DRAFT

Whose custom is it anyway? The rise of traditional leaders and the fall of living customary law in twenty years of South Africa's democracy

1. Introduction

The adoption of the Constitution in South Africa marked the first time that indigenous customary law was recognised as a source of law equal to its common law and even statutory law counterparts. While this recognition is implicit in a number of sections of chapters two and twelve of the Constitution, it was the Constitutional Court's jurisprudence in the 2000s that placed such recognition beyond doubt.

Ironically, the same decade saw the executive and legislative spheres of the South African government entrench an understanding of the constitutional recognition of custom with a completely different emphasis, namely the recognition of traditional leaders. While this emphasis on one aspect of customary law – governance or the locus of power – may seem justified given the attention the Constitution itself affords traditional leadership, it is the complete disregard for the recognition of the customary law system that underlies traditional leadership that is problematic – and, I would argue, not constitutionally tenable. This is even more so given that the Constitutional Court's jurisprudence emphasises the implications of customary law for the ordinary people who abide by it.

This paper investigates the significant discrepancy between the development of the Court's jurisprudence on customary law as the law of the community and Parliament's increasing insistence on entrenching traditional leadership as the sole aspect of customary law deserving of recognition. This is far more than a game of semantics. Instead, it continues to reduce members of traditional communities to the second class citizens that they were under apartheid, but now with a constitutional veneer.

As a litigator, I am interested in tracing the actual development of these two paths as they unfolded in parallel in the judiciary on the one hand, and in parliament and the executive on the other over the last two decades – thereby attempting to trace the impact of litigation, of submissions to parliament and of those interventions at the executive level of which we can just speculate.

But why do these questions of customary law matter? I was recently approached by a village committee in the North West province who desired to take steps to neutralise their corrupt and uncooperative headman. They requested that I write to the senior traditional leader and the Premier on their behalf, indicating that they have decided to rather elect a democratic structure to represent the village at the level of the traditional community. I had to explain to them that, regrettably, despite the Constitution and twenty years of democracy, what they wished to do was not possible within the current legislative framework. If you are within the boundary of a traditional community, under the jurisdiction of a traditional leader, you cannot opt out of its jurisdiction. You cannot choose to govern yourselves democratically. You are, literally, stuck.

An estimated 21 million South Africans live within the boundaries of 'traditional communities'. The effect of the current legislative framework is that traditional leaders have almost unfettered power to make, enforce and adjudicate law within those communities. Moreover, one of the great ironies of apartheid South Africa is that vast areas of the homeland territories turned out to be rich with resources. A couple of South African chiefs, for example, are sitting on top of 70% of the world's platinum wealth. To be recognised as the leader of a traditional community is thus to be the one to decide over – and benefit from - the fate of your community's resources. The stakes are very high.

2. Customary law and traditional leadership prior to the Constitution

Before tackling the evolution of the customary law discourse under the Constitution, however, a brief note on the status of customary law and traditional leadership prior to democracy is in order.

Pre-constitutionally, customary law was understood, on the one hand, as a bunch of rules applicable within the boundaries of 'tribes' with little or no application outside those boundaries. In that sense, customary law was relegated to a separate and inferior system of rules that could not give rise to rights, either individually or collectively, in the formal legal system. On the other hand, customary rules did have some very limited application in the 'real world' as an accessory to the common law. In this context, customary law itself was not recognised as a system of law, but customary rules were recognised where appropriate as rules functioning in isolation. As such, these rules had to be proven as 'certain' and 'universally observed' in order to have any force, as no force was derived from the system of customary law at the time.

Where gaps existed in the law, it was thus possible to give legal force to a 'customary rule' by proving that a particular rule had existed 'since time immemorial' and was uniformly observed by all. This test was based on the test for proving customary international law and, as such, was an instance of common law classifications rather than of customary law.

Van der Westhuizen J dealt with the pre-constitutional test in *Shilubana*:

The classical test for the existence of custom as a source of law is that set out in Van Breda v Jacobs, in which it was held that to be recognised as law, a practice must be certain, uniformly observed for a long period of time and reasonable. […] The appropriateness of this test to determine the existence of a norm of indigenous customary law must be examined. […]Van Breda dealt with proving custom as a source of law. It envisaged custom as an immemorial practice that could be regarded as filling in normative gaps in the common law. In that sense, custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory. Its continued validity is rooted in and depends on its unbroken antiquity […] Change annihilates it.

In contrast, and as we will see below, customary law under the Constitution is understood as a system of 'living' law that is by its very nature both changing and flexible in application.

While customary law was relegated to apply within the boundaries of 'tribes' only, that did not mean that they were safe from the interference of the colonial and apartheid government. On the contrary, these customary rules were interpreted and adapted by first the colonial and then the

apartheid powers to facilitate the project of indirect rule – and eventually mass forced removals. Essential to these projects was to ensure the centralisation of power in the hands of a single despotic leader who could be manipulated at will. As historian Peter Delius has described:

This rendition [of the Zulu kingdom] of all-powerful chiefs had considerable appeal to officials and policy makers who saw themselves as the heirs of chiefly power and thus welcomed inflated versions of their authority. Especially attractive was the idea that chiefs held ultimate authority over land, and that with the coming of colonial control, this control had been assumed by the colonial state […] Both anthropologists and contemporary observers tended to interpret what they saw in terms of the western legal constructs of property and ownership that they were familiar with. These perspectives – especially in combination – tended to lead towards an exaggeration of chiefly power – especially over land and to an understatement and misconceptualisation of the rights of their subjects and the occupants and users of the land.

These misconceptions were the bases for colonial codifications of customary governance and land tenure systems. The result was

the decentralisation, from and by the [former colonial and apartheid] state, of despotic power centralised to individual chiefs within sometimes manufactured indigenous communities for purposes of achieving state control over the members of that community.

