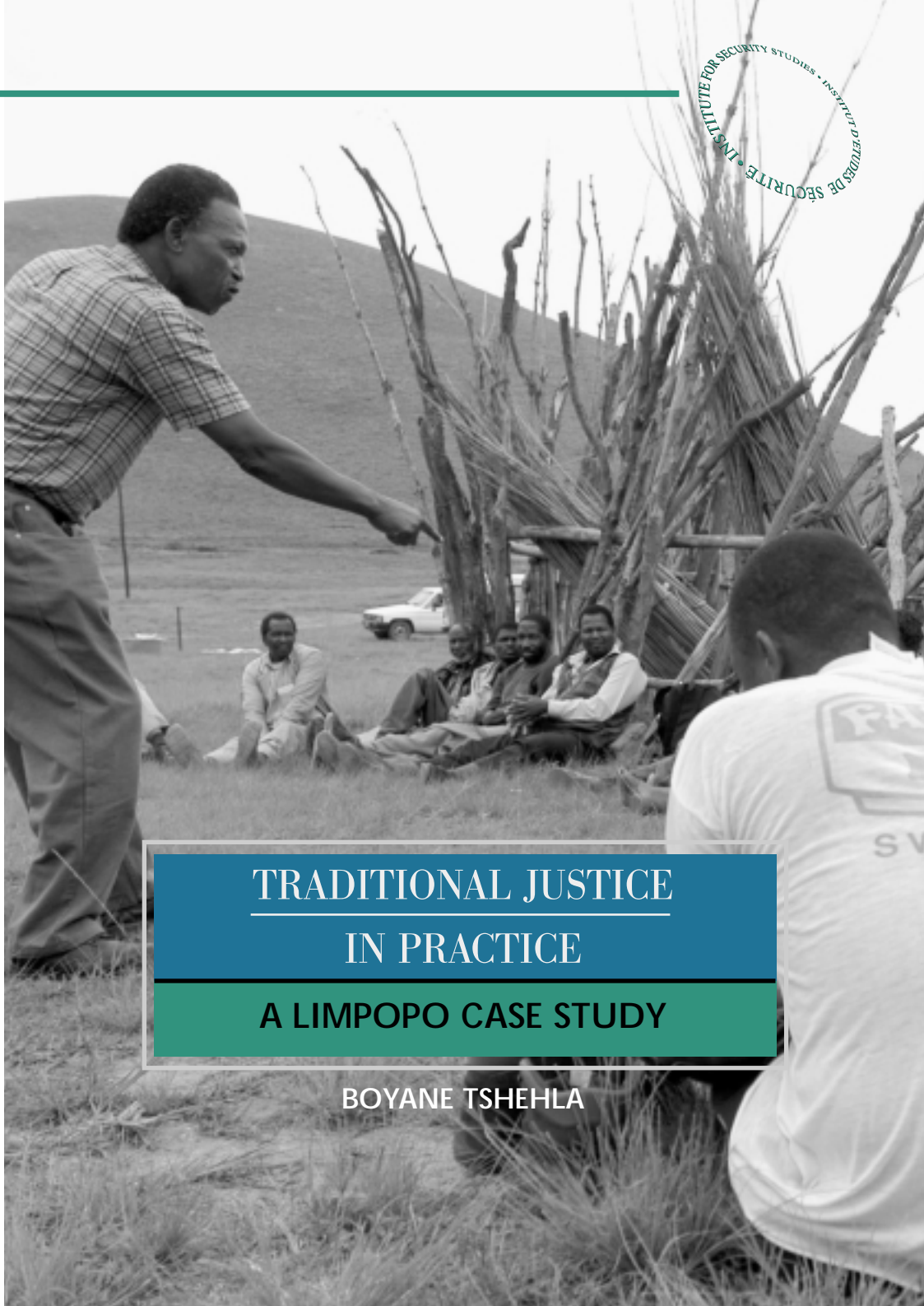




Traditional leadership is an entrenched attribute of governance in African countries. Even with its entrenched status, however, the system of traditional leadership presents a challenge to many countries as they try to create a harmonious relationship between this system and the post-colonial dispensations. In South Africa – although legislation exists to govern the incorporation of traditional leadership into the post-1994 democratic dispensation – there remains an intense debate on the issue. As this monograph argues, traditional leaders contribute to several spheres of governance, but their role and potential in crime prevention and the administration of justice is more pronounced. The key question that faces us today must not be whether traditional leaders should perform such functions, but how they can participate in the delivery of local safety.

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**TRADITIONAL JUSTICE
IN PRACTICE
A LIMPOPO CASE STUDY**

BOYANE TSHEHLA

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LIST OF ACRONYMS

ANC	African National Congress
CONTRALESA	Congress of Traditional Leaders of South Africa
CBO	Community Based Organisation
CPF	Community Police Forum
NGO	Non-government Organisation
NCPS	National Crime Prevention Strategy
SAPS	South African Police Service

FOREWORD

I regard writing a foreword to this monograph as a privilege. Limpopo has a large rural population base and is steeped in traditional customs and rituals. Given this scenario, it is not surprising that traditional leaders have strong links with communities. Moreover, the current democratic dispensation recognises the institution of traditional leadership. The Traditional Leadership and Governance Framework Act 41 of 2003 even obliges the state to protect the institution of traditional leadership.

Despite this recognition and the strong relationship that traditional leaders have with traditional communities, there has been limited progress in practically accommodating the institution in the current structures of governance. This is important given that some traditional practices may affront the constitutional ethos espoused by the current order. There is a need, therefore, to line practices of traditional leaders with the human rights culture, the democratic ethos, and constitutional rights and privileges that promote gender equality and respect for human rights.

On the one hand, the study demonstrates some glaring weaknesses in our justice system. On the other, it exposes undemocratic practices inherent in the institution of traditional leadership. These undemocratic practices have already been recognised by the legislature in the Act quoted above. The Act acknowledges the potential role that traditional leaders can play in the current dispensation. While this Act sets a framework, the South African Law Reform Commission is busy investigating ways in which their role in dispensing justice may be improved. This resonates with one of the core findings in this research, namely: the need to facilitate the democratisation of the institution of traditional leadership and to bring it in line with the Constitution.

There is still a long road ahead, but the first steps have been taken and this will gain momentum as more and more people realise the importance of the traditional leaders in promoting the institutions and precepts of equity, justice and fairness in all matters under their adjudication. This study will contribute

to the current debate on the role of traditional leaders in the administration of justice.

Mention must be made of the continued collaboration between the ISS and the Research Unit of the Department. This team effort contributes to the strengthening of the unit and facilitates the capacity of research to be undertaken in the province.



Mrs Dikeledi Magadzi
MEC Safety, Security & Liaison in Limpopo

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EXECUTIVE SUMMARY

Traditional leadership is an integral part of the current democratic dispensation and consequently an institution that cannot be ignored. In South Africa, and Africa as a whole, it is entrenched as a form of governance.

Over time traditional leadership in South Africa has been influenced by interventions and, at times, outright interference, by different governments. Notable here is the influence of the apartheid government that created the current system of traditional leadership by introducing tribal councils and regional councils. The tribal councils are now called traditional councils and these councils constitute the governance of traditional communities, with functions ranging from the distribution of land and the development of traditional communities, to the administration of justice. While all these functions are important, this monograph focuses on the administration of justice and crime prevention only.

The monograph introduces the institution of traditional leadership. It demonstrates how this system has been entrenched in the rural areas and raises related questions (chapter two). It deals with the policy and legislative framework that applies to traditional leadership. It shows that traditional leadership as an institution has been tremendously influenced by both colonisation and apartheid systems of government. This is evident in that one of the most important pieces of legislation applicable to traditional leadership is the Black Administration Act (38 of 1927). More significant, however, are developments that took place in the post-1994 era. After a worryingly long period of time, an Act was passed in 2003 (Act 41 of 2003) to deal with the institution of traditional leadership comprehensively.

The monograph then proceeds to present current day experiences as observed in Mokopane, a traditional community in Limpopo province (chapter 3). Two cases – about domestic disputes – are dealt with. These cases are used to demonstrate how an ordinary traditional court deals with cases and disputes. This paves the way for an interrogation of some of the problems that pertain

to a traditional court. The issue of gender (and gender relations), as well as that of the procedure followed in the traditional courts, are dealt with.

Crime prevention is one of the areas in which traditional leaders play a significant role – at least so it is claimed. The role of traditional leaders in crime prevention is examined and interrogated: do traditional leaders indeed play such a role and, if so, are they being effectively tapped into as a resource (chapter 4)?

Having confirmed, on the basis of the evidence presented, that traditional leaders do indeed play a significant role in crime prevention, the monograph goes on to assess feasible ways in which traditional leaders can participate in improving their communities' access to justice (chapter 5).

The monograph ends by concluding that traditional leadership is entrenched in the rural areas and has a crucial role to play. However, there are problems that need to be addressed in order to ensure that justice prevails in these traditional communities.

CHAPTER 1 INTRODUCTION

'They (chiefs and headmen) constitute the local power, whether one likes it or not. The increasing uncertainties about their future can have negative spin-offs'.¹

'..... government acknowledges the role of traditional leaders in the governance processes of our country. In order to entrench this role, the Traditional Leadership and Governance Framework Act has been passed. The intention of the Act is to transform traditional leadership to be in line with the Constitution of the Republic of South Africa. In this Province, we will continue together with traditional leaders to seek measures to give meaning to the implementation of this Act'.²

Some key definitions according to the 2003 Act (hereafter the 2003 Act):

The 2003 Act defines traditional leadership as "the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practiced by traditional communities".

Similarly, a traditional leader is defined as "...any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Act" (i.e. the 2003 Act).

Traditional community is defined as a "...traditional community recognised as such in terms of section 2 of the Act". Section 2 of the 2003 Act states: A community may be recognised as a traditional community if it:

- a) is subject to a system of traditional leadership in terms of that community's customs; and
- b) observes a system of customary law.

The same section – in subsection 2 – empowers the premier to recognise a community as a traditional community.

