several cases that should have defined a unique South African jurisprudence in the area of customary law. In my view, the structural foundation of customary law located in the past continues to strongly influence the development of that system of law. I will argue that the Constitutional Court has made some remarkable steps towards the development of this institution, however, there are still areas of inconsistency in their approach to customary law matters. I shall argue further that neither one of the superseding nor unilateral development approaches of the Constitutional Court as seen in *Bhe* and *Mayelane* have truly embraced the notion of living law. There is, therefore, the urgent need to adopting a robust and purposive approach towards living law with a view to reflecting its nature in the development of the law. In the first place, I deal with the Constitutional agenda and how it seeks to promote social justice and societal transformation, then, African customary law is examined in the second place, as one the areas where the transformation agenda seemed to have the greatest significance because of the issues of custom and gender equality. It is imperative to discuss the 'living customary law as the basic system. This is done by exploring the various approaches of the Constitutional Court and how it has employed the notion of living law in South African case law with a view to examining its role in the development of a unique South African jurisprudence. Finally, I discuss the role of traditional institutions towards social cohesion, community stability and development in the last 20 years.

[6] Section 3 of Act 41 of 2003.
[7] Centre for Law and Society- Rural Women's Action Research Programme, "Questioning the Legal Status of Traditional Councils in South Africa, August, 2013.

2. The South African Constitutional Agenda

The historical basis for the South African constitutional agenda stems from the racial and segregationist past in which there was large scale discrimination by a white minority against the major black population of the country. The step first towards transformation was the agreement on a number of principles to guide the future of South Africa. The principles were contained in the 1993 Multi-Party Negotiations that bound all stakeholders to the ideals of a new order in South Africa. Some of the principles underlining constitutionalism were:

Principle III: "The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity;
Principle IV: The Constitution is to be the supreme law of the land, binding on all organs of state at all levels of government;
Principle VII: The Judiciary shall be appropriately qualified, independent and impartial …;
Principle IX: Provision shall be made for the freedom of information so that there can be open and accountable administration at all levels of government".[8]

It was imperative that a new order be created, one in which there is a common South African citizenship in a state that is sovereign and all men and women are equal regardless of race and shall be able to enjoy and exercise their fundamental rights and freedom. These principles gave rise to a constitutional state that came into being on 27th April 1994. This day signalled the beginning of many steps towards transformation. One of the major decisive breaks from the past came in the form of the case on death penalty; *S v Makwanyane (1995 3 SA 391 (CC), par 262)*. In this seminal case of 1995, then Justice Mohammed in a dictum aptly described the point of departure for the country when he said:

[8] Venter, F "The Need For Real Transformation", FW de Klerk Foundation, 31 January 2014.

"…The South African Constitution…retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution … What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South African, irrespective of colour, race, class, belief or sex".

The main feature of this judicial statement is the reversal of the legacy of discrimination which then introduces constitutionalism to the South African society. Constitutionalism, thus, gives expression to the desires of a nation and it is this recognition of the substantive rights and freedoms for all that make the South African transformation agenda unique. In *Du Plessis v De Klerk*[9], it was explicitly stated that "the Constitution is a document that seeks to transform the status quo ante into a new order". Also, Klare[10] succinctly captured the essence of this new order when he coined the term 'transformative constitutionalism'. He said

"By transformative constitutionalism, I mean a long term project of constitutional enactment, interpretation, and enforcement … Transformative constitutionalism connotes an enterprise of inducing large scale social change through nonviolent political processes grounded in law".

Other writers and academics have expressed opinion on the nature and extent of the transformation that the South African society needs and should undergo to ensure the future of 'all who belong to it; black and white'. Notable among them

[9] 1996 (3) SA 850 (CC), par 157.
[10] Karl Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR* 146-188 at 150

are: Albertyn & Goldblatt [11] who made the point that the kind of change envisaged "requires a complete reconstruction of state and society, including a redistribution of power and resources along egalitarian lines"; Former Chief Justice Pius Langa [12] also said that "Transformation is a social and economic revolution" and Former Chief Justice Chaskalson[13] wrote that "a commitment …to transform our society …lies at the heart of the new constitutional order" and in the case of *City of Johannesburg v Rand Properties (Pty) Ltd* [14] Jajbhay J held that:

"Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights? The full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole…"

The uniqueness of this Constitution is also shown in the manner in which it applies to the relationship between the state and the citizen (vertical) and the relationship between private persons (horizontal). The substantive rights located in the Bill of Rights thus, represent the cornerstone of the South African democracy which applies to all law, and binds all organs of state according to section 8 (1). It is this broad jurisdiction of the constitution that gave other sources of law including African customary law their legitimacy. Nelson Mandela in his foreword to a book on South African Post-Apartheid Constitution[15] said that

[11] Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 SAJHR 248
[12] Langa, P "Transformative Constitutionalism" a Prestige Lecture delivered in 2006 at Stellenbosch.
[13] In *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) par 8.
[14] 2006 6 BCLR 728 (W) par 51-52.
[15] Foreword by Nelson Mandela in Andrews, P and Ellmann, S The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law (2001) Witwatersrand University Press.

