

**University of Cape Town**



**Post-Apartheid Legislative Recognition of Traditional Leaders in South Africa: Weak Legal Pluralism in the Guise of Deep Legal Pluralism**

**An analysis and critique of the legislative framework for the recognition of traditional leadership in South Africa under the 1996 Constitution.**

**By: Mphati Ntebaleng Mutloane MTLMPH014**

**Supervised by: Professor Dee Smythe**

**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LLM) in approved courses and minor dissertation.**

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## Declaration

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## Abstract

This study explores the limitations of recognising traditional leadership as institution through legislation. The legislative recognition of traditional leadership has serious implications for the processes of change within customary law from ‘official’ customary law to ‘living’ customary law. The advent of the 1996 Constitution and its emphasis on freedom, dignity, equality and accountability has opened up avenues for democratic political participation, which is changing the nature of customary law through a bottom-up process involving community members in the evolution of customary law. This process of evolution draws on various sources of law, including aspects of official customary law, community norms and procedures as well as the Constitution, particularly rights discourse. Deep legal pluralism has taken root through living customary law and is changing the way in which community members relate to traditional leaders by empowering rural citizens to demand accountability from traditional leaders.

Legislative recognition of traditional leadership has been characterised as necessary for the restoration of the dignity of African justice systems. Though constitutionally sanctioned through the rule of law, the legislative framework recognising and regulating traditional leaders has had a negative impact on the processes of change and democratisation described above at grassroots level. Gaining an understanding of these consequences and how they have come about is at the heart of this study, especially given that they are unintended consequences of a government policy meant to improve the lives of rural citizens.

Legal pluralism as a theory of law provides a critical lens through which the shortcomings of legislation recognising traditional leadership can be perceived, and probing questions can be asked about the effect of state law on non-state legal orders. However, in South Africa the situation is quite complicated given that the distinction between state law and non-state law with regard to African customary law is not always easy to make. The two systems have existed not only in juxtaposition for many years, but have bled into each other in layered ways. These layers have been moulded very deeply through the influence of various politico-legal orders in existence at particular times and their impact on social relations in South African society. As a theory of law, legal pluralism is used in this study to try and peel back a few of these layers, enabling observation and analysis of how the distribution of political power from the different politico-legal frameworks of governance in South Africa namely,

colonialism, apartheid, and constitutional democracy, have shaped traditional leadership; and the impact of these processes on the power relationships between traditional leaders and rural citizens.

Law, mostly in the form of legislation, has been an important factor in the establishment, destruction, and re-establishment of these power relationships. This forms the basis of the study, at the end of which it is determined that although legislation is necessary for the recognition and regulation of traditional leadership, as a requirement of the rule of law, the current and proposed legislative framework for traditional leadership is an inappropriate framework. It centralises legislative, judicial and executive power in an unelected arm of government, namely traditional leaders, which is unconstitutional on the basis of the separation of powers principle which is a founding value of South Africa's constitutional democratic dispensation.

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## Dedication

I dedicate this Dissertation to:

My parents: Mummy, Daddy, and Mama Dudu. Thank you for being superb parents, for all your hard work, dedication and love.

My sisters, Motheo and Amogelega, for being the best baby sisters in the world. I hope this work inspires you to dream big, aim for the greatest heights, and work hard.

Daddy, this one is especially for you. While writing this dissertation, I remembered when I was younger and you were doing your Master's degree. I watched you work a full time job, then come home and study. I realised during that time that anything is possible with hard work and perseverance. I cannot thank you enough for the sacrifices you've made to educate me, for teaching me to believe in myself and aim high, but most of all, for teaching me that my dreams matter and are worth fighting for.

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## **Chapter One: Introduction**

### ***Introduction***

The topic for this study was inspired by the mass opposition presented by rural people's movements when the Traditional Courts Bill was presented in different provinces for public consultation, and in the South African national Parliament. Many people were surprised by the vehement opposition of large numbers of citizens of rural South Africa to the Bill, the assumption always having been that traditional leaders and the communities in which they rule live in perfect, idyllic harmony. Rural citizens who opposed the Bill were not necessarily representative of all traditional communities, nor of whole traditional communities, but of sectors in traditional communities of which the groups they represented made up large numbers of rural citizens. Particularly, some of the larger and most vocal groups consisted of rural women's movements and democratic communal land owners associations who own land within or adjacent to the territorial boundaries of a traditional community. Additionally, there were large numbers of rural citizens, not necessarily part of any movement, who were deeply disenchanted with particular traditional leaders, for abusing their power in a variety of ways, and seeking to impede processes of change occurring in their communities. These processes of change, often brought about by community members, and being of benefit to community members, usually threatened the power of the chief in some way, especially attempts by communities to hold traditional leaders accountable<sup>1</sup>.

### ***Purpose of the Study***

The aim of this study is to gain greater insight into the realities in rural citizens' lives that shaped and sparked the reactions noted above. It seems curious that people whose leaders were finally receiving the state recognition they deserved would react in the ways mentioned above; or was there more to the story? Has the legislative recognition of traditional leaders in fact had unintended negative consequences in the social realities of rural people? More specifically, what effect would the TCB have when interpreted along with the already existing legislative recognition of traditional leaders such as the Traditional Leadership and

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<sup>1</sup> For a more detailed description of these events please see Nolundi Luwaya 'Report on the Traditional Courts Bill hearings: exploring rural people's democratic participation and freedom of expression' (2013) Issues in law and society Occasional Paper Series: issue 2.

Governance Framework Act (TLGFA)? Would this not result in a concentration of power in one institution, which is also unelected? What effect would this have on power dynamics between traditional leaders and their community members? Most importantly, does the draft and existing legislation adequately reflect the realities of the relationships between traditional communities and their leaders; or was the law presenting a picture of political neutrality, when in fact traditional communities are complicated spaces with intense political contestations of varying kinds?

These are some of the questions the study grapples with, specifically: what impact has the legislation in the form of the TLGFA had on relationships between traditional leaders and traditional communities; and the potential impact on these already existing relationships of additional legislation such as the Traditional Courts Bill (TCB) or Traditional Affairs Bill (TAB), and the Communal Land Rights Act (CLRA). These issues also present questions about the relationship between constitutional democratic governance and traditional leadership, not so much about their compatibility, but about the possibilities and limitations of constitutional democracy in reshaping power relationships between traditional leaders and their communities in South Africa. Legislation has long been used in South Africa for the recognition of traditional leadership as an institution of governance, during the eras of late colonialism and apartheid, and the effects of this have been well documented. Why then, use the same approach in a political dispensation aimed at eradicating the effects of colonialism and apartheid in South Africa?

### ***Legislation and the Rule of Law:***

The questions raised in this study are important because they have direct implications on the relationship between legislation and the rule of law, particularly in Africa. The rule of law is a founding principle and provision of the South African Constitution<sup>2</sup>. It is also a principle fundamental to constitutional democratic governance, the politico-legal framework upon which South Africa's democratic dispensation is based. The implication of this politico-legal framework is that the Constitution is supreme, and all law and conduct must be consistent with the Constitution<sup>3</sup>. The enactment of legislation for the implementation of government

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<sup>2</sup> Constitution of the Republic of South Africa, 1996

<sup>3</sup> s2, Constitution of the Republic of South Africa, 1996

policy is a crucial aspect of the rule of law, and respect for the supremacy of the constitution. The principle of legality, a procedural aspect of the rule of law, requires that laws should be certain, accessible and publicised<sup>4</sup>. One of the least challenging and transparent ways of doing this is by enacting statutes, hence legislation is a core part of constitutional democratic governance and state government.

The rule of law is a substantive aspect of the concept of the supremacy of the constitution, as it is most easily measured or ascertained through the interpretation of legislation. The process of turning a Bill into law involves the interpretation and explanation of the Bill and its purpose to members of parliament, and to ordinary members of the public<sup>5</sup>. An additional reason why legislation is a core aspect of this study is because traditional leadership has been recognised by the state in South Africa through legislative means during late colonialism and apartheid<sup>6</sup>.

### ***Research Approach:***

In order to engage meaningfully with the central question of this study, desktop research has been undertaken using books, journal articles, cases and legislation. This is because the study engages the effect of using legislation to confer recognition on an institution of leadership, whose practices are not uniform all over South Africa, yet the legislation is silent on this reality. Furthermore, a complex and ever-evolving theoretical concept is used in order to analyse the effects of legislation on the complex relationships between traditional leaders and their communities. Desktop research enables the study by allowing for a generalised discussion, as it is impossible for this study to account for the situational realities in all recognised and un-recognised traditional communities in South Africa. Primary and secondary written resources are used in the study.

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<sup>4</sup> Michel Rosenfeld “The rule of law and the legitimacy of constitutional democracy’ (2001) 74 *Southern California Law Review* 1307, 1307

<sup>5</sup> Ss 59 and 72 of the Constitution of the Republic of South Africa, 1996: require the national assembly and national council of provinces respectively to facilitate public participation in law-making processes.

<sup>6</sup> Mahmoud Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); Lungisile Ntsebeza *Democracy Compromised: Chiefs and the politics of land in South Africa* (2005)

### ***Structure of the Study***

This study consists of five chapters:

Chapter One is an introductory chapter and is dealt with above. In Chapter Two, Legal pluralism as a theory of law is discussed. Allusions are made to legal pluralism as an empirical fact, at the same time as discussing it as a theory of law because in reality, the difference is not always easy distinguish. Legal pluralism tends to function as both empirical fact and theory of law at the same time in social situations. As a theory chapter, this section lays the foundation for the rest of the study, and the paradigm through which the problem at the heart of the study will be discussed. It will also be used as a means through which to suggest a solution to the problem identified in this study.

Chapter Three explores legal pluralism in South African society during colonialism, apartheid, and under the Constitution is the focus of this chapter. The purpose is to gain a sense of how legal pluralism is and has been influenced by political changes expressed through law. Additionally, this chapter provides historical and political context for the issues raised in the theory chapter; as well as doing the same for the chapter which follows. This chapter maps the socio-legal and politico-legal processes that have shaped the current expressions of legal pluralism in contemporary South African society.

Chapter Four: This is a critique and analysis chapter; in it legislation pertaining to the recognition of traditional leaders in South Africa's constitutional democracy is discussed and analysed through the use of two court cases which function as case studies. These case studies demonstrate the limitations of recognising non-state legal orders using state law, and serve as further contextual examples of the problem this study grapples with.

Chapter Five: Conclusion

The conclusion chapter will provide a detailed summary of the problem identified as the basis for this study. It will also summarise the different issues discussed in the preceding chapters in brief, and suggest solutions to the problem.

## Chapter Two: Legal Pluralism

### *Introduction*

Legal pluralism can exist in a society as an empirical fact<sup>7</sup>; and can be used as a descriptive theory of law to analyse and account for legal pluralism as an empirical fact. As an empirical fact, legal pluralism has existed for centuries, as a consequence of conquest, empire and state-making. This is due to the fact that it is often easier for a conquering group to establish dominance over a conquered group using aspects of the conquered group's laws, in combination with the conquering group's laws. The ways in which the interaction of legal orders takes place, especially in relation to the flow of political power is at the heart of legal pluralism as a theory. Moreover, legal pluralism as theory is a lens with which to perceive the consequences of legal orders interacting and the effects of these interactions on social and political relations.

