

Political and cultural recognition of minorities: what is their meaning in
the case of Khoisan in South Africa?

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Title

Political and cultural recognition of minorities: what is their meaning in the case of Khoisan in South Africa?

Thesis question

From adopting the contemporary Constitution 1996 to the recent Traditional and Khoi-San Leadership Act 2019 (TKLA2019), what prevents the political and cultural recognition of Khoisan in contemporary South Africa?

Abstract

Post-apartheid South Africa committed to the political and cultural recognition of ethnic minorities. The commitment was instilled in the Bill of Rights of 1996, the United Nations Declaration on the Rights of Indigenous Peoples adopted by South Africa in 2016, and in the direction toward repair of past injustices that transpired in the Truth and Reconciliation Commission report of 1994. However, attempts to politically recognise Khoisan are producing some significant challenges. This work argues that without a deeper understanding of political and philosophical recognition, social justice may be inadequately distributed and may lead to misrepresentation and the extension of injustices. I will argue that the absence of recognition, or misrecognition, inflicts harm and becomes a form of oppression that preserves a distorted and reduced mode of being for Khoisan, created in the colonial past. In chapter 1, I will illustrate how harmful identity politics of colonial and apartheid times produced identities of “primitive” people, unworthy of political membership. In chapter 2, I will trace the development of the philosophical concept of recognition in Europe and its path in Africa using the theoretical framework of Axel Honneth, Charles Taylor, Mahmood Mamdani and Milton Bennett. It will be shown that the blindness of indirect rule and the insufficient intercultural competence perpetuate the misrecognition of Khoisan. In chapter 3, I will analyse post-apartheid legislations aimed towards the upliftment of traditional communities. The legal misrecognition will transpire from the analysis of the Traditional and Khoisan Leadership Act of 2019. The last chapter will illustrate how TKLA2019 may misrepresent Khoisan ethics and the historical vitality of traditional governance. In conclusion, I will evaluate how the current socio-political dynamics affects just governance and decolonial understanding of sovereignty.

Introduction

South Africa's post-apartheid development reflects both a transformation and continuation of its apartheid past. Transformation is rooted in the country's commitment to democracy and the recognition of people who were oppressed throughout colonization and apartheid. South Africa held its first democratic election in 1994. The African National Congress won the national vote in this and all subsequent elections, taking responsibility to fulfill the national commitment to political, social and cultural transformation of South Africa in line with its first democratic constitution. Adopted through an inclusive and consultative process, the Constitution of the Republic of South Africa, 1996, is evidently transformative and declares commitment to the continued inclusion of civil society in governance, freedom of expression and respect for cultural diversity (Pieterse 2005; Theunis 2009).

The legacy and continuity of the apartheid past has also been present in the last 25 years. They include growing inequality, racial tensions, and institutional chieftaincy in the form that was shaped by colonial and apartheid legislations to promote indirect rule (Myers 2008; Mamdani 2013). The institution of chieftaincy, as well as the notion of traditional leadership, requires careful scrutiny, especially in evaluating the progress of state-society recognition and the quality of democracy in South Africa (Williams 2010, 1).

Historical experience of colonial and apartheid past colors all post-apartheid democratic experience in South Africa, especially among previously disadvantaged communities. The crisis of identity, rooted in the colonial past, is still painfully present in Khoisan communities, with an apparent need for political and cultural recognition.

The concept of recognition is closely linked to identity, or the person's understanding of their fundamental characteristics as a human being. Identity includes a sense of continuity, a sense of uniqueness from others and a sense of affiliation (Sharma, 2014, 1). The history of engagement between colonial powers and Khoisan in the first section of this dissertation illustrates the development of colonial identity politics that signified a wide range of political activity and theorizing that aimed to secure political and economic power in the hands of white minority. The political activity, grounded in the colonial system, included land redistribution, legal inequality, mass extermination and displacement among a few. For centuries the Khoisan political identity was honed as unworthy of land ownership, political equality and legal justice. The concept of political recognition arose as a need for repair of the legal injustices of the past, as well as self-governance and the ability to adopt certain kinds of legislation deemed necessary for survival (Taylor 1994, 52).

Unlike political recognition, cultural or social recognition is grounded in the emotional experiences invoked by attitudes and actions of others towards a particular ethnic minority (Abrams 2010, 6). According to Besten (2011, 68), from the late 1800s till 1980s, there was consistent

degrading representation of Khoisan in school history - an important medium through which negative cultural views were reproduced and sustained. The impact of two centuries of cultural misrepresentation may result in internalizing the negative views of dominant society (Erickson 1968, 303) and in ethnic trauma of a negative identity and self-hatred (Phinney 1989, 34).

An important aspect of recognition includes the repair of spatial “modes of belonging” - discourses, social practices and institutional arrangements through which people make claims for land (Rutherford 2008, 73). Land ownership as a spatialized form of power and authority, land distribution is not only symbolic in a cultural sense, but it is also political as it matters greatly in power relations (Biersack&Greenberg 2006, 172). The issue of land redistribution is of great importance for every indigenous community whose livelihood was inseparable from the environmental landscape it inhabited and was acknowledged by a number of academics (Viljoen 1996; Verbuyst 2016, 2022; Sato 2018). Although this topic deserves and receives a lot of attention, the focus of this work lies in the deepening of our understanding of political recognition in terms of Khoisan leadership system as a distinct cultural phenomena, different from other traditional communities of South Africa.

In this thesis I will refer to the collective term “Khoisan”, despite this is often frowned upon. The term Khoisan was coined in the 1920s in an attempt to describe multiple tribes and refer to people who lived on the territory of South Africa and Namibia with distinct similarities in physical appearance, language and way of life. Both pastoralist Khoi and hunter-gatherers San consisted of several distinct clans or families, who lived far away from one another and hardly underwent assimilation at that time. The term Khoisan replaced derogatory predecessors, such as Bushmen and Hottentot (Jethro 2017, 350). The evidence of San people populating southern Africa traces back to 120 000 years ago (Adhikari 2010, 4). The contemporary term Khoisan, which is used in legal terms, and everyday life refers to five main groups: Cape Khoi, Nama, San, Griqua and Korana.

Khoisan identity, perceived and imposed, suffered dehumanizing processes over the period of encounter with colonialism and apartheid, which Wynter (2003) calls dysselection. The myths about Khoisan identity have a long history as they appeared on the colonial frontiers of the Cape in 17th century (Robins 2000, 61). Chidester (1996, 22) traces the shifts of colonial attitudes towards Khoi people depending on whether colonial intent was to trade goods or to conquer land. When the necessity was to conquer Khoi or San lands, the locals were portrayed as animal-like creatures to the point of being hunted as vermin by some colonial settlers (Chidester 1996, 82). When the necessity was to trade, the attitude was generally respectful and considerate. When the colonial necessity was to harness farm labour, the Khoi and San were portrayed as dangerous vagrants and attached to the farms as permanent laborers with the help of legislations that prevented free movement of Khoisan people between the farms (Adhikari 2011, 32).

By 19th century political discourse on Khoisan identity completed the dehumanising process of dysselection, or less than human-ness (Ellis 2019, 319). Khoisan were denied their humanity in a multiple ways: they were jailed for hunting, dispossessed of their land and virtually converted into slaves on boer farms. San men were hunted as vermin, whereas women and children were enslaved into forced labour (Adhikari, 2010, 20). With introduction of alcohol, disease and rape, Khoisan additionally received such labels as drunkards, indolent and sexually depraved. Even after their land was dispossessed, violent practices, such murder, capture and allocation for farm labour, prohibition of native language and rituals (Van Wyk 2016) continued to destroy their culture: Ellis (2019, 320) claims that “the complete and total dysselection of the KhoiSan in these periods creates inhumane labour practices that many are still not being able to escape today”.

The health statistics for South African “colored” population - a racial category of the past that is still used at present and includes Khoisan, - exhibits some very disconcerting numbers and brings attention to great health challenges (Fetal Alcohol Syndrome disorders, HIV, tuberculosis, and alcoholism) and poverty, including multidimensional child poverty as high as 37.9% among colored children (South Africa Demographic and Health Survey, 2016).

McKittrick (2016, 82) suggests that the solution to traumatic experiences of the past that caused complete dysselection among Khoisan is to be found in the recreation of humanity, or in other words, recognition of Khoisan culture and land rights.

The political discourse of recognition in democratic South Africa provided the language and commitment to recognition of previously oppressed. Significant signposts in the development of the political discourse of recognition of Khoisan were the Truth and Reconciliation Commission (1995), the Bill of Rights (1996) and United Nations Declaration on the Rights of Indigenous Peoples adopted by South Africa in 2016. These documents set out the commitment and framework for the recognition of ethnic minorities including the Khoisan, a public political discourse that African National Congress, South African ruling party, on behalf of the nation is committed to undertake and manifest into action. The purpose of this work is to expose a significant gap between the political discourse of recognition and the legislative enactment of recognition. The evidence from the historical context of colonisation indicate that the assumptions of predemocratic political discourse merged with the current language of recognition. The task of this work is to raise awareness of the fact that the discriminatory assumptions, such as hierarchical leadership style, are brought into the political discourse of recognition at present and are important determinants of the kinds and quality of recognition we see produced. The colonial and apartheid legislation was concerned with the leadership and governance of traditional communities. I argue that current legislation aimed at recognition in democratic South Africa can be traced to colonial and apartheid customary governance, which included the approach of “indirect rule” governance. Inevitably, the

similarities between apartheid and post-apartheid legislations that target traditional communities are striking, despite the opposing political discourse. The political idea of apartheid aimed to manage and control traditional communities, whereas the political intent of post-apartheid government is to undo the damage of colonial era and to revive previously oppressed communities. Why is then opposing political ideas manifest in a similar political action? I will demonstrate that there is a significant gap between constitutional ideals of equality and freedoms and their actioning into the reality of the livelihoods of ethnic minorities. The purpose of this work is to argue that two forms of blindness prevent cultural and political recognition of Khoisan: the blindness of indirect rule and the intercultural blindness.

Indirect rule is a form of political control in which state authorities delegate daily governance to traditional leaders in exchange for obedience and state support in upholding the leadership roles (Furnivall 1956). Traditional authorities thus become state intermediaries who enforce state politics. They act on behalf of state administration while creating the visibility of traditional governance to their subjects. The blindness of indirect rule is the inability of a democratic state to detect the infiltration of colonial method of indirect rule into the democratic legislations for traditional governance (Mamdani 2011, 22).

What are the possibilities of Khoisan recognition within democratic governmental policies that repeat the ideology of indirect rule? The administrative practices, inherited from colonial ideologies, inevitably reproduce the realities of the past, despite the aspirations of a constitutional democracy. The Traditional and Khoisan Leadership Act of 2019 as the most recent act in a sequence of post-apartheid legislations aimed at political recognition. I will argue that the blindness of indirect rule in the certain aspects of the Act, or inability to distinguish “customary” as a reproduction of indirect rule from the Khoisan traditional mode of “governance”, does not always reflect the historical vitality of traditional governance. Ellis (2019, 303) described it as the following: “to commit culture to rules, types, forms and standard practice is to confine it to history and, especially in South Africa’s case, to colonial history. The *capture* (the violence of this word is purposely implied) of traditional leadership on paper, and in law, serves to fossilise what is potentially a very dynamic and creative form.”

The second type of blindness, the intercultural blindness, draws from Milton’s Bennett’s Developmental Model of Intercultural Sensitivity (DMIS) and reflects the intention of a ruling elite to make Khoisan conform with the current hegemonic paradigm of reality instead of the intention of understanding Khoisan paradigm and translating it into the legal space. Bennett (1986, 180) popularised the term “intercultural competence” - one's effective and appropriate engagement with cultural differences; a learned skill that is essential for South African policy makers.

I will theorise that insufficient intercultural competence of the South African government prevents the creation of successful policies and campaigns aimed at political recognition and revival of cultural identities, and holds back the movement from ethnocentrism towards ethnorelativism. I will advocate for the necessity of intercultural expertise as a necessary prerequisite for South African officials in order to facilitate decolonization, recognition and justice.

I argue that the blindness of indirect rule and the intercultural blindness constitute the phenomena of harmful misrecognition, or active rewiring of Khoisan cultural values towards greater uniformity, disguised under the rhetoric of recognition and revival.

In an attempt to provide for the recognition of Khoisan in a democratic South Africa by way of constitutionally protected rights through legal acts, the parameters of recognition still lie along the spectrum of Western categories and are based on ontological and epistemological models that are distinctly different in Khoisan culture. Such “blind” recognition, or misrecognition, reveals the danger of setting up hybrid cultural categories, where many Khoisan, in order to receive the benefits of a particular legislation, adapt to the imposed model of a suggested legislative virtue, such as a particular form of leadership or practice, which are alien to their culture and represent the values of the ruling elite or majoritarian culture. One of the most central aspects of DMIS is culture learning, as it is not impossible to become interculturally competent without learning about a culture other than one’s own (Bennett, & Bennett, 2003, 200). The lack of intercultural competence of the post-apartheid South African government impedes the political and cultural recognition of its ethnic minorities.

Chapter 1. The case of Khoisan

1.1 History of violence and oppression of Khoisan

The Khoisan engagement with Europeans began in the precolonial period. Between 1590s - 1610s the first trading frontier was founded in Table Bay, when Dutch and British ships would put in Table Bay en route to India. Khoisan traded cattle and sheep in exchange for tobacco, iron and copper (Adhikari 2011, 51).

With the start of Dutch colony period in 1652 Cape authorities adopted amicable and non-violent attitude towards Khoisan, governed by the directors of Dutch East Indian Company (the Company), who proclaimed Khoisan free people, who were to be neither conquered, nor enslaved. Such policy was protecting the precious livestock trade that the colony relied on. The Dutch commander in Cape Peninsula, Jan van Riebeeck maintained this policy for years without great eagerness - he repeatedly asked the Company’s authorities to lift the ban on Khoisan enslavement without success. He used three main issues to substantiate his requests: petty theft of mainly metal

items, unwillingness to part with their best livestock and alleged concealment of escaped slaves (Chidester 1996, 25).

In 1657 a new agrarian frontier was established. In order to save money and provide the colony with continuing livestock and fresh supplies, the Company didn't renew contracts of some of its employees and offered quality pastures on the slopes of Table mountain instead. New farmers, or freeburghers, occupied lands that previously were utilized by Khoisan. It caused active Khoisan resistance, who stole most of European cattle and sheep and destroyed farms during the sudden attack in May 1659. In 1660 two Khoisan groups, Goringhaiqua and Gorachouqua, made peace with the Company (Elphick & Giliomee 2014, 12). They agreed to recognise the sovereignty of the Company on the lands in question in exchange for the right to keep all stolen stock during the 1659 attack and pay no reparation for the damage.

In 1670s there was further movement in Drakenstein and Stellenbosch areas by newly arrived Europeans. In 1677 the Company had first imposed its right to pass judgements regarding matters between clans and enforce them with violence (Elphick & Giliomee 2014, 12). In 1679 Simon van der Stel introduced the anointing of Khoikhoi chiefs with a ceremony of presenting a new leader with a cane with engraved copper handle. A new Khoikhoi leader was also given a latin name, like Hannibal or Hercules, thus manifesting its alliance with the Company, as well as loss of independence (Elphick & Giliomee 2014, 14).

In the beginning of 1700s, the growing appetite for livestock witnessed the Company's strategic shift towards violent enforcement of trade: Khoikhoi chiefs were not only obliged to sell their diminishing cattle for a fixed price, stipulated by Dutch, but also threatened Khoikhoi chiefs with military attacks in case of refusal (Elphick & Giliomee 2014, 11).

By 1720s Khoikhoi were assimilated in the Company's legal system. They could testify against Europeans and seek judgment, however, their discrimination was clear in the cases of murder. A Khoikhoi would be executed for murder; however, a European would only suffer confiscation of goods (Elphick & Giliomee 2014, 18).

Khoikhoi wealth and cultural-economical growth in 1700s was negatively impacted by several factors. Firstly, the colony's increased need in labour drew a lot of Khoikhoi to European farms, where they worked for tobacco, food, lodging and rarely calves. Thus, the absence of support from struggling members of clans prevented local chiefs from gaining power, which normally would be used for waging wars between Khoisan and their enemies (Bushmen) for livestock replenishment. Now all military conflicts between locals were monitored and suppressed by Dutch. Secondly, the growing colony relaxed its control over freeburghers and granted them permission to barter - this resulted in several plunder expeditions between 1702 and 1705, and remarkable growth

of colonist's livestock. Thirdly, a smallpox virus in 1713 and 1755 disseminated around 90% of Khoikhoi population (Elphick & Giliomee 2014, 126).

With the expansion of trekboers inland their encounters with remaining Khoisan would usually go according to three scenarios. The first one would have boers settled at Khoisan kraal, gaining access to water, food and labour. In exchange boers would pay and offer protection from robbery. The second scenario would involve theft of Khoisan stock, murder and taking prisoners-of-war, mainly children, who further would become servants for boer families. The third scenario would imply displacement of a kraal for the purpose of sole occupation of the territories by boers (Chidester 1996, 66).

During this time, the distinction between Khoikhoi and Bushmen started to blur, as more and more herdless Khoikhoi would unite their forces with hunter-gatherer Bushmen to survive from or implement attacks on Dutch freeburghers (Elphick & Giliomee 2014, 26).