"The constitution of South Africa speaks of both the past and the future. On one hand, it is a solemn pact in which we, as South Africans, declare to one another that we shall never permit a repetition of our racist, brutal and repressive past. But it is more than that. It is also a charter for the transformation of our country into one which is truly shared by all its people- a country which in the fullest sense belongs to all of us, black and white, women and men".

2. African Customary law and transformative constitutionalism

The African customary law which governs the majority of Africans was also part of the overall transformative legal project that commenced in 1994. Prior to 1994, African customary law that was applied in South Africa was based on a version that served mostly the intention of the colonisers. The law for the majority of the people had to be interpreted and applied from the perspective of British and Roman-Dutch legal principles. The law became mostly vitrified and fossilized with little consideration for the actual or living law of the people. Mokogoro, J in *Du Plessis v De Klerk* [16]aptly described it as a system that was detached from its roots. Since 1994, African customary law has been undergoing a transformation particularly in the area of customary marriage, inheritance and in the recognition of the institution of traditional leadership and their role in post-apartheid South Africa. In the first instance, the constitution recognises the right to culture and being a member of a cultural community in terms of section 30 and 31. In other words, persons who are living by the system of African customs and tradition have the right to do so, albeit in a manner that is consistent with the provisions in the Bill of Rights. Furthermore, chapter 12 signified a new order in which customary law should be applied in the country. For example, section 211 provided that:

(1) The institution, status and role of traditional leadership, according to *customary law, are recognised, subject to the Constitution*;

[16] 1996 (3) SA 850 (CC).

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of that legislation or those customs;

(3) The *Courts must apply customary law when that law is applicable, subject to the Constitution* and any legislation that specifically deals with customary law (emphasis mine).

The constitution in this instance not only recognised the system of law of the majority of the African people but also empowers the Courts to apply same, only subject to the Constitution. The Constitutional Court became, thus, the final arbiter on matters of constitutional nature and the apex court in the land mandated to give effect to the rights in the constitution in terms of section 167 (3) (a). One of the main guiding forces for the Constitutional Court is its obligation to interpret the law as an instrument to bring about transformation in society. To this extent, the Court hoped to transform the South African society into a just and equitable one by applying constitutional values of human dignity, equality and freedom, to discriminatory traditional customs. The constitution also places an obligation on the courts "to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law". [17] In carrying out this mandate, the Constitutional Court has adopted several approaches in dealing with customary law matters.

The Notion of Living Law in South African Constitutional Dispensation

By having a transformative constitution, it is implied that the reasoning of the Court must reflect this understanding. Transformative adjudicatory approach means therefore the critical engagement of the Constitutional Court in giving effect to the values of the Constitution with sole purpose of bringing about a

[17] Section 39 (2) of the Constitution.

paradigm shift in the society. In relation to the South African context, it is important to first, critically examine the notion of living customary law.

What is Living Customary Law?

Living customary law is used to depict the practices and customs of the people in their day-to-day lives.[18] It is primarily based on the world view of the people which is largely influenced by the political, social and economic conditions of their lives. For example, marriage in an African community as a customary practice takes place with lots of giving on the part of the groom and the family of the bride including cash and gifts for the hand of the intended bride. Specific names given to this process where the intended bridegroom gives these gifts is commonly referred to as *lobolo, ime-ego, and bohadi*.[19] The nature of these gifts have changed over the years; from cows to cash, bales of cloth or food stuff. This exchange distinguishes the relationship from any other kind recognised or known in the community. The entire process must be concluded with the sending of the bride to her new home. Basically, the people own the law and so, living law is not state-centric which presents occasion for the evolution of legal principles within African law.[20] Grounded in legal theoretical frameworks of sociology of law[21] and legal anthropology,[22] living law is considered as rules that govern the conduct of people and these rules derive their force from the social associations within which, people live their lives such as the family, ethnic group, religious affiliation and the state. The general characteristics of living law is that it is loose and flexible making it challenging in ascertaining its exact content. In the South African context, however, the imperative of section 39 (2) remains a

[18] Himonga, C and Bosch, C "The Application of African Customary Law under the Constitution of South Africa: Problems solved or Just Beginning? 117 2000 SALJ 306-341 at 319.
[19] The languages used in describing bride-wealth come from Zulu and Sesotho in South Africa (*lobolo* and *bohadi*) and Igbo tribe in Nigeria (*ime-ego*).
[20] Juma, L "From "Repugnancy" to "Bill of Rights": African Customary Law and Human Rights in Lesotho and South Africa" 2007 (1) Speculum Juris 88-112 at 111.
[21] Ehrlich, E Fundamental principles of the Sociology of Law (1936).
[22] Falk Moore, S Law as a Process: An Anthropological Approach (1978).

guiding principle since it requires that in developing customary, the court must consider the spirit, purport and object of the Bill of Rights .