As we will see, the fact of these distortions has become a central point of contention in the interpretation of customary law in South Africa. It is thus useful to reflect on exactly what these 'distortions' meant. Arguably, the distortion of customary law under colonial and apartheid administrations happened at three levels:

a) the biased and methodologically flawed methods of government ethnologist to ascertain the 'rules' of customary law, in particular succession. These flawed versions were repeated and used often enough to become authoritative statements on the 'rules of custom/succession' of various 'tribes' – and thus applied. This was the first level of distortion.

b) Even if the ethnologist had used more sophisticated methods in ascertaining the 'rules' of custom and could have claimed that they had done so successfully, their disregard for the nature and logic of the customary law systems within which these rules functioned created a second level of distortion. 'Rules' cannot be applied within customary law systems in a predictive manner. They fulfil a different function: that of facilitating legitimate outcomes. This is the second level of distortion. It requires an understanding the significant distinction between rules and their application in customary law systems.
In understanding this level of distortion, it is useful to emphasise the distinction between the 'changing' nature of customary law and its 'flexible' nature – both previously recognised by the Court. The difference is very significant: a changing system may look different now from what it did in the past, but it is always possible to establish the content of the rule at present – for example through extensive community participation – and apply it. This process could deal with the first and even third level of distortion. A flexible system, in contrast, is one where the rules may or may not

change, but the application of the rules is flexible so that merely ascertaining the content of the rules does not enable one to predict the outcome.
A superficial interpretation of the principles of establishing customary law laid down by the Constitutional Court in *Shilubana* suggests that the court leans towards customary law as 'changing' to the exclusion of also being 'flexible'. In the light of the reliance of the Court in *Alexkor*, repeated in *Shilubana*, on the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*, this is probably an inadvertent conflation. The Constitutional Court found that the determination of the content and real character of indigenous land holding "involves the study of the history of a particular community and its usages". The distinction is not between 'past practice' and 'present practice' (as *Shilubana* seems to emphasise), but between 'history' (ie tradition, 'rules') and usage (the application of rules). This distinction is drawn from *Amodu Tijan*i, in which the Privy Council continued to say "Abstract principles [read: rules] fashioned a priori are of but little assistance, and are as often as not misleading". The implication is that the question is not merely about ascertaining customary rules, but allowing these to be 'lived' and 'processed' within the community. This raises obvious questions as to how customary law should be regulated in parliament – questions which we will see, remain lost on the legislature.

c) Colonial and apartheid interests dictated that these rules had to be applied in the interest of facilitating the colonial and apartheid states. As a result, rules were applied and interventions made to serve the interest of the government and, for example, ensure the rise of the leaders they preferred. This was the third level of distortion and operated not only in the moment of interference, but further served to confuse communities about the nature of 'true' customary law.

All three levels of distortion militate against the constitutional imperative of recognising and giving effect to 'true' living customary law. Two implications are key for this analysis, however: firstly, the obsessions with the position of traditional leadership from the colonial and apartheid governments served to uncouple that position and its status from the system of customary law. Secondly, I would argue that the impact of these levels of distortion under colonial and apartheid regimes was probably far more pronounced in relation to the positions and succession of traditional leaders. The pre-constitutional governments were not terribly concerned with what happened within the boundaries of the homelands. Their concern was with the locus of power and ensuring that the one in power is amenable to the government of the day. In order to ensure that attitude, the leader was granted powers far exceeding those under customary law – including, in effect, the power to make and dispense law within the boundaries of his jurisdiction.

As we will see below, while the executive and the legislature set out in the late 1990s and early 2000s to 'restore' African culture to its pre-colonial dignity, the focus of the legislative framework that was eventually passed was exclusively on restoring the dignity of traditional leadership from the distortions of the past – rather than customary law in its totality. The legislature has continued on that path despite the Constitutional Court's jurisprudence that insisted on rather recognising customary law as a *system of law that belongs to the community*.

Whatever the reason of this trajectory, we are stuck with a legislature and an executive and, of late, much of the judiciary, that is stuck in the pre-constitutional understanding of customary law as a set of peculiar rules to be applied within the boundaries of the traditional community with no real status

as law. Within that understanding, traditional leaders become the only link between the 'formal' legal system and the 'informal' one of the community and therefore become the sole representatives of 'customary law'. In the circumstances, customary law continues to be the inferior legal system it once was.

In the next sections, I begin to trace how the contradictory discourses of the Court and the legislature evolved since the late 1990s, but first a note on the recognition of customary law by the Constitution.

3. Customary law and the Constitution

The Constitution entrenches the recognition of customary law in the Bill of Rights as an expression of culture and pluralism, as acknowledged by the Constitutional Court. [1] The relevant provisions include:

Section 30
Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
Section 31
(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community–
(a) to enjoy their culture, practise their religion and use their language; and
(b) . . .
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Arguably the most significant recognition of customary law, however, is tucked away in section 39. It recognises all rights arising from customary law – including real rights.

Section 39
(1) . . .
(2) 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.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.[2]

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[1] See *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

[2] Arguably, the right to equality itself guaranteed that the proper place of indigenous forms of law be restored. A history of overt racial discrimination against all indigenous forms of law necessitated it. That inability to recognise customary law as equal to other sources of law – such as common and statutory law – meant that communities could never claim any strong rights to resources, for example, in order to protect it from outside interest or deprivation of their rights. When the Australian Supreme Court rejected the Privy Council case of In re Southern Rhodesia, it did so based on the international law right to equality and non-discrimination. Southern Rhodesia defined the attitude of common law courts across the Commonwealth to the recognition of

But it is Chapter 12 of the Constitution that is seen by many as the 'real' source of customary law recognition, perhaps because it deals with the topic exclusively. Rather, as the Constitutional Court explained in its first *Certification* judgement, the Chapter should be understood as an attempt by the constitutional drafters to put it beyond doubt that the institution of traditional leadership – the overtly undemocratic aspect of customary law – will find a space within the democratic order.

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.
Section 212
(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
(2) 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 —
(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
(b) national legislation may establish a council of traditional leaders.