The theory of legal pluralism has evolved rapidly over the last fifty years. At first it was mostly used to compare legal orders in a society as binaries<sup>8</sup>, and later used to analyse the relationships between legal orders and their impact on each other. This chapter is devoted to a discussion of legal pluralism as a descriptive theory of law. The theoretical contributions of particular authors to the theory of legal pluralism will be discussed in this chapter. Due to time and space limitations it is not possible at this instance to undertake a full review or map the entire conceptual field of legal pluralism. The theorists discussed in this chapter were selected on the basis of the level of coherence that could be established between their theoretical contributions to legal pluralism, and the issues this study seeks to engage.

### *What Is Legal Pluralism?*

According to John Griffiths, in his aptly titled article 'What is Legal Pluralism?', one of the most damaging effects of legal centralist ideology is that societies and cultures that conceive of law differently to legal centralist thought, have had their systems of law and normative ordering rendered subordinate to state law or completely irrelevant because, 'in the legal centralist conception, law is a systematic and unified hierarchical ordering of normative

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<sup>7</sup> Multiple forms of legal ordering exist in the same society

<sup>8</sup> Weak v Strong legal pluralism; African customary law as opposite or 'other' of European/ Western law.

propositions... it is the factual power of the state which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'.<sup>9</sup> In order to justify its authority and its exclusive control of the legitimate use of force to coerce compliance, the state lays claim to the law as its exclusive domain, creating the perception that the factual power of the state is necessary for the existence of law.

As a result, all other normative orders which claim to be 'law' are expected to resemble the legal centralist logic of law as it ought to be, rather than law as it is<sup>10</sup>. One of the concerns of legal pluralism is to grapple with what law actually is, rather than what it ought to be, because it is only once we ascertain what law is that a descriptive theory of law can be developed. Thus, in order for processes and normative orders to be studied or analysed, they must first be assessed against what state law says the law is, before they can be analysed on their own terms. This presents a serious problem as state law in itself is not a conception of what law is, but rather of what law, and its application in a situation, ought to be. A classic hallmark of state law and its presentation of law and social reality as they ought to be, is legislation: it defines terms in a manner that is value laden, and establishes a web or framework of relationships, usually consisting of rights and duties that flow in particular directions, usually from top to bottom. However, the social situation that legislation seeks to govern might often appear quite differently in reality, with definitions and terms meaning different things at different times, and the flow of relationships going in many different directions depending on circumstance. Relationships in social reality are complex and hybrid, changing their nature in reaction to different circumstances, as they change in time and space.

The result of this state of affairs is that legal professionals, social scientists and students of law, and the social sciences, battle to observe that what state law presents as legal and social reality is not value neutral and immutable, but rather that the reality of law and the social situations it operates in are inconsistent and changeable and do not make for easy definition or interpretation<sup>11</sup>. One of the more damaging effects of the legal centralist ideology is that it questions the validity of legal orders which do not emanate directly from the state, by questioning whether they qualify as law at all. This is often evident when speaking of the legal orders of non-western societies, such as African customary law, and indigenous law.

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<sup>9</sup> John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal Legal Pluralism and Unofficial Law* 1, 3

<sup>10</sup> Ibid

<sup>11</sup> Ibid 4

Furthermore, by setting up a conception of state law as unified and hierarchically superior to the other forms of normative ordering, legal centralism leaves the door open, so to speak, for state law to co-opt other normative orders such as customary law, in order to entrench domination and assert a monopoly of meaning over other normative orders for its own purposes,

a legal system is pluralistic when the sovereign (implicitly) commands... different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds. Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state legal system, result from 'recognition' by the state of the supposedly pre-existing customary law of the groups concerned. While such pluralism is not limited to the colonial and post-colonial situation that is certainly where it is best known<sup>12</sup>.

Legal centralist or state law based recognition of customary law creates problems for the development of a society's customs as state law, usually in the form of legislation and court decisions, ascribes particular meanings to terms that, when used in the social context of a community, have fluid meanings which change depending on circumstance, but retain a core value. Indeed, state law recognition of non-state legal orders often co-opts customary law for particular purposes, and imposes on it false boundaries that require it to operate in specifically defined situations, which stifles the development and meaning of customary laws in social contexts<sup>13</sup>. This has significant implications in situations where a subgroup of the population can be further broken up into other categories such as clans, as the groups of people in the additional categories of the subgroup may follow some of the norms of the larger subgroups but not all of the, yet state law will apply all the norms uniformly.

Griffiths' conception of legal pluralism serves as a direct challenge to legal centralism, but also seeks to present an alternative to legal centralism, by establishing legal pluralism as a descriptive theory of law, and says of legal pluralism that it is not a situation in which more

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<sup>12</sup> John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 5-6

<sup>13</sup> *Ibid*, 6

than one rule is applicable to a situation. Legal pluralism is an attribute of a social field; it is the reality that in a social setting, multiple forms of law exist which emanate from different normative orders, without state law necessarily being the superior normative order, but just one of a number. In many instances though, and in tandem with legal centralism, state law tends to co-opt other legal orders in order to maintain its own claims to hegemony and maintain control of the interactions between legal orders.

Griffiths completes his argument by making a definitive statement of what legal pluralism is. This particular conception of legal pluralism has come to shape and inform many studies of the relationship between normative orders and semi-autonomous social fields, especially by sociology of law scholars. Griffiths says of legal pluralism

any sort of 'pluralism' necessarily implies that more than one of the sort of thing concerned is present within the field described. In the case of legal pluralism, more than one 'law' must be present. For reasons we have seen above, this cannot be conceived of as a situation in which more than one rule is applicable to the 'same' situation, for any such assertion is normative and not empirical. It identifies a situation in which law is non-uniform, not one of legal pluralism. Legal pluralism is an attribute of a social field and not of 'law' or a 'legal system'. A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of 'law', more than one legal order, is observable, that the social order of that field can be said to exhibit legal pluralism<sup>14</sup>.

In Griffiths' estimation, in order for legal pluralism to operate as a descriptive theory of law in a locality or situation, it is not enough for there to be more than one type of law that applies to the same situation: this merely reflects the non-uniformity of law. Rather, for legal pluralism to operate as a descriptive theory of law, the social field must be one in which a variety of laws or normative orders operate. Legal pluralism as a descriptive theory of law is concerned more with the normative orders operating in a social field, how they come together and most importantly how these processes shape realities and relationships in the social field, rather than the applicability of different types of law in the same situation.

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<sup>14</sup> John Griffiths; 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 38

### ***Refinement of Legal Pluralism as a Theory: Weak and Strong Legal Pluralism***

Anne Griffiths contributes to the discussion about legal pluralism as a descriptive theory of law by engaging with the conceptions of legal pluralism as ‘weak’ or ‘strong’<sup>15</sup>. Her approach is a development on John Griffiths’ conception of legal pluralism. However, rather than declare ‘weak’ legal pluralism as not really legal pluralism, and ‘strong’ legal pluralism as the real manifestation of legal pluralism as a descriptive theory of law, Anne Griffiths sees the two conceptions as opposite ends of a continuum. ‘Weak’ legal pluralism, is legal pluralism in the form in which the state co-opts the law of non-state legal orders in order to impose its own dominance and superiority, usually by creating clear boundaries between the legal orders, and defining in which situations the rules of different legal orders will apply. Anne Griffiths is particularly concerned with the way power is expressed and entrenched using the different stages along the legal pluralism continuum.

#### **Weak Legal Pluralism**

Weak legal pluralism, as one end of the spectrum, is often used by elites and the state to exert control over the way law develops as state law and non-state law, in order to maintain or establish a monopoly over economic and political power. When a society moves along the continuum, away from weak legal pluralism and towards strong legal pluralism, power relationships in society are changing especially concerning the law, and who has the power to influence state and non-state law. At the stages along the continuum towards strong legal pluralism different groups of people are able to engage with power at various levels and in a variety of ways, thus breaking up the monopoly of meaning previously held by elite groups. These processes disturb the mono-directional flow of influence between legal orders from state to non-state, and evidence a multi-directional flow of influence.

The authority of the state to define the boundaries between legal orders, at its most basic level, was upheld through the power to impose or enforce sanctions, best expressed through the state’s monopoly on the legitimate use of violence. This approach presents law as solely reliant on the state for its validity and legitimacy; it presents law as a self-creating and self-sustaining universe with its own professionals, specialists and institutions, set apart from

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<sup>15</sup> Anne Griffiths ‘Legal Pluralism’ in Reza Banakar et al (eds) *An Introduction to Law and Social Theory* (2002) 1

society and in no way informed by alternative normative orders. If anything, it is law in this formalist sense that validates or legitimises other normative orders, not the processes and societies that create them<sup>16</sup>. One of the great problems with this model is that it presents the state as the sole source of legitimacy and validity for rules and norms governing society, even if a society is made up of diverse cultural groups, some of which may have pre-existed the formation of the nation-state, which can lead to many societies being described as being without law, despite exhibiting high levels of social organisation and methods of managing conflict amongst their members. A more constructive approach would be one that takes account of the role state law has to play in normative ordering without necessarily being the centre of the legal universe, but in a way that engages with other sources of normative ordering and rule generation.

### **Strong or Deep Legal Pluralism**

The strong, deep or new approach to legal pluralism is suggested as a method for addressing the centralist approach to law, 'by recognising that legal pluralism exists in all societies, that is, that there are multiple forms of ordering that pertain to members of a society that are not necessarily dependent upon the state for recognition of their authority.'<sup>17</sup> The method provided by this approach to legal pluralism allows for an engagement with a variety of forms of normative ordering in addition to, and in relation to, the state. It allows for greater interaction between normative orders and for greater observation of the porosity of legal orders. When conceived in this way, legal pluralism operates on two levels: as an observable empirical fact; and as a descriptive theory of law.

A widely favoured concept suggested as a framework for strong legal pluralism is Sally Falk Moore's concept of the semi-autonomous social field. Moore did not specifically develop this concept as a framework for legal pluralism, however it has nevertheless found great resonance in legal pluralist scholarship and research as it provides a framework that avoids the criticisms levelled against the state centralist model of legal pluralism. The semi-autonomous social field is described as a 'social unit that generates and maintains its own norms' thus overcoming the challenge of relying on the state to validate or legitimise a

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<sup>16</sup> Anne Griffiths 'Legal Pluralism' in Reza Banakar et al (eds) *An Introduction to Law and Social Theory* (2002) 1, 290

<sup>17</sup> Ibid, 302

society's normative or legal orders. The semi-autonomous social field is located in a social setting, usually a community with a definable identity. It has the ability to generate its own customs, symbols and rules within its social and identity boundaries, but is also susceptible to rules, decisions and symbols which emanate from the larger world of which it forms a part. It is a social space which, in addition to rule-making, has the methods and means to induce compliance, but also exists in a wider world that influences it in a variety of ways and from a variety of sources<sup>18</sup>.

The popularity of this concept as a framework for strong legal pluralism lies in the way that it shifts the focus of observation away from state centralist perspectives of law, while not completely excluding the role this perspective of law plays within the semi-autonomous social field. By breaking the stranglehold of state-centralist conceptions of legal pluralism, room is created for the development of a 'descriptive and analytical framework of legal pluralism' by allowing for the relationship between state law and other law or normative orders to be redefined, and has been applied and developed by other scholars observing processes of change involving state and non-state law within particular social fields.