Approaches and Reasoning of the Courts to the notion of 'Living Law'

This notion of 'living law' was first employed by the Supreme Court of Appeal (SCA) case of *Mthembu v Letsela*[23] dealing with the right of an illegitimate child to inherit from her deceased father's estate. The language employed by the court in this particular instance was *boni mores* of society which implied the ethos of tolerance, pluralism and religious freedom that were already established values of the community before the formal adoption of the 1993 Interim Constitution. It is important to note that although, in this case, the SCA refused to strike down a statutory regulation on grounds of public policy, it had great support for them because they underline the fundamental assumptions of the community, and still yet, public policy could not sway its decision to invalidate a regulation. In other words, what the community believes to be unconscionable has great relevance in determining the issues before the court. Interestingly, the term public policy as used in South African law and to which the court referred was an 'embodiment of the sentiments of the small, dominant, white population in the country'.[24] For example, in the context of marriage, public policy was defined in terms of civil law which viewed monogamous marriages as the only acceptable form of marriage. Marriages contracted under any other form were deemed to be polygamous and so, undermined the known status of marriage.[25]

In this Constitutional dispensation, therefore, 'living law' became the new way of conceptualising customary law. In fact, it can no longer be tested against the views of the judge as in *Mthembu* but rather, in terms of the views and practices of the people as well as how they regard the rights and duties that apply to them.

[23] 2000 (3) SA 867-885 at para 38.
[24] Himonga, C and Bosch, C "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning? 117 2000 SALJ 306-341 at 308.
[25] This was the view of the Appellate Division in *Ismail v Ismail* 1983 (1) SA 1006 (A).

The approach of the court is insightful in understanding how living customary law is being currently applied. For example in the *Bhe* case, the Constitutional Court in the majority judgment took the approach of superseding customary rule of primogeniture with common law rules. In this case, the customary rule of primogeniture was found to be inconsistent with the constitutional value of equality and the majority judgment per Langa DCJ held that development of customary law was a slow process.[26] In order to remedy the position of vulnerable group of the society who had been denied so much, it declared invalid the customary rule of primogeniture. Since invalidating this rule would create a lacuna in law, the majority opted to replace the customary living law with rules of common law.

This approach of the Constitutional Court was quite significant because the case was viewed as a landmark decision in many circles of the South African society but it was also unfortunate that the notion of living law was not given much relevance. Even though the majority showed some form of understanding of the concept, it however, held that its ascertainment stood as an impediment to its use. Langa DCJ said:

"…The Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and materials to enable the court to do this. *The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from the official customary law, but in determining its content and testing it,* as the court should, against the provisions of the Bill of Rights"…[27] (emphasis mine)

[26] *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC).
[27] In *Bhe and Others v Magistrate, Khayelitsha and Others* at para 109.

It is obvious from the above that although the notion of living law had begun to gain traction with the Constitutional Court, it is nevertheless, a concept that they have huge reservations for its use. For example, Langa, DCJ conceded that:

"the evolving nature of indigenous law and the fact that it is unwritten have resulted in difficulty in ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law"…[28]

Evidently, mere recognition of the notion of living law in this case did not do much in expounding the contours of its application, however, the minority judgment of Ngcobo, J, provided some form of guidance on how judge-based decision should reflect the living law. A key point that could be deduced from the approach of the majority judgment is that the development of customary law is intricately linked to the acceptance of the notion of living law.

The Constitutional Court in the majority judgment in *Mayelane*, approached the notion of living customary law from an entirely different perspective. For example, it went to great lengths to ascertain what the living law of the Xitsonga were in relation to polygynous marriages. One of the contributions made in *Mayelane* relates to methods by which living customary law can be ascertained. Froneman, J in writing for the majority was clear that it cannot solely rely on the word of the applicant for the determination of the living law of the Xitsonga people. So, the court made a directive requiring evidences on the true nature of consent to the subsequent marriage of a Xitsonga man, from a wide range of community members.[29] This approach in my view to ascertaining living customary was indicative of an understanding of the character of living law as law that is largely unwritten. The Court, however, decided on a path of unilateral development of the living law of the people without any input from them, which in my view, goes

[28] *Bhe* para 159.
[29] *Mayelane v Ngwenyama* SA 2013.

against all the values of a constitutional democracy. This approach is what has been referred to as 'Roman-Dutching' of African customary law.[30] Another aspect that tends to further complicate matters in proper understanding and application of the notion of living customary law is the application of specific legislation that governs aspects of customary law. For instance, in the *Mayelane* case, the application of Recognition Customary Marriages Act resulted in the prejudice of the second wife despite the constitutional protection of equality as well as the notion of substantive equality in our law.