In South Africa, as in many other African countries, the system of traditional leadership is firmly entrenched. Historically, traditional leaders served as governors of their communities with authority over all aspects of life, ranging from social welfare to judicial functions. Many countries in Africa retain a system of traditional leadership and many have gone a long way in incorporating traditional leaders into democratic forms of government.³ Nonetheless it is acknowledged that traditional leadership presents a challenge to our constitutional democracy as we have come to know it today. However, creating a home for traditional leadership within the modern day democratic dispensation remains one of the most difficult areas of policy for African states.⁴

Like many other liberated African countries, South Africa had to consider how it was going to accommodate the system of traditional leadership in the newly acquired democratic dispensation. This was not an easy question to deal with, especially for a new government that had to address a myriad of other challenges related to the re-engineering and overhaul of the whole state machinery. Moreover, many regarded the institution of traditional leadership as having been so influenced by colonial and/or apartheid policies that it was in many respects more a reflection of those policies than of the traditional and/or cultural practices of South Africans. This view is based on the well-documented process of colonisation and apartheid governance, during which different administrations forced their political systems and methods on to traditional African communities. Even the African National Congress (ANC) is said to be undecided on the issue of traditional leaders. In words attributed to Albie Sachs, “the discussion on traditional leaders cuts the ANC in half”.⁵

While it may be a moot point why traditional leadership constituted a challenge to the architects of the new dispensation, it is common knowledge that traditional leadership has remained at the periphery of transformation in the country. Even the South African Constitution, which devotes one of its shortest chapters to traditional leaders,⁶ does not sufficiently outline the constitutional status, powers and duties of these traditional leaders. Of significance in this chapter, among others, is that it provides for the establishment of Houses of Traditional Leaders.⁷ Of the nine provinces, six have Houses of Traditional Leaders.⁸ There is one National House of Traditional Leaders in which the provincial Houses of Traditional Leaders are represented.⁹ The Houses of Traditional Leaders have been given an important role in the post-1994 democratic dispensation as the effective custodians of African tradition and culture. They act in an advisory capacity

(both nationally and provincially) on issues that affect traditional communities, traditional leadership and customary law.¹⁰

This monograph focuses on one province, Limpopo (a province with a significant number of traditional leaders), in interrogating the role that traditional leaders *ought to play, are currently playing and should play in future in the administration of justice*¹¹ and crime prevention in particular. Limpopo is 89% rural and is one of the poorest provinces in the country.¹² One hundred and ninety-two traditional authorities in the province are headed by chiefs, and only one is headed by a paramount chief.¹³ There are also 1,742 headmen that serve under the chiefs.¹⁴ Each traditional authority has support staff such as a secretary, a clerk and cleaners on the payroll of the state.

Crime prevention and the administration of justice – two aspects that are not seen as separate by many a traditional leader¹⁵ – are some of the core responsibilities of the institution of traditional leadership. Traditional authorities devote a substantial amount of time to handling of cases and disputes. For instance, three traditional authorities¹⁶ indicated that they devote at least three days a week to handling of cases and the resolution of disputes and conflicts in their communities. This participation of traditional leaders in the administration of justice – like the other functions they perform – constitutes a significant contribution to the governance of the country.

For this reason it is crucial to examine a number of issues inherent to the performance of a function of this nature. Among these are:

- The relevance and position of traditional leadership in the post-1994 democratic dispensation;¹⁷
- The appropriateness or otherwise of traditional courts to deal with cases;
- The type of law applied in the traditional courts and procedure followed, especially in relation to the Constitution, given that all laws are subject to the Constitution;
- The administration of justice in traditional courts that do not have clear lines of accountability;¹⁸
- The lack of uniformity of constitution and/or practice among the various traditional courts;
- The lack of training and awareness among traditional leaders regarding human rights, as entrenched in the country's Bill of Rights; and
- The possible policy direction, given that in the short term the state justice system will not be able to take over the cases dealt with in the traditional courts.

Methodology

This research focused on three traditional communities in Limpopo Province, namely Mokopane, Moletji and Ramokgopa. One focus group interview was conducted with the traditional council of Ramokgopa, after which no further research was possible due to a dispute between the traditional leader and the traditional council. The research took the form of participant observation, one-on-one interviews and focus group interviews. Participant observation entailed researchers attending court while cases were being tried in Mokopane. One-on-one interviews and focus group interviews were also conducted with four senior traditional leaders (including the chairman and vice-chairman of the provincial House of Traditional Leaders), members of the judiciary (2), police officers (10), traditional councils (2), and headmen or matona (2). Members of the Limpopo government were also interviewed; three from Local Government and Housing, two from the research unit of the Department of Safety, Security and Liaison and one from the regional office of the Department of Justice and Constitutional Development (DOJCD). This research also benefited from a conference on 'Traditional Leaders and the Administration of Justice' held in Durban on 6 and 7 October 2004, where the researcher observed public deliberations and held discussions with different traditional leaders and local councillors.

CHAPTER 2 POLICY AND LEGISLATIVE FRAMEWORK GOVERNING TRADITIONAL LEADERS IN SOUTH AFRICA

Traditional leaders have been central to the lives of African people for centuries. However, with the advent of colonialism, traditional systems and the administration of justice in particular, were significantly influenced by Western systems of government. Customary law as we know it today, therefore, is a hybrid of African practices and aspects of the Western system of law. Moreover, the different South African provinces, independent states and homelands had different forms of customary law,¹⁹ mainly as dictated by their respective colonial governments' approach to African affairs. Transvaal, of which Limpopo Province (then known as Northern Transvaal) was part, tended to acknowledge and recognise customary law, as did the then Natal. The Orange Free State and the Cape Province took a very different approach, as abundantly evident in the following damning observation by Brooks:

Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed with one or two exceptions, to recognise Native law at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the law courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape province has similarly withheld all recognition of Native Law.²⁰

It seems that the recognition of customary law by the Transvaal was influenced by British intervention. As Van Niekerk observed:

The Transvaal was annexed by Britain in 1877. One of the reasons for the annexation was the failure of the Republic's Native Policy. Shepstone's son who became Secretary of Native Affairs of the territory, was of the opinion that it was unjust to subject the black population to a law that was quite foreign to them. During the British rule, which ended in 1881, most of the old legislation was abolished and the position of indigenous law regulated by Ordinance 11 of 1881.²¹

Notwithstanding its recognition of customary law, P Stubbs criticised Transvaal for its selectivity in such recognition as follows:

In the former Transvaal, while the government was prepared to apply laws and customs of African population, it deemed polygamy and lobolo 'uncivilised'. As a result, the courts 'bastardised almost the entire Native population...deprived practically every Native father of guardianship or other rights to his children (and)...destroyed any equitable claim in property'.²²

The question and interpretation of equality before the law for all citizens remains with us even today. However, legislative progress made in the post-1994 period indicates a realisation that equality before the law does not necessarily mean that state courts are the only forums to mete out justice, nor does it mean that the official law applied by state courts is the only law. As Schärf asserts:

It would be naïve to believe that access to justice means access to the courts only, state courts. That idea was already dispelled at the Third Legal Forum convened by the Ministry of Justice in Durban in 1995.²³

It could therefore be said that legal pluralism forms part of the South African legal system.²⁴ This approach is evident in the work of the South African Law Reform Commission which seeks to preserve forms of traditional justice and allow them to operate within the post-1994 democratic dispensation.²⁵ To contextualise the customary law applied by customary courts (traditional courts), a short sketch of the development of the legal framework (both legal precedent and legislative intervention) delineating the laws applicable to the researched traditional authority is apposite.

Year	Legislation	Purpose/Results
1878	Natal Code of Zulu Law ²⁶	To eliminate uncertainties regarding customary law.
1881	Ordinance 11 of 1881	Recognised African civil law.
1885	Ordinance in Law 4 of 1885	Recognised African civil law subject to the repugnancy clause.
	Natal Native High Court & Transkei Native Appeal Court	Handed down written judgments that served as precedents on customary law.

Year	Legislation	Purpose/Results
1927	Black Administration Act	Created separate court system for black South Africans.
1967	Rule 6(1) of Chiefs and Headmen's Civil Courts Rules, No R2082 of 1967 Government Gazette Extraordinary No 1929	Required the traditional court to record the names of the parties, particulars of claim, particulars of defence, judgement and the date of judgement.
1951	Black Authorities Act	Created 'homelands'.
1988	Law of Evidence Amendment Act	Provided for admissibility of evidence of the existence of custom different from the official version.
1993	Interim Constitution of the Republic of South Africa Act	Provided for the recognition of customary law subject to the Constitution.
1996	Constitution of the Republic of South Africa Act	Chapter 12 dedicated to traditional leadership and section 166(e) providing for the recognition of courts outside the state system.
1996	Schedule 6 to the Constitution	Provided for the inclusion of all pieces of legislation from different homelands and independent states into the South African law.
1997	The Abolition of Corporal Punishment Act	Abolished traditional leaders' right to apply corporal punishment.
2003	Traditional Leadership and Governance Framework Act	Regulates traditional leadership and seeks to put it in line with the country's Constitution.

As evident from the table, it has taken a long time for the current government to introduce legislation that specifically deals with traditional leaders and provides a space for them within the sphere of governance. This delay was occasioned – at least partly – by the fierce battle for the soul of traditional leadership and its role as the custodian of African tradition.²⁷

The battle is characterised by calls for and against the accommodation of traditional leadership within the current system of governance. At the one end of the spectrum the dismantling of the whole institution is called for. This line of thinking suggests that, given that South Africa is now a democratic dispensation where all citizens are equal, it would not make sense to subject some sections of the citizenry to forms of traditional leadership. Proponents

of this view put forward at least two main reasons. First, they question the legitimacy of some traditional leaders. They wonder whether, given the influence of colonial and apartheid governments that at some stage deposed rightful traditional leaders and replaced them with those of their choosing, it is still tenable to sustain traditional leadership on the basis of tradition. Crudely put, some of the traditional leaders (those appointed by the colonial and apartheid rulers) were *strictly speaking* not entitled to their positions.

In this line of thinking, the only basis for the maintenance of the system of traditional leadership is to reinstate the wrongfully deposed leaders. Secondly, and alternatively, they argue that traditional leadership does not have space within the current dispensation, as African communities have developed significantly. This point is well captured by Govan Mbeki, who stated:

If Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship....then to force it on them is not liberation but enslavement.²⁸

At the other end of the spectrum are those who point out the importance of tradition and the need to preserve the cultural practices of the diverse South African citizenry. Proponents of this view even see traditional leadership as the bedrock of African democracy.

Amid all these opinions, the government managed to develop a conciliatory position. It recognised the importance of traditional leadership, but pointed out that traditional leadership is an institution that is not static and should therefore be developed to remain relevant to current day realities, in particular the pressing need for balancing the post-1994 human rights culture and the practice of traditional leadership. This stance pervades a string of speeches by leading government figures, and is aptly captured by the spirit of the 2003 Act. The preamble to the 2003 Act succinctly paints a picture of the envisaged relationship between traditional authorities and the organs of state by stating that

- ... the State, in accordance with the Constitution, seeks:
- to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;

- to transform the institution in line with constitutional imperatives;
- to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

Importantly, the 2003 Act entrenches the institution of traditional leadership by obliging the state to develop and support it. The pertinent part of the preamble continues:

- the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
- the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership’.

While the 2003 Act introduces a framework for the functioning of traditional leadership and stands to bring about significant changes, there are some provisions that are striking. Without attempting to provide an exhaustive list, the following are some of the important provisions:

Establishment of the Local House of Traditional Leaders

This is a new development, as the National House of Traditional Leaders Act²⁹ only provided for national and provincial houses of traditional leaders. The local house of traditional leaders is provided for in municipalities that have five traditional leaders or more.³⁰ Importantly, the 2003 Act provides that the electoral college (consisting of all relevant traditional leaders) should ensure sufficient representation of women in the local house of traditional leaders. This development is bound to impact significantly on the functioning of traditional leaders within a municipality, and may provide scope for the enactment and enforcement of by-laws by the traditional authorities within a given municipality.