Displaced and robbed, Khoisan would attack boer farms, stealing cattle and burning white settlements. As a response, in 1715 Dutch government introduced commando - an institution, initially consisting of contracted Dutch with a fraction of boer militia and later of trekboers, often with their dependent Khoisan, for whom commando service became compulsory from 1739. Commandos were raiding Khoisan communities, stealing cattle and killing thousands of people (Elphick & Giliomee 2014, 25). From 1798 the Government permitted trekboers to exclude Khoisan from any land they fancied, and to kill or capture survivors as labourers. By the 19th century the independent kraals ceased to exist in Western Cape. Majority of Khoisan were enslaved or employed on farms, whose owners often used violent measures to keep their employees at work, such as threats, withholding Khoisan livestock or even children (Elphick & Giliomee 2014, 31).

To avoid servitude, some Khoisan would desert the farms, surviving from banditism inside the Colony or forming allies with Bushmen or Xhosa on frontiers. From the 1790s the rebellions, who agreed to lay down arms, could join newly established Christian mission posts or become a part of a military unit, which fought other Khoisan, Xhosa or British invasion from 1799 (Elphick & Giliomee 2014, 33).

Although joining missionaries provided some protection, schooling and "civilized" lifestyle, it required a radical religious and cultural change. In 1804 a Khoisan convert named Boesak writes about the duality of his experience: "The one heart... will do nothing but sing all kinds of Hottentot and Boscheman's songs and all that is bad and the other heart strives to sing the praises of Christ". (Adhikari 2011, 109). Schooling, provided by missionaries, meant that many injustices suffered by Khoisan now could be articulated and addressed through the court system. The pastors often supported Khoisan who legally fought for their freedom. However, a number of laws by 1819 had solidified the subservience of Khoisan.

In 1809 Lord Caledon proclaimed that every Khoisan required a “fixed place of abode”, thus making it illegal to move around the country (Elphick & Giliomee 2014, 40). Khoisan children were required to serve “apprenticeship” from 8 to 18 years old, in order to pay back their sustenance to their “employer” in the first 8 years of age. This rule would additionally keep his or her parents on the farm if they chose to preserve their family unit.

Another freedom inhibition came into play when the local missionaries promoted “artificial wants” in an attempt to instill ethics of gain-oriented continuous work in Khoisan. Heavy debt (2 years of labor would be required to pay off a suit of clothes) attached laborers to farms for even longer (Elphick & Giliomee 2014, 46).

The land ownership by 1820s was inscribed into law: the Khoisan have been considered incapacitated by law from holding land (Elphick & Giliomee 2014, 41).

Since the first British occupation in 1795, the frontier violence against locals became a concern for British authorities. Not so much because of the humanitarian violations, but rather because of the high costs of disorder and disruption in meat supplies and farm loans repayments (Adhikari 2011, 60). Thus, new British initiatives were directed towards assimilation of Khoisan into functional colonial membership by turning them into farming herders. Indigenous people were to become more “civilized”, which meant abandonment of hunter-gatherer’s lifestyle, acculturation to European values and adaptation of European labour ethics. Several administrative efforts, together with intense missionary activity, were done to implement this agenda. Firstly, a proclamation by Governor Macartney in 1798 encouraged donation of animals to San in the hope that they would stop violent raids on frontiers, would settle and become pastoralists (Elphick & Giliomee 2014, 329). However, egalitarian San often were so poor that donations would be immediately slotted and shared among the community. Secondly, the British created Bushmansland - an arid reserve for Khoisan between Orange river and the northern frontier. Together with Kat river farm, it became the only refuge to lead the lifestyle, independent from colonists. And lastly, British authorities attempted to establish connections with existing Khoisan chiefs and designate new ones. This attempt failed due to the unsurprisingly persisting image of the colonists as enemies. Thus, the leadership in San community would mainly imply devising an organized resistance rather than collaboration with the authorities, with some exceptions of leadership arising to negotiate conditions of product exchange or coexistence within the colony (Adhikari 2011, 66).

Once ‘Hottentot’ or ‘coloured’ was assimilated into a farm and became a member of colonial society, he or she would most likely become part of a downtrodden proletariat prone to disease and alcoholism (Neville 1996, 230-244).

In 1861 Louis Anthing conducted investigations on San people. He discovered that only around 500 San people in the whole Bushmansland. Their disappearance was the result of several influences. Thus, trekboers were not respecting the boundaries of Bushmansland and used its already arid areas for grazing their cattle and hunting. Starving San had no choice but to steal livestock from the neighbouring areas, making themselves an excellent target of revenge. Not only trekboers hunted San, but pastoralists Griqua and Korana communities, who had access to the superior than San war technologies, attacked San bands with remarkable violence, killing women and children together with able men (Chidester 1996, 103).

In the 1850s Cape Government granted the Khoi political rights to vote, in order to avoid political struggles like the Xhosa rebellion in 1853. It was decreed that all male citizens meeting a low property test, regardless of colour, had the right to vote and to seek election in Parliament. This non-racial principle was later abolished by the apartheid government (Fraser 2013, 29).

By the end of 19th century, Khoian resistance was suppressed and those who stayed alive were distributed on farms in rural areas, mainly as farm laborers. A small fraction of Khoian males were allocated for military service.

During the apartheid, they were placed in “colored” racial categories with the rest of non-white and non-black population.

In 1996 Khoisan were legally recognised as full-fledged citizens of South Africa. However, the impact of their tragic past requires a robust methodology for their recognition, political and cultural, to heal the trauma of South Africa’s present.

The history of relationship relationship between Khoisan and pre-democratic legal power in South Africa is considered genocide by a prominent South African historian Mohamed Adhikari in his book “The Anatomy of a South African Genocide” (2011).

Whether or not the radical terminology of “genocide” should be used in relation to Khoisan history, the disadvantage of Khoisan in comparison to other ethnic groups of South Africa throughout its colonial and apartheid history is undeniable (Adhikari 2011, 54). The aim of this section was not to prove that the legal and administrative actions of colonialist and then apartheid government oriented towards the purposeful destruction of Khoisan, but rather to illustrate the government’s denial to perceive cultural differences and attribute them to psychological qualities, such as backwardness and primitiveness (Chidester 1996, 34). This relationship of ethnocentrism was driven by two main objectives of the colonial power: to obtain rights for new lands and to secure inexpensive labour for its cultivation. Thus, forceful displacement of Khoisan created a generation of homeless people, whereas the imposition of farm labour contributed to cultural impoverishment, so that practicing Khoisan culture and language became nearly impossible and often forbidden. The historical overview of Khoisan engagement with ruling power in

pre-democratic South Africa gives a good understanding of past injustices which South Africa committed to repair.

1.2 Difficulty in studying Khoisan

The term Khoisan was coined in the 1920s in an attempt to describe multiple tribes and refer to people who lived on the territory of South Africa and Namibia with distinct similarities in physical appearance, language and way of life. Both pastoralist Khoi and hunter-gatherers San consisted of several distinct clans or families, who lived far away from one another and hardly underwent assimilation at that time. The term Khoisan replaced derogatory predecessors, such as Bushmen and Hottentot (Jethro 2017, 350). At some point between 120 000 and 30 000 years ago Khoisan people belonged to the largest population group on the planet, according to recent DNA research (Science, Vol 338, Issue 6104, 12 October 2012). Being one of the earliest population groups of Homo sapiens, the Khoisan were also the first inhabitants of southern Africa. Throughout the centuries, they persevered gradual displacement from Bantu people (5th-17th century), and Europeans (17th - 20th century).

The contemporary term Khoisan used in legal terms and everyday life refers to five main groups: Cape Khoi, Nama, San, Griqua and Korana.

Studying the Khoisan in contemporary South Africa involves considerable difficulties. Firstly, the era of colonialism had detrimental effects on indigenous people: they faced mass destruction due to European diseases, removal and displacement from their native lands, officially sanctioned exterminations, and forceful allocation as boer farm labourers (Adhikari 2011). Social and cultural suppression continued during the apartheid: some cultural forms were prohibited and others were hybridized with the accepted Calvinist's norms; the usage of the indigenous languages and religious beliefs were censored (Adhikari 2011, 67).

Secondly, 25 years later into democracy, the Khoisan, as well as mixed families, usually with white and Khoisan parents, are still placed into the "colored" racial category, making their ethnic belonging practically invisible in the socio-political landscape (Le Fleur & Jansen 2013, 2). The term "colored" was introduced in order to neatly encompass the diverse population who would not fit into the binary black and white racial model, such as Khoisan and mixed race people. Such nebulous categorization left Khoisan untouched by the majority of recognition policies. South African statistics still uses apartheid typology of race and language and, as a result, does not reflect the presence of Khoisan in South Africa. Genetic studies suggest that the group has the highest levels of mixed ancestry in the world. Mitochondrial DNA studies have demonstrated that the

maternal lines of the Coloured population are descended mostly from African Khoisan women (Quintana-Murci et al. 2010, 612).

Thus, the political discourse in regard to Khoisan has some fundamental disjunctions. On the one hand, Khoisan are excluded from the democratic legislations except TKLA2019 and some mention in the Constitution 1996, their languages did not receive the status of official, and Khoisan ethnic profile is merged with “colored” racial category. On the other hand, Khoisan heritage was acknowledged and promoted as an important part of South African culture. The country distinguished Khoisan culture in the process of its heritage formation and defining its nationalistic image as a nation state on the local and international arena. The Khoisan indigenous identity is placed on the coat of arms of South Africa, designed by Mr Bekker and introduced on Freedom day 27 April 2000, depicts two Khoisan men and reads the motto in the Khoisan language of the !Xam people that translates to "diverse people unite". The Khoisan cultural resources are not only used in the representation of the country, but also constitute a substantial part of history subject as a part of school curriculum (“Society and politics”, <https://www.sahistory.org.za/#section6>).



The official discourse of South African government includes and distinguishes Khoisan history among other ethnic minorities, allocating a special place for them among other diverse cultures, constituting the Republic of South Africa. Unfortunately, such discourse has significant pitfalls in the legal arena. The necessity of legal recognition transpires from severe legal disadvantage that Khoisan were placed during their coexistence with colonial and apartheid systems, in comparison to other ethnic minorities. In order to illustrate this disadvantage, the next part of this introductory section contains the brief history of legal injustices that peppered the history of Khoisan engagement with power.

Chapter 2. Political and cultural recognition: development of the theory of recognition in Europe and Africa

The previous chapter illustrated identity politics of colonialism and apartheid, invoked through the legal documents of that time. The construction of Khoisan identity during colonialism and apartheid reflects absence of political representation, legal inequality, coercive administrative practices, freedom inhibition and restriction by law from land ownership. Such identity politics span throughout three centuries, and undoubtedly made a lasting damage on Khoisan conception of self,

society and the other, demanding repair in the landscape of democratic South Africa. In this perspective, the politics of recognition aims to repair internal self-dislocation (Frazer 2000, 109).

This chapter aims for a deeper understanding of the theory of recognition. Further I will trace its development in Europe and will then analyse the African politico-cultural landscape in terms of recognition, culture and custom - custom as a uniquely African category which is inseparable from the concept of recognition.

2.1 Hegelian Legacy

Recognition theorists argue that recognition can determine the value of our identities as individuals as well as the value of our group identities. Political theories of recognition aim to reshape the concept of justice in terms of adequate or withheld recognition in order to combat a wide range of social injustices. The concept of “struggle for recognition” was coined by Hegel, who in turn was influenced by Johann Fichte’s idea of individual freedom as tension between self-understanding and the limiting demands made by other individuals. In other words, for an individual to perceive oneself as free and capable of action, it is necessary to acknowledge the claims of another free individual (Fichte 1796, 7). In this way, Fichte offered an intersubjective ontology of humans, echoing the ethos of African Ubuntu, in which freedom and self-understanding are dependent upon mutual recognition.

Hegel further developed Fichte’s ideas in his *Phenomenology of Spirit* by suggesting that self-identity, also termed one’s sense of freedom, cannot be attained in solitude; it always requires the recognition of such from another: “Self-consciousness exists in itself and for itself, in that, and by the fact that it exists for another self-consciousness; that is to say, it *is* only by being acknowledged or recognized” (1807, 229). In “*Elements of the Philosophy of Right*” (1821), Hegel further claims that recognition is an essential component of ethical life, and that only through the mutual recognition of an individual’s freedom are her rights actualised. For him, rights are not the way to achieve freedom but rather an expression of it. Hegel believes that human existence as social beings is governed by the mechanism of mutual recognition. Each individual is independent from the other and is recognised as such; but at the same time each is equally dependent on the other for that very recognition (Houlgate 2013, 92). In this sense, therefore, our self-actualization as political and ethical subjects depends on attaining, as well as providing sufficient recognition between the members of a particular community. The Hegelian understanding of rights as secondary to the recognition is an important framework for understanding the current situation of the Khoisan, whose rights are constitutionally granted, but the mechanisms of their enactment are missing, being solely focused on creation and management of leadership elite.

2.2 Social Theory of George Herbert Mead

In his book “Mind, Self and Society” (1934), George Herbert Mead, an American social psychologist, brought a new group angle to the Hegelian concept of recognition by giving an extensive description of how selfhood or identity arises out of social interaction. In his work, he claims that social process is prior to the process of individual experience, and that the “processes of experience which the human brain makes possible are made possible only for a group of interacting individuals: only for individual organisms which are members of a society; not for the individual organism in isolation from other individual organisms” (1934, 6). For Mead, mind is a mechanism of participation in an interpersonal, hence social, field. He claims that interpersonal behaviour is a prerequisite for individual internalisation; it gives a sufficient range of symbols for this internalization to occur that, in turn, gives rise to mentality or self-identity as we know it. Mead suggested that consciousness of speech and social experience surface at the same time, that both experiences are interdependent (Barresi & Martin 2006, 252). This opposed the prevailing paradigm of consciousness, originated from Descartes which implies that, before understanding the mind of others, one has to know one’s own mind. In Mead’s theory of consciousness, he followed Hegel by asserting that social meanings and symbols within an individual’s social field formulate one’s consciousness, especially through language. However, his emphasis on group interaction as a primary source of identity formation places a question of whether full recognition is only possible if individual recognition is given.

For Mead, the mind comes to life as a result of the social act of communication. He views communication as being not only of paramount importance in developing ethical life, but also as a pillar on which individual human experience rests: “dealing with experience from the standpoint of society, at least from the standpoint of communication as essential to the social order” (1934, 1). Thus, the development of human selfhood is preeminently social, whereas communication is the mechanism for the identity formation within a community.

Two major contemporary philosophers on recognition, Axel Honneth and Charles Taylor, had utilized Hegel’s and Mead’s views in their theory of recognition. They will become the point of discussion for the next two sections.

2.3 Axel Honneth’s theory of recognition

Axel Honneth advances the Hegelian concept of recognition in his “The Struggle for Recognition” (1995). Honneth equates human integrity with the need for recognition. He provides additional

moral categories of recognition that differ from the concept of redistributive recognition. Honneth suggests that there are degrees of the denial of recognition. Although the whole spectrum would colloquially be called “disrespect”, it is important to distinguish the degrees of the denial of recognition depending on the humiliation that accompanies it. For example, denial of basic human rights is significantly more impactful than the subtle humiliation of a negative cultural image as “being lazy”. Honneth suggests that there are various degrees of the denial of recognition, and it should be distinguished according to how denial of recognition for particular claims of identity disrupts “practical relation-to-self” (1995, 132). Through each framework an individual's formation of identity can be affirmed and protected, thus providing the conditions of personal integrity in a society.

The first distinction lies in whether the denial of recognition affects the physical integrity of a person and the autonomous control of one's own body. People form a web of relationships through the roles of parent, child, spouse, employee, etc. They are constituted through emotional attachment. These attachments should be devoid of domination, for only in recognizing each other as needy creatures, can we perceive our mutual interdependence in an emotionally positive way. “*Love* represents the first stage of reciprocal recognition, because in it subjects mutually confirm each other with the regard to the concrete nature of their needs” - this Hegelian definition of love was used by Honneth (1995, 108). Honneth perceives love as a synthesis of symbiosis and self-assertion that comes about after the experienced oneness in the early developmental stage of a human being. Here recognition is the condition that defines him or her as an entity in its own right and lays the foundations of one's identity formation. As for the relationship of dependency of a human being as a socio-political subject within a nation state, love as a foundational stage of the identity formation is largely dependent on the mutual respect of one's own physical and economical body - thus, state guarantees autonomy and protection of a person and his or her acquired possession, whereas the inverse relationship is regulated by the respect of the legal subject of state authority and its possessions.

This emotional concern of recognition becomes familiar from the early relationships in life and provides the foundation for human integrity, as one's practical relation-to-self is mirrored in these emotional experiences within an immediate social circle. Denial of recognition here through neglect, abuse, domination is the most severe form of disrespect with destructive consequences to an individual's practical relation-to-self. Physical abuse, slavery, and forceful displacement are the examples within the first distinction. Every external action that is intended to take control over a person's body, irrespective of the intention behind this control, has a long term damaging effect on the belief in self-autonomy and confidence, and may lead to feeling deprived of reality and an eventual collapse of identity (Breakwell 1983, 85). Denial of this basic form of recognition that is

required for the synthesis of symbiosis and self-assertion, causes struggle for recognition which may take emotionally charged forms which lend themselves towards self-assertion, such as violence and disrespect of law. The loss of self esteem as a result of unproductive synthesis is scientifically proven to be a predictor for drug abuse, some forms of crime, and prostitution (Kahn & Fawcett 2007, Guglielmo et al. 1985).