In the case of *Pilane and Another versus Pilane and Another* [31] where constitutional, statutory and customary scheme have been used in a matter concerning traditional leadership, it was also confirmed that:

"…the true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs".[32]

Although historically, customary law had been distorted and subverted in its application, the import of the constitution is aimed to reverse this trend and to facilitate its preservation and evolution as a system of law that conforms with the provisions of the constitution. So, in the above-mentioned case that came before the High Court sitting in Mahikeng, North West, Landman J granted three interdicts against the applicants. In terms of the interdict, the applicants were restrained from convening any unauthorised meeting purporting to have leadership authority; they were to desist from acting in a manner contrary to applicable statutory (Traditional Leadership Governance Act & North West Act)

[30] Himonga, C and Manjoo, R in Manfred Hinz (ed.) in collaboration with Patemann, HK (2006) CASS.
[31] 2013 ZACC 3.
[32] *Pilane* case, para 34, *Bhe* case, para 87 and 90.

and customary law, holding themselves out as community leaders by using specific names and titles.

At the Constitutional Court, the question for determination was the appropriateness of these interdicts. The applicants; Mmuthi Kgosietsile Pilane and Ramoshibidu Reuben Dintwe are residents of Motlhabe village, one of the 32 villages making up the Bakgatla-Ba-Kgafela Traditional Community of the Pilanesberg area of the North West. They have been dissatisfied with the governance and administration of their village by the designated leaders for a number of years and so, sought to secede from the Motlhabe Village. The applicants are not recognised as traditional leaders neither by the Premier of the Province nor in terms of sections 2 (1)-(2) and 11 of the Traditional Leadership and Governance Framework Act (Framework Act), read with sections 3 and 13 of the North West Traditional Leadership Governance Act (North West Act). It must also be stated that the villagers of the Motlhabe are not recognised as a traditional community distinct from the Bakgatla-Ba-Kgafela Traditional Community. On the other hand, the respondent, Nyalala John Molefe Pilane is recognised as the *Kgosi* of the traditional Community and so is the officially recognised leader of the Bakgatla-Ba-Kgafela Traditional Community together with the Traditional Council of the Traditional Community (Traditional Council).

The dissatisfaction of the applicants in the governance and administration of their village stems from the alleged misallocation of resources in which they describe their village as being poor and under-developed despite being a platinum producing area of the country and also having a stake in the Sun City Luxury Hotel.[33] The High Court granted the interdict on which, the applicants contended that the High Court incorrectly granted the final interdict and grossly limited their rights of freedom of expression, freedom of assembly and freedom

[33] *Pilane* case para 6.

of association.[34] The applicants further contended that the interdict was fundamentally flawed in three ways:

(1) The respondents could not sustain the fact alleged in their founding affidavit that by utilising the term 'Motlhabe Tribal Authority, the applicants held themselves out to have possessed statutory powers which they did not have;

(2) The Court's reasoning is based on a false premise that the applicants were empowered by statute, when in fact there is no statutory body known as 'Tribal Authority' under the law and there is no evidence that the applicants sought to perform any function of any legally recognised body;

(3) The High Court interdicted actions that they had already held were permissible under the law based on evidence. This is because as a community, they were entitled in law to meet and discuss their desired independence.

The respondents in this case submitted that they were the only recognised traditional leadership structure entitled to convene a community meeting of the kind sought by the applicants. This case raises critical issues of the democratisation of traditional institutions and their role in a democratic South Africa. In the first instance, the majority judgment in the Constitutional Court dealt with issues of freedom of expression, assembly and association on the basis of the interdicts granted by the High Court and secondly, if any there had been any violation of a clear right in which a remedy is necessary. The minority judgment on their part, held that traditional institutions in South African democratic dispensation is under threat of being emasculated. It is, therefore, important that the institution is not exposed to veiled threat in the form of call for secession. It is, however, the constitutional issues arising from the

[34] *Pilane* case para 16.

circumstances of this case that demands an assessment of the role of traditional institution.

The Role of Traditional Institutions in a Constitutional Democratic Dispensation

One of the core elements of a democratic society entails the protection of freedom of expression and freedom of association which is underpinned by the right to self-determination. In South Africa, the Bill of Rights laid the foundation for all the fundamental rights and freedom in the constitution; section 16 specifically provides for the freedom of expression and section 18 protects the freedom of association. These rights are critical to the socio-economic development sought by the members of the Motlhabe community. The members of this community desired to assert their right to determine who their leaders should be and how they should be governed in a democratic society. This move is not widely known under customary law hence the need to examine the relevance of traditional institution 20 years into the South African constitutional democracy. For a proper analysis, it is pertinent to examine where we are coming from as a society.

