
**TRADITIONAL LEADERSHIP AND INDEPENDENT BANTUSTANS OF SOUTH AFRICA:
SOME MILESTONES OF TRANSFORMATIVE CONSTITUTIONALISM BEYOND
APARTHEID**

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TRADITIONAL LEADERSHIP AND INDEPENDENT BANTUSTANS OF SOUTH AFRICA: SOME MILESTONES OF TRANSFORMATIVE CONSTITUTIONALISM BEYOND APARTHEID

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1 Introduction

The object of this article is to explore and discuss the legal position and the role of the politics of the traditional leaders in the independent Bantustans or homelands of apartheid South Africa. As a point of departure, this article gives a brief account of the status of the traditional leaders before the inception of apartheid. In 1948, the now defunct National Party (NP) won the general elections and ascended to political power. The party's victory was marked by the formal introduction of apartheid.¹ The main goal of the NP was racial, cultural and political purity.²

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1 Gobodo-Madikizela *A Human Being Died* 144. The ideology of apartheid was laced with different terminologies such as multinational development, plural democracy and a confederation of independent nations or even good neighbourliness. See also Deane 2005 *Fundamina* 1-3, where she stated that the aim of apartheid was to maintain white domination and extended racial segregation. Whites invented apartheid as a means to cement their power over the economic, political and social systems. See also Liebenberg "National Party" 481. According to Liebenberg, the apartheid policy was not a new one. It was an old policy, which could be traced back to the time when Jan van Riebeeck at the Cape planted a lane of wild almond trees to indicate the boundary between the Khoikhoi area and the white area. However, the policy applied after 1948 was different from the pre-1948 policy. The difference lies in the ruthlessness of the 1948 policy which was implemented in South Africa. The 1948 policy was also enforced by the government with the aid of legislation.

2 For more information on the issue of race, see West "Confusing Categories" 100-101. West asserted that the system of race classification in South Africa was often referred to as "race classification". As West further noted the opponents and supporters of this classification regularly refer uncritically to race as the guiding principle. They argued that the system divided South Africans on the basis of colour and other physical features. According to West, classification is determined by several factors, which include *inter alia* appearance, descent, acceptance, language, behaviour and so on. It is on the basis of this account that West argued strongly that race classification was not based exclusively on the physical features of race.

The foundation of apartheid was premised on the formation of artificial black nations or homelands in reserves. These homelands were created on the basis of the language and culture of a particular ethnic group.³ The political leadership of the homelands served as the prototype of the disintegration of traditional authorities. The traditional authorities in these 'artificial' states seemed to be used by the homelands' regime and were no longer accountable to their communities but to the entire political hegemony of apartheid.

The TBVC states enacted a considerable number of legislative measures, which influenced the structures of traditional leadership. This article elaborates on how the TBVC states manipulated the institutions of traditional leadership and how the roles and powers of traditional authorities were greatly altered. This article further proceeds to examine the constitutional and legislative changes of directions which have been influenced by both the 1993⁴ and 1996⁵ Constitutions of South Africa and shows how these changes have been initiated. The present South African government has launched a transformation project of the institution of traditional leadership. This project is intended to cure the ills of the past and democratise the institution in accordance with the constitutional imperatives.

2 Background perspectives

In the pre-colonial era, traditional leaders and traditional authorities were important institutions which gave effect to traditional life and played an essential role in the day-to-day administration of their areas and the lives of traditional

3 For more information on culture, see Thornton "Culture" 19. Thornton asserted that the idea of "culture" has frequently been fused with that of society and had been used interchangeably to refer to a general social state of affairs or to a more or less clearly recognisable group of people. Ideas about 'cultures' and 'organisms' influenced each other in the development of theories of evolution, both cultural and biological. Sometimes people have argued that cultures are like organisms. Unfortunately for Thornton these ideas were confused and contributed nothing to a useful understanding of culture.

4 The *Constitution of the Republic of South Africa* Act 200 of 1993. Hereinafter referred to as the Interim Constitution.

5 *Constitution of the Republic of South Africa* 1996. Hereinafter referred to as the Constitution.

people. The relationship between the traditional community and traditional leader was very important. The normal functioning of the traditional community was the responsibility of the traditional authority.⁶ The pre-colonial traditional leadership was based on governance of the people, where a traditional leader was accountable to his subjects. According to Spiegel and Boonzaier, there is much evidence that in pre-colonial times a significant proportion of the Southern African population was organised into political groupings with centralised authority vested in hereditary leaders known as 'chiefs'.⁷

Before the inception of apartheid, the traditional authorities were the instruments of indirect rule. Indirect rule or rule by association, as Ntsebeza noted, was created to manage the Africans under the administrative rule rather than to enfranchise them.⁸ The indirect rule was a British concept and not the making of the Afrikaner nationalists. The policy of indirect rule purported to preserve the pre-colonial structures of the traditional leadership. However, as Ntsebeza observed, in reality it was established as a means of controlling traditional communities in their areas.⁹ The leadership monopoly of traditional leaders changed when the colonial administrators and rulers introduced their authorities. Through the colonial system, traditional leaders became the agents of the colonial governments. The traditional authorities were recognised and shaped by colonial governments to suit, adopt and promote the objectives and aims of their colonial strategies and missions.

6 Khunou *Legal History* 2007 Z. See also the case of *Shulubana v Nwamitwa* 2008 (9) BCLR 914 (CC) 933, where the Constitutional Court held that the traditional authorities' power is the high-water-mark of any power within the traditional community on matters of succession. The court held further that no other body in the community has more power than traditional authorities.

7 Spiegel and Boonzaier "Promoting Tradition" 49. The word 'chief' was used differently during the colonial and apartheid periods to refer to a leader of a traditional community. A 'Chief' was also known as Kaptein, traditional authority, native leader, Bantu leader, African ruler, etc. However, under a new constitutional dispensation, the word 'chief' is no longer used and has been replaced by the words 'traditional leader'. The words 'Kgosi', 'Morena', 'Inkosi', 'Hosi', etc are also used depending on the language spoken by a particular traditional group.

8 Ntsebeza *Democracy Compromised* 17.

9 Ntsebeza (n 9) 17.

The successive colonial governments of South Africa enacted a considerable number of legislative measures to change the pre-colonial structures, roles and powers of the traditional leaders. For example, the *Black Administration Act*¹⁰ was enacted to give limited powers and roles to traditional leaders. This was due to the fact that the Governor-General was made the supreme chief of all traditional leaders in the Union of South Africa. The colonial and post-colonial governments recognised the institution of traditional leadership as an important political instrument.

At some point they withheld support from a particular traditional leader by appointing another in his place. They would also remove certain rights such as control over the distribution and administration of land. This resulted in a radical change in the leadership roles of the traditional leaders.¹¹ What occurred in Transkei, Bophuthatswana, Venda and Ciskei provides a good example of change in the leadership roles of the traditional leaders.

3 Strategic creation of homelands

The borders of the homelands were 'fixed' long before apartheid was introduced as an official government policy, namely by the 1913 *Land Act*¹² and the 1936 Trust and *Land Act*.¹³ When Verwoerd became Prime Minister of South Africa in 1959, he introduced the *Promotion of Black Self-Government Act*.¹⁴ The main objective of this Act was to create self-governing black units.

10 Act 38 of 1927.

11 Spiegel and Boonzaier (n 7) 49.

12 *Black Land Act* 27 of 1913. Hereafter referred to as the 1913 *Land Act*. Through this Act, the majority of black people were deprived of their land. The traditional communities and their leaders lost vast tracks of land. This piece of legislation also restricted blacks from entering into agreement or transaction for the purchase, lease or the acquisition of land from whites. This meant that traditional leaders and members of their communities could not buy or acquire land from the whites for their communities. See also Cope *South Africa* 18.

13 Act 18 of 1936. The *Native Trust Land Act* had the effect of reserving certain land in traditional communities for occupation by black people in traditional authorities' areas. With the introduction of this Act, more acres of land were added to the reserves thus making it possible for black communities to secure 13% of land.

14 Act 46 of 1959. The purpose of Act 46 of 1959 was among many other things intended to provide for the gradual development of self-governing black national units and for direct

The Black population was arranged and categorised into national units based on language and culture. There was the North-Sotho unit, the South-Sotho unit, the Swazi unit, the Tsonga unit, the Tswana unit, the Venda unit, the Xhosa unit and the Zulu unit.¹⁵

The administrative authorities in these national units were to be based on the tribal system. The government's contention was that each nation had to develop according to its own culture and under its own government. The government further argued that in this process of development, no nation was supposed to interfere with another.¹⁶

The *Promotion of Black Self-Government Act* laid a foundation for the constitutionalisation of separate development. This is so because it had the effect of creating radical separation not only for blacks from the white South African population, but also of black ethnic groups from each other. This was aptly illustrated partly in the Preamble of the Act as follows:¹⁷

The Bantu people of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture ... it is desirable for the welfare of the said people to afford recognition of the various national units and provide for their gradual development within their own to self-governing units on the basis of Bantu system of government ...and its expedient to provide for direct consultation between the various Bantu national units and the government of the Union.

