

MISTRA WEBINAR

TRADITIONAL LEADERSHIP IN SOUTH AFRICA'S DEMOCRATIC CONSTITUTION

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WELCOME AND OPENING REMARKS

I wish to welcome all the participants, and to acknowledge especially Deputy Minister Andries Nel (who is also a member of our Board of Governors) and the esteemed presenters.

On the occasion of the 30th anniversary of the adoption of the Constitution, South Africa is called upon to reflect on the basics that underpin our democracy.

It can be argued that most of the Constitutional provisions have been tested and re-tested through implementation, policy refinement and astute judicial interpretation.

There are however a few areas that seem to defy certainty. Two of them stand out, and it is on this account that they form the basis of our webinar today.

One of them is the matter of property rights especially as it applies to land. In the words of then Deputy Chief Justice Dikgang Moseneke at a Conference organised by MISTRA and other partners in 2014:

In 20 years, [the Constitutional] Court has not resolved even one case of land expropriation under the property clause... [and] the courts have never been called upon to give meaning to the property clause in the context of land expropriation or to decide on what is a just and equitable compensation. One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes in the post-conflict contestation.

The second and related issue, which forms the core theme of today's engagement, pertains to the powers and functions of traditional leaders. And it is an issue that has assumed the character of a ping-pong ball between law-makers, the executive, the judiciary, communities, and traditional leaders themselves.

This is borne out by such cases as Melmoth (KZN) on communal land ownership and valuation, Bakgatla (NW) on communal land rights, and Xolobeni (EC) on community consultations regarding the granting of mineral rights.

With regard to generic legislation, the Traditional Leadership and Governance Framework Act of 2003 seemed to have struck the delicate balance, and it survived for some 20 years. However, besides the exclusion of Khoi San communities, it suffered from a few weaknesses, such as platforms of accountability and democratic representation (inclusive of gender); and the persistent complaint of some communities that the Act was largely observed in the breach.

Unfortunately, the Traditional and Khoi San Leadership Act, which was meant to improve on it, did not pass constitutional muster and, according to community and other activists, it did not in any case resolve the core issues.

In the book published in 2019, entitled *Traditional Leaders in a Democracy: Resources, respect, and resistance*, the Mapungubwe Institute sought to address this issue at a conceptual level, with contributions from academics, activists, policy-makers and traditional leaders. It raised the fundamental question whether democracy is a threat to traditional leadership or whether traditional leadership is incompatible with democracy!

In his contribution in the book, Nkosi Pathekile Holomisa challenges the notion of ‘accommodation’ of traditional leadership in a democracy. He argues that the question from the onset *[should] have been, ‘How shall we accommodate the western way of governance within the original African forms of governance?’* In the same book, Nkosi Mwelo Nonkonyana says, more bluntly, that government seems to be *playing mind games with traditional leaders, as the necessary re-instatement of the pride and dignity of the institution of traditional leadership in South Africa seems to be perpetually delayed.*

On the other hand, many have argued – often with the concurrence of the courts – that the exercise of traditional leadership cannot override the various generations of human rights, the combination of which makes ours one of the most progressive constitutions across the globe. In Section 211 and 212, the Constitution acknowledges customary law and recognises the institution of traditional leadership – within the guardrails of constitutional democracy.

However, in the context of the broad spectrum of global monarchical experience, has South Africa in practice rather than theory, found the sweet spot? One is referring here to the following categories: one, a ceremonial monarchy with symbolic powers such as Lesotho, the UK, Denmark and Malaysia; two, an executive monarchy with control over executive functions such as Thailand, Bahrain and Morocco; and three, an absolute monarchy which exercises all executive power with circumscribed electoral choice such as Eswatini and Saudi Arabia.

As in other African countries with diverse nationalities, such as Zimbabwe, Ghana and Uganda, South Africa has tried to find post-colonial spatially localised expressions of traditional leadership. This applies to local communities, municipalities, districts or – in the case of KwaZulu-Natal – at provincial level; and it is defined in a manner that does not subtract from the quest for nationhood or the rights codified in the Constitution.

In actual practice, we have ceremonial monarchies, with provincial and national Houses that provide advice; but in communal areas we also have provisions on executive and judicial functions for the traditional leaders. Further, depending on the nature of traditional councils, or the inclination of traditional leaders, some do behave, in their localities, as absolute monarchs.

The endless ping-pong is in part because the asymmetric elaboration of roles provided for in the Traditional Leadership and Governance Framework Act was hardly undertaken. In addition to what has been provided for in legislation, it is also necessary to develop formal mechanisms through which traditional leaders relate to democratic institutions such as ward, municipal and district governance structures. In turn, consideration needs to be given to representation of ward councillors and mayors (or their representatives) in equivalent Traditional Councils – all to allow for bidirectional osmosis.

It can also be argued that traditional authority should be underpinned by a sense of responsibility and accountability, including mechanisms to obviate conflicts of interest, especially in relation to commercial activities.

This is how MISTRA addresses this issue; and we believe that these and other refinements in policy, legislation and praxis will help South Africa find an appropriate balance between the exercise of traditional leadership and the authority and sovereignty of the democratic state.

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