Historical Background

The apartheid era system of governance for the majority of South Africans comprising mainly black Africans was based on what was termed 'separate homeland development'. In simple terms, this form of governance meant that people were separated in terms of language and culture of their ethnic groupings.[35] It was the view of the government at the time that socio-economic development and political development of the people would be best achieved where they live in their own enclave. This was a system of indirect rule based on the notion of 'divide and conquer' of first, British colonisers. Then, the apartheid

[35] Khunou, SF "Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid" PER 12 4 (2009) 3.

government under President Hendrik Verwoerd introduced the Bantustan homelands of Transkei, Ciskei, Bophuthatswana, and Venda under the promotion of Black Self-Government Act 46 of 1959. The purpose of this Act was to promote gradual development of self-governing black units having direct consultation between the units and the union of South Africa particularly in matters affecting the interests of the units. Many traditional leaders fell prey to the destructive pattern of this form of governance because they were assigned powers, functions and duties that made them accountable to the central government rather than to their own people. The racial dimension of the separate development policy was strengthened when four out of the ten Bantustan homelands were granted independence from South Africa. In effect, the black population in their ethnic groupings in terms of language and culture became foreigners in their own country.[36] The implication of this was that a great majority of the traditional leaders were given authority that emasculated the communitarian form of governance that operated amongst African communities. As independent nations, these homelands were able to pass pieces of legislation that empowered them to make policies for their citizens with permission from the South African government. In others words, the central government still maintained control of these so-called 'independent territories'.

The independence of some of these homelands created hostility amongst traditional leaders in the homelands. For example, the South African government declared Matanzima a Chief, after he arrested the paramount chief of the Tembu and deposed him from his position because of his anti-independence stance.[37] Many of these 'puppet' creations of the central government of South Africa were largely responsible for destabilisation of the communities, resulting in some seeking to secede from their territories. For example, Chief Lebone of the Bafokeng community in the Rustenburg area defied the leadership of Chief

[36] Note 35 at 4.
[37]Khunou note 35 at 5.

Mangope to hoist the Bophuthatswana flag at the local tribal offices. Lebone was stripped off his office and sent into exile whilst his younger brother became the paramount chief of the Bafokeng traditional community. One of the pieces of legislation utilised by Mangope to exert his authoritarian rule of his community was based on the Bophuthatswana Traditional Authorities Act 23 of 1978. The Act empowered him to appoint, recognise and depose traditional leaders.

Basically, the system of governance previously known to the black community was fundamentally changed to serve merely the purposes of the corrupt African traditional leaders and the South African government. The entire traditional leaders and their institutions were destroyed which left majority of the African people greatly disillusioned in the governance of these 'puppet' leaders. In Bophuthatswana, the Bafokeng community sought to secede as well as some Kwandebele communities near Hammanskraal.

In the 1990's, change gradually began to emerge within the traditional institutions as the legitimacy, powers and authorities of the traditional leaders came under scrutiny. For example, one of the earlier cases that came before the court concerned the Ba-kgatla-Kgafela community in the Saulspoort area with its headquarters in Moruleng, the same group as in the *Pilane* case that is being threatened with secession by the Motlhabe community. It is apparent that the current case has a long history of leadership crisis with a group seeking to secede. It is also clear that the right to secede from the greater Ba-Kgatla-Kgafela community has always been an acceptable practice before the final constitution came into being in 1996. It is significant to note that the Ba-kgatla-Kgafela community retained its governance structures both in South Africa and Botswana. Under the South African constitutional dispensation, the right to secede became yet again a matter that had come to be determined by the Constitutional Court as noted in the *Pilane* case.

Traditional Leadership and Institution in democratic South Africa

The constitution as already indicated provides for the recognition and role of traditional leaders and community practising customary in terms of section 211 and section 212. According to the provisions of section 211:

(1) "The institution, status and role of traditional leadership according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

These provisions are significant because they unequivocally recognise and place traditional institutions, its leaders and their system of law within the purview of the constitution. This is a critical step towards transforming a system of law, and its institution that were previously distorted by the apartheid racial regime. Furthermore, section 212 (1) & (2) provides that:

"National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities";

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

The above provisions confirm the widely accepted view that traditional leaders are important at the local level because they at the interface between the government and the people. Clearly, in recognition of this unique position, the transformative agenda of the Constitution in this area in particular is intended to restore the dignity of those institutions that define majority of South Africans. To this extent, the institution is enabled by the Constitution through legislation to provide for council of traditional leaders. One of the

relevant pieces of legislation is the 'Traditional Leadership and Governance Framework Act' (Framework Act) 41 of 2003. As a national framework, this Act is intended to regulate traditional institutions at the national level whilst at the provincial level, each province is mandated to enact their own provincial framework Act.