Service agreements between municipalities and traditional authorities

The 2003 Act provides that municipalities may enter into service agreements with traditional authorities.³¹ This provision is crucial given that such agreements will provide a clear framework within which the two organs will function, stipulate the exact minimum requirements for compliance with the agreement, and provide for penalties in the case of non-compliance on either side. This may go a long way in dealing with the complaint by many traditional leaders that they are in the dark as to what is expected of them in the current democratic dispensation.³²

Transitional arrangements

The Act allows for the recognition of all traditional authorities and communities duly recognised as such at the date of commencement of the Act. In other words, all traditional leaders, traditional authorities and traditional communities that are recognised as such as on the date determined by the President in terms of the Government Gazette, as well as their functions, remain in force.³³

Code of Conduct for Traditional Leaders (see Annexure A)

The Act provides a Code of Conduct for Traditional Leaders and allows for provincial governments to introduce codes of conduct in respect of traditional leaders within their provinces. This is a welcome measure in that traditional leaders will know what is expected of them in terms of their conduct. Equally, members of traditional communities will be able to hold traditional leaders accountable by referring them to the expectations contained in the code of conduct. Judging by recent newspaper reports,³⁴ traditional leaders need to be subjected to a clear code of conduct so as to protect traditional authorities and communities under their jurisdiction.

Commission on Traditional Leadership Disputes and Claims

Section 22 of the 2003 Act provides for the establishment of a Commission on Traditional Leadership Disputes and Claims. Given the extent of disputes regarding traditional leadership this commission is to be welcomed as it provides a mechanism through which disputes can be resolved without resorting to the courts. The courts are often resorted to at a very advanced stage of disputes, when the damage has already been done, perhaps even dividing communities. These disputes over traditional leadership normally affect the functioning of traditional communities and that of traditional authorities. If the spirit of the 2003 Act is to prevail, especially as regards the relationship between traditional authorities and state organs, the institution needs to be firmly protected against unnecessary disputes that tend to hamper progress and development within traditional communities.

CHAPTER 3 ADMINISTRATION OF JUSTICE IN THE TRADITIONAL COURT

*The administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law.*³⁵

One of the responsibilities of a traditional leader is to settle disputes in the traditional community. This is done through the traditional court (also known as the chief's court or, as recommended by the South African Law Reform Commission, 'customary court'). This court deals with all disputes that are brought to it as long as they are not serious cases. Asked what they regard as serious cases, traditional leaders invariably mention rape, murder and assault with intent to do grievous bodily harm (GBH), i.e. serious assault. The court also deals with dissolution of customary marriages, with the proviso that the maintenance of children is referred to the magistrate's court for resolution.

According to the traditional leaders interviewed, it is not for lack of jurisdiction that traditional leaders do not deal with maintenance cases, but due to practical constraints. For example, as the traditional councillors of Mokopane stated, the traditional court does not have the capacity to make sure that maintenance orders are enforced. On the contrary, they reason, the magistrate's court has the necessary resources, as evident in that court's ability to get maintenance money directly from the employer of the parent.

From the previous chapter it appears that in dealing with the administration of justice, traditional leaders are acting within their legislative mandate. In terms of Schedule 6 of the Constitution, laws that applied to the different homelands are part of South African law.³⁶ For instance, laws that applied in the former homeland of Lebowa remain in force until legislative or judicial intervention. Equally important to note in this respect is the recent work of the South African Law Reform Commission, which, though not having a binding legal effect, shows that the move is towards allowing traditional leaders to proceed with their judicial functions. Both the Discussion Paper of 1999 and the report – with the proposed Bill – submitted to Parliament in January 2003 show that

the issue is not so much whether traditional leaders should be responsible for the administration of justice, but the extent and nature of their involvement. Moreover, through the 2003 Act, the legislature has reaffirmed this function, as demonstrated by the Preamble to that Act, which unequivocally states:

...the institution of traditional leadership must...promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice as envisaged in applicable legislation.

It is noteworthy that both the administration of justice (which seems to refer to or include trial of cases), and dispute resolution are specifically provided for in this Act. In a traditional court, the two are not necessarily seen as distinct functions but as aspects of one process. While it is true that a traditional court would try a case and hand down a verdict (i.e. find someone guilty or innocent), it is also true that the ultimate objective of the proceedings is dispute resolution and restoration of a healthy relationship between the parties. This restorative attribute of traditional courts finds expression in the rituals that many traditional communities conduct at the end of the trial, which are aimed at restoring the relationship between the parties and ceremoniously readmitting the deviant party into society. While this attribute was not observed in any of the cases witnessed during the course of this study, it was, however, confirmed by traditional leaders that this practice did not apply to all cases but only to those that are serious and are seen to have affected relations (sometimes among relatives) negatively. This seems to be one of those instances where it proves difficult to document customary law, for it is often a situation of playing it by ear.

In grappling with the problem of documenting customary law, observers differentiate between 'official customary law' and 'living customary law'.³⁷ Official customary law refers to traditional or cultural legal practices that have been captured and made part of the written law (often reflected in statutes and case law), while living customary law³⁸ refers to the non-static unwritten law that is practiced by traditional communities on a day-to-day basis. In practice, the difference between the two manifests itself in that customary law is applied by state courts, while living customary law is applied by traditional courts.

This application of living customary law is reflected in the following account of two cases that were heard in the traditional court of Mokopane. This court – constituted by members of the royal council³⁹ – sits every Monday, Tuesday and Friday, with at least two cases reported on each of these days.⁴⁰ The court

is composed of four men and one woman. While a number of cases were observed, two cases will be referred to in detail in this monograph. They both involved domestic disputes.

Case 1

This case was brought to court on 14 June 2004 by one Sylvia (complainant).⁴¹ She started by stating that she had come to the court to report 'motho yo ke dulago le yena' (someone I stay with). The chairman of council asked her if that was her 'mokgalabja' (husband). She responded to this in the affirmative. The complainant then proceeded to state that she was reporting the man because he was refusing to leave the house. The chairman intervened at this stage to state that the court was not dealing with the case as yet so there was no need for detail. The chairman also enquired whether this problem had been dealt with at home with relatives and neighbours, to which the complainant responded in the affirmative and added that they (relatives and neighbours) had told the respondent (man) to leave the settlement.

The chief councillor then intervened and asked: "What really is the problem there?" To this the complainant stated that the problem started because the respondent had found a new stand for himself and wanted to leave. But the respondent wanted to take building material from the shack they occupy together. At the time he had already taken seven sheets of corrugated iron. This seemed to elicit sympathy from the court.

The sympathy, however, was very short-lived as one of the councillors asked the following question: "Are you married to each other?" The complainant stated that they were not married to each other but were nevertheless staying together. To this there were murmurs of disapproval among the members of the court with the chairman of council stating that they did not deal with "vat en sit" (people staying together without marrying each other). After saying this the chairman enquired as to whom the stand belonged to and the complainant stated that it was hers. The chairman also wanted to know who owned the sheets of corrugated iron that the respondent had taken away. To this the complainant stated that the respondent owned the sheets. A follow-up question to this was: "If he is taking the sheets that belong to him, what is your problem then?" The complainant stated that she had not come to report his taking of the corrugated iron sheets but the fact that when the respondent took them (the sheets) he also swore at her. The court then decided that the respondent should be called to come and answer for the swearing. A letter was issued, summoning the respondent to come to court.

Case 2

This case involved a husband and wife, James and Winnie, and came straight to the chief's court as it did not fall under the authority of any ntona (headman).⁴² It took place in the morning of 17 June 2004 at Mokopane Traditional Authority before a traditional court comprised of the royal council. The two were the only people present in the hall facing the council, besides the two researchers.

The chief councillor asked them who their witnesses were. The complainant (the wife) indicated that her sister and the respondent's (the husband) aunt were the witnesses. She further stated that the sister should have arrived already but to her surprise she was not yet at court. The respondent's aunt, she stated, was sick, and should not be expected to attend. The chief councillor indicated that it would be difficult to proceed with a case that did not have witnesses.

The chairman of council and the other three councillors started talking to one another. Then the chairman of council indicated to the chief councillor that the case could proceed even in the absence of witnesses and, should it become apparent that witnesses were necessary for the resolution of the dispute, the matter would be postponed. The chief councillor expressed his reluctance to deal with the two disputants in the absence of witnesses because "Lena ba babedi le ka se kwane ka selo. Le tlo phigisana" (the two of you will not agree on anything. You will start arguing about what really happened). Having said this, however, he asked the two parties (complainant and respondent) if they would like to proceed with their case in the absence of witnesses. They both said they would like to proceed. The chief councillor then ordered the complainant to stand up. She stood up and the chief councillor told her to state what her complaint was. She stated that she was complaining about her husband, after which she related her story as follows:

I am someone who is sick. My sickness relates to ancestors. So I went to a priest where I am being healed. It has now become necessary that I slaughter a goat in order to appease the ancestors. Therefore last week I organised a function where the goat was slaughtered. I had brewed some beer for the occasion. Unfortunately the beer was not ready on Sunday when the function was scheduled to take place. The function was taking place at my parental home not at my own home. My husband was not present at the time when we went to communicate with the ancestors. He only arrived later in the day and

I approached him and told him that we had proceeded with the function so that he could also go to the spot and communicate with the ancestors. He said he would do so later. This never happened but I did not worry much about it. He spent some time with us and left. The following day he came back in the company of my sister's husband. When he arrived there was one man sitting with us still drinking beer. On arrival he greeted us and demanded to know who the man was. I said: "You left people drinking here yesterday and now you come back today to ask who they are. These are the very people we invited to come and be with us for the function." My husband then became angry. "A thoma go ntshwara ka di watshene a nkisa pele le morago" (he started grabbing me by my clothes and pushing me to and fro repeatedly). I pushed him into my sister's room and ran away. I went to our house where I intended to inform my eldest son about his father's behaviour. Unfortunately my son was not there as he had gone to his fiancée's home where he often sleeps. I, however, informed my other two sons about my problem. Then I slept at home until the following day when I went to look for my son. I found my son and informed him about his father's behaviour of the previous night. My son suggested that we should go back and see how he (my husband) is and what may have transpired after I had left. We went back. When we arrived there I was horrified to find that he had burnt all my clothes that were in the wardrobe and had also taken the beer and smeared it all over the walls. That is why I am here to complain.

At this stage the chief councillor informed the complainant that this was the matter they would be dealing with and asked her if she was certain that she had stated all that she wanted the court to know. The complainant answered in the affirmative. Then the chief councillor warned her that she would not be allowed to raise any more issues later. The complainant said she understood. The chief councillor ordered the respondent to stand up. Then he asked him whether he had heard the complaint against him. The respondent answered in the affirmative. The first councillor was then told to proceed with the case. The first councillor asked him to respond to what his wife had to say. His (the respondent's) response was as follows:

I admit that my wife had a function relating to her sickness where a goat was slaughtered. My problem is that she now stays at her parental kraal where she even claims to be a healer herself even before she has been completely healed. The right approach is for her to get healed

first and then I will come here to mosate (royal office) with her to inform you that she is now a healer. Instead of following the correct procedure, she starts practising healing on her own and she does that at her parental home so that whatever she earns will be enjoyed by that family. That is all I have to say on the matter.

The first councillor interrupted to say that it could not be all he had to say while the complainant had spoken about burning of clothes and other things. In reaction to this reminder he continued:

That part has been dealt with at home because I have asked for forgiveness. I have also offered and still offer here to buy all the clothes I burnt or pay compensation for them. If we talk about the assault on the day she (complainant) is the one who hit her brother-in-law with an open hand twice. You see, she hit him and then ran away. That is when she left and then came back the following day.

