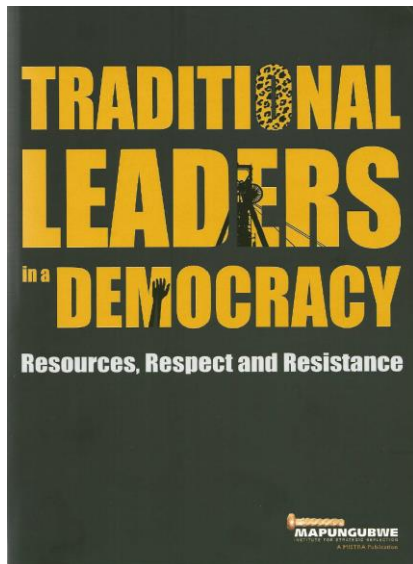


BRIEF CONCEPTUAL REFLECTIONS AND POLICY RECOMMENDATIONS ON TRADITIONAL LEADERSHIP IN SOUTH AFRICA

March 2021



*Taking forward recommendations from
the research publication, launched
February 2019, by the Mapungubwe
Institute for Strategic Reflections
(MISTRA)*

INTRODUCTION

In 2019, MISTRA published a book titled: *Traditional Leaders in a Democracy: Resources, respect, and resistance*.¹ The publication explored two types of governance structures that have come to define South Africa since the dawn of democracy in 1994 – the indigenous traditional and multi-party democratic systems. Traditional systems predominate in communal areas where AmaKhosi/DiKgosi and traditional councils are not only heavily involved in issues of land and its use, but also act as mediators of disputes, custodians of traditions and customs, and champions of local development.² The book demonstrate that in

some instances, traditional authorities have been regarded as wardens of natural resources.

Legislation such as the **Traditional Leadership Governance Framework Act, 2003** and the **Communal Land Rights Act, 2004** have, for many years, been used to elaborate the workings of traditional authorities. While the latter was declared unconstitutional by the Constitutional Court in 2010, the former was replaced by the **Traditional and Khoi-San Leadership Act in 2019**, the impact of which is still to be felt.

¹ MISTRA. 2019. *Traditional Leaders in a Democracy: Resources, respect and resistance*. Johannesburg: MISTRA.

² Mnwana, S. 2019. 'Chiefs, land and distributive struggles on the platinum belt, South Africa'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA:

Johannesburg, 128-52; Ngcapayi, F. 2019. 'Emerging rural struggles against unelected traditional authorities and the role of the courts: Lessons from rural villages of the Eastern Cape'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 262-96.

MOTIVATION FOR THIS INTERVENTION

At the launch of *Traditional Leaders in a Democracy: Resources, respect and resistance*, the issue was raised about the need to reflect, more explicitly, on the conceptual underpinning to South Africa's constitutional system about traditional leadership and how this can be further improved. Since 1994, there have been instances where the practice of the two parallel forms of governance have manifested contradictions. This has highlighted the need for an empirical and conceptual understanding of the role of traditional leadership in a multi-party democracy. Questions such as the following have emerged as part of these debates:

1. What is (and should be) the conceptual underpinning of traditional leadership in South Africa's constitutional democracy?
2. Can traditional leadership and multi-party democracy - as envisaged for the post-1994 dispensation, continue to co-exist?
3. Should traditional leaders, in their various manifestations, be vested with executive powers?
4. How can the jurisdictions between traditional authorities and local government leadership be determined and enforced?

Neither the Constitution of the Republic of South Africa, nor the Traditional Leadership and Governance Framework Act, 41 of 2003³ (TLGFA) refer to the concept of executive

powers for traditional leaders, and what those may entail. However, the roles and functions of traditional leaders, as explicated in Chapter 5(20:1) of the TLGFA, confer what can be considered as executive authority on traditional institutions. Chapter 5 of the Act says national or provincial governments may, through legislation or other measures, provide a role for traditional leaders in respect of, among others, arts and culture, land administration, agriculture, health, administration of justice, safety and security, economic development, disaster management and the management of natural resources. In terms of the MISTRA research⁴, giving traditional authorities powers to make decisions on these important issues means giving the institution the right to make executive decisions, at least at local levels.