### ***The "what is law?" Conundrum***

One of the major critiques levelled against legal pluralism as a descriptive theory of law is that it is unable to answer the question "what is law?" The inability of legal pluralism to answer this question is seen as a major stumbling block to its claims of validity as a conceptual theory of law. John Griffiths attempted to answer this question on the basis of Moore's analysis of the semi-autonomous social field that

it follows that law is the self-regulation of a 'semi-autonomous social field'. The idea that only the law of the state is law 'properly so called' is a feature of the ideology of legal centralism and has for empirical purposes nothing to be said for it. Distinctions can, where appropriate, be made between more or less differentiated forms of law. The self-regulation of a semi-autonomous social field can be regarded as more or less 'legal' according to the degree to which it is differentiated from the

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<sup>18</sup> Anne Griffiths 'Legal Pluralism' in Reza Banakar et al (eds) *An Introduction to Law and Social Theory* (2002). At 303, Griffiths gives a description of Sally Falk Moore's concept of the semi-autonomous social field.

rest of the activities in the field and delegated to specialized functionaries. But differentiated or not ‘law’ is present in every ‘semi-autonomous social field’, and since any society contains many such social fields, legal pluralism is a universal feature of social organization<sup>19</sup>.

The way Griffiths reasons it, in the semi-autonomous social field, law is the way in which the social fields regulate themselves or rather, what the actors in the social fields deem to be the regulations of processes and relationships in the social field, especially if particular forums and persons are designated with the functions of maintaining consensus on what the regulations are within the social fields.

Tamanaha, a major critic of legal pluralism as a theory of law, is of the opinion that although the question of what constitutes law for the most part remains unresolved in legal philosophy, and he concedes that this question might never be answered. Despite this concession, and the fact that the same problem plagues positivist law, Tamanaha is dismissive of John Griffiths’ theory of legal pluralism because, according to Tamanaha, the ‘what is law’ question is central to legal pluralism’s theoretical foundation. Having an unresolved, and seemingly unresolvable question at its core, renders legal pluralism a theory on ‘tenuous footing’ as Tamanaha puts it<sup>20</sup>. He does not dispute the empirical existence of legal pluralism, the reality that different normative orders can exist in one locality, and perhaps ascribes to a view of legal pluralism in the weak sense. What Tamanaha disputes is the validity of legal pluralism as a social scientific theory of law.

Tamanaha goes on to explain that the problem is not so much that legal pluralists are unable to answer the question ‘what is law?’, considering that Griffiths himself attempts to provide an answer; and legal philosophy itself is unable to provide an answer to the question. Rather, the problem, according to Tamanaha, is that legal pluralists have taken different approaches to answering the question and provided different answers, which has led to a level of incoherency to legal pluralism as a descriptive theory of law. Perhaps rather than render legal pluralism a conceptual theory on ‘tenuous footing’, there needs to be greater engagement

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<sup>19</sup> John Griffiths ‘What is Legal Pluralism’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 38

<sup>20</sup> Brian Tamanaha; ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) St John’s University Legal Studies Research Paper Series 1, 30

with why there are such differing approaches to answering the question of what law is. Perhaps it is this very problem that indicates the reality of what legal pluralists have been trying to grapple with: the existence of many forms of law in social fields. Should the question be ‘what is law?’, or would a more constructive approach be ‘what is law to the actors in the social fields?’ Approaching the question this way avoids placing too great an emphasis on legal centralist notions of what law is, while still allowing for investigation to be led into what law is within ‘semi-autonomous social fields’. Take, for example, the South African situation in which there is so called ‘official customary law’ as practiced by the state, and ‘living customary law’. Official customary law tends to operate at state level but is not entirely reflective of the norms people in traditional communities live by, which is living customary law. Greater emphasis needs to be placed on investigating the legitimacy of normative orders and the norms they establish, rather than whether norms are law or not, and the ways in which the norms are integrated through contact between different semi-autonomous social fields.

The benefit of this approach is that rather than placing too great an emphasis on the validity of the normative orders on the basis of their relationship in relation to state law, greater emphasis is placed on the ways in which different power dynamics play out within the normative orders and between them, as well as between actors and institutions within the normative orders, and actors and institutions between the normative orders. This approach takes legal pluralism in all the forms suggested in Anne Griffiths’ continuum, from ‘weak’ legal pluralism to ‘strong’ legal pluralism, as a fact. It thus shifts the focus of enquiry from what legal pluralism and law are, to what legal pluralism and law do in social fields.

Describing how Sally Falk Moore’s concept of the semi-autonomous social field has been beneficial to legal pluralism as a theory of law, Merry suggests that strong legal pluralism is no longer concerned with the effect of law on society, but rather with how we think about and understand the interactions between state and non-state law in complex ways, and thinking about the spaces in which these interactions take place as semi-autonomous social fields shifts the focus in a way that enables observation of how interaction between legal fields affects social change<sup>21</sup>. Additionally, through this perspective it is possible to understand why

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<sup>21</sup> Sally Engle Merry ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869, 878 here Merry describes the functionality of Moore’s concept of the semi-autonomous social field.

the enactment of new laws, or deliberate attempts at change, result in unforeseen outcomes<sup>22</sup>. Moore's approach concept is highly effective when through field work for the purposes of empirical research, as it enables exposure of the layered nature of law, official and unofficial, when it is understood through a contextual reality. The layers of interpretation and meaning can be peeled back when observed through the eyes of the law-makers, law-users and law interpreters. Community settings involving dispute resolution forums and practices lend themselves particularly well to this analysis.

Writing about the establishment and role of community courts, or 'legal hybridization in Mozambique, De Sousa Santos makes the following point:

'in Africa 'the disjunction between the officially established unity of the legal system and the sociological plurality and fragmentation of the legal practice is probably more visible there than in any other developing region of the world... this disjunction has a multiple impact on state action and legitimacy, on the operation of the official legal system, on the relationships between political and administrative control, on the mechanisms of conflict resolution operating in society, on the legal and institutional frameworks of economic life, and on the social and cultural perceptions of politics and legality.'<sup>23</sup>

This statement makes clear that simply recognising normative orders by differentiating the types of law operative in their communities and recognising their institutions, is no longer a viable approach to legal pluralism in Africa today. This method was sufficient during colonialism as the aim was to exploit the differences between racial and cultural groups in order to further racial segregation and entrench it. However, after the end of colonialism, many societies in Africa still have different race and cultural groups that have to find ways to co-exist peacefully, yet form cultural or religious communities. Therefore, a deeper more sensitive approach has to be taken to recognising the normative orders emanating from these different communities, and do so in a manner that encourages diversity within one society with shared citizenship. This also has to take place in a manner in which these different

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<sup>22</sup> Sally Falk Moore 'Law and Social Change: the semi-autonomous social field as an appropriate field of study' (1973) 7 *Law and Society Review* 719, 723

<sup>23</sup> Boaventura De Sousa Santos 'The heterogeneous state and legal pluralism in Mozambique' (2006) 40 *Law and Society Review* 39, 40

normative orders, and their dispute resolution forums and laws, can still translate into the positivist/ state law paradigm, especially when matters are adjudicated in the state law courts.

De Sousa Santos suggests interlegality as a way of understanding deep legal pluralism. His basic premise is that legal pluralism exists in all societies, whether officially recognised or not, as there can be any number of forms of ordering which are prominent in the publics' lives but do not derive authority from the state. Thinking about legal pluralism as 'porous legality' places greater emphasis on the ways in which different legal spaces and values inter-mingle, share knowledge and combine to form new experiences and ideas of law.

***Conclusion:***

The existence of legal pluralism in all societies is an undisputed fact. Complications and contestations come in to play about legal pluralism as a theory of law. As societies have become more complex, legal pluralism as a theory of law has gained prominence as a means through which to observe the interactions between legal and social spaces. Despite doubts about its validity as a theory, legal pluralism has displayed a great amount of resilience, and been developed beyond what was originally imagined it could do. Its popularity and resilience lie in its malleability and adaptability to different social situations. This is because it is a remarkably flexible theory, which enables research into law as a social phenomenon in a wide variety of settings. Furthermore, it enables observation of social processes and their effects on law within the context of real life situations. Only a few contributors to the concept have been discussed above due to space and time constraints, but also because legal pluralism is used as a theory of law in this study in a particular way, and for particular purposes.

## Chapter Three: Legal Pluralism in South Africa

### *Introduction*

The purpose of this chapter is to understand legal pluralism in South African society as an empirical fact, and as a descriptive theory of law before the advent of constitutional democracy, and afterwards. Legal pluralism during colonialism, and especially during apartheid, took a particular form and was often marshalled for particular political purposes. It could be said that legal pluralism existed in the weak sense as a form of state-centralist legal ideology, used to maintain the dominance of the state's claims to legitimacy despite evidence to the contrary, and for the exclusion of a group of people on the basis of race. This part of the chapter will look at some of the laws enacted in South Africa between 1910 when the Union of South Africa was established, and 1970 when the Bantu Homelands Citizens Act was enacted. The reason for selecting this particular period in South African legal history, is that it was during this time that racial segregation, entrenched through institutional segregation, became a clearly defined agenda in South African politics, and was acted upon with determination through a system of laws and institutions.

Additionally, the possibilities for strong legal pluralism in post-apartheid South Africa will be engaged by analysing how the 1996 Constitution has changed the political, legal and social landscapes of South African society, creating an environment more conducive to strong legal pluralism. It is acknowledged in the 1996 Constitution<sup>24</sup> that South Africa is a plural society. Not just racially, but culturally, religiously, and linguistically, to mention a few ways in which plurality operates in South African society. Furthermore, South Africa has been a plural society for a very long time, although in the past plurality and difference were understood and used in negative ways, to keep different people apart and entrench racial domination. The Constitution does not explicitly refer to or recognise legal pluralism in South African society, however it can be inferred from the way diversity and difference are protected in the Bill of Rights, and the emphasis placed in the Constitution, on the inherent dignity and equality of all people, especially given South Africa's past and the declaration in the preamble to the Constitution that 'South Africa belongs to all who live in it, united in our diversity.'<sup>25</sup> A commitment to strong legal pluralism is also evident in the ways in which

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<sup>24</sup> Constitution of the Republic of South Africa, 1996

<sup>25</sup> Constitution of South Africa, 1996, Preamble

legislation has been enacted to recognise a variety of religious and cultural norms, through judgments of the Constitutional Court, and through policy. However, these attempts have taken place piecemeal, due to a number of factors, mostly political, which impinge on processes deepening legal pluralism in South African society.

Legal pluralism has been a feature of South African law, since the first Dutch settlers arrived in South Africa at the Cape of Good Hope, South Africa became a sovereign state with plural state laws in 1910 when the Union of South Africa was established as a British colony. '[F]rom a comparative-law perspective, South Africa can be described as a mixed jurisdiction for its "common" law derives from two European systems, English and Dutch'<sup>26</sup>; and a separate body of law for the black African population, usually based on African customary law, or some version of it.