The basis of the *Promotion of Black Self-Government Act* was to ensure that blacks lived in the Bantustans and ran their own affairs without any shares in the greater South Africa. The Bantu reserves were transformed into

consultation between the government of the Union of South Africa and the national units in regard to matters affecting the interests of such national units. According to the Preamble of Act 46 of 1959, it was expedient to develop and extend the black system of government and to assign further powers, functions and duties to regional and territorial authorities. See also Beinart *Twentieth Century South Africa* 146. Beinart submitted that apartheid in its broader conception had increasingly become associated with Verwoerd. He further argued that Verwoerd dominated policy towards blacks. He described Verwoerd as one of the ideologues who moulded notions of separate cultures, nations and homelands.

15 S 2(1) of Act 46 of 1959.

16 Act 46 of 1959. The Act described the 'black population' as a heterogeneous group.

17 See the Preamble of the *Promotion of Black Self-Governing Act* 46 of 1959.

Bantustans, later called homelands. The communities in these Bantustans were to be guided and led by the traditional leaders. Traditional leaders were used by the system to sustain the legitimacy of the Bantustans because the idea of the homeland system was to divide and rule black people.¹⁸

Verwoerd argued that the policy of independent black homelands would offer blacks economic opportunities and political representation in the reserves. As a result, traditional leaders were manipulated by the government to accept the idea of self-rule or independent homelands. Some of these homelands gained independence with the idea of forming a commonwealth with South Africa. This vision of grand apartheid became the ideal for white South Africa. The independence of the four South African homelands, namely Transkei, Bophuthatswana, Venda and Ciskei, meant that all of the Xhosa, Tswana, Venda and many other black population groups had effectively become foreigners in their own country.¹⁹

The leaders of these four homelands who 'sold' their subjects out and accepted independence endorsed the idea of independence. Most of these leaders had in their personal capacities reaped the fruits of independence. To the apartheid government, the vision of separate development was an alternative to domination by the black majority. To achieve this ideal, they thought it prudent to divide and rule the black majority. In fact, the plan to create the Bantustans was a result of fear of the united black community by the apartheid government.²⁰

18 De Klerk *The Man of His Time* 8-9. Verwoerd is quoted by De Klerk, describing his viewpoint of the homelands system, as follows: "If we treat the Coloured, the Indian in such and such a manner, how will the Bantu Chief react? Will he not demand the same rights since he will not differentiate between one dark skin from another. And if he is granted those rights, will it not mean the end of our western civilization? Is it therefore not preferable that all persons of colour should be treated as races separate from the white, thereby eliminating all possibility of overthrowing western culture and western institution in South Africa? I say that if it is within the power of the Bantu, and if the territories in which he now lives can develop to full independence, they will develop in that way."

19 The inhabitants of TBVC states were regarded as the citizens of their respective territories. As a consequence, they were stripped of their citizenship of South Africa.

20 There were ten Bantustans which were created by the apartheid regime in South Africa. These were KwaZulu, Qwaqwa, KwaNdebele, KaNgwane, Lebowa, Gazankulu, Venda, Ciskei, Transkei and Bophuthatswana. The *Self-Governing Territories Constitution Act 21*

After Verwoerd's assassination in 1966, Vorster became the Prime Minister of South Africa. According to Walter, Vorster described his black policy, which differed little from that of his predecessor, as follows:²¹

I believe in the policy of separate development, not as a philosophy but also as the only practical solution in the interests of everyone to eliminate frictions and to do justice to every population group as well as every individual. I say to the Coloured people, as well as to the Indians and the Bantu, that the policy of separate development is not a policy, which rests upon jealousy, fear or hatred. It is not a denial of the human dignity of anyone, nor is it so intended. On the contrary, it gives the opportunity to every individual, within his own sphere, not only to be a man or woman in every sense, but it also creates the opportunity for them to develop and advance without restriction or frustration as circumstances justify and in accordance with the demands or development achieved.

Vorster believed that separate development was the only policy that could accommodate otherwise irreconcilable political and cultural differences among the various national groups. Therefore, he insisted that each nation was to determine its own future. One of the objectives of Vorster's government was to make South Africa safe for the white population. This could be achieved only if blacks were given citizenship of the homelands and denied citizenship of the so-called white South Africa. In 1970, the *National States Citizenship Act*²² was promulgated to provide citizenship to blacks in homelands.²³

This measure provided that all blacks of South Africa would be citizens of their respective homelands.²⁴ The system was designed in such a way that Bophuthatswana would be the homeland for the Tswana, Venda for the Vendas, Transkei for the Xhosas and Ciskei for the Xhosas as well. In other

of 1971 made provision for the establishment of self-governing territories. Unlike the states of Bophuthatswana, Transkei, Ciskei and Venda that opted for independence, the leaders of these territories had not accepted the idea of independence. These self-governing national units consisted of different and separate ethnic groups on the basis of language and culture, namely KaNgwane, Lebowa, KwaNdebele, Gazankulu, KwaZulu, and QwaQwa.

21 Walter *War against Capitalism* 23.

22 Act 26 of 1970.

23 S 2 of Act 26 of 1970.

24 S 5 of Act 26 of 1970.

words, this Act eliminated all blacks from the Republic of South Africa, thereby taking a policy of separate development to its full fruition. As a result, black South Africans became citizens of ten homelands depending on their ethnic groups.²⁵ The NP government intended to achieve a policy of pure apartheid by racial separation.²⁶

The Department of Native Affairs was mandated to shape the policy of racial discrimination by creating more black nations with languages, cultures and interests of their own.²⁷ It seems Jansen, the then Minister of Native Affairs, hoped that by creating more black nations, the government would foster solidarity between different traditional communities in South Africa. In fact, the policy of apartheid divided and separated traditional communities. In so doing, apartheid sowed the seeds of hatred and hostility between different traditional communities. The apartheid government was successful in sustaining its policy of tribal divisions for many decades.²⁸ For example, Transkei became a self-governing territory in 1963 and was the only homeland which was dealt with outside the *Self-Governing Territories Constitution Act*.²⁹

The *Self-Governing Territories Constitution Act*³⁰ provided for the establishment of legislative assemblies and executive governments vested in executive

25 Act 26 of 1970. Finally, in 1970, all black people in South Africa were stripped of their citizenship.

26 Chidester *Religions* 204. Chidester confirmed this new order of separate development when he quoted one of the Ministers of Bantu Administration, Mulder, when he said that: "If our policy is taken to its logical conclusion as far as the Bantu people are concerned, there will be no one black with South African citizenship."

27 Chidester (n 26) 205. Chidester further cited the Minister of Native Affairs, Jansen saying: "We are of the opinion that the solidarity of the tribes should be preserved and that they should develop along the lines of their own national character and tradition."

28 It was through the policy of apartheid that the traditional communities and families were disintegrated. Furthermore, members of the same traditional community were separated and fragmented. The whole notion of apartheid was the antithesis of the notion of unity and cohesion among the black people of South Africa. For example, in 1963 Transkei received its self-government status. This was an achievement on the part of the apartheid government in breaking the unity and cohesion among the black of South Africa.

29 See *Transkei Constitution Act* 48 of 1963. The Transkei Constitution established a unicameral legislative assembly consisting of 109 members, of whom 45 were directly elected by all Transkeian citizens and 65 ex-officio members comprised Paramount Chief and other traditional leaders. The Constitution further made provision for the granting of Transkeian citizenship as well as national symbols such as a flag and anthem and coat of arms. See also in this regard Vorster "Constitution" 25.

30 Act 21 of 1971.

councils in respect of homelands.³¹ With the introduction of this Act, self-governing territories were allowed to legislate for their citizens. It was also through the passage of this Act that blacks were to run their own affairs in their homelands. According to Balatseng and Van der Walt, homeland leaders could pass their own legislation only with the permission of the South African government. This demonstrates the fact that the South African government was still in control of the homelands.³² The Act also provided for the recognition and retention of the functions and powers lawfully exercised by traditional leaders in terms of the *Bantu Authorities Act*.³³ As a result, both tribal and regional authorities were retained while territorial authorities were disestablished.³⁴

The conditions in the homelands were not conducive to the creation of employment. Some land in the homelands was barren and not good for any kind of development. Although poverty in the homelands was a cause for concern, the homelands' leaders used public funds for their personal gains and worthless projects.³⁵ Malnutrition was common in the communities of these homelands, not forgetting the overcrowding due to the acute shortage of land in

31 S 1 of Act 21 of 1971. TARG Report on Conference Documentation 24. TARG team stated that the promulgation of Act 21 of 1971 was a step further on the part of the apartheid government to realise the goal of denying the black people any claim in the government of South Africa. According to TARG, blacks had to govern themselves in small patches of land far from industrial and commercial sites. Traditional leaders in these homelands also played a very crucial role in assisting the government to achieve its goal of entrenching apartheid.

