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# *Traditional Authority in South Africa: Reconstruction and Resistance in the Eastern Cape*

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*This article examines two contradictory conceptions of customary law, as either fundamentally democratic or autocratic, and their impact on the constant reconstruction of and resistance to chiefly authority in modern-day South Africa. In the last 15 years or so South Africa has witnessed a strong legislative agenda to centralise the power of senior traditional leaders. The new traditional authority laws' ahistorical, authoritarian understanding of customary law – as something to be defined and imposed on rural communities by senior traditional leaders – is directly opposed to the Constitutional Court's interpretation of customary law as something to be determined with reference to practice from and acceptance by the people whose customary law is under consideration. This article studies the net result of these contradictory processes on local contestations over chiefly power in the Eastern Cape. It displays the state's concerted efforts to impose a model of traditional authority that empowers senior traditional leaders, even in contexts where local communities strongly contest this model, arguing that it contravenes their custom and history, as well as their democratic rights. The article highlights the enduring legacy of apartheid constructions, and the powerful role of contemporary governments in their recreation. New laws are an important tool in this process. They entrench an apartheid model of traditional leaders and minimise rural democracy. It is only with serious efforts of community mobilisation and legal education and support that local communities can successfully access the courts to challenge the actions taken by an alliance of chiefs and state. Ultimately, our analysis highlights an understudied link between the functioning and legitimacy of chiefs in democratic states and the autocratic or democratic conception of the customary law underlying the powers of such chiefs.*

**Keywords:** traditional authority; customary law; Constitutional Court; legislature; Ciskei; AmaHlathi; Eastern Cape; amaMfengu

## Introduction

In the last 15 years or so South Africa has witnessed a strong legislative agenda to centralise the power of senior traditional leaders. The resulting legislative instruments – the Communal Land Rights Act of 2004 (CLARA), the Traditional Courts Bill (TCB), the Traditional and Khoi-San Leadership Act, the Traditional Leadership and Governance Framework Act Amendment Act and the Communal Land Tenure Bill<sup>1</sup> – have been severely criticised for bolstering the powers of traditional leaders while ignoring participatory features and multi-level customary decision-making processes, and for compromising democracy and rural people’s citizenship rights.<sup>2</sup> These laws also brought with them the much-hated inventions of apartheid: tribal authorities renamed as traditional councils.<sup>3</sup> Peter Delius describes the new laws as ‘hark[ing] back to the darkest days of colonialism and apartheid [and] entrench[ing] one of their most pernicious legacies – the division between insiders who enjoyed equality before the law and full political and property rights, and outsiders who did not’.<sup>4</sup> Lungisile Ntsebeza cautioned that the implementation of these laws would, in some communities, ‘amount to imposing chiefs on an unwilling population’, similar to the introduction of tribal authorities.<sup>5</sup> The 2017 report of the Motlanthe High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change castigates the lawmaker for its failure to

dismantle the apartheid and Bantustan boundaries that enclosed people in constructed and imposed units of identity. Instead of scrapping the apartheid model of traditional leaders as state employees in charge of often artificially constituted communities it was decided to retain it with a few minor changes. As a result [people’s] rights to exercise customary affiliation and to demand accountability from their leaders are neutralized.<sup>6</sup>

In the drafting process of these laws, the voices of rural citizens have not been heard. The CLARA was struck down by the Constitutional Court on the grounds of government’s failure to facilitate public involvement in the processing of the acts.<sup>7</sup> The first (2008) iteration of the TCB was withdrawn in 2011 due to lack of public consultation,

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1 The CLARA was struck down by the Constitutional Court in 2010, before ever having been brought into operation; the TCB was approved by parliament, and is currently under consideration by the National Council of Provinces in a third attempt to be passed into law; the Traditional and Khoi-San Leadership Act and the Traditional Leadership and Governance Framework Act Amendment Act were both signed into law by the president on 20 November 2019; and the Communal Land Tenure Bill was published for comment in 2017.

2 A. Claassens, ‘Contested Power and Apartheid Tribal Boundaries: The Implications of “Living Customary Law” for Indigenous Accountability Mechanisms’, *Acta Juridica* 1 (2011), pp. 174–209; A. Claassens, ‘Mining Magnates and Traditional Leaders: The Role of Law in Elevating Elite Interests and Deepening Exclusion, 2002–2018’, in M. Buthelezi, D. Skosana and B. Vale (eds), *Traditional Leaders in a Democracy: Resources, Respect and Resistance* (Johannesburg, Mapungubwe Institute for Strategic Reflection, 2019), pp. 75–128; L. Ntsebeza, ‘Traditional Authorities and Democracy: Are We Back to Apartheid?’, in G. Ruiters (ed.), *The Fate of the Eastern Cape: History, Politics and Social Policy* (Scottsville, University of KwaZulu-Natal, 2011), p. 76; S. Mnisi Weeks, ‘Regulating Vernacular Dispute Resolution Forums: Controversy Concerning the Process, Substance and Implications of South Africa’s Traditional Courts Bill’, *Oxford University Commonwealth Law Journal* 12, 1 (2012), pp. 133–55.