4. Customary law given content

The first legislative act of significance for customary communities in South Africa came through the Restitution of Land Rights Act of 1994. With this Act, the legislature gave effect to the constitutional promise, in section 25, that land would be returned to dispossessed communities Many customary communities had been dispossessed or denied ownership of land on the basis of racial

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customary tenure for decades: a rejection of its validity due to the perceived 'lack of civilisation' of the African populations. In finally rejecting this precedent in 1992, the Australian Court held:
Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. […] The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration
South Africa's political history of gross racial inequality is widely known and bears no repeating here. The Constitution recognises equality not only as a formal right but as a substantive one. Indeed, former Chief Justice Langa in 2006 recognised substantive equality as a key measure of the transformation of our society. As such, it represents the aspirational value of substantive equality which envisions a society where "all enjoy equal access to the resources and dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of diverse human identities and capabilities (social equality)". In this context, it is interesting that rural communities in South Africa are increasingly asserting and uncovering hidden boundaries of inequality that are as oppressive as the traditional lines of race and gender. These dichotomies include rural/urban, citizen/subject (in the context of traditional communities) and customary law as opposed to common law rights holders.

discrimination. The Restitution Act is relevant here for at least one reason: it defines 'communities' – as potential claimants – without any reference to traditional leadership or traditional boundaries. It even includes 'part of a community' within the definition. This indicates that at that early stage, the legislature did not understand communities as necessarily represented by traditional leaders– a far cry from the position they are occupying today.

The same applied to the next significant piece of legislation passed, the Interim Protection of Informal Land Rights Act of 1996 (IPILRA). This statute was designed to provide interim protection for customary land rights while effect was given to Section 25(6) of the Constitution which required legislation to ensure such protections formally. IPILRA doesn't mention traditional leadership; doesn't align the definition of a community with the jurisdiction of a traditional leader and certainly does not assume the senior traditional leader of a community as its representative. Rather, it insists on proper community participation in decision making and majority vote.

Also significant about IPILRA is that, while it explicitly recognises customary law, it avoids the temptation of codifying customary law. It leaves the space for decision making to happen within a community in terms of their own custom, provided that it will constitute proper consultation and majority decision-making.

The very first time the Constitutional Court was faced with issues of customary law was, fittingly, in the first *Certification* judgement delivered in September 1996. Not surprisingly, the issues raised pertaining to customary law related to the status and function of traditional leaders – and were raised by traditional leaders. They complained that the Final Constitution did not protect the "institution, status and role" of traditional leadership as required by the Constitutional Principles. Their objections were based on two grounds: first of all, they argued that the Constitution merely 'acknowledged' their powers and functions, without 'protecting' it. Secondly – and this is where I would like to place the emphasis – they argued that the substance of their powers and functions should not be based on national legislation but on "indigenous law". What they sought was a role for traditional leadership in government.

In hindsight, the remedy sought by traditional leaders to be able to draw their authority from customary law rather than statute is deeply ironic: the rise of traditional leadership over the last twenty years was facilitated precisely by the statutory empowerment of these leaders that have disregarded the mechanisms of accountability that customary law requires. Their arguments show that they still understood their powers at that time to be sourced from customary law.

In any event, the Court disagreed that the Constitutional Principles required the express institutionalisation of governmental powers and functions for traditional leaders. It found it "neither necessary nor desirable to make definitive statements at this stage about the precise scope of the words 'institution, status and role' of traditional leadership".

Re-reading the judgement in the light of this enquiry, it is noticeable that the Court insists throughout on mentioning customary law and its interpretation (at that stage the Court still referred to 'indigenous law') alongside traditional leadership. While declining to define the status of traditional leadership, the Court says in the same breath, that it is equally not "obliged to define the manner in which indigenous law is to be interpreted". In addressing the traditional leaders'

objection that their authority won't be sourced from customary law exclusively, the Court acknowledges the distortions of the past. It refers to the impact on indigenous law, however, rather than on traditional leadership per se.

Moreover, indigenous law has for over a century become closely interlinked with and influenced by statutory law. The second sentence of CP XIII.1 expressly declares that the continuing application by the courts of indigenous law, as is the case with common law, will be subject to fundamental rights and legislation.

Finally, the Court states that the Constitutional Principles acknowledges "three elements of traditional African society and continuing cultural relevance": traditional leadership, customary law and traditional monarchy.

In our view, therefore, the NT complies with CP XIII by giving express guarantees of the continued existence of traditional leadership and the survival of an evolving customary law.

In February 2007, the Final Constitution comes into effect. It recognises, in the first instance (s 211), the role, status and institution of traditional leadership *according to customary law*. Despite the objections of the traditional leaders during certification, section 212 provides for the possibility of national legislation to provide for a role for traditional leaders at a local level. As the Constitutional Court had confirmed in the *Certification* judgement, the role that national legislation provides would be in addition to the real basis of traditional leadership, namely customary law.

It was thus up to the legislature to provide a role for traditional leaders in addition to their customary law functions if they chose to do so. A far more serious challenge faced the legislature, however. The boundaries of traditional communities and the leaders in place at the adoption of the Constitution were those entrenched by the Bantu Authorities Act of 1951 and subsequent apartheid government interference. In perhaps the majority of cases, neither the identity of these communities nor the leadership position and incumbent in place were sourced from customary law. How could that be undone?

In late 1998, there was no ministry dedicated to so-called 'traditional affairs'. When Cabinet resolved to take on the Constitutional challenge of regulating traditional leadership, it fell to the Department of Provincial and Local Government to investigate the issue. They commissioned a so-called 'Status Quo Report' which entailed a national audit on traditional leadership. The focus of the audit was a survey of leaders and "those that were deposed by successive apartheid and homeland regimes in the past" as well as of the legislation by which these institutions were established – although the institutions were of course actually established in terms of customary law.