Since the enactment of the Framework Act, it has been established that the traditional institutions are democratising particularly in the area of gender equality. For example, the Framework Act stipulates that women are to make up 30 per cent of the traditional leaders.[38] Thus far, the attitude towards women as chiefs and headwomen has significantly changed. It is now more readily acceptable for women to even succeed to thrones. This was noted in the *Shilubana* case where it was recognised by the Valoyi Tribal Council that the daughter of late Chief Fofoza should be rightfully installed as the *hosi*. The decision of the Valoyi Tribal Council was based on the recognition of the gender equality and anti-discrimination clauses in the Constitution. It must therefore, be acknowledged that, in the last 20 years, South Africa has made remarkable strides in changing the perceived and actual perceptions on the institution of traditional leaders. It must also be acknowledged, however, that despite the strides made, there remains a great deal of serious contentions to which I will now turn.

Contentions and Challenges to the Traditional Institutions

The Constitution has created the opportunity for the democratisation of traditional leaders and their institutions. There are, however, serious contentions on a number of issues such as legitimacy crises and undemocratic governance. These two areas are interrelated because they depict echoes from the past that seek to undermine the democratic values

[38] Phatekile Holomisa "Balancing Law and Tradition: The TCB and its Relation to African Systems of Justice Administration" 2011 35 SA Crime Quarterly 19.

and the transformative agenda of the constitution. As already stated, the Constitution recognises the roles of traditional leaders and their institutions but fixed border controls in exercise of the leadership of the communities, pre-1994 have been embroiled in leadership claims and disputes. To ensure the protection of this valuable institution, the then president constituted a Commission generally referred to as the Nhlapo Commission to deal with the leadership disputes.

One of the earlier disputes involve the Bapo ba Mogale in the North West Province, of illegitimate leadership, which dates back to many decades ago. The Royal family of this clan has been in disarray as a result of the appointment of Edward Mogale by the then President of Bophuthatswana, Lucas Mangope. This appointment is being refuted by Julius Mogale, the headman of the Legalaope clan to be illegitimate because Edward ruled the Bapo people autocratically, rather than a leader who is subject to his people and he is also being accused of maladministration.[39] This leadership dispute has created a situation of uneasiness around the legitimacy of traditional leaders in a democratic South Africa. Another leadership legitimate crisis involved the ruling houses of the AmaMpondo aseQaukeni in the Eastern Cape. In the case of *Sigcau v President, Republic of South Africa* 2013 ZACC, the Constitutional Court held that the accession of Zanozuko Sigcau was invalid as a result the incorrect procedure followed by the President in giving effect to the findings of the Commission on Traditional Leadership Dispute and Claims.[40] The basis for the invalidity is based on the application of the Framework Act of 2003 and the coming into effect of the amended 2009 version of the Act. The procedure taken by the President in terms of the old

[39] Andisiwe Makinana "Bapo Leadership spat Historical" 14 – 20 September 2012, Mail and Guardian Newspaper 21.
[40] Wilmien Wicomb and Monica de Souza "An Urgent rethink on customary law is Needed" 21 June 2013 Mail & Guardian Newspaper 2.

act was materially different from the new act upon which he made the announcement for the kingship of the amaMpondo.

This is an indication of the limit of the law in addressing critical issues of African customary law. The inconsistencies resulting from the use of legislation to regulate issues arising from customary law system, in my view, does not sufficiently contribute to its development as envisaged by the constitution. The balance to be struck between the transformational agenda of the constitution and African customary law remains very fragile because of the deep contestations that surrounds many traditional leaders and their position at the time of the transition.[41] Many of these contestations have been brought to court by affected parties, but the extent of the longstanding feud depicts the challenges faced by traditional institution in fused system such as found in South Africa. For example, the case of the leadership of the Bakgatla-Ba-Kgafela communities in the Pilanesburg area of the North West Province could be traced back almost 20 years ago. In the case involving Chief Pilane and Chief Linchwe, the matter of how the leader of the communities was appointed by the then Bophuthatswana President, Lucas Mangope was in question. In that case, in relation to the desire to appoint their own leaders, it was said then that "if the tribe at Saulspoort wished to secede, and become separate, no one would stop them".[42] The court held that Chief Nyalala Pilane was overwhelmingly acceptable to the communities as their leader and that the former ex-president Mangope duly followed the custom and practices of the people in making the appointment.