3 L. Ntsebeza, ‘Chiefs and the ANC in South Africa: The Reconstruction of Tradition?’, in A. Claassens and B. Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (Cape Town, UCT Press, 2008), p. 238.

4 Peter Delius, ‘Why is the ANC Bent on Conferring Colonial and Apartheid-Era Rights on Rural Chiefs’, *Daily Maverick*, Johannesburg, 25 April 2019.

5 Ntsebeza, ‘Chiefs and the ANC’, p. 258.

6 Parliament, *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (Parliament of South Africa, Cape Town, 2017), p. 488.

7 *Tongoane and Others vs National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

among other concerns.<sup>8</sup> The introduction of these laws and bills led to a strong campaign in the rural areas where people believed these ‘bantustan bills’ would undermine the citizenship and property rights of the 18 million South Africans residing in the former homelands.<sup>9</sup> The legislature’s focus on centralising the power of senior traditional leaders and bolstering their authority to shape and define customary law is heavily contested in local communities, and by human rights and grassroots organisations, who place the power to define and develop customary laws with communities.

This perception of customary law is supported by Constitutional Court jurisprudence. From 2003, the Constitutional Court has made several decisions in which it has described customary law as a system which throughout its history has evolved and developed to meet the changing needs of the community and will continue to do so. When development happens within a community, the Constitutional Court stipulated that courts must respect the right of communities to develop their customary law and ‘strive to recognize and give effect to that development, to the extent consistent with adequately upholding the protection of rights’.<sup>10</sup> These decisions mainly concerned the weighting of official customary law and living customary law in cases where these two versions clashed. The Court held that the historical context of racial oppression, division and conflict exposes the official customary law as the result of both unintended distortions arising from political assumptions as well as deliberate distortions of customary law to further the goals of colonial and apartheid governments.<sup>11</sup> When official customary law conflicts with living customary law it is therefore the latter, the Court said, that should be seen as the ‘true customary law’.<sup>12</sup>

Several authors raise dilemmas with regard to the description and recognition of living customary law, including a concern that while placing customary law in people’s practices may indicate its legitimacy, it does not guarantee its constitutionality, nor does it necessarily overlap with historical authenticity.<sup>13</sup> Living customary law is normatively empty; it can be either just or unjust, which is why courts need to test it against the Constitution. This article is, however, not concerned with the validity of customary law in state courts or the adequacy of the concept of living customary law for establishing such validity. We are discussing the Constitutional Court’s living customary law jurisprudence for its situating of customary law in people’s practice and acceptance rather than sovereign command. Aninka Claassens and Geoff Budlender conclude that the Constitutional Court jurisprudence displays ‘a fundamentally democratic conception of customary law ... [t]he law comes from practice and practice comes from the people ... the essence is that law is not simply imposed from the top – it is determined by practice’.<sup>14</sup> In the words of Chuma Himonga, ‘the test of

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8 Sonke Gender Justice, ‘Stop the Traditional Courts Bill’, available at <https://genderjustice.org.za/project-policy-development-advocacy/stop-traditional-courts-bill/>, retrieved 30 September 2020.

9 ‘Stop the Bantustan Bills’, website, available at <https://stopthebantustanbills.org>, retrieved 4 February 2021.

10 *Shilubana and Others vs Nwamiwa* 2009 (2) SA 66 (CC), sections 45 and 49.

11 *Alexcor Ltd and Another vs Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Bhe and Others vs Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC): paras 61–2; *Shibi vs Sithole and Others; South African Human Rights Commission and Another vs President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC): para. 61. See also A. Claassens and G. Budlender, ‘Transformative Constitutionalism and Customary Law’, *Const. Ct. Rev.* 6 (2013), p. 79.

12 *Bhe*: paras 62, 72, 82, 86, 87.

13 T. Bennett, ‘Official vs Living Customary Law: Dilemmas of Description and Recognition’, in Claassens and Cousins (eds), *Land, Power and Custom*, pp. 138–53; Claassens, ‘Contested Power and Apartheid Tribal Boundaries’; A.C. Diala, ‘The Concept of Living Customary Law: A Critique’, *The Journal of Legal Pluralism and Unofficial Law*, 49, 2 (2017), pp. 143–65; C. Himonga, ‘The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond with Special Reference to South Africa’, in J. Fenrich, P. Galizzi and T. Higgins (eds), *The Future of African Customary Law* (Cambridge, Cambridge University Press, 2011); O. Zenker, ‘Mind the Gaps: Renegotiating South African Legal Pluralism within the Post-Apartheid State’, in K. Seidel and H. Elliesie (eds), *Normative Spaces and Legal Dynamics in Africa* (London, Routledge, 2020), pp. 151–71.

14 Claassens and Budlender, ‘Transformative Constitutionalism’, p. 80.

validity of customary rules and norms the Court applies is their acceptance by the people whose customary law is under consideration rather than the command of a sovereign or pronouncement of a legislator'.<sup>15</sup>

Within South Africa, we can thus identify two opposing understandings of customary law. The first views customary law as something that can be commanded or pronounced by leaders (autocratic), the second as something that is shaped by the community or at a minimum requires acceptance by the community (democratic). These different conceptions underpin the different approaches of the legislature and the Constitutional Court. In this article, we aim to show empirically the impact of these opposing conceptions of customary law on the constant reconstruction of and resistance to chiefly authority in modern-day South Africa.