Shortly after the establishment of the union government, institutional segregation was adopted as a policy of governance in South Africa<sup>27</sup>. Mamdani describes institutional segregation as 'a politically enforced system of ethnic pluralism... as a way to stabilize racial domination (territorial segregation).'<sup>28</sup> One of the methods employed in the implementation of institutional segregation by the Union government was to create a separate system of law for black African people in the form of African customary law, 'the Native Administration Act made customary law applicable nation-wide, but only in a special system of courts constituted by traditional leaders and native commissioners. This regime was given its decidedly racist stamp by a rule that these courts had jurisdiction over blacks only, and only blacks could be subject to customary law.'<sup>29</sup> A fundamental feature of this policy was the separation of land for black people in order to create the territorial jurisdictions necessary for the application of a separate system of law for black people, and the furtherance of an institutionally and racially segregated society in South Africa: 'Africans were prohibited from

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<sup>26</sup> T.W. Bennett 'Law in the Face of Cultural Diversity: South Africa' in Marie-Claire Foblets (ed) *Cultural Diversity and the Law: State Responses from around the World* (2010) 1, 17

<sup>27</sup> Mahmoud Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 5

<sup>28</sup> Ibid

<sup>29</sup> T. W. Bennett 'Law in the Face of Cultural Diversity: South Africa' in Marie-Claire Foblets (ed) *Cultural Diversity and the Law: State Responses from Around the World* (2010) 1, 21

buying or leasing land outside certain “scheduled zones”. Areas demarcated under this law, and the subsequent Native Trust and Land Act of 1936, provided the core of the future bantustans (which thereafter became the independent or semi-independent homelands)<sup>30</sup>.

The ‘scheduled zones’ or bantustans, as they would later be called, forced black people to live in specific localities, usually on the basis of belonging to a certain ethnic group, or tribe<sup>31</sup>, and this process has often been branded ‘retribalisation’<sup>32</sup> due to the fact that by the time this policy was entrenched as law by the Bantu Homelands Citizens Act<sup>33</sup>, many Africans had become westernized having been exposed to Christianity and Western education through mission schooling, in addition to urbanisation due to migration to the newly established cities in search of wage labour.

In fact, a professional, educated black middle class, albeit it small, was growing in South Africa, and although this black middle class in many ways still identified with African culture and tradition<sup>34</sup>, it nevertheless also took advantage of capitalist modernity<sup>35</sup>. The gold mining economy was growing rapidly in South Africa and would need cheap labour to maximise profits from the minerals mining industry, which was capital intensive. Furthermore, the growing black middle class had begun to compete with white farmers and professionals, and in order to stem this tide, and provide cheap labour for the mines, racial and institutional segregation, especially where land and public administration were concerned, could be used to solve the problem of economic competition, the need for cheap labour, and keep the colonial government’s administration costs down. By forcing black people onto the reserves or ‘scheduled zones’ where they could not own land, black people would only be allowed to inhabit urban areas as labourers, and public administration could be centralised in customary

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<sup>30</sup> T.W. Bennett ‘Law in the Face of Cultural Diversity: South Africa’ in Marie-Claire Foblets (ed) *Cultural Diversity and the Law: State Responses from Around the World* (2010) 1, 21

<sup>31</sup> Promotion of Bantu Self-Government Act 46 of 1959

<sup>32</sup> T.W. Bennett ‘Law in the Face of Cultural Diversity: South Africa’ in Marie-Claire Foblets (ed) *Cultural Diversity and the Law: State Responses from Around the World* (2010) 1, 21

<sup>33</sup> Bantu Homelands Citizens Act 26 of 1970

<sup>34</sup> T.W. Bennett ‘Law in the Face of Cultural Diversity: South Africa’ in Marie-Claire Foblets (ed) *Cultural Diversity and the Law: State Responses from Around the World* (2010) provides a brief historical description of the development of a black middle class in South Africa before apartheid.

<sup>35</sup> Lungisile Ntsebeza *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2005)

law custodian of land, the chief, thus significantly reducing administration costs for the colonial government<sup>36</sup>.

The Union and apartheid governments forced black people onto reserves, denying them rights to own land individually<sup>37</sup> as a means to entrench institutional segregation: black people were subjected to a different set of laws and institutions, curtailing full and equal citizenship of South Africa. To achieve this end, the application of customary law to black people's private and civil affairs within the law was insufficient, a whole body of administration and authority was needed in order to fully actualise institutional segregation. A body of laws, the most prominent of which were the Black Administration Act<sup>38</sup>, and the Bantu Authorities Act<sup>39</sup>, was part of the colonialist

'state's production of a customary law [which] was a fundamental and powerful intervention in the way in which African life could and would develop under white rule. African tribal authorities and family heads in the countries around South Africa, and inside it, needed the weight of state power to enforce the customary family law. Without this power the practices of young men and women, of divorcees and widows, all of whom struggled against aspects of the maintained patriarchy, would clearly be visible as custom. Nowhere in the rest of Africa has customary law been invoked to advance egalitarian social relations. Its use has been to resist the developing customary practices which were overwhelming customary law,<sup>40</sup>

and overwhelming the ability of the colonial government in South Africa to keep the development of an economically active and empowered black section of society at bay. Indeed, 'the South African legal system has been overtly based upon the principle that differing cultural groups do in some way naturally "have" and require different laws. Varying

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<sup>36</sup> Mahmoud Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996), 7. The system of rule by chiefs in place of colonial administration commonly known as 'indirect rule' in British colonial policy.

<sup>37</sup> Native Land Act 27 of 1913

<sup>38</sup> Black Administration Act 38 of 1927

<sup>39</sup> Bantu Authorities Act 68 of 1951

<sup>40</sup> Martin Chanock 'Law, State and Culture: Thinking About 'Customary Law' After Apartheid' (1991) 52 *Acta Juridica* 52, 55

versions of African law have been constructed and applied by a process of mutual interaction between white politicians, and officials, and African traditional elites.<sup>41</sup>

Under colonial and apartheid government in South Africa, legal pluralism was shaped in the legal centralist mould, and used for very particular ends. Perhaps the aim when colonial government was established, was not so much dispossession of black people's land rights, and curtailment of their citizenship in South Africa. It is likely that for early colonial government representatives, their initial strategy had been to recognise the African customary law of the indigenous people, in order to ward off resistance to colonial domination, and to reduce the administrative burden of running a colony. However, it cannot be denied that there came a point when the colonial, and subsequently the apartheid government, systematised and controlled legal pluralism through state law, for the purpose of entrenching a particular political and economic vision of South African society.

Whether it was intended or not, the effect of shaping legal pluralism in this way has had negative consequences. It has led to the calcification and essentialisation of African customary law<sup>42</sup>, as particular aspects of the law<sup>43</sup> were presented in legislation as unchanging, particularly the relationship between traditional leaders and their communities. Moreover, the greatest damage inflicted by this approach to legal pluralism, is the idea that an African cultural or traditional community cannot exist without a traditional leader in whom administrative, judicial and legislative power are centralised; and that the legitimacy and authority of traditional leaders are not disputed at varying moments in time.

### ***The 1996 Constitution and Legal Pluralism: Scope for Deep Legal Pluralism***

A key question this section seeks to address is whether the 1996 Constitution of South Africa establishes a legal order that resonates with conception of legal pluralism as strong legal pluralism? Put differently, can the legal order in the 1996 Constitution be analysed in terms

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<sup>41</sup> Ibid 56

<sup>42</sup> Rachel Zimmerman; 'The Reconstitution of Customary Law in South Africa: Method and Discourse' (2001) 17 *Harvard Blackletter Law Journal* 197, 205

<sup>43</sup> Much of the statute relating to customary law generated during colonialism and apartheid relied on particular interpretations of customary law, and ascribed defined meanings to certain concepts. This has severely diminished the fluid and evolving nature of customary law in official discourse, emanating the concept of 'official customary law' which is customary law applied by the state and lower courts.

of a social-scientific theory of law such as the form of legal pluralism in which various sources of law combine in a semi-autonomous social field, not just state law conceptions of non-state legal orders?

In seeking to establish a society and legal system that is plural in the deep sense, recognition of cultural rights is but a step along a continuum. Further steps must be taken, especially to bring plural legal orders into closer contact with the state legal system. One of the effective ways of doing this is by recognising the dispute resolution forums which emanate from these normative orders through law. In the South African context, it appears that state law has an important role to play in the recognition of normative orders operating outside of state law, not in order to legitimise them as they are already legitimate in the eyes of the communities that use them, but in order to broaden the number of forums available for the management of dispute and conflict within communities, to lessen the burden on police and the courts, but most importantly to give people a sense that they can resolve disputes efficiently, cost effectively and in a manner that resonates with the communal spirit of reconciliation and restoration of dignity to both the victim and the victor. However, this system needs to be integrated within the larger framework of state law, so that when there are crimes involved that are also of interest to the state, these crimes can be investigated and tried within the state legal system, but having also involved the parties in the justice process. Recognition of community centred dispute resolution forums allows justice to operate and flow on different levels within society.

The preamble to the 1996 Constitution states that ‘South Africa belongs to all who live in it, united in our diversity,<sup>44</sup>’ and seeks to ‘lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.<sup>45</sup>’ Furthermore, s1 of the Constitution states that ‘the Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; and (c) supremacy of the constitution and the rule of law.

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<sup>44</sup> Preamble, Constitution of the Republic of South Africa, 1996

<sup>45</sup> Ibid

Section 2<sup>46</sup> of the Constitution entrenches supremacy of the Constitution as the founding principle upon South African law is founded, thus moving South Africa away from the system of Parliamentary Sovereignty which was the source of authority for all law under the pre-democratic South African constitution, and which was often abused by the executive arm of government under the same political dispensation. Section 2 of the 1996 Constitution states categorically that ‘this Constitution is the supreme law of the Republic (of South Africa); *law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*<sup>47</sup>’

One of the revolutionary aspects of the 1996 Constitution, especially given the history of law and constitutionalism since the establishment of the South African nation-state, is the Bill of Rights. It establishes a legal framework for the protection and promotion of fundamental human rights enforceable vertically<sup>48</sup> and, more importantly horizontally<sup>49</sup>, and can only be derogated from in terms of a limitations clause which sets out a specific test<sup>50</sup> which must be met in order to justifiably limit rights in the Bill of Rights.

The 1996 Constitution provides scope for deep legal pluralism, at least in the sense that it lays the foundation for a legal culture that recognises difference and diversity, and attempts to manage diversity in positive ways. Indeed, despite chapter 12<sup>51</sup> of the Constitution, the document itself leaves open the ways in which recognition of cultural, religious and linguistic rights can be actualised and recognised institutionally; this task is left to parliament and civil society to manage. Progressively utilised, this deep approach to legal pluralism will give a more accurate reflection of South African society, and the type of society envisioned in the Constitution.

The 1996 Constitution further envisions a framework of governance based on openness, accountability and transparency in law-making processes. The national, provincial and local

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<sup>46</sup> Section 2, “Supremacy of the Constitution”; Constitution of the Republic of South Africa, 1996

<sup>47</sup> Ibid s2; emphasis my own.

<sup>48</sup> The Bill of Rights was held to be applicable against the state and private bodies.

<sup>49</sup> Often deemed to be a particularly revolutionary aspect of the Bill of Rights in the 1996 Constitution is its enforceability between private citizens.

<sup>50</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC)

<sup>51</sup> Chapter dealing with traditional leadership. Section 212, contained in this chapter, requires that national and provincial legislation be enacted to provide a role for traditional leaders in government.

levels of governance in South Africa<sup>52</sup> are constitutionally required to facilitate public participation in their law-making and implementation processes. The Constitution suggests methods for the facilitation of this duty such as public consultations, and notice and comment procedures; however, it does not specify which method government should adopt, but states that it is up to government to decide which approach would be best, depending on the type of legislation being enacted, and how significant its political implications are. However, it has been decided and confirmed in South African law, especially in the jurisprudence of the Constitutional Court, that the facilitation of public participation in the law-making process is a fundamental aspect of the process<sup>53</sup>, and legislation has been struck down and declared unconstitutional by the Court because government did not facilitate public participation sufficiently, or at all.