32 Balatseng and Van der Walt "History of Traditional Authorities" 8.

33 S 11 of Act 21 of 1971.

34 S 12 and 13 of Act 21 of 1971.

35 South Africa *Debates of the National Assembly* 782. Commenting on the Economic Co-operation and Promotion Loan Fund Amendment Bill, Dalling ANC MP stated that the so-called homelands' prime and only exports were the sweat and the toil of their people who were forced into a cruel system of contract and migratory labour. He went on to say that: "Perhaps it is important to reflect on how much of the money handed over to the petty dictatorships of the TBVC territories was wasted and not used for beneficial purposes. I remember for instance, Lennox Sebe built the extravagant international airport, which during the entire life of the state of Ciskei never saw the landing of any aircraft from any country other than from South Africa. President Sebe also purchased two – not one, but two jets for his planned Ciskei Airline. This cost several million and stood idle on the airport apron for years. Mr Mangope and Chief Matanzima used South African money to build their palaces, to stock their farms and so on."

traditional communities. Therefore, the introduction of the system of the homelands worsened the living conditions of the black people.³⁶

4 Independent Bantustans

4.1 *Transkei*

The 'architects' of the independence of Transkei sought to justify their political legitimacy by producing a mixture of both democratic and tribal policies. According to Chidester, an election held in 1963 in Transkei, which led to the creation of self-government, was intended to legitimise the idea of the homeland system.³⁷ The status of self-government in Transkei was conferred on Transkei through the passage of the *Transkei Constitution Act*.³⁸ This was followed by the *Status of Transkei Act*,³⁹ which granted independence to Transkei.⁴⁰

The *Status of Transkei Act* endorsed the status, roles and functions of traditional leaders in the Legislative Assembly of the Transkei as constituted in terms of the *Transkei Constitution Act*.⁴¹ In other words, this Act indirectly

36 The black inhabitants of the homelands were thoroughly subjected to untold suffering and poor socio-economic conditions. For instance, the majority of them had no access to electricity, clean water, sanitation and so forth. However, in homelands such as Bophuthatswana there were a considerable number of developmental projects, which signified economic growth and progress. Some of the residents of Bophuthatswana had access to clean water, electricity and sanitation. For more information on the development of the homelands, see Sharp "Two Worlds" 128. Sharp argued that development was a crucial aspect of separate development or apartheid. He further argued that as the racial policy unfolded, the development policies of the state were continually adapted, development priorities re-defined, and development goals altered accordingly. The question is: to what extent did racial policy or apartheid influence development in the homelands? If racial policy or apartheid indeed influenced development in the homelands as Sharp argued, why was apartheid widely condemned by both the black majority and international communities? The issue of development in this context remains a moot point.

37 Chidester (n 26) 207-208.

38 Act 48 of 1963.

39 Act 100 of 1976.

40 See the *Republic of Transkei Constitution Act* 3 of 1976. Transkei adopted this Constitution when independence was granted to it by SA in 1976. S 22 of Act 3 of 1976 provided *inter alia* for the representation of traditional leaders in the National Assembly. The National Assembly consisted of the Paramount Chiefs and 72 traditional leaders who represented the districts of Transkei.

41 Act 48 of 1963.

recognised the legislative role of traditional leaders in Transkei. The majority of seats in the legislature were reserved for traditional leaders because the homeland leaders continuously enjoyed their support. These traditional leaders were given seats in the legislature to give the homeland system the flavour of a democratic mandate. The *Transkei Authorities Act*⁴² was promulgated to regulate the institution of traditional leaders. Traditional leaders in Transkei were used as 'puppets' to legitimise the notion of separate development. In this regard, it is important to note that the creators of the homeland of Transkei used traditional leaders to validate the so-called 'independence' of Transkei.⁴³

The white authorities employed traditional leaders who participated in the Transkei government. The majority of those traditional leaders who collaborated with the white regime as early as the introduction of the *Black Authorities Act*⁴⁴ were minor traditional leaders. For instance, the leading traditional leader of Transkei, Chief Matanzima, who later became its President, was a minor traditional leader under the authority of the Paramount Chief of the Tembu.

Chief Matanzima was declared a Paramount Chief by the South African government when conflict arose in the 1960s between Chief Matanzima and the Paramount Chief of the Tembu. Chidester noted that in 1979, when Chief Matanzima was in power in the homeland, he stripped the Paramount Chief of the Tembu of his traditional authority and had him arrested because of his anti-

42 Act 4 of 1965. This Act dealt *inter alia* with matters pertaining to the appointment, recognition, suspension and deposition of traditional leaders in Transkei. In *Matanzima v Holomisa* 1992 (3) SA 876 (TK-CD), the court dealt with the matter concerning the suspension of a Paramount Chief in terms of s 47 (1)(b) of the *Transkei Authorities Act* 4 of 1965. The court found that the suspension affected the interests and the reputation of the suspended Chief and secondly there was non-compliance with the *audi alteram partem* maxim. The court further stated that the position of the Paramount Chief and the tribal authority are institutions which give effect to tribal custom and hierarchy and play an important role in the day-to-day administration of the area and in the lives of the Transkeian citizens. The mere existence of the tribal authority and the position of Paramount Chief, Chiefs and headmen is evidence of the tribal customary ways of all Transkeians. The position of Paramount Chief is hereditary and the suspension of a Paramount Chief must be seen against this background.

43 Chidester (n 26) 207.

44 Act 68 of 1951.

independence stance.⁴⁵ Chief Matanzima undoubtedly supported the idea of separate development. He declared at the Transkei celebration in 1968 that:⁴⁶

We believe in the sincerity of Dr Verwoerd's policy. The Transkei should cling to its ideals and continue building its nationhood as a separate entity...within the framework of separate development.

Lipton held the view that the argument of Chief Matanzima to accept independence and also the loss of South African citizenship was that partition in their own separate states was the only way blacks could win their political rights, and that the history and cultural identity of Transkei made it as well qualified for independence as neighbouring Lesotho. Many nominated traditional leaders supported this policy of Chief Matanzima. These were the people whom Lipton called its 'beneficiaries'.⁴⁷ According to Matanzima the independence of Transkei was to assert the political and economic freedom of the Xhosas. Matanzima quoted Verwoerd saying that:⁴⁸

We will have in the Transkei...an independent state of multi-racial character with a free economy. It will be a sovereign state that will conduct its own affairs... We feel that this will benefit the black man not only in the Transkei but also in the Republic...

4.2 *Bophuthatswana*

Bophuthatswana became a self-governing homeland in 1972 and gained its nominal independence on 6 December 1977.⁴⁹ Bophuthatswana was granted independence through the enactment of the *Status of Bophuthatswana Act*.⁵⁰

45 Chidester (n 26) 207.

46 Chidester (n 26) 208.

47 Lipton *Capitalism* 298. According to Lipton, the Matanzima brothers also supported Matanzima's policy. They were rewarded by the Transkei Assembly (TA) for their faithful service in the development of Transkei by granting them valuable farms in the land transferred by SA to Transkei.

48 Matanzima *Independence* 85.

49 See the *Republic of Bophuthatswana Constitution Act* 18 of 1977.

50 Act 89 of 1977. The sovereign and independent status of Bophuthatswana was questioned in the case of *S v Banda* (1989-1990) BLR 45-53. The defence contended that Bophuthatswana was not recognised by any state except South Africa nor was a member of the United Nations. It was further contended that by virtue of its non-recognition, Bophuthatswana did not have the attributes of a sovereign, independent state. This contention followed the theory of the constitutive school, which postulated that by non-recognition, Bophuthatswana was not a sovereign entity although on the basis of the

Although the *Status of Bophuthatswana Act* did not directly articulate and define the roles, functions and powers of traditional leaders, it did so tacitly when it recognised the Legislative Assembly of Bophuthatswana as constituted in terms of the *Self-Governing Territories Constitution Act*,⁵¹ which gave direct recognition⁵² to the authority of traditional leaders in the Legislative Assembly.⁵³

Bophuthatswana consisted of tribal land, initially administered as a black reserve under the authority of the traditional leaders.

Later, land acquired by the South African Development Trust (SADT) was added into Bophuthatswana.⁵⁴ Lawrence and Manson pointed out that Chief

declaratory theory it might be a sovereign independent state. The state argued that the question of non-recognition was inspired by political considerations. The state further argued that Bophuthatswana was recognised as an independent state according to the law of South Africa and that it complied with the essentials of statehood according to the norms of international law. The court concluded that Bophuthatswana was an independent sovereign state possessing majestas. The court applied s 1 and 2 of the *Status of Bophuthatswana Act* 89 of 1977, which provided that: "Bophuthatswana is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa and the Republic of South Africa shall cease to exercise any authority over Bophuthatswana". The court therefore rejected the notion that Bophuthatswana was an agent or an extension of the Republic of South Africa.

51 Act 21 of 1971.

52 See also s 56 of the *Bophuthatswana Constitution Act* 18 of 1977, which provided for the retention of the personal status of traditional leaders in Bophuthatswana and recognised the authority of traditional leaders. S 57 of the Bophuthatswana Constitution further provided that the designation of Chiefs, acting Chiefs, headmen, acting headmen and independent headmen vested in the President of Bophuthatswana. In recognising a Chief, the President was required to do so with proper observance of the law and customs of the traditional community concerned. In case a conflict occurred with regard to such law and customs, proper steps had to be taken to establish correct law and customs and such conflict to be resolved before the President could properly exercised his powers. In *Molotlegi v President of Bophuthatswana* 1989 (3) SA 119 (B), the court held that s 57 of the Constitution and s 36(1) of the *Bophuthatswana Traditional Authorities Act* 23 of 1978 empowered the President to appoint and recognise George Molotlegi (not a Chief) as acting Chief of the tribe. The court further held that the President as he was obliged to do by s 36(1) had recognised George Molotlegi as acting Chief with due observance of the law and customs of the tribe. The President's appointment was held to be valid. In *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B), it was alleged that the Deputy Minister failed to have due regard to the traditional laws and customs of the tribe when he deposed a Chief and recognised another. The court held that the Minister exercised his administrative discretion correctly by having due regard to the traditional laws and customs of the tribe concerned. In *Mosome v Makapan* 1986 (2) SA 44 (B), the court held that s 36 of the Bophuthatswana *Traditional Authorities Act* 23 of 1978 did not compel the President to adhere slavishly to tribal law and customs among the factors on which he based the exercise of his discretion.