To deeply understand the questions raised above, in March 2020, MISTRA developed a working paper, titled *Traditional Leadership in the Era of Multi-Party Democracy: A focus on South Africa*⁵, authored by Lungisile Ntsebeza, a scholar on traditional leadership and democracy. In December 2020, MISTRA hosted a webinar on the same subject. These activities were undertaken not only to gather more information from stakeholders, but also to identify issues that require broader societal discussion. Key arguments gathered through the working paper and the webinar are captured in the next section.

³ Republic of South Africa. 2003. Traditional Leadership Governance Framework Act 41 of 2003. https://www.gov.za/sites/default/files/gcis_document/201409/a41-03.pdf, accessed 20 January 2021.

⁴ MISTRA. 2019. *Traditional Leaders in a Democracy: Resources, respect and resistance*. Johannesburg: MISTRA

⁵ Ntsebeza, L. 2020. Traditional Leadership in the Era of Multi-Party Democracy: A focus on South Africa. MISTRA Working Paper. <https://mistra.org.za/wp-content/uploads/2020/12/Traditional-Authorities-and-executive-powers-Working-Paper-Ntsebeza-Final-ZM271020.pdf>, accessed 20 January 2020.

KEY ARGUMENTS

The working paper⁶ begins by recognising that the role of traditional authorities (of various ranks) in Africa in the era of multi-party democracy remains unresolved. Historically, the institution of traditional leadership has been comprised of members who are either hereditary or appointed. This gives rise to tension between a leadership based on the democratic principles of representative government, and another comprised of unelected leaders.

This issue came to the fore especially from the early 1990s, when multi-party democracy and decentralisation started to infuse much of African constitutional governance. In many African post-colonial jurisdictions, traditional authorities were seen as important actors who could not be entirely sidelined. Over time, in the context of nascent multi-party democratic systems, some political leaders surmised that winning the support of these traditional authorities would put political parties in a strong position to win the support of the 'subjects'.

At the dawn of South Africa's democracy, the country adopted a Constitution that, in its Bill of Rights, enshrines a governance system based on the will of its citizens. The same Constitution recognises the institution of traditional leadership. Even though the Constitution recognises this institution, it does not elaborate, except to accord it recognition, 'subject to the constitution', and further goes on to urge Parliament to pass relevant

legislation clarifying the role of traditional authorities in a democracy (Chapter 12, Sections 211 and 212). This role was then elaborated in the TLGFA, and recently in the Traditional and Khoi-San Leadership Act⁷, signed into law by the President in November 2019.

The key argument is that recognising an institution that is based on unelected leaders in a democracy, and giving such an institution executive powers over the use of land and other natural resources or the administration of justice, undermines the democratic project. In the process of exploration, the working paper highlights the complexities and intricacies associated with the role of traditional authorities in a multi-party democracy.

On the other hand, there is a very strong argument in defence of traditional authorities, advanced by groups such as the Congress of Traditional Leaders of South Africa (CONTRALESA) and some political parties. This argument, framed in pursuit of African modes of rule in which traditional leaders wield executive powers, says the negotiated constitutional settlement failed to take sufficient account of pre-colonial African ways of governance, and instead foisted on South Africa western models of liberal democracy that undermine in perpetuity the traditions, customs, cultures and identities of indigenous communities.⁸ That line of argument is complicated by the fact that, during the colonial period, traditional authorities variously played contradictory roles: some

⁶ Ntsebeza, 2020, op. cit..

⁷ Republic of South Africa. 2019. Traditional and Khoi-San Leadership Act, 3, 2019. https://www.gov.za/sites/default/files/gcis_document/201911/4286528-11act3of2019tradkhoisanleadership.pdf, accessed 20 January 2021.