This experience of disrespect is invariantly dramatic and historically constant - that is, in any cultural epoch it results in a breakdown of a belief in the just social world and in the most fundamental form of practical relation-to-self - the underlying trust in oneself. The trust in oneself results from the successful negotiation of fusion and ego-demarkation. Love, as the first form of recognition, is based on human biology and is historically invariant, unlike the other two other forms of recognition, rights and solidarity, denial of which creates the moral injury which is embedded in the process of historical change (Honneth 1995, 58).

The second distinction, *rights*, lies in the realm of a historically variable quantity, because it is discussed in the context of socialization, and hence depends on the legal relations that shift and change in various historical epochs. It legally protects an individual who enters into social relationships with its possibilities of emotional impetus and associated vulnerabilities. The right of self-autonomy, bodily integrity, as with equality and freedom, is thus guaranteed by the state. Just like within the family unit every family member is legally protected from the violence of another member, the equal status of legal subjects within the nation state is guaranteed by the Constitution. The form of disrespect, attributed to this second distinction, refers to the structural exclusion from the possession of certain rights within a society.

Honneth lays out a tripartite structure of individual rights: civil rights that guarantee liberty, political rights that guarantee participation, and social rights that guarantee the basic welfare of the citizens. The tripartite structure provides for a “full-fledged membership in a political community” (1995, 116), a community where one can assert all of her or his claims to rights. By gaining the legal recognition a citizen thus develops self-respect, a belief that he or she deserves and is entitled to the social standards of living, just like all other citizens. Social ostracism is one of the outcomes of this form of disrespect; it comes with the feelings of a diminished partner to interaction who is only partially endowed with moral rights in the socio-political landscape of South Africa.

The third distinction refers to “the degree of self-esteem accorded to the manner of self-realization within a society’s inherited cultural horizon” (1995, 134), which Honneth calls “*solidarity*”. In this form of recognition people mutually sympathise with their specific forms of life as culturally valuable. In this way, various cultural groups would esteem each other symmetrically.

Here Honneth (1995, 134) explains social devaluation - a process that establishes a particular hierarchy of values within a spectrum of human expressions of life (such as economic

life, education, family development, labour preferences, religion, communal practices, etc), so that their specific forms of life and forms of self-realization that are applicable to these expressions are given a lesser value or are not tolerated. This evaluative degradation results in the inability of an individual to experience herself or himself as a meaningful member of the society, and simultaneously to freely express his or her cultural identity.

The third distinction, or the form of recognition, leads to self-realisation, which is a mature stage of identity formation. Belief in oneself and self-esteem which results from the recognition of love and rights, develops into self-realization, a reciprocal creative engagement with the world. Marx conceived self-realization as a product of creative labour; however, Honneth, Sartre and Sorel critiqued this utilitarian view, a view that occupies the position of economic self-assertion. The Marxian view had not only become a gateway for the utilitarian themes of a grand scale (Alexander 2014), but it also reduced the goals of class struggle to the demands connected to the organization of labour and its remuneration, ignoring the violation of moral and political claims. For Honneth, labour could indeed be the medium, but not the origin for self-realization.

Social solidarity sprouts from this form of recognition; in its definition, social solidarity is the agreement on the developmental trajectories and mutual pursuit of the developmental goals within the scope of a country.

The denial of recognition brings a sense of disrespect with far reaching consequences in terms of psychological suffering. The three forms of denial of recognition relate to the three forms of disrespect, such as: physical abuse that destroys person's relation-to self and leads to psychological death; denigration that leads to the loss of moral self-respect and social death; and degradation, which is the devaluation of shared social ideals that leaves psycho-social scarring for the members of cultural minorities.

Axel Honneth offered tangible and measurable factors that impact a person's recognition within a society, refining Hegel's ethical life and Mead's social psychology. The degree of due recognition can be assessed through a tripartite system of recognition: love, rights and solidarity. Honneth offered a model, according to which we can measure the degree of emancipation among previously oppressed people, however, there is substantial criticism to such a model. Firstly, Honneth focuses on social and economic rights and not on cultural and ethnic rights. The concept of multicultural diversity as an alternative to the politics of equal rights requires more exploration in the recognition theory. Honneth's perspective is focused on the struggle for equality of basic rights, economic and social, as well as civil and political, rather than on the struggle for recognition of ethnic identity and special rights that come with it (Basare 2011, 344). Honneth's focus is on social justice but not on the validation of cultural differences (Fraser & Honneth, 2003, 19), which is a perfectly valid perspective but only one of the perspectives. Secondly, while acknowledging the

pressing issue of cultural recognition that permeates modern struggle for recognition, Honneth believes that critical theory should deal with other forms of social misery. In other words, instead of dealing with the issues of cultural recognition which are collectively articulated, critical theory should focus on those forms of misery that are anonymously experienced in private life (Basaura 2011, 204), thus evading the problematics of multiculturalism. Thirdly, Honneth's proposal of his recognition theory on anti-utilitarian social integration includes three spheres of recognition, namely, love, rights, and solidarity as a moral infrastructure of modern society, none of which assert the struggle for recognition of cultural identity.

In a multicultural country like South Africa, Honneth's model of recognition poses significant limitations. And although it captures the main premises addressing individual recognition that are already instilled in the South African Bill of Rights 1996, it has its limitations in addressing the issue of cultural (or group) restoration, preservation and revival that could be better understood through the framework of Charles Taylor's model of recognition. His model incorporates the view of intrinsic value of an individualised identity, a counterpoint of Honneth's model, into a wider spectrum of human existence - the group field, arguing that there is no such thing as individualised identity; identity forms through mirroring and interaction with others, opening a philosophical space to see how the non- or misrecognition of groups directly harms the individuals who affiliate with it, despite the equality of the individual's rights as instilled through South African Constitution.

In conclusion, it must be mentioned that Honneth extended his idea of recognition in his later work "The Idea of Socialism: Towards a Renewal" (2016) where he argues for the necessity of social differentiation in modern societies. He touches on the importance of maintaining cultural differences while creating an economy that realizes freedom in solidarity (Kempf 2019; Piromalli 2020).

2.4 Charles Taylor's theory of recognition

The preamble to the South African Constitution claims that the reason for adopting the Constitution is to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". In the previous chapter, Axel Honneth had deeply interrogated the recognition of the "fundamental human rights" which are largely reflected in the Bill of Rights, making it one of the most progressive constitutions in the world. However, the preamble's commitment towards social justice is not developed in the Constitution because, as soon as we start engaging on the level of groups instead of individuals, it becomes apparent that the constitutional clause regarding "equality" may prevent discriminatory treatment of the individuals who affiliate

themselves with groups, thus depriving them of formulating a group identity. Charles Taylor makes an important intervention in recognition theory by exploring the notion of identity as intrinsically arising from group interaction.

Taylor links recognition with identity, where identity is “a person’s understanding of who they are, of their fundamental defining characteristics as a human being” (1994, 62).

His theory carries through the notions of authenticity or being true to one’s own originality (1994, 72). Authenticity is articulated through self-fulfilment and self-realization. Here Taylor relies on Herder’s notion of originality, which is expressed on two levels, the first relates to an individual person among others, and the second to a cultural community among other people. Just like individuals have a moral right to their authenticity, cultural groups should also be true to themselves and their own culture. For example, Zulu’s should not be considered as second grade South Africans among the multiple cultural groups of which the nation consists. In the same fashion, Khoisan communities should have their own customary rules and practices and should not be unified under the customary law of Zulu people. In South Africa there is a political emphasis on group recognition, protection and revival of ethnic minorities; however, it is often conflated to a mass recognition of group/cultural identity of all previously oppressed that relegates or misrecognises minority identities (Taylor 1994, 96). Thus, the post-apartheid legal acts, aimed at recognition, deal with traditional communities en masse, without providing for their historical distinctiveness from one another.

Before Herder, in Western philosophy it was believed that the ideal of authenticity, or one’s original way of being, was something that is individualised and inwardly generated. Taylor’s important input to the theory of recognition is the denial that one’s identity can be understood monologically. He argues against the monological ideal of mainstream philosophy and suggests that human life has a fundamentally dialogical character. What does dialogical mean in this instance? The way we define and understand ourselves, discover our identity, receive love, exercise rights, and establish solidarity always happens through the acquisition of rich human languages of expression. Hegel describes this process of recognition as a mirroring of one in the other – an intersubjective, dialogical process.

Taylor returns to this important aspect of the self-consciousness formation, already raised by Hegel, but somehow forgotten by the proponents of an individualized identity. Taylor states that we define ourselves through the languages of art, love, behaviour, and the like, which we learn only through exchanges with other human beings (1994, 72). These languages that we use to express our own identity are not acquired through inward self-observation, but learned through exchanges with others. And if that exchange is set in apartheid structures, it might be important to seek healing in the realms where apartheid exchange was held, that is around land and governance. Apartheid

exchange between ruling minority and oppressed ethnic groups around land and governance was characterized by relationship of domination, submission and coercion. Hence recognition of ethnic minorities has to create such conditions for an ethnic minority, where domination, submission and coercion are absent in political interaction. “The genesis of the human mind is in this sense not monological, not something that each person can accomplish on their own, but dialogical” (Taylor 1994, 72). Taylor explains that indeed we do form our own opinions through solitary reflections. However, when it concerns important issues such as the definition of our identity, we always define it in dialogue with, sometimes in struggle against, the demands that are placed on us by significant others, institutions, or social groups. Therefore, even when we outgrow parents, school relationships, romantic partners, and cultural affiliations, the inner conversations with them continue all our lives, whether it is on a conscious or a subconscious level. Thus we can never break free from those influences that we experienced in our formative years, and although we often return to a monological ideal, it serves to reinvent our identity in alignment more with new values that we discover for ourselves in different forms of relationships – with book authors, teachers, psychologists, or cultural groups that resonate with us more than those values and identities that we absorbed from our primary carers.

Taylor states that the presence of monological ideal in identity formation undermines the fact that our very understanding of what is “good” comes from the experiences of mutual enjoyment of good things in life with people we love and want to associate with; our understanding of what is “moral” comes from the experience of justice which is never solitary and always involves another person or a non-human entity.

To illustrate the deeply dialogical character of identity, Taylor suggests to imagine what it would take to prevent one’s identity from not being influenced by parents, friends, community or government. Identity relates to “where we are coming from”, a background against which persons define their ideals, opinions, desires, and endeavours. It may be viewed by some as a limiting force that is better to be liberated. In the search for freedom from the identity absorbed in the past, people may choose to associate themselves with other social groups, or engage in inner work as a hermit or a solitary artist. It is clear that even in the deepest forms of solitude we have an interlocutor. Perhaps it is God, or an ancestor, spirit, or a book author. The statement is that even while in the process of reconstructing one’s identity, we do it by engaging inwardly or outwardly in a dialogue. Therefore, identity is crucially dependent on dialogical relationships with others. It gives a new angle to the previous formulations of recognition theory, a perspective that demands not only for recognition of the individual, but for the social recognition that is inscribed in the preamble to South African Constitution 1996 as “social justice”.

In Taylor's view, social justice does not only include "an identical basket of rights and immunities" for an individual (1994, 84), it incorporates the recognition of a unique identity of a group as a distinct group from everyone else. Withholding of such recognition is a form of oppression, oppression through assimilation to a dominant or majority identity. Just like the fundamental right of self-expression is protected by South African Constitution, Taylor creates a necessity to protect group identity by bringing our awareness to the fact that identity is a dialogical construct. Withholding of such recognition is a stance against the ideal of authenticity. According to Taylor, authentic expression as well as the theory of recognition, includes two levels: the level of individual recognition that grounds a *politics of equal dignity*, and the level of group recognition which necessitates a *politics of difference*. The latter is an important approach that allows to eliminate so called "second-class citizenship" that at some point in time was an accepted given. It is universally accepted that the principle of equal citizenship should be upheld by democratic governments. However, what it means in practical manifestation greatly differs among democratic countries. In South Africa, equalisation affected not only voting and civil rights, but is also present in the socioeconomic sphere where reverse discrimination measures are employed to provide support for the previously disadvantaged minorities. In this way, it goes beyond the acknowledgement of equal dignity, unequal conditions that are intended to restore the dignity that was previously lost. The Black Economic Empowerment Act of 2003 is already an example and a precedent of the politics of difference undertaken by the South African government as racial difference was the rationale behind different treatment of South African citizens.

Taylor concludes that the politics of equal dignity and the politics of difference are both necessary conditions for actualizing human universal potential. The duality of self as a spectrum between inwardly and outwardly formed identity requires both practices at the foundation of a democratic society. The liberalism of equal rights practiced without the politics of difference can only provide a limited recognition of distinct cultural identities. The standard set of civil rights may not be exactly applicable in a different cultural context, simply because collective goals and individual values within a particular culture may differ greatly from those in the majority culture. From this perspective, the politics of equal rights may be viewed as homogenizing, or incorrectly recognizing the distinctiveness of a particular culture by not taking into account its cultural context within which equal political and civil rights are to be implemented. It is like providing political membership for a minority culture but within the context of the majority culture's system of leadership. In this case, although the political participation is enabled, the cultural leadership institution is, in fact, disabled: the political membership in itself requires assimilating the leadership system of a majority culture in order to practice the benefits of the political membership.

The existing political discourse on recognition in South Africa places paramount importance on the politics of equal dignity; however, it gives insufficient attention to invoking the politics of difference. Celebrating difference in a multicultural society of South Africa would positively contrast colonial and apartheid discourse and help to restore the dignity of previously oppressed.

Taylor's perspective shed light on why customary law received legal attention in times of democracy and why in such a multicultural country like South Africa, a parallel set of laws is seen as a necessary prerequisite for cultural recognition, responding to the necessity of the politics of difference. The question we would like to ask now is whether customary law is an authentic expression of a particular cultural group's striving for self-governance or whether it is an institution designed to keep natives within economic and political confines of a power structure that seeks to perpetuate itself under the rhetoric of recognition. Mahmood Mamdani illuminates the forces behind the construction of customary as a form of indirect rule in African landscapes. His perspectives on recognition will become our point of interest in the next section.

2.5 Defining “customary” in African landscapes: Mamdani’s perspective of recognition in Africa

Just like Charles Taylor, Mahmood Mamdani acknowledges two seemingly opposing influences in constructing political in Africa: (1) the liberal solution, that seeks to locate politics in civil society with the regime that champions rights; and (2) the Africanist solution, or the politics of difference, that seeks to place African communities at the centre and stands in defence of culture. The Africanist solution, however, is not a straightforward route towards democratic reforms. Mamdani problematizes tribalism, the creation and dissolution of tribes and ethnic groups. He claims that customary law and governance, that on surface are perceived as the artefacts of African culture, in essence are largely a creation of colonial and apartheid systems. The notion of “customary” is closely related to the organisation of power and fragmentation of resistance. Whereas racial segregation created non-white majority, tribal segregation disassembled the non-white majority into many tribes, or ethnic minorities. In the circumstance of chiefdomship backed up by white military support, the production of customary law and governance was an ingenious move of ruling elite to disguise indirect rule behind the rhetoric of recognition of customary governance. Mamdani believes that decolonizing politics in a contemporary African state should include the decolonization of customary, historical, racial, and also tribal, political identities that are taken as natural (2020, 19).

In the following section, I will show that the organising principles of indirect customary law remain in place in democratic SA and affect the recognition strategies of the Khoisan and the TKLA in particular.

Mamdani claims that colonialism institutionalized difference in social and political realms for the purpose of creating a limited citizenship - the citizenship that was to be enjoyed only by the settler (2012, 13). Throughout colonial history two political identities were created: settler and native. Native was allocated a set of rules, defined as “customary”, that was presented as original and authentic. However, Mamdani claims, that “the native is the creation of the colonial state: colonized, the native is pinned down, localized, thrown out of civilization as an outcast, confined to custom, and then defined as its product” (2012, 14). The validity of Mamdani’s analysis is important to examine in a democratic state like South Africa.

Mamdani refers to the works of Sir Henry Maine who successfully endeavoured to articulate a new, revolutionary form of colonial governmentality that experienced crisis in the middle of 19th century. Being a British jurist and legal historian, he pioneered the study of comparative law, primitive law and anthropological jurisprudence. His theory was aimed to strengthen the influence of the empire onto its colonial subjects after a series of violent conflicts in India. Maine provided the grounds for distinguishing Western civilization from non-Western local custom, shaping the theory of nativism. Maine outlined the principles according to which one should discriminate settler from native. He defined the settler by its history, whereas native culture was fixed and unchanging part of nature (Mantena 2010, 34). Maine received a number of awards for his work, which became a prerequisite for educating new colonial managers heading to empire’s colonies in India and Africa. Mamdani (2012, 94) perceives Maine to be the originator of imperial creation of “customary” as a mode of governance through indirect rule. The colonial subjects received their customary law, the “permission”, from the empire to be themselves: however, only to the extent of defined geographical boundary, limited political action and approved colonial leader. In that way, European colonial management alleviated the conflict and delegated management of native’s masses to a native’s local leader whose actions had to be in alignment with the colonial agenda.

