

The Customary Anatomy of the Traditional Governance of the Bafokeng Traditional Community: The Implications of the Constitutional Recognition of Hereditary Headmanship

SF Khunou*



P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Samuel Freddy Khunou

Affiliation

Faculty of Law, NWU Mafikeng
South Africa

Email Freddy.Khunou@nwu.ac.za

Date published

18 October 2017

Editor Prof Paul du Plessis

How to cite this article

Khunou SF "The Customary Anatomy of the Traditional Governance of the Bafokeng Traditional Community: The Implications of the Constitutional Recognition of Hereditary Headmanship" *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a3270>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a3270>

Abstract

The institution of the hereditary headmanship of the Bafokeng traditional community in the North West Province, South Africa has been in existence from time immemorial. It survived the calamities and vicissitudes of both the colonial and the apartheid regimes. The question asked here is whether the hereditary headmanship is relevant in the new constitutional dispensation or, to put the question differently, whether this customary practice is in line with the dictates and ethos of the *Constitution of the Republic of South Africa, 1996* (the Constitution). This article asserts that the customary practice of hereditary headmanship of Bafokeng is still apposite and fitting in the new South Africa. In particular, it is in accord with the Constitution, as is the customary practice of the Cala community in the Eastern Cape, which requires its headmen to be elected by members of the community from time to time.

Keywords

Hereditary headmanship; traditional governance; customary law; Interim Constitution; 1996 Constitution; legislation; homelands; Apartheid; genealogical seniority; family group; traditional ward; Bill of Rights

.....

1 Introduction

This article seeks to examine and discuss the customary practice of the traditional governance of the Bafokeng community in the North West province of South Africa with an emphasis on the community's custom of hereditary headmanship. Historical evidence indicates that the Bafokeng community has over centuries been ruled by hereditary chiefs and headmen in terms of their living customary law. The custom of the Bafokeng hereditary headmanship determines which of the sons of the incumbent headman should succeed.¹ In other words, the headmanship of the Bafokeng community is determined on the basis of hereditary succession in accordance with the genealogical seniority of the particular royal family of the headman concerned.

Although it is the practice among the Bafokeng community and many black communities in South Africa that a son of the community's headman succeeds his father, there are exceptions to this general usage. The customary law of the Cala reserve community in the Eastern Cape Province, for example, requires its headmen to be elected by members of the community.² It is against this backdrop that this article aims to establish whether or not the Bafokeng customary rule of hereditary headmanship is consistent with the *Constitution of the Republic of South Africa, 1996*³ and the applicable legislation on traditional leadership.⁴

2 Background

Thornhill and Selepe posit that members of the Bafokeng community ("the people of the dew") are the descendants of the Sotho-Tswana people who travelled southwards from central Africa over a period of 200 years.⁵

¹ Holomisa *Double-Edged Sword* 233.

² See in this regard, *Penrose Ntamo v The Premier of the Eastern Cape* (ECB) (unreported) case number 194/14; and *Premier of the Eastern Cape v Ntamo* 2015 6 SA 400 (ECB).

³ Herein referred to as the "final Constitution" or the "Constitution".

⁴ The applicable laws governing how traditional leadership may operate include among others the final Constitution, the *Traditional Leadership and Governance Framework Act* 41 of 2003, the *Traditional Leadership and Governance Framework Amendment Act* 23 of 2009 and various provincial legislation such as the *North West Traditional Leadership and Governance Act* 2 of 2005, the *Traditional Leadership and Governance Act* 4 of 2005 (Eastern Cape), the *Mpumalanga Traditional Leadership and Governance Act* 3 of 2005, the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005, the *KwaZulu-Natal Traditional Leadership and Governance Act* 5 of 2005, the *Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act* 2 of 2007, the *Gauteng Traditional Leadership and Governance Act* 4 of 2010 and the *Free State Traditional Leadership and Governance Act* 8 of 2005.

⁵ Thornhill and Selepe 2010 *J Public Admin* 164.

Mbenga indicates that one version of the Bafokeng community's oral tradition asserts that in some distant period, possibly during the 17th century, the Bafokeng people separated from the Hurutshe lineage and formed their own independent chiefdom.⁶ According to Bammann, the Bafokeng's *kgosi*⁷ was Nape, who ruled with the support of the hereditary headmen at the time when the Bafokeng entered the territory which was later called the western Transvaal. It is possible to trace a chronologically accurate genealogy of the hereditary chiefs and headmen of the Bafokeng community, however, only from Kgosi Mokgatle (1834-1891) onwards.⁸

The Bafokeng community settled in Phokeng, its capital village (near the present modern town of Rustenburg), after they broke away from the Hurutshe.⁹ Enduring the vicissitudes of the *difaqane* or *mfeqane*¹⁰ and the arrival of the *voortrekkers*¹¹ in the region of Phokeng in the first four decades

⁶ Mbenga *Acquisition of Land 2*. It is also recorded that the Hurutshe also broke away from the parent Kwena group under Chief Malope. According to Sepeng, Malope was regarded as the father of all of the different communities of the Kwena group. The larger Tswana chiefdoms of the Ngwaketsi, the Bakwena, the Ngwato, the Tawana (Botswana), the Bakwena ba Mogopa, the Bafokeng, the Baphalane, the Bakwena ba Mmatau, the Bakwena ba Manamela, the Bakwena ba Matlhaku, the Bakwena ba Maake, the Bakwena ba Moletse (North West province, South Africa), the Batsotetsi, Bamonaheng and the Bakwena (Free State province of South Africa and the Kingdom of Lesotho) emerged from the parent Kwena tribe. Also see in this regard, Sepeng *History of the Bakwena Ba Mogopa* 27.

⁷ The Tswana word "*kgosi*" is used interchangeably in this article with the words "chief", and "senior traditional leader", depending on the context. However, the word "chief" is no longer used in the statute book of South Africa. On the other hand, the word "headman" (plural: headmen) is a term associated with government usage and "ward-head" with the anthropological literature. The word "headman" is used in this article to translate *induna* (Zulu), *ibonda* (Xhosa), *morenana* (Sotho) and *kgosana* (Tswana). For more information on the issue of headmanship, see Bennett *Customary Law* 103.

⁸ Bammann *The Bafokeng* 10. Since Mokgatle's time, the following chiefs or *dikgosi* of the Bafokeng traditional community could be ascertained: Mokgatle (1834-1891), Tumagole (1891-1896), Molotlegi (1897-1938), Manotshe Molotlegi (1938-1956), Lebone Edward Molotlegi (1956-1995), Molelwane Molotlegi (Lebone Molotlegi II) (1995-2000), Leruo Tshekedi Molotlegi (2000-). It is of great importance to note that all the successive chiefs of the Bafokeng community together with their respective headmen were hereditary leaders. Also see Breutz *Tribes of Rustenburg* 68.

⁹ Manson and Mbenga 2003 *JSAS* 25.

¹⁰ The Zulu word "*difaqane*" or "*mfeqane*" refers to a period of dispersal and great turmoil in Southern Africa where chiefdoms and tribes (traditional communities) were displaced by Zulu warriors under King Shaka of the Zulu kingdom. Like many black communities in Southern Africa, the Bafokeng community was adversely affected by the *difaqane* and disintegrated in the process. See generally in this regard, Shaw *State Formation* 66.

¹¹ The Afrikaans word "*voortrekkers*" literally means "those who go ahead". The word basically refers to any of the Boers (Dutch settlers or their descendants) or as they came to be called in the 20th century, the Afrikaners, who left the British Cape Colony in South Africa after 1834 and migrated into the interior highveld north of the Orange River. The *voortrekkers* found the black communities in the interior. Later, this region evolved into the independent Boer states of the Orange Free State and the Zuid-Afrikaansche Republiek or the Republic of Transvaal. The "*voortrekkers*" label is

of the 19th century, the Bafokeng community retained the institution of hereditary headmanship. The Bafokeng practice of hereditary headmanship also continued to be in existence during the turbulent years of the *Zuid-Afrikaansche Republiek (ZAR)*¹² or the Republic of Transvaal (TVL), when the Boer government recognised their successive chiefs and headmen. In 1885 the TVL *Volksraad* enacted Law 4 of 1885, which recognised the laws and customs of the hereditary leadership of the black communities in the Republic of TVL. It also gave the State President power and authority over chiefs.¹³ However, despite the Boer government's ruthless oppression of the chiefs throughout TVL, the hereditary leadership of the Bafokeng and other black communities survived.

In 1910 the Tswana communities of the TVL became part of the Union of South Africa.¹⁴ Following the establishment of the Union government, the white authorities allowed, among other customs, the continued existence of the Bafokeng customary rule of hereditary headmanship. This recognition was confirmed in section 2(7) of the then *Native Administration Act*,¹⁵ which

therefore used to refer to the Boers who participated in the organised migration commonly referred to as the Great Trek. The *voortrekkers* invaded the land of the Bafokeng and other communities in the region, which was later called the Republic of Transvaal, with the subsequent effect of land dispossession. In this regard see Editors of Encyclopaedia Britannica Date Unknown <http://global.britannica.com/EBchecked/topic/632827/Voortrekker>.