It is absolutely significant that the same desire to secede and who is the legitimate leader of the Motlhabe community within the Bakgatla- Ba – Kgafela remains highly contested. In the case of *Mmuthi Kgosietsile Pilane*

[41] Note 6 at 1.
[42] *Chief Pilane v Chief Linchw*e 1995 (4) SA 686 at 689J.

and Ramoshibudi Reuben Ditnwe v Nyalala John Molefe Pilane & the Traditional Council of the Bakgatla-Ba Kgafela Traditional Community, the Constitutional court heard how the applicants in a letter addressed to the traditional council on 20 July 2009, advised them that " the Bakgatla- Ba-Kautlwale Pilane Motlhabe Tribal Authority" had resolved that they were an "independent tribe" and would, effective from 1 July 2009, no longer fall under the jurisdiction of the traditional council". It was this correspondence that prompted urgent application by the respondents interdicting the actions of the applicants.

The case of *Pilane* was insightful on how the constitutional court addressed these various contentions by protecting human rights which is the bedrock of the new South African dispensation. In the first instance, the Constitutional Court reiterated that in a democratic society, right to self-determination is essential to the development of the community. The Constitution in section 235 provides that:

"The right of the South African people as a whole to self-determination, as manifested in this constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common culture and language heritage, within a territorial entity in the Republic"…

The majority decision in the *Pilane* case was therefore clear on the necessity to allow communities to voice their opinions and dissatisfaction with the manner in which they are governed by the traditional leaders. In other words, the court affirmed that legitimacy of traditional leaders rests with the people and in a society such as this one, right to dissent should be protected.

Secondly, it was clear that the rights of freedom of expression, association and assembly of the Motlhabe community were crucial to their achieving their development objectives as a community given that they are hugely endowed with mining and hospitality industries.[43] So, the inability of the *kgosana* or the *kgosi* to convene a meeting to discuss the numerous allegations of maladministration and legitimacy crisis supports the view that the institutions are undemocratic.[44] Furthermore, quite a number of these traditional leaders are undemocratically elected giving rise to unaccountable leaders who are autocratic and abuse their position.[45] Undoubtedly, this situation raises concern and indeed casts doubt on whether the people have sufficient agency to influence the political process. The manner in which the political processes of this institution operate underpins the critical question of their relevance in a democratic South Africa. To briefly examine this issue, it is necessary to acknowledge global, regional and national influences on the political values of the South African democracy. In the first place, the history of apartheid and colonialism played a huge role on how traditional leadership within the society was valued. Holomisa and Sango[46] aptly described the position when they said that:

"…the advent of colonialism in Africa destroyed the social fabric and the political system of the continent's customs. Customs and traditions that were the basis and source of law were either nullified as being *contra boni mores*

[43] The North West Province of South Africa is well-known for its mining in Platinum, and the luxury Sun City Casino.
[44] De Vos, P "Democracy v Traditional Institution: the delicate ballet" 2013 Daily Maverick (on file with the author).
[45] In *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 3 SA 1095 (Tks), the court dealt with the conduct of the traditional leaders who 'sold' their land in the environmentally protected coastal zone of the Wild Coast of South Africa at a nominal price of R200 and a bottle of brandy. Meer, T & Campbell, C "Traditional Leadership in Democratic South Africa" April 2007 at 9 (On file with the author).
[46] Holomisa, P and Sango, "Democratization of the Institution of Traditional Leaders" June 2001 in a Workshop for Political Leaders in the Democracy, Development Programme.

or distorted in their interpretation to the extent that they were regarded as reactionary and in the contravention of human rights…"

The post-apartheid traditional governance structures are however, still defined by the colonial and apartheid systems that destroyed its nature as already indicated in the cases cited in this article. Furthermore, Phatekile Holomisa, Chairman of CONTRALESA and also an ANC Member of Parliament stated that traditional leaders were 'insulted' because the final constitution did not specify the courts of traditional leaders as part of the court structure but rather, relegated them to the description of 'other courts' in the constitution.[47] In his view, such omission denigrates the authentic African value system. He reiterated the view in the wake of the criticisms following the enactment of the Traditional Courts Bill (TCB) that, compared to western-styled courts, the courts of traditional leaders are genuine, accessible and directed towards the rehabilitation of the offender and harmony within the community. According to him, democratising and modernising the institution of traditional leadership devalues the system and consistently depict it as an inferior system of law. Notwithstanding this, about 80 per cent of people living in the rural areas still support and acknowledge the relevance of traditional leaders.[48] The recognition and respect that traditional leaders continues to enjoy suggests that they maintain some measure of relevance in society. It is also pertinent to acknowledge that traditional leadership is the most important feature of traditional communities particularly with regard to society organisation. The position of these leaders at the grassroot level remains an avenue for public relations both for the community and the politicians that utilise their popularity with the people.