Mamdani outlines two main directions, in which colonial rule was perpetuated through the notion of customary, standardized throughout African colonies, independently from the local variations between indigenous people. The first direction was related to land ownership. Unlike settlers, natives in a colony were confined to a particular homeland, which was defined as a home of a designated native group (Mamdani 2012, 105). Such geographical confinement was neither “traditional”, nor natural, but it allowed colonial power a possibility to exclude natives residing in homelands from participation in political and social life of a country, simultaneously creating a “privilege” of confinement, that is, outside of the allocated territory a native was an outcast - neither

the tribal privilege extended to other homelands, nor his or her citizenship rights could be exercised. The outcast identity was an unfortunate fate of Khoisan. As nomadic people who moved, mixed and merged among themselves, they did not receive neither the “privilege” of confinement to a homeland, nor the citizenship rights of settlers (Mamdani 2012, 107).

The second direction in which colonial rule was perpetuated through the notion of customary, was the institution of customary governance. Mamdani claims that “natives are not natives because of anything essential to them but because they were created as natives in law by settlers” (2020, 146). There is no equality to customary law, therefore it could offer traditional leaders, who Mamdani calls “native enforcers”, the authority over other natives, often fickle and despotic. Tribal particularity was viewed as a marker of cultural diversity and treated as if natives were tribal by nature. Native administration, or practice of governing natives, was static and exclusionary towards members of other traditional communities, making it discriminatory in its essence without a possibility to evolve, change and include, like legal systems of European countries. Claassens and Weeks (2009, 516) state that a generation of South Africans has grown up with these distorted versions of customary law that became the mainstream conceptualisation of customary law in democratic South Africa.

Mamdani asserts that customary law is created by settlers and is not traditional:

“The particular practices and norms associated with customary law are sometimes inspired by those of an era preceding colonialism, but customary law’s authority over natives, and the authority of natives to wield it, derives from statutes of the civil law. Those who write the civil law ultimately determine what the customary law is, while the natives themselves serve as customary law’s custodians, implementing it within the tribal territory. Together, the authors and enforcers of law determine, say, who gets to be a tribal member, which land the member may own or use, what religion the member may practice, how the member is to dress and groom himself, or whether the member is at liberty or detained” (2020, 146).

In South Africa, colonial privilege took two forms: racial and tribal (Mamdani 2012, 3). Racial privilege was instilled through civil law, whereas tribal privilege through customary law, which is largely derived from the statutes of civil law. The example of racial privilege would be the majority allocation of seats in government was given to white minority. The tribal privilege would usually extend onto land rights in bantustans, as every new comer who did not belong to a particular tribe had lesser opportunities in a tribal settlement, to which he or she did not belong. Xenophobia is believed to be the legacy of tribalism. With the decolonization and end of apartheid racial privilege was dismantled in the South African Bill of Rights. However, I will argue that the tribal privilege is still linked to geographical position of the members of traditional communities

and has not only not been dismantled, but is reinforced through post-apartheid legislation aimed at traditional communities that are framed to support recognition and social justice but, as I hope to demonstrate in the case of the TKLA, are in essence preserving two directives of colonial indirect rule: geographical confines and the system of traditional governance.

According to Mamdani, the administrative politics of the Cape in the late 19th century were defined by white farmers and the need for farm labour (1996, 66). This need required breaking up tribes and appropriating their lands so that the tribe members could be absorbed and controlled into settler farms as workers. In this way, the Cape province stood out from the other provinces, where the political economy was defined by the need of migratory mining labour. The mines required retention of tribal lands “so that peasant farms would continue to function as productive family units releasing and reabsorbing single male labour in an ongoing series of migration cycles” (Mamdani 1996, 68). In 1908, Khoisan were attached to the settler’s farms with the help of Caledon Code, which made it “compulsory for a Khoisan to have a fixed and registered place of residence and to carry a pass when moving within or between districts of a colony”. Mamdani distinguished three phases of native policies that took place over the next 100 years after Cape Hope Constitution Ordinance of 1852. The first phase could be characterized as direct rule over colonized minority consisting of Khoisan and Cape Malay people. The second phase did claim a single legal system, but there was an informal tolerance of tribal law preserved in small peasant enclaves in the Cape. In the third phase the legal dualism signified the emergence of indirect rule. Customary law was codified and enforced onto natives. During the colonial period customary law was enforced through white commissioners, who ruled under the authority of governor-general. In Natal, the governor-general was called the paramount chief. Under the apartheid, the same customary law was enforced through native chiefs. In both Cape and Natal, the governor general had immunity from the parliament and courts, making it “an unfettered rule by decree” (Mamdani 1996, 71).

In 1927, the Native Administration Act proclaimed the governor-general as a supreme chief of all natives. Dividing, amalgamating and constituting new tribes were among his entitlements (Cotran, & Rubin 1970, xx). Governor-general could give powers to the native chiefs. For the first time courts of chiefs and headmen appeared in South Africa, established under the authority given by government warrant. In the Cape the governor-general ruled not through native chiefs, but rather through white commissioners who administered customary law until the apartheid. A key difference between Cape and other provinces was that white governance was in radical opposition to the restoration of chiefs due to African resistance during century-long Kaffir wars. In order to eliminate the possibility of resistance, which was synonymous with tribalism in Cape Province, all efforts were directed to fragment the colonized further, rather than establish native chiefs (Mamdani 1996, 72). We note that while there was a difference in governance of the Cape Province, the aims of

control and the disenfranchisement of native claims remained the central concern of colonial and apartheid governance.

The emergence of the philosophy of tribalism, grounded in customary law, as a basis of indirect rule, Mamdani traces historically back to the experience of perpetuating conflict between British colonizers and inhabitants of India in the second half of 19th century. In order to avoid violent conflicts with local population who resisted colonial governance, the philosophy of tribalism was created: the locals were given freedom to practice some of their customs under traditional governance which was ratified by colonial leaders and backed up by British military forces.

During the apartheid era, chiefdom was restored in every province of South Africa. Native control was enabled through chiefs, thus establishing institutional segregation. Native institutions had to be created, existing chiefs tamed or replaced by more lenient natives. Frederick Lugard, British colonial administrator, came up with the particulars of the process regarding natives in 1893: “thrash them first, conciliate them afterwards; and by this method our prestige with the native tribes would be certainly greatly increased, and subsequent troubles with them would be less likely” (Low 1973, 22). Mamdani claims that “native institutions were given life and substance through a policy that combined recognition of existing facts with creative modification and even outright fabrication” (1996, 77). In movement towards tribalism and customary law the relationship between white rulers and native chiefs were strengthened, whereas the alliance with African intelligentsia was severed. The psychology behind the newly established native authority is explained by Lugard in his report of 1919:

“The policy of the government was that these chiefs should govern their people, not as independent, but as dependent rulers. The orders of the government are not conveyed to the people through them, but emanate from them in accordance, where necessary, with instructions received through the Resident. ... The Resident acts as a sympathetic adviser to the native chiefs being careful not to interfere so as to lower his prestige, or cause him to lose interest in his work. His advice on matters of general policy must be followed, but the native ruler issues his instructions to his subordinate chiefs and District Heads not as the orders of the resident, but as his own.”

Mamdani states that “to install a state apparatus among communities whose lives had never before been shaped by one was literally to invent tribes” (1996, 79). Tracing the history of the initial establishment of indirect rule in Nigeria, Tanzania and South Africa, Mamdani claims that many native peoples did not have local chiefs, and “if there did not exist a clearly demarcated tribe with a distinct central authority, then one had to be created in the interest of order” (1990, 79). One of the examples of a forceful establishment of a chiefdom was the Ndebele in colonial Zimbabwe. These

people had no distinct leader and did not constitute a distinct ethnic group in the end of 19th century. Not only Ndebele showed no deference to any authority, Ndebele women could choose her male partner whenever she liked among Ndebele men. To remedy such a deviation from European version of customary law, the Natal Native code of 1891 was imposed on the Ndebele, and because newly established Ndebele chiefs were attracted by powers granted to them by the Natal Code, they expressed no disagreement.

By juxtaposing historically defined modes of control, Mamdani draws a striking similarity between the politics of racism, that was implemented through segregation according to the category of race, and the politics of tribalism, that was implemented through segregation according to the category of tribe. The tribal category was represented and upheld with customary law; each tribe was autonomous, but dependent on apartheid government. The tribal segregation was necessary for implementing the apartheid version of indirect rule, because “faced with peasant resistance to colonial occupation, a resistance often led by clan leaders or chiefs, indirect rule was meant to hitch compliant sections from the traditional leadership of Africa to the colonial wagon and thereby broaden its social base” (Mamdani 1996, 102). Mamdani exposes the relationship between customary law, tribalism and indirect rule that undoubtedly affects the politics of recognition in South Africa. In this light, the blind recognition of customary law may rather be a practice of misrecognition.

The colonising force of the indirect rule, however, was not acknowledged in the proceedings of Truth and Reconciliation Commission (TRC). TRC targeted the individuals, victims and perpetrators of apartheid, but not the ethnic groups who persevered coerced labour, forced removals and dispossessions. Mamdani (2020, 185) argues that the victims of farm labour system, a form of coerced labour that could only be established by force, were not recognised as “political prisoners” and consequently were not acknowledged as victims of gross violations of human rights. Mamdani views TRC proceedings as a missed opportunity to achieve social justice. As a result of post-apartheid reforms, South Africa made important achievements in reforming the state around race as a political identity. However, there were no reforms aimed to detribalize political identities, those tribal identities, invented and perpetuated through colonial customary law. The legitimacy of a tribe as a category of political identity in post-apartheid South Africa was not reformed like the category of race, but rather celebrated as an example of politics of difference.

The justification of power was in the language of rights (Mamdani 1996, 109). Customary law was not about guaranteeing rights; it was about enforcing custom. Its point was not to limit power, but to enable it. Customary law consolidated the noncustomary power of chiefs in the colonial administration.

South African post-apartheid policies are peppered with the rhetoric of recognition, especially the policies that concern traditional communities. Mamdani's focus on customary as a system of production of power undermines the immediate association between recognising customary law and governance and recognising an ethnic group as superficial and therefore subject to scrutiny. By undermining the notion of customary as a resource of traditional way of life and showing its investment with political power, Mamdani illuminates the invisible obstacles in politics of difference, or Africanist solution. He shows that rhetoric of recognition may fight for invented tribal identities that keep being perpetuated with democratic policies as traditional.

Thus, Mamdani draws our attention to a particular blindness in the course of politics of recognition in South Africa - let's call it the "blindness of indirect rule". This type of blindness is particularly persistent in two areas, that is, governance and land distribution. What are the possibilities of Khoisan recognition within democratic governmental policies that repeat ideology of indirect rule, such as TKLA 2019? Unfortunately, misrecognition based on the distortion of the cultural leadership model is the immediate possibility that comes to mind. Just like the apartheid version of indirect rule, in TKLA 2019 local leaders need to be ratified by the government and higher tier leaders. Once leaders are established, they are not only backed up financially and by military forces of South Africa, but also are very difficult to replace and provide for equal communal participation in administrative and law making decisions. These markers are sufficient to recognize the blindness of indirect rule in post-apartheid legislations. This type of blindness towards achieving true recognition, or recognition of totality of cultural expressions, is specific to South Africa. The next section will deal with yet another distinction, largely universal, that may turn intended recognition into misrecognition: a type of blindness that occurs as a result of intercultural incompetence of governing bodies.

2.6 Cultural blindness: Milton Bennett's the developmental model of cultural sensitivity

Axel Honneth had proposed a model of recognition that restores the ethical balance in a society on a basis of intrinsic human needs. He highlighted the psychological needs that are hardwired in every human being, and if not met, produce various degrees of distress and humiliation. Charles Taylor showed the dialogical character of a human identity, that is, it's formation always happens in a dialog with other individuals or groups. He illustrated that absence of group recognition may result in distress and humiliation on a personal level. Mahmood Mamdani took a historical perspective on recognition and demonstrated the pitfalls behind group recognition specifically for South Africa, such as how embedded structures of indirect rule, that were implemented in South Africa from the

end of 19th century till the end of apartheid, are still in play within the policies of modern democracy. Particularly, Mamdani highlighted that land and governance are the two spheres of interaction between ethnic minorities and the government where the blindness of indirect rule may present “customary” as traditionally cultural in support for its rhetoric of recognition. These three theorists expanded the concept of recognition.

Milton Bennett is a sociologist, whose developmental model of intercultural competence support my argument that for Khoisan recognition the following conditions are necessary: firstly, intercultural competence of the government; and secondly, effective intercultural communication between government and ethnic minorities. Although it does not exactly fit with other critical theorists discussed above, his model is relevant in the context of multicultural South Africa; and it is useful, because it links the deeper understanding of recognition in South Africa with the possibility of its practical implementation, serving as an instrument for the government to achieve policies that are better designed for recognition of ethnic minorities. Bennett's model exposes another form of blindness that results from intercultural incompetence of policy makers - the “cultural blindness” that results in misrecognition, that could be more harmful than the absence of recognition (Taylor 1994, 70). It adds a practical dimension to the recognition theories in terms of the style of governance in the multicultural space. Its application in South African political landscape exposes the necessity for nurturing intercultural competence before approaching the sensitive subject of recognition of ethnic minorities.

In terms of historically changing social attitudes, South Africa persevered a shift from ethnocentrism of apartheid with Afrikaner ethnic nationalist party promoting Afrikaner interests in South Africa, towards ethnorelativism of the constitutional democracy with ANC promoting right to culture, equality and dignity to all. Thus, ethnorelativism has become a political strategy in South Africa. Ethnorelativism, or cultural relativism, means a set of attitudes that allows one to understand a person's or group's beliefs, morals, values, and practices from the point of view of the person's own culture, and to not judge against the criteria of another culture (Ezez 2017). It's opposing concept is ethnocentrism. Ethnocentrism is an attitude of applying one's own culture or ethnicity as a frame of reference to judge other cultures, behaviors, practices, beliefs, and people, instead of using the standards of the particular culture involved. The judgement is often negative, because it is made from a position of superiority or normality, and is applied onto the distinctions that define one's ethnic identity, such as religion, educational system, leadership models, and practices (Hooghe 2008, 4). In critical theory ethnocentrism "combines a positive attitude toward one's own ethnic/cultural group (the in-group) with a negative attitude toward the other ethnic/cultural group (the out-group)" (Adorno et al. 1950). The increased attitudes of ethnocentrism had shown to

influence the fragmentation of national identity (Zeugner-Roth, Žabkar, & Diamantopoulos 2015), xenophobia and emergence of racism (Hooghe 2008, 1).

South Africa achieved significant success in transitioning from ethnocentrism to ethnorelativism with the transition from apartheid to democratic state. Bennett's model explains that perceptual experience of difference allows us to make distinctions in ethnic attitudes. The six stages of development from ethnocentrism to ethnorelativism are the following: (1) denial, or failure to perceive cultural differences and rather attribute them to psychological qualities, such as backwardness, primitiveness; (2) defense, or acknowledging the difference while simultaneously seeing threat in it; (3) minimization, or focusing on understanding of human commonality in order to reduce prejudice; minimization is projecting one's categories onto the rest of the world and believing that everyone is human (like me); (4) acceptance, or ability to accept that other people have a significantly different experience of reality and equal human complexity across the ethnic groups; (5) adaptation, or generating mutually appropriate and authentic alternative behaviour; (6) integration, or ability to include the cultural context into decision making and act with ethical commitment; it is not just to be respectful of others, but rather to be respectful of how other people defining "good" in a different way than one's definition of "good" (Bennett 2016, 18).

Bennett's model is supported by substantial research since 1986, however, he claims that in the last 30 years there was no significant movement along the six stages of development from denial to integration. In South African context, we could observe the attitudes of denial during apartheid, when boer culture was positioned as superior whereas other ethnicities were assigned to separate development in reservations, or bantustans. The attitudes of defence are expressed in flairs of xenophobia in 2008, 2015 and 2019, as well as prejudices towards people of color as criminals. Minimisation, the most subtle form of ethnocentrism, "just shifts the form of ethnocentrism from overt polarized judgment to covert assumptions about universality of one's own experience in the world" (Bennett 2016, 9). The attitude of minimization reserved a peace prize for Nelson Mandela, as it was a step towards ethnorelativism, however, highlighting the commonalities rather than differences, for the purpose of building national identity. Minimization could also be accorded to TKLA2019: "despite the differences between Bantu people and Khoisan, we, the government, we apply the same leadership model on both, because the underlying universal value of power could apply to all people". The attitude of acceptance is expressed in the Bill of Rights that legitimate the practices of one's own culture, religion and beliefs. However, South African governance is lagging on adaptation and integration. Although a number of legislations and initiatives had used the rhetoric of recognition and indeed, may have provided some partial recognition, the failure to accept and apply another's cultural categories and paradigm of existence prevents the level of political and cultural recognition we would like to see in a truly ethnorelative society. The level of adaptation

suggests a necessity to generate mutually appropriate and authentic alternative behaviour. In the case of Khoisan, such authentic but alternative behaviour would mean coming up with their own vision of recognition in the fields of education, environment, leadership and economic activity. Creation of Khoi and San Centre at the University of Cape Town is an important milestone in this direction.