53 S 11 of Act 21 of 1971.

54 Francis 2002 JSAS 532-533. Bophuthatswana was politically controlled by the then apartheid SA government and depended on it financially and economically.

Mangope, who was its President until March 1994, emphasised the ethnic origin of the Tswana nation and his own position as an important and powerful traditional leader within this ethno-national entity.⁵⁵ Chief Mangope claimed to be a significant paramount traditional leader of Bahurutshe and the main architect of Bophuthatswana and its transition to modernity. It was in this sense that Chief Mangope justified his control over the Bantustan structures on the basis of his status as a traditional leader of significant status. However, Lawrence and Manson explained that Chief Mangope's claim to paramountcy even over Bahurutshe lacked both validity and legitimacy.⁵⁶

Chief Mangope gave the origins of Bophuthatswana mythical justifications. For instance, he emphasised the fact that the Tswana people emerged from a bed of reeds of *Ntswana Tsatsi*.⁵⁷ Mangope believed that history,⁵⁸ which placed the Tswana on the political map, began and moved through the stages of homeland development and led to the granting of Bophuthatswana's independence by the South African government in December 1977.⁵⁹ When Bophuthatswana was declared an independent state, Chief Mangope stated that the event was a turning point in history.⁶⁰

Bophuthatswana introduced the *Bophuthatswana Traditional Authorities Act*⁶¹ to regulate the institution of traditional leadership. The Act prescribed the

55 Lawrence and Manson 1994 JSAS 449.

56 Lawrence and Manson (n 55) 46.

57 *Ntswana Tsatsi* is a Tswana phrase, which means the place where the sun sets.

58 Lawrence and Manson (n 55) 450.

59 Lawrence and Manson (n 55) 451. The Mangope clan was at one time amongst the Bahurutshe but it did not occupy land in the reserve north of Zeerust. Due to the shortage of land the Mangope clan moved to today's Botswana. Twenty years later, this group returned to the Zeerust reserve. But since they had left the area, they were under legal obligation to accept the authority of Chief Gopane. In 1941, the independence of Bahurutshe at Motswedi was recognised and that move drove Mangope's family to the government.

60 Chidester (n 26) 210. Chidester cited Mangope as saying the following words in a symposium held in Germany in 1986, to justify the political legitimacy of Bophuthatswana: "The concept of homeland should be used in referring to his nation in the same sense that Jewish people use it when they refer to Israel, that is, as the ancestral land of their forefathers, the forefathers of my people; the Tswana, were buried in Bophuthatswana."

61 Act 23 of 1978. This legislation regulated and defined the scope of the duties, authority and functions of Chiefs and headmen in Bophuthatswana. The powers and functions of the Chief of Bakgatla-Ba-Kgafela were also tailored and defined by this legislation. S 38 (a) of the *Bophuthatswana Traditional Authorities Act* provided that a chief or headman shall

powers, functions and roles of the traditional authorities.⁶² In terms of this Act, traditional leaders were also made ex-officio members of the Bophuthatswana parliament.⁶³ As members of parliament, they were paid salaries or stipends.⁶⁴ In this regard, the Bophuthatswana government almost placed all of the traditional leaders in the centre of the political bureaucratic arena. It was through this legislative measure that the independence and authority of traditional leaders were eroded and curtailed⁶⁵ in Bophuthatswana. The reason for this assertion is that those traditional leaders who would not toe the line were deposed and replaced by appointed traditional leaders.⁶⁶

Chief Lebone of the Bafokeng traditional community near Rustenburg defied Chief Mangope outright. He refused to hoist the Bophuthatswana flag at the local tribal offices. Chief Lebone also instructed the Bafokeng to relinquish Bophuthatswana citizenship. The Bophuthatswana government declared a state of emergency in Phokeng and ordered a Commission of Inquiry into the affairs of the Bafokeng traditional community. According to Cooper *et al*, about 20 headmen told the Commission that they preferred a traditional form of

enjoy the status, rights and privileges and duties conferred or imposed upon his office by the recognised customs or usages of his tribe or community. This piece of legislation recognised the duties and powers of the Tswana Chiefs conferred upon them by custom or customary law. The Act further provided that the Chief shall generally seek to promote the interests of his tribe or community and actively support and himself initiate measures for the advancement of his peoples. It is in this context of development and advancement of the tribe that the Act made provision for the tribal authority account. The Act required the President of Bophuthatswana to open in the office of every Magistrate in respect of each tribal authority an account into which tribal accounts will be paid. These accounts included: (a) All fees and charges which according to the laws and customs of the tribe are payable to the tribal authority, (b) All amounts from any property of the tribal authority, (c) Any donation made by any person for the benefit of the tribal authority, (d) All other amounts derived from any source whatsoever for the benefit of the tribal authority including amounts payable to the tribal authority which the National Assembly may grant for the purpose.

62 S 19 of Act 23 of 1978.

63 S 27 of Act 23 of 1978.

64 S 39 of Act 23 of 1978.

65 Eg, the judicial powers of the traditional leaders in Bophuthatswana were curtailed through the *Traditional Courts Act* 29 of 1979. This included the powers of the traditional leaders to impose corporal punishment on married men over 30 years. This position was confirmed in the case of *S v Molubi* 1988 (2) SA 576 (B), where the court held that the judicial powers of traditional leaders in Bophuthatswana were limited by the *Traditional Courts Act* 29 of 1979 and therefore traditional courts had no power to impose strokes on a married men over 30 years for contempt of court even if committed *in facie curiae*.

66 Balatseng and Van der Walt (n 32) 23.

government under the leadership of Chief Lebone to that of the elected Bophuthatswana government.⁶⁷

The activities of the Bafokeng tribal police also widened the rift between Chiefs Mangope and Lebone. The Bafokeng tribal police instituted a reign of terror on the non-Tswana and those who harboured them. These non-Tswanas were tried in Phokeng before a tribal court. Those who could not afford to pay their fines were sjambokked.⁶⁸ Although non-Tswanas were unpopular with Mangope, the cruel behaviour of the tribal police moved them more closely to Chief Mangope than Chief Lebone. Mangope capitalised on the activities of the tribal police to attack Chief Lebone and his tribal police for abusing non-Tswanas and the landlords who rented them their houses.⁶⁹

It also transpired that it was not only Bafokeng who wished to relinquish their Bophuthatswana citizenship. A large group of Ndebele who lived in the Hammanskraal area of Bophuthatswana led by Chief Kekana also threatened to secede. According to Cooper et al, Mangope warned them that unless they became citizens of Boputhatswana, they would be evicted from the land where they lived. The cases of Chief Lebone and Chief Kekana demonstrate that traditional leaders in Bophuthatswana ran the risk of being deposed or harassed by Chief Mangope.⁷⁰

In most cases, Mangope relied on the *Bophuthatswana Traditional Authorities Act*, which gave him as President of Bophuthatswana the powers to recognise, appoint⁷¹ and depose traditional leaders.⁷² This Act was to a very large extent a

67 Cooper *et al Survey* 295.

68 The non-Tswanas were mainly the Xhosas from the defunct Transkei and Ciskei homelands, as well as the Sothos from Lesotho who worked in Bafokeng mines and resided in Bafokeng as tenants. Those who were mainly harassed and flogged by the police were the wives of these non-Tswanas.

69 It was also discovered that some of these non-Tswanas who were harassed by the Bafokeng tribal police had documentary proof of land ownership. It was alleged that corrupt headmen sold tribal land to more than 2000 illegal squatters in Phokeng.

70 Cooper (n 67) 295.

71 In *Chief Pilane v Chief Linchwe* 1995 (4) SA 686 (B), the court held that in terms of the *Traditional Authorities Act* 23 of 1978, the law and customs of the tribe concerned must be considered and that the Constitution of Bophuthatswana never intended to give the President the right to appoint anyone as Chief, but that the laws and customs of the tribe

replica of the *Black Administration Act*.⁷³ Like the Governor-General (later State President) under the *Black Administration Act*,⁷⁴ the President of Bophuthatswana also had the power to depose a traditional leader or headman and install his appointed traditional or acting leader. For example, in 1985, Chief Mangope invoked the provision of this Act when he deported Chief Lebone under the guise that he wanted to topple the State President of Bophuthatswana.⁷⁵

It is also significant to note that both the central and local government of Bophuthatswana were firmly anchored in the institution of traditional leadership. Chief Mangope, the President of Bophuthatswana, was a traditional leader of the Bahurutshe Bo-Manyane. The Bophuthatswana government appointed traditional leaders and some of these traditional leaders were members of the

concerned must be considered, and also the acceptability of the person to the tribe. The appointment of a Chief who was not acceptable to the tribe would result in an intolerable situation. The court concluded that Chief Nyalala Pilane was most acceptable to the overwhelming majority of the tribe and that in recognising him the ex-President certainly followed the laws and customs of the tribe. The court ordered that the Premier who superseded the President should formalise the appointment of Chief Nyalala Pilane as a Chief of Bakgatla-Ba-Kgafela in Saulspoort.