In April 2000, then Minister of Provincial and Local Government Sydney Mufamadi, invited all South Africans to engage in a dialogue in order to affirm and define traditional leadership and clarify its role in democratic governance. "Traditional leadership embodies a system of discourses…The challenge therefore, which this Discussion Document seeks to engage with, is not whether or not to recognise the institution of traditional leadership. Rather, it is to determine the precise way in which the institution will promote constitutional democracy". A key question identified by the Document was that of accountability of unelected structures.

The document makes for fascinating, if ambiguous, reading. In an initial historical overview, we are told that, pre-colonially, traditional leaders ruled

according to the principles of African democracy and accountability….With the advent of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded…When the National Party came into power in 1948…legislation increasingly strengthened tribal divisions and gave traditional leaders powers and roles they did not possess before….Essentially, these laws established a system of local government that placed the traditional leaders at the centre of the bureaucratic system of traditional authorities. Chieftainship came to be reduced to a very different institution. As one commentator noted: 'It was a public office created by statute. That is the reversal of the position of the chief in traditional society in which the role of the chief was to represent his people according to the dictates of customary practice. This reversal, effected by the Act, has plainly made the appointment, suspension and deposition of chiefs subject to political manipulation'.

Elsewhere, the document admits in terms that "the customary structures of governance of traditional leadership were put aside or transformed. New structures were established in their place in terms of the Black Authorities Act of 1951".

While these extracts suggested a deep understanding of the problematic uncoupling of traditional leadership from its source in customary law – the law of the community – the introduction to the document already betrays a misunderstanding of the Constitution's recognition of the institution. The introduction announces that the Constitution "provides…for the recognition of the status and role of the institution of traditional leadership in South Africa. In addition, customary law is recognised, once again subject to the Constitution" (own emphasis).

In August 2002, the draft Communal Land Rights Bill is published. It provided a role for traditional leadership in the administration of communal land, but this was largely consultative. It did not give traditional leaders any executive power over land, but rather provided for the appointment by a community of an "administrative structure". It emphasised that the only traditional leadership institutions that may participate in the administrative structure is one that is "recognised by a community as being its legitimate traditional authority" – rather than recognised by the State.

In October 2002, the draft White Paper on Traditional Leadership is published. The Forward makes the important observation that traditional leadership could only function to promote democratic governance and stability in rural areas "if measures are taken to ensure that people in rural areas shape the character and form of the institution of traditional leadership at a local level, inform how it operates and hold it accountable". A central objective of the policy is to "restore the integrity and legitimacy of the institution of traditional leadership *in line with customary law and practices*". In articulating its vision for the transformation of traditional leadership away from the distortions and manipulation of the past, the White Paper envisions that the institution of traditional leadership "derives its mandate and primary authority from applicable customary laws and customary practices". In turn, the "custom, as it relates to the institution, [must be] transformed and aligned with the Constitution and the Bill of Rights". As we will see, the Constitutional Court made it its task to do just that.

After discussing the *Certification* judgement, the Draft White Paper announces that "the Constitution entrusted to the three spheres of government all powers and functions which are governmental in nature, and assigned to traditional leadership those functions which are customary in nature".

The first red flag is raised, however, when the Draft White Paper distinguishes between customary structures, brought under formal control and legislation by the apartheid and colonial governments, and structures not customary in nature created through legislation such as community authorities and regional councils. The distinction seems to be between 'legitimate' and 'illegitimate' structures. The admission in the Discussion Document that the Bantua Authorities Act 'transformed' or 'abolished' customary structures, has been replaced with an interpretation that, in fact, these structures remained unchanged under the regulation. The three levels of distortion that in fact tainted these structures, seem to be forgotten. Thus, "[s]tructures which were created by apartheid and homeland legislation […] should be disestablished. Tribal councils as existed before colonialism based on custom should be established and renamed Community Councils. Their constitution should also be based on custom and customary law." In addition, "recognised levels of traditional leaders should be based on custom and customary law; and any levels which were introduced as a result of colonial, apartheid and homeland laws […] should be abolished".

In hindsight, this simple distinction between 'customary structures' and artificially created structures should have raised red flags. However, given that large parts of the document is still dedicated to outlining precisely those distortions, commentators would have been forgiven for skipping over this dangerous simplification. As it turns out, this problematic distinction was the basis for the legislative scheme enacted a year later.

Significantly, the document also makes the following assertions (to which I will return in conclusion):

- The apartheid government introduced levies as a measure to "induce an exodus of Africans to the mines, farms and manufacturing firms…this strategy for indirect rule was centred around the notion of self sufficiency for traditional leadership areas". Moreover, "the power to impose levies and taxes lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose taxes and levies on communities".
- With regards to headmen, the document indicates that "in some areas headmen were appointed in accordance with custom, in some they were elected". Furthermore, "there are a number of headmen who are recognised in terms of custom but who are not accorded statutory recognition". As a result, the document emphasises that "recognised levels of traditional leaders should be based on custom and customary law; and levels which were introduced as a result of colonial, apartheid and homeland laws….should be abolished; [and] headmanships, given its peculiarities relating to appointment, recognition, remuneration, numbers, status and role from regime to regime, should be dealt with by provincial governments, <u>taking into consideration these peculiarities</u>".

July 2003 saw the release of the final White Paper. The emphasis on the distortions of history remains intact. Subtle differences are introduced, however. The problematic distinction between 'customary' and artificially created institutions remain butis refined - newly established customary institutions will now be called 'traditional councils'. The White Paper also indicates for the first time

that the 'developmental' functions afforded traditional leaders under the old regimes may not have been so bad – and insists on traditional councils being "well-resourced and their staff capacitated" to continue such good work. Despite setting out to clarify the 'role' and 'functions' of traditional leaders, these thus remain ambiguous.

With regards to accountability, the **draft** document noted that a split in opinion existed as to whether traditional leaders should be accountable to the community or to the government. The final document announces that "they should be accountable to government".

With regards to the issue of the boundaries of communities, the **draft** paper notes that

Government believes that, in order for traditional authorities to function properly and to co-exist in harmony amongst themselves and with municipalities, the areas of traditional authorities should be clearly defined. In this regard, the responsibility to define and identify the exact physical boundaries of traditional authorities vests with the Department of Land Affairs.