According to Bennett, integration fully reflects an ethnorelativist's position, where the efforts to value diversity shift from conscious to unconscious, becoming habitual for individuals and institutionalized in organizations.

South Africa is a multicultural society for which meta-coordination of cultural differences is of paramount importance. Bennett suggests that there are two aspects to meta-coordination: reconciliation of unity and diversity. They are frequently in competitions: if unity wins, then uniformity reigns, if diversity prevails then divisiveness occurs. According to the research on multicultural teams (Adler 2001, 3), diversity does not add value to the performance. However, the leader's behaviour becomes a key factor to change the relationship of diversity and performance: when the leader recognises cultural difference and takes time to establish it as an asset, the multicultural team outperforms the monocultural team. Assuming a meta-level for coordinating diverse cultures within one society is the utmost skill for a leader whose aim is to derive value from diversity. Using Bennett's model with our example of political misrecognition (that is, TKLA2019 imposition of hierarchical leadership on Khoisan), we could outline meta-leadership as firstly, not assuming an assimilative context of a similar leadership model, where Khoisan communities are legally obliged to share a hybrid of traditional Bantu and European leadership model if they seek legal benefits of TKLA2019. Secondly, cultural differences should not be automatically used towards a mutually desirable goal (legal recognition in this case), but rather intentionally coordinate the differences towards a goal. Thirdly, taking a position of empathetically participating in Khoisan ontological structure whose value and morality are oriented differently from Western ontology.

A number of sociological studies confirms the world's tendency towards greater diversity. Marshall McLuhan coined the term "global village" in 1964, implying the movement towards greater diversity rather than uniformity: "in a global village our neighbours will be profoundly different from us". Corporate research aimed to assess the influence of multicultural diversity on creativity and innovation, illustrates that if a leader ignores or suppresses cultural difference, we observe less effectiveness in creative tasks in comparison to the average performance of monocultural teams; the leader's attitude becomes an obstacle to performance. However, if a leader acknowledges and supports cultural difference, the cultural difference becomes an asset to performance and multicultural teams have higher effectiveness in creative tasks than monocultural teams (Adler & Gundersen 2007). Extrapolated on national level, ANC leadership within lines of

supporting cultural differences of the Khoisan would render their performance as active citizens and contributors to state economy more effective, whereas suppressing and ignoring the cultural differences may manifest in greater necessity of support and funding.

Bennett's model of intercultural competence provides a tool for the government to achieve the ethnorelative attitude that ANC committed to in its political strategy. Raising the intercultural competence of the government through education or otherwise is the first step; enabling effective intercultural communication between government and ethnic minorities is the second step to achieve recognition.

Chapter 3. Formulating and enacting recognition of minorities in legal space of post-apartheid South Africa

Commitment to the recognition of the Khoisan occurs in three foundational documents: the Bill of Rights in the Constitution of South Africa (1996), the Truth and Reconciliation Commission report (1998), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007, adopted by South Africa in 2016. These three documents introduced and codified the political discourse on recognition in post-apartheid South Africa. They provided the language of recognition for previously oppressed minorities that was to be implemented in the subsequent legislations. The following section will discuss the foundational documents for the purpose of understanding the emergent language of recognition in democratic South Africa.

The minorities, included in legislation that followed the foundational documents aimed to fulfill the commitment to recognition of the Khoisan. Since 1996, there were five acts that aimed at recognition of cultural minorities, namely the Traditional Leadership and Governance Framework Act, 41 of 2003 (TLGFA2003); Traditional Courts Bill (2019, 2012, and 2008); National House of Traditional Leaders Act, 22 of 2009; Traditional Affairs Bill of 2013; and, lastly, the Traditional and Khoisan Leadership Act of 2019. This legislation was supposed to enact the discourse of recognition that was set out by the three foundational documents discussed below.

Alongside with above documents, the Land Reform Act (1996), the Extension of Security of Tenure Act (1997), and the Communal Land Rights Act 11 (2004) addressed the land issue, which will not be focused on in this work.

3.1 Foundational documents that lay out the language of recognition

3.1.1 The Truth and Reconciliation Commission

The setup of TRC was the fruit of political compromise between “victims” and “perpetrators” with the commitment to repair predemocratic injustices (Mamdani 2002, 32) .

The South African Truth and Reconciliation Commission (TRC) was assembled in Cape Town by the Government as a restorative justice body in terms of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. The hearings started in 1996 with the purpose of recording the injustices of apartheid past, enacting reparation and rehabilitation to the victims, granting amnesty to the perpetrators in some cases, and offering the space for South Africans to express their regret and remorse concerning the apartheid past. Three committees were established to fulfill the TRC mandate: the Amnesty Committee, Reparation and Rehabilitation Committee, and the Human Rights Violations Committee.

The Human Rights Violations Committee focused on investigation of human rights abuses between 1960 and 1994 that were submitted to the TRC.

The Reparation and Rehabilitation Committee was to ensure that the TRC process restored the dignity of the victims, and suggested reparative policies and recommendations on rehabilitation of survivors and their families. The main purpose of these recommendations was to provide healing, well-being and to eliminate the possibility of repetition. In the interim, the victims benefited from the Presidents’ Fund.

The Amnesty Committee observed whether the amnesty applications were done within the provisions of the Promotion of National Unity and Reconciliation Act.

The purpose of TRC was to “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past” (TRC of South Africa report 1999, 14). It also recommended that Parliament should favour “the reconstruction of society”, which would involve a wider concept of “reparation”. This was implemented in order to address the “untold suffering” of those South Africans whose human rights had been jeopardized during the conflict of the past (TRC of South Africa report 1999, 33). The TRC was also mandated to provide "granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims" (TRC of South Africa report 1999, 42).

It was acknowledged that apartheid produced the space for were gross, systematic violations and policies which transgressed the whole range of fundamental human rights protected in international law: “Apartheid’s violations were based on a denial of national rights where torture, ill-treatment and violence were instruments of state policy” (Doxtader, & Salazar 2007, 80).

The TRC has introduced the language for recognition into the legal space of post-apartheid South Africa (Wilson 2000; Goodman 2006; Du Toit 2010). It outlined the commitment of democratic South Africa to transform legal and administrative practices and create institutions “conducive to fair and stable society”. Desmond Tutu, one of the members of TRC, had expressed that the aim of the Commission was “to promote reconciliation, but not to achieve it”, which implied that TRC is only a starting point to achieve repair. Although the TRC widely operated with the recognition language, it received some criticism against its intentions and actions, localized only around those individuals, who submitted applications to the TRC as victims.

One of the most important critiques of the TRC process was presented by Mahmood Mamdani in “Amnesty and Impunity” (2002), who defined three key limitations in the Commission’s report. The Commission claimed to exercise no vengeance or impunity, unlike its counterparts in Latin America or Eastern Europe. For this purpose it was set “to avoid two pitfalls: on the one hand, reconciliation becoming an unprincipled embrace of political evil and, on the other hand, a pursuit of justice so relentless as to turn into revenge. For that purpose the Commission was determined to address both "victims" and "perpetrators," not just one or the other” (Mamdani 2002, 33). This double definition was to be interpreted by the TRC itself. As a result, the following limitations paved South African future. The first limitation was due to the fact that the victims of apartheid were individualized, despite TRC’s acknowledgement of apartheid as a “crime against humanity”. Although apartheid policies enacted ethnic and racial policing and cleansing among whole communities, the Commission was reluctant to address the victims en masse. Mamdani states, that such approach “reduced apartheid from a relationship between the state and entire communities to one between the state and individuals” (Mamdani 2002, 34). Apartheid system had been implementing its policies against the whole communities based on racial or ethnic principle; however, only individuals, who submitted the application to TRC became the beneficiaries of reconciliation and the President Fund. Mamdani claims that in order to pursue the Commission's mandate, it had to address the entire communities and aim for social reconciliation, not only the acknowledged individual victims. He argues that “national unity and reconciliation”, set out in the the Promotion of National Unity and Reconciliation Act, was not achieved due to the individualization of victims.

The second limitation of the TRC process was its failure to recognize apartheid system of governance, which subdivided native population into tribal groups with a separate set of laws applied to them. Such set would be defined as “customary law”, which is enabled by customary leaders, positioned by the hand of apartheid. Custom would not contradict right, because both were enabled by the same power: “Rights and custom were two different and contradictory languages: the former claimed to circumscribe power, the latter to enable it. Whereas the former claimed to be

a rule of law, the latter claimed the legitimacy of custom and tradition.” (Mamdani 2002, 34). The TRC focused on rights, namely, the “civil” regime, failing to recognize another underlying apartheid scheme - the “customary” regime. The research behind this thesis sets the precedent to state, that apartheid-induced “customary” regime, slipped from the attention of TRC with drastic repercussions: the majority of acts, adopted after TRC and aimed at the recognition of customary, convey the “customary” regime of apartheid, in a sense that Traditional Leadership is defined, enabled and subsidized by the government.

The third limitation of TRC was the group amnesty, which was given by default to all perpetrators who did not identify themselves as such. Individuals who defined themselves as victims, led to the prosecution of individual perpetrators. Those enactors of crime who did not identify themselves as such, benefited from automatic impunity.

Annie Leatte (2017, 146) reinterpretes Mamdani’s second and third limitation by suggesting that in prosecuting the actors of apartheid law, the TRC failed to address the more widespread injustice that was the law itself. Christopher Marx (2002, 51) argues that by focusing on individual injustices the TRC omitted systemic injustices and did not confront the system as a whole, eradicating its practice that permeated the legal and administrative fabric of society.

Leatte claims that strong Christian presence in the TRC’s vision anchored the concepts of “reconciliation” and “forgiveness”, that came from a psyche nurtured by Christian upbringing and also added to the current political discourse. She criticizes the instrumentalization of forgiveness that was virtually forced on the population through tele-broadcasting of public hearings. Some individual reconciliations indeed reached wide public resonance, but overall the TRC process did not translate into “the broader event of national or social reconciliation on which peace and stability of a future South African would come to turn” (Van der Valt 2007, 12).

Despite the limitations, the TRC introduced and promoted the language of reconciliation, recognition and reparation of human and civil dignity of indigenous people. And although the TRC failed to address wide social groups who suffered throughout colonization and apartheid, its acknowledgement of unjust past paved the path towards South African Constitution and the policies, aligned with the concept of recognition.

3.1.2 The Bill of Rights and South African Constitutionalism

The fundamental rights for all South Africans were enshrined in the Bill of Rights of 1996 that protects civil, political and socio-economic rights of all South Africans. Considered as a cornerstone of democracy, the South African Bill of Rights additionally provided the interface between

traditional law and a constitution in recognising and developing a pluralistic legal system (Harris 2006, 1).

By virtue of constitutional supremacy, the Constitution lies at the centre of the law and sets the limits for the interpretation of all legal instruments. It aims at redressing the injustices and racial divisions of apartheid; it also seeks to nurture South Africa into becoming an equal and just society for future generations (Moosa 2018, 3).

The Bill of Rights was devised for the recognition and protection of human rights; it depicts a political consciousness and commitment toward the protection of individual rights. I will focus on the most relevant sections for the traditional communities in the Bill of Rights.

The right to equality recognizes a demand for equal opportunities in law, government, education, employment, housing, and social welfare (Jozana 1991, 53). On the other hand, the right to equality is the government's commitment to non-hegemony and fair representation of all ethnic minorities of South Africa.

Section 15 of the Bill of Rights affirms the right to "freedom of conscience, religion, thought, belief and opinion." These freedoms are additionally balanced against tradition: "This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."

Section 16 provisions for the freedom of expression: "Everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research."

Section 18 states "Everyone has the right to freedom of association."

Section 21 provides that "Everyone has the right to freedom of movement. Everyone has the right to leave the Republic."

Section 24 protects environmental rights in the context of human health: "Everyone has the right to an environment that is not harmful to their health or well-being". The rights of future generations are provisioned for in the right "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The rights of cultural, linguistic and religious communities are affirmed in Section 3: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their

language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

Assuming that Khoisan rights warrant protection and recognition, it is necessary to explore the meaning of the rights listed above in South African context. Khoisan experience, named by some historians as ethnic genocide (Adhikari 2013), naturally highlights the need for some specific rights to be protected: the right to property, children’s rights, the right to culture and the right to self-determination (Harris 2009, 81).

The South African Constitution of 1996 was intended to undo the colonial and apartheid injustices and restore the previously oppressed into the citizens with full membership who freely exercise their rights as per the Bill of Rights. The Constitution was to become “a historic bridge” away from the culture of authority and towards a culture of justification, where every exercise of power can be justified and governmental policies are enacted because they have a strong case for implanting “a future founded on the recognition of human rights”, not the fear of the military force behind the state’s decisions (Mureinik 1994, 34). Every governmental decision, then, could be scrutinized with the reference to the Bill of Rights, for whether it recognizes “human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.

The Bill of Rights became a manual of values for every citizen of South Africa, it set out the parameters of accountability for every manager, chief or governor whose leadership decisions have to reflect the new culture of justification and lead to the standards, presented in the Constitution.

Constitutional supremacy in South Africa is a benchmark against which Parliamentary legislations are reviewed by the Constitutional court of South Africa for their legitimacy in accordance with the Constitution and the Bill of Rights. Not only leadership decisions of institutions and individuals should be justified constitutionally, but every step of the law-making process has an overarching responsibility for preserving the Bill-of-Rights exceptionalism in South Africa from 1996 onwards.

Supremacy signals that rights are important and that they may lead to legislation’s invalidity. It does not translate directly, however, into predictable or automatic effects. Robert Leckey studies constitutional supremacy in South Africa and Canada, and illustrates in his book “Bills of Rights in the Common Law” that judges often “sever offending provisions rather than declaring an entire statute invalid” (2015, 116). Thus, unconstitutional legislations have a number of ways of penetrating social fabric, as well as a number of consequences to the litigants or/and their class in the process of objection in constitutional court. These consequences are specifically jeopardizing freedom of association and equality which are inscribed constitutionally into the Bill of Rights.

South African Constitution and the Bill of Rights have overriding power over any other legislation. It is important to note that if we assume that the Khoisan leadership system is a part of their right to culture, any legislation that aims to impose another leadership system would be considered unconstitutional. Another remark is related to the fact that if the government is to use Bill of Rights as a vehicle for protection of indigenous rights, it has to provide positive support in exercising Khoisan right to culture, because any minority culture under threat could be overwhelmed by majority culture. In this sense, providing positive support to exercise Khoisan culture would mean creating infrastructure, where the culture could be practiced or exercised.

3.1.3 The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by South Africa in 2016. The UNDRIP protects collective, or group rights that have difficulty being addressed in legal documents, such as the Constitution, which emphasizes individual rights. The UNDRIP protects the individual rights of indigenous people that do not fall under citizen's rights. One of the most deliberated rights in the UNDRIP is the right to self-determination. After months of discussions and pressure from indigenous peoples' movement which maintained that it would not be satisfied with anything less than an unconditional reference to self-determination, it was agreed that indigenous people have the right to self-determination:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (United Nation 2007, 7).

The Declaration clearly added a new dimension to the preexisting view on self-determination. Autonomy or self-government in relation to indigenous people used to be the concepts confined to domestic constitutional law, whereas the UNDRIP introduced self-determination as autonomy and self-rule into international legal language. Now indigenous communities have the fully-fledged right under international law to govern their most essential matters autonomously (Cambou; Inman & Smis 2018, 350).

The right to self-determination goes hand in hand with the right to practice cultural traditions and customs outlined in Article 11 (United Nation 2007, 9), with the help from the government, which may take the shape of effective mechanisms, developed in consultation with indigenous communities, not excluding restitution.

The right to revitalize and transmit histories, languages, oral traditions, philosophies, writing systems and literatures to future generations is secured in Article 13 (United Nation 2007, 10). This transmission between the generations of indigenous people is to be protected and facilitated by the state in a way that allows intercultural understanding in political, legal and administrative proceedings.

Article 20 essentially relates to self-determination in terms of education and economic system: “Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities” (UNDRIP 2007). The important part of it is the provision for reviving and maintaining the indigenous economic relations - a stumbling rock in the realm of overarching reality of capitalist economy. The right to develop own political and social systems and institutions closely correlates with the expression of indigenous leadership as a role model for governing of such institutions.

Adaptation of the UNDRIP was an important milestone for South Africa. It was a marker of consistency in its commitment to revitalize, restore dignity and recognize, outlined in TRC and South African Constitution 1996. The language of the UNDRIP extended the rights of Khoisan people as a group further than the Constitution had granted them as citizens. By adopting the UNDRIP, South Africa additionally committed to maintain and develop Khoisan political, economic and social systems or institutions, as well as to the protection of their own means and ways of subsistence and development, including their traditional and economic activities. Additionally, the right to self-determination provided the space where self-governance according to indigenous traditions of communal life, including leadership and education, became possible (Crawhall 2011; Gathright 2019).