72 S 36(2) and 42(4)(e) of Act 23 of 1978.

73 Act 38 of 1927.

74 S 1 of Act 38 of 1927. In *Minister of Native Affairs v Buthelezi* 1961 (1) SA 766 (A), the court held that the appointment of a Chief is made by the Governor-General as Supreme Chief. The court further stated that there is nothing in the *Black Administration Act* or any other statutory provision, which in any way limits the discretion vested in the Governor-General in regard to the appointment of a Chief. See *Buthelezi v Minister of Bantu Administration* 1961 (3) SA 760 (CLD), where the court stated that in all cases of quarrels regarding chieftainships or successions to chieftainships the Chief Native Commissioner had to make an enquiry for the information of the Governor-General in his capacity as the Supreme Chief of all Chiefs in South Africa. In *Saliwa v Minister of Native Affairs* 1956 (2) SA (AD) 310 the court stated that the Governor-General has absolute power as the Supreme Chief in native law and he had no obligation to grant a person hearing before the order of removal or dismissal is granted. See also *Sibasa v Ratsialingwa* 1947 (4) 369 (TPD), where the court held that the Governor-General in his capacity as Paramount Chief has a legal right to depose a Chief. The court also confirmed the powers of the Governor-General in respect of the traditional leaders in *Mabe v Minister for Native Affairs* 1958 (2) SA (TPD) where the court dealt with a matter concerning the deposition of a Chief by the Governor-General. The Governor-General relied on information put before him that a Chief was not fit to be a Chief. The Governor-General accepted that information and determined that the Chief should no longer hold an appointment as Chief. The court concluded that the Governor-General's decision in good faith could not be set aside even if the information upon which he acted was subsequently found to be incorrect.

75 For instance, when Chief Mangope stripped Chief Lebone of his office and sent him to exile, he appointed Edward Mokgwaro the younger brother of Chief Lebone as the Paramount Chief of Bafokeng traditional community.

Cabinet and the Bophuthatswana parliament.⁷⁶ Francis posited that while some of the traditional leaders were popularly considered legitimate, some were thought to be little more than stooges.⁷⁷

According to Francis, Mangope's regime was characterised by personal rule and was held together by patronage and corruption. In this regard, jobs, land and trading licenses were pieces of patronage distributed in ways that aimed to maintain and sustain political support. Political activities were banned and the opposition was severely punished, repressed and intimidated.⁷⁸ This political climate made it impossible to develop strong participatory political institutions in Bophuthatswana, which was mostly an authoritarian and unpopular Bantustan.⁷⁹ It alienated its inhabitants and did not create loyalty. The government of Bophuthatswana failed to achieve legitimacy or even credibility with the majority of its people or with South Africa. According to Lipton, Bophuthatswana instead became ridiculed as a Casinostan and a source of cheap labour.⁸⁰ Of much importance is the fact that the Bophuthatswana government relied entirely on the support of traditional leaders to mobilise

76 S 36(1) and 57(1) of Act 23 of 1978.

77 Francis (n 54) 532-533.

78 Francis (n 54) 532-533. The government of Bophuthatswana had a tendency to violate the fundamental human rights entrenched in the Constitution of Bophuthatswana. For instance, freedom of movement and association and freedom of speech were severely curtailed. In *Segale v Bophuthatswana Government* 1987 (3) SA 237 (B), the court stated that s 31 of the *Internal Security Act* 32 of 1981, which required the political parties to apply for permission to the government to hold meetings, was *ultra vires* the Constitution of Bophuthatswana. However, in *Government of Bophuthatswana v Segale* 1990 (1) SA 434 (BA), the Appeal Court of Bophuthatswana stated that the ban on meetings in terms of s 31 of the *Internal Security Act* 32 of 1979 could not be said to be permanent and therefore *ultra vires* the Constitution of Bophuthatswana, as it was for the parliament to decide when the provision of s 31 should be relaxed. See also *Lewis v Minister of Internal Affairs* 1991 (3) SA 628 (B), where the court accordingly found that the Minister's power to order the removal of persons from Bophuthatswana in the interest of public safety was not unconstitutional. The cases of Lewis and Segale (appeal case) failed because the appellants failed to appreciate that the Constitution of Bophuthatswana was not only a supreme statute but that it was also supreme authority. The Constitution of Bophuthatswana provided a framework for and set limits on governmental power and acted as a controlling instrument against which all other laws were to be tested. The restrictions imposed on the political parties and citizens of Bophuthatswana by the government were seen in the light of this being a state which oppressed its people.

79 Francis (n 54) 533. In the 1990s the landscape of politics changed drastically in South Africa. Mandela was released from prison and the realities of the new South Africa based on the ideals of democracy and freedom became evident.

80 Lipton (n 47) 339. Places like Sun City, the gambling den of Bophuthatswana, attracted white South Africans who usually indulged in the gambling, mixed sex and blue sex forbidden in puritan South Africa.

voters in the traditional authorities' areas. Suffice it to say that the political survival of Bophuthatswana revolved around support of the institution of traditional leadership.

4.3 Venda

Venda⁸¹ was the smallest of the four independent black states in South Africa. The Venda National Party (VNP) under the leadership of Chief Mphephu was the political vehicle which introduced Venda to independence.⁸² The VNP consisted mainly of traditionalists, particularly of traditional leaders. The VNP came into power in 1973 and was returned to power in the independence elections in 1979, largely as a result of the influence of traditional leaders and headmen.

Venda became the third homeland to gain independence from the South African government, with the introduction of the *Status of Venda Act*⁸³ on 13 September 1979. Although the Venda Independent Party (VIP), the opposition party, won the overwhelming majority of elected seats in both the 1973 and 1978 elections, the ruling party, assumed power each time because the support of the VNP by the nominated traditional leaders decided the results in the National Assembly.⁸⁴ The traditional leaders seemed to be used as barriers against democracy.

81 TARG Report on Politico-Historical Background 4-5. According to TARG, the Venda homeland consisted of six districts and covered a total area of approximately 639 000 hectares. These districts were again divided into tribal areas. The characteristic of the political system amongst the VhaVenda was that it was highly centralised, in the sense that each tribal area was under the authority of a traditional leader assisted by his sub-Chiefs and headmen. In most cases this hierarchy of subordinate headmen was hereditary. TARG report states that in the VhaVenda community a traditional leader often performed ritual on a tribal or national scale and was himself frequently believed to have a mystical relationship with the ancestors and the land. He was described as the 'owner' of tribal land because it was believed that he was by tradition the protector of the people and their lands.

82 The *Status of Venda Act* 107 of 1979 preceded the independence of Venda. According to the *Status of Venda Act*, the Legislative Assembly of Venda was authorised to pass laws including a Constitution. See the *Constitution of the Republic of Venda Act* 9 of 1979. Traditional leaders were represented in the National Assembly of the Republic of Venda.

83 Act 107 of 1979.

84 Cooper (n 67) 297. The dominance of the traditional leaders in the government of Venda made it unpopular with the vast majority of the citizens of Venda. In *Tshivhase Royal Council v Tshivhase* 1990 (3) SA 828 (V), the court stated that the tribal system embedded

The Venda hegemony was centred on the institution of traditional leadership. The *Venda Tribal and Regional Councils Act*⁸⁵ regulated the institution of traditional leadership. The traditional leaders were manipulated by Chief Mphephu to lubricate the political wheel of the Bantustan administration of Venda. It was difficult to refer to Venda as a democratic state or homeland. Chief Mphephu confirmed this proposition when he announced his intention to declare Venda a one party state because the western style of democracy was not appropriate to and compatible with an African country like Venda. This announcement justified Mphephu's sense of intolerance of democracy and political opposition.⁸⁶

In 1983, Chief Mphephu became life President of the homeland. In 1984, the first post-independence elections were held in Venda. The VNP won 41 of the 45 elected seats. During the independence of Venda political activity was not tolerated and members of the opposition were detained. This earned Mphephu's administration a reputation for ruthlessness. It is important to note that since it was mainly the traditional leaders who ruled Venda, they perpetrated oppressive violations of human rights and therefore became

in government had two main drawbacks for a fast-growing country like Venda, firstly in that it created a parallel system of government to the newly formed National Assembly and State President, thereby acting as a retarding force in certain highly desirable developments such as land reform and private land ownership, and secondly in that it tended to divide the tribe rather than unite it, as it served to perpetuate old tribal rivalries and feuds.

85 Act 10 of 1975. This Act repealed the *Bantu Authorities Act* of 1951 as far as Venda was concerned. The primary objective of Act 10 of 1975 was to deal with the following matters: (a) To substitute Tribal and Regional Councils for the Tribal and Regional Authorities in Venda. (b) To define their constitution, powers, authorities and functions. (c) To regulate the appointment, deposition, discharge and discipline of Paramount Chiefs, Chiefs and headmen and to define their powers, functions and duties. S 35 of Act 10 of 1975 provided for the functions and duties of the traditional leaders in Venda as follows: (a) To exercise their functions in terms of indigenous law and custom. (b) To maintain law and order. (c) To report without delay any matters of concern including any condition of unrest or dissatisfaction. (d) To ensure the protection of life, person and property. (e) To disperse or order the dispersal on any unlawful meeting or gathering. (f) To make known to the residents of their areas the requirements of any law. (g) To ensure compliance with all laws, orders and instructions of any competent authority.