⁸ Holomisa, P. 2019. 'In defence of traditional leadership'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 331-343; Nonkonyana, M. 2019. 'A long walk for traditional leadership in South Africa'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 344-355.

became an extended arm used by the colonisers to control local communities, while others took active part in the struggle against colonialism. In this context, traditional institutions enjoyed varying levels of legitimacy (or lack of it) among communities. Many traditional leaders became unpopular, a sentiment that still prevails in some sections of the country even to this day.⁹

Ntsebeza¹⁰ and Skosana¹¹ also focus on the relationship between the African National Congress (ANC) and traditional leaders from a historical perspective. While before 1994, the relationship was ambivalent, it has been described, post-1994, as symbiotic, co-dependent and encouraging a co-existence of democratic and traditional systems of governance. As in many parts of the African continent, these two institutions seek to draw political legitimacy from each other. This dispels views amongst scholars who analyse the relationship between the governing party and traditional leadership as one-sided, and only benefiting the latter.¹² The historical analysis of the relationship between the ANC and the institution of traditional leadership also helps to shine light on the agency inherent in traditional institutions of governance, which are not only able to renew themselves in response to changing times, but are also able to bargain for their continued, and probably growing, relevance in a post-apartheid dispensation.¹³ It can be argued, therefore, that despite not being a favourite mode of governance for many in rural South Africa, the continued existence of traditional leadership must be attributed to its ability to adapt and

renew the institution in changing circumstances.

The question that emerges is whether this symbiotic relationship with traditional leaders has compromised the ways in which the post-1994 government has responded, or should respond, to the dictates of democracy, which prioritise elected leadership. The next section outlines the legislative environment that the government has put in place in furtherance of Sections 211 and 212 of the Constitution.

LEGISLATIVE ENVIRONMENT AFTER 1994

It was only in 2003 and 2004 that a degree of clarity about the role of traditional authorities in South Africa's post-apartheid democracy emerged. In 2003, Parliament passed the Traditional Leadership and Governance Framework Act (Framework Act). The objective of this law was to establish and recognise 'traditional councils', and to define the parameters of, and principles defining, their operations. A traditional council, according to section 3(1), will be established in an area that has been recognised by the Premier of a province as a traditional community. The Act's preamble asserts that this would take place within the context of transforming 'the institution of traditional leadership ... in line with constitutional imperatives ... so that democratic governance and the values of an open and democratic society may be promoted'.¹⁴ The Act provides for a role for traditional leadership, not only in the local government sphere, but in all three spheres of government. It did not specify an exact role for traditional authorities in land administration.

⁹ Ntsebeza, 2020, op. cit.

¹⁰ Ntsebeza, *ibid.*

¹¹ Skosana, D. 2019. 'Traditional leadership and the African National Congress in South Africa: Reflections on a symbiotic relationship'. In: MISTRA. *Traditional Leaders in a Democracy: Resources,*

respect and resistance. MISTRA: Johannesburg, 50-74.

¹² Skosana, D. 2020. Traditional leadership and executive powers in the last decade. *Webinar Notes*, 10 December 2020.

¹³ Skosana, *ibid.*

¹⁴ Republic of South Africa, 2003, op. cit.

This was to be dealt with in the Communal Land Rights Act, which was promulgated the following year, in 2004.

The Communal Land Rights Act, 2004 (CLARA) recognised apartheid-era so-called 'Tribal Authorities' as the basis on which traditional councils would be established. In terms of this Act, traditional councils established under the Framework Act were empowered to have land allocation and administration powers and functions in the communal areas they controlled under apartheid.¹⁵ Thus, Section 21(2) of the Communal Land Rights Bill reads: 'If a community has a recognised traditional council, the powers and duties of the land administration committee may be exercised and performed by such council'.¹⁶ This gave enormous powers to a structure with a majority of unelected members.¹⁷

In the past 10 years, we have witnessed leanings towards the assertion of executive powers for traditional leaders. This has been accompanied by legal battles by civil society on behalf of communities to challenge the impact of laws such as CLARA on rural people. A massive legal battle was won in 2010, when the CLARA, which gave traditional leaders control over communal land occupation, use and administration, was invalidated by the Constitutional Court. However, this was subsequently threatened when the Department of Rural Development and Land Reform (DRDLR) introduced the Communal