- ¹² The Dutch name *Zuid-Afrikaansche Republiek (ZAR)* often referred to as the Republic of Transvaal was an independent Boer republic from 1852 to 1902. The ZAR defeated the British in what is often referred to as the First Boer War of 1880 and remained independent until the end of the Second Boer War (the Anglo-Boer War) on 31 May 1902, when it was forced to surrender to the British. From 1852 to 1902, the Bafokeng and other black communities were under the authority of the Boer Republic of TVL. See in this regard Tummala *Politics of Preference* 143.
- ¹³ Article 13 of *Law 4 of 1885 (Transvaal)* provided that: "the State President as paramount chief shall exercise over all chiefs and natives in the Republic all the power and authority which is in accordance with native laws, habits and customs... He is hereby empowered with advice and consent of the Executive Council, to depose from his chieftaincy any chief found guilty of an act whereby the peace of the Republic is endangered, to remove him from the place where he resided, to place him under supervision and in such safe custody as may appear expedient and to appoint some other suitable person in his place. A decision of this nature shall not be capable of revision in any court in this Republic".
- ¹⁴ In 1910, the Tswana communities including the Bafokeng became part of the Union of South Africa, when it was created through the promulgation of the *South Africa Act* of Edward VII C of 1909. The Union of South Africa was basically an amalgamation of the former Boer republics of Orange Free State and Transvaal, and the British colonies of Natal and Cape.
- ¹⁵ *Native Administration Act* 38 of 1927. The *Native Administration Act* was later renamed the *Bantu Administration Act* and the *Black Administration Act* successively. This Act was essentially related to the administration of the reserves (homelands) such as the Tswana homeland, where at that time the Bafokeng community resided. The Act was also designed to stress the need for blacks to be re-tribalised under a distinct system of law and government. The Union government's intention to consciously revive tribalism was presented as "traditional", even though it was not reminiscent of

continued during the *apartheid* era.¹⁶ Despite the repressive nature of the *apartheid* system, the Bafokeng hereditary headmanship continued to survive and enjoyed the recognition of the *apartheid* regime, albeit subject to some forms of manipulation and the introduction of some control measures. On 6 December 1977, as a result of the implementation of the so-called homeland policy of the *apartheid* government, Bophuthatswana became an independent Tswana "country" through the enactment of the *Status of Bophuthatswana Act*.¹⁷ Accordingly, the Tswana people (including the Bafokeng community) became "citizens" of the newly created Bophuthatswana.¹⁸

In 1978, the Bophuthatswana parliament enacted the *Bophuthatswana Traditional Authorities Act*¹⁹ to recognise, among other customs, the system of hereditary headmanship of its Tswana traditional communities. Again the Bophuthatswana legislative enactment recognised the Bafokeng custom of hereditary headmanship. As it will be shown below,²⁰ in 1994, when the homelands and *apartheid* regime were abolished,²¹ the democratic

any pre-colonial traditional structure. The "renewal" of tribalism was crucial to the development of diverse African ethnicities which were brought to full fruition in the policy of the reserves under the authority of the chiefs. In fact, the renewal of tribalism reinforced the existence of traditional leadership in black communities which observed customary law. Also see Khunou *Legal History of Traditional Leadership* 108-109.

¹⁶ *Apartheid* is an Afrikaans word which literally means "apart" or "separate". It was a system of legal racial separation which dominated South Africa from 1948 until 1994. However, as will be demonstrated below, the mechanisms of apartheid were set in place long before 1948. Under apartheid, various races were separated into different regions and discrimination against other races such blacks, Coloureds and Indians was legally entrenched with whites, among others, having priority over housing, jobs, education and power. See in this regard Bujo *African Theology* 237.

¹⁷ *Status of Bophuthatswana Act* 89 of 1977. This Act declared Bophuthatswana to be an independent state and no longer part of South Africa. However, the "independence" of Bophuthatswana was not accepted and recognised by the majority of the black people and any country other than South Africa. This Act further provided among other matters that: "Bophuthatswana is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa and the Republic of South Africa shall cease to exercise any authority over Bophuthatswana".

¹⁸ Bophuthatswana belonged to a group of four black homelands which obtained their so-called "independence" from the Republic of South Africa during the period 1976 to 1981. Known as the TBVC states, the group comprised of Transkei, Bophuthatswana, Venda and Ciskei.

¹⁹ *Bophuthatswana Traditional Authorities Act* 23 of 1978. In most cases, the President of Bophuthatswana (Lucas Manyane Mangope) relied on this Act to recognise, appoint and depose traditional leaders. This Act was to a very large extent the replica of the *Black Administration Act* 38 of 1927. Despite the fact that the President of Bophuthatswana meddled with the traditional affairs of the Bafokeng community and subjected its traditional authority to a severe treatment, the institution of hereditary headmanship survived the despotic regime of Bophuthatswana.

²⁰ See 6.1 and 6.2 below.

²¹ In terms of section 230(1) read with Schedule 7 of the *Constitution of Republic of South Africa* 200 of 1993 (the "Interim Constitution") the status of the homelands such as Bophuthatswana was abolished. On the other hand, s 124 read with Schedule 7 of

government recognised the institution of traditional leadership throughout the new South Africa. It is against this backdrop that Molotlegi correctly stated that the Bafokeng community has been ruled according to the custom of hereditary leadership for many generations and they continue to do so even today.²²

The Bafokeng community is currently led by Kgosi Leruo Tshekedi Molotlegi whom the Bafokeng commonly refers to as King rather than as chief or *kgosi*.²³ The community is wealthy, having become rich as a result of the platinum deposits on its land. The community is referred to by the mining industry and mass media as "Bafokeng Inc" and sometimes as "the richest tribe in Africa." However, the community's preferred designation is the "Royal Bafokeng Nation".²⁴ Kgosi Molotlegi relies on traditional structures such as hereditary headmanship to lead and govern the Bafokeng community. The system of hereditary headmanship and the traditional governance structure of the Bafokeng community are not unusual in the communities recognised as traditionally governed in South Africa. The patriarchal hereditary system of the Bafokeng community is common to Tswana communities in both South Africa and Botswana.²⁵

3 The political and traditional divisions of governance

3.1 The family group (*kutle* or *kgoroana*)

The Bafokeng community and other Tswana communities in South Africa and Botswana are divided into several different groups, which ultimately derive from the relationships established by blood and marriage. The smallest of these groups is the family, consisting of a man, his wife and their own or adopted children.²⁶ Shaw wrote that the most elementary political and social unit of the Bafokeng community is the household.²⁷ The Tswana

the Interim Constitution provided that all of the Bophuthatswana territory was to form part of South Africa mostly within the new North West Province. In addition, on 1 January 1994 all the residents of Bophuthatswana attained South African citizenship in terms of the *Restoration and Extension of South African Citizenship Act* 196 of 1993.

²² Molotlegi "Role of Traditional Leadership" 6. S 3 (a) of the *Bophuthatswana Traditional Authorities Act* 23 of 1978 provided that a chief or a headman shall enjoy the status, rights and privileges and duties conferred or imposed upon his office by the recognised customs or usages of his tribe or community. This piece of legislation recognised the duties and powers of the Tswana chiefs and headmen conferred upon them by customs or customary law.

²³ Molotlegi "Role of Traditional Leadership" 1-5.

²⁴ Cook 2011 *Current Anthropology* 152.

²⁵ Cook 2011 *Current Anthropology* 152.

²⁶ Schapera *Handbook of Tswana Law* 12.

²⁷ Shaw *State Formation* 70. The patriarchal heads of the households are known as the "kraal heads" in colonial and apartheid parlance and more commonly today are called

customary family law is founded on the principle that family ties must be strengthened and are essential to the healthy development of the entire community. The Bafokeng believe that nothing must be allowed to weaken family ties. As a result, family affairs are largely left to the family itself to handle, while the headman of a traditional ward is merely notified of the events as they happen.²⁸

The family head (or household head) has legal, social and religious authority over his family. Although every household is to some extent a distinct legal and administrative group, the most effective social unit is the family group (*kutle* or *kgoro*). The family group consists of several different households usually claiming descent in the male line from a common grandfather or great-grandfather.²⁹ The head of the family group is the *mogolwane* or "common elder",³⁰ who deals with matters concerning the whole group.³¹

The members of the family group are subjected to the administrative control of the *mogolwane*. This man occupies his position either by right of birth as the senior male member in line of descent or because he has himself founded the group. However, these days the Bafokeng practice permits a senior woman to act as the *mogolwane* of a particular family group. However, the *mogolwane* is not formally appointed or even formally recognised by the superior traditional authority.³² Instead, the *mogolwane* is entitled to respect from the members of his or her family group. He or she is expected to keep them in order and must be consulted by them in all their important undertakings.³³ In turn, the family group has a family council which is a loosely organised body embracing in general all the adult members of the family group.³⁴

"family heads". However, nowadays many Bafokeng women are also the family heads. In this regard see Bennett *Customary Law* 103.

²⁸ TARG "Administrative and Legal Position" Vol VII 3.

²⁹ The Tswana word "*kutle*" (plural: *dikutle*) basically means a family group. According to the Bafokeng community, the *kutle* is also referred to as the "*kgoro*" (plural: *dikgoro*). The accuracy of this observation is based on my personal experience as a member of one of the traditional divisions of the larger Tswana community such as the Bafokeng, the Bakgatla ba Kgafela and the Bakwena ba Mogopa in the North West Province of South Africa.

³⁰ The word "elder" means an older, influential member of the family, tribe or community. On the other hand, "common elder" or "commoner" means one of the ordinary or common people as opposed to the aristocracy or royalty. In the same way, the Tswana word "*mogolwane*" (plural: *bagolwane*) literally means the elder or the head of the family group. In other words, the *mogolwane* is the senior man or woman of the family group.

³¹ Shaw *State Formation* 70.

³² Schapera *Handbook of Tswana Law* 89-90.

³³ Schapera *Handbook of Tswana Law* 90.

³⁴ Schapera *Handbook of Tswana Law* 90.

The gathering of the family group is held at the family *kgotlana*,³⁵ if there is one, or else in one of the homesteads belonging to the group, generally in that of its *mogolwane*, who also summons the people either at his own instance or on the advice or request of some other members. The adult members of the family group (the family council) meets to discuss matters such as betrothal and marriage negotiations, the arrangement of feasts, the settlement of estates, the disposal of property, the fate of a widow, or other matters concerning the family group.³⁶

The family council also assist the *mogolwane* to settle disputes arising within the family group. Its right to deal with such disputes is explicitly recognised in the saying: *fa gare ga bana ba mpa ga go tsenwe*.³⁷ However, the *mogolwane* has no means of enforcing his decision except through general domestic discipline or by handing the matter over to the higher authorities such as the *kgotla*³⁸ under the authority of the hereditary headman.³⁹

3.2 The traditional ward (*kgotla*)

The more inclusive political, administrative and social unit of the Bafokeng community is the traditional ward (*kgotla*).⁴⁰ A number of family groups living together in the same village or part of a village make up a traditional ward, which is under the authority of a hereditary headman. Generally, the traditional ward consists of different family groups which are usually related by blood or marriage (*kutle* or *kgoroana*).⁴¹ Schapera states that every person in the tribe⁴² belongs to a traditional ward. Any stranger or alien

³⁵ The Tswana word "*kgotlana*" is used in the context of this article to refer to the meeting place of the members of the family group.