86 Codman 1986 www.nu.ac.za/ 82.

unpopular in Venda.⁸⁷ They became the enemies of the people and the servants of apartheid.

Another critical element which reduced and undermined the status and pride of traditional leaders in Venda was the dramatic resurgence of witchcraft in Venda. According to Minnaar, witchcraft cases posed a serious challenge and threats to the credibility of traditional leaders. Some of the traditional leaders were accused of working in cahoots with the witches.⁸⁸ It should also be remembered that after the death of Chief Mphephu in April 1988, a considerable number of cases of witchcraft and medicine murders were reported. Some believed that Chief Mphephu made it difficult for the people to attack the witches because he was linked with witchcraft. This resulted into witch burning. When the climate of terror intensified, anyone accused of being a witch was simply killed on the spot despite protestations of innocence. Minnaar observed that in some villages up to five or more accused witches were either killed or driven out of their homes each night.⁸⁹

Various reasons were advanced for both the witch burnings and muti.⁹⁰ Witch burnings were associated with certain political motivations, personal jealousy of individual success, and the settling of old scores. Medicine murders were

87 TARG Report on Politico-Historical Background 16-17. TARG team noted that the public opinion was that traditional leaders had been turned into politicians by the homeland's politics, a system, which was not popular with many people because they were seen as upholders of that system. As a result, traditional leaders became a target of the politicised youth. These youth fought the traditional leaders in traditional authorities' areas. They saw traditional leaders and the government as the supporters of apartheid. As a result, they continued to be in the forefront of the political struggle. After the death of President Mphephu, Chief Ravhele became the new President of Venda. His government was more unpopular than that of Mphephu.

88 TARG Report on Politico-Historical Background 16-17. According to TARG report, in 1979 Chief Ramovha, the Deputy Minister of Post and Telegraphs, killed one Nyathela, a local high school principal, for ritual purposes. For the first time in Venda history a Chief was indicted and brought before the Supreme Court of Venda. Chief Ramovha was subsequently found guilty and sentenced to death and was in fact hanged. Throughout the so-called independence of Venda a considerable number of witch burnings and medicine murders occurred. People accused of witchcraft were burned or driven from their homes. The Cabinet Ministers and the top government officials were competing for power in the government. As a result, there were allegations that those political competitors indulged in medicine murders to secure their positions.

89 Minnaar 1991 www.nu.ac.za/ 53.

90 'Muti' is a Nguni term, which is always used to refer to medicine murder.

commonly attributed to an individual's attempt to enhance his own personal power or to ensure success in a new business venture. Some of the traditional leaders were also accused of medicine murders.

These accusations destroyed the credibility of the institution of traditional leadership in Venda. Although not all of the traditional leaders were accused of witchcraft, they were no longer seen as the guardians and protectors of their subjects but as 'criminals' who murdered people for their material or political gain. As a result, traditional authorities lost a great deal of respect in the eyes of the Venda people.⁹¹ The traditional leaders also lost credibility in the eyes of their people because they were seen as the faithful supporters of the homeland system and administration.

4.4 Ciskei

The territory known as Ciskei was declared a self-governing area by the South African government in 1972 and its territorial authority was replaced with a Legislative Assembly.⁹² The early independence years of Ciskei were marred with a plethora of challenges. For example, the Transkei government vehemently opposed the independence of Ciskei. Chief Matanzima pointed out that the Ciskei independence contravened the *Promotion of Black Self-Government Act*. As a result, Chief Matanzima warned Chief Sebe that the march of time would catch up with him. Chief Matanzima produced a petition document signed in 1976 by 12 Ciskei traditional leaders who were in favour of the incorporation of Ciskei into Transkei. Cooper *et al* cited Matanzima as saying that:⁹³

The Ciskei celebrations (and independence) were the culmination of a systematic defiance of the natural leaders of the Ciskei now scared of Chief Sebe's wrath.

91 Minnaar (n 89) 53.

92 Zinge 1984 www.nu.ac.za/ 4. Since its independence in 1981, the Ciskei had become in many ways the most controversial of South Africa's homeland states. See also the *Constitution of the Republic of Ciskei Act 20 of 1981*. S 6(3) of Act 20 of 1981 provided for the representation of traditional leaders in the National Assembly.

93 Cooper (n 67) 301.

Shortly before independence, Chief Sebe announced what was termed a 'Package Deal' agreed upon between himself and the then Minister of Co-operation and Development, Koornhof. According to the deal, the envisaged independence of Ciskei was to be different from that negotiated by Transkei, Bophuthatswana and Venda. The 'Package Deal' *inter alia* stipulated that the Ciskeians would retain their identity and nationality while at the same time not surrendering their South African citizenship.⁹⁴ Subsequently, the *Status of Ciskei Act*⁹⁵ was promulgated and Ciskei was granted independence on December 1980.

On 5 December 1980, the National Assembly of Ciskei chose Chief Sebe as the Executive President. Chief Sebe appointed a Vice President and eleven members of the Cabinet. The National Assembly consisted of 22 elected members, 33 nominated traditional leaders, one Paramount Chief and five members nominated by the President for their special knowledge, qualifications and experience.⁹⁶ Chief Sebe declared his intentions to support the idea of separate development by stating that the separate development of nations had always been a characteristic of traditional African life.⁹⁷ Sebe saw the homeland system as a way to re-establish his people's own traditions and customs both religiously and politically and not as a product of apartheid.⁹⁸

Chief Sebe was a commoner. He made all the necessary arrangements for his installation as a traditional leader. He declared himself a traditional leader in order to legitimise and justify his traditional and political power. Sebe stated clearly at his own installation ceremony that:⁹⁹

94 Cooper (n 67) 297.

95 Act 110 of 1980.

96 Cooper (n 67) 297.

97 Chidester (n 26) 208. Chidester quoted Sebe as saying that: "Ciskei was our homeland where we lived as a proudly independent and free nation, quite separate and distinctly different from the other black nations of South Africa. The Ciskei nation was not being created but was being restored to its former glory."

98 Chidester (n 26) 209.

99 Chidester (n 26) 209.

The Chief was the central symbol of national honour and pride, the custodian of all those tribal and national customs and practices that are dear and sacred to the tribe.

Ciskei's lesson is of great historical importance in the sense that it shows how the institution of traditional leadership was re-created by the apartheid government. It is therefore difficult to refer to pristine institutions of traditional leadership under these political circumstances. In fact, the traditional leaders and not the people supported the independence of Ciskei. It is evident that both the Ciskei parliament and the Cabinet were staffed with traditional leaders. Suffice it to say that the traditional leaders in Ciskei including Chief Sebe manipulated the institution of traditional leadership to justify the concept of the homeland system and Ciskei nationality.

5 The demise of the Bantustans and beyond

5.1 A call for the transformation of traditional leadership

The introduction of multi-party democracy brought the issue of traditional authorities, their history and roles in the new South Africa under a spotlight. Ntsebeza argued that the recognition of the hereditary institution of traditional leadership in the South African Constitution, while at the same time enshrining liberal democratic principles based on representative government in the same Constitution, is a fundamental contradiction. According to Ntsebeza, the two cannot exist at the same time for the simple reason that traditional leaders are born to the throne and not elected by the people.¹⁰⁰

Therefore Ntsebeza asserted that the recognition of the institution of traditional leadership compromised the democratic project that the post-apartheid government had committed itself to. More surprisingly, he asked why it was that an organisation such as the African National Congress (ANC), which fought for

100 Ntsebeza (n 9) 256-258.

a democratic unitary state after apartheid, would embrace the institution of traditional leadership, which had a notorious record under apartheid.¹⁰¹

The debate on the future role of traditional leaders in a democratic South Africa led to the emergence of the schools of modernists and traditionalists respectively. According to Keulder, the modernists call for a major transformation of the institution of traditional leaders to meet the requirements of a modern, non-sexist and non-racial democracy.¹⁰²

The modernists were primarily concerned with gender equality and reviewed the institution of traditional leaders as the basis of rural patriarchy. On the other hand, the traditionalists believed that the institution of traditional leaders was at the heart of rural governance, political stability and rural development. They further argued that a traditional leader acted as a symbol of unity to maintain peace, preserve customs and culture, resolve disputes and faction fights, allocate land etc.

For the institution of traditional leadership, despite past policies and practices, enjoyed substantial support and legitimacy.¹⁰³ However, as Keulder observed both the modernists and traditionalists agreed that the institution of traditional leadership, its composition, functions and legal manifestations should change in order to adapt to the changes in the new constitutional, social and political environments of post-apartheid South Africa.¹⁰⁴

6 Transitional dispensation: 1993 to 2003

The constitutional transition was preceded by protracted negotiations which were aimed at creating a new order where all South Africans would be entitled to equality before the law. In terms of section 235 of the Interim Constitution of

101 Ntsebeza (n 9) 258.

102 Keulder *Traditional Leaders* 3-10.

103 Keulder (n 102) 3-4.

104 Keulder (n 102) 6.

the Republic of South Africa, legislation dealing with the administration of justice, traditional leadership and governance vested with the President of the Republic of South Africa in 1994. Some of these functions were later assigned to the competent authorities within the jurisdiction of different ministries and provinces.