The discursive relation between chiefs, the postcolonial state and the people forms a recurring theme in Africa, as does the legitimacy and aptness of traditional authority in democratic states. Some literature portrays traditional structures as inherently anti-democratic and their recognition as a reproduction of authoritarian forms of power.<sup>16</sup> Other literature in contrast sees traditional authority as components of a specifically African form of democracy, a vehicle for authentic indigenous expression.<sup>17</sup> A third category of studies defies such categorisations and shows the multiform relationships between states, national and local governments, traditional leaders and people.<sup>18</sup> The broad diversity in local manifestations exemplifies that the contemporary position of traditional leaders and how it affects processes of democratic consolidation are empirical questions, to be unearthed and answered for specific countries and localities.<sup>19</sup>

This article aims to contribute to this debate in two ways. First, by undertaking such an empirical study in a specific local context of amaMfengu settlement in South Africa's Eastern Cape, where communities are heavily resisting what they see as the reimposition of illegitimate traditional leadership structures. In these areas, differing conceptions of customary law underlie claims for strengthening the power of traditional authorities as much as resistance against such claims. Laws and courts provide a strong impetus in these contestations. Second, through an analysis of these case studies we demonstrate that any discussion of the role that traditional institutions can and do play in African political cultures, and their responsiveness and accountability to the population, needs to take account of the nature of customary law, which itself can take more democratic or autocratic forms.

After a discussion of the history of amaMfengu settlement, leadership structures and relations to the state, this article turns to our two case studies, of struggles around senior

15 Himonga, 'The Future of Living Customary Law', p. 35.

16 M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, Princeton University Press, 1996); L. Ntsebeza, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa* (Leiden, Brill, 2005); Ntsebeza, 'Traditional Authorities and Democracy'; Ntsebeza, 'Chiefs and the ANC'.

17 G.B.N. Ayittey, *Indigenous African Institutions* (New York, Transnational Press, 1991); D.I. Ray and E.A.B. Van Rouveroy van Nieuwaal, 'The New Relevance of Traditional Authorities in Africa', *The Journal of Legal Pluralism and Unofficial Law* 28, 37–38 (1996), p. 7; P. Skalnik, 'Succession and Democracy in Nanun, Northern Ghana', *Asian and African Studies*, 28, 2 (2019), pp. 205–22.

18 M. Krämer, 'Neither Despotic nor Civil: The Legitimacy of Chieftaincy in its Relationship with the ANC and the State in KwaZulu-Natal (South Africa)', *The Journal of Modern African Studies*, 54, 1 (2016), pp. 117–43; B. Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (Oxford, James Currey, 2005); J.M. Ubink, *Traditional Authorities in Africa: Resurgence in an Era of Democratization* (Leiden, Leiden University Press, 2008); T. von Trotha, 'From Administrative to Civil Chieftaincy: Some Problems and Prospects of African Chieftaincy', *The Journal of Legal Pluralism and Unofficial Law*, 28, 37–38 (1996), pp. 79–107; J.M. Williams, 'Leading from Behind: Democratic Consolidation and the Chieftaincy in South Africa', *Journal of Modern African Studies*, 42, 1 (2004), pp. 113–36.

19 See also H.M. Kyed, and L. Buur, 'Introduction: Traditional Authority and Democratization in Africa', in L. Buur and H.M. Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (New York, Springer, 2007), pp. 1–30; O. Zenker and M.V. Hoehne, 'Processing the Paradox', in O. Zenker and M.V. Hoehne (eds), *The State and the Paradox of Customary Law in Africa* (London, Routledge, 2018), p. 14.

traditional leadership in AmaHlathi traditional community and village leadership positions in Keiskammahoek, located just north of and 40 kilometres north-west of King William's Town, respectively. In the conclusion, we discuss the impact of the two contradictory conceptions of customary law on struggles over chieftaincy, as well as the impetus behind them. Furthermore, we clearly establish the link between the functioning and legitimacy of chiefs in democratic states and an autocratic or democratic conception of the customary law underlying the powers of such chiefs. This article builds on data gathered via qualitative research in the Eastern Cape between December 2016 and May 2017. The authors conducted semi-structured interviews in AmaHlathi, Keiskammahoek and other localities, with villagers, local activists, ward councillors, senior traditional leaders, head(wo)men, non-governmental organisation (NGO) representatives, South African National Civic Organisation (SANCO) leaders and lawyers. The sampling method was a balance between snowballing and specifically targeting the leaderships of all the different community, civil society and governmental structures as they were more informed about the contestations due to their position. Ordinary villagers were also interviewed to balance the perspectives of the leaders. One of the authors was also involved in research preparing the AmaHlathi court case (described below) in 2015–2016 with the Legal Resources Centre, which represented AmaHlathi Crisis Committee (ACC).<sup>20</sup>