At this point, the first councillor informed the parties that the witness (the complainant's sister) would be called to tell the court what she saw on the day in question before the court asked the parties questions. The witness had disappeared and efforts to look for her outside the courtroom were not successful. At this stage the council agreed to proceed with the case, with the next step being the opportunity for council members to ask questions. The first question came from the chairman of council and his interaction with the complainant proceeded as follows:

Q: You and your husband agree that you had a function and a goat was slaughtered for that purpose. Where did this goat come from?

A: My young son and myself bought it.

Q: Where was your husband because it is strange that it should be your son's responsibility to buy a goat for the function?

A: I told my husband and he said 'ga Kekana ga gona badimo' (there are no ancestral spirits at the Kekana family).

The chairman of council at this stage ordered the complainant to sit down. He then ordered the respondent to stand up and asked him to explain to the court why his wife and son had to buy the goat. To this the respondent answered by stating that he was aware that his son had bought the goat but this was because at the time when his wife (complainant) asked him to buy the goat he had no money. As the wife and son had the money ready they decided to buy

it. He, however, emphasised that this was done with his blessing. The chairman ordered the respondent to sit down and the complainant to stand up. Then he asked her:

Q: Are you aware that if there is a family dispute you should go and report to the people who stay next to you?

A: Yes.

Q: Why did you not go and report your husband to someone then?

A: I went to Sinah and asked for some towel to wear as my clothes were torn by my husband. Only then did I go to my son.

Q: Did Sinah not take you back to go and see what was happening with your husband? To find out what his problem was.

A: No. They are all tired of him because it is not the first time that he beat me. Even his aunt is tired of him because I always complain about him. Our children are also tired of this man. Even this court knows that it is not the first time that we come here. Baba (father) over there knows it as well because on a number of occasions he told my husband to stop giving me trouble. I am now tired and to tell you the truth the real reason why I brought him here today is for the court to let us part ways so that I can live in peace. I now have grown up children and even grandchildren. I cannot allow my husband to continue humiliating me in this way.

The chairman of council indicated that he would give other council members the chance to proceed with the questioning. The chief councillor intervened and stated that he thought the discussion was going in circles as the complainant had already indicated what her wish was. "Ge pitsa e thubegile o ka se e bope gape wa e kgona" (once a pot has broken into pieces, you cannot successfully mend it). There seemed to be consensus on this observation among council members. After confirming with the complainant that she had fully thought the issue through and was sure that she would like to have their marriage terminated, the chief councillor – at the instigation of the chairman – asked the respondent whether he had heard what the complainant said and if so, what his reaction was. The respondent stated that he had no problem with them parting ways. The outcome of this case was that the court referred the parties back to their respective families who negotiated their marriage in the first place, to deal with the matter. The parties were advised to come back to the traditional court if the matter was not dealt with to their satisfaction.

Issues arising from the two cases

The cases reported above, and the way in which they were dealt with, represent the types of cases that are generally brought to the traditional courts and also the manner in which they are dealt with. There are a number of problems with the court's approach. For the present purposes, however, only two will be dealt with:

Gender and traditional justice

First, it is debatable whether a court dealing with a domestic problem should be composed of a majority of men. While this fact in itself is not necessarily a serious flaw of the system, it could boost the image of the court if women were represented in a more active way, especially given that the trial and the procedures followed are not rigid, but open to influence by the members throughout the proceedings.

However, it remains to be seen whether the mere presence of women would add value to the court and its approach, given that the women who appear before the court are supportive of this approach. While the male dominance of the court is conspicuous, given the current democratic dispensation, of greater concern is the dominant approach that sees the man as the head of the household and therefore a guardian of his wife, as well as the assumption that the man has a duty to take care of his household. In this line of thinking the wife can only contribute to the household if the man is unable to do so. This can be seen in the above example (case 2) where it is clear that all the parties before court had a common understanding that the woman had to first get permission from the husband for the son to help her buy a goat.

The chairman's submission in case 2 made it clear that it was crucial to the case that such permission was sought and granted. This approach seems to affront the gender equality clause in the constitution. Any solution, however, appears to lie in the empowerment and orientation of community members into the post-1994 ethos, especially as regards issues relating to gender equality. The problem seems to lie in the inaccessibility of the state courts to members of the community, which means that the type of justice familiar to the members of this community – a factor that influences their expectations from a justice system – differs from the type of justice that the state courts offer.

By way of an example, in case 2, if this matter had been reported to the state court, chances are that the issue of assault on the woman would have been the only pertinent one. More revealing in this case is the fact that the

complainant (wife) did not see herself as an equal to her husband nor did she challenge the philosophical approach of the court. It would appear that even if the gender composition of the court were better balanced, the lot of women who appear before it would not necessarily be improved. In other words, the outcome of this case does not necessarily depend on the gender composition of the court.

Procedure in the traditional court

The procedure followed by the traditional court is one of common sense. The rules of procedure are not written down, but depend on the extent to which the particular members of the court at the given time are familiar with the appropriate procedure. The approach of the court is mainly inquisitorial and informal in nature. However, legislation requires that the traditional court should record in detail the names of the parties, particulars of the claim, particulars of the defence, judgement and the date of judgement.⁴³

Notwithstanding the absence of clear rules, there is an opportunity for the complainant to give evidence uninterrupted. Particularly striking about testifying before this court is the fact that the witness is free to tell the court whatever she/he thinks is relevant to the case. The only time that the court (in case 2) seemed procedurally strict was at the end of the complainant's testimony when the chief councillor warned her that the court would base its decision on the evidence she had already given, as no new evidence or issues not raised during the testimony would be acceptable. The relative informality of the proceedings, however, implies that the court could – as happened in some other cases observed in this court – still decide to accept new issues if such issues are seen as important for the fair resolution of the dispute.

A notable variation from the general trend in traditional courts – at least as far as literature on the subject goes – is that the disputants in the above case were not allowed to ask each other questions. The court conducted the examination and cross-examination in line with its inquisitorial approach. The complainant in the second case asked to be given an opportunity to ask the respondent questions, to which the chief councillor responded by saying such questioning would not be allowed as it would “just lead to an altercation”.

In line with academic commentary on the issue of procedure, Holomisa⁴⁴ sees the common sense and flexible approach as one of the advantages of the traditional court. He argues that this approach makes the court transparent and democratic. This is one of the reasons why he rejects the possibility of

having legal representatives (attorneys and advocates) appearing in this court, as this – he argues – would distort the procedure. In his words these are “not courts of law but courts of justice”, and that is why there is no need for fixed rules regarding admissibility or otherwise of evidence. He gave the following example:

In a court where someone is being tried for stealing a sheep and such a person denies the charge, someone may just stand up and say: “how can you say you never stole the sheep while just a day after the sheep disappeared, I saw fresh sheep skin in your hut”?

Holomisa suggests that such evidence would not be admissible in a state court because the magistrate would say “if you wanted to be a witness, you should have sat outside the court”. While this example illustrates that witnesses may sit in court throughout the case and even contradict the testimony of a disputant or accused, the Mokopane traditional court required the witness to sit outside court until called to testify.

It appears that the two issues (procedure and gender) have been seen as significant enough to attract the attention of the legislature and the South African Law Reform Commission. This is evident in the provision in the 2003 Act that women should be represented in the traditional authority. Equally important is the apparent quest of the South African Law Reform Commission – as gleaned from the Discussion Paper – to ensure that traditional courts are procedurally fair, just and predictable. Noble as this ideal may seem, such a traditional court created in the spirit of the Discussion Paper would be deprived of the common sense attribute. In practice, attainment of this goal would require training of all those who apply the customary law on what such law is and how it should be applied. In essence, traditional courts would then be required to apply the official and documented customary law instead of the living and oral customary law. If that were to happen, resources would be better spent in empowering magistrates’ courts to apply such customary law. Moreover, should this happen, it would be even more difficult to argue for the retention of traditional courts within a democratic dispensation.

The competence of traditional courts to deal with the administration of justice appears dependent on applying living customary law, which is resonant with the expectations that members of traditional communities have of a court. This living customary law is applied using common sense procedure. This does not, however, deny the need for accountability in respect of decisions

reached in that court. At present this responsibility lies with the magistrate’s court, even though magistrates do not seem to take the responsibility seriously.⁴⁵ There ought to be a competent body⁴⁶ that audits decisions that are reached in traditional courts with concomitant guidelines as to how to assess such decisions and judgments.

CHAPTER 4

THE TRADITIONAL LEADERS' ROLE IN CRIME AND JUSTICE RELATED ISSUES

Crime prevention is a consequence of many institutional forces. Most of them occur naturally, without government funding or intervention. While scholars and policy makers may disagree over the exact causes of crime, there is widespread agreement about a basic conclusion: strong parental attachments to consistently disciplined children in watchful and supportive communities are the best vaccine against street crime and violence. Schools, labour markets and marriage may prevent crime....
(Lawrence W. Sherman)⁴⁷

Prominent among complaints heard when interviewing traditional leaders is one that crime is rapidly on the increase and that the criminal justice system is unable to deal with it. As the Institute for Security Studies' 2003 national victims of crime survey⁴⁸ shows, there is a poor correlation between actual crime trends and fear of crime. The same could be said about the correlation between incidents of crime and perceptions about levels of crime and lawlessness within communities. Duxita Mistry's apt articulation of the South African position illustrates the point:

despite the decline in crime rates indicated by the victim surveys and the official crime statistics, South Africans feel less safe in 2003 than they did in 1998.⁴⁹

This discrepancy is more evident in the rural areas for a number of reasons. First, both police statistics and victims of crime surveys indicate that crime levels have, in the main, decreased since 1994. Second, crime levels in rural areas are lower than those in urban areas. In the light of these two facts, it becomes difficult to immediately understand the core of traditional leaders' complaints if they are not seen in the context of the relative nature of perceptions of crime and lawlessness. This is evident from the fact that many traditional leaders constantly refer to the past when there was control in the community, when people respected the traditional authority, when parents had control over their children, and so on. They look back and recall how

secure they felt in the past and how crime was a thing that took place in the urban areas. In that glorious past, if someone dared commit a crime the full might of the law would be visited upon him or her.

The case made by traditional leaders is that crime and lawlessness are rising in their areas. They argue that this situation is exacerbated by a feeling of impotence brought on by the new culture of human rights. Invariably in every interview a traditional leader raised the issue of crime and lack of 'muscle' to deal with crime prevention and crime control. This complaint by traditional leaders seems well founded if one considers that traditional leadership has not been actively and explicitly incorporated in crime prevention strategies and mechanisms deployed in the post-1994 democratic dispensation.⁵⁰ This is despite the fact that all traditional leaders interviewed expressed their willingness to be involved in the criminal justice system and crime prevention in an intensive way. As Kgosi Kekana put it:

I am prepared to do anything that will improve this community. Crime is the main problem here. It affects development.

The exclusion of traditional leaders from crime prevention must be seen within the context of the ambivalent and uncertain position of traditional leadership post-1994. While there has been a consistent endorsement of the institution of traditional leadership on the part of government, there has not been much clarity regarding the role that the institution will ultimately play in the democratic dispensation. Their political space has remained a grey area. This was clearly demonstrated in an interview with the matona of Mokopane. While all the matona interviewed expressed frustration about the approach of government to crime prevention in very broad terms, they also pointed out the following issues that concern them and affect the running of their communities.