Land Tenure Policy (CLTP) in 2013.¹⁸ The CLTP proposed to 'resolve' the problem of insecurity of land tenure and unaccountable land management structures by transferring land titles to traditional councils. According to the CLTP, 'the land shall be administered by traditional councils in areas that observe customary law, or communal property institutions outside these'.¹⁹

In order to address the issues of patriarchy and of the popular will in these councils, the regulations attached to the TLGFA 'stipulated that women should hold at least 30 per cent of the seats on the council, and that 40 per cent of representatives on the council should be elected rather than appointed'.²⁰

Recently, the Traditional and Khoi-San Leadership Act (TKLA), 3 of 2019 was passed, giving, above all, traditional councils permission to enter into agreements or partnerships with municipalities, government departments and, most importantly, 'any other person, body or institution'. These laws have given traditional councils administrative, controlling, and decision-making powers, more especially at the local level.²¹ At the time MISTRA's research was conducted, the TKLA was relatively new and it was too early to have a solid view of its impact. However, early criticism of the Act is that it will rob millions of rural people, especially women, of their rights by granting traditional leaders the green light to sign deals with investment companies

¹⁵ Ntsebeza, 2020, op cit.

¹⁶ Republic of South Africa. 2004. Communal Land Rights Act, 11, 2004. https://www.gov.za/sites/default/files/gcis_document/201409/a11-041.pdf, accessed 22 January 2021.

¹⁷ Ntsebeza, 2020, op. cit.

¹⁸ Department of Rural Development and Land Reform. 2013. Communal Land Tenure Policy (CLTP). <https://www.customcontested.co.za/wp-content/uploads/2013/11/06-AUG-2013->

[Communal-Land-Tenure-Policy-v2.pdf](#), accessed 23 January 2020.

¹⁹ Department of Rural Development and Land Reform, ibid.

²⁰ Buthelezi, M and Vale B. 2019. 'Collisions, collusions and coalescences: New takes on traditional leadership in democratic South Africa – an introduction'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 12-13.

²¹ Ntsebeza, 2020, op. cit.

without the consent of those whose land rights are directly affected.²² It should be expected that another round of litigation will follow.

AN INTERNATIONAL PERSPECTIVE ON TRADITIONAL LEADERSHIP

The challenge of finding the appropriate balance between traditional leadership and a democratic dispensation has concerned the political leadership in many parts of the African continent and is not unique to South Africa. Similar studies have been done for countries such as Ghana, Mozambique, Uganda, Zimbabwe and Mozambique.²³ At a conceptual level, this is a matter that finds expression across the world with systems ranging from 'unadulterated republicanism' to 'absolute monarchies'.

In terms of formal allotment of powers, most countries with monarchies do have the powers of the traditional leaders defined in a Constitution, thus a reference to a constitutional monarchy. These powers can range from ceremonial to absolute, with grey areas in-between. At a country level, these can be classified as follows:

- **Ceremonial monarchy:** titular head of state seen as a symbol of unity, in some instances with ceremonial powers of symbolic royal assent to legislation as well as formally constituting and dissolving elected parliament and affirming executive appointments. Such leaders enjoy the right to be consulted and have the responsibility to advise, encourage and warn. Examples

in this regard are Lesotho, United Kingdom (UK), Denmark and Malaysia.

- **Executive monarchy:** as head of state with political powers to determine policy and its execution as defined in the Constitution. This would include, for instance, control over the armed forces and the judiciary as well as matters pertaining to religion and foreign policy, and the authority to appoint and dismiss elected officials. In many of these instances, there are elected governments over which the monarch exercises leadership. Examples in this regard, are Morocco, Bahrain and Thailand.
- **Absolute monarchy:** with ultimate authority over, and powers to decide on, the three arms of government i.e. the legislature, the executive, and the judiciary. Examples in this regard include Eswatini. In such instances, forms of electoral engagement are not democratic.