## AmaMfengu, Traditional Leadership and the State

AmaMfengu are made up of several distinct groupings of associated clans who 'had broken their ties with particular chiefdoms', particularly Hlubi, Bhele and Zizi.<sup>21</sup> They fled from what came to be known as Zululand to the territory of amaXhosa around 1818–1828, during the *mfecane*.<sup>22</sup> Some became fully absorbed in southern Nguni communities, while others lived semi-autonomously in client–patron relationships with local chiefs. In 1835, the missionary John Ayliff persuaded amaMfengu to seek colonial protection against their amaXhosa patrons, who demanded servitude and rents of them. AmaMfengu swore an oath to obey the British queen in 1835 and, honouring the alliance, they fought on the side of British forces in the frontier wars.<sup>23</sup> For this, they were rewarded with extensive tracts of amaXhosa land. After the War of Mlanjeni (1850–1853),<sup>24</sup> groups of amaMfengu settled among others in our case study locations, King William's Town/Zwelitsha<sup>25</sup> and

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20 The purpose of the interviews was explained to all interviewees, after which they were asked for their oral consent. Typed-out transcripts of the interviews are held by the authors.

21 M. Iiyama, 'Livelihood Diversification, De-Agrarianisation and Social Differentiation: Case Studies on Rural Livelihoods from South Africa and Kenya' (PhD thesis, University of Tokyo, 2008), p. 48. Language note: the group names amaMfengu and amaXhosa already contain the definite article 'ama' within them, so it is deemed inappropriate to reiterate 'the' in the English here, in that it appears to speakers of the indigenous languages to objectify the peoples of these clans.

22 *Mfecane* ('the crushing' in isiZulu) refers to a period of warfare among Zulu and Nguni kingdoms.

23 J.B. Peires, 'Continuity and Change in Ciskei Chiefship', in *Collected Seminar Papers*, vol. 22 (London, Institute of Commonwealth Studies, 1978), pp. 133–4; J.B. Peires, 'Ethnicity and Pseudo-Ethnicity in the Ciskei', in L. Vail, *The Creation of Tribalism in Southern Africa* (Berkeley, University of California Press, 1989), pp. 398–9; R. Southall and Z. De Sas Kropiwnicki, 'Containing the Chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa', *Canadian Journal of African Studies / Revue canadienne des études africaines* 37, 1 (2003), p. 50; N.J. Van Warmelo, *A Preliminary Survey of the Bantu Tribes of South Africa* (Pretoria, Government Printer, 1935). See for an alternative version of the history of amaMfengu the description of Cobbing and Webster's work in L. Switzer, *Power and Resistance in an African Society: The Ciskei Xhosa and the Making of South Africa* (Madison, University of Wisconsin Press, 1993), pp. 58–60.

24 The War of Mlanjeni was the eighth of a series of nine frontier wars fought in 100 years (1779–1879) of intermittent warfare between the kingdoms of amaXhosa and Cape colonists.

25 W.D. Hammond-Tooke, *The Tribes of King William's Town District* (Pretoria, Government Printer, 1958). See also Correspondence by Manganya, headman of Izeli Location, in Return in Compliance with a Resolution of the Honorable House of Assembly, Adopted on 5 July 1883; Annexure F, Detailed Final Report of the Commission on Restitution of Land Rights on the Cwengewe Community Land Claim (2012).

Keiskammahoek.<sup>26</sup> While amaMfengu ‘brought their values and customs with them’, they were made up of diverse groups and did not establish leadership structures above the village level.<sup>27</sup> They elected their own headmen who interacted with the British government.

This aligned well with the intentions of the British administration in this period, to reduce the power of hereditary chiefs. To achieve this, they introduced the position of elected headmen to supplant hereditary chiefs. In addition, they introduced elected councils (*amaBunga*).<sup>28</sup> The councils were used by the Native Administration Department as a consultative interlink between the white government and the rural communities. *AmaBunga* were formally superior to the headmen, but the Native Commissioner often bypassed the councils, carrying directives from the Minister of Native Affairs directly to headmen, in an effort to avoid resistance.<sup>29</sup>

In some areas of the Eastern Cape, particularly in the Ciskei,<sup>30</sup> these changes severely diminished the power of chiefs and some even claim they largely destroyed traditional authority.<sup>31</sup> In other areas, chiefs remained important actors due to their role in the administration and allocation of communal land tenure in the reserves, particularly when these reserves became increasingly populated and land more scarce.<sup>32</sup> Furthermore, while in some locations commoners became headmen, in others chiefs were chosen for, or could influence the selection of, these positions.<sup>33</sup> Chiefs and headmen also came to dominate *amaBunga* in some areas<sup>34</sup> or refused to participate in their elections and to follow their leaders.<sup>35</sup>

While the Native Administration Act of 1927’s ‘re-tribalization’ strategy involved the restoration of chieftaincy and the government of Africans through native law and custom under rather strict bureaucratic control of the Native Administration Department, in the Eastern Cape the Department continued to work extensively with the elected headmen and their *iinkundla*.<sup>36</sup> In 1951, the promulgation of the Bantu Authorities Act formed the basis for the creation of the bantustan (homeland) system promoted ‘to deflect demands for enfranchisement by an increasingly assertive African majority’.<sup>37</sup> *AmaBunga* were abolished. Ethnic groups were now to be organised as tribal authorities headed by a chief and his councillors.<sup>38</sup> A later amendment to the Bantu Authorities Act allowed for an alternative model of community authorities, for those communities that did not have a

26 C. Manona, ‘The Collapse of the “Tribal Authority” System and the Rise of Civic Associations’, in C. de Wet and M. Whisson (eds), *From Reserve to Region: Apartheid and Social Change in the Keiskammahoek District of (Former) Ciskei, 1950 to 1990* (Grahamstown, Institute for Social and Economic Research, Rhodes University, 1997), pp. 49–68.