All the pieces of legislation from the homelands were assigned to the President and later re-assigned to the new provinces. Under section 235(8) of the Interim Constitution, the President was assigned and could re-assigned the administration of certain laws to a competent authority within the jurisdiction of the government of a province. Any such assignment would be regarded as having been made under the similar transitional arrangements in the 1996 Constitution.

Legislation dealing with the administration of justice such as the *Black Administration Act*¹⁰⁵ and certain legislation of the self-governing territories and the so-called independent states, for example, the *Transkei Authorities Act*,¹⁰⁶ the *Regional Authorities Courts Act*,¹⁰⁷ The *Chiefs Court Act*,¹⁰⁸ the *Bophuthatswana Traditional Courts Act*,¹⁰⁹ the Venda Traditional Leaders Administration Proclamation 29 of 1991 etc were temporarily assigned to the Department of Justice and Constitutional Development. The 1996 Constitution provides for the continuation of both pre-1994 legislation and various pieces of legislation issued in terms of the Interim Constitution including the old order legislation passed before 27 April by the homeland governments.¹¹⁰

105 Act 38 of 1927.

106 Act 4 of 1965.

107 Act 13 of 1982.

108 Act 6 of 1983.

109 Act 29 of 1991.

110 Olivier "Recent Developments" 78.

7 1993 Constitutional provisions

7.1 1993 Constitutional dispensation

In 1994, South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, the promotion of national unity and reconciliation. The new constitutional dispensation culminated in the Interim Constitution.¹¹¹ The institution, status and role of traditional leadership according to indigenous law were recognised and protected in the Interim Constitution in accordance with the Constitutional Principle VIII. The roles and functions of traditional leadership were not defined in this Principle.

In the Interim Constitution, traditional authorities and indigenous and customary law were recognised and provision was made for certain functions of traditional leadership at central and provincial government levels. Chapter 11 provided for the recognition of all existing traditional leaders and customary law. These constitutional provisions were as follows:¹¹²

- (1) A traditional authority, which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.

These Constitutional provisions were a victory for traditional leaders in the new democratic South Africa. Although Chapter 11 recognised and protected the institution, status and role of traditional leadership according to customary law, recognition of customary law and traditional leadership was subject to the supremacy of the Constitution and the Chapter on the Bill of Rights. Section 160(3)(b) of the Interim Constitution provided that where applicable a provincial Constitution may provide for the institution, role, authority and status of a

111 Khunou (n 6) 134.

112 S 181 of the Interim Constitution.

traditional monarch in the province and would make provision for the Zulu monarch in case of KwaZulu-Natal.

In view of this constitutional arrangement, it is unsurprising that the traditional leaders negotiated for the type of the Constitution that would respect and uphold their aspirations and powers. The Interim Constitution provided for ex-officio status of the traditional leaders in local government structures. This status was recognised by the Constitutional Court in *ANC v Minister of Local Government and Housing, Kwazulu-Natal*.¹¹³ The Interim Constitution further provided a function for traditional leadership at the local level of government.¹¹⁴ It also provided for a National Council of Traditional Leaders at national level and a Provincial House of Traditional Leaders at provincial level.¹¹⁵ Initially, the six Provincial Houses of the traditional leaders were established in terms of the legislation enacted by the provincial legislatures concerned.¹¹⁶ These constitutional provisions were once again a victory for traditional leaders in the new democratic South Africa.¹¹⁷

CONTRALESA commented:

113 1998 (3) SA 1 (CC) 11.

114 S 182 of Interim Constitution.

115 S 184(1) of Interim Constitution.

116 See Olivier "Traditional Leadership" 72. Provisional Houses of Traditional Leaders were established in North West, KwaZulu-Natal, Mpumalanga, the Free State, Eastern Cape and Limpopo. See in this regard *House of Traditional Leaders for the Province of the North West Act 12 of 1994*, *KwaZulu-Natal Act on the House of Traditional Leaders Act 7 of 1994*, *Mpumalanga House of Traditional Leaders Act 4 of 1994 as amended in 1998*, *Free State House of Traditional Leaders Act 6 of 1994*, *Northern Province House of Traditional Leaders Act 6 of 1994* and *Eastern Cape House of Traditional Leaders Act 1 of 1996*. This provincial legislation is more or less similar in content. It determines the powers, functions and duties of the respective Houses. It also gives provinces powers to advise on and make recommendations on any draft Bill in respect of the status, powers and functions of traditional authorities, the affairs of traditional communities, traditional and customary law. At the time of writing this thesis some parts of the North West Province, which consisted of areas of Traditional Authorities, were incorporated into the Northern Cape Province. The Northern Cape Provincial Legislature was expected to pass legislation for the establishment of a House of Traditional leaders in that Province.

117 S 183(1) of Interim Constitution. This section was mandatory and therefore six Provincial Houses of Traditional Leaders were established. According to Olivier constitutional Principles XIII, which provided for the recognition and protection of traditional leadership was of paramount importance. The Interim Constitution gave effect to the protection of the institutions of traditional leadership.

[T]he democratic dispensation developed in South Africa should be developed in a manner which reflects the values of the whole community it serves. The Constitution should therefore mirror the soul of the nation and it must include all the aspirations, beliefs and values. The institutions and role of traditional leaders, which have been in existence as long as a liberal democracy in the West are to be treated with respect and accordingly be integrated within the structures of national, provincial and local government.

7.2 1996 Constitutional settlement

The 1996 Constitution is the supreme law of the country. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. Section 2 must be read with section 1 of the Constitution, which also pronounces the supremacy of the Constitution and the rule of law. If all of these principles are read together, one principle is indisputable: the Constitution is supreme and everything and everybody is subject to it.

Everything and everybody – all law and conduct, all traditions, customs, perceptions, customary rules and the system of traditional rule are influenced and qualified by the Constitution. The institution of traditional leadership is obliged to ensure full compliance with the core constitutional values of human dignity, equality, non-sexism, human rights and freedom. The Constitutional Court confirmed the supremacy of the Constitution in *S v Thebus*,¹¹⁸ where it held that since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity.

Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency. The 1996 Constitution recognises the institution of traditional leadership. This recognition is housed in section 211(1), (2) and (3) of the Constitution.¹¹⁹

118 2003 (10) BCLR 1100 (CC) 1111.

119 Ch 12 of the 1996 Constitution. See also *In Ex Parte Chairperson of the Constitutional Assembly: In the Certification of the Constitution of the Republic of South Africa* 1996 (4)

- (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.

Traditional leadership is recognised subject to the 1996 Constitution and is required to be compatible with the Constitution. This constitutional provision requires the traditional leadership to change its own rules and practices not to be in conflict with the Bill of Rights. Discrimination on the ground of sex or gender would for example not be allowed and more inclusive participation in the decision-making processes will be considered.¹²⁰ The 1996 Constitution is a

SA 744 (CC), the court dealt with the provisions relating to traditional leadership to establish whether it was repugnant with the Constitution or not. The court in considering this matter held that s 211 and 212 of the New Text (NT) complied with the Constitutional Principle XIII. The court stated that whatever meaning the future court might give to the words "institution, status and role of traditional leaders", the requirements of Constitutional Principle XIII were carried out by s 211(1) which expressly declared that the institution, status and role of traditional leadership according to customary law were recognised subject to the Constitution. Accordingly, traditional leadership was protected by and found its place under the wide umbrella of the 1996 Constitution. The recognition of customary law and traditional leadership was a mechanism to protect the cultural heritage of the African people.

¹²⁰ See in this regard *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) 933. The *Shilubana* case raised issues about the powers of the traditional authorities to develop their customs and traditions to promote gender equality in traditional leadership in accordance with the 1996 Constitution. Ms Tinyiko Shilubana was appointed to a traditional leadership position for which she was disqualified by virtue of her gender. The Constitutional Court was called on to decide whether the Valoyi traditional community, in particular the traditional authority, has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred before the 1996 Constitution came into operation. In dealing with the appeal against a decision of the Supreme Court of Appeal, substantially confirming a decision of the Pretoria High Court, the Constitutional Court found as follows: That the Valoyi traditional authority restored the traditional leadership to a woman who would have been appointed traditional leader in 1968, were it not for the fact that she was a woman. As far as lineage is concerned, the traditional leadership was also restored to the line of Hosi Fofeza (Ms Shilubana's father) from which it was taken away on the basis that he had only a female and not a male heir. The Constitutional Court further held that the Valoyi traditional authority had authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership. Their actions reflected in the appointment of Ms Tinyiko

legal effort to recreate a new and democratic institution of traditional leadership in South Africa.¹²¹

8 Milieu of legislation and public policy

8.1 Overview

In the first ten years of democracy, the post-apartheid parliament of South Africa enacted a plethora of legislation and issued government policy intended to transform and democratise the institution of traditional leadership and the system of land administration and use. Various pieces of legislation and policy are discussed hereunder.

8.2 White Paper on Traditional Leadership and Governance

The White Paper on Traditional Leadership and Governance was a product of approximately four phases, namely research, debates, extensive consultation and discussions.¹²² These discussions led to the production of a Draft White Paper where preliminary policy positions were outlined. The fourth phase witnessed the launch of the White Paper on Traditional Leadership and Governance that paved the way for the drafting of the *Traditional Leadership and Governance Framework Act 41 of 2003* concerning the institution of traditional leadership.¹²³

The White Paper was a culmination of a long process wherein the country engaged in a dialogue regarding the role and place of the institution of traditional leadership in contemporary South Africa as a democratic state. The key objectives of the White Paper centred on the principle of creating an

Shilubana accordingly represented a development of customary law. The traditional authority intended to act to affirm constitutional values in traditional leadership in its community. It had the authority to do so.