³⁶ Schapera *Handbook of Tswana Law* 90.

³⁷ The above Tswana adage literally means in English that the outsiders are not allowed to interfere in the affairs of the family group.

³⁸ Schapera *Handbook of Tswana Law* 21.

³⁹ Schapera *Handbook of Tswana Law* 90-91.

⁴⁰ The Tswana word "*kgotla*" (plural: *dikgotla*) literally means in English a traditional ward. However, in Tswana context, the word *kgotla* has other meanings. For instance, it may be used to refer to a place where the affairs of the community are discussed. It may also be used to refer to the traditional court. See in this regard, Isaaks *Guide to Botswana* 39. However, according to Breutz, the well-known traditional wards in Phokeng include among others the Bakgosing, the Baratshwene, the Baphotsana, the Baphiring, the Bataung, the Bašiga, the Barakhudu, the Batlase and the Bamolapo. However, Breutz acknowledged the fact that these traditional wards exclude traditional wards of more recent origin. This is so because as it will be shown below currently the Bafokeng community has 72 traditional wards. See in this regard, Breutz *Tribes of Rustenburg* 68-69.

⁴¹ Schapera *Handbook of Tswana Law* 21.

⁴² The word "tribe" is used in this article to refer to the Bafokeng traditional community. However, it must be emphasised that the word 'tribe' is no longer used in the statute book of the new South Africa. This word was mainly associated with the colonial and apartheid terminology.

family joining the Bafokeng community is placed within one of the traditional wards.⁴³ The foreigners assigned to specific wards by the *kgosi* may be related to other members of the traditional ward by marrying into it. For this reason, members of the same ward regard themselves as a body of related people. As a result, a man calls the people of his traditional ward *ba ga etsho*.⁴⁴ Accordingly, members of the same ward are regarded as friends and neighbours.⁴⁵

The Bafokeng community is divided into 72 wards, each of which is under the authority of a hereditary headman. The headman is much more important than his counterparts at the family group and household levels. It is through the headman that all communication with the *kgosi* takes place.⁴⁶ Everything happening within the ward must come to his knowledge before it passes on to the *kgosi*. He is expected to see that members of his ward observe the customary law and customs of the community.⁴⁷

By virtue of his office, the headman also acts as the recognised adviser to the *kgosi*. He must keep the *kgosi* informed of the grievances and the proposals of the people in his ward.⁴⁸ To ensure that a headman of the Bafokeng community has his finger on the pulse of the ward, he is assisted in the execution of his duties by a minimum of four *bannakgotla*⁴⁹ and/or *basadikgotla*⁵⁰ and his wife (the *mmakgosana*).⁵¹ This system allows women to have representation in the process of decision-making and ensures that some form of democratic governance is practised.⁵²

⁴³ Schapera *Handbook of Tswana Law* 21.

⁴⁴ The Tswana phrase *ba ga etsho* literally means the people of my home or our people.

⁴⁵ Schapera *Handbook of Tswana Law* 22.

⁴⁶ Schapera *Handbook of Tswana Law* 22.

⁴⁷ Schapera *Handbook of Tswana Law* 91-92.

⁴⁸ Schapera *Handbook of Tswana Law* 93.

⁴⁹ The Tswana word *bannakgotla* (singular: *monnakgotla*) essentially refers to men who assist the headman. They usually assist the headman to administer the *kgotla* or traditional ward. Although in most cases, the *bannakgotla* are related to the headman or the *kgosi*, generally they need not be from the royal family. In any event, it is not the requirement for one to have the hereditary title to occupy the position of the *monnakgotla*. All that is required is loyalty to the traditional authority and the requisite knowledge and experience of the traditional affairs of the ward and the community in general.

⁵⁰ The Tswana word *basadikgotla* (singular: *mosadikgotla*) literally refers to women who assist the headman to administer the affairs of the *kgotla* or traditional ward. Therefore, a headman of the Bafokeng community does not discharge his functions with men only, but women are also part of the administration of the *kgotla*. In this context, the traditional governance or hereditary headmanship of the Bafokeng is in practice not patriarchal in nature.

⁵¹ The Tswana term *mmakgosana* (plural: *bommadikgosi*) literally means a wife of a headman.

⁵² Thornhill and Selepe 2010 *J Public Admin* 165.

The headman is also responsible for keeping the *kgosi's* office informed of births, marriages and deaths, and of the pressing issues or specific problems in the traditional ward. He is also required to supply character references for members of his traditional ward seeking jobs. According to Thornhill and Selepe, a headman of the Bafokeng community is expected to be a role model to the ward and a bearer of the community's traditions and customs.⁵³

In addition, a headman has well-defined judicial powers, and his authority is compulsory and legal.⁵⁴ Each traditional ward has its own *kgotla* (ward court) where cases are tried.⁵⁵ If the headman is unable to resolve disputes, he refers the aggrieved party to the Royal Bafokeng traditional court, which sits at the Civic Centre in Phokeng.⁵⁶ It must be stressed that in all instances, the court emphasises the need for reconciliation between the parties. However, if the aggrieved party is unable to seek redress in the traditional court, the party can then seek redress through the formal Magistrates' Courts.⁵⁷

It is also important to note that in most Tswana communities a *kgosi* decides cases with the advice of his council. However, the Bafokeng community follows a different tradition in the sense that the *kgosi* seldom decides any cases himself. This task is delegated to a number of judges (*banna ba lekgotla*)⁵⁸ appointed by the *kgosi* and his council.⁵⁹ This practice is undoubtedly in line with the principle of the separation of powers.⁶⁰ This is so, because the *kgosi* of the Bafokeng community does not have unlimited powers and is always sensitive to the need to refrain from undue interference in the functional independence of other branches of the traditional government.

⁵³ Thornhill and Selepe 2010 *J Public Admin* 168.

⁵⁴ Schapera *Handbook of Tswana Law* 19.

⁵⁵ Moumakwa *Botswana Kgotla System* 43.

⁵⁶ The Phokeng Civic Centre is the administration building of the traditional government of the Bafokeng community. The Civic Centre is basically the seat of the traditional government of the Bafokeng community.

⁵⁷ Thornhill and Selepe 2010 *J Public Admin* 165. Also see the *Black Administration Act* 38 of 1927, which will be replaced by the *Traditional Courts Bill* [B1-2017].

⁵⁸ TARG "Administrative and Legal Position" Vol VII 3.

⁵⁹ TARG "Administrative and Legal Position" Vol VII 3.

⁶⁰ The doctrine of the separation of powers is a constitutional theory which means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. Basically, the principle of the separation of powers requires the separation of the three main spheres of government, namely the legislature, the executive and the judiciary. In this context, the *kgosi* of the Bafokeng, who is the head of the executive government of the community, does not interfere in the affairs of the judicial arm of traditional government. For more information on the principle of the separation of powers, see Mojapelo 2013 *Advocate* 37.

3.3 *The village (motse)*

The Bafokeng community is comprised of 29 villages (*metse*).⁶¹ As already noted above, each village is divided into the traditional wards under the authority of the respective hereditary headmen. Depending on the size of the village, various traditional wards are grouped together into a village, with their senior ward headman acting as the headman of the village.⁶² However, the Bafokeng community has introduced a system of councillors who were and still are elected democratically among the villagers. The traditional structure of the elected councillors constitutes the Executive Council (EC), which has the status of the local authority and is supported by the committees responsible for portfolios such as economic development, health and education.⁶³

It is for this reason, among others, that Molotlegi maintains that the traditional governance of the Bafokeng community espouses the principles of democracy through the mechanisms of the system of electing the village representatives to the EC.⁶⁴ It must be stressed that the Bafokeng community also elects women to the positions of the EC. This practice ensures that there is a gender representation in the EC and the traditional structures in general.⁶⁵

3.4 *The community (morafe)*

Finally, all the levels or local territorial divisions of the Bafokeng community are grouped under the hereditary *kgosi*, who has authority over all the constituent sections. All of these levels, namely the households, the family groups, the traditional wards and the villages, form the *morafe* or the *setshaba*⁶⁶ of the Bafokeng. Therefore, the Bafokeng traditional community is the largest political and administrative unit within which the *kgosi* exercises chiefly authority with the assistance of his hereditary headmen.⁶⁷

The *kgosi* of the Bafokeng is the most senior traditional leader of the community. To this end, the Bafokeng traditional authority is invariably vested in a nuclear group, consisting of the senior traditional leader (the

⁶¹ The Tswana word *metse* (singular: *motse*) literally means villages or settlements of groups of the community. Usually each settlement or village is made up of the traditional wards, which are under the authority of the headmen.

⁶² Shaw *State Formation* 71-72.

⁶³ Molotlegi "Role of Traditional Leadership" 8.

⁶⁴ Molotlegi "Role of Traditional Leadership" 7.

⁶⁵ Also see s 1(2)(b) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

⁶⁶ Shaw *State Formation* 70. The Tswana word *morafe* or *setshaba* refers to a traditional community.