27 C. de Wet, ‘Historical Background – Keiskammahoek up to 1950’, in de Wet and Whisson (eds), *From Reserve to Region*, p. 13.

28 Southall and De Sas Kropiwnicki, ‘Containing the Chiefs’; L. Wotshela, ‘Transformation in Late Colonial Ngqika Society: A Political, Economic and Social History of African Communities in the District of Stutterheim (Eastern Cape), c.1870–1910’ (unpublished PhD thesis, Rhodes University, 1994), p. 84.

29 A.K. Mager, *Gender and the Making of a South African Bantustan: A Social History of the Ciskei, 1945–1959* (Portsmouth, Heinemann, 1999), pp. 98, 108, and 110.

30 ‘Cis-Kei’ is a colonial term coined in the mid 19th century to refer to Xhosaland west of the Kei River (*Ibid.*, p. 1).

31 D.M. Groenewald, ‘The Administrative System in the Ciskei’, in N. Charton (ed.), *Ciskei: Economics and Politics of Dependence in a South African Homeland* (London, Routledge, 1980), p. 88; C. Manona, ‘Local Government’, in C. de Wet and S. Bekker (eds), *Rural Development in South Africa: A Case Study of the Amatola Basin in the Ciskei* (Pietermaritzburg, Shuter & Shooter, 1985), p. 71.

32 Southall and De Sas Kropiwnicki, ‘Containing the Chiefs’, p. 52.

33 W. Beinart, *The Political Economy of Pondoland 1860–1930* (Cambridge, Cambridge University Press, 1982), pp. 115–7; Ntsebeza, ‘Traditional Authorities and Democracy’, p. 78; Peires, ‘Continuity and Change’, p. 8; Southall and De Sas Kropiwnicki, ‘Containing the Chiefs’, pp. 50–1.

34 Beinart, *The Political Economy of Pondoland*, pp. 118, 121; W.D. Hammond-Tooke, *Command or Consensus: The Development of Transkeian Local Government* (Cape Town, David Philip, 1975), pp. 187–9.

35 Mager, *Gender and the Making*, p. 105.

36 Southall and De Sas Kropiwnicki, ‘Containing the Chiefs’, p. 53.

37 *Ibid.*, p. 54.

38 Ntsebeza, ‘Traditional Authorities and Democracy’, p. 78.

common ethnically defined leader.<sup>39</sup> This was for instance the case in several communities with a large amaMfengu population.

The Bantu Authorities Act transformed chiefs from independent representatives of their people into appointed and paid apartheid state officials. They were given greater powers than they had traditionally held, and new executive responsibilities from the state. In addition, chiefs gained a numerical majority in bantustan legislatures from then on. All of these changes transformed chiefs from leaders accountable to their people into officials accountable only to government. The increased scope for corruption, combined with their increased powers of arrest, search and seizure, eroded their legitimacy in the eyes of their people and made them increasingly dependent on the ruling parties in the homelands and on the South African state. As a result, from the 1980s chiefs clashed with popular movements of resistance against apartheid rule and their relationship with the African National Congress (ANC) wavered.<sup>40</sup>

The Transkei and Ciskei homelands were granted self-government in 1963 and 1972 respectively. Elections in Ciskei were characterised by a strong rivalry between amaMfengu and amaXhosa. AmaXhosa were still bitter about the collaboration of amaMfengu with British forces during the frontier wars, and their resulting control over land formerly occupied by amaXhosa groups. Resentment was furthermore fed by the fact that amaMfengu – whose alliance with the British was not only military but also cultural, embracing Christianity and formal education – dominated the professional salaried positions as well as headmanships.<sup>41</sup> This rivalry came to a head in 1973, in the first election for the government of the Ciskei. Chief Justice Thandathu Jongilizwe Mabandla led the *Imbokotho* (grinding stone) party, a mainly amaMfengu-supported group that later became the Ciskei National Party (CNP), while Lennox Leslie Wongama Sebe headed the largely amaXhosa-supported *Ikhonco* (link) party, forerunner of the Ciskei National Independence Party (CNIP). Sebe's party won the elections in a tight victory and immediately set about reducing the power of the CNP and amaMfengu.<sup>42</sup>

In the Ciskei legislature chiefs outnumbered the elected members 60 per cent to 40 per cent, and amaMfengu held a disproportionate number of chieftainships. This led Sebe to focus on gaining control of chieftaincy positions.<sup>43</sup> The Ciskei government used two methods to create new chieftaincies. First, by converting the existing community authorities into tribal authorities led by a chief. The second method was to capitalise on the South African government's policies to consolidate the geographical area of the Ciskei, through the amalgamation of the various reserves on the land and the purchase of interspersed white-owned farms. The combination of new land bought from white farmers and an influx of black persons displaced from white areas in the Cape allowed for the creation of new chieftaincies.<sup>44</sup> All in all, nine new chieftaincies were created after the 1973 elections: eight new amaXhosa chieftaincies and one amaMfengu, all of which went to Sebe supporters. These new chieftaincies include two of the case study areas, Keiskammahoek and AmaHlathi, where amaXhosa chiefs were imposed on the largely amaMfengu communities

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39 Black Authorities Act, 1951 (Act 68 of 1951), section 3.