121 William 2004 *JMAS*.

122 White Paper on Traditional Leadership and Governance (2003) 12-13.

123 *Ibid.*

institution which is democratic, representative, transparent and accountable to the traditional communities.

9 Selected pieces of legislation

The *Traditional Leadership and Governance Framework Act*¹²⁴ (hereinafter referred to as the '*Framework Act*') and the *Communal Lands Rights Act*¹²⁵ (hereinafter referred to as the 'CLARA') are intended among many other things to revamp and resuscitate the powers and functions of traditional leaders enjoyed under the notorious *Black Authorities Act*¹²⁶ and various pieces of homelands' legislation. For example, the *Framework Act* endorses tribal authorities, which were set up in terms of the *Black Authorities Act* as a foundation for establishing the traditional councils,¹²⁷ while the *Communal Land Rights Act*¹²⁸ recognises these councils as having the authority to administer and allocate land in the traditional authorities' areas.¹²⁹ The *Framework Act* directs that local houses of traditional leaders must be established for the area of jurisdiction of a

124 Act 41 of 2003. The *Framework Act* took its cue from s 212(1) of the 1996 Constitution. This section provided that national legislation may provide for the role for traditional leadership as an institution at local level on matters affecting local communities.

125 Act 11 of 2004. The CLARA gives effect to s 25(5), which requires the state to take reasonable legislative and other measures to enable citizens' basis. It took its cue from s 25(b) of the 1996 Constitution, which states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices, is entitled to the extent provided by the Act of parliament either to tenure which is legally secure, or to comparable redress.

126 Act 68 of 1951.

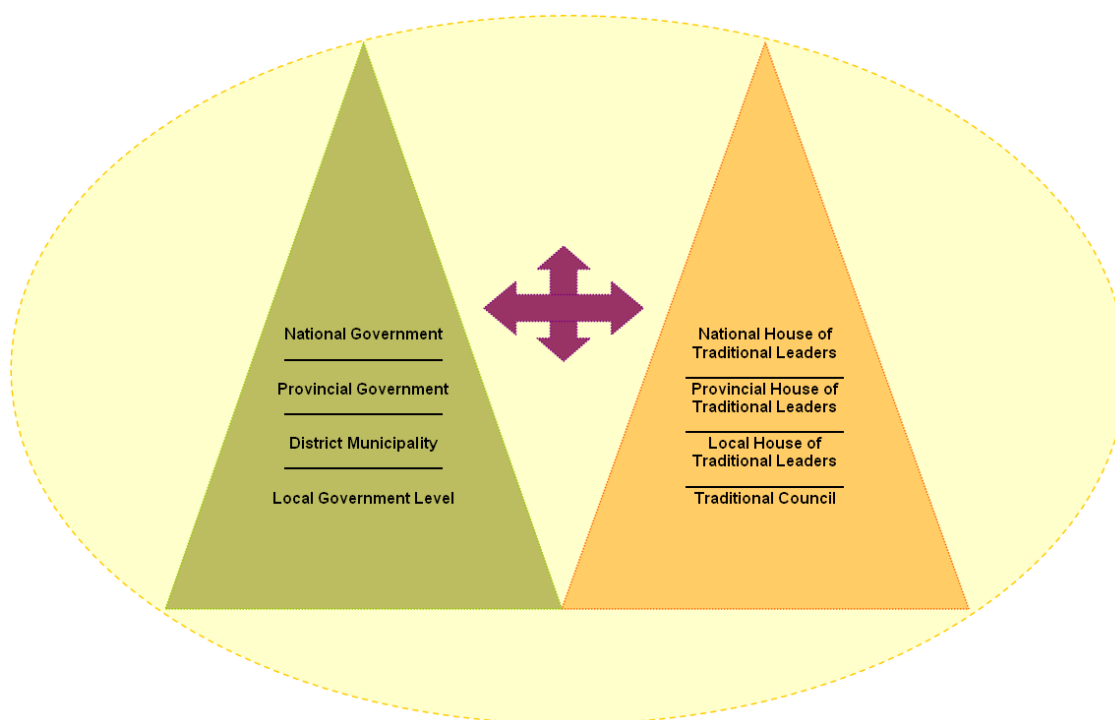
127 S 3 of the *Framework Act* provides for the establishment and recognition of traditional councils. S 20 of this Act provides for the role of a traditional council or traditional leaders in respect of: arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, economic development, environment, tourism, disaster management, the management of natural resources, the dissemination of information relating to government policies and programmes and the registration of births, deaths and customary marriages. The Act promotes and re-asserts the development role and local government functions played by the traditional leaders in their respective homelands. See also, the Traditional Leadership and Governance Framework Amendment Bill, 2008 which provides for the establishment of sub-traditional councils.

128 Act 11 of 2004. If a Traditional Council in terms of the *Framework Act* is recognised by the community as its Land Administrative Committee, it is stated in the CLARA that the functional area of competence of such a Traditional Council is the administration of land affairs and not traditional leadership as contemplated in schedule 4 of the Constitution. See also s 21(2) of the CLARA.

129 Ntsebeza (n 9) 14.

district or metropolitan municipality where more than one senior traditional leader exists.

The *Framework Act* and various pieces of both the national and provincial legislation also provide for the establishment, composition, recognition and roles of respective provincial houses of traditional leaders and a national house of traditional leaders. These houses of traditional leaders are established horizontally in relation to each sphere of government in order to engender the principle of co-operative government. The following diagram illustrates the horizontal pattern of these houses in relation to each sphere of government:¹³⁰



Other legislative initiatives affecting traditional leadership include amendments of the *National House of Traditional Leaders Act*,¹³¹ various pieces of the

¹³⁰ See in this regard the manual issued by the Department of Co-operative Governance and Traditional Affairs. Toolkit 2009 www.cogta.gov.za/ 36.

¹³¹ Act 10 of 1998. This legislation provides for the establishment of a Council to be known as the National House of Traditional Leaders. It further provides for the objects and functions of the House. See also the National House of Traditional Leaders Amendment Bill, 2008. This Bill makes a provision for key areas, which include *inter alia* the establishment of the National House of Traditional Leaders, alignment of the powers, functions and duties of the House with the White Paper on Traditional Leadership and Governance, 2003 and the

provincial legislation of the North-West Province, Mpumalanga, Limpopo, Northern Cape, Eastern Cape, Free State, KwaZulu-Natal,¹³² the *Remuneration of Public Office Bearers Act*¹³³ and finalisation of the Traditional Courts Bill, 2008.¹³⁴

The above legislative initiatives demonstrate the government's intention to develop and reform the institution of traditional leadership, indigenous customs and practices considered to be in conflict with the democratic values entrenched in the Constitution. According to De Beer, the passing of the *Promotion of Equality and Prevention of Unfair Discrimination Act*¹³⁵ left nobody in any doubt about the parliament's intention to eradicate customs and practices perceived to be in conflict with the gender equality principle in the Constitution.¹³⁶

10 Conclusion

In view of the preceding discussion, it is evident that both the apartheid and homelands' legislative frameworks altered the roles, powers and functions of traditional leaders. Moreover, those various pieces of legislation eroded the foundation upon which the institution of traditional leadership was founded and established. Just as the successive colonial and apartheid governments were ready to deal the institution of traditional leadership a mortal blow, the governments of the TBVC states did not hesitate to take the attack forward.

Despite the fact that the political leadership of the TBVC states promised traditional leaders 'bread' and 'butter' before they could attain 'independence'

Framework Act, provision for support of the House by government, the accountability of the House and the relationship between the House and the Kings and Queens.

132 Olivier (n 110) 81.

133 Act 20 of 1998. This Act provides for the President to determine the remuneration and allowances payable to traditional leaders from the National Revenue Fund, after consultation with the National House of Traditional Leaders and the Commission on the Remuneration of representatives.

134 Traditional Courts Bill B15-2008.

135 Act 4 of 2000.

136 De Beer "South African Constitution" 216.

from South Africa, it was the same political leadership which eroded and undermined the powers and roles of the traditional leaders and exploited them to the fullest while they (the 'Presidents' of the TBVC states) were exploited by the successive apartheid governments. With the advent of the constitutional democracy in South Africa, the institution of traditional leadership is required to re-define itself within the framework of a democratic dispensation. The government has been in the forefront of transforming the institution of traditional leadership for about 15 years, but it seems that the transformation has not got off the ground yet.

This is a new ball game altogether. Whether or not the present government will completely democratise and transform the institution of traditional leadership is yet to be seen. As Donkers and Murray note, if the traditional leaders are to assume a dignified and just role in the new South Africa, they will have to deal with the problems facing them within the constitutional and legislative framework, for they and they alone hold the key to transforming the challenges they face into prospects, and those prospects into a reality within the confines of a constitutional democracy.¹³⁷

137 Donkers and Murray "Prospects and Problems".

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List of abbreviations

ch	chapter(s)
par	paragraph(s)
reg	regulation(s)
s	section(s)
NP	National Party
SADT	South African Development Trust
VNP	Venda National Party
VIP	Venda Independent Party
ANC	African National Congress
CLARA	Communal Lands Rights Act
TA	Transkei Assembly