3.2 Post-apartheid legislations designed for the recognition of traditional communities

Three foundational documents formulated the language of recognition and commitment of the government to repair previous injustices in South Africa, that included the concepts of legal repair, reconciliation, recognition and reparation of human and civil dignity of indigenous people, freedom of association, equality, group self-determination politically, economically and culturally.

The next set of legislations were designed to provide for the recognition and are supposed to reflect the recognitive language set out by the TRC, Bill of Rights and UNIDRIP. Traditional Leadership and Governance Framework Act, 41 of 2003 (TLGFA2003); Traditional Courts Bill (2019, 2012, and 2008); National House of Traditional Leaders Act, 22 of 2009; Traditional Affairs

Bill of 2013; and, lastly, the Traditional and Khoi-san Leadership Act of 2019 (TKLA2019) are the legislations that followed. They will be reviewed in the next subsections, except TKLA2019, which will be reviewed in chapter 4.

3.2.1 Traditional Leadership and Governance Framework Act of 2003 (TLGFA2003)

TLGFA2003 defines the leadership framework in customary law and endeavours to unify the customary leadership system across the country. Its intent is:

“To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; 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; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.” (The White Paper on Traditional Leadership and Governance of 2003).

The bill intends to recognise traditional communities by organizing and managing their leadership framework. However, a deeper engagement with the document depicts transference of colonial definitions and distinction from the apartheid era into the post-apartheid era. The structural integrity and distinctions of colonial law are retained even while there is the explicit attempt to repair previous injustices. Section 28 of TLGFA2003 automatically transfers communities, “tribes”, recognized as “tribes” according to the Bantu Authorities Act of 1951, into officially recognized “traditional communities”. Traditional councils, as well as traditional leaders, preserve their position of authority over a traditional community. If a traditional community chooses to disestablish its authority, the process of disestablishment must have happened within 2 years from the commencement of the Act, meaning that all traditional leaders, who preserved their authority by 2005, stay as such.

Traditional council of up to 30 people, 60% of which must be constituted of traditional leaders and members of the community, selected by a senior traditional leader (section 3 of TLGFA2003). There is no expiry to the term of service for traditional leaders, the power to disestablish a traditional leader belongs to the king or queen, who may apply for such removal to the President. Subsequently, the king or queen can be removed by the members of the royal family, given that their application complies with section 10 of TLGFA2003.

Thus, a traditional community has little power over the choice of its authorities. A multilayered governing structure in TLGFA2003 recognises kingship, traditional leadership, and headmanship positions. Within this power institution, headmen, traditional leaders, and 60% of traditional council are elected by the royal family concerned (Section 11 of TLGFA2003), leaving a mere 40% of traditional council to be democratically elected by a traditional community.

Governmental subsidies in the form of salaries and allowances are allocated to traditional leaders by Parliament (section 5 of TLGFA2003). In the act there is no provision for the remuneration of kings or queens, however, in the definitions section king or queen are defined as “a traditional leader under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law; and recognised as such in terms of this Act”, which suggests that kings or queens are also subsidized by Parliament.

Apart from the functions provided for in terms of customary law (they are not defined by the Act), TLGFA2003 defines the roles and functions of traditional leaders in respect of the administration of justice, the management of natural resources, land administration, safety and security, economic development, tourism and health (section 20 of TLGFA2003).

Thus, TLGFA2003 establishes a bottom-up leadership of a traditional governance institution, which is fully supported by the funds from Parliament and only has a fraction of representatives, elected by a community, who live within the boundaries of their jurisdiction. Such framework of governance closely resembles apartheid legislations and recognises traditional authorities, established during apartheid. Chiefs are renamed into “traditional leaders” and tribes into “traditional communities”. Enormous powers of administration, justice and policing, given into hands of traditional leaders, places communities under their jurisdiction in a vulnerable state of authoritarian regime, that has no expiry date, no accountability to its community and holds fertile space for corruption and crime (Rugege 2003; Reddy 2004; Kamieth 2007).

Additionally, TLGFA2003 is in contradiction with the Interim Protection of Informal Land Rights Act, 1996 (IPILRA1996), by substituting consultation with the people directly affected by proposed developments with the consultation with one institution - the institution of traditional leadership. IPILRA1996 states in the section 2 “Deprivation of informal rights to land” that communal land rights cannot be disposed without achieving agreement with the majority of land right holders: “For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate”.

The act provided protection for the members of traditional communities who held informal rights to the land, which are defined as “the use of, occupation of, or access to land in terms of—

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in”, as well as for anyone who had held continuous beneficial occupation of land from at least 1993 without the consent of the formal owner. Under the Interim Protection of Informal Land Rights Act, 1996, any customary or indigenous community would be protected from the use of their occupied land by a third party, however, the legal contradiction with TLGFA2003 gives power over the land distribution and management of natural resources to traditional leaders, who are appointed or approved by the government without consent of a traditional community. Although traditional leaders are meant to represent the interests of their community, it is often not the case (Buthelezi, & Stha 2016).

South Africa witnessed a number of infamous assassinations of activists, who represented their community’s disagreement with their traditional leader, who was in alignment with local or international extraction companies, over repurposing their occupied land. Raymond Suttner stated that "assassinations have become a regularised way of deciding on leadership and access to wealth within the ANC and its allies" (Suttner 2013, 44). It illustrates the failure of traditional leadership institution to simultaneously provide safety, security and the management of natural resources for their traditional communities.

While being inconsistent with the Interim Protection of Informal Land Rights Act, 1996, TLGFA2003 provided a greater scope for traditional leaders to exercise their power of communal resources without consulting with their community (Tlale 2020, 7). The Traditional Courts Bill (2019, 2012, and 2008) extended the possibilities of such misuse by expanding their legislative and executive power, instilled in TLGFA2003, to judicial power, thus amalgamating all three branches of power in one hand.

3.2.2 Traditional Courts Bill (2019, 2012, and 2008)

The Traditional Courts Bill (B1-2012, formerly B15-2008) was contemplated to reimagine Sections 12 and 20 of the Black Administration Act of 1927, a colonial legislation that defined participation of chiefs and headmen in administering justice according to customary law, but within colonial perspective. Sections 20 of the Black Administration Act of 1927 allowed chiefs and headmen to “try and punish any Black who has committed, in the area under the control of the chief or headmen concerned... any offence at common law or under Black law and custom...; and any statutory offence”. Section 12 of the Act prohibited chiefs and headmen to resolve disputes arising from

divorce or separation. This Act formalised a colonial model of indirect rule based on a “highly authoritarian understanding of chiefly rule (Delius 2008, 213)” that created a separate justice system for Africans (Chanock 2001).

The intended form of recognition of the Traditional Courts Bill (TCB) was “to provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values”; additionally, in preamble, it intends to recognise “the spirit of voluntary affiliation in customary law” (South Africa, TCB, 2017). The first introduction of the TCB in 2008 received a lot of resistance from South Africans, including the inhabitants of bantustans, for its extension of apartheid distortions of customary law into oppressive practices in democratic era (Thipe 2013, 15). TCB opposition argued that the bill undermines constitutional rights of people living under traditional leadership, such as the right to equality, due process and freedom of culture. The 2008 version of TCB was withdrawn from the national Assembly because of the failure to comply with the required legislative procedures around public consultation. In 2012, it was reintroduced again, unchanged. It was met with such ardent opposition that Parliament opted not to proceed further. In 2017 the Bill was revived and passed by the national Assembly in March 2019. The disputes, covered by traditional courts, are limited to theft or damage up to R15000; unlawful impairment of another’s dignity; advice relating to ukuThwala, initiation, customary law marriages, custody/guardianship of minor children, succession and inheritance and customary law benefits; customary law matters below the value of R15000; and altercations between members of the community. People residing under the jurisdiction of a traditional leader, created before or under apartheid, cannot opt out from a traditional court, thus, confining them to a court system, which is not applicable to South Africa as a whole. In this context Claassens and Butlender (2016) ask the following question: “The people who bore the brunt of the Land Acts and forced removals are once again subjected, by law, to ascribed tribal identities and all-powerful traditional leaders, regardless of whether they agree to this. As many ask, why would legitimate traditional leaders need laws like these, and what do they fear would happen if customary affiliation were to be voluntary and consensual?”

The fourth attempt to pass the TCB happened in March 2019, two months before the elections, which many critics view as an attempt to gather political support from the traditional leaders.

Although the TCB 2019 may provide the space for less bureaucratic and more speedy judicial process for conflict resolution, based on consensual approach and communal participation, it also could be utilized as a tool for oppressive practices towards community members, whose interests are not in alignment with their traditional leader. Separation of judicial, legislative and executive powers was considered “essential to avoid usurpation and tyranny by the holder of these

powers” as well as to improve accountability (Persson, Roland, & Tabellini 1997). However, it was not accomplished in TCN 2019.

3.2.3 National House of Traditional Leaders Act 2009

Constitutional recognition is given to the role of traditional leaders in terms of section 212:

“National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law— (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.”

National House of Traditional Leaders Act, 22 of 2009 (NHTLA 2009) was devised for the purpose of the establishment of another ruling institution: the national House of Traditional Leaders. Its intention was to provide for traditional leader’s accountability, relationship with provincial houses and support from government; and determines their duties, powers and responsibilities (NHTLA 2009). National House consists of 18 people, three senior traditional leaders elected from six provincial houses. The Khoisan were not represented in the national house of Traditional Leaders, however, an informal discussion body was created from the representatives of five Khoisan groups: the Griqua, the Nama, the San, the Koranna and the Cape Heritage Council Group (Plessis & Scheepers 2017, 23). Among the roles of the National House are the preservation of moral fibre and regeneration of society, promotion of the role of traditional leadership within democratic constitutional dispensation, the preservation of the culture and traditions of communities, the social well-being and welfare of communities, and the transformation and adaptation of customary law and custom so as to comply with the provisions of the Bill of Rights in the Constitution (Section 11 of NHTLA 2009).

Despite clear indication on the roles, Parliament is not obliged to consult the National House neither according to the Constitution of 1996, nor to NHTLA 2009. Thus, from the establishment of the National House only the following discussions, initiated by the South African Law Commission, were held with the participation of the National House: Recognition of Customary Marriages Act 120 of 1998, the Intestate Succession Amendment Bill⁴² and legislation dealing with childcare (Plessis & Scheepers 2017).

Based on such evidence, one could draw a conclusion, that establishment of the National House has great potential for the cultural recognition of the traditional and Khoisan societies, if, first, it would include representatives of all minority cultural groups, and second, it forms close reciprocal relationships with Parliament, especially in regard with policy creation and the

commentary on the bills. However, in order to enact it, there were a number of missing links in the bill, such the absence of provision of inclusion of Khoisan representatives and lack of specificity with regard to the National House's framework of influence on Parliament and provincial houses. These issues were addressed and responded to in TKLA2019.

The review of the legislations aimed at the recognition of ethnic minorities in South Africa allows to conclude that for the last 25 years South African government dealt with the issues of governance and leadership in traditional communities, in a similar manner as it was dealt with during apartheid times. Such issues as cultural rights, self-determination, and children rights have not received positive support from the government in the legal space. The implication for legislative drafting is that, where a Bill of Rights affirms the rights of traditional communities to practice their culture, religion, freedom of association and self-expression, in practice these rights do not provide a mechanism for Khoisan people to benefit from these rights. In conclusion, South African path from the political discourse to legislative practice shows a significant gap in recognition in the legal realm.

3.3 Traditional and Khoi-San Leadership Act, 2019: how does it attempt to deal with Khoisan legacy within the current framework of the political discourse

Before TKLA2019, recognition in democratic South Africa, as it could be seen in the previously analyzed democratic legislation, was framed and applied as the following:

- a) legally inscribed, bureaucratized access to leadership;
- b) state financial support to the registered leaders;
- c) ascription of indigenous community members to judicial powers of their traditional leaders;
- d) Khoisan did not receive the membership to National House, but were formed into a separate informal advisory body to Parliament.

TKLA2019 was a final succession of the legislative documents that had rhetoric of provision for the recognition of traditional communities. It caused a controversial reaction and is considered by some as “a victory for a Bantustan politics of authoritarianism and ethnicity, a shot in the arm to xenophobia, and a defeat for democracy” (Claassens 2019, 1). TKLA2019 is the first legislation that appeals to Khoisan as a distinct ethnic group, unlike the previous acts that did not differentiate between particular ethnic communities but rather dealt with all and every ethnic group under the umbrella of “traditional community”. Leadership, governance, community management and criteria of inclusion into act's scheme of benefits became TKLA2019 focus.

TKLA2019 intends to provide for the recognition of traditional and Khoi-San communities and their leadership. It specifies functions, roles and rules of establishment of traditional and Khoi-San leaders and councils, the National House, provincial and local houses of Traditional and Khoi-San leaders.

If we were to omit the rhetoric of recognition, widely used in TKLA2019, and focus on the definitions and content of the document, it would transpire that TKLA2019 is the framework for the establishment of traditional and Khoisan elite, its support, remuneration and relationship with government.

Part 1 “Traditional and Khoi -San communities” addresses the procedure of application for the governmental employment of traditional elite. Such application has to include the proves that a community “observes a system of customary law; (c) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities; (d) occupies a specific geographical area; (e) has an existence of distinctive cultural heritage manifestations”. In the process, outlined in TKLA2019 as “recognising a traditional community”, a several employment positions are created for the leadership elite, which are subsidised by government and have judicial, administrative and customary law interpreting powers.

The application from a prospective Khoi-San leader must be accompanied by the application from the community under his or her authority, which has to contain certified copies of their identification documents with the proof of address and a personal signature, acknowledging his or her association with the community (Section 5 of TKLA2019). Unlike the condition of recognition for the traditional leadership elite and his or her community, Khoi-San community must be “subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community”, and occupy "occupies a specific geographical area or various geographical areas together with other non-community members”. Thus, the Act does not tie Khoi-San community members to a specific geographical area, but allows for a possibility of dispersed existence, which is not the case with the other traditional communities who are required to occupy a specific geografic area in order to be considered.

Part 2 “Traditional and Khoi-San Leaders” sets up the framework for the establishment of four-tier elite in the case of traditional leadership (king or queen, principal traditional leader, senior traditional leader, and headman or a headwoman) and two-tier elite in the case of Khoisan leadership (senior Khoi-San leader and brunch head). The leadership elite requires approval of the Premier, except in the case of king or queen, which must be approved by the President (Section 7 of TKLA2019). In order for a leader to emerge, he or she has to prove the legitimacy of his or her existence within the historical context of the community which also has to obtain the approval of

the government to be called traditional or Khoi-San according to the procedure described in part 1 of TKLA2019. Additionally, he or she has to prove the history of acceptance, functions and powers within the governmentally approved community. These elite positions are assigned for life and “shall continue to receive the salary and benefits associated with the senior traditional leadership position until his or her death (Section 7.7.d.ii of TKLA2019), even if his or her position is withdrawn. The withdrawal of such positions is a complex bureaucratic process that requires the application of the majority of communities under the jurisdiction to request the President or Premier to withdraw the recognition. Such a request is to be accompanied by a resolution of each traditional council (Section 4.1 of TKLA2019). It is important to remember that community members constitute only 40% of a traditional council; the other 60% are elected by and within the leadership elite (Section 16.c.i of TKLA2019). Thus, it is impossible for a community to reach a quorum without the support of the leadership elite.

Subsections 7 to 14 of TKLA2019 outline the procedures of establishment and remuneration of four-tier elite in the case of traditional leadership and two-tier elite in the case of Khoisan leadership, spanning over 13 pages. Section 15 of TKLA2019 outlines the functions of traditional and Khoisan leaders, spanning over one sentence: “A traditional or Khoi-San leader performs the functions provided for - (a) in terms of customary law and customs of the traditional community concerned; and (b) in terms of any applicable national or provincial legislation.” The customary law of the traditional community concerned is subject to interpretation by the traditional leaders, who simultaneously “define and interpret customary law, and settle disputes in accordance with customary law” (Department of Provincial and Local Government 2003, 20) and executes functions according to their own interpretations (TLGFA2003, TKLA2019).

Part 3 “Traditional and Khoi-San councils” of TKLA2019 deals with the relationships between the leadership elite and its relevant community. The Minister defines the number of members for the council. 60% of members are to be elected by a senior leader, and 40% of members are elected by members of their community for a period of 5 years (Sections 17, 18 of TKLA2019).

Part 3 contains a widely contested section 24 “Partnership and agreements”. According to this section, councils may enter into partnerships and agreements with any person, body or institution, subject to ratification of such a partnership or agreement by a Premier. Such partnership is subject of a prior consultation with the relevant community and “a decision in support of the partnership or agreement taken by a majority of the community members present at the consultation” (Section 24.3 of TKLA2019). Neither there are provisions made regarding the minimum number of community members necessary for such “prior consultation” to be valid, nor is there a provision for the transparency of council’s affairs and its financial documents to the

community members. Naturally, for any partnership to be effective, its progress and results should be readily available for the community to evaluate its benefits. There is no provision in TKLA2019 which specifies how a council's activity becomes transparent to its community or how a council can be held accountable by the community members.

Chapter 3 of TKLA2019 "Houses of Traditional and Khoi-San leaders" deals with the establishment, composition, duties, relationship with Parliament, and remuneration. This chapter is an updated version of the National House of Traditional Leaders Act 2009 and responds to its issues, such as inclusion of Khoisan leaders, remuneration of the National House and establishment of more formalized relationships with Parliament and provincial houses.