40 N. Charton, 'The Legislature', in Charton (ed.), *Ciskei: Economics and Politics of Dependence*, p. 179; Ntsebeza, 'Chiefs and the ANC', p. 240; Southall and De Sas Kropiwnicki, 'Containing the Chiefs', pp. 54–6.

41 A.O. Jackson, *The Ethnic Composition of the Ciskei and Transkei* (Pretoria, Department of Bantu Administration and Development, 1975), p. 30; Peires, 'Continuity and Change', p. 398.

42 Peires, 'Ethnicity and Pseudo-Ethnicity', p. 399; N. Charton and G. Renton kaTywakadi, 'Ciskeian Political Parties', in Charton (ed.), *Ciskei: Economics and Politics of Dependence*, p. 130.

43 Peires, 'Continuity and Change', p. 12; Southall and De Sas Kropiwnicki, 'Containing the Chiefs', p. 55.

44 Peires, 'Ethnicity and Pseudo-Ethnicity', pp. 401–2.

in 1979 and 1982 respectively. This increased Sebe's thin majority into a comfortable margin, and meant the CNP was unable to regain power.<sup>45</sup>

During Ciskei self-government the tribal authorities were 'largely reduced to vehicles for [ruling party CNIP] programmes, fundraising ventures, and directives'.<sup>46</sup> The relationship between the tribal authority and the Ciskei government was characterised by one-way directives from the government to the tribal authority, with the government responding minimally to concerns and requests raised by the tribal authority.<sup>47</sup> The Ciskei government provided tribal authorities limited financial means or independence to take care of local needs. Even the levies tribal authorities raised hardly benefited their residents. Among the councillors – who were nominated by the tribal authority without consulting the community – there was no longer a culture of active discussion or an airing of opposing views. Headmen and sub-headmen positions, particularly the unremunerated sub-headmen, were no longer coveted due to the amount of work, and the fact that they were tasked to collect dues in their villages.<sup>48</sup> The position of headmen became politicised when, due to the weakness of their local branches, political parties started relying on tribal structures to serve as links between the legislature and the rural communities. The politicisation of headman positions undermined the legitimacy of traditional institutions.<sup>49</sup> Nancy Charton points out that both the party political role for chiefs and the existence of a centralised body drawing 'historically disparate tribal units into intensified relationship with one another' in itself further disturbed traditional checks and balances based on the idea that a chief ruled with a group of councillors representative of all people.<sup>50</sup> This undermined chiefs' traditional legitimacy.

As chiefs increasingly operated as state functionaries, relying more and more on penalties and coercive measures, resistance against apartheid included frequent and violent rebellion against chiefs.<sup>51</sup> When President Sebe was ousted from power in the Ciskei in March 1990, Oupa Gqozo, who identified with the ANC at that time, became the new head of state. Responding to popular sentiment he promised the dismantling of the detested tribal authority system. He started by proclaiming that all headmen had to resign and encouraging people to organise residents' associations led by elected members. This was eagerly taken up by the population. In fact, so eagerly and with so much support from militant youth, that Gqozo started to fear the new associations' popularity. The administration then tried to change course and abolished residents' associations in favour of the reintroduction of headmen. This raised the ire of many Ciskei residents, who refused to be ruled by headmen and drove away chiefs and headmen, burning their homes and killing their stock and even some of the headmen. This was where things stood when Gqozo's regime collapsed in 1993, mainly due to his resistance to the ANC and the pending reintegration of Ciskei into South Africa. Gqozo was replaced by a caretaker administration until the upcoming first democratic elections, in April 1994.<sup>52</sup>

We now turn to the two case studies illustrating contestation over traditional leadership and differing conceptions of customary law underpinning these struggles.

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45 Charton and Renton kaTywakadi, 'Ciskeian Political Parties', pp. 145–7; Manona, 'Local Government', pp. 72, 80; Peires, 'Ethnicity and Pseudo-Ethnicity', pp. 401–2; Switzer, *Power and Resistance*, p. 330.

46 Manona, 'The Collapse of the "Tribal Authority" System', p. 83.

47 Manona, 'Local Government', pp. 78–83.

48 *Ibid.*, pp. 83–4; Mager, *Gender and the Making*, p. 116.

49 Charton and Renton kaTywakadi, 'Ciskeian Political Parties', p. 135.

50 Charton, 'The Legislature', pp. 177–80.

51 Manona, 'Local Government', pp. 84–5; Ntsebeza, 'Traditional Authorities and Democracy', p. 79; Southall and De Sas Kropiwnicki, 'Containing the Chiefs', pp. 56–7.

52 Manona, 'The Collapse of the "Tribal Authority" System'; Southall and De Sas Kropiwnicki, 'Containing the Chiefs', pp. 57–8.