This paragraph disappears from the final White Paper. No-one would have noticed, but those 1951 boundaries were to remain intact. Coupled with the denial of the distortion of the tribal authorities reigning within those boundaries, the entrenchment of apartheid distortions was complete.

In conclusion, the White Paper makes the crucial observation that "the legitimacy of those occupying positions within the institutions should be beyond reproach…When traditional leaders have to be identified and designated as such, *the State should play a limited role which is guided by the culture and tradition of the relevant community*".

The subtle shift towards underplaying the extent to which traditional leaders were co-opted by the colonial and apartheid governments may well be explained by an observation of Jeff Peires in a recent article. Peires writes:

It was, moreover, common cause in government circles that the institution of traditional leadership had been tainted by its association with colonialism and apartheid; that many legitimate traditional leaders had been deposed in favour of compliant stooges; and that the very kingships themselves…required further scrutiny. Since the entire thrust of President Thabo Mbeki's policy….was to empower traditional leaders and augment their authority, it was deemed necessary to 'cleanse' the institution of its colonial accretions so as to officially recognise traditional leaders as shining lights of pre-colonial African democracy.

In October 2003, the Constitutional Court hands down its second significant judgement dealing with customary law in *Alexkor Ltd and Another v Richtersveld Community and Others*. The case concerns the customary land and mineral rights of the Richtersveld community and was brought in terms of the Restitution Act. A definition for customary communities had not been formulated in legislation yet. In any event, the Nama people of the Richtersveld, are to this day not recognised by South African legislation as customary communities and therefore, even had legislation existed, they would not have been bound to define themselves in terms of such legislation. The definition of the Richtersveld community thus had nothing to do with traditional leadership, but rather sought to pass the specific test of the Restitution Act (which at the time made no mention of traditional leadership). The Land Claims Court, as the first court of instance dealing with the matter, formulated the test as such: is this "a group of persons with rights in the subject land held in common by the

group which rights are derived from shared rules determining access to the land"? The definition is about rights in shared resources. It does not impose a boundary – as the community and the court acknowledges that the Richtersveld community is part of a larger group of people in the area, but also has smaller 'sub-communities' with rights of their own. It also does not see rules and their application as operating through traditional leadership. The rules exist and develop through community practice. Any reference to leadership was to show that the community had institutions, not that leaders existed and therefore the existence of a community followed.

The Richtersveld community contended that it possessed rights in the land, including the exploitation of natural resources, in terms of their indigenous or customary law. The Constitutional Court, in its finding in favour of the community, held:

The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law…While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. The courts are obliged by section 211(3) to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law….Our Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are constituted with the Bill [of Rights].

The Court goes on to recognise customary law "as an independent source of norms with the legal system"…[which] feeds into, nourishes, fuses with and becomes part of the amalgam of South African law".

As a second principle, it recognises that customary law "is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of live"…It is a system of law that was known to the community, practices and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution".

Thirdly, the Court states that the content of customary law "may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary", but the danger of viewing customary law through the lens of legal conceptions that are foreign to it, must always be borne in mind.

Thus, and as a fourth principle, the Court states that "the determination of the real character of indigenous title to land [as the customary law enquiry in the case at hand] therefore 'involves the study of the history of a particular community and its usages'. So does the determination of its content".

By October 2003, the legal position on the recognition of customary law in the Constitution thus meant that customary law was recognised as an independent system of norms to be understood and interpreted within its own context and, in particular, the context of how it is lived and applied by the community (with no reference to traditional leadership). This system is by its nature evolving and must therefore not be stifled by the interpretations of authors – or, by implication, the legislature. What is more, it is recognised that customary law gives rise to rights in land and other resources that must be recognised as real rights – and where appropriate, rights of ownership.

It was perhaps fortuitous that the first landmark customary law case was brought by a community that had no reason to rely on traditional leadership for its definition. It meant, however, that the core principles of customary law defined by the Constitutional Court made no reference to traditional leadership whatsoever. With regards to the boundary of the community, it was interested in the shared access to land and other resources – with the boundary defined by those who and no or only conditional access to those resources.

In the same month, the Communal Land Rights Bill is introduced in parliament. It is wholly transformed from the draft document circulated a year earlier. Now, traditional councils have the power to replace and perform the functions of a land administration committee. Public hearings are held in parliament during November 2003. A report on the hearings records the following: "All presenters (except the traditional leaders themselves) find it problematic that traditional councils are turned into land administration committees".[3] The legislature ignores this fact.

In December 2003, the Traditional Leadership and Governance Framework Act is assented to. Amongst other things, it purports to "provide for the recognition of traditional communities" and "the establishment and recognition of traditional councils". The Preamble sets out many of the good principles agreed upon in the documents leading up to the legislation. However, the text in fact represents a radical shift toward traditional leadership – rather than customary law – as the point of departure for this framework, coupled with the historical distortions plaguing those very traditional leaders, airbrushed out of the picture.

The definition of 'traditional community', for example rests on the community being "subject to a system of traditional leadership in terms of that community's customs" as a first principle, with the observing of a system of customary law being secondary (s 2). The decision to recognise a traditional community is that of the State. Once a community is recognised, it must establish a traditional council with at least one third members women and 40% of the council members democratically elected (with the balance selected by the senior traditional leaders 'in terms of that community's customs').

Some civil society organisations who followed these developments at the time thought that these sections meant that the government intended to start from a clean slate, wiping out all the distortions of boundaries, identities and leadership positions caused by the colonial and apartheid

[3] The following problems were raised: traditional councils are undemocratic institutions that cannot be held accountable in a sufficient manner; traditional councils are likely to be dominated by the traditional leaders regardless of the portion of elected members and/or women; not all communities within the boundaries of tribal authorities recognise the traditional leaders as theirs or as an authority at all. [complete]

regimes. The assumption was that communities would be allowed to apply for recognition of their identities and boundaries afresh, thereby ensuring that communities are allowed to 'self-define' rather than have identities imposed upon them. Once they were recognised as such, they could constitute a traditional council. In fact, some researchers insist that this was expressly set out during the parliamentary consultations that preceded the passing of the legislation. This position certainly made sense given the emphatic recognition of the past distortions in the White Paper. The rest of the Act, however, suggested otherwise.