The question this section began with is whether the Constitution provides a politico-legal environment conducive to strong or modern legal pluralism? The provisions listed above are the provisions that most clearly demonstrate that the 1996 Constitution does envision a plural legal order, and provides for a legal landscape made up of various normative and alternative legal orders, through the establishment of a matrix of legal institutions and rights that enable citizens to hold the state, private institutions, and each other accountable. However, of great significance is the way in which the Constitution recognises cultural, communal rights and envisions scope for institutions of authority such as traditional leaders to form part of the South African governance framework. Sections 30<sup>54</sup> and 31<sup>55</sup> of the Constitution recognise the right of individuals and communities to belong to religious, cultural, and linguistic communities. As recognised rights, surely these provisions should play a major role in shaping legal pluralism in South African society, from weak legal pluralism as existed under colonialism and apartheid, to strong legal pluralism which is enabled by the current

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<sup>52</sup> Sections 59, 72 and 152 of the Constitution of the Republic of South Africa, 1996

<sup>53</sup> *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC); *Matatiele Municipality and Others v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC); *Doctors For Life International v Speaker of National Assembly and Others* 2006 (6) SA 416 (CC)

<sup>54</sup> Section 30 recognises an individual's right to use a language and participate in the cultural right of their choice, in a manner consistent with the Bill of Rights.

<sup>55</sup> This right protects people who make the choice belong to cultural, linguistic, and religious communities; while also protecting the right to 'form, join, and maintain cultural, linguistic, and religious groups', subject to the provisions of the Bill of Rights.

Constitution<sup>56</sup>. Why then, is this not the case? Why have attempts to deepen legal pluralism under the constitutional democratic order so closely resembled apartheid and colonial legal pluralism? An explanation for this may be that the laws entrenching legal pluralism during apartheid and colonialism were imported into the constitutional democratic order, to the extent that they were not inconsistent with the Constitution. New legislation was only introduced nearly ten years<sup>57</sup> after the advent of the Constitution. Meanwhile, major changes have been underway at community and court level, with judgments such as the *Bhe*<sup>58</sup> Constitutional Court judgment, and the Constitutional Court's living law jurisprudence being applied to customary law matters, has deepened legal pluralism<sup>59</sup>, without transforming some of its institutions like traditional leadership. This has led to resistance and lobbying by traditional leaders for legislation that recognises their authority and entrenches their positions of power in communities. This is a strategy designed to stem the tide of the social changes brought about by the Constitution, the Constitutional Court's progressive jurisprudence, and mobilisation and activism at community level for greater democracy and community participation in decision-making and defining the content of customary law.

### ***Conclusion***

Legal pluralism has existed as an empirical fact in South Africa for a very long time. However, as a descriptive theory of law it is affected in profound ways by the socio-political and politico-legal environments operates in as demonstrated by the impact colonialism and apartheid, and their allocations of political and social power through state law. Legal pluralism was co-opted by the colonial and apartheid governments for the purpose of entrenching dominance over groups of people, and for the maintenance of the state's claims to hegemony and legitimacy, in a climate in which there was great resistance to the state's claims by a section of society. Moreover, the state's reliance on legal centralist ideology for the purpose of entrenching weak legal pluralism has had devastating effects on the nature of a body of non-state law: African customary law. The effect of colonial and apartheid state law

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<sup>56</sup> Barbara Oomen 'Group Rights in Post-Apartheid South Africa' (1999) 44 *Journal of Legal Pluralism and Unofficial Law* 73, 93

<sup>57</sup> The Traditional Leadership and Local Governance Framework Act became law in 2003

<sup>58</sup> *Bhe v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC)

<sup>59</sup> Christa Rautenbach 'Deep legal pluralism in South Africa' (2010) 60 *Journal of legal Pluralism and Unofficial Law* 143

entrenchment of customary is pervasive, and proving very difficult to remedy even under a constitutional democratic order which provides an environment for strong legal pluralism.

## Chapter Four: Traditional Leadership Institutional Framework Analysis

### *Introduction*

National legislation as required by s212 of the Constitution, has been enacted in South Africa to give effect to the role of traditional leaders, in the form of the Traditional Leadership and Governance Framework Act<sup>60</sup> (TLGFA); the Traditional Courts Bill<sup>61</sup> (TCB), has yet to be enacted but is before parliament for discussion. The Communal Land Rights Act<sup>62</sup> (CLRA) came into effect, but was found to be unconstitutional by the Constitutional Court in the *Tongoane*<sup>63</sup> case. The CLRA was not intended specifically for the recognition of traditional leadership; it was designed to provide security of tenure to people living on communal land. However, it is relevant to the discussion in this chapter as it gave traditional councils, previously known as tribal authorities, a role in the administration of communal land. Furthermore, the communally owned land often falls within the apartheid era boundaries of traditional communities, giving rise to claims by traditional leaders that communal land, and the people living on it fall under the authority of a traditional leader.

The recognition of traditional leadership institutions through legislation has not been a seamless process, or rather, contrary to the harmony and simplicity depicted in the legislation, there have been incidents of opposition to traditional leaders legitimacy and recognition in some communities. The seeds of discord in traditional communities emanate from a number of sources, lack of accountability on the part of traditional leaders to their people being a large source of disaffection. Two cases, *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*, and *Pilane and Another v Pilane and Another*, both of which were decided in the Constitutional Court, are discussed in this chapter as case studies illustrating the issues raised above. These cases also serve as context-based, real life examples of the complexities of legal pluralism discussed in the theory chapter of this study.

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<sup>60</sup> Traditional Leadership and Governance Framework Act 41 of 2003

<sup>61</sup> Traditional Courts Bill [B1 of 2012]

<sup>62</sup> Communal Land Rights Act 11 of 2004

<sup>63</sup> *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

## *The Legislative Framework for the Recognition of Traditional Leaders in South Africa:*

### **The Traditional Leadership and Governance Framework Act**

A primary function of the TLGFA is ‘to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders’<sup>64</sup>. The Preamble to the Act further states that ‘the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that...democratic governance and the values of an open and democratic society may be promoted’<sup>65</sup>.

According to s1 of the Act, king or queen ‘means a traditional leader’; senior traditional leader ‘means a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority’. Traditional leadership is defined as ‘the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities’; headman or headwoman ‘means a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law; and is recognised as such in terms of this Act’<sup>66</sup>. It must be noted that by listing these definitions, the TLGFA envisions a tiered system of governance within traditional communities, in line with governance practice under customary law, as is reflected by s8 of the TLGFA described below. Section 8 of the TLGFA deals with the recognition of traditional leadership positions.

Section 2 of the TLGFA requires that the premier of a province recognise a traditional community situated in their province. Recognition of a community as a traditional community may only be conferred by the premier if the community is ‘subject to a system of traditional leadership in terms of its customs, and observes a system of customary law.’<sup>67</sup> The Act establishes a framework in which a community can only be deemed traditional if it has a

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<sup>64</sup> Traditional Leadership and Governance Framework Act 41 of 2003

<sup>65</sup> Ibid

<sup>66</sup> The definitions listed above were all taken from the definition and application section of the Traditional Leadership and Governance Framework Act 41 of 2003, s1.

<sup>67</sup> s2 Traditional Leadership and Governance Framework Act 41 of 2003

traditional leader, and that customary law cannot be practiced by a community if it does not have a traditional leader. This definition of traditional community is quite innocent when perceived in the neutral language of the legislation presents it, but has serious implications when placed in a social context<sup>68</sup>.

### **Case Study 1: *Pilane and Another v Pilane and Another***

This case involved a dispute over legitimacy and authority amongst the Bakgatla-ba-Kgafela, a traditional community resident in the Pilanesberg area in the North West Province of South Africa. The case heard in the Constitutional Court was an appeal against three interdicts handed down by the North West High Court in Mahikeng, by Landman J. The applicants, Mmuthi Kgosietsile Pilane and Ramoshibidu Reuben Dintwe, had attempted to secede with some community members from the Bakgatla-ba-Kgafela traditional authority, which is represented by the respondents, Nyalala John Pilane and the Traditional Council of the Bakgatla-ba-Kgafela Traditional Community. The applicants wanted to form a new tribal authority, the Bakgatla-ba-Kautlwale Pilane Motlhabe Tribal Authority<sup>69</sup>.

### **The Court Proceedings**

In the High Court proceedings, the respondents had succeeded in having three interdicts granted against the applicants prohibiting them from representing themselves as the Bakgatla-ba-Kautlwale Pilane Motlhabe Tribal Authority, and holding a meeting to discuss the prospects of secession from the Bakgatla-ba-Kgafela Traditional Authority<sup>70</sup>. Two key pieces of legislation involved in the case are the TLGFA and the North West provincial legislation recognising and regulating traditional authority and chiefs. Furthermore, the court identified as a matter of great concern, the fact that the conduct of the respondents in attempting to silence opposition within the traditional community, was unconstitutional. The case raises important questions about the negative effects of statutory recognition of traditional leadership and empowerment, especially in terms of accountability and democratic

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<sup>68</sup> Boitumelo Matlala 'We want the bread, not the crumbs: Challenging traditional authority in the platinum belt' (2014) *South African Crime Quarterly* 31, 32

<sup>69</sup> *Pilane and Another v Pilane and Another* CCT 46/12 [2013] ZACC 3, 2

<sup>70</sup> *Pilane and Another v Pilane and Another* Case no 263/2010 ZANWHC

deliberation. The grounds upon which the applicants sought to appeal the granting of the interdicts, was that ‘the grant of the interdicts occasions infringements of their rights to freedom of expression, assembly and association...[and] the constitutional principle of accountability, in so far as it pertains to traditional governance structures and leadership.’<sup>71</sup>

Additionally, this case serves a useful example of the realities of legal pluralism and the ways in which state law and customary law interact with each other, especially in a constitutional democratic order. ‘It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.’<sup>72</sup> An additional point of interest is the difference of approach to adjudicating customary law matters in the lower courts and the Constitutional Court.

#### **Accountability to the Community:**

One of the basic premises upon which traditional leadership is based, and which defines the relationship between chief and subjects is the saying “Kgosi ke Kgosi ka Batho”. Loosely translated, it means that a king is a king because of his people; that without subjects a king cannot be a king. However, this saying also encapsulates the way in which the legitimacy of a king is established in relation to his subjects in African culture; that leadership and decision-making are a community affair, not the sole prerogative of the king. Most importantly, the king is accountable to his subjects, perhaps not in the particularly defined ways suggested by the constitutional democracy, but village/ community fora exist through which subjects may ascertain information about the king’s decisions, or gather to discuss grievances as a community.

It was held in the majority judgment that traditional leadership now falls under constitutional supervision, just like all other forms of governance in South Africa. The Court reasoned that recognition of traditional leadership as part of South Africa’s democratic governance structure emanates from the Constitution and as such, traditional leaders are organs of state

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<sup>71</sup> *Pilane and Another v Pilane and Another* CCT 46/12 [2013] ZACC 3, 16

<sup>72</sup> *Pilane and Another v Pilane and Another* [2013] ZACC 3, 19: The same position has been taken by the Constitutional Court in *Alexkor. Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at para 51

and therefore required to perform their duties and functions in a manner consistent with the Constitution.<sup>73</sup> The powers of traditional leaders are to be exercised in a manner consonant with the Constitution, accountable government being one of the principles upon which the Constitution is based, and a value which informs governance in South Africa<sup>74</sup>. Furthermore, constitutional principles such as openness, transparency, and responsiveness require the participation of citizens in decision-making, particularly at local government level<sup>75</sup>.