## AmaHlathi Senior Traditional Leadership

AmaHlathi, located north of King William's Town in the former Ciskei, is the scene of a protracted chieftaincy dispute. The settlement of AmaHlathi was established in 1853 from a mixed population of mainly amaMfengu groupings and some amaXhosa.<sup>53</sup> In 1957, AmaHlathi was registered as AmaHlathi Fingo Community Authority when the community could not agree on one chief to lead their community of diverse amaMfengu groups (increasingly intermixed with people from Xhosa groups), whose villages were each led by their own headman. In 1982, Sebe appointed a Xhosa woman, whom he gave the name Nontsapho Maqoma (Nonesi), as chieftainness of AmaHlathi Fingo Community Authority. According to AmaHlathi community members, this was not her original name. They say Sebe gave her this name, suggesting a family relation to famous Xhosa chief Jongumsobomvu Maqoma (1798–1873), to forge a connection between the woman and the royal Tshawe clan of Xhosa speaking groups.<sup>54</sup> Nonesi's appointment was followed by the official disestablishment of AmaHlathi Fingo Community Authority and the establishment of AmaHlathi Tribal Authority.<sup>55</sup> Not only did the change convert a community authority into a tribal authority, but it also dropped the word 'Fingo', obscuring the strangeness of appointing a Xhosa woman to lead a largely amaMfengu community. The Sebe regime furthermore replaced amaMfengu village headmen with people from the Tshawe clan of amaXhosa.<sup>56</sup>

Nonesi had an intermittent reign over AmaHlathi, and no effective presence in the community after the fall of Sebe and Gqozo in the early 1990s. The Tshawe headmen also lost power at that time and the community started electing village chairpersons instead, for five-year terms.<sup>57</sup> After a long period in which neither he nor his mother was active in the area, Nonesi's son Luvuyo started to claim the chieftaincy in 2004. He told AmaHlathi's chairpersons to become his *iiNkosana* (headmen; singular: *iNkosana*), a position that would earn them a governmental salary. When they refused, he appointed his own *iiNkosana*, from the Tshawe clan. While some community members supported Luvuyo, many residents refused to recognise him as their chief, even after official governmental recognition was conferred on him in 2006. They fear that Luvuyo is trying to control their land, including an ongoing land restitution claim, and divert development funds.<sup>58</sup>

In 2013, a group of AmaHlathi residents constituted themselves as AmaHlathi Crisis Committee (ACC) and lodged a claim with the Eastern Cape Committee on Traditional Leadership Disputes and Claims (the Committee) for the disestablishment of the senior

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53 Commission on Restitution of Land Rights' final research report on Cwengcwe community land claim, 15 January 2012, Annexure F.

54 Group interview with villagers, Nkangeni, 2 December 2016.

55 Recommendation on the traditional leadership claim of AmaHlathi Traditional Council by AmaHlathi Community Council represented by B. Kiva against Luvuyo Maqoma [hereafter *Recommendation*], Annexure A; Field report of the Eastern Cape Provincial Committee of the Commission on Traditional Leadership Disputes and Claims, p. 9. For more historical details of this case study, see T. Duda and J. Ubink, 'Resisting the Imposition of *Ubukhosi*: Conflicted Authority-Making in the Former Ciskei', in W. Beinart, R. Kingwill and G. Capps (eds), *Land, Law and Chiefs in Rural South Africa: Contested Histories and Current Struggles* (Johannesburg, Wits University Press, forthcoming 2021).

56 Cwengcwe affidavit and resolution, Commission on Restitution of Land Rights' final research report on Cwengcwe community land claim, 15 January 2012, Annexure C.

57 Group interview with villagers, Nkangeni, 2 December 2016; group interview with villagers, Mbaxa, 3 December 2016; interview with two villagers, Jaftha/Kwelerhana, 3 December 2016; interview with chairperson, Nothenga, 6 December 2016. This was in line with what SANCO was proposing across the Ciskei. See also founding affidavit of the court case in the matter between Mnikeli Elliot Kiva and Premier of the Eastern Cape Province and five others, case no. 662/15, Eastern Cape High Court Bisho, para. 33 [hereafter *Kiva*].

58 These data come from interviews conducted in AmaHlathi community between December 2016 and May 2017 as well as from the founding affidavit, *Kiva*.

traditional leadership of AmaHlathi traditional community. Before the Committee, the ACC argued that AmaHlathi community had never had a chief and that it is contrary to their custom for one to be imposed on them. Luvuyo and his supporters responded that the land on which AmaHlathi community live belonged to King Ngqika of Rharhabe from whom he, Luvuyo, was descended. They furthermore argued that community contributions to a traditional leadership robe (*umnweba*) for Nonesi and Luvuyo's initiation rites during Sebe's time proved the community's acceptance of the senior traditional leadership. The ACC argued that they had settled on unoccupied land awarded to them by the British for fighting on their side during the frontier wars. They also argued that Luvuyo does not hail from a royal family, and that they had had no choice but to pay for the robe and initiation under Sebe's repressive, volatile rule.<sup>59</sup>

The Committee's field research report confirmed the position presented by the ACC: neither Luvuyo's father nor grandfather was ever chief, and the chieftainship could not be traced further back than 1982, when Sebe appointed Nonesi.<sup>60</sup> Despite these findings, the Committee in its final report in 2012 recommends *against* the disestablishment of the senior traditional leadership. It argues that 'AmaHlathi is an integral part of the land of Ngqika from whom [Luvuyo] Maqoma descends. Yet of critical importance is the fact that amaMfengu settled in AmaHlathi during the period of Jongumsobomvu Maqoma's incarceration in Robben Island'. Jongumsobomvu Maqoma had resided in Fort Beaufort, about 80 kilometres from AmaHlathi, and is well known for mounting strong resistance against the British.<sup>61</sup> This led to his repeated incarceration in Robben Island, where he died in 1873.