Issues of concern for traditional leaders

Lack of control

Traditional leaders complain that they no longer have control over their communities. Ordinarily a traditional leader is responsible for the overall governance of his/her area (at least, many of them see that as their role). This ranges from allocating business/grazing/development/recreational areas to running initiation schools, officiating over marriages and resolving disputes. In order to perform these functions traditional leaders need support of their

traditional communities. Traditional leaders also have the responsibility of maintaining social order. If someone is seen by (or reported to) the traditional leader as deviating from or affronting the generally accepted social norms, the traditional leader has the responsibility to enforce such norms. In an organised traditional community no one would be able to affront the social norms of the community and yet proceed to be part of it. The essence of this fact is captured by the Se-Pedi saying, often fondly quoted by traditional leaders during the interviews, that 'go nyatsa kgosi ke go tloga' (roughly translated: 'if you undermine the authority of the traditional leader you have to leave').

According to traditional leaders, resettlement of the offender was part of the sanctions at the disposal of a traditional leader. A traditional leader vested with this authority would be able to effectively control behaviour within his/her community. Immediately pertinent to crime prevention is the fact that the traditional leader is well placed to deal with misdemeanours and/or lawlessness occurring within the traditional community. For instance, if someone in the community sells liquor and makes noise that disturbs his/her neighbours, such aggrieved neighbours could seek the intervention of the traditional leader. In that case the traditional leader would be able to set rules that would accommodate both the person selling liquor and the aggrieved neighbours.

These days, traditional leaders complain, people do not respect their authority. Using the example of someone selling liquor, the person accused of causing problems may simply assert his or her right to earn a living and to do as s/he pleases on her/his property. Here an example given by Kgosi Moloto is illustrative of the point. He said:

"I think you have chosen a good research topic. For instance the other day we had a problem in this village. Members of the community held a meeting where it was agreed that shebeens should be closed early so that school children can study and rest. One shebeen owner decided to disregard the agreement. The police do not enforce the decision of the community. The owner and her children insist that they have a right to earn a living. Now I do not know what to do because the community expects me to act".

Resettlement is not an option for the traditional leader. As one traditional leader of Mokopane put it:

These days if you tell someone to go (i.e. leave the community), you have to pay him/her and build a house for him/her where he/she goes to stay.

Traditional leaders also complain that new members (i.e. people who join the traditional community) are not reported to the traditional leader. The dominant example relates to 'go kaola' (where a man from outside the traditional community finds a woman and cohabits with her). In the past, the interviewed traditional leaders stated, the presence of such a man would be reported to the traditional leader. At any given time, the traditional leader would know who was residing within his/her area of jurisdiction. The need for this practice is justified on the basis that it helps deal with crime, as it is difficult for a person running away from the law to be accommodated by the traditional community while at risk of committing further crimes.

Role of 'politics' in the affairs of traditional leadership

"Politics make our work very difficult", quipped one traditional leader of Mokopane. Traditional leaders have a notably uncomfortable relationship with political leaders within traditional communities. The nature of this uncomfortable relationship was dramatically captured during the Durban conference by a councillor from Mpumalanga province on 6 October 2004. He stated:

'I am a councillor and I know that traditional leaders are allergic to councillors. The other day we had a meeting with traditional leaders and when I was introduced as a councillor the traditional leader said "sa fihla stress (here arrives the cause of my stress)".

This is particularly true in respect of local councillors. The nature of this problem is both contemporary and historical in origin. It is contemporary in as far as it is based on the democratic nature of the post-1994 dispensation. Some political leaders assert that they have been democratically elected into office and therefore cannot be controlled by traditional leaders. Some local councillors feel comfortable merely informing traditional leaders of projects that they embark on and reporting to the community through traditional leaders' offices, even though the traditional leaders would not necessarily be involved in the conceptual and initiation stages of such projects.

The historical nature of this problem relates to the role that many traditional leaders in the homelands played during the apartheid era. Traditional leaders acted as instruments of the apartheid government to implement and enforce

its policies. Some even served as ministers in the homeland Parliaments. Because they were aligned with the apartheid government, their relationship with members of the liberation movement was a hostile one. In situations where traditional leaders used their power and control of traditional communities to serve as the ears and eyes of security forces, the situation was even worse. Given this history, the level of respect and trust between traditional leaders and political leaders in some areas is still quite low today.

Traditional leaders complain that some local councillors and members of civic organisations do not recognise the institution of traditional leadership. This is evident in the fact that some local councillors proceed with development projects without the blessing of the traditional leader.⁵¹ In Ramokgopa, for instance, the traditional council complained bitterly about the fact that the traditional office has been deprived of access to water and has had to resort to fetching water at times dictated by the local councillor. Similar low-key tension also manifests itself in instances where there is a dispute between a member of the community and a traditional leader.

Again in Ramokgopa, the traditional council was complaining that a member of the community had allocated himself a site at a place reserved for grazing purposes. When the traditional council tried to remove him from the site, the local councillor intervened, threatening legal action on behalf of the resident. This led to the traditional council suspecting that the person had settled at the site with the approval of that local councillor.⁵² In Mokopane a traditional leader complained bitterly about members of the civic organisation who constantly challenged his decisions and refused to attend when he called a meeting.

Related to this problematic relationship between traditional leaders and political leaders is the fact that some traditional leaders are often drawn into party politics. If a traditional leader is seen as aligned to a particular political party, the tendency is that those within his jurisdiction who belong to other parties undermine his authority. In places where the traditional leader is seen to be (or just suspected to be) aligning himself with a party other than the one to which the local councillor belongs, the result is the marginalisation of his area and himself in government projects.

Protection against criminals

All traditional leaders interviewed raised the concern that they feel vulnerable to criminals. Interestingly, the charge is that, unlike in the past when

traditional leaders and law enforcement agencies would act in unison against criminals, today law enforcement agencies cannot be trusted. This is interesting because it points to the historical tension that exists between some traditional leaders and the current political leaders,⁵³ as pointed out above. A traditional leader of Mokopane puts it dramatically as follows:

How can you trust them (police)? You show them a criminal. They arrest him and say: "if it was not for the assistance of so and so we would not have arrested you".⁵⁴

While the above incident may or may not have happened,⁵⁵ it would obviously have been a serious case of breach of confidentiality. What is worrying about it is that it is reflective of the lack of trust that certain traditional leaders have in police officers (and criminal justice at large), which influences the extent to which they are willing to cooperate with the criminal justice system. There is a fear among some traditional leaders that, should they be seen as the ones behind police activities within communities, they may become targets of suspected criminals. This also happens when traditional leaders concern themselves with progress made in cases affecting people staying in their areas. A story related by a traditional leader illustrates the nature of this fear:

A woman is raped. She comes to my house. We go to the police. The police arrest the person who raped her but later he comes out. The woman again comes to me to report and I say, " I do not know what happened, these things happen, let us ask the police". When I make follow-ups the criminal comes and say "timer (old man), what is your problem?".⁵⁶

In essence traditional leaders worry that while the very nature of their traditional functions may put them in danger, they are not afforded protection against criminals. They do not ask for protection in the form of bodyguards – though a number said it would be a welcome but surely an unrealistic demand – but ask for recognition of their status. It is better explained in the words of a traditional leader:

When a police officer is killed it must show that a man of the law has been killed. Because police keep order, when you attack them you do not only attack the individual but also the law. Traditional leaders should be treated the same way because they are not attacked for

performing their personal duties. If criminals know that we are protected they will not threaten us.⁵⁷

Cooperation among traditional leaders

Traditional communities are geographically situated in close proximity to one another. This is especially true for matona who are situated in one area and fall under one senior traditional leader (kgosi). For instance, Moletji is divided into 96 villages, each headed by a traditional leader (ntona), while Mokopane has 14 traditional leaders, each heading a section of the traditional community. By virtue of their close proximity to one another, with virtually no clear-cut boundaries, traditional leaders have to cooperate with one another so as to maintain social order.

Such cooperation, however, is not always forthcoming. Many traditional leaders interviewed think there is not enough cooperation among traditional leaders. Even more disturbing to traditional leaders is the fact that in some instances even the relationship between the traditional authority and some traditional leaders is not a good one. Ordinarily, a traditional leader in the position of ntona is under the authority of the senior traditional leader who is normally in the position of a kgosi.

This hierarchy gives a person not satisfied with the decision of the ntona an avenue to take the case to the traditional court of the kgosi. Some matona think it would help if the kgosi's court were not seen as undermining the authority of the ntona. In other words, except in serious matters, the kgosi's court should not contradict the ruling of the ntona. Again, a pertinent example from a traditional leader:

... if I say a person must stop playing his/her music at nine it is fine if kgosi says no let him/her stop playing at twelve. But it is not right if kgosi says no, not at nine but at quarter past nine. When kgosi says this he undermines my authority. What is the difference between nine and quarter past nine?⁵⁸

In order to deal with the relationships among traditional leaders, especially between kgosi and matona, some traditional leaders felt the need for clear powers that should be given to them by kgosi. They also wanted to have uniformity within the traditional community under a kgosi regarding issues such as playing music during weekends when there is a funeral in progress, and closing hours for shebeens. The issue here is that if one traditional leader

makes rules different to those of another leader in the same or adjacent area, people affected by those rules find grounds to defy them on the basis that they are unreasonable, given that other traditional leaders do not prescribe such rules.

Police views on traditional leaders' role in crime prevention

The picture of traditional leaders' impotence, as painted by themselves, stands in stark contrast, however, to the views expressed by members of the South African Police Services (SAPS) regarding the role of traditional leaders in crime prevention. Members of the SAPS see traditional leaders as indispensable role players in crime prevention. They attribute this to the influence that traditional leaders have in traditional communities. The head of the crime prevention unit of the SAPS at Seshego – the station responsible for part of Moletji (comprising 52 villages) – categorically stated that, "without traditional leaders it would be impossible to deal with crime in the rural areas". He then went on to make the following comparison:

At this station we have problems with Seshego because it is a township. There is no chief in Seshego. A lot of crime happens there and there is no control.⁵⁹

Discussions with the police officers of Seshego not only showed the high regard that these officers have for traditional leaders, but also the cordial relationship that they have with the traditional leaders of Moletji, especially with the kgosi (senior traditional leader). If the traditional leader experiences a problem in the area, he can contact the station so that the station and the traditional authority can deal with the problem jointly. When there are important events taking place in Moletji, the kgosi approaches the station for joint planning of the security measures to be taken for the event.⁶⁰

Moreover, the crime prevention unit of Seshego police station visits the traditional authority office once a week (every Friday) to attend to a satellite police station situated at the traditional authority office. During these visits, which are dubbed 'taking services to the people' by the police officers, all services that are normally performed in a community service centre are rendered at the traditional authority. These include the opening of case dockets, certifying of documents and generally attending to queries from community members. Over and above these functions the community policing forum (CPF) coordinator (a member of the SAPS) is responsible for leading patrols that are conducted with police reservists in the community.

According to members of the SAPS interviewed, it is clear that traditional leaders are playing a vital role in crime prevention, even at present. According to the head of crime prevention at Seshego police station, there are areas within the jurisdiction of that police station that they (the police) never have to go to because

no crime takes place there. In some of these areas children are not used to seeing police. Some run away when police come.⁶¹

While the image of children running away when they see police is not an ideal reflection of police-community relations, it is in this instance useful in that it corroborates the thesis that rural areas are mainly self-policed under the guidance of traditional leaders.