### **Location of Traditional Leaders in Local Government:**

The recognition of traditional leaders as organs of state, empowered by the Constitution, and therefore subject to its supremacy, means that the nature of traditional leadership is significantly altered, and so is the relationship between traditional leaders and their subjects. The Bill of Rights which promises freedom, equality, and transparency amongst other rights, has transformed people from subjects to citizens in relation to their leaders. Significantly, the placement of traditional leadership as a function of local government<sup>76</sup>, in addition to provision of rights, has changed the way in which traditional leaders and subjects relate, thus establishing the need for engagement between subjects as citizens, and traditional leaders as organs of local government.

Local government is the best or most essential site for robust and meaningful public participation to take place. This is due to the fact that municipalities, and or villages, represent discrete communities. Managing public participation and the expectations of communities at this level, as opposed to provincial or national level, is better facilitated because a community, although made up of individual people, shares a collective identity and tends to represent itself as a collective group rather than as individual people. This is because the problems that face a community are often shared by a number of individuals in a community and create a shared experience amongst individuals. This is more the case in

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<sup>73</sup> *Pilane and Another v Pilane and Another* para 43, 22-23

<sup>74</sup> *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC)

<sup>75</sup> *Ibid*

<sup>76</sup> Inference from TLGFA; interpreted as such by Constitutional Court in *Pilane and Another v Pilane and Another*.

traditional communities whose collective identity is established through deeper affiliations such as clan, ancestral and language affiliations.

It is a well-established fact in South Africa that local government in many provinces, and in both urban and rural areas, has performed disappointingly since the advent of constitutional democracy in South Africa<sup>77</sup>. Many of the failings of the post-apartheid democratic governance framework are felt and witnessed in communities, particularly in poor and rural communities, which is the sphere in which local government operates. It is hardly surprising then that conflict between communities and government often takes place at this level. In the context of the *Pilane* case the Constitutional Court stated that

‘This Court has on more than one occasion recognised the significance of the rights to freedom of expression, association and assembly in the functioning of a democratic society. It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group’s identity and purpose, expressed through its name, emblems and labels. These rights are interconnected and complementary. Political participation, actuated by the lawful exercise of these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance... There is an inherent value in allowing dissenting voices to be heard and in doing so, permitting robust discussion which strengthens our democracy and its institutions.’<sup>78</sup>

### **The Minority Judgment**

The minority judgment, crafted by the Chief Justice and assented to by one other justice provides a practical example of the effects of weak legal pluralism on the recognition of non-state legal orders. This part of the judgment placed a large amount of emphasis on the authority of the traditional leader, relying on a close and extremely narrow reading of the

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<sup>77</sup> Tshepo Madlingozi; ‘The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, ‘Interpretive Charity’ and the Citizenry as Sangomas’ (2008) 1 *Constitutional Court Review*, 66

<sup>78</sup> *Pilane and Another v Pilane and Another* para 69, 33

TLGFA and the way it recognises and empowers traditional leadership. Reference was made to the fact that the TLGFA was enacted for the purpose of recognising traditional leadership in a manner consistent with the Constitution, yet is silent on the ways in which the traditional leader of the Bakgatla people is infringing the rights of the community to express dissent and seek accountability. If anything, the minority judgment replicates apartheid legal pluralism by emphasising the authority of the traditional leader, founding his legitimacy solely in terms of the state's recognition, and leaving the role of the community and changing notions of customary law as living law unacknowledged. This judgment's silence on the role played by the development of living law, a process deeply embedded in village level activism and dependent on active participation, is astounding. It does however, demonstrate the limitations inherent in legislative recognition of non-state legal orders, even when the legislation emanates from a politico-legal framework conducive to strong legal pluralism.

### ***The Communal Land Rights Act***

The Communal Land Rights Act (CLRA), despite having been struck down by the Constitutional Court, is an important aspect of this discussion as it forms part of the package of laws that empower traditional leaders and establish a sphere of authority for their leadership in communities. The CLRA has been declared unconstitutional by the Constitutional Court as Parliament did not follow certain procedural requirements when it brought the CLRA Bill into legislation. It was held in the *Tongoane* case<sup>79</sup>, that the Bill the CLRA was invalid because Parliament had failed to undertake public participation before enacting the legislation. Parliament claimed that this situation came about because the CLRA Bill was tagged incorrectly; an additional challenge by the applicants was that CLRA was unconstitutional on substantive grounds as it did not provide for their security of tenure<sup>80</sup>.

Four communities were involved in the litigation which formed the basis of the *Tongoane* case. The Kalkfontein and Makuleke communities owned their land as a community, while the Mokgobistad community established rights over land in an area called Mayayane in the North West Province. The Dixie community occupy a farm called Dixie 240 KU in the Pilgrim's Rest area of Limpopo Province. In the case of each community, the land they

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<sup>79</sup> *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

<sup>80</sup> *Tongoane* para 4

occupy falls within the jurisdiction of what used to be tribal authorities, now known as traditional councils. The communities in question had been administering the use and occupation of their land according to a system of indigenous law, and they were deeply concerned that their indigenous law based system would be replaced by the provisions of the CLRA. Of particular concern to the communities was the negative and potentially regressive impact of the CLRA would have on their indigenous law system which was naturally constantly evolving along with social processes taking place in the communities<sup>81</sup>.

The community mounted two challenges, the first was aimed at the substantive provisions of the CLRA, and the latter challenge was premised on Parliament's decision to pass CLRA as a Bill which does not affect the provinces, under section 75 of the Constitution<sup>82</sup>, instead of s76 which governs the procedure for a Bill which does affect the provinces.

A further source of disquiet for the litigants was the fact that their land would fall under the control of the traditional councils, which they were convinced would not be able to administer the land for the benefit of their communities, as the role and rule of traditional leaders and traditional councils in indigenous law was disputed by the litigants. For the purposes of this discussion, the substantive issues raised by the applicants in challenging CLRA are more important than the procedural challenge. The substantive challenge raised by the applicants' impugned section 21 of the CLRA in particular, as it made provision for the traditional councils to exercise powers and perform functions in respect of the administration of communal land. The indigenous law based system they had in place worked on a democratic framework in which all adult community members had a say in matters pertaining to their land. The traditional councils would not necessarily continue with this framework.

Under the Black Authorities Act, the State President was empowered to establish tribal authorities for African 'tribes' with or without regard for customary law, and whether such existed under customary law. Tribal authorities constituted the basic unit of administration in the areas to which the provisions applied. The CLRA before it was struck down, applied to these areas. According to the BAA tribal authorities could advise and assist 'the government

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<sup>81</sup> *Tongoane* paras 30-33, 19-21

<sup>82</sup> Section 75(1)'When the National Assembly passes a Bill other than a Bill of the Constitution of South Africa Act 108 of 1996 states that 'when the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure: (a) The Council must – (i) pass the Bill; (ii) pass the Bill subject to amendments proposed by it; or (iii) reject the Bill.

and other regional or territorial authority' with matters involving the development of land in their jurisdiction. These tribal authorities are now recognised as traditional councils under s28(4) of the TLGFA, subject to some changes regarding their constitution.<sup>83</sup> While CLRA has been repealed, it is only a matter of time before parliament introduces similar legislation, in order to regulate the administration of communal land<sup>84</sup>.

### ***Contested Powers and Legitimacy of Traditional Leaders***

#### ***Case Study 2: Tongoane and Others v Minister of Agriculture and Land Affairs and Others***

Despite having discussed this case above, I turn to it in this section for different reasons. The facts of the case provide a helpful context for the discussion that will take place in this section. The facts of the case are illustrative of a state of affairs common to many traditional communities all over South Africa. Furthermore, the legislative scheme described above has direct and material consequences for communities such as will be described using the facts from the *Tongoane* case<sup>85</sup>. The reaction to the enactment of the legislation is surprising given the aims stated in the preamble of the CLRA: 'to provide for legal security of tenure [and]... to provide for the democratic administration of communal land by communities.'<sup>86</sup> The CLRA made provision for the democratic administration of communal land by requiring communities to establish their own land administration rules, and to establish land administration committees. However, the legislation also empowers traditional councils to act as a land administration committees, subject to a caveat in subsection 4 of s21 that 'when acting as a land administration committee... the functional area of competence is the administration of land affairs and not traditional leadership'<sup>87</sup>. Furthermore s22(2) states that

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<sup>83</sup> *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC), paras 23-24 15-16

<sup>84</sup> The Communal Land Tenure Policy is under discussion in the Department of Local Government and Traditional Affairs

<sup>85</sup> *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

<sup>86</sup> Communal Land Rights Act 11 of 2004

<sup>87</sup> Communal Land Rights Act 11 of 2004

‘subject to s21 members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community.’<sup>88</sup>

These provisions of the CLRA are ironic, given the legislation’s stated aims, and the reality that much of the land subject to communal ownership falls within the boundaries of former homelands, which were often ruled by despotic traditional leaders<sup>89</sup>. Attempts have been made using the TLGFA to democratise traditional councils by requiring that traditional council members be elected by the community. However, many traditional communities have failed to implement this system, and where attempts have been made, there have been allegations made by community members that the election process was not free and fair<sup>90</sup>. Additionally, traditional councils often work in close proximity to traditional leaders such as kings and are susceptible to co-optation through the king’s power, compromising the traditional council’s ability to represent ordinary community members and be accountable to them.<sup>91</sup>

### ***The Traditional Courts Bill:***

The TCB relies on the TLGFA for many of its definitions, especially relating to the definitions discussed above. A particularly alarming feature of the TCB is that it does not recognise the tiered system of traditional leadership described in the TLGFA, in respect of the traditional court system. Section 4 of the TCB<sup>92</sup>, which deals with the designation and training of traditional leaders, also deals with the composition of traditional courts.

The TCB, envisions a traditional court system with a centralised presiding officer in the court, which is not consonant with customary law: ‘in reality, “traditional leaders” are not custodians of culture in the African cultural milieu. People of different ranks and stature are

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<sup>88</sup> Communal Land Rights Act 11 of 2004

<sup>89</sup> Aninka Claasens ‘Contested Powers and Apartheid Tribal Boundaries: the implications of ‘living customary law’ for indigenous accountability mechanisms’ in Hanri Mostert et al (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2012) 174

<sup>90</sup> Monica de Souza ‘Justice and Legitimacy Hindered by Uncertainty?: The legal status of traditional councils in North West Province’ (2014) 49 *South African Crime Quarterly* 41, 41

<sup>91</sup> Monica de Souza ‘Justice and Legitimacy Hindered by Uncertainty?: The legal status of traditional councils in North West Province’ (2014) 49 *South African Crime Quarterly* 41, 41

<sup>92</sup> Traditional Courts Bill [B1-2012]

custodians and repositories of knowledge, customs and practices.<sup>93</sup> Traditional leaders play an important role in their communities, however, community involvement is very important in matters relating to the administration of justice, as customary is based on a system of restorative justice. Chief (Nkosi) Phathekile Holomisa, a member of the South African Parliament and representative of the Congress of Traditional Leaders of South Africa (CONTRALESA), concedes that the Bill concentrates on the court at the level of the senior traditional leader, ignoring vital dispute resolution forums at levels above and below the senior traditional leaders' courts in traditional communities<sup>94</sup>.