In 2013, the then Eastern Cape premier Noxolo Kiviet confirmed Luvuyo as Senior Traditional Leader of AmaHlathi, citing the Committee's formal recommendation as the grounds for her decision.<sup>62</sup> The disjuncture between the field report and recommendation was later explained by two of the commissioners. In an informal meeting they told an ACC member that Premier Kiviet had changed the Committee's recommendations in nine out of ten recent cases. The commissioners recommended that the ACC appeal the premier's decision.<sup>63</sup>

In 2016, the ACC applied to the High Court for a review of the premier's decision to appoint Luvuyo. In this court, Premier Kiviet's (as she then was) argument revolved around the issue of land ownership. She argued that AmaHlathi community never defeated the previous occupants of the land and thus, through their settlement on that land, 'subjected themselves to the reign of those customary leadership structures that predated their settlement'.<sup>64</sup>

The ACC argued that how they came on to the land was irrelevant to the case. The Framework Act mandates the Commission to 'consider and apply customary law and the customs of the relevant traditional community'.<sup>65</sup> According to its customs, AmaHlathi community does not have a chief, and Sebe's imposition of a senior traditional leader – whose rule was intermittent, ineffective and regarded as illegitimate by the community – did not change or extinguish that custom.<sup>66</sup> In addition, expert witness for the ACC Professor Jeff Peires testified that while the land in question was originally occupied by amaXhosa, it was never ruled by the Ngqika house of Rharhabe from which Luvuyo claims to descend. In an abrupt change of direction the new premier, who had replaced Kiviet, distanced himself

59 *Recommendation*.

60 Field Report of the Eastern Cape Provincial Committee of the Commission on Traditional Leadership Disputes and Claims, 6 August 2012 [hereafter *Field Report*].

61 *Field Report*, Annexure E1.

62 Office of the Premier, Eastern Cape, Decision on Traditional Leadership claim on AmaHlathi Traditional Council by B. Kiva (claimant) against Luvuyo Maxoma (respondent), 10 October 2013.

63 Interview with ACC member, 8 December 2016, King William's Town.

64 Reasons for the decision, Noxolo Kiviet, *Kiva*.

65 Section 25(3).

66 Founding affidavit, *Kiva*.

from Kiviet's decision and the state respondents withdrew from the case.<sup>67</sup> The Bisho High Court heard the case unopposed in June 2017 and granted a court order for the disestablishment of the senior traditional leadership over the residents of AmaHlathi.<sup>68</sup>

However, this was not yet the end of the battle for the residents of AmaHlathi. The Eastern Cape Department of Traditional Affairs at first defied the court order because Luvuyo applied to the court for a rescission of the court order. It took a letter from the ACC's attorney to the Member of the Executive Council of Local Government and Traditional Affairs, explaining that an application for rescission does not suspend a court order, to stop the official reinstatement of Luvuyo.

The case of AmaHlathi highlights the state's conception of traditional authority as being derived from pre-colonial historical control over land. Premier Kiviet places AmaHlathi land ownership with the Rharhabe-amaXhosa, ignoring the fact that amaXhosa were defeated in the 1857 War of Mlanjeni, after which the British government transferred the land in question to amaMfengu, who have been occupying it for over 150 years. Or perhaps she places ownership of this land with the Rharhabe house precisely *because* it came to be in the possession of amaMfengu via colonial forces. Her reference to the incarceration of Xhosa chief Jongumsobomvu Maqoma for resisting the British seems to imply that pre-colonial history and who fought with or against colonial forces provides a justification for appointing a Xhosa chief to what had become an Mfengu position.

Traditional authority, in Kiviet's reasoning, follows historical land ownership. In this way, the democratic government of South Africa perpetuates colonial notions of traditional leadership as connected to bounded areas of land. AmaHlathi community articulates a different notion of customary authority, one that is in line with the customary conception found in many Southern African languages of *inkosi yinkosi ngabantu* (isiXhosa), meaning a chief is a chief through the people. This saying signifies that a chief derives his authority and legitimacy from the people and gives a community the power to determine their own governance structure.

Premier Kiviet's reconstruction of AmaHlathi Traditional Authority is ahistorical and divisive. It also centralises authority within the community in the person of the senior traditional leader. It overlooks the history that shaped traditional authority in the former Ciskei, including the impact of Sebe's repressive regime that, similar to apartheid government tactics, relied on the creation of chieftaincies. Kiviet references the glorious past of amaXhosa resistance against British rule to erase the history of amaMfengu in the former Ciskei, and former homeland