⁶⁷ Bekker and Boonzaaier "Traditional Leadership" 122.

kgosi), hereditary headmen, other royal elites, the *bommadikgosana*, the *bannakgotla*, the *basadikgotla* and the elected members of the community.⁶⁸ At the community level, there is also a Supreme Council (SC) which is made up of the EC, the headmen, the *bannakgotla* and/or the *basadikgotla*. The *kgosi* convenes the SC whenever important decisions affecting the community need to be discussed. However, the Royal Bafokeng Administration (RBA) manages the community's infrastructure and basic services. It is effectively the local municipality of the community. The Royal Bafokeng Holdings (RBH) manages the community's mineral assets and investment portfolios.⁶⁹

The highest ranking decision-making body in the Bafokeng community is, however, the *kgotha-kgothe*.⁷⁰ This is a general meeting of all the adult members of the Bafokeng community which is held twice annually, whenever there is an important matter to discuss and debate.⁷¹ This body also discusses major issues that affect the community and where the *kgosi* and his headmen have sought input from the community. The mandate of the *kgosi* and the headmen comes from consultation with the *kgotha-kgothe*. As a result, the input of the *kgosi* and the headmen on any given matter can be overturned by the people at the *kgotha-kgothe*.⁷²

Quite evidently, the *kgotha-kgothe* ensures that there is accountability, responsiveness and openness in the traditional governance of the Bafokeng community. It is in the *Kgotha-kgothe* that the community exercises its right to make political, social and economic decisions. The principle involved in decision-making in the Bafokeng community is usually one of inclusiveness and transparency.⁷³

⁶⁸ Bekker and Boonzaaier "Traditional Leadership" 122.

⁶⁹ Cook 2011 *Current Anthropology* 158.

⁷⁰ The Tswana word *kgotha-kgothe* literally means in English the "community assembly" or "community parliament". This assembly is usually attended by the adult members of the Bafokeng community.

⁷¹ A notice of the meeting is usually announced in a full page advertisement in major newspapers of the country. In addition to the newspaper advertisement, the headman of each traditional ward is required to announce the date of the meeting to the people residing in his ward.

⁷² Molotlegi "Role of Traditional Leadership" 7-8.

⁷³ Molotlegi "Role of Traditional Leadership" 7-8.

4 The nature of customary law and hereditary headmanship

Before one can deal with the nature of the hereditary headmanship of the Bafokeng community, it is important to define what custom or living customary law is. Tobin cites Bekker defining customary law or custom as:⁷⁴

An established system of immemorial rules which had evolved from the way of life and natural wants of people, the general context of which was a matter of common sense, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councilors, their sons and their sons' sons, until forgotten, or until it becomes part of the immemorial rules.

According to Rautenbach and Du Plessis, living customary law consists of various customs and usages traditionally observed among the indigenous African people of South Africa and forms part of the culture of those people.⁷⁵ Essentially, the term "living customary" law is used to refer to the practices and customs of the people in their day-to-day lives. It is primarily based on their world view, which is largely influenced by the political, social and economic conditions of their lives.⁷⁶ Equally so, the custom of hereditary headmanship of the Bafokeng community forms part of their day-to-day lives.

In the case of *Pilane v Pilane*, the Constitutional Court confirmed the recognition and existence of customary law of a traditional community as follows:⁷⁷

... the true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs ...

However, the living customary law differs from community to community. It is against this backdrop that Jobodwana asserts that the customary law of a community (for instance, the Bafokeng community) is a body of customs and traditions which regulates various kinds of relationships between members of that particular community. Hence, the living customary law of the Bafokeng community is recognised as obligatory by its members.⁷⁸

⁷⁴ Tobin *Indigenous Peoples* 30.

⁷⁵ Rautenbach and Du Plessis "Final Nails" 336.

⁷⁶ Jobodwana 2000 *SAPL* 30.

⁷⁷ *Pilane v Pilane* 2013 4 *BCLR* 431 (CC) para 34.

⁷⁸ *Pilane v Pilane* 2013 4 *BCLR* 431 (CC) para 34. In attempting to understand the living customary law of the Bafokeng community, it is therefore important to draw a distinction between the "living" and the "official" customary law. According to Moodley, "living" customary law may be defined as the law that is actually observed by community; while "official" customary law is the law contained in legislation and

Jobodwana further argues that the acceptance of living customary law means that customs must conform to actual patterns of behaviour. In other words, living customary law derives its strength and validity from its acceptance by members of the community as being binding on them. For instance, members of the Bafokeng community have accepted the customary rule of hereditary headmanship as binding on them. For this reason, the living customary law of the Bafokeng community is an expression or a product of patterns of behaviour among its members and a mirror of accepted usage or practice.⁷⁹

In terms of the customary practice of the Bafokeng community, the headman succeeds automatically to his office by right of birth. There is a Tswana adage that says *kgosi ke kgosi ka a tsetswe*.⁸⁰ Equally so, this Tswana adage applies to the position of the headman who is also required in accordance with the customary rule of hereditary succession of the Bafokeng community to be born to the position.⁸¹ Breutz confirms the Bafokeng custom of hereditary leadership when he notes that the chieftainship⁸² of the Bafokeng community is hereditary.⁸³

Succession to the position of the headmanship of the Bafokeng community is also hereditary. As a rule, the headmanship is vested in a particular royal family and the headman according to customary law is appointed to the post.⁸⁴ This means that a headman of the Bafokeng community is not elected but he acquires his position by virtue of birth in accordance with the customs and customary law of the community. It must nevertheless be stressed that even the hereditary headman must be acceptable to the ward.

precedents. It is therefore important to note that the practice of hereditary headmanship of the Bafokeng is primarily sourced from the living customary law of the community and confirmed in various pieces of legislation and court cases. In this regard also see Moodley *Customary Law* 9.

⁷⁹ Moodley *Customary Law* 30.

⁸⁰ The Tswana idiom *kgosi ke kgosi ka a tsetswe* literally means that a chief is a chief because he is born to the traditional position. In other words, a *kgosi* is not elected. Equally so, a headman of the Bafokeng community is not elected.

⁸¹ Schapera *Handbook of Tswana Law* 53.

⁸² The term "chieftainship" is used interchangeably in this article with the terms "traditional authority" or "traditional leadership". The term "traditional authority" or "leadership" has different connotations depending on its historical circumstances. The first connotation has to do with traditional leadership as an institution of traditions associated with the communal system of life of the community. Another connotation has to do with traditional leadership as an administrative institution according to the statutes and policies of government. See in this regard, Khunou "Origin and Nature of Traditional Leadership" 293.

⁸³ Breutz *Tribes of Rustenburg* 68.

⁸⁴ Anon *Bantu Authorities and Tribal Administration* 9.

Having a headman who is not acceptable to the ward could create an intolerable situation.⁸⁵

Therefore, generally the Bafokeng customary rule of hereditary traditional leadership is important to ensure the continued existence of the community, the welfare of its members and their relationship with the ancestors.⁸⁶ As Olivier *et al* correctly observe, a *kgosi* is a direct link with the ancestral spirits of the traditional community. It is for this reason, among others, that his position is inherited. The same rule applies to the position of a headman of the Bafokeng community. Generally, a headman of the Bafokeng community is also regarded as a direct link to the ancestral spirits of a traditional ward. This belief is ingrained in the living customary law of the Bafokeng community.⁸⁷

5 The scope of antagonism and protagonism

There is much confusion and controversy surrounding the role of the traditional leaders, especially the hereditary headmen and chiefs, within the new democratic order in South Africa. The role and status of hereditary traditional leadership (such as the hereditary headmen of the Bafokeng community) is judged to be inherently undemocratic as it is hereditary.⁸⁸ The fault-finders with the institution of traditional leadership contend that the customary rule of hereditary traditional leaders is undemocratic since they are not elected. As a result, some of the critics suggest that hereditary traditional leadership should be allowed to die and propose that chiefs and headmen should be elected.⁸⁹ The sceptics further argue that the institution of traditional leaders is a patriarchal organisation that has no place in an open and democratic South Africa founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.⁹⁰

However, despite these concerns and misgivings, there is ample justification to support and recognize customary law and traditional structures and even to grant them an elevated status. For instance, Nicholson holds the view that the distortion of traditional leadership in the legal and political discourse is a consequence of a lack of understanding of customary law and the system of traditional authority on the part of the colonialist and *apartheid* politicians, combined with attempts to establish

⁸⁵ TARG "Administrative and Legal Position" Vol VII 2.

⁸⁶ Bekker and Boonzaaier 2008 *CILSA* 455.

⁸⁷ Olivier *et al* *Indigenous Law* 4.

⁸⁸ Nicholson "Critical Analysis" 7.

⁸⁹ Rautenbach and Du Plessis "Final Nails" 336.

⁹⁰ Khunou *Legal History of Traditional Leadership* 197-198.

traditional structures within a modern westernised legal context.⁹¹ According to Ozoemena, customary law was distorted and the version that was observed and applied by the courts was not based on the living law of the black people but on precedents and texts. As a result, customary law was interpreted and applied from the perspective of British and Roman-Dutch law principles.⁹²

Sesay expresses the opinion that democracy as a concept and system of government is perhaps the most commonly used, "abused" and misunderstood word in political discourse. Hence, traditional structures such as the hereditary headmanship of the Bafokeng community may be construed to be undemocratic just because the word "democracy" is misunderstood.⁹³ It is against this background that the proponents of traditional leadership argue that instead of looking at the institution as undemocratic perhaps it would be more appropriate to look at it from the African perspective. In this context, they maintain that it is crucial to balance tradition and modernity in a way that does not denigrate one structure in comparison with the other.⁹⁴

Traditional leaders are seen as the custodians of the morals, values and cultural systems of the traditional communities in South Africa. Therefore, the institution of hereditary leadership remains important in the preservation of African life and good traditional governance. For instance, as already indicated above, the Bafokeng system of traditional governance embraces a range of mechanisms for ensuring that people's concerns, opinions and ideas are an internal part of policy-making. There are also checks and balances so that no hereditary headmen or any other branch of traditional government of the Bafokeng community can act on its own. Thus, the hereditary headmen of the Bafokeng community are answerable to the *kgosi*, traditional wards, village, community (*kgotha-kgothe*), the EC and the SC. Hence, Molotlegi contends that democracy is not a new or revolutionary concept to the Bafokeng community. As a result, he laments that it is a pity that the traditional leaders and democratically elected officials are often perceived to be at opposite ends of the spectrum in terms of the forces that legitimise their power.⁹⁵

⁹¹ Nicholson "Critical Analysis" 7.