Tucked away at the end of the Act under 'General Provisions', however, was a provision entitled 'transitional arrangements'. This section purported to deal with the period from the commencement of the Act until the new communities were recognised and new councils established. During that transitional period, traditional leaders, traditional authorities and the boundaries in force at the time of the enactment would be "deemed" to have been appointed or established in terms of the requirements of the Act. On the face of it, the provision dealt with the problem of the existence of a vacuum whilst the map of customary communities in South Africa is redrawn based on custom rather than the 1951 Bantu Authorities Act. That was, at the time, how civil society interpreted it.

Some problems were already clear to see. I have traced the development of the government narrative earlier from fully recognising the deeply problematic nature of traditional leaders, authorities and boundaries in place at the advent of democracy due to government interference, to the more palatable understanding of apartheid legislation merely 'regulating' the tribal authorities without causing distortion which leave as the only problem the creation of non-customary institutions such as community authorities and paramount chiefs. The former would thus be entrenched by the new legislation and the latter, done away with.

The Act thus provides for the disestablishment of community authorities and the establishment of a Commission on Traditional Leadership Disputes and Claims. In terms of the simplistic distinction that the White Paper made between customary institutions and those created by previous regimes, the Commission was clearly designed to eradicate artificial institutions (such as created kingships) on the one hand, and deal with the distortions of customary institutions on the other. But whereas the initial Discussion Document emphasised the pervasiveness of these distortions, the legislature had come to think of these disputes as few and far between. How else did it imagine one Commission dealing with all disputes over incumbents to traditional leadership positions, claims to be recognised as traditional communities, the legitimacy of 'tribes' and traditional boundary dispute within five year?

The Commission's mandate was limited to disputes arising after September 1927 as the coming into force of the Black Administration Act – recognition of the fact that it is colonial and apartheid distortion that the Commission must undo. Within two weeks of a Commission decision being taken, it was to be conveyed to the President for "immediate implementation". The legislature clearly did not anticipate that claims and disputes may overlap.

The fact that the Commission would deal with applications to be recognised as new communities clearly signalled that these applications did not apply to all traditional communities, as civil society

was led to believe. Rather, those existing at the time of the end of apartheid would remain alive – and their authorities deemed to be traditional councils under the 'transformed' regime.

Given how key the Commission was to in this legislative scheme in lifting customary law from its historical distortions, I interrupt our chronology here to give you a glimpse into the decade of the Commission from the enactment of the TLGFA (in 2004) until 2012, when the first Commission decision hit the Constitutional Court.

The Commission (which became known as the 'Nhlapo Commission') was established on 1 November 2004. It was fraught with difficulty from the outset, and most of its crucial members, including the chair, Prof Nhlapo, resigned before its findings were first published. These resignations had to do with the objection of the customary law specialists on the Commission with the methodology applied which had, in the words of Jeff Peires, nothing to do with customary law. In any event, the Commission was from its inception wholly inadequate to deal with the task it was set. By April 2008, it had only dealt with the status the twelve paramountcies without pronouncing on the rights and status of the incumbents. Thus, nearly five years after the enactment of the TLGFA, not a single boundary or leadership dispute had been entertained. The enormity of the task was simply overwhelming.

The mandate of the Commission was extended in 2008 with an amendment to the TLGFA. Significantly, the status of Commission decisions was also changed: rather than transmitting decisions to the President, it now could only make recommendations, with the final decision resorting with the President. The White Paper's insistence on the State playing as small a role as possible in the regulation of customary institutions was long forgotten.

In the meantime, disgruntlement amongst communities in most if not all former homeland areas was growing. Communities understood the new democratic era to enable them to assert their 'real' identities and redraw the boundaries of traditional authorities in those terms. They also accepted that the democratic government would get rid of leaders imposed by apartheid. They were increasingly frustrated that no mechanism existed by which these disputes could be settled. As a result, a series of provincial Commissions were eventually set up to hear these disputes, although in practice they have really only entertained disputes about the incumbents to leadership roles. These Commissions are even smaller and have even fewer resources, while the amount of disputes registered with them - both those not dealt with by the Nhlapo Commission and newly registered complaints – mounted. In Limpopo Province alone, more than 500 leadership disputes had been lodged by May 2012. To date, none has been settled.

In addition to that, the vision of transformed traditional councils with an elected minority and a third women representatives has simply not materialised – in part because councils suffer no consequences for flouting these provisions.

It should be said that many of the mechanisms designed by the democratic government to ensure the transformation of the South African society have been hampered by serial delays and inadequate implementation. But the mechanism of the Commission established by the TLGFA to undo apartheid distortions was not only badly conceptualised; its slow and inadequate

implementation has rendered the envisioned transformation impossible. The continued reign of illegitimate and abusive traditional leaders post-democracy now for twenty years, has seen them rise in power and authority so as to make it politically untenable to touch them. When I turn to the litigation currently in Courts across South Africa the impact will become clear.

In the meantime, the Constitutional Court went on its merry way of bolstering customary law as the living law of the community. In 2005, in *Bhe*, the Constitutional Court dealt with the statutory regulation of intestate succession in terms of customary law. The Court held that

The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.

It bemoaned "the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, '[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community'.