Chapter 4 "Commission on Khoi-San Matters" regulates the establishment of Commission, which deals with the applications for recognition of Khoisan communities, branches, senior Khoisan leaders and branch heads according to the procedure, outlined in parts 1, 2 and 3 of TKLA2019.

To summarize, TKLA2019 and the series of the democratic era legislations that deal with the customary law and traditional communities place emphasis on the establishment of authorities, or traditional leadership elite, instead of providing recognition and protection to the most vulnerable in cultural minorities. It is enabled by a number of disturbing techniques. Firstly, the traditional leadership elite is subsidized, empowered and accountable to the government, but not to their respective communities. Secondly, it has low representation of elected community members, who are only represented as 40% of the elected traditional or Khoisan council component. The rest of the multi-tier traditional leadership elite is elected within itself. Thirdly, enacting change, or withdrawing the traditional leadership recognition, is a tedious affair on the presidential level, taxing in terms of time and costs to a Khoisan community. And lastly, and perhaps, most importantly, the dangerous sublimation of judicial, administrative and customary law interpretative powers in the hands of one person, a traditional leader.

Although the word "recognition" is widely used, what it actually means is "being registered as a bureaucratic unit".

Additionally, TKLA2019 does not reflect the traditional model of leadership that existed among Khoisan, thus imposing a harmful cultural alteration, or misrecognition of Khoisan culture. TKLA2019 poses a dualistic trap that requires a member of Khoisan community to subscribe to the leadership model of another culture, in order to receive material benefits of political recognition, offered by the government in TKLA2019.

Chapter 4. Khoisan misrecognition in the legal landscape of South Africa on the example of TKLA2019

This concluding chapter will make sense of the findings in two previous chapters, that is, firstly, the analysis of TKLA 2019 - the latest legislation aimed at Khoisan recognition, and secondly, the current philosophical conceptualization of recognition. The previous chapters transpired the following major findings. Axel Honneth's model for recognition exposed individual needs, such as love, rights and solidarity, as three necessary aspects to be addressed in order for recognition to occur. The South African Constitution (1996) provides the context for the development of the political discourse and rights-based recognition of all three aspects among ethnic minorities. Charles Taylor's model illuminated the dialogical character of identity formation and brought forward the necessity of a group recognition as a necessary condition for the recognition of an individual who belongs to a particular ethnic group. Mahmood Mamdani proposed that in terms of recognition, South African legal practice possesses a particular customary blindness, unique to African politico-cultural landscape, that developed in the conditions of coloniality, indirect rule and apartheid. And finally, Milton Bennett exposed so-called cultural blindness, or intercultural incompetence, that leads to misrecognition in the context when meta-coordination of cultural differences through the reconciliation of unity and diversity is absent.

In this chapter I will apply Mamdani's customary blindness and Bennett's cultural blindness to Khoisan recognition on the example of TKLA2019. I will also demonstrate with examples where Khoisan misrecognition occurs. In conclusion, I will evaluate how the current socio-political dynamics affects just governance and decolonial understanding of sovereignty.

It is important to note that, although the voices of Khoisan that support TKLA19 "are eclipsed by those who thoroughly reject it" (Verbuyst 2022, 158), some of Khoisan do support TKLA19. Siv Øvernes (2019, 93) argues that they do so because "different criteria were used when it concerned recognising the Khoisan [and] too much power would be in the hands of Khoisan leaders and councils, especially when it came to how land would to be utilised. It should be noted that the TKLA does not stipulate anything about controlling land". Another example of supportive attitude towards the act was expressed by Mr Cecil le Fleur, Chairperson of Griqua National Conference, who said that "the Conference supports the adoption of the Bill, but did not want the promulgation of a Bill that will not fully the needs of the Griqua people" ("Traditional and Khoi-San Leadership Bill [B23-2015]: public hearings Day 2." 2016). Although there is support for the act, the dissenting voices dominate the debate.

4.1 How TKLA2019 violates the right of equality

Section 9 of Bill of Rights provides equal protection and benefit of the law for South African citizens:

“1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

I will argue that the TKLA2019 contradicts the essential right of equal protection and benefit of the law. Such contradiction arises in unequal access to legal protection between traditional leaders, who are engaging in unlawful actions and appropriation of communal resources, and community members, who seek to oppose such actions and demand accountability in courts. Mnwana (2014, 232) describes several court cases of the local activists against their traditional leaders. In the majority of such cases the local courts would rule in favour of a traditional leader; however, in the case of appeal to the Constitutional court, the court orders are reversed in favour of the local activists representing the community Mnwana (2014, 234). Despite invariable success of the appeals in the Constitutional court, for a court case to be escalated from the Magistrate court it requires considerable financial expenditure from the applicants, who frequently are unable to proceed their search for justice due to the financial constraints. However, a traditional leader in question can maintain the legal battle using for his defence his community funds and not his own. Thus, “equal protection and benefit of the law” fails in the instance of the TKLA2019 that provides grounds for traditional leaders to use community funds in South African courts, whereas community members have no access to such privilege and have to conduct litigations against traditional leaders from their own account. This practice could be linked to the colonial system of traditional management, a practice of indirect rule discussed in the previous chapter. Funds and rights are allocated to the traditional elite but not to the members of Khoisan community, and although the funds allocation holds the intention of community upliftment and development, in a case where they are misused and the usage is questioned, the members of community hold significant disadvantage in comparison with their leader, constituting inequality in accessing legal representation.

Additionally, inequality comes forth in the circumstances, which arise in the result of merging statutory, financial and customary powers into one position of a traditional leader. Governmental leadership practices separation of powers, or the division of governmental responsibilities and functions into three distinct organs, legislative (the Parliament), executive

(government) and judicial (the courts), to limit any one organ from exercising the core functions of another (Scalia 1983, 881). The doctrine of the separation of powers implies that one person should not belong to more than one organ of government (Bradley & Ewing 2007, 201). The main reasons for this doctrine being adopted by most progressive governments is that it provides for accountability, common interest, the rule of law, efficiency, and balancing of interests. In the case of customary leadership as it prescribed in the TKLA 2019 those three powers are merged into one localised institution.

The “rule of law” rationale implies that those who engage in law-making should not be involved in the judicial act of judgment and punishment. However, traditional leaders are expected to both interpret customary law and exercise judicial powers in regard to its enactment. This legitimates the non-separation of powers at the local ‘customary level’.

Merging of powers in hands of a traditional leader could also be viewed as a culturally sensitive position, but only with regard to Bantu people who were known to be led by chiefs who would both interpret customary law and enact it. In the case of Khoisan it represents misrecognition on a level what Taylor calls “group recognition”: it is an act of dismissal of Khoisan as a distinct cultural group from other Bantu people, whose leadership model is applied on all traditional communities, including Khoisan, denying recognition of their group identity.

The right to equality in terms of the right of equal protection and benefit of the law is jeopardized due to unequal protection of a chief and an ordinary community member, resulting in misrecognition on an individual level, from Honneth’s perspective, .

4.2 TKLA2019 as a tool of misrecognition of Khoisan traditional leadership system

Instead of cultural recognition of the previously oppressed Khoisan TKLA2019 alters the cultural conception of leadership despite cultural recognition being incorporated into the political discourse of South Africa.

Traditionally, the legitimacy and execution of the legislative pronouncements made by customary authorities is made up of the normative repertoire in a combination with how well they reflect public opinion, how useful they are for the disputing individuals, and how legitimate is the authority who delivers them (Comaroff & Roberts, 1981, 112). Thus, when traditional authorities speak about their legislative rules as necessarily “determinative”, in essence they perpetuate their authoritative claims at the expense of ordinary people. It was illustrated in the previous chapters that such arrangement is colonial, not traditional in nature, or, as Mamdani named it, “the blindness of

indirect rule”. In such authoritarian invocation, rural community governance is led by rather “dead customary law”, because observance of living customary law is always a dynamic expression of people’s evolving practices, morals and values. Traditional governance has a very delicate power balance which involves individuals in the dispute, their community and its traditional authority, which in the case of Khoisan consisted of a participatory egalitarian process (Schapera 1930, 321). The shifts in the power balance affects vulnerable members of the community in particular and makes it especially difficult to have agency and control over her security and dignity (Weeks 2015, 218).

Mnisi Weeks (2019, 184) argues that the notion of “traditional leadership” was over-romanticised and has little to do with the distant past. What we call the “traditional leadership” today is a colonial and apartheid distortions of traditional leadership. These distortions served the ruling power one particular aim - to consolidate law-making and law-preserving power in the hands of individuals, approved by ruling authorities. This approach would establish a smooth top-down governance (or indirect rule, as it was shown by Mamdani) as well as assistance of local chiefs with the labour supply for big businesses. The reality of the present days thus is not responded to in such governance models.

Colonial and apartheid customary laws were mainly established for the purpose of centralisation of authority in the chief which necessarily went hand in hand with diminishing power of ordinary members (Mamdani 2011, 34). The TKLA2019 shifts the delicate balance of power in favour of male minorities, or senior traditional leaders, at the expense of rural women and headmen. Okoth-Ogendo (2008, 96) asserts that the government has to redistribute power and reorient authority from top-down to bottom-up. Such an approach not only would protect the most vulnerable layers of the population involved, but would also reflect more accurately the major tenets of traditional communities. Bottom-up power distribution enables strong relationships between the community members during the negotiation process that would be necessary for the decision-making and dispute resolution. The TKLA2019 has the opposite effect - it alienates customary community members from the various forms of effective negotiation and, as a result, casts disempowerment, sense of non-belonging and relational vacuum between authority empowered members of a community and ordinary people. Additionally, how can South African movement for the decolonisation be taken seriously, if TKLA 2019 has colonial and apartheid practices in its foundation?

In the case of the Khoisan, this position presents the case of intercultural incompetence. While there is evidence of strong leadership among Bantu people, Khoisan historically has never exhibited the presence of a strong singular leader (Adhikari 2011, Van Wyk 2016), and instability of leadership was clearly a function of Khoi economy. San societies existed in small groups with

egalitarian structure, did not have hereditary leaders, and usually developed a temporary leadership for the specific purpose of a community (Adhikari 2011, 39).

Thus, imposition of the leadership as proposed in TKLA2019 goes against the theoretical framework of recognition discussed above. From Bennett's perspective, it is the case of cultural incompetence that does not recognise traditional egalitarian style of governance among Khoisan communities.

4.3 TKLA2019 as an instrument for women disempowerment

TKLA2019 witnessed the reduction of headmen's power, which resulted in female voices being distanced further away from the source of power within traditional communities. Instead of being represented by a headman who is well versed in the affairs of his or her community, women's voices are now represented by a less approachable chief with little knowledge of communal affairs. Applying Bennet's methodology of intercultural competence, we have to conclude that the form of leadership with the reduced voice of some community members and the enhanced voice of others is a non-traditional form of leadership. One of the most important features of Khoisan leadership was co-participation of all members in communal affairs, or shared leadership. In this sense, the imposition of a hierarchical leadership system could only be viewed as the intercultural incompetence of the policy makers.

Mnisi Weeks (2015, 216) illustrates how the laws from 1885 to 2012 gradually distorted the customary law, depriving women of power and headmen of authority. She claims that the immense significance of such faultification negatively impacts the most vulnerable population of traditional communities (2019, 182), especially women. Due to their historically diminished status, much of women's influence is contained in the strength of their relationships with the members of their community and a headman/headwoman. Increased formalisation of customary norms and forums leads to the growing alienation between the forums and the community (Hailey 1953, 113).

The reality of many Khoisan and traditional livelihoods had drastically changed over the past two centuries. The mining industry had drawn male heads of households away from their traditional settlements, often resulting in creation of two or more single-parent families with a female as a household head. According to the national statistics (2017) the median annual expenditure by sex of household head is almost twice as little among the families with woman as a head of household. The South African statistics of vulnerable groups indicator report (2015) shows that only 42.3% of South African women are married or co-habiting, whereas 43.1% are never married. 41.3% of households are female headed, 49.6% of households are female headed in rural areas. 83.1% of women (16 yrs. and above) living in households where the households feel unsafe

or very unsafe to walk alone in their area during the day. 40.4% of South African children live with mother only, 3.1% with father only and 21.4% live with neither (either orphans or in extended family household usually with the woman head of household). On top of these disconcerting figures there is a growing rate of female alcoholism, one of the world's highest in South Africa. Thus, according to Olivier et al. (2016), 29 to 290 children of every 1000 children born are diagnosed with fetal alcohol spectrum disorders (FASD) and this rate is the highest among rural populations. Some of the areas of South Africa have higher rates of FASD, a permanently crippling but totally preventable condition, than HIV/AIDS or tuberculosis. The acknowledgement of FASD prevention is yet to be acknowledged as a public health priority by the National Department of Health, but also in the wider governmental circles for a more holistic approach to wellbeing and empowerment of the future mothers of the South African nation.

The statistics above show that the majority of South African women fall in the category of vulnerable population and carry the apparent need for recognition. Additionally, women struggle to access residential land because 'traditionally' local chiefs allocate land only to men (Cousins 2011). Khoisan and traditional communities more often practice an exclusionary attitude to female representation on traditional and village council meetings, during disputes in traditional courts which are perceived as biased towards men (Curran & Bonthuys, 2005). Thus, the power asymmetry in traditional communities perpetuates disadvantage and inability to negotiate security for the female population.

Mnisi Weeks (2015, 234) argues, that traditional leadership had been distorted during the apartheid, and TKLA2019 solidified apartheid distortions between genders into a law. She illustrates, how the mechanisms of female oppression came in place during apartheid: firstly, in an attempt to invert the "bottom-up" nature of leadership by distorting the customary law and stripping headmen of their authority. In this way the individual livelihoods of the most vulnerable citizens, single women with dependents, do not receive a proximal and powerful intervention of a headmen in a case of a dispute, because all such issues are dealt with by senior traditional leaders who are usually unaware about day-to-day life in a community. Secondly, during the apartheid, women were given the status of minors and subjected to the authority of their husbands, fathers and brothers. Effectively, this would eliminate the possibilities of women to negotiate her independent status, participate in community meetings and attain land rights. Both apartheid distortions of customary laws are remnants of South African oppressive past and have no grounds in historically dynamic tradition. Mamdani revealed the "customary blindness" as a process necessary to establish the system of indirect rule.

Eisler (1988) describes two distinctly different belief systems of dominator and partnership model. The "dominator" model is the heritage of colonial and apartheid past, whose ideology was

rooted in Judeo-Christian worldview. By dominator model she means “either patriarchy or matriarchy - the ranking of one half of humanity over the other”, “I am civilized, you are backward”, “my religion is above yours”. The partnership model is based on the principle of linking rather than ranking, and social relationships do not hold superiority or inferiority at the base of diversity between human beings, but interdependence rather than dependency, cooperation rather than conflict (Christ 2012, 12). In a partnership worldview there is no polarity between dark and light, good or bad, it encompasses opposites in a process of ever-changing relationship. In South Africa, British colonists were astonished how “backward” and “barbaric” the native Khoisan were because their genders were not rigidly separated and hierarchised. Colonialism was based on monotheistic patriarchal religious system, which not only aimed to convert locals into Christianity, but gradually distorted the partnership model by introducing a dominator model on all levels of human lives: family structure, work ethics and community leadership.

While the issue of gender equality in traditional communities is a large and contested topic, we can note that the recognition of Khoisan in terms of woman empowerment would require recognising and upholding some form of non-hierarchical gender model. Instead, the TKLA2019 diminishes the status of Khoisan women in a community by removing the powers of headmen, who translate women’s voices to traditional leaders, in facilitating the disputes and allocating those powers to senior traditional leaders, who do not live with the community members and are unaware of the dynamics between them (Weeks 2015, 234). In this sense, “the cultural blindness” of TKLA2019 results in indirectly perpetuating misrecognition of Khoisan women on an individual level, continuing the legacy of gender inequality.

Conclusion

The purpose of this work was to address the issue of political recognition of Khoisan ethnic minorities in democratic South Africa, and provide insights into the challenges on the path towards recognition, political and cultural. The case of Khoisan was set out in chapter 1, which exposed the dehumanizing identity politics of colonial and apartheid government, those conditions of the past that established the need for recognition at present.

Chapter 2 interrogated the concept of recognition within the wider philosophical framework, incorporating perspectives from Hegel and Mead to Honneth and Taylor. Using Taylor’s perspective, it transpired that human identity has dialogical character, hence individual recognition is insufficient and, in the case of previously oppressed ethnic minorities, has to be complemented with group recognition. However, political emphasis on protection and revival of ethnic minorities in South Africa is often put together by a uniform legislation that does not

distinguish between cultural identities of the previously oppressed cultural minorities, such as Bantu and Khoisan, suspending the necessary conditions for group recognition. The group recognition is understood to be a balance between the politics of equal dignity and politics of difference (Taylor 1994, 84). Mahmood Mamdani's work was engaged to provide an African perspective on recognition and introduce the concept of the blindness of indirect rule as a major impediment of recognition. In his view, the assumptions of colonial and apartheid political discourse spill into contemporary democratic legislation, resulting in “customary blindness”, or a conservative utilisation of pre-existing legislation and the inadequate scrutiny of the pre-democratic legal approach. Bennett expanded the understanding of challenges of recognition in multicultural societies by introducing the concept of intercultural sensitivity. Using Bennett’s perspective, it transpired that misrecognition often occurs due to the lack of intercultural competence of the policy makers who endorse legislation within cultural forms, such as systems of governance or forms of leadership, that are alien to the Khoisan ethnic minority.