⁹² Ozoemena 2016 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ozoemena.pdf>.

⁹³ Sesay "African Governance Systems" 6.

⁹⁴ Anon 2000 *Insight @ ipt* 6. In view of the above, the final Constitution and the applicable legislation have attempted to strike a balance between modernity and traditionalism. Hence, the final Constitution and the applicable laws recognise the institution of traditional leadership in the new South Africa.

⁹⁵ Anon 2000 *Insight @ ipt* 6.

6 The constitutional recognition of hereditary headmanship

6.1 *The 1993 constitutional design of hereditary headmanship*

Despite the criticisms levelled against the institution of traditional leadership (including the Bafokeng hereditary headmanship), the *Constitution of the Republic of South Africa* 200 of 1993 (Interim Constitution)⁹⁶ took a different direction and recognised the role and status of the institution. This constitutional recognition was entailed in the Constitutional Principle XIII of the Interim Constitution, which provided that:⁹⁷

The institution, status and role of traditional leadership, according to indigenous law, shall be recognized and protected in the Constitution. Indigenous law, like common law shall be recognised and applied by courts, subject to the fundamental rights contained in the Constitution and the legislation dealing specifically therewith.

Section 181 of the Interim Constitution reinforced Constitutional Principle XIII by providing for the recognition and continued existence of the traditional leadership and indigenous law (customary law) of all the traditional communities in South Africa. This constitutional provision endorsed the recognition of the traditional leadership as follows:⁹⁸

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

⁹⁶ Interim Constitution. The Interim Constitution was the supreme law of the land. Its Preamble provided among other matters that: "In humble submission to Almighty God, We, the people of South Africa declare that-WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms." These fundamental rights and freedoms include those conferred by customary law of the traditional communities such as the Bafokeng community.

⁹⁷ Schedule 4 of the Interim Constitution.

⁹⁸ In addition to s 181 of the Interim Constitution, which provided for the recognition of traditional leadership and indigenous law, ss 182 to 184 provided a framework for traditional leadership. For instance, s 182 provided for the traditional authorities and local government and stated that the traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in ch 10, shall *ex officio* be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government. S 183 provided for the establishment of the provincial house of traditional leaders while s 184 made provision for the establishment of a council of traditional leaders.

- (2) Indigenous law shall be subject to regulation by law.

In the context of the above, the recognition of traditional leadership also extended to the recognition of the living customary law of the traditional communities in South Africa. For this reason, the Bafokeng custom which recognizes the system of hereditary headmanship was guaranteed and protected by the Interim Constitution. The Interim Constitution in fact affirmed the continued existence of the hereditary headmanship of the Bafokeng community.

6.2 The 1996 constitutional structure of traditional leadership

The final Constitution⁹⁹ is compatible with Constitutional Principle XIII of the Interim Constitution.¹⁰⁰ Section 211 of the Constitution gives effect to the continued existence and the recognition of the traditional leadership and customary law as follows:¹⁰¹

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

According to Bank and Southall,¹⁰² the Constitution is based primarily upon notions of liberal and constitutional democracy. South Africa's constitutional democracy simultaneously provides a framework for the recognition of legally constituted traditional authorities, which include the hereditary headmanship. The final Constitution therefore did not abolish the custom of the hereditary headmanship of the Bafokeng community. In fact, the Constitution endorses the practice of the hereditary headmanship of the Bafokeng community. As I will demonstrate later, although the Constitution recognises the hereditary institution of traditional leadership, the

⁹⁹ The Constitution is the highest law in the country and everyone is bound by the Constitution. Any laws that go against the Constitution will be changed or set aside. This means that customs and practices of the Bafokeng community which are inconsistent with the Constitution will be set aside if challenged in court.

¹⁰⁰ As confirmed by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

¹⁰¹ Section 211 of the final Constitution.

¹⁰² Bank and Southall 1996 *J Legal Plur* 407-430.

headmanship of Bafokeng is still required to be in line with the Constitution and the Bill of Rights such as the right to equality.

Most importantly, the recognition of the institution of traditional leadership and customary law took centre stage in a number of the Constitutional Court cases which put the constitutional status and role of traditional leadership and customary law beyond doubt. For example, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,¹⁰³ the Constitutional Court recognised the institution, status and role of traditional leadership. In so doing, the Constitutional Court further stressed that:¹⁰⁴

In our view, therefore, the NT [the Constitution] complies with CP XIII by giving express guarantees on the continued existence of traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected. They are protected ... by means of entrenchment in the NT and any attempt at interference would be subject to constitutional scrutiny.

In view of the above, the Constitutional Court enjoined that the institution of traditional leadership (and its concomitant hereditary headmanship) are protected and its continued existence is guaranteed in the Constitution. It follows that the founding fathers and mothers of the Constitution realised the importance of the institution of the traditional leadership within the new constitutional order. In addition, through section 211(2) the Constitution envisages the continued existence of traditional authorities, which may perform functions subject to any applicable customs.

Therefore, the Constitution acknowledges the originality and distinctiveness of customary law as an independent source of norms within the legal system of South Africa. It is through the Constitution that the status of customary law in South Africa is constitutionally entrenched. This means that the Bafokeng hereditary headmanship is constitutionally permitted to perform its functions in terms of the applicable customs of the community, but always subject to the Constitution.¹⁰⁵

Section 211(3) of the Constitution has the effect of raising customary law to the same status as common law. Therefore the courts are enjoined to apply

¹⁰³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

¹⁰⁴ Khunou and Nthai 2011 *De Rebus* 34.

¹⁰⁵ See 6.2 above.

customary law when it is applicable.¹⁰⁶ The Constitutional Court in *Alexkor Ltd v Richtersveld Community* held that:¹⁰⁷

...while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution...

One of the inferences to be drawn from the above conclusion of the Constitutional Court is that no particular culture, and thus no particular system of personal law, is to be given preference over any other. In other words, customary law must be accorded the same respect as common law. As such, the practice of hereditary the headmanship of the Bafokeng, as an essential component of the customary law of the community, should also be treated with respect.

In recognising the significance of customary law the Constitutional Court went further to state that:¹⁰⁸

...in applying indigenous law, it is important to bear in mind that indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution...

In actual fact, the Constitutional Court emphasises the significance of the customary law and practices of the traditional communities such as the Bafokeng community within the framework of the new constitutional scheme. According to Ntlama,¹⁰⁹ Langa DCJ (as he then was) substantiated the importance of the constitutional protection of customary law values and principles in the new South Africa in the case of *Bhe v Magistrate, Khayelitsha*, where he pointed out that:¹¹⁰

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be

¹⁰⁶ The *Law of Evidence Amendment Act* 45 of 1988 echoes the same message as s 211(3) of the Constitution in one way or another. S 1 of this Act provides that any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty, provided that indigenous law shall not be opposed to the principles of public policy and natural justice and provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

¹⁰⁷ *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51.

¹⁰⁸ *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 53.

¹⁰⁹ Ntlama 2012 PER 28.

¹¹⁰ *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (CC) para 41. See also Ntlama 2012 PER 28.

accommodated, not merely tolerated, as part of South African law provided the particular rules or provisions are not in conflict with the Constitution...

In *Shilubana v Nwamitwa*,¹¹¹ the Constitutional Court held that customary law is protected by and subject to the Constitution in its own right:¹¹²

... Customary law, like any other law, must accord with the Constitution. Like any other law, customary law has a status that requires respect ... It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly...

In order to determine the content of living customary law, the Constitutional Court in the *Shilubana* case set out factors to be considered. These factors must be taken into account by the court when there is a dispute over the legal position under customary law. The first factor entails a historical enquiry into the past practice and the traditions of a particular community. In this particular case the traditional leadership was conferred on a woman, as that was the wish of the specific community.

On the basis of the historical enquiry of the living customary law of the Bafokeng community, it seems that the traditional wards of the Bafokeng community have from time immemorial being under the authority of hereditary headmen.¹¹³ It is also a historical fact that in the Bafokeng community the headmanship passes from father to son. The court must also consider the current practice of a particular community. The practice of the Bafokeng hereditary headmanship is evident from the fact that even at the present juncture the headmen of the community are still the hereditary leaders. The second factor which the court must consider is the fact that it is important to respect the communities that observe the system of customary law as they develop their law.¹¹⁴

As stated above, the Bafokeng community has developed its custom of hereditary leadership by including the *bommadikgosana* and the elected councillors into the traditional governance of the community. In one way or another, this development of the community's custom promotes a system of

¹¹¹ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

¹¹² *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 43.

¹¹³ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 43. The court began its historical enquiry into the customs of the Valoyi tribe by referring to the classical test for the existence of custom as a source of law, as set out in *Van Breda v Jacobs* 1921 AD 330, in which it was held that to be recognised as law, a practice must be certain, uniformly observed for a long period of time, and reasonable. The requirement of reasonableness would now, of course, be applied in a way compliant with the Constitution. Quite evidently, the Bafokeng customary law of hereditary headmanship is a reasonable practice in the sense that it is not in conflict with the Constitution and the values of democratic governance. Most importantly, the Bafokeng custom of the hereditary headmanship has been in practice from time immemorial.

¹¹⁴ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 45.

democratic representation in traditional governance and advances the cardinal principle of gender equality in all the branches of the traditional government of the Bafokeng community.

The third factor enjoins the court to weigh up the application of the custom of the community against any negative impact that it may have on the people who live in it and against the value of legal certainty. It is apparent that the custom of the hereditary headmanship of the Bafokeng community is certain, has no negative impact on the community, and has been accepted and legitimised by the individual members of the community. The Bafokeng community has never rejected the practice of the hereditary succession of the headmen and there is no evidence to suggest that it may do so in future.