The examples cited above apply mostly at the national level, and they manifest in countries largely with homogenous populations or communities that accept or are subjected to the authority of the monarchy. In all these instances, the arrangements have emerged after long histories of contestation, including wars of nation-formation, the quest for democracy, and a search for applicable balances. The prevailing systems, even today, are subject to debate and conflict at various levels of intensity.

²² Pikoli, Z. 2019. Traditional and Khoi-San Leadership Act 'brings back apartheid Bantustans', say activists. <https://www.dailymaverick.co.za/article/2019-12-08-traditional-and-khoi-san-leadership-act-brings-back-apartheid-bantustans-say-activists/>, accessed 21 January 2021.

²³ Ubink, J. 2009. *Traditional authorities in Africa: Resurgence, in an era of democratisation*. Leiden

University Press, Leiden; Crook, R. 2005. The role of traditional institutions in political change and development. Ghana *Centre for Democratic Development*, CCD/ODI Policy Brief No. 4.; Makhamadze, T., Grand, N. and Tavuyanago, B. 2009. 'The Role of Traditional Leaders in Fostering Democracy, Justice and Human Rights in Zimbabwe'. *The African Anthropologist*, 16, (1/2), 33-47.

TRADITIONAL LEADERSHIP IN SOUTH AFRICA

Colonialism led to the emergence of the South African nation-state which, as a polity, can today be defined, in terms of the constitution, as democratic republicanism. This is the overarching conceptual underpinning to the South African political system.

South African society is made up of diverse communities many of them largely spread over the length and breadth of the country. These are made up of various nationalities and languages (both migrant and indigenous), with some communities concentrated in specific geographic locations. As such, the issue of traditional leadership applies in specific instances defined by geography (communal areas) and cultural affiliations associated with indigenous nationalities.

As explained above, the Constitution recognises the institution of traditional leadership in broad terms and, over the years, attempts have been made to define its role in a manner that does not subtract from the generic rights enshrined in the Constitution. This applies in relevant local areas and districts; and, in the case of one province, KwaZulu-Natal, there is a sense of provincial application, though this is not only contested,

but also finds manifestation mainly in the rural areas.

The Constitution acknowledges the institution of traditional leadership in its various manifestations and informs the establishment of Houses of Traditional Leaders in some provinces and at national level. The powers of traditional leaders are defined in legislation and range from cultural and traditional issues to certain judicial functions and management of land and resources. To ensure consistency with basic human rights and administrative justice, various pieces of legislation provide for traditional councils that are more or less legitimately constituted, with issues such as gender representation taken into account. However, it is argued that many of these provisions are observed mostly in the breach.²⁴ For example, in relation to matters such as traditional courts, provisions for voluntary affiliation, as well as for individuals to opt-out of customary court processes, which were included in the earlier versions of the Bill,²⁵ were narrowed in the successive version. This, in part, has been the basis of present contestations against the Bill – that it infringes on people's rights of choice and affiliation.²⁶ Furthermore, the contestation has also been that the Bill will enable the concentration of power in one individual, the traditional leader.²⁷ However, it is important to note that

²⁴ Weeks, S. M. 2019. 'The violence of the harmony model: Common narratives between women and lower-level traditional leaders'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 182-223; Motaung, T. M. 2019. 'Chieftaincy succession disputes among the AmaNdebele-a-Moletlane in Hammanskraal'. In: MISTRA. *Traditional Leaders in a Democracy: Resources, respect and resistance*. MISTRA: Johannesburg, 1962 to 1994. 224-261

²⁵ Republic of South Africa. 2017. Traditional Courts Bill.

<https://www.justice.gov.za/legislation/bills/2017-TraditionalCourtsBill.pdf>, accessed 14 March 2021.