Additional dispute resolution forums exist in traditional communities, such as those located within families which deal with family and household related disputes. Disputes between neighbouring families are often settled by clan leaders or elders, and village level disputes are resolved by headmen in their special forum. These dispute resolution forums and processes allow for the knowledge and history of a community's customs to be recited and preserved, and used to settle disputes through interpretation and re-interpretation. Moreover, the senior traditional leader's court will often be constituted by the senior traditional leader along with a council consisting of headmen, clan elders and leaders, and family heads<sup>95</sup>. The TCB does not reflect these nuanced dispute resolution protocols within traditional communities. It is in the lower level, community-based dispute resolution forums that processes of change and negotiation are occurring, as community members interpret customs through the lens of their lived reality.

Providing for a structure of traditional courts which emphasises the role played by the various dispute resolution forums within a traditional community is beneficial to communities as these forums work on a participatory method of dispute resolution, in which emphasis is placed on the restoration of justice, rather than punishment, and the maintenance of harmony amongst the various individuals who make up the community. Maintaining this democratic and participatory space within traditional justice administration, could play a significant role in the speed with which customary law develops, and ensuring a democratic, and therefore constitutionally consonant process. Structuring the traditional courts in this way could also

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<sup>93</sup> Nomboniso Gasa 'The Traditional Courts Bill: A Silent Coup?' (2011) 35 *SA Crime Quarterly* 23, 25

<sup>94</sup> Phathekile Holomisa 'Balancing Law and Tradition: the Traditional Courts Bill and its relation to African systems of justice' (2011) 35 *South African Crime Quarterly* 17

<sup>95</sup> Phathekile Holomisa 'Balancing Law and Tradition: the Traditional Courts Bill and its relation to African systems of justice' (2011) 35 *South African Crime Quarterly* 17, 18

have the impact of developing customary law in a way that recognises and entrenches rights to culture, and to belong to a cultural, religious or linguistic community as envisioned by sections 30 and 31 of the South African Constitution.

The legislative recognition of traditional courts has been justified in terms of s211 and s212 of the 1996 Constitution, and in terms of giving greater recognition to African systems of justice, especially restorative justice and reconciliation. Gasa suggests that there is a danger inherent in this approach as ‘traditional leaders are not [sole] custodians of culture in the African cultural milieu. People of different ranks and stature are custodians and repositories of knowledge, customs and practices.’<sup>96</sup> Rule-making and the interpretation of customary law are processes deeply embedded within a community and its collective identity, as the rules and their interpretation are based on the community’s reality and relational dynamics.

### **Impact of the Traditional Courts Bill on the Legislative Framework: Constraint of Negotiation Space?**

Chief Phatekile Holomisa, characterises the African justice administration system, of which customary law is an integral part, as ‘epitomised by traditional courts [which are] inclusive, democratic, open and welcoming to those who seek justice’<sup>97</sup>. He states further that ‘western-value inspired courts [are]...intimidating, alienating, complicated, retributive, incarcerating, and expensive.’ He is of the opinion that opposition to the Bill emanates from the way it centralises power in traditional leaders, whereas African justice systems are based on layered authority operating in a network of dispute resolution forums within a community.

There is much truth in the claim that Chief Holomisa makes about traditional courts, especially the ways in which they dispense justice, or rather, the ways in which they differ from ‘western-value inspired courts’. Furthermore, traditional courts have been in existence in South Africa for decades, long before the existence of the 1996 Constitution and the introduction of the Traditional Courts Bill<sup>98</sup>. Chief Holomisa is also correct in citing the fact

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<sup>96</sup>Nomboniso Gasa ‘The Traditional Courts Bill: A Silent Coup?’ (2011) 35 *SA Crime Quarterly* 23,29

<sup>97</sup> Phatekile Holomisa ‘Balancing law and tradition: the Traditional Courts Bill and its relation to African systems of justice’ (2011) 35 *SA Crime Quarterly*

<sup>98</sup> Christa Rautenbach ‘Deep Legal Pluralism in South Africa’ (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 143

that the TCB, at least the B15-2008 version of it centralises authority in the Court of the King in an African traditional community, when in fact African court systems tend to be layered throughout a community. However, he misses an additional point which raises concern about the TCB in its 2008 and 2012 versions: it establishes the jurisdiction of traditional courts in areas that are under the authority of a traditional leader, or tribal authority, and often these are areas which geographically conform to the boundaries of the Homelands, or Bantustans, created during apartheid as separate states for black people in order to deny them citizenship in South Africa. This situation has implications for the groups of people who have either bought, had restituted, or purchased before apartheid, land which falls within the general geographical jurisdiction of a traditional court.

Due to the fact that in African customary law, a traditional leader is responsible for the administration and allocation of land, and holding it in trust for the community. In many traditional communities though, ownership of land is a contentious concept, as land traditionally belongs to the community as a whole, with community members given rights to use land in perpetuity within a family; however, some traditional leaders have abused their position as administrators of land, and additionally there have been groups of people within traditional communities who bought land for themselves, either due to non-acceptance of the chief's authority, or because they sought to own land autonomously<sup>99</sup>.

These are communities that generally prefer to administrate their land in a democratic way, such as through the establishment of community property forums, in which all adult members of the community have a say in how the land is used, regardless of their standing from a gender or economic perspective<sup>100</sup>. That being said, there are many benefits to living in a community under the rule of a traditional leader; despite some of the complaints made by members of some communities who are ruled by traditional leaders, there are many communities under traditional leadership where community members feel safe protected and have good relations with their traditional leaders. The reasons for this state of affairs are many: some traditional leaders have established somewhat democratic relations with their

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<sup>99</sup> *Tongoane* submission in Nolundi Luwaya 'Report on the Traditional Courts Bill hearings: exploring rural people's democratic participation and freedom of expression' (2013) Issues in Law and Society Occasional Paper Series Issue 2

<sup>100</sup> Tanya Charles 'Peculiar places and legitimate chiefs?: an exploration of the role of traditional authorities in the titled locality of KwaMeyi village, Umzimkhulu district, South Africa' (unpublished MPhil thesis, University of Cape Town, 2012)

subjects, especially since the advent on the 1996 Constitution, others enjoy having traditional leaders, especially in the tiered institutional system, where the customary law of the community is applied even handedly and without opposition to progress and the participation of community members in the application of customary law and decision-making.

Many communities in South Africa relate quite closely with traditional leaders and want to be led by them<sup>101</sup>, but in a way that still allows for the full exercise and benefits of citizenship rights as promised and protected under the Constitution, and due to the experience of subjecthood under traditional leaders during the apartheid and colonial regimes in South Africa's past. This presents quite a challenge for the development of customary law and the recognition of traditional leaders, as there is a tension between the sometimes autocratic method of traditional leadership and practice on the one hand; and the desire of people living in traditional communities to benefit from a conception of South African citizenship which empowers citizens through rights to equality, dignity and freedom. One of the issues this paper seeks to engage is finding a strategy that can accommodate traditional leadership in a framework that also fulfils the desire of rural people living in traditional communities to access and benefit from rights as protected in the Constitution of South Africa.

Recognising traditional courts or community courts in a manner guided by the Constitution, and social realities of communities allows for a wider variety of people to access courts within their communities, and may assist in removing some of the problems identified with the TCB and in the ways in which it overlooks the complex ways in which many rural/traditional communities are constituted. The Traditional Courts Bill (TCB), if appropriately amended as suggested in this paper, could play a significant role in the development of customary law as living law in a manner that reflects the rights to equality, dignity and freedom enshrined in the Constitution, and underpinned by the spirit, objects and purport of the Constitution; but also reflects the practices of communities as influenced by their lived realities. This is a process that should be undertaken organically within communities, on an incremental but ongoing basis, governed by their own needs and priorities.

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<sup>101</sup> Michael J Williams 'Chieftaincy, the State, and Democracy: Political Legitimacy in Post-Apartheid South Africa' (2010)

By centralising power in the courts of the kings or chiefs, courts which are often not the first port of call in many communities, it privileges the voice of one powerful force within a community, and empowers it to make law in a top-down, undemocratic way, the effects of which are evidenced by much of the official customary in South Africa's statute books. Privileging the voice of the chief over the voices of the community may cause great harm in developing customary law, especially in such a way as to eventually influence and inform the content of common law in South Africa. These developments also demonstrate consonance with the constitution and indicate that there is sufficient room for customary law, cultural communities, and traditional leaders within the South African democratic space. Processes of democratisation and development of customary law are already under way, and if amended, the TCB could play a major role in protecting and enhancing the forums at community level.

The framework of governance established by the legislative scheme discussed above, and which comes about as a result of the way in which the three pieces of legislation interact with each other is in conflict with the separation of powers doctrine. The TLGFA, TCB and CLRA, centralise the governance, justice administration and land administration in one institution. All three laws require the establishment of traditional councils, however final decision-making rests with the traditional leader. This is a concentration of power which conflicts with a fundamental principle of the 1996 Constitution, the separation of powers. It has been argued by some that the separation of powers does not apply to traditional leadership as it is an alien concept<sup>102</sup> however, such reasoning is poor justification. Furthermore, traditional leaders now derive their powers and recognition from the Constitution, and therefore their powers must be exercised in a manner based on the principles fundamental to the Constitution, such as the separation of powers.

### ***Separation of Powers, the South African Constitution, and Traditional Leadership:***

This section of the paper shall not give a detailed description of the separation of powers doctrine, nor its particular application or operation in the South African Constitution, nor how exactly the institutions of government are arranged within this scheme, suffice to say why the

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<sup>102</sup> Phatekile Holomisa 'Balancing Law and Tradition: The TCB and its relation to African systems of justice administration' (2011) 35 *SA Crime Quarterly* 17, 21

separation of powers was chosen as principle defining governance in South Africa post-1994; and in what ways the separation of powers has been actualised under the 1996 constitutional arrangement as opposed to the constitutional arrangement upon which apartheid South Africa was established.

The Constitution of the Republic of South Africa does not state explicitly that South Africa's constitutional governance arrangement is based on the separation of powers. Instead, the separation of powers is inferred from the way the constitution establishes the powers and functions of the Executive, the Legislature and the Judiciary, the drafters of the 1996 Constitution regarded the separation of powers as a means to securing democracy, good governance and transparency. It was believed at the time that establishing a governance framework informed by the separation of powers would ensure a distribution of political power between the branches of government, which would ensure that the branches would not usurp each other's powers and functions<sup>103</sup>.

It can be safely concluded that the Constitutional Assembly, when drafting the Final Constitution deliberately avoided entrenching the separation of powers explicitly in the Constitution. They may have foreseen that given the way in which constitutionally explicit relationships of power between the arms of government could be used detrimentally, as had been done during apartheid; and the reality that the relationships between the arms of government need to be flexible and allowed to shift as time goes on, it would probably be best to define the powers and functions of each arm of government individually, rather than dictate how they should relate, or be separate from, each other. By placing greater emphasis on the powers and functions of the arms of government, there is greater clarity on what they may and may not do, but the ways in which the checks and balances between them operate will differ and shift depending on context or the facts of a situation.