[47] Phatekile Holomisa "Balancing Law and Tradition: The TCB and its relation to African System of Justice Administration" 2011 SA Crime Quarterly, 35 17-22.
[48] Oomen, B "Walking in the Middle of the Road: Peoples' perspectives on the Legitimacy of Traditional Leadership in Sekhukhune, Limpopo Province" (2002) presented at a seminar on Popular Perspectives on Traditional Authority in South Africa, African Studies Centre, Leiden

One of the major areas of concern regarding the relevance of traditional leadership in a democratic society stems largely from the centrality of power in the leader. The way in which political authority is structured in this institution suggests that it is a system that restrains opposition and is despotic in character. This feature of the traditional institution implies therefore, a system that is fundamentally opposed to democratic governance which could potentially have a destabilizing effect on the entire system of governance. The disparaging remarks and difference of opinions in two incidents evidently proves this view when Holomisa, Chairman of Congress of Traditional Leaders in South Africa (CONTRALESA) said regarding to the right to sexual orientation in the constitution that "if you accept being gay, you might as well accept people having sex with their relatives or animals for that matter…". The other incident involved two cabinet Ministers; Jeff Radebe (Department of Justice and Constitutional Development and Lulu Xingwana (Women, Children and Persons with Disabilities) in the aftermath of the huge outcry against the Traditional Court Bill as a piece of legislation modelled in apartheid era notion of governance.

Clearly, for these reasons, the compatibility of traditional leadership in democratic South Africa remains a contested arena. Despite this divergence in political structure and process, several people have viewed these differences as a misunderstanding of the system. For example, Digby koyana [49] succinctly described the chief's court as very critical to the promotion of access to justice in the country. This is because in the Eastern Cape, the chief's court deals with close to 300 cases as opposed to the few cases per month at the Magistrate Court. Also, in relation to the political

[49] Koyana, DS "The Role of Traditional Courts in a Democratic South Africa" in Fenrich, Gallizi & Higgins (Eds.) The Future of African Customary Law (2012) Cambridge University Press.

decision-making process, Holomisa[50], clearly described the African Traditional System where Chief and his Council in conjunction with the people are part and parcel of the governing structure. According to him, laws are made with the participation of every citizen at a gathering (imbizo) and even in deciding criminal and civil cases, people actively participate as cross-examiners. In other words, everyone has opportunity to deliberate on matters affecting their communities.

It is clear from the above that the traditional institutions have a role to play in a democratic South Africa. I am of the view that in a number of areas where there are convergence with democratic institutions have not been properly explored, and given prominence in order to capture the essence of traditional institution for the country as a whole. Furthermore, the only process known to government in South Africa is to regulate and in the process, organs of government create a conundrum that complicates matters. It is not that regulation is improper but in most cases, the provisions sustain boundaries set during colonisation and apartheid and the application of these pieces of legislation is out of sync with the living customary law.

It has been shown to be the case in Traditional Leadership and Governance Framework Act, Traditional Court Bill, Communal Land Rights Act and even in the Recognition of Customary Marriages Act. In some cases where the living law is acknowledged and considered, the courts make decisions that affect a large number of people with consequences that were not envisaged in the legislation. It is my view that we must begin to recognise the limits of law in certain areas particularly in regulating personal conduct as the pieces of legislation tend to do in a number of cases. Also, there seems to be a consistent misunderstanding of the nature of customary living law, even

[50] Holomisa, P "Balancing Law and Tradition: The TCB and its relation to African Systems of Justice Administration" 2011 35 SA Crime Quarterly 20.

where the courts are acutely aware of the notion. It is my view that the courts have not yet understood the nature of living customary law and how its different dimensions could be applied in a multi-cultural society like South Africa. It is only when issues of African culture are viewed against the progressive nature of its rule and practices that we might begin to appreciate the values of the African traditional system.

Conclusion

The Constitution of South Africa protects both liberal and traditional values. It is therefore, absolutely important to appreciate the opportunity created by fusing together two fundamentally opposed institutions. The notion of 'living law' has gained traction in the Constitutional Court as already indicated from several cases that have come before it. It is now time to truly capture the essence of this system of law by having regard to the nature of our diversity. Replacement of rules of customary law or imposition with common law rules must now be done away with, and another mechanism devised. The approach to be utilised must involve a proper assessment of the nature of the customary practice with a view to drawing out its content for proper application. Furthermore, it is not enough to merely recognise the roles of traditional leaders without specific portfolio for their contribution to political, social and cultural development. It is clear that the support base of traditional leaders has not waned rather it is strengthened because of its relevance to the rural communities. This is a useful tool that should stimulate public participation in political affairs, strengthen social mobilisation and prevent the myriad of social ills that plague the South African society. The dictatorial tendencies of many traditional leaders can be addressed thorough public education on constitution and human rights. All levels of leadership must share common values in order to create a sustainable, transparent, democratic and uniquely fused society.

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