²⁶ Pikoli, Z. 3 December 2020. Activists implore President Ramaphosa not to sign the controversial Traditional Courts Bill into law. *Daily Maverick*. <https://www.dailymaverick.co.za/article/2020-12-03-activists-implore-president-ramaphosa-not-to-sign-controversial-traditional-courts-bill-into-law/>, accessed 14 March 2020.

²⁷ Van Dalsen, A. 19 April 2019. 'The Traditional Courts Bill will enable the concentration of power in one individual – a traditional leader'. *Daily Maverick*.

<https://www.dailymaverick.co.za/article/2019-04-09-the-traditional-courts-bill-will-enable-concentration-of-power-in-one-individual-a-traditional->

the Bill still recognises the supremacy of the judicial systems of the democratic state.

At provincial and national levels, traditional leaders' powers can be characterised as a minimalist form of ceremonial monarchies with the right to be consulted, to advise, to encourage and to warn. This takes place through the Houses of Traditional Leaders and informal arrangements of consultation. As indicated earlier, most traditional leaders have called for more powers in this regard.

The complication arises more intensely at a local level with wall-to-wall municipalities based on democratic principles. According to legislation referred to earlier, in the communal areas, traditional leaders are accorded powers that include elements akin to ceremonial, executive, and absolute monarchies.

This then is the nub of the contestation which requires resolution. The country needs to resolve the conceptual question: how should traditional leaders relate to local government (municipalities and districts), and how should the rights in the Constitution find full expression in the communal areas, while at the same time allowing for some form of traditional 'governance'? In trying to resolve this quandary, further questions arise:

- Should traditional authorities be vested with the kind of powers envisaged in the TKLA and the Traditional Courts Bill? What about the current practices of land administration and arrangements that traditional leaders enter into with commercial entities such as mining companies? Should these powers be

divested from them, so they operate merely as ceremonial figureheads, should the current status be retained, or should more powers be allocated to traditional leaders?

- Which powers and functions currently held would need to be transferred, and from which authorities? Do present arrangements not already do this including in extra-legal ways?²⁸
- If such open vesting with greater levels of authority were to be seriously contemplated, where would it be sourced in history – in colonial and apartheid law and politics or pre-colonial political systems – and how should these square up with the indivisible rights enshrined in the Constitution?²⁹
- What kind of citizen responses might a move to vest more authority in traditional leadership elicit? Inversely, if existing powers were to be divested from traditional authorities or if the status quo is retained, what response would this elicit among traditional leaders and the sections of communities that pay allegiance to them?

RECOMMENDATIONS

The recommendations outlined below proceed from the understanding that the institution of traditional leadership cannot be wished away. At the same time, culture, tradition and history cannot be used to negate rights contained in the Constitution; nor can these rights be

leader/#:~:text=The%20Traditional%20Courts%20Bill%20will%20enable%20concentration%20of,Africa..%20Photo%20by%20Gallo%20Images%20/%20Ziyaad%20Douglas, 14 March 2021.

²⁸ Buthelezi, M. 2020. Practical policy proposals on traditional leadership and executive powers. *Webinar Notes*. 10 December 2020.

²⁹ Buthelezi, 2020, op. cit.

treated as divisible based on an accident of birth in terms of geography or nationality. What is required is a set of principles (and clear articulation of their application) in a manner that paves the way for an even better set of political and institutional arrangements for the harmonious co-existence of multi-party democracy and traditional leadership. Emphasis in these recommendations is placed on the local government sphere, as provincial and national arrangements seem to have settled at some level of equilibrium, except for issues around the intensity of consultations and the weight accorded to traditional leaders' contributions to decision-making.

The recommendations proceed from the principle that traditional authorities need to accept that in South Africa's constitutional democracy, ultimate authority or sovereignty lies with the democratic state and its structures as defined in the supreme law of the country. This means that, as with national and provincial spheres, executive authority at the local level formally lies with elected municipal councils across the country. The same applies to matters pertaining to the management of resources including land and mineral endowments as well as commercial arrangements that are entered into in these areas. Various pieces of legislation seem to fudge this issue, and it is often left to the courts to resolve the myriad of conflicts that arise in practice.

