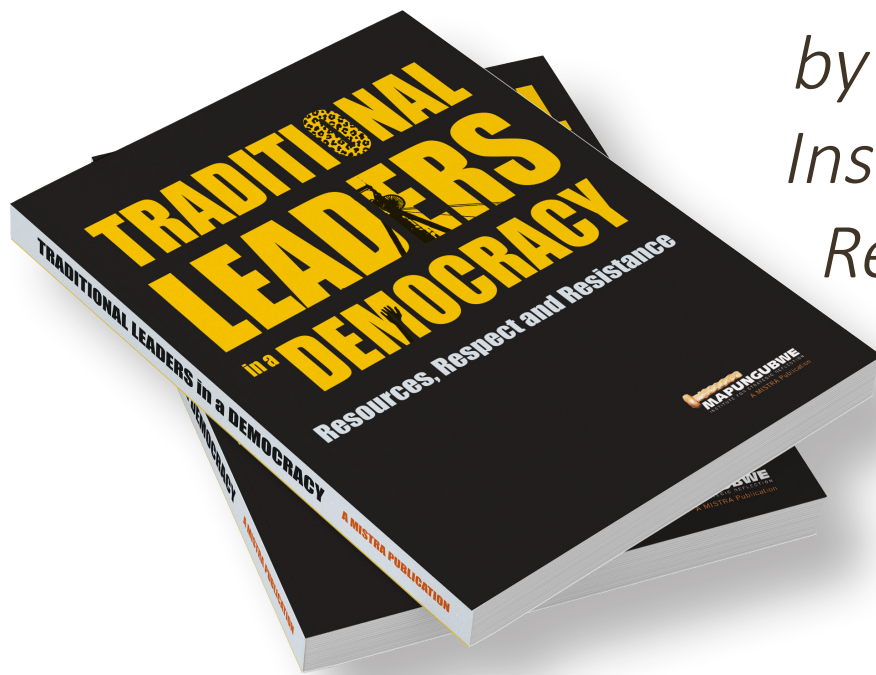


A MISTRA Policy Brief



*A research project
by the Mapungubwe
Institute for Strategic
Reflection (MISTRA)
Launched February 2019*

Traditional Leaders in a Democracy: Resources, respect and resistance

TRADITIONAL LEADERS HAVE FOUGHT FOR RECOGNITION, seized new opportunities and positioned themselves as major players in South Africa's post-1994 political landscape. Yet, the role of traditional authority in a democratic dispensation is highly contested, with leaders frequently accused of abusing power, disregarding human rights, expropriating resources and promoting tribalism.

A recently released research report from the Mapungubwe Institute for Strategic Reflection (MISTRA) explores how chieftaincy is practised, experienced and contested in contemporary South Africa. The key policy findings and relevant arguments arising out of this project are presented below.

Central argument

This report argues that it is not traditional leadership itself that poses problems for democracy, but rather the ways in which the institution has been distorted in post-apartheid South Africa, often at the expense of ordinary people. Contributors to the research offer alternative views of traditional leadership that are far more fluid, heterogeneous and participatory

than the official story suggests, drawing on a history of customary law, chieftaincy and rural governance in South Africa which stretches back to the pre-colonial period. The report makes a case for the fact that traditional leadership and custom are, and always have been, continuously in flux.

Arising from this study, the following policy recommendations are made:

Recommendations on land reform

- **The parliament of South Africa should enact legislation that gives the 17-million residents in the former homelands security of tenure on communal land.** Otherwise these residents will remain vulnerable, with their land-rights threatened.
- **The October 2018 landmark judgement of the Constitutional Court in favour of the Lesetlheng community should be treated as precedent.** The Court upheld the land rights of the Lesetlheng community over and above mining rights that had been obtained in collaboration with traditional leaders.
- **The Traditional and Khoi-San Leadership Bill (TKLB), as it stands, should be prevented from passing into law.** The Bill gives traditional leaders sole decision-making authority over residents of the former homelands and entrenches apartheid's bantustan borders. It is fundamentally incompatible with the intention to protect rural residents from eviction and exploitation and uphold their constitutional land rights.

Recommendations on mining

- **Those residing on the land must be consulted, and their consent must be obtained, before any mining takes place.** This is currently law, and is supported by the Interim Protection of Informal Land Rights Act (IPILRA). Should the TKLB pass, it will give traditional councils the ability to make binding deals about how land will be used without the consent of those who live on said land. Parliament should rather enact laws that support the October 2018 Constitutional Court judgement discussed above, which rules that mining rights do not trump the land rights of rural residents.
- **Corruption and collusion to flout the consultation requirements of the Interim Protection of Informal Land Rights Act (IPILRA) should be investigated and those involved should be charged,** including mining companies, law firms, traditional leaders or government. Both the Department of Mineral Resources and the Department of Rural Development and Land Reform have been complicit in traditional leaders signing surface leases with mining companies in contravention of the consent requirements of the Interim Protection of Informal Land Rights Act (IPILRA). It is the duty of local and national

Recommendations on local governance

- **Decentralised leadership should be upheld, in both policy and practice, if traditional leadership is to further democratic principles and align with living customary law.** It is at the lower levels of traditional leadership that extensive dispute resolution and community building takes place. Government approaches to traditional authority have favoured senior traditional leaders at the expense of local-level leaders, eroding forms of democratic participation inherent in customary communities. There must be cognition of the bottom-up authority of customary communities and traditional leaders.
- **There should be recognition of rural residents' demands for a say in how land and other natural resources are treated in rural communities.** The emerging rural struggles discussed in this book raise the possibility of the development of a rurally-oriented social movement to lead the transformation of the countryside. The struggle is about the democratisation of governance.