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, that law or conduct inconsistent with it is invalid, and that obligations imposed by it must be fulfilled. As a result, a crucial question which cannot be avoided is whether the customary rule of the Bafokeng community, which requires headmen to be appointed from a particular royal family, is consistent with the Constitution? The answer to this question must be sourced from the Constitution itself.

As indicated above, the constitutional recognition of the traditional leadership in South Africa demonstrates without any shadow of doubt that the founding fathers and mothers of the Constitution acknowledged the role and the status of traditional leadership within the new constitutional dispensation. Therefore, it may be assumed that they did not consider the institution of traditional leadership to be inconsistent with the Constitution.

Section 211 of the Constitution unequivocally recognises and places traditional institutions such as the Bafokeng institution of hereditary headmanship, its leaders and their system of customary law within the protective purview of the Constitution. This constitutional recognition is intended to restore the dignity of the traditional authorities that define not only the Bafokeng community but many black communities which rely on hereditary headmanship and traditional governance to run their affairs. That is why the Constitutional Court in *Pilane v Pilane*¹¹⁵ went further and described such a traditional institution as fragile and emphasised that matters concerning it must be treated with sensitivity.

6.3 Hereditary headmanship and the Bill of Rights

The Bill of Rights is a cornerstone of democracy in South Africa. Moreover, the Constitution enshrines the rights of all people in the country and affirms

¹¹⁵ *Pilane v Pilane* 2013 4 BCLR 431 (CC) para 78.

the democratic values of human dignity, equality and freedoms.¹¹⁶ The recognition of the institution of the traditional leadership (including the hereditary headmanship of the Bafokeng community) is subject to the Constitution and the provisions of the Bill of Rights.¹¹⁷ For instance, section 8(1) of the Constitution makes the Bill of Rights applicable to all law (including customary law) and binds the legislature, the executive, the judiciary and all organs of state.

In this context, the Bill of Rights applies to the traditional authorities because they are deemed to be organs of state in terms of section 239 of the Constitution.¹¹⁸ In addition, the Bill of Rights also applies to the customary law of the Bafokeng community. For this reason, no law (including the customary law of the Bafokeng community) ought to limit any right enshrined in the Bill of Rights. The Bill of Rights is based on the premise that a person has rights because he or she is an individual human being. On the other hand, the underlying principle of customary law is social solidarity.¹¹⁹

For this reason, the group plays a prominent role in customary law. This means that any individual of the Bafokeng exists as a member of a community. According to Bekker, under customary law individual rights are subject to the interests of the group. However this customary arrangement does not mean that individuals do not have rights. Hence, the family and community form a framework within which individuals exercise their political, economic and social rights within the broader scheme of traditional governance.¹²⁰

¹¹⁶ Section 7(1) of the *Constitution of the Republic of South Africa*, 1996.

¹¹⁷ Vorster "Institution of Traditional Leadership" 130.

¹¹⁸ The Constitution defines "organ of state" as meaning- "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer". This definition is in line with the decision of the Bophuthatswana Supreme Court in *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC), where the court held that the term "an organ of state" is to be given an extended meaning to include *inter alia* statutory bodies; parastatal bodies; bodies established by statute but managed and maintained privately, such as universities, law societies, etc; bodies supported by, and operating in co-operation with structures of state authority; and private bodies fulfilling key functions under supervision of organs of state. Since the traditional authorities are "clothed" with state authority and perform public functions, they fall squarely within the definition of organs of state. If this analysis is correct, then the institution of the hereditary headmanship or traditional authority of the Bafokeng community is to be deemed to be an organ of state.

¹¹⁹ Bekker 1994 *THRHR* 440.

¹²⁰ Bekker 1994 *THRHR* 440.

On the other hand, government is obliged to respect African culture and tradition. The Constitution further provides for the recognition of customary law and respect for South Africa's diverse cultures. This obligation is met by two sections in the Bill of Rights, which protect a right to culture. In particular, sections 30 and 31 of the Constitution make provisions for the recognition of language and culture.¹²¹ For instance, section 30 of the Constitution recognises the right to culture and provides that:¹²²

Everyone has the right to use language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

This provision is reinforced by section 31 of the Constitution, which also protects the right to culture by providing that:¹²³

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
 - (a) to enjoy their culture, practise their religion and use their language;
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.

Although the state is obliged to treat all cultures equally, a group's right to practise its culture may not be used as a reason for depriving an individual of his or her fundamental rights. Hence, both sections 30 and 31 expressly provide that the right to culture may be exercised only in a manner consistent with the Bill of Rights. In view of the above, the issue to be discerned is whether the customary rule of the Bafokeng community, which permits the practice of hereditary headmanship, is consistent with the Bill of Rights? Sibanda cites Bennett asserting that from a constitutional point of view the recognition of the Bafokeng custom of hereditary headmanship is central to the right to culture. Traditional leaders, including the hereditary headmen of the Bafokeng, are the custodians of culture. Therefore they are expected and obliged to protect the individual's and the community's right to culture.

In addition to sections 30 and 31 of the Constitution, the importance of the Bafokeng customary law of hereditary headmanship is further reinforced by section 39(2) of the Constitution. This constitutional provision requires a court when developing customary law to promote the spirit, purport and

¹²¹ Khunou and Nthai 2011 *De Rebus* 34.

¹²² Ntlama 2012 *PER* 27.

¹²³ Ntlama 2012 *PER* 27.

object of the Bill of Rights. Quite evidently, the courts are constitutionally obliged to develop and promote the right to culture, which means, among other things, the Bafokeng community's right to practise their cultural life of traditional governance. In addition, section 39(3) of the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill of Rights.

The Bafokeng community transformed its custom and practice of hereditary headmanship to comply with the Bill of Rights in preventing unfair discrimination, promoting equality and seeking to progressively advance gender representation in traditional governance. The system of the *bommadikgosana*, the *basadikgotla* and the elected councillors introduced more women into traditional governance than ever before. The participation of women in the traditional governance of the Bafokeng community is clearly in line with section 9 of the Constitution¹²⁴ and the *Promotion of Equality and Prevention of Unfair Discrimination Act*.¹²⁵ These changes did not affect the position of hereditary headmanship, though.

The Bafokeng headmen are, however, not above the law and their powers are always subjected to checks and balances reinforced by various

¹²⁴ Section 9 of the Constitution provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In view of the above, it is evident that the Bafokeng community has created a framework which allows women participation and representation in traditional governance in line with the Bill of Rights.

¹²⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, herein referred to as "the PEPUDA." As far as gender discrimination is concerned, the prohibition in s 9 of the Constitution and the PEPUDA is reinforced by South Africa's obligations under the *International Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). This treaty places the government under a duty to amend any of its laws that may infringe the principle of gender equality. There is no doubt that the participation of women in the traditional governance of the Bafokeng community complies with the dictates of the CEDAW. For more information on gender equality, also see the *Promotion of Equality and Prevention of Unfair Discrimination Amendment Act* 52 of 2002.

mechanisms of traditional structures. For example, they are bound by customary law of the community to follow the advice of the *bannakgotla*, the *bommadikgosi*, the councillors and the community at the *kgotha-kgothe*. This approach is based on the fundamental Tswana adage that says: *Kgosi ke Kgosi ka morafe*.¹²⁶ This wise saying binds the hereditary headmen of the Bafokeng community. I would argue that the customary law protects the principle of gender equality within the institution of hereditary headmanship without tampering with the institution itself. This form of traditional governance organises community life on the foundation of basic human principles such as respect, sense of community and a sense of commitment to one's neighbours as well as oneself.¹²⁷ Hence, the Bafokeng community has a robust system of traditional structures which promote the individual fundamental rights within the entire community. It is within this context that the Bafokeng community system of traditional governance may be said to have developed in a democratic manner. It is therefore consistent with the Constitution and the Bill of Rights.

7 The legislative environment of the traditional leadership

7.1 Legislation and the recognition of hereditary headmanship

Section 212(1) of the Constitution stipulates that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. In line with this constitutional imperative, the national parliament enacted the *Traditional Leadership and Governance Framework Act*,¹²⁸ which is intended to regulate traditional institutions at the national level. This piece of legislation entrenches and guarantees the customary role and the powers of the traditional leaders within the new constitutional order.

¹²⁶ The Tswana adage *Kgosi ke Kgosi ka morafe* is literally translated to mean that a *kgosi* is a *kgosi* by the people. In other words, a *kgosi* cannot be a *kgosi* without a traditional community. His leadership resides entirely on the wishes and will of his people. Similarly, the headmen of the Bafokeng community are enjoined by the Tswana idiom *kgosi ke kgosi ka morafe* to listen to the members of their wards and give effect to their wishes. Koyana 2000 *Speculum Juris* 145.

¹²⁷ It does not preclude that a woman may one day challenge the position of hereditary headmanship in terms of s 9 of the Constitution. The courts will, however, then have to apply the living customary law of the community as espoused in the *Shilubane* case.

¹²⁸ *Traditional Leadership and Governance Framework Act* 41 of 2003, herein after referred to as the "Framework Act". Also see the *Traditional Leadership and Governance Framework Amendment Act* 23 of 2009. This Act recognises among others the traditional positions of the kingship, queenship, principal traditional leadership, senior traditional leadership and headmanship. In terms of the *Traditional Leadership and Governance Framework Amendment Act*, "headmanship" means the position held by a headman or headwoman. In other words, this piece of legislation recognises the hereditary headmanship of the Bafokeng community.

The Preamble to the Framework Act records, among other things, that the state must seek to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices; and that the Constitution recognises the institution, status and role of traditional leadership according to customary law, and a traditional authority that observes the system of customary law. The Preamble to the Framework Act enjoins that the institution of traditional leadership must derive its mandate and primary authority from applicable customary law and practices and strive to enhance tradition and culture.