Inversely, critics of traditional authorities need to recognise that traditional leadership has, variously, some level of popular legitimacy. The state has limited reach in many rural areas – its extent is essentially through the school, the clinic, a councillor, and maybe a police station or post office, not all of which are clear about how they should relate to traditional

authorities. Besides, these amenities and elected authorities may not be easily accessible. Hence, many communities in the communal areas turn to traditional authorities for certain functions as they have always done in living memory. A future policy cannot but acknowledge this state of affairs.

1. ***The TKLA and other relevant legislation need to be amended (and appropriate regulations developed) to address the vagueness in the current statutes. In this regard, in addition to matters of culture and tradition, sufficient emphasis needs to be placed on the developmental role that traditional leaders can and should play.*** For instance, currently, the TKLA simply says: 'A traditional or Khoi-San leader performs the functions provided for (a) in terms of customary law and customs of the traditional or Khoi-San community concerned and (b) in terms of any applicable national or provincial legislation.'³⁰ This statement fails to clarify what their roles entail. There must be supporting and guiding regulations that spell out what their exact roles are, and this will help traditional leaders and their critics (such as those in civil society) to know the parameters of their functions.
2. ***Some level of accommodation is needed between local municipalities and traditional authorities – i.e., a modification of institutions to suit the South African context to ensure local social cohesion and also lay to rest the criticism that South Africa's democracy at present eschews traditional African modes of***

³⁰ Republic of South Africa, 2019, op. cit.

leadership. The Constitution has given the country a good start by subjecting traditional authorities to the Constitution and the state itself. Besides, regulations need to be crafted, at the local level, where people can decide for themselves if they want to be subjected to any form of traditional authority, and what the extent of that authority would be.

3. ***Democracy in Traditional Councils as defined in legislation³¹ needs to be strengthened and closely monitored in its actual implementation.*** One possible way of achieving this would be to insert local government constituency representatives into these Councils. The same should apply to at least a Ward Committee leader. Depending on the new electoral system currently being developed, a constituency representative in provincial and/or national legislatures, where applicable, can also be brought in. Inversely, a formal role should be found for traditional leaders in relevant municipalities (including districts). This could combine ceremonial functions (the right to be consulted and the responsibility to advise, to encourage, and to warn), and limited forms of executive powers within their jurisdictions, focussing mainly on developmental programmes and subject, in each instance, to confirmation by the elected local council.

4. ***Customary law differs from place to place and may also change over time.³² Thus, as argued by Justice Plasket in a 2015 Bisho High Court case,³³ a framework that recognises this difference, and does not attempt to impose uniform institutional arrangements everywhere across the country is needed.*** Such a proposal leaves open the possibility of striking sensitive balances in terms of powers of traditional leaders subject to the will of the majority of residents in that area. Such experiments would need to be preceded and underpinned by strong research that identifies what modifications to regulations would need to be devised to make the arrangements practical, legitimate, and sustainable. It should also be noted, however, that, any move in the direction of greater powers for traditional leaders in one localised setting would simultaneously open the door to a clamour for the same powers to be extended to other areas. In other words, while flexibility may address the variety of histories and lived experiences, it could also become a double-edged sword.³⁴

5. ***In any polity – particularly in a constitutional democracy with a Bill of Rights – as a matter of principle, such rights are coupled with responsibilities, and powers go along with accountability.*** Therefore, ***firstly,***

³¹ Republic of South Africa. 2019. Traditional and Khoi-San Leadership Act, 3, 2019. https://www.gov.za/sites/default/files/gcis_document/201911/4286528-11act3of2019tradkhoisanleadership.pdf, accessed 20 January 2021.

³² Ntsebeza, 2020, op cit.

³³ Bisho High Court Judgement. 2015. Premier of the Eastern Cape et al. versus Penrose Ntamo et al. Case no. 169/14. Date heard: 7 August 2015; Date delivered: 18 August 2015 (Reportable). Eastern Cape Local Division, Bisho. Full Bench.