Chapter 3 established the commitment to repair past injustices through a process that was set out in the TRC, South African Constitution and UNDRIP. A set of influential bills that aimed at reconstituting and repairing Apartheid-era legislation regarding the Khoisan was examined, with special attention given to the Traditional and Khoi-San Leadership Act 2019 (TKLA2019). I illustrated State commitment to a constitutional legal process and demonstrated the failures of that process, which resulted in a gap emerging between the political discourse of recognition and the practical-situational and legislative enactment of recognition for the Khoisan. I argued that the TKLA2019 offered a politics of assimilation instead of politics of difference. In this act, the Khoisan leadership is presented alongside the traditional authorities of other ethnic groups, ignoring differentiation in their leadership styles for the sake of “a state-sanctioned conception of Khoisan traditional leadership” (Verbuyst 2022, 11).

Chapter 4 demonstrated how the regulation of traditional leadership South Africa may result in practices that are detrimental to rural people’s access to justice, freedom of association and cultural expression, and gender equality.

Thus, the current political discourse, although well intended in its nature, is ambiguous in terms of its outcomes and needs revising into a more articulate form, which would take into account individual recognition, group recognition, intercultural competence and avoid the pitfalls of “customary blindness”. I suggest that a revised political and legal discourse would result in better educated laws.

The gap between the current political discourse and its practical implementation greatly affects the lived reality and livelihoods of the Khoisan and continues to perpetuate the distortions of

pre-democratic South Africa, and needs to be addressed to restore the dignity of South Africa as a multicultural democratic nation.

Bibliography

- Abrams, Dominic. 2010. *Processes of prejudices: Theory, evidence and intervention*. Equalities and Human Rights Commission.
- Adhikari, Mohamed. 2011. *Anatomy of a South African Genocide*. Athens: Ohio University Press.
- Adler, Nancy, and Allison Gundersen. 2007. *International dimensions of organizational behavior*. Nashville: Nelson Education.
- Adorno, Theodor, Frenkel-Brunswik, Else, and Levinson, Daniel. 1950. *The Authoritarian Personality*. Nevitt Sanford: Harper & Brothers. ISBN 978-0-06-030150-7
- Alexander, Jeffrey C. 2014. *The antinomies of classical thought: Marx and Durkheim* (Theoretical logic in sociology). Melbourne: Routledge.
- Bennett, Milton J. 1986. A developmental approach to training for intercultural sensitivity. *International journal of intercultural relations* 10(2): 179-196.
- Bennett, Milton, and Bennett, Janet. 2004. "Developing intercultural sensitivity: An integrative approach to global and domestic diversity." In *Handbook of intercultural training*, edited by Janet Bennet, Milton Bennett and Dan Landis, 147-165. Thousand Oaks: Sage.
- Bennett, Milton. 2016. *The Value of Cultural Diversity: Rhetoric and Reality*. Meeting Report on Fellows Day, International Academy of Intercultural Research 9th Biennial Congress. Bergen: SpringerPlus 5: 897. doi:10.1186/s40064-016-2456-2
- Besten, Michael. 2011. "The Ghost of Theal: Representation of the Khoe-San in SA School History Books." *African Studies* 70(1): 67-88.
- Biersack, Aletta, and Greenberg, James. 2006. *Reimagining political ecology*. Duke University Press.
- Bradley, Antony, and Ewing, Keith. 2007. *Constitutional and administrative law*. Harlow, England: Pearson Longman.
- Breakwell, Glyris. 1983. *Threatened Identities*. New York: Wiley.
- Buthelezi, Mbongiseni, and Stha, Yeni. 2016. *Traditional Leadership in Democratic South Africa: Pitfalls and Prospects*. Johannesburg: Nelson Mandela Foundation.

- Cambou, Dorothee, Inman, Derek, and Smis, Stefaan. 2018. "Evolving Legal Protection for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections." *African Journal of International and Comparative Law* 26(3): 339-365.
- Chanock, Martin. 2001. *The Making of South African Legal Culture, 1902–1936: Fear, Favour, and Prejudice*. Cambridge: Cambridge University Press.
- Chidester, David. 1996. "Mutilating Meaning: European Interpretations of KhoiSan Language of the Body" in *Miscast: Negotiating the Presence of the Bushmen* edited by Pippa Scotnes, 5-96. Cape Town: University of Cape Town.
- Christ, Conor. 2012. Societies of Peace: Matriarchies Past, Present, and Future. *Literature and theology*, 26(1): 108-110
- Coleman, Monica. 2007. From Models of God to a Model of Gods: How Whiteheadian Metaphysics Facilitates Western Language Discussion of Divine Multiplicity. *Philosophia*, 35: 329-340.
- Comaroff, John, and Roberts, Simon. 1981. *Rules and processes: the cultural logic of dispute in an African context*. Chicago: University of Chicago Press.
- Crawhall, Nigel. 2011. "Africa and the UN Declaration on the Rights of Indigenous Peoples." *The International Journal of Human Rights* 15(1): 11-36.
- Delius, Peter. 2008. "Contested terrain: Land rights and chiefly power in historical perspective." In *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*, edited by Aninka Claassens and Ben Cousins. Athens: Ohio University Press.
- Department of Provincial and Local Government (South Africa). 2003. The White Paper On Traditional Leadership And Governance (Notice 2336). *Government Gazette*, 25438: 20.
- Doxtader, Erik, and Salazar, Philippe Joseph. 2007. *Truth & reconciliation in South Africa: the fundamental documents*. Cape Town: New Africa Books.
- Du Toit, André. "VI. The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition." In *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert Rotberg and Dennis Thompson, 122-140. New Jersey: Princeton University Press.
- Eisler, Riane. 1988. *The Chalice & the Blade: Our History, Our Future*. San Francisco: HarperCollins.

- Ellis, William. 2019. "Situational chiefs" in *Traditional Leaders in a Democracy: Resources, Respect and Resistance*, edited by Beth Vale and Dineo Skosana, 297-322. Johannesburg: Wits University Press.
- Elphick, Richard, and Hermann Giliomee. 2014. *The Shaping of South African Society, 1652-1840*. Middletown: Wesleyan University Press. Honneth, Axel. 1995. *The Struggle for Recognition : The Moral Grammar of Social Conflicts*. Cambridge UK Oxford: Polity Press.
- Ezez. 2017. *Ramuhovhi and Another v President of Republic of South Africa and Others (Maphumulo Intervening; Trustees of the Women's Legal Centre Trust as Amicus Curiae)*. <https://collections.concourt.org.za/handle/20.500.12144/3882>.
- Foster, Robert. 1991. "Making National Cultures in the Global Ecumene." *Annual Review of Anthropology* 20: 235-60.
- Fraser, Ashleigh. 2013. *A Long Walk To Universal Franchise in South Africa*. HSF.org.za. Helen Suzman Foundation. Last modified 3 June 2013.
- Fraser, Nancy, and Honneth, Axel. 2003. *Redistribution or recognition?* New York: Verso Books.
- Gathright, Marina. 2019. "The United Nations Declaration on the Rights of Indigenous Peoples: What Has This Meant for Africa?" *Confluence* 1(1): 83-100.
- Goodman, Tanya. 2006. "Performing a "New" Nation: The Role of the TRC in South Africa." In *Social performance: Symbolic action, cultural pragmatics, and ritual*, edited by Jeffrey Alexander, Bernhard Giesen, and Jason Mast, 169-192. New York: Cambridge University Press.
- Guenther, Georg. 2020. *Human-animal relationships in San and Hunter-Gatherer cosmology. Volume I*. Cham: Palgrave Macmillan.
- Guglielmo, Robert, Polak, Roxane, and Sullivan, Arthur. 1985. "Development of Self Esteem as a Function of Familial Reception". *Journal of Drug Education* 15(3): 277-284. London: Sage Publications.
- Harris, Bede. 2009. "The Place of Indigenous Rights in the Bill of Rights Debate." *Australian Indigenous Law Review* 13(2): 70-89.
- Hooghe, Marc. 2008. "Ethnocentrism." *International Encyclopedia of the Social Sciences*: 1-5.

- Jansen, Martin. 2002. The recognition of Customary Marriages Act: many women still left out in the cold. *Journal for Juridical Science*, 27(2): 115-128.
- Kahn, Peter, and Fawcett, James. 2007. *The Encyclopedia of Mental Health (Facts on File Library of Health & Living)*. New York: Facts on File.
- Kamieth, Alexander. 2007. "*The Traditional Leadership and Governance Framework Act, 2003, and its subsequent provincial legislation: a critical review of attempts at integrating traditional leadership into the new democracy in South Africa.*" PhD diss., University of the Western Cape.
- Kempf, Victor. 2019. "The Subjects of Socialism: Politicizing Honneth's Idea of Socialism." *Critical Horizons* 20(3): 262-281.
- Landis, Dan, Bennett, Janet, and Bennett, Milton. 2003. *Handbook of intercultural training*. London: Sage Publications.
- Leatt, Annie. 2017. *The State of Secularism*. Johannesburg: Wits University Press. ISBN 978-1-77614-057-2.
- Leckey, Robert. 2015. *Bills of Rights in the Common Law. Cambridge Studies in Constitutional Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9781139833912.
- Mamdani, Mahmood. 2002. "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)." *Diacritics* 32 (3): 33-59.
- Mamdani, Mahmood. 2012. *Define and Rule: Native as Political Identity*. Cambridge: Harvard University Press.
- Marx, Christopher. 2002. *Ubu and Ubuntu: On the Dialectics of Apartheid and Nation Building*. *Politikon*, 29 (1): 49-69.
- Meiring, Pieter. 2000. The Baruti versus the lawyers: the role of religion in the TRC process. In *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, edited by Charles Villa-Vicencio and Wilhelm Verwoerd. Cape Town: University of Cape Town Press.
- Mudimbe, Victor Y. 1988. *The invention of Africa: gnosis, philosophy and the foundation of knowledge*. Bloomington: Indiana University Press.

- Mureinik, Etienne. 1994. "A Bridge to Where? Introducing the Interim Bill of Rights." *South African Journal on Human Rights* 10(1): 31–48.
- Mwambene, Lea, and Kruuse, Helen. 2013. "Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa." *Acta Juridica* 1: 292-317.
- Myers, Jason. 2008. *Indirect Rule in South Africa: tradition, modernity, and the costuming of political power*. Rochester: University of Rochester Press.
- Okoth-Ogendo, Hastings. 2008. "The nature of land rights under indigenous law in Africa." *Land, power and custom: Controversies generated by South Africa's communal land rights act*: 95-108.
- Olivier, Larry, Curfs, Mary and Viljoen, Deon. 2016. "Fetal alcohol spectrum disorders: Prevalence rates in South Africa". *South African Medical Journal* 106(6): 103.
doi:10.7196/samj.2016.v106i6.11009.
- Øvernes, Siv. 2016. *Street Khoisan: on Belonging, Recognition and Survival*. First edition. Pretoria: UNISA Press.
- Pieterse, Marius. 2005. "What do we mean when we talk about transformative constitutionalism?" *SA Public Law* 20(1): 155-166.
- Persson, Torsten, Gerard Roland, and Tabellini, Guido. 1997. "Separation of powers and political accountability." *The Quarterly Journal of Economics* 112(4): 1163-1202.
- Phinney, Jean. S. 1989. "Stages of ethnic identity development in minority group adolescents". *The Journal of Early Adolescence*, 9(1–2): 34–49
- Sharma, Shridhar. 2014. *Self, Identity and Culture*. 10.1007/978-81-322-1587-5_10.
- Piromalli, Eleonora. 2020. Does Socialism Need Fraternity? On Axel Honneth's The Idea of Socialism. *European Journal of Political Theory* 19(3): 375-395.
- Plessis, Willemien & Scheepers, Theo. 2017. House of Traditional Leaders: Role, Problems and Future. *Potchefstroom Electronic Law Journal* 3(92).
- Robins, Steven. 2000. Land struggles and the politics and ethics of representing "Bushman" history and identity. *Journal of Cape History* 26(1): 56-75.
- Rugege, Sam. 2003. Traditional leadership and its future role in local governance. *Law, Democracy & Development* 7(2): 171-200.

- Rutherford, Blair. 2008. "Conditional belonging: farm workers and the cultural politics of recognition in Zimbabwe." *Development and change* 39(1): 73-99.
- Quintana-Murci, Louis et al. 2010. "Strong maternal Khoisan contribution to the South African coloured population: a case of gender-biased admixture". *The American Journal of Human Genetics*. 86(4): 611–620.
- Reddy, Peter. 2004. "Traditional Leadership and Local Governance in South Africa: Quo Vadis?" *Africanus* 34(2): 32-44.
- Sato, Chizuko. 2018. "Khoisan revivalism and land question in post-Apartheid South Africa." In *Land reform revisited: democracy, state making and agrarian transformation in post-apartheid South Africa*, edited by Femke Brandt and Grasian Mkodzongi, 199-220. Leiden: Brill.
- “Society and Politics.” Home Page | South African History Online, February 2, 1990.
<https://www.sahistory.org.za/#section6>.
- South Africa Demographic and Health Survey. 2016. Pretoria: National Department of Health.
- South Africa. 1951. *Black Authorities Act 68*.
 <<http://www.ruraldevelopment.gov.za/phocadownload/Acts/black%20authorities%20act%2068%20of%201951.pdf>>. [Accessed on: 22 May 2021]
- South Africa. 1996. *The Bill of Rights*. Government Gazette 17678.
- South Africa. 1999. *Truth and Reconciliation Commission of South Africa report*. Cape Town: The Commission.
- South Africa. 2016. *Traditional and Khoi-San Leadership Bill [B23-2015]: public hearings Day 2*. Parliamentary Monitoring Group. <https://pmg.org.za/committee-meeting/21974/>, accessed 12 January 2023
- South Africa. 2017. *Traditional Courts Bill*. Government Gazette 40487. Available at:
 <<https://www.justice.gov.za/legislation/bills/2017-TraditionalCourtsBill.pdf>>. [Accessed on: 22 May 2021]
- Scalia, Antonin. 1983. "The doctrine of standing as an essential element of the separation of powers." *Suffolk University Law Review* 17: 881.

- Suttner, Raymond. 2013. *Government and tripartite alliance 'no pitch' at Marikana memorial*. <https://raymondsuttner.com/2013/08/18/raymond-suttner-government-and-tripartite-alliance-no-pitch-at-marikana-memorial/>. Accessed 13 February 2021.
- Taylor, Charles and Gutmann, Amy. 1994. *Multiculturalism : Examining the Politics of Recognition*. Princeton N.J: Princeton University Press.
- Theunis, Roux. 2009. Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference? *Stellenbosch Law Review* 20(2): 258-285.
- Thipe, Thuto. 2013. Defining boundaries: Gender and property rights in South Africa's traditional courts bill. *Laws* 2(4): 483-511.
- Tlale, Mpho. 2020. Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute. *Potchefstroom Electronic Law Journal* 23(1): 1-32.
- United Nations. 2007. *United Nations Declaration on the Rights of Indigenous Peoples*.
- Van Wyk, Berte. 2016. Indigenous rights, indigenous epistemologies, and language:(Re) construction of modern Khoisan identities. *Knowledge Cultures* 4(4): 33-45.
- Verbuyst, Rafael. 2016. Claiming Cape Town: towards a symbolic interpretation of Khoisan activism and land claims. *Anthropology Southern Africa* 39(2): 83-96.
- Verbuyst, Rafaël. 2022. *Khoisan Consciousness : An Ethnography of Emic Histories and Indigenous Revivalism in Post-Apartheid Cape Town*. Leiden: Brill.
<https://doi.org/10.1163/9789004516618>.
- Viljoen, Russel. 1996. "Khoisan heritage and identity." *South African Historical Journal* 35(1): 140-145.
- Weeks, Mnisi. 2015. Customary succession and the development of customary law: The Bhe legacy. *Acta Juridica* 1: 215-255.
- Weeks, Mnisi. 2019. "The Violence of the Harmony Model. Common Narratives between Women and Lower-level Traditional Leaders" in *Traditional Leaders in a Democracy: Resources, Respect and Resistance*, edited by Beth Vale and Dineo Skosana, 182-223. Johannesburg: Wits University Press.

- Williams, Michael. 2010. *Chieftaincy, the State, and Democracy: Political Legitimacy in Post-Apartheid South Africa*. Bloomington: Indiana University Press.
- Wilson, Richard. 2000. Reconciliation and Revenge in Post-apartheid South Africa: Rethinking Legal Pluralism and Human Rights. *Current Anthropology* 41(1): 75-98.
- Zeugner-Roth, Katharina, Žabkar, Vesna, and Diamantopoulos, Adamantios. 2015. Consumer Ethnocentrism, National Identity, and Consumer Cosmopolitanism as Drivers of Consumer Behavior: A Social Identity Theory Perspective. *Journal of International Marketing* 23(2): 25–54.