It is against this background that the Framework Act empowers the royal families of traditional communities to identify candidates for headmanship and the Premier to recognise headmen or headwomen in a particular province.¹²⁹ The royal family of the Bafokeng community is therefore empowered to identify a suitable person for the position of hereditary headmanship and it can therefore be inferred that the customary rule of hereditary headmanship of the Bafokeng is in compliance with the Framework Act. The Framework Act consciously requires the state to respect, protect and promote the institution of traditional leadership and will therefore be statutorily obliged also to respect, protect and promote the hereditary headmanship of the Bafokeng community.¹³⁰

At provincial level, each province is mandated to enact its own provincial legislation in line with the Framework Act and the Constitution. In the North West province, where the Bafokeng community is found, the provincial legislature has enacted the *North West Traditional Leadership and Governance Act*,¹³¹ which recognises traditional leadership and the institutions of the headmanship of the traditional communities throughout the North West province.

In so doing, it echoes the spirit and the object of the Framework Act in a direct manner. The North West Legislation favours the recognition of diverse customary law and practices. For instance, it provides that customs, traditions or customary laws relating to traditional leadership will continue to

¹²⁹ Section 11(1) of the Framework Act provides for the recognition of senior traditional leaders, headmen or headwomen.

¹³⁰ The Preamble of the Framework Act read in conjunction with the *North West Traditional Leadership and Governance Act 2 of 2005*.

¹³¹ *North West Traditional Leadership and Governance Act 2 of 2005*, herein after referred to as the "North West Legislation". Ss 19 to 23 deal with the identification of *kgosana* (headman or headwoman) by the royal family in accordance with customary law and customs, the recognition of a person identified as *kgosana* by the premier, the removal of *kgosana*, the recognition of an acting *kgosana*, the recognition of a deputy *kgosana* and the functions of *kgosana*. The statutory function of *kgosana* include, among others, to perform the functions entrusted to him or her in terms of customary law and customs.

operate, subject to the Constitution and the Framework Act.¹³² It is evident that the North West Legislation did not abolish any of the current practices for the appointment of headmanship and does not preclude hereditary headmanship. The Act does, however, include the possibility that women may be appointed as headmen.

In line with the Framework Act and the North West legislation, the Bafokeng community established the Bafokeng traditional council. According to Cook, this statutory body is made up of eleven community members, five elected by the community and six appointed by the *kgosi*. The Bafokeng traditional council together with the SC chaired by the *kgosi* debates and ratifies all major financial and policy matters for the community.¹³³

The creation of the Bafokeng traditional council represents the fusion of democracy and tradition. Therefore, it is quite manifest that the entire traditional leadership of the Bafokeng community complies with the Constitution and the Framework Act read in conjunction with the North West Legislation.

8 The cultural dichotomy between the Bafokeng and Cala Community

The Bafokeng and the Cala reserve community in the Eastern Cape Province are divided not only by language and geographical locations but also by their traditions and customs. For instance, contrary to the custom of the Bafokeng community, which permits hereditary headmanship, the custom of the Cala reserve community allowed and still allows them to elect a candidate to be a headman. This customary right was confirmed in the case of the *Premier of Eastern Cape v Penrose Ntamo*.¹³⁴

The facts of this case are briefly as follows:¹³⁵ In 2013, the headman of Cala reserve community, JH Fani, who had served since 1979, tendered his resignation. As had been their custom, the residents of the Cala reserve called a community meeting and elected Mr Gideon Sitwayi (a sub-headman and Fani's *de facto* deputy) as their new headman. However, the amaGcina traditional council rejected their choice because Sitwayi was not a member of the royal family. Chief Gecelo, head of the amaGcina

¹³² Section 2(5) of the North West Legislation.

¹³³ Cook 2011 *Current Anthropology* 152. Also see 3.4 above.

¹³⁴ *Premier of the Eastern Cape v Ntamo* 2015 6 SA 400 (ECB).

¹³⁵ *Premier of the Eastern Cape v Ntamo* 2015 6 SA 400 (ECB) paras 7-14. Also see UCT Communication and Marketing Department 2015 https://www.uct.ac.za/usr/press/2015/MassiveBlow_27Aug2015.pdf.

traditional council, imposed his own choice, Mr NJ Yolelo (a clansman) on the community.

Gecelo cited the *Eastern Cape Traditional Leadership and Governance Act*¹³⁶ which, he said, instructs the royal family to elect the headman and told the Cala reserve community that: *Nokuba niyathanda okanye anithandi na, yiroyal family ethata izigqibo ngokubekwa kwenkosana* (whether you like it nor not, it is the royal family that decides on the headman). The community made various complaints about the council's appointment to the Premier of the Eastern Cape, the Member of Executive Council (MEC) for Local Government and Traditional Affairs, and the Qamata Regional Traditional Council.¹³⁷ When they were unsuccessful, they approached the Legal Resources Centre (LRC), which launched an application on their behalf in the Eastern Cape High Court against the decision of the MEC for Local Government and Traditional Affairs (acting on the delegated authority of the Premier of the Eastern Cape province) to recognise Yolelo as the headman of the community. On 9 October 2014, the Eastern Cape High Court found in favour of the Cala reserve community and declared that the customary law of the Cala reserve community requires its headman to be elected by the members of the community in accordance with the community's customs and customary law. Subsequently, the Premier appealed against the decision of the court of first instance.

However, the appeal was dismissed by a full bench of the Eastern Cape High Court, which found that the practice of the Cala reserve community was reasonable in that it is not in conflict with the applicable legislation or the Constitution, and it was consonant with the values of democratic governance aimed at the achievement of accountability, responsiveness and openness. The court further held that the practice of the Cala reserve community was consistent with various fundamental rights such as the right to dignity, the right to freedom of opinion, the right to freedom of association and the right to make political choices.¹³⁸

Based on the above decision of the full bench of the Eastern Cape High Court, the question which immediately arises is whether the practice or

¹³⁶ *Traditional Leadership and Governance Act* 4 of 2005 (Eastern Cape), herein after referred to as the "Eastern Cape Legislation." This Act provides among other matters for the recognition of traditional communities; the establishment and recognition of traditional councils; a statutory framework for leadership positions within the institution of traditional leadership; the recognition of traditional leaders (including headmen); the removal from office of traditional leaders; and the functions and roles of traditional leaders.

¹³⁷ *Premier of the Eastern Cape v Ntamo* 2015 6 SA 400 (ECB) para 12.

¹³⁸ Suttner 2015 <http://www.polity.org.za/article/eastern-cape-courts-affirm-communitys-democratic-right-to-elect-headman-2015-08-21>. Also see *Premier of the Eastern Cape v Ntamo* 2015 6 SA 400 (ECB) para 49.

custom of hereditary headmanship of the Bafokeng community negates the community's right to freedom of opinion and the right to make political choices? It is quite evident that the Bafokeng community has chosen to be governed by hereditary headmen from time immemorial. Therefore, the question of election does not arise in the case of the Bafokeng.¹³⁹ Much as the Cala Reserve community has chosen to be ruled by elected headmen, the Bafokeng community has chosen to be governed by hereditary headmen.

It can be argued that the Bafokeng community has already exercised its right to make political choices and the right to freedom of opinion by accepting and legitimising the customary rule of hereditary headmanship. The *Cala* judgment does not apply to the custom of hereditary headmanship of Bafokeng community and other communities in South Africa which follow a similar custom or practice. The Eastern Cape High Court ruling does not have a general application, but it was meant specifically for the Cala reserve community and other communities which follow customs similar to those of the Cala community, as the court decided on living customary law and living customary law that applies only to a specific community at a specific time.¹⁴⁰ This case again illustrates how important it is that the courts should establish what the particular living customary law of a specific community is before arriving at a decision, including in a dispute relating to the appointment of headmen and traditional leaders.

9 Conclusion

It is cogently evident from the above that the headmen of the Bafokeng community rise to power through birth-right, and that this practice is entrenched in the custom of the community. On the other hand, the elected headmen in the Cala reserve community get their authority by means of a popular vote which also is based on custom and usage. It has been demonstrated that the powers and the authority of the hereditary headmen of the Bafokeng community are sourced from the living customary law of the community, the Constitution, the Framework Act and the North West Legislation.

Critics of the institution of traditional leadership must take care not to rush to the conclusion that traditional structures such as that of the Bafokeng hereditary headmanship are undemocratic and therefore inconsistent with the Constitution and the Bill of Rights. The Bafokeng system of traditional governance has proved that hereditary headmen are subjected to checks and balances by means of the traditional structures which play an oversight

¹³⁹ Holomisa *Double-Edged Sword* 54.

¹⁴⁰ Also see 4 above.

role over their traditional authority. It was further been indicated that the structures provide for democratic elections and provide a role for women. It is hoped that other traditional communities which practise the system of hereditary headmanship will take a leaf out of the book of the Bafokeng democratic model of traditional governance and adjust their structures to also provide a role for women within the structure, for example, even though it may not necessarily be within the institution of headmanship.