³⁴ Buthelezi, 2020, op. cit.

the hierarchy of accountability mechanisms - from Traditional Councils to municipal, provincial and national government (both the executive and the legislatures), and the Constitutional Court as the ultimate arbiter on constitutional matters - would have to come into play and, where applicable, be sufficiently empowered. Importantly, ways should be found to make it easier, financially and otherwise, for individuals and communities to exercise their legal rights across the hierarchy. **Secondly**, in instances where individual traditional leaders (and/or their family members) choose to become active participants in business, politics, the professions, and other areas of social authority, appropriate mechanisms of good governance such as declaration of interests and recusal will need to apply. In this regard, account also needs to be taken of the fact that the state already covers at least part of the income needs of traditional leaders.

6. ***It should also be recognised that people who challenge traditional leadership are calling for accountability on the management of resources - including mining royalties that go into accounts controlled by traditional authorities, money collected by traditional authorities as so-called tribal levies, the rents collected by the Ingonyama Trust and others.***³⁵ The draft of the bill on Traditional and Khoi-San Leadership went a long way towards creating the ability for people to opt-in when they

choose to subject themselves to the authority of a traditional leader. However, this provision was removed from the final bill that was forwarded to the President. What is clear, though, is that contestation on the content of this Act is bound to continue, including through litigation, and the challenging of its peer, the Traditional Courts Bill. As such, continuing, proactive engagement on these issues is critical.

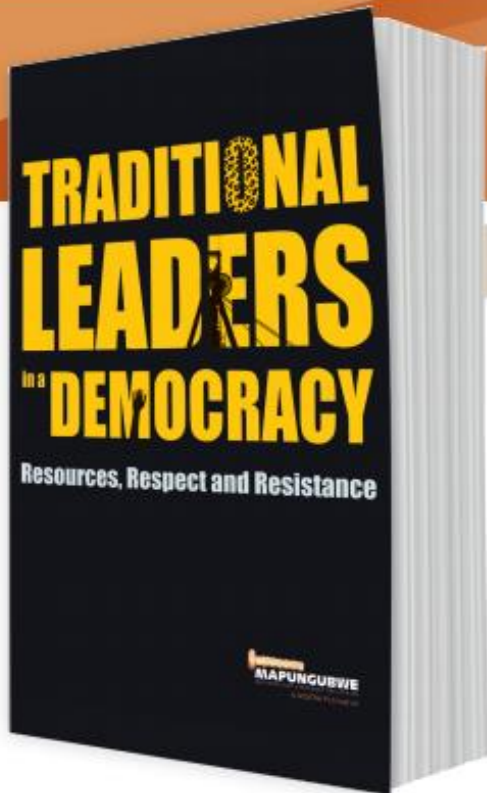
PRACTICAL WAY FORWARD

The matters canvassed in this document straddle areas ranging from constitutional matters to policy and legislation, institutional mechanisms as well as individual rights and responsibilities. They require deeper reflection – dispassionately and patiently undertaken – to help steer South Africa towards the appropriate balances and harmony between the overarching constitutional framework and the institution of traditional leadership.

To take these matters forward, an inclusive dialogue – led by national Parliament, in partnership with the House of Traditional Leaders, and advised by an appropriately constituted Panel of Experts – should be initiated to provide a platform for an exchange of views among policy-makers, traditional leaders, communities and researchers.

Consideration can be given to the Department of Co-operative Governance and Traditional Affairs (COGTA) providing administrative and secretarial services to such an exercise.

³⁵ Buthelezi, *ibid*.



The published book containing the research report entitled *Traditional Leaders in a Democracy* can be purchased from:
sales@jacana.co.za | Tel: +27 011 628 3200

To contact MISTRA

Tel: +27 11 518 0260 | **Fax:** +27 11 518 0266

Email: web@mistra.org.za | **Web:** www.mistra.org.za

Address: Cypress Place North,
Woodmead Business Park,
142 Western Service Road,
Woodmead, Johannesburg, 2191