Implications for appointing traditional leaders

- **The will of the people should (as it traditionally has) play a role in determining the legitimacy of traditional leadership appointments.** Current government practice, in line with the Nhlapo Commission, often relies on literal genealogy and colonial appointments to determine who is designated a legitimate chief. However, such practices usually distort more flexible, pre-colonial versions of chiefly authority, which were often based on repetitious processes through which the right to govern was earned, regularly contested, and was not an indefinite given.

Research and public discourse on traditional leadership has been deeply divided – centred on the oppositions between democracy and chieftaincy, as well as the continuities and discontinuities of traditional leadership pre- and post-liberation.



government to protect and further the land rights of residents in the former homelands.

Chieftaincy has seen an unexpected political resurgence in the post-1994 period, with its proponents growing increasingly vocal. Traditional leaders have mobilised new opportunities and resources, fought for recognition and positioned themselves as major players in South Africa's political landscape.

Recommendations on legislation and constitutionalism

- **Legislation on traditional leadership should take into account 'living' customary law**, rather than focusing so heavily on the powers and status of traditional leaders. A democratic South African government needs to ensure that it does not create different modes of citizenship for urban and rural residents.
- **Protective laws in place – such as the IPILRA – should be enforced.** The financial accountability mechanisms in the Traditional Leadership Governance Framework Act should not be ignored. This has allowed for grave injustices to rural people.
- **The state should make both traditional and civil courts of justice accessible to all affected South African citizens.** This would allow those who want to use traditional courts to do so freely. The same applies to those who want to use civil courts of justice.

Recommendations on gender policy

- **Changes in legislation, and in the implementation of the law, should be introduced to address the lack of women's power in customary communities.** Government should ensure women's equal representation in decision-making bodies in traditional communities. Similarly, government should ensure that women – who make up the majority of people living under traditional leadership – are always robustly consulted in the making of laws for customary communities.
- The Traditional Leadership and Governance Framework Act (TLGFA) and subsequent bills related to traditional leadership should be reassessed. This is because these pieces of existing and pending legislation shift power dynamics in rural areas so that women are no longer able to use the flexibility and negotiability of living customary law to negotiate greater security for themselves. The requirements for a one third quota of women in traditional councils, as laid out in the TLGFA, should be implemented. Even these very small boosts to women's equality are currently rendered ineffectual due to patchy implementation.

Reflections on identity politics

The debates surrounding traditional leadership in a democracy pose a number of key identity questions: What should African pasts mean in postcolonial presents, as new modes of existence are being worked out? How are the boundaries of contemporary 'customary communities' determined and on what basis is one a member? And does it matter whether traditional identities are 'authentic', imposed, or chosen? **Do traditional leaders partly owe their continued existence to an association with a pre-colonial past that we have been eager for,**

as recent calls for 'decolonisation' suggest?

This climate, combined with the tabling of the Traditional and Khoi-San Leadership Bill (TKLB), has meant that traditional leaders are positioned as powerful claimants of recognition, land and resources in a democratic dispensation. This has prompted some in the KhoiSan community, despite never having had leaders in the conventional sense, to mobilise notions of 'traditional' leadership to make claims on the state.

Voices of traditional leaders

A vocal movement of traditional leaders, including the two represented in the MISTRA research report, believes that the roles and functions of traditional leaders are under threat in democratic South Africa. They argue that this threat results in the eroding, and in some instances the abolishing, of African values, systems and cultures, which are then replaced with European ones.

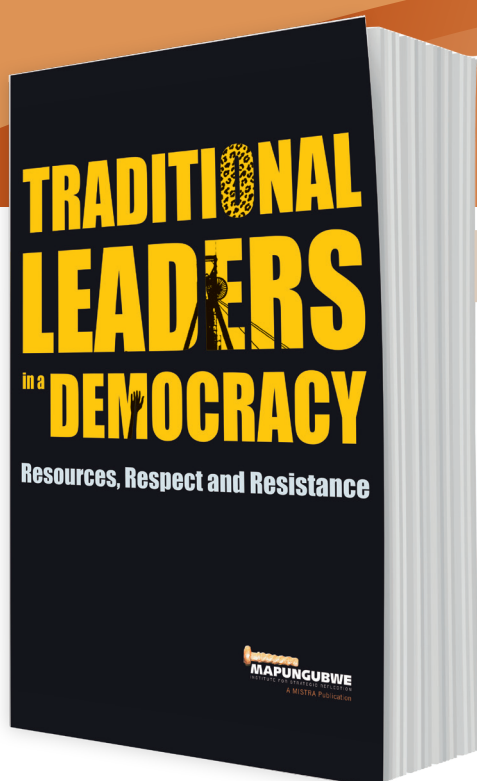
These traditional leaders recommend measures to bring government and traditional leadership closer together including the following:

- Provision should be made for the powers and functions of traditional leadership to be upheld in tandem with those granted to municipalities.
- Traditional leaders should be given a role in legislative bodies, the judiciary and the executive.

The Mapungubwe Institute for Strategic Reflection (MISTRA) has collated this edited volume to explore how chieftaincy is practised, experienced and contested in contemporary South Africa.

- Government must pass legislation that supports the institution of traditional leadership as an ally in the cause of good

governance, service delivery and human rights, rather than seeing this institution as an as opponent of progress.



The published book containing the research report entitled Traditional Leaders in a Democracy can be purchased from:

sales@jacana.co.za | Tel: +27 011 628 3200

To contact MISTRA

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

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

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