Ironically, exactly the same was happening in rural areas under the TLGFA. The Court went on to coin the phrase 'living customary law'. With regards to the status of customary law vis a vis statute law, the Court held:[4]

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. […]It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

In 2008, the Court is faced with its first leadership dispute – one brought by Ms Tinyiko Shilubana. The Court describes the case as one that "raises issues about a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership". But it also "raises issues regarding the relationship between traditional community structures and courts of law envisaged by our constitutional democracy". Ms Shilubana claimed that, whereas the customs of her community in earlier times would not allow a woman to

[4] [12] It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated. Secondly, the legislative authority of the Republic vests in Parliament. Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.

succeed as chief, law of her community had developed to indeed allow for such an appointment. As proof, she provided a resolution of the elders of the community supporting her appointment.

The Court was thus challenged to find the content of the customary law of Ms Shilubana's community. In considering how the content of customary rules may be found, Van der Westhuizen J says:

The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted. It follows that the Van Breda test cannot be applied to customary law, where the development of living law is at issue. This is not to say that past practice is not relevant. Past practice and tradition may well be of considerable importance in customary law, but as one important factor to be considered with other important factors.

He continues to argues that, as an independent source of law, "the process of determining the content of a particular customary law norm must be one informed by several factors" [para 44]. He identifies four factors.

First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm[…] It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.
It follows that the practice of a particular community is relevant when determining the content of a customary law norm. […]
Thirdly, courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights. […] The outcome of this balancing act will depend on the facts of each case. Relevant factors in this enquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.

Furthermore, while development of customary law by the courts is distinct from its development by a customary community, a court engaged in the adjudication of a customary law matter must remain mindful of its obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.

Four factors will thus be considered by the Constitutional Court in ascertaining the content of a living customary law rule: historical practice (with the appropriate caution as to Western notions and historical interpretations), current practice, the need to be flexible to the specific contextual needs and the need to promote customary law to be brought in line with the Bill of Rights.

These factors reflect the Constitutional Court's sophisticated understanding of the complexity of dealing with living customary law within a formal legal forum based on Western legal norms. It also affirmed the Court's understanding that customary law is the law of the community and there to be developed by the community rather than the traditional leader.

None of it translated into the minds of the legislature. As a great piece of irony, the Traditional Courts Bill is introduced in parliament for the first time later that same year – and met with an outcry from civil society. Their complaints included that traditional leaders were privileged in the drafting process, while the people most affected were excluded. In addition,

Rather than affirming traditional justice systems, the Bill fundamentally alters customary law by centralising power in the hands of senior traditional leaders and adding powers that they did not traditionally hold under custom. This centralisation of power ignores and disempowers the complex layers of governance that exist below senior traditional leaders, where dispute resolution is most often handled before it is escalated to the senior traditional leader. This undermines existing accountability structures both from below and at higher levels. It effectively empowers senior traditional leaders to interpret custom, enforce it and make the final decision in case of an appeal.

The White Paper's promise of ensuring a customary basis for traditional leadership and its powers and functions was long forgotten. The outcry was such that the Bill was withdrawn, but not for long.

In 2010, the constitutional challenge of four communities to the Communal Land Rights Act reaches the Constitutional Court. While the Court, in *Tongoane*, found the Act to be unconstitutional in its totality on a procedural ground (lack of public participation in parliament), it did make a few crucial observations with regards to the substance. For one, it recognised that the CLRA was not legislation that was to step into a vacuum; rather it sought to overtake the customary law existing and operating on communal land.

The field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend […] the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.

The Court also made a side comment about the boundaries entrenched by the 1951 Bantu Authorities Act, "part of the colonial and apartheid legislative scheme for the control of African people […] It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003. And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land".

Rather than a new CLRA being introduced, the Traditional Courts Bill made a surprise return to parliament in 2011. As has become the habit of the legislature in introducing controversial bills, the TCB was published for comment on 13 December 2011 – catching civil society and communities unawares. It did not take them long to regroup and in fact launch one of the most coordinated projects of resistance to hit parliament since 1994 – and the most successful. But it was not easy. Community upon community stood up in parliament and at the provincial hearings to relate stories of the abuses of their traditional leaders – the same leaders who would be empowered to dispense justice within their boundaries. Many complained that these were not even the leaders that they acknowledged in terms of custom. Astonishingly, they were met repeatedly by the same response from parliamentarians: that they complaints were irrelevant to the TCB and stood therefore to be ignored. At the height of parliaments denialism, the Select Committee of the NCOP dealing with the Bill scrapped twenty of the twenty two submissions made at its public hearings on the basis of it not addressing the specific provisions of the Bill, but only referring in general to the problems of boundaries, illegitimate leaders and the fact that the Bill was misconceived in its entirety. It took a threat of legal intervention for the Committee to retract its position.

The stand-off in parliament, in rural town halls and in the media between government and the Bill's detractors lasted until weeks before parliament was to rise for the 2014 national elections. The pressure was enough and the Bill was allowed to lapse.

During the more than two years that the TCB hovered over parliament, the issue of traditional leadership – its status, its role and its legitimacy – finally hit the Constitutional Court, and opened the floodgates in a manner of speaking. However, the composition of the Court had by now changed. As litigators, we watched with some anguish as a small minority in the Court increasingly reflected what communities and activists had been facing in parliament. It has not led to bad precedents yet, but it has certainly become more difficult to assert the rights of communities against their traditional leaders.

In January 2012, the first Nhlapo Commission decision reached the Constitutional Court. Following a fascinating and engaging hearing, the Court disappointed with a short judgement basing its decision on the narrowest procedural point possible. For those who observed the hearing, the outcome was telling of the changing composition of the Court. While some of the judges were open to arguments that traditional leadership disputes should rather be taken from the hands of the State and placed in the hands of the community, some of the new faces on the bench showed a marked deference to the institution of traditional leadership independent of the communities it served.

So, while the Court found it unnecessary to consider whether the Commission's approach was sound in finding and applying customary law, there were important indications both during the hearing and

in the judgement that the Court had put its finger on the real issue plaguing this Commission – and indeed legislation dealing with customary law: whose law is it? The community's law developed through its practice? Or the law of the State as regulated, codified and adapted by the legislature? Moreover, the Court insisted, in its judgement, to differentiate between a leadership dispute settled "statutorily" and one settled "customarily" – and privileged the latter as in line with what the Constitution envisions.