Members of the SAPS think traditional leaders should be further empowered so that they can be more effective in their crime prevention role, and in crime control. The suggestions made by these members of the SAPS are outlined below.

Prosecutorial powers

Police officers interviewed suggested that traditional leaders should be formally granted powers to prosecute certain offences that take place within their traditional communities. While it could be argued that traditional courts have these powers in terms of the law, the police officers point out that many traditional leaders are either unaware of these powers, or unwilling to exercise them.

Moreover, there are no clear guidelines showing the traditional courts which cases to prosecute and how to go about it, which results in the situation that the only sanction available to a traditional leader when his authority to prosecute someone is challenged, is to threaten that the matter will be referred to the state court. The envisaged benefit of this suggestion is that traditional leaders will free police officers to focus on more serious cases. Cases that could potentially be prosecuted by the traditional court include *crimen injuria* and common assault.

Some of the police officers at Seshego police station feel that they spend a lot of time attending to trivial cases in the traditional community. They argue that the state court is not effective in dealing with minor cases in that such cases, for instance common assault and *crimen injuria* are normally symptoms of a

bigger problem. Typically, state courts will focus on the criminal act itself and ignore the context in which the criminal act took place. This is especially true in respect of people who belong to the same traditional community.

Criminal acts such as *crimen injuria* and common assault are most likely to take place between people known to each other and who may, therefore, need to live together after the criminal case. It follows that traditional courts are more suited to deal with such crimes, given that the *actus reus* (the criminal act itself) is just one of the issues forming part of the holistic and restorative approach of the traditional court.⁶²

Improvement of infrastructure

While calling for official and clear prosecutorial powers for traditional leaders, the interviewed police officers also see the need for improvement of infrastructure, such as traditional authority offices and roads leading to traditional communities. Their complaint is that roads leading to traditional authorities are often in a terrible state of repair, and untarred. The immediate impact of this on crime prevention and crime control is that it is hard for police vehicles to reach the area. It is obvious that time is of the essence when it comes to police reaction in a crime situation.

Improved accessibility of these traditional communities, especially the traditional authority office, will positively impact on patrol hours as less time will be spent on the road and more time spent in addressing the needs of the community (e.g. doing patrols). If this is to be achieved there has to be a consolidation of resources, with all the crucial state departments for service delivery housed at the traditional authority office. However, where it would be more cost-effective to move the traditional office to a more generally accessible place, that option should be considered.

Resources

Police members noted that resources were needed to sponsor departments that provide services. Prominent among these necessary resources are vehicles for the use of police officers in their daily activities in the traditional communities. Some stations, such as Seshego, pride themselves in having well-functioning community police forums as well as a well-organised pool of police reservists, whose members are used in patrols within communities (including traditional communities).

According to the officers at Seshego they are sufficiently resourced in terms of human resources. Their only potential problem, should vehicles become available for crime prevention or control purposes, is that there are few members of staff, including members of the CPF and police reservists, who are licensed to drive motor vehicles. The issue of resources, however, goes beyond material resources such as vehicles. Police officers envisage a situation where a variety of services will be provided at the traditional authority office. These would range from trauma counselling to first aid.

Workshops for traditional leaders

There was a general sense among police officers that many traditional leaders are not well-informed regarding their rights, responsibilities and duties. As traditional leaders perform diverse functions in their communities, the suggestion is that each department should take the responsibility to conduct workshops covering the particular functions that traditional leaders are expected to perform.

For instance, the department of Safety and Security and the SAPS should take responsibility regarding issues that are important in respect of arrests, police procedures and the human rights of people living in traditional communities. The department of Justice and Constitutional Development would be responsible for workshops on basic procedural safeguards that a traditional court is expected to respect, as well as providing clarity on the types of cases that traditional leaders are authorised to deal with.

CHAPTER 5

CHALLENGES FOR INCORPORATING TRADITIONAL LEADERS INTO DEMOCRATIC GOVERNANCE STRUCTURES

Policy and legislative developments detailed in chapter two clearly show that government is moving towards incorporating traditional leaders into democratic government structures. It is a reality, however, that this will present many challenges. These include perceptions about who is responsible for crime prevention and crime combating, traditional leaders' understanding of justice, and recognising traditional leaders as role players in both crime prevention and the administration of justice. Each of these challenges shall be dealt with below.

Crime prevention and combating: whose responsibility?

Asked whether communities would be willing to participate in SAPS activities as police reservists and/or neighbourhood watch members, one traditional leader at Mokopane responded:

If they pay us we will participate. The police are paid to do their work. Why must I help them if I do not get paid?⁶³

It is clear that this particular traditional leader does not see it as the responsibility of the community to deal with crime unless there is remuneration. This is an honest response, given that community members often take part in voluntary activities with some expectation to benefit, directly or indirectly (police reservists who expect to be employed as police officers later on, or participation with the purpose to enhance a curriculum vitae). This view somehow sits uncomfortably with the work that these traditional leaders do on a regular basis, for instance:

People come to us to report crime that we know we cannot handle. We call the police to come and deal with the cases. Sometimes police come and at other times they do not come.⁶⁴

The core of the problem is the reluctance of some traditional leaders to be involved in the operational side of policing while continuing to serve as a

conduit between the police and the community – something they see as their function. Linked to this seems to be a situation of misplaced expectations regarding police powers. For instance, one of the complaints that traditional leaders have is that the police are incompetent or unwilling to deal with crime.

It was on the basis of this belief that a traditional leader from Mokopane would often bypass the police station close to his place of residence to go to one at the centre of town. This same belief also explains the tendency of some community members to join vigilante groups.⁶⁵ Some of the traditional leaders fondly spoke of a time in the past when a criminal would not be treated with kid gloves – when police would deal with a criminal in a manner that showed the might of the law. This perception – disturbingly – is quite pervasive among traditional leaders and members of traditional communities.⁶⁶

Traditional leaders' understanding of justice and its administration

Some traditional leaders do not understand how the state criminal justice system works. They expect it – as we saw in the foregoing paragraph – to act harshly against criminals. Dealing harshly with criminals would not be restricted to the meting out of harsh sentences, but also to denying them bail. Needless to say, this stands in stark contrast to the democratic ethos of the post-1994 dispensation,⁶⁷ in particular the presumption of innocence until proven guilty.

While there may appear to be a fundamental philosophical difference between the approach of the traditional leaders and the criminal justice system, further probing shows that it is often a misunderstanding of the system on the part of traditional leaders. This is illustrated by the words of the Mokopane chief councillor:

I have a problem with the police, but I understand their difficult position. They arrest criminals, but justice (Department of Justice & Constitutional Development) releases them. Why don't they (the two departments) work together against the criminals?⁶⁸

On explaining to him what the possible causes for such early release could be, he seemed to understand. For instance, asked whether he knows that being released on bail does not mean acquittal, he revealingly asks:

Why can't they simply explain these things the way you do? All you see is police arresting someone today and he is out tomorrow bragging and committing more crimes.⁶⁹

The chief councillor's understanding of how the criminal justice system operates reflects the views of many in the traditional community. This is a mindset that cannot be changed overnight and is not restricted to the traditional communities in the rural areas. It is the mindset that has been aptly dubbed 'popular punitiveness.'⁷⁰ A solution to this problem – or at least a step towards a solution – would be improving communication between the police and traditional leaders.

Recognising traditional leaders' role in crime prevention

The South African Constitution and other legislation⁷¹ recognise the relevance of traditional leaders in many spheres of governance. However, there has not been explicit recognition in crime prevention policy documents such as the National Crime Prevention Strategy (NCPS) and the White Paper on Safety and Security of the role played by traditional leaders. Traditional leaders therefore remain at the periphery of crime prevention even though, in reality, they play such a crucial role in this regard in rural areas. Refreshingly, the 2003 Act provides government with the latitude to recognise the role played by traditional leaders in safety and security as well as in other related services. This recognition – relying on the views of traditional leaders – is set to play an important part in improving the relationship between traditional leaders and other role players in crime prevention.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

With very few exceptions, the role of traditional leaders in crime prevention has, until very recently, been ignored. In a country that struggles with a serious crime problem, one would have expected the utilisation of every structure in the pursuit of crime prevention and combating. This should have included investigating the role that traditional leaders can play in crime prevention. While noting that crime prevention is an ill-defined rubric for the many strategies employed in dealing with crime, the nature of traditional leadership is elastic enough to allow for whichever definitional approach is employed, as it is in effect the one-stop facility in the community.

Traditional leaders deal with matters relating to every aspect of life within the traditional community. It is this elasticity that puts traditional leaders in a position to interact with every state department as well as non-government organisations (NGOs) and community based organisations (CBOs). This is a potential role identified by the 2003 Act, which received the following accolade from a state official:

Chieftainship can benefit democracy and has a future because of the Act and other government efforts.⁷²

The 2003 Act not only identifies the role of traditional leaders in safety and security and in the administration of justice, but also in arts and culture, land administration, agriculture, health, welfare, the registration of births, deaths and customary marriages, economic development, environment, tourism, disaster management, the management of natural resources, and the dissemination of information relating to government policies and programmes (section 20 (1) (a-n)). In short, the traditional leaders or councils can do anything that the national or provincial government asks them to do.

The potential role of traditional leaders in crime prevention and justice becomes obvious when one looks at it from the perspective of the NCPS. With the possible exception of transnational crime, all the pillars of that strategy⁷³ can be accommodated within traditional leadership, as can those of the White Paper on Safety and Security. This is especially true in the light of the fact that the majority of crimes committed in rural areas are either crimes

of need or social fabric crimes.⁷⁴ This makes a case for a comprehensive, socially anchored crime prevention strategy, one that is more appropriate than the crime combating approach. The latter is arguably more suited for violent and property crimes prevalent in urban areas.

Another important reason why it makes direct sense for traditional leaders to be involved in crime prevention is that most crime prevention and control activities work best when planned and implemented at LOCAL level. It is for this reason that local government is, internationally and in South Africa, identified as the key level of government for leading crime prevention efforts. Because traditional leaders are part of the local governance infrastructure, they should be as involved in crime prevention in their areas as the municipalities are (or should be).

A disturbing factor is that many traditional leaders see their authority as diminishing. For example, some traditional leaders stated that young members of traditional communities do not recognise traditional leaders. As one traditional leader put it:

There cannot be control because these days we have “setshaba ka gare ga setshaba” (a community within another community).⁷⁵

He cited the example of people who are aligned to civics and prefer civic leaders to traditional leaders. Many traditional leaders state that they are frustrated because they are powerless when it comes to ruling people who stay within the area of their jurisdiction. For instance, if one member of that community comes to the traditional leader and lays a complaint against another, the traditional leader cannot do anything more than requesting such a person to come to his office. Should this person refuse to attend, the traditional leader can do nothing more. This problem was ostensibly overcome by a legal provision making it an offence to refuse to attend when called by a traditional leader. Asked why they do not apply this provision, one traditional leader responded:

I once went to report a person to the police for not asking for permission before occupying a stand. The police said there was nothing they can do. The laws have changed.⁷⁶

The previous chapters sought to show the role that traditional leadership currently plays in the rural areas. One of the core observations of this monograph is that the state's criminal justice system cannot substitute

traditional forms of justice as practised within the institution of traditional leadership. In the same breath, the institution of traditional leadership cannot realistically operate independent of the state's criminal justice system. Sheer practicalities, such as the coercive component of the administration of justice, are simply not constitutionally available to traditional leaders and their forums of justice.