Bibliography

Literature

Anon *Bantu Authorities and Tribal Administration*

Anon *Bantu Authorities and Tribal Administration* (Information Service of the Department of Native Affairs Pretoria 1958)

Anon 2000 *Insight @ ipt*

Anonymous "Role of Traditional Leadership – Part I" 2000 (October) *Insight @ ipt* 1-14

Bammann *The Bafokeng*

Bammann H *The Bafokeng: History, Culture, Religion and Education in Perspective from the First Three Hermannsburg Missionaries until 1940* (Lif Verlag Wien 2014)

Bank and Southall 1996 *J Legal Plur*

Bank L and Southall R "Traditional Leaders in South Africa's New Democracy" 1996 *J Legal Plur* 407-430

Bekker and Boonzaaier "Traditional Leadership"

Bekker J and Boonzaaier CC "Traditional Leadership and Governance" in Bekker JC *et al* (eds) *Introduction to Legal Pluralism in South Africa* (LexisNexis Butterworths Durban 2006) ch 8

Bekker and Boonzaaier 2008 *CILSA*

Bekker JC and Boonzaaier CC "Succession of Women to Traditional Leadership: Is the Judgment in *Shilubana v Nwamitwa* Based on Sound Legal Principles?" 2008 *CILSA* 449-462

Bekker 1994 *THRHR*

Bekker JC "How Compatible is Customary Law with Human Rights? Some Preliminary Observations" 1994 *THRHR* 440-447

Bennett *Customary Law*

Bennett TW *Customary Law in South Africa* (Juta Cape Town 2004)

Breutz *Tribes of Rustenburg*

Breutz PL *The Tribes of Rustenburg and Pilanesberg Districts* (Government Printers Pretoria 1953)

Bujo *African Theology*

Bujo B *African Theology in the 21st Century: The Contribution of the Pioneers* Vol 2 (Paulines Nairobi 2006)

Cook 2011 *Current Anthropology*

Cook SE "The Business of Being Bafokeng: The Corporatisation of a Tribal Authority in South Africa" 2011 *Current Anthropology* 151-159

Holomisa *Double-Edged Sword*

Holomisa P *A Double-Edged Sword: A Quest for a Place in the African Sun* (Lotsha Cape Town 2007)

Isaaks *Guide to Botswana*

Isaaks AC *A Guide to Botswana, Lesotho and Swaziland* (Butterworths London 1983)

Jobodwana 2000 *SAPL*

Jobodwana ZN "Customary Courts and the Human Rights: Comparative African Perspectives" 2000 *SAPL* 26-49

Khunou *Legal History of Traditional Leadership*

Khunou SF *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* (LLD-thesis North West University 2007)

Khunou "Origin and Nature of Traditional Leadership"

Khunou SF "The Origin and Nature of Traditional Leadership in South Africa: A Precolonial Perspective" in Collier G (ed) *African Cultures and Literatures* (Rodopi Amsterdam 2013) 293-320

Khunou and Nthai 2011 *De Rebus*

Khunou SF and Nthai S "Are Traditional Councils Replicas of Tribal Authorities or New Institutions Altogether?" 2011 (Jan/Feb) *De Rebus* 32-36

Koyana 2000 *Speculum Juris*

Koyana DS "Chieftainship and Headmanship are not Hereditary" 2000 *Speculum Juris* 144-160

Manson and Mbenga 2003 *JSAS*

Manson A and Mbenga B "The Richest Tribe in Africa: Platinum Mining and the Bafokeng in South Africa's North West Province, 1965-1999" 2003 *JSAS* 25-47

Mbenga "Acquisition of Land"

Mbenga B "The Acquisition of Land by Africans in the Western Transvaal: The Case of the Bafokeng of the Rustenburg District" Unpublished contribution delivered at the *First Annual Edward Patrick Lebone Molotlegi, Memorial Lecture, Phokeng* (1 October 1997 Phokeng)

Mojapelo 2013 *Advocate*

Mojapelo P "The Doctrine of Separation of Powers: A South African Perspective" 2013 (April) *Advocate* 37-46

Molotlegi "Role of Traditional Leadership"

Molotlegi LT "The Role of Traditional Leadership in South Africa" Unpublished contribution delivered at the University of Pretoria (10 September 2003 Pretoria)

Moodley *Customary Law*

Moodley I *The Customary Law of Intestate Succession* (LLD-thesis University of South Africa 2012)

Moumakwa *Botswana Kgotla System*

Moumakwa PC *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana: Case Study of the Kanye Kgotla* (Master's Thesis in Philosophy of Peace and Conflict Transformation University of Tromso 2011)

Nicholson "Critical Analysis"

Nicholson C "A Critical Analysis of the Role of Traditional Leadership in Modern South African Law" Paper presented at the *Third International Conference on Therapeutic Jurisprudence* (7-9 June 2006 Perth) 1-11

Ntlama 2012 *PER*

Ntlama N "The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation" 2012 (15)1 *PER* 24-44

Olivier *et al Indigenous Law*

Olivier NJJ *et al Indigenous Law* (LexisNexis Butterworths Durban 1995)

Rautenbach and Du Plessis "Final Nails"

Rautenbach C and Du Plessis W "Final Nails in the Customary Law Coffin?" in Fenrich J *et al* (eds) *The Future of African Customary Law* (Cambridge University Press Cambridge 2011) 336-360

Schapera *Handbook of Tswana Law*

Schapera I *A Handbook of Tswana Law and Custom* (Frank Cass London 1938)

Sepeng *History of the Bakwena Ba Mogopa*
Sepeng GP *History of the Bakwena Ba Mogopa and the Baphalane*
(Archival Records of South Africa, Source: A 327 Vol 27)

Sesay "African Governance Systems"
Sesay A "African Governance Systems in the Pre- and Post-Independence
Periods: Enduring Lessons and Opportunities for Youth in Africa"
Unpublished contribution delivered at The Mandela Institute for
Development Studies (11 July 2014 Johannesburg)

Shaw *State Formation*
Shaw BP *State Formation, Nation Building and the Tswana of Southern
Africa* (Master of Arts in African Affairs Dissertation Duquesne University
1975)

TARG "Administrative and Legal Position" Vol VII
Traditional Authority Research Group "The Administrative and Legal
Position of Traditional Authorities in South Africa and their Contribution to
the Implementation of the Reconstruction and Development" Vol VII
(Unknown Publisher and Place 1996)

Thornhill and Selepe 2010 *J Public Admin*
Thornhill C and Selepe MM "The Role of the Royal Bafokeng Administration
in the Promotion of Municipal Service Delivery" 2010 *J Public Admin* 162-
174

Tobin *Indigenous Peoples*
Tobin B *Indigenous Peoples, Customary Law and Human Rights: Why
Living Law Matters* (Routledge London 2014)

Tummala *Politics of Preference*
Tummala KK *Politics of Preference: India, United States, and South Africa*
(CRC Press London 2015)

Vorster "Institution of Traditional Leadership"
Vorster LP "The Institution of Traditional Leadership" in Bekker JC *et al*
(eds) *Introduction to Legal Pluralism in South Africa: Part I Customary Law*
(LexisNexis Butterworths Durban 2002) 127-138

Case law

Alexkor Ltd v Richtersveld Community 2004 5 SA 460 (CC)

Baloro v University of Bophuthatswana 1995 4 SA 197 (BSC)

Bhe v Magistrate, Khayelitsha 2004 2 SA 544 (CC)

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of
the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC)

Penrose Ntamo v The Premier of the Eastern Cape (ECB) (unreported) case number 194/14

Pilane v Pilane 2013 4 BCLR 431 (CC)

Premier of the Eastern Cape v Ntamo 2015 6 SA 400 (ECB)

Shilubana v Nwamitwa 2009 2 SA 66 (CC)

Van Breda v Jacobs 1921 AD 330

Legislation

Black Administration Act 38 of 1927

Bophuthatswana Traditional Authorities Act 23 of 1978

Constitution of the Republic of South Africa 200 of 1993

Constitution of the Republic of South Africa, 1996

Free State Traditional Leadership and Governance Act 8 of 2005

Gauteng Traditional Leadership and Governance Act 4 of 2010

KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005

Law 4 of 1885 (Transvaal Volksraad)

Law of Evidence Amendment Act 45 of 1988

Limpopo Traditional Leadership and Institutions Act 6 of 2005

Mpumalanga Traditional Leadership and Governance Act 3 of 2005

Native Administration Act 38 of 1927

Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007

North West Traditional Leadership and Governance Act 2 of 2005

Traditional Courts Bill [B1-2017]

Traditional Leadership and Governance Act 4 of 2005 (Eastern Cape)

Traditional Leadership and Governance Framework Act 41 of 2003

Traditional Leadership and Governance Framework Amendment Act 23 of 2009

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002

Restoration and Extension of South African Citizenship Act 196 of 1993

South Africa Act of 1909

Status of Bophuthatswana Act 89 of 1977

Internet sources

Editors of Encyclopaedia Britannica Date Unknown
<http://global.britannica.com/EBchecked/topic/632827/Voortrekker>
 Editors of Encyclopaedia Britannica Date Unknown *Voortrekker*
<http://global.britannica.com/EBchecked/topic/632827/Voortrekker>
 accessed 12 June 2015

Ozoemena 2016 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ozoemena.pdf>
 Ozoemena R 2016 *Protecting Constitutional Democratic Values, Traditional System and Institutions in the New South Africa*
<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ozoemena.pdf> accessed 6 June 2016

Suttner 2015 <http://www.polity.org.za/article/eastern-cape-courts-affirm-communitys-democratic-right-to-elect-headman-2015-08-21>
 Suttner R 2015 *Eastern Cape Courts Affirm Community's Democratic Right to Elect Headmen* <http://www.polity.org.za/article/eastern-cape-courts-affirm-communitys-democratic-right-to-elect-headman-2015-08-21>
 accessed 15 May 2016

UCT Communication and Marketing Department 2015
https://www.uct.ac.za/usr/press/2015/MassiveBlow_27Aug2015.pdf
 UCT Communication and Marketing Department 2015 "*Massive Blow*" Dealt to Eastern Cape over Customary Law - UCT Researcher
https://www.uct.ac.za/usr/press/2015/MassiveBlow_27Aug2015.pdf
 accessed 21 May 2016

List of Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CILSA	Comparative and International Law Journal of Southern Africa
EC	Executive Council
J Legal Plur	Journal of Legal Pluralism

J Public Admin	Journal of Public Administration
JSAS	Journal of Southern Africa Studies
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PER	Potchefstroomse Elektroniese Regsblad / Potchefstroom Electronic Law Journal
RBA	Royal Bafokeng Administration
RBH	Royal Bafokeng Holdings
SAPL	Southern African Public Law
SC	Supreme Council
TARG	Traditional Authority Research Group
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TVL	Transvaal
ZAR	Zuid-Afrikaansche Republiek