Not long thereafter, another leadership dispute found its way to the Court – and this time put the split on the bench on display for all to see. In *Pilane v Pilane*, a village under the leadership of Chief Nyalala Pilane challenged an interdict that Nyalala had successfully gained stopping the village from meeting to discuss their unhappiness with his leadership and the possibility of seceding. The interdict also stopped the village leaders from calling themselves a 'tribal authority' – something they did to already assert their desired independence from the authority of a chief that they did not recognise. The village had made many attempts to resolve the issue – also through the provincial Commission of Traditional Leadership Disputes – without success.

The majority set aside the interdict. It found that

the three challenged interdicts adversely impact on the applicants' rights to freedom of expression, association and assembly. In the absence of more convincing argument from the respondents in relation to their own rights against which the applicants' interests are to be balanced, one is hard-pressed to find in the respondents' favour. The restraint on the applicants' rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants' numerous unsuccessful attempts to have this resolved.

In reaching its decision, the majority mentioned as an aside that "given that statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation, the position as it stands is far from clear".

The minority did not agree. Writing on their behalf, the Chief Justice made no bones about his contempt for the first applicant, the customary headman of the village. He depicts him as a villain who tried everything to grab the power as headman of the village on the basis "that the current lawfully appointed and recognised headman and his father were, according to the applicants, no the legitimate traditional leaders of that community". In fact, the first applicant provided ample evidence that the imposed headman is, in fact, not legitimate in terms of custom. With equal disdain, the Chief Justice says that "[the first applicant] chose to act as if he were the headman of Motlhabe and virtually ceased to recognise the first respondent as his traditional leaders". He continues:

Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime. Bearing in mind the need to help these fledgling institutions to rebuild and sustain themselves, threats to traditional leadership and

related institutions should not be taken lightly. The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights. Like all others, the constitutional rights the applicants seek to vindicate are not absolute. They co-exist within a maze of other rights to which expression must also be given […]Disorderliness is on the rise in this country and traditional communities are no exception. If it were to be permissible, the applicants' form of secession would have to be led by a legally-recognised leader of the community. Meetings that are meant to pave the way for secession should not be clothed with authority the applicants do not enjoy.

The Chief Justice believed that the convening of a general meeting in the village, and inviting people from neighbouring villages, "without any legal authority had the potential of creating factions and disorder which could make the community ungovernable". In the circumstances, he would have granted the interdict.

If this attitude was not ominous enough, the executive hit back at the detractors of the Traditional Courts Bill with the introduction of the Restitution Amendment Bill. While publically it was sold as a way to recognise the pre-1913 land claims of the Khoi San, the Bill that eventually sailed through parliament in record time made no concessions to the Khoi San leaders – but was overtly a way of apologising to traditional leaders that the original Restitution Act did not ensure that restituted land would belong to them. In a speech at the opening of the National House of Traditional Leaders, President Zuma assured them that the amendment to the Restitution Act was to ensure that they could claim the land fraudulently claimed by communities within their jurisdictions. Get yourselves good lawyers and be ready, he said.

5. Conclusion

A recent litigation experience perhaps illustrates the extent to which traditional leaders, and their executive backers, have come to believe that their power is untouchable – even, or especially, by the courts. Early this year, the Legal Resources Centre was approached by a community in the Eastern Cape who complained that a headman was illegitimately imposed upon them by the Chief in the area. This community had proof – both from an expert historian and based on the actual facts of its history – that their custom has for generations been to elect their headman. When the last headman retired, however, the Chief came and introduced a member of his family as the new headman in the area. These facts may sound familiar, as I mentioned earlier that the White Paper on Traditional Leadership recognised this very phenomenon and emphasised that it should be respected.

Times had changed, however. The community leaders complained to the Chief, the Regional Traditional Council and eventually the Premier that their custom was flouted. They pointed to the provisions of the Eastern Cape Traditional Leadership and Governance Act which holds that headman must be appointed by the Royal Family "in terms of the customary law of the community concerned". That meant, the community said, that they should be allowed to follow their custom and elect their headman.

Time and again, they were met with a dismissive attitude. The chief, the senior council, the Premier and officials from the Department of Traditional Affairs all turned the community away on the

grounds that the legislation in fact gave the Roayl Family the prerogative to choose whom they wanted. They gave no meaning to the phrase “in terms of customary law” contained in the Act, other than to insist that it had something to do with bloodlines.

When the illegitimate leader was about to be inaugurated, the LRC represented the community in interdicting the inauguration and launching a review of the decision to appoint him. Despite the interdict being granted, the headman and the chief went ahead with the inauguration – in blatant defiance of the court order. We then launched contempt proceedings – but the headman refused three times to appear in court and even threatened the life of the sheriff if he dared to serve another order on him.

In the meantime, we had argued the review against the Premier, the Chief and the MEC for Traditional Affairs who had all opposed it. Their defence was dismal and we quickly received judgement in our favour. To our slight amazement, they have sought leave to appeal.

There are many aspects of the case that are astonishing. I highlight a few in this context. It is clear from the papers filed by the Premier and the Chief that their understanding of the phrase ‘in terms of customary law’ that appears repeatedly in the legislation and is meant to ensure that the basis of traditional leadership is, in fact custom rather than statute, is nothing more than an insistence on the absolute power of the traditional leader and his royal family. The notion of customary law as something that exists in the practice of the community is completely foreign.

The headman’s insistence to flout the court proceedings signals that he does not understand the High Court to have jurisdiction over his status and actions as a traditional leader. He is entitled to ignore the Court. He is arguably emboldened in his position by the disdain for the courts shown by his chief and Premier.

A recent off the record statement by our Minister of Rural Development and Land Reform to a colleague at a reputable research institution haunts me. When my colleague told the Minister that he could never get away with the series of land policies and laws introduced over the last year as these are blatantly unconstitutional, the Minister responded, “You may win in the courts, but we will win on the ground”.