Moreover, there are some cases that, in terms of the law, traditional courts do not have the jurisdiction to deal with, for instance serious offences such as murder, rape, etc.

It is also clear that the involvement of traditional leaders in the *formal* structures of crime prevention (e.g. CPFs, municipalities, etc) is either limited or non-existent. This becomes evident when one evaluates the instruments of crime prevention such as the NCPS and the White Paper on Safety and Security. Both documents do not make reference to the institution of traditional leadership when it comes to crime prevention. This conspicuous exclusion of traditional leaders from the formal structures of crime prevention seems to be the basis for their (traditional leaders') frustration with their lack of authority in crime prevention and crime control.

Based on the foregoing discussion, the only reasonable way forward is to establish a working relationship between traditional leaders and functionaries of the state's justice system with specific regard to the administration of justice and crime prevention. Respondents (both members of the state machinery and traditional leaders) are unanimous that there is a mutual need for cooperation. This need is also echoed in the 2003 Act. The Act creates a framework that makes this cooperation possible and, importantly, allows for a locally orientated engagement between traditional leaders and relevant role players. What remains, however, is working out the structure and practicalities of such an involvement.

While it is clear that a mammoth task lies ahead in establishing a functional relationship between traditional leaders and the criminal justice system (and even the state at large), there are some issues that call for immediate attention. Without attempting to provide an exhaustive list, three will be mentioned.

Uncertainty among traditional leaders regarding their powers

Many respondents pointed out that since the dawn of democracy they have not been exposed to any form of training relating to what is required of them

in the new dispensation. Traditional leaders were going about their daily functions just as they had done in the past; however, their practices often affronted the post-1994 constitutional ethos.

For instance, traditional leaders are aware that corporal punishment is not permissible anymore, but are at a loss as to how to deal with cases that in the past would have been dealt with through corporal punishment. As another example, traditional leaders are conscious of the fact they are no longer at liberty to order the resettlement of any person from the community when they do not comply with the community's mores and regulations. Traditional leaders express this as the doom visited upon communities by 'ditokelo' (rights).

While this uncertainty among traditional leaders is understandable in many respects, it appears to be founded on many misconceptions as well as the actions of opportunistic individuals in communities who hold traditional leaders to ransom. For instance, a shebeen owner who sells liquor throughout the night and plays loud music within a residential area is for all intents and purposes breaking the law. First, the illegal sale of liquor by such a person constitutes an offence. Second, if licensed, staying open throughout the night and playing loud music in all likelihood constitutes a violation of the licence conditions.

The community, therefore, has a right to act against such a person. A traditional leader becomes an embodiment of the community; members of the community affected by a problem will therefore approach the traditional leader to seek relief. Unfortunately, the shebeen owner in this example may wave the constitution at the traditional leader and say that s/he has the right to earn a living. Compounding this problem is the fact that such a shebeen could be afforded credibility because it is frequented by people who command respect in the community. A headman of Mokopane described the problem as follows:

What can you say because you find men of law, prosecutors, magistrates and police in that person's shebeen. Who am I to say it is wrong? Even if you refuse to write a letter allowing the person to open a shebeen they just go to lawyers and get the papers (licence to sell liquor) without the ntona's consent.⁷⁷

What is necessary here is a basic orientation of traditional leaders regarding their rights, and the limitations of individual members of the community in the

exercise of their rights. This does not entail formal education of traditional leaders in the workings of the country's constitution and the various pieces of legislation. A mere outline of the basic rights and duties of community members would suffice.

This could be restricted to issues of immediate concern to traditional leaders, so that when approached by individual members of the community s/he will be able to give informed advice, take appropriate steps and/or refer the individual member to the relevant place for assistance. It is crucial for traditional leaders to be reasonably informed, as members of the community frequently approach them for advice.

Potentially unconstitutional (or inappropriate) practices within the institution of traditional leadership

There is concern among many people that the institution of traditional leadership is so inherently undemocratic that it simply does not have a place in an open democratic society. In support of this view, those against traditional leadership point to the hereditary nature of traditional leadership, the lack of representation of youth and women, as well as the unconstitutionality of some of the practices and sentences in the traditional court.

Indeed, there is a great deal to take issue with in the institution of traditional leadership. As we have seen from the Mokopane case, some of the procedural aspects can be faulted for unjustifiably infringing the rights of the disputants. Yet there seems to be more positive than negative about the chief's court, and criticism levelled against the traditional court should therefore be balanced against the need not to disregard the immense contribution that the institution makes to governance. This kind of reasoning should inform the approach to the democratisation of the institution of traditional leadership, and efforts to bring it in line with the constitution.

Communication between state organs and traditional leaders

There are a variety of actors at the local level that pursue the same agenda as traditional leaders. These are structures such as the community policing forums (CPFs), victim empowerment groups, women's rights groups, research organisations, youth groups, municipalities, etc. While often targeting the same group of people, it is rare to find these structures in constant communication with one another.

If progress is to be seen in delivery of justice and crime prevention, it is crucial that a communication line be opened among all these structures. The mechanisms of how such a relationship will work should be left to local players. The 2003 Act makes a good start by placing an onus on the traditional leader to engage with other structures and lobby government so as to facilitate delivery of services to the people.

A corresponding responsibility, however, would be to require actors such as CPFs and municipalities to also recognise and engage with the traditional leaders in order to facilitate such delivery. This does not appear to be a matter that requires any legislative intervention, but simply an innovative approach on the part of all involved using existing legislation and policies as a basis.

For instance, municipalities have a responsibility to take care of the safety and security needs of their areas. Equally so, traditional leaders have a responsibility to perform safety and security duties as well as the administration of justice. Both structures are based at the local level of government and relatively accessible. At the same time both are represented at provincial and national government levels. Traditional leaders and local municipalities, therefore, stand to contribute significantly to crime prevention.

It is with the above in mind that it is recommended that local municipalities, in close consultation with traditional leaders – if not working together on the project as equal partners – should develop a comprehensive crime prevention strategy in line with the provisions of the national and provincial crime prevention strategies. The obvious advantage of such a locally engineered crime prevention strategy is that it will be relevant to local needs and priorities. Furthermore, the proximity of local municipalities and traditional leaders to traditional communities puts them in a good position to understand the socio-economic dimensions that may be contributing to crime in that particular locality. While other role players, such as the provincial department responsible for safety and security, remain important, their role should be to facilitate and/or complement initiatives and programmes led by municipalities and traditional leaders.

It is clear that traditional leadership as an institution will remain part of the post-1994 dispensation. It is also evident, from this monograph, that traditional leaders have not been integrated into the major crime prevention policies of the country. For their mere indispensability – as admitted by police

officers who work with them – state and its functionaries can only ignore traditional leaders at their own peril.

Comfortingly, after an inexplicable *de facto* marginalisation of traditional leaders, there seems to be a growing willingness to accommodate them. This willingness is matched by eagerness on the part of traditional leaders to be fully integrated into the current order. The appropriate question to attend to in dealing with traditional leadership is: “how do we integrate them into ‘the mainstream’” as opposed to “should we integrate them?”.

If crime prevention consists of proactively preventing crime from occurring, and reactively dealing with offenders as well as with causes of crime, then the role of traditional leadership cannot be ignored. Crime prevention by environmental design (one of the pillars of the NCPS) would benefit significantly in rural areas from the active participation of traditional leaders. Traditional leaders are at the centre of development in rural areas. This is a role that they have always played, as demonstrated by traditional leaders facilitating the building and maintenance of schools and clinics within their respective traditional authorities.

With 193 traditional authorities in Limpopo that have reasonable infrastructure, it would be prudent to effectively use these traditional offices in coordinating crime prevention projects. This is particularly pertinent given that the 2003 Act provides for accountability mechanisms for traditional leaders. For instance, women would enjoy at least 25% representation in the traditional council, and the traditional council would not be solely comprised of members of the royal family.

This representation should provide the necessary checks and balances to deal with suspicions that some traditional leaders and their courts are biased. Such bias could be against women or against people not related to the traditional leader. Kelley Moutt described the problem thus:

Numerous respondents expressed the opinion that women are put in a precarious position when the members of the family who are responsible for the abusive behaviour are also part of the headman's family or advisory. Not only does bringing the dispute before the headman's council put the complainant at risk of being shamed within the community for exposing what are often considered private issues, but she is often subjected to further (increased) abuse as a result of bringing such an action.⁷⁸

Equally, a community worker stated:

It is sad that with certain traditional leaders justice depends on who you are. Whether you are related to the royal kraal.⁷⁹

Within the current legislative framework – as provided by the 2003 Act – these concerns about traditional leaders can be dealt with.

NOTES

- 1 W Schärf, *Non-State Justice Systems in Southern Africa: How Should Governments Respond?* Institute of Criminology, University of Cape Town, 2003, p 80.
- 2 State of the Province address by Sello Moloto, the premier of Limpopo Province, delivered on 27 May 2004.
- 3 This is evident from the report of the South African Law Reform Commission, which draws from different African countries in grappling with the judicial functioning of the institution of traditional leadership. Project 90, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, 1999.
- 4 See W Schärf op cit for a more detailed discussion in this respect.
- 5 B Oomen, 'We Must Now Go Back To Our History, Retraditionalisation in a Northern Province Chieftaincy' *African Studies*, 59,1, 2000, p 74.
- 6 Chapter 12, Republic of South Africa Constitution Act 108 of 1996.
- 7 The establishment of these houses is provided for in section 212 (2) of the Constitution (Act 108 of 1996).
- 8 The three provinces that do not have houses of traditional leaders are Gauteng, Northern Cape and the Western Cape. These are provinces that did not have homelands in the pre-1994 dispensation.
- 9 Each province sends three representatives to the national house of traditional leaders. The houses of traditional leaders are established pursuant to the provisions of the House of Traditional Leaders Act 10 of 1997, which replaced the Council of Traditional Leaders Act 31 of 1994.
- 10 See section 2 (a) (i)-iv) of the House of Traditional Leaders Act 10 of 1997, as amended. Nkosi Nonkonyana, the provincial chairman of Congress of Traditional Leaders of South Africa (CONTRALESAs) in the Eastern Cape, laments the limited influence of the house by equating its role to that of a toy cell phone. M. Nonkonyana, *Addressing the Concerns of Traditional Leaders*, paper delivered at the Conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 11 Traditional authority has a right to run a court on the basis of the provisions of section 166(e) of the Constitution which bestows status of a court to 'any other court established or recognised in terms of an Act of Parliament.....'.
- 12 See, for example, the article written by A Thom titled 'Limpopo – Limping Behind in Health Care', online at: <www.csa.org.za> (10 February 2005).
- 13 A paramount chief is a senior traditional leader under whose supervision other traditional leaders fall. There is such a traditional leader in Sekhukhune, Limpopo.
- 14 Throughout South Africa 30 out of 47 district municipalities have traditional authorities within them, while 114 out of 231 local municipalities contain traditional authorities. See D. Hornby (ed.), *Traditional Leaders - A KwaZulu-Natal Study: 1999-2001*, Independent Projects Trust, 2001.
- 15 Indeed this is not only the case among traditional leaders but also among criminologists. See LW Sherman et al, *Preventing Crime: What Works, What Doesn't, What's Promising*, A Report for the United States Congress Prepared for the National Institute of Justice, 1996, available on <www.ncjrs.org/works/chapter2.htm>, last accessed on 10 November 2004.