According to Seedorf and Sibanda, this constitutional scheme came about as a response to the constitutional arrangement which had existed in South Africa before 1994. The pre-1994 governance arrangement in South Africa was one in which Parliament and the executive were centralised with the judiciary playing a minimal role in administrative oversight. 'Furthermore, both in terms of formal constitutional law and in practice, legislative powers

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<sup>103</sup> Simon Seedorf. & Sanele Sibanda 'Separation of Powers under the South African Constitution' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Service 12)

were increasingly transferred to the executive, mainly from 1976 onwards.<sup>104</sup> When the Final Constitution was drafted, it was not necessary to explicitly state that the principle informing the constitutional arrangement was the separation of powers, but rather to empower the arms of government in such a way as to have separate powers and functions, yet be forced to engage each other through a system of checks and balances. In the *First Certification* judgment it was held that ‘the principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances...prevents the branches of government from usurping power from one another.’<sup>105</sup>

The separation of powers should apply to traditional leadership in the same way as it applies to the branches of government described above. Moreover, it does not have to be an explicit separation, as is the case in the South African Constitution. An additional reason why the separation of powers must apply to traditional leadership is the fact that traditional leaders are unelected, and in many parts of South Africa, the legitimacy of traditional leaders is contested in different ways and for different reasons by community members.

### **Conclusion:**

The rule of law requires that all law be certain, publicised and easily accessible. To this end, legislation is favoured means of meeting the requirements of the rule, as writing laws down makes them certain, easily accessible and public. However, as the discussion and analysis above demonstrates, legislation is not always the most effective means through which to recognise institutions and norms, especially those of non-state legal orders. In contexts where there is much social change, indeterminacy as to meaning, and claims to power and authority are contested, the limitations of legislation become particularly acute. In the context of the recognition of traditional leaders in South Africa, legislation has played a significant role in locating traditional leaders within the constitutional democratic governance structure. However, as the case studies demonstrate this has not necessarily led to certainty about the law. If anything, the enacted legislation and proposed legislation has not successfully created

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<sup>104</sup> Simon Seedorf & Sanele Sibanda ‘Separation of Powers under the South African Constitution’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Service 12)

<sup>105</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 109, 66-67

certainty in the social context it is meant to operate in; it has exposed the reality that traditional communities and customary law are not settled concepts easily defined by legal centralist ways of viewing the law. Moreover, legislation has had the effect of upsetting processes of social transformation necessary for the establishment of balanced power relations between community members and their traditional leaders. A particular problem with the legislative recognition of traditional leaders is the way in which it emulates notions of African cultural identity and community constructed during apartheid and colonialism.

The application of customary law, and the ways in which communities relate with traditional leaders is not uniform, as presented by the legislative scheme envisioned by CLRA, the TCB and the TLGFA. The administration of land especially presents variable relationships between communities and traditional leaders/ traditional authorities, as some communities living within the territorial jurisdiction of a traditional leader, own their land privately, either through purchase or from a land restitution claim. Furthermore, in some communities, community members contest the title of the traditional leader to the throne or question his legitimacy for a variety of reasons.

Ultimately, what the legislative scheme for traditional governance overlooks is the reality that, the TLGFA and TCB entrench distorted meanings of community and belonging by making these concepts subject to the presence and leadership of a traditional leader. These meanings are deeply informed by colonial and apartheid era thinking, despite the fact that they are meant to represent a move away from this legacy. Both pieces of legislation, but particularly the TLGFA, reflect colonial and apartheid meanings and understandings of traditional leadership, customary law, and cultural practices and identities. The TLGFA entrenches these meanings as the definitions contained in it are used for definitional and interpretative purposes in the TCB and CLRA. The legislation overlooks the ever-evolving, dynamic, and complex nature of African cultures, thus reinforcing essentialist representations of culture, authority, and identity yet claiming to restore the dignity of African society. Socio-cultural processes are represented as static and unsophisticated when they are in fact dialectical, dynamic and exist in multiple relationships and identities<sup>106</sup>.

It is unwise to ignore or take for granted the complexity that exists within traditional communities and their relationships with traditional leaders, especially given the wide powers

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<sup>106</sup> Nomboniso Gasa 'The Traditional Courts Bill: A Silent Coup?' (2011) 35 *South African Crime Quarterly* 23, 24

that the legislative scheme confers on traditional leaders. These powers include control over the administration of land, adjudicative interpretation of customary law, and powers to govern rural areas. A further concern is the way in which the legislation places traditional leaders close to political elites such as Ministers and the President, who the legislation gives the power to recognise traditional leaders should disputes as to legitimacy arise. Moreover, the legislation does not indicate that community members have a large role to play in the interpretation of customary law, and the fact that customary law evolves continuously.

Read together, the TLGFA, CLRA and TCB place great powers in traditional leadership institutions. These powers could be abused by traditional elites to maintain or further develop interpretations and understandings of customary law that exaggerate the powers of traditional leaders, while excluding community members from the development of customary law. Custom will continue to be defined in narrow, constraining ways that allow some traditional leaders to continue to behave with impunity<sup>107</sup>.

There is an urgent need to rethink the way in which customary law is recognised in South Africa. Recognising customary law by only giving effect to s211 and s212 of the Constitution, which recognises traditional leaders, leads to a legislative language which gives great power to traditional leaders, but overlooks the involvement of communities in defining and interpreting the content of customary law. A more balanced approach needs to be taken, which gives effect to s211 and s212 of the Constitution.

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<sup>107</sup> Aninka Claassens 'Contested Power and Apartheid Tribal Boundaries: the implications of 'living customary law' for indigenous accountability mechanisms' in Hanri Mostert et al (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2012)

## **Chapter Five: Conclusion**

Traditional leadership and customary law has been in an interactive relationship with state law for decades in South Africa. What has defined the interaction between the laws is the politico-legal doctrine in place at the time of each manifestation. During late colonialism and apartheid, the interaction between state law and customary law was informed by a politico-legal framework of authoritarian and undemocratic rule, which produced a particular institutional logic. The politico-legal framework in which the current interaction of laws is taking place is one premised on democracy, freedom, equality and the rule of law. However, the old institutional logic of traditional leadership still informs the legislation meant to recognise traditional leadership in the constitutional politico-legal framework. As a result, the mechanisms for communities to hold their chiefs accountable are not reflected in the new legislation. This omission presents an impediment to the transformation of the institutional logic of traditional leadership, and is not consistent with the Constitution.

The current manifestation of this interaction is not new or unique, except that it is taking place within the context of a constitutional democracy, in which the Constitution is supreme and ‘law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’<sup>108</sup> In principle, the advent of constitutional democracy and its effect on the governance structures of South Africa, has redefined the way state and non-state law interact with each other.

### ***Legislative Framework for the Recognition of Traditional Leaders***

The legislative framework recognising traditional leadership in South Africa has been a major concern of this study. The legislative framework in many ways frames the ways in which state law and non-state law interact with each other, and plays a defining role in the way power is distributed at local level between traditional leaders and the communities they govern. Even though this study is a critique of legislation such as the TLGFA and TCB, there are some positive aspects of the legislation that must be acknowledged. In general terms, the rule of law requires, as a basic minimum, that all laws should be certain, clear and easily

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<sup>108</sup> s2 Constitution of the Republic of South Africa, 1996

ascertainable. One of the principal ways of achieving this requirement of legality is to write laws down on paper and make them publicly available and accessible.

Legislation allows parties to know what their rights and duties are, and especially allows for a clear delineation of power. In the context of relations between state agencies and citizens, it enables citizens to know the limits of a state agency's power, thus enabling citizens to articulate rights when attempting to hold the state accountable or limit the state's interference with their basic liberties. Legislation is also meant to serve the purpose of regulating state agencies' power, imposing duties and legitimating the power exercised by states agencies, especially in relation to citizens.

An additional positive aspect of the legislative framework recognising traditional leaders is that it meets the requirements set out in ss211 and 212 of the Constitution which require that legislation be enacted to provide for the powers and functions of traditional leaders in South Africa. The recognition of traditional leadership as part of South Africa's governance structures is important and necessary in order to promote the transformational agenda of the Constitution, and to reflect a diverse society. Furthermore, it is a means of ensuring respect for the rule of law, which has been dismissed from time to time in Africa, as a purely Western concept<sup>109</sup>.

***Reality: Context legislative framework operates in:***

The legislative framework recognising traditional leadership in South Africa meets the standard set by the rule of law in terms of procedural legality, by being publicly available and accessible. However, it does not meet the substantive requirement of legality as the statutes do not adequately regulate the powers of traditional leaders in relation to citizens in the communities in which they play a leadership role. Furthermore, the legislation does not place sufficient limitations on the powers of traditional leaders as neither the TLGFA nor the TCB provides for mechanisms through which citizens can hold traditional leaders accountable. As demonstrated by the cases studies, *Pilane and Another* and the *Tongoane* case, enabling community members to hold traditional leaders accountable is of grave importance, especially in resource rich traditional communities, and particularly in light of the fact that

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<sup>109</sup> Sammy Adelman 'Constitutionalism, Pluralism and Democracy in Africa' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 74

traditional leaders are unelected officials of the state, at local government level. From the manner in which the legislation is drafted, it can be safely surmised that the underlying assumption regarding the relationship between traditional leaders and community members is uncomplicated and without conflict; furthermore, that social change in these communities has been minimal.

The reality is that there are major social changes underway in many rural communities in South Africa, influenced by a variety of factors, a prominent one of which is the change in South Africa's politico-legal framework. The advent of constitutional democracy and rights discourse has not left rural communities untouched, despite the distance of some rural areas from urban centres. This phenomenon is particularly acute in resource rich regions and areas where people have successfully claimed land through land restitution cases. The *Tongoane* and *Pilane* case studies illuminate the reality that community members do not always agree with the leadership of traditional leaders, nor necessarily need to have their land managed by them, but still form part of a broader community within a traditional community.

Furthermore, the very idea of a traditional community is a problematic classification as many people living in so-called traditional communities might identify with the collective linguistic or clan identity but may not necessarily want to be led by a chief. In some cases, community members may have been forced to become part of a traditional community during apartheid but do not necessarily identify with traditional leadership. Even in more culturally settled communities, conflict is a reality as demonstrated by the *Pilane* case. A major complaint from members of traditional communities is a lack of space for public participation, particularly with regard to holding traditional leaders accountable. The legislative framework however, does not reflect this reality and provides little scope for public participation forums other than the traditional council. It appears though that the traditional council framework is not being implemented, and where attempts have been made to implement it there have been great difficulties. As demonstrated by the *Tongoane* case, there is a level of suspicion on the part of community members towards the idea of traditional councils. This is due to the history of tribal authorities, the administration entities traditional councils have been introduced to replace. In reality, simply changing the composition of the traditional council, and requiring that members be elected does not necessarily change the institutional culture established during the operation of tribal authorities. The introduction of traditional councils also does little to change the dynamics of power, heavily skewed in favour of traditional leaders, nor

does it improve prospects for ordinary community members to hold their leaders accountable. As mentioned in chapter four, traditional councils, even if elected, can be easily co-opted by the king as is demonstrated by the *Pilane* case, and used as an instrument to squash dissent and close down spaces for democratic participation, particularly in resource rich localities such as the platinum belt in the North West Province.

This study demonstrates that legislation, particularly the framework it establishes, is not the only mechanism through which African customary justice systems and dispute resolution forums can be recognised. Legislation works well where institution-making and empowering an elite group is concerned however, it cannot come at the cost of hard-won freedoms and changes that ordinary citizens have struggled for and achieved. Legislation cannot be used to disempower citizens by closing down the spaces and methods that give rise to interlegality, nor can it be used to diminish participation by re-inscribing an unbalanced power relationship, such as that which existed between traditional leaders and their communities in the apartheid and colonial eras. This constitutes a breach of the substantive aspects of the rule of law, and therefore is unconstitutional.

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