- 16 Mokopane, Moloto and Ramokgopa.
- 17 Debate on this particular issue has been going on for some time with the former president Nelson Mandela asserting on 18 April 1997: 'But we dare say that consultation, transparency and equity were the cornerstones of the early societies from which we come. We dare issue the challenge that on matters such as gender equality, tradition – good and bad, then and now – cannot be seen as static. Our view on all these and other issues is that old and new mores were accepted by communities as such, because they regulated relations of their times. And so it should be now; so that tradition is seen not as a sentimental attachment to the past, but as a dynamic force relevant to present-day realities', Address by President Nelson Mandela at the inauguration of the National Council of Traditional Leaders in Cape Town, available on the South African government website, <www.polity.org.govdocs/speeches/1997/sp970418.html> as quoted by D Hornby, *op cit*, p 14.
- 18 Some proponents, especially traditional leaders themselves, argue that they are accountable to their communities. While that point is not contested here, accountability here refers to their accountability to the state.
- 19 At the dawn of the democratic dispensation in 1994 the country had four provinces and ten homelands (four independent and six dependent states).
- 20 Quoted by GJ van Niekerk, *The Interaction of Indigenous Law and Western Law in South Africa: a Historical and Comparative Perspective*, LLD Thesis. UNISA. 1995, p 67.
- 21 Van Niekerk *op cit*, p23.
- 22 Quoted in the 1998 Discussion Paper, p 25.
- 23 W Schärf, Policy Options on Community Justice, in W Schärf and D Nina (eds.) *The Other Law: Non-state Ordering in South Africa*, Cape Town, Juta, 2001, p 40.
- 24 Legal pluralism refers to the co-existence of more than one legal system within one country. For further discussion on legal pluralism in the South African context see B Tshehla, *Non State Ordering in the Post-Apartheid South Africa - A Study of Some Structures of Non-state Ordering in the Western Cape Province*, unpublished dissertation, UCT, 2001.
- 25 See the approach of the discussion paper on *Community Dispute Resolution Structures*, Discussion Paper 87, Project 94, August 1999 as well as that on *The Harmonisation of the Common Law and the Indigenous Law*, Project 90, August 1998.
- 26 While the name of the code may indicate that it is a law applicable to Natal or Zulu law this code had tremendous effect on the development of official customary law. Van Niekerk explained this succinctly: 'The indigenous law.....consists mostly of law established by judicial precedent or codified in the Natal Code,Until 1988, if not established by judicial or in the Natal Code, indigenous law had to be proved in the same way that custom had to be proved in that it differed from the general law of the land', in W Schärf & D Nina *op cit*, p 29.
- 27 This battle for the soul of traditional leadership has been well documented. For instance see Oomen, *op cit* and Nongonyana, *op cit*.
- 28 Quoted in Oomen, *op cit*, p 6.
- 29 10 of 1997 as amended.
- 30 This can be gleaned from the wording of section 17 (2)(a), which provides that 'the number of members of a local house of traditional leaders may not be less than five....'.
- 31 See section 28 of the 2003 Act.
- 32 Many of the traditional leaders interviewed indicated that they are in the dark as to what is expected of them in the current democratic dispensation. Indeed this is a point conceded by the president of CONTRALESA who argues that this is not to be blamed on the traditional leaders and they need to be capacitated (Answer to a question posed to him on 6 October 2004).
- 33 To the disappointment of some commentators, this means that those traditional leaders

- appointed by the colonial and apartheid governments are secured. Ironically, this leaves those traditional leaders who resisted and were punished (e.g. by being dethroned) out in the cold. This, however, is a matter left to the commission responsible for traditional leadership disputes as announced on 16 October 2004.
- 34 The Sowetan of 14 June 2004 reports that the traditional leader of Ramokgopa traditional authority abuses alcohol and neglects his functions with the result that the traditional council would have him deposed. According to *Daily Sun* of 5 July 2004, the traditional leader of Mokomi traditional authority at Malamulele charges people R50.00 for writing them a letter confirming their residency within his area of jurisdiction for the purpose of updating their banking details and according to the *Sowetan* of 5 July 2004, the chief of Bapahalane-ba-Mantserre, Ramokokastaad, defies the paramount chief with the result that he had even divided the traditional authority into two factions.
- 35 South African Law Commission, Project 90, *Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders*, presented to Parliament by Dr P Maduna, former Minister of Justice, in January 2003.
- 36 Moreover, the 1996 Constitution – in section 166 (e) and chapter 12 (sections 211 and 212) – recognise this role of traditional leaders and traditional courts.
- 37 See the 1998 report of the South African Law Commission and Oomen, *op cit*.
- 38 Living customary law is largely based on oral recollections that are passed on from generation to generation.
- 39 The royal council consists of the chairman of council, the chief councillor and three other ordinary councillors. The gender composition of the council is four males and one woman with the latter also serving as the secretary of council.
- 40 Interview with Thelma Kekana, the secretary of both the traditional council and the traditional court at Mokopane on 17 June 2004.
- 41 Names have been changed to protect privacy of the parties.
- 42 The area next to the traditional authority does not have a ntona. It falls directly under the kgosi/chief.
- 43 See Rule 6(1) of Chiefs and Headmen's Civil Courts Rules, No R2082 of 1967 Government Gazette Extraordinary No 1929. This procedure was followed in each of the cases observed at Mokopane as notes were taken down throughout the proceedings.
- 44 S P Holomisa, *Administration of Justice Under Traditional Leadership*, Paper presented in Durban at the conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 45 As an example, the head of judiciary in a court under whose jurisdiction Mokopane traditional authority falls does not recall reviewing any case from a traditional court nor does anyone of his colleagues.
- 46 This is more along the lines of what happens in Botswana. See K.C. Sharma, *The Role and Character of Customary Courts*, paper presented at the Durban conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 47 Sherman *op cit*, Chapter 2.
- 48 See P Burton, A du Plessis, T Leggett, A Louw, D Mistry and H van Vuuren, *National Victims of Crime Survey: South Africa 2003*, ISS Monograph 101, 2004.
- 49 D Mistry, *Falling Crime, Rising Fear: 2003 National Victims of Crime Survey, South African Crime Quarterly*, No. 8, ISS, 2004, pp 17-24.
- 50 This is quite clear even from a quick glimpse at the main crime prevention documents such as the national crime prevention strategy and the white paper on safety and security.
- 51 A similar instance was raised by the chairman of the Limpopo House of Traditional Leaders who stated: "Recently our municipality wanted to build houses for people in an area where I am the traditional leader. They did not consult with me first so that I could inform the

- community. Every morning when they came they found that their work had been destroyed. I also do not know who did this but if they had come to me I would have informed the community properly and the work would have run smoothly from the start.”
- 52 Discussion with the traditional council of Ramokgopa on 19 April 2004.
- 53 Although police officers are not political leaders many a traditional leader see them as accountable to and therefore following instructions for political leadership.
- 54 Chief councillor of Mokopane, interviewed on 17 June 2004.
- 55 This does not point to our disbelief of the traditional leader but to the fact that he was relating what he had heard doing rounds in the community. This apparently pervasive perception was put to the station commissioner of Mahwelereng and that station's head of detectives. They both denied any knowledge of such a practice but stated that it could be true adding that in the event of it being true the community had to report such an officer or officers so that the problem could be dealt with.
- 56 Interview on 15 June 2004.
- 57 Interview on 15 June 2004.
- 58 Interview on 15 June 2004.
- 59 Interview on 14 July 2004.
- 60 A pertinent example is the function that was held on 10 July 2004. When we conducted interviews at the station on the 8th, we were told by the station commissioner that the chief had been at the station the previous day with a view to do planning with the police for the event.
- 61 Interview on 14 July 2004.
- 62 This line of thinking resonates with the restorative justice approach. For instance see D.L. Kgosimore, 'Restorative Justice as an Alternative Way of Dealing with Crime', *Acta Criminologica*, 15 (2), 2002.
- 63 Focus group interview on with headmen of Mokopane on 15 June 2004.
- 64 Focus group interview on with headmen of Mokopane on 15 June 2004.
- 65 The chief councillor drives around spotting the sign: 'Mapogo-a-Mathamaga'. This is an organisation that is known for dealing harshly with suspected criminals.
- 66 This view is, however, not restricted to traditional leaders and traditional communities. As Antoinette Louw and Anton du Plessis (personal communication) rightly pointed out, this view also pervades many other sections of society.
- 67 This is not to deny that the new dispensation also promotes harsh sentences and brought about tightening of bail legislation (as provided for by the Criminal Law Amendment Act 105 of 1997 and the Criminal Matters Amendment Act 68 of 1998, respectively). It is rather to argue that even these pieces of legislation are, strictly speaking, a misfit in the current dispensation.
- 68 Interview on 28 May 2004.
- 69 Interview on 28 May 2004.
- 70 This is a mindset that demands harsh punishment for criminals. It is evident in many jurisdictions and has had inroads into many a criminal justice system.
- 71 For instance the Black Administration Act, Black Authorities Act and importantly (as legislation produced in the current democratic dispensation) the 2003 Act.
- 72 Joel Shai, 19 May 2004.
- 73 The four pillars of the NCPS are the criminal justice process, community values and education, environmental design and trans-national crime.
- 74 CSIR, Incidence of Social Fabric Crime (SFC) in Limpopo and Strategy to Combat Social Fabric Crime (SFC), 2003.
- 75 Focus group interview with headmen of Mokopane.
- 76 Focus group interview with headmen of Mokopane on 15 June 2004.

- 77 Focus group interview with headmen of Mokopane on 15 June 2004.
- 78 K. Moul, op cit, p 36.
- 79 Interview with Dudu Setlatjile on 19 April 2004.

ANNEXURE A

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Act No. 41,2003

Traditional Leadership and Governance Framework Act, 2003

Code of Conduct

General conduct of traditional leader

1. A traditional leader:
 - must perform the functions allocated to him or her in good faith, diligently, honestly and in a transparent manner;
 - must fulfil his or her role in an efficient manner;
 - may not conduct himself or herself in a disgraceful, improper or unbecoming manner;
 - must comply with any applicable legislation;
 - must act in the best interest of the traditional community or communities he or she serves;
 - must promote unity amongst traditional communities;
 - may not embark on actions that would create division within or amongst traditional communities;
 - must promote nation building;
 - may not refuse to provide any service to a person on political or ideological grounds;
 - must foster good relations with the organs of state with whom he or she interacts;
 - must promote the principles of a democratic and open society; and
 - must disclose gifts received.

General conduct of traditional council

2. A traditional council must-
 - (a) perform the functions allocated to it in good faith, diligently, honestly and in

- (b) execute its duties in an efficient manner;
- (c) comply with any applicable legislation;
- (d) act in the best interest of the traditional community it serves;
- (e) give effect to the principles governing public administration set out in section
- (f) foster good relations with the organs of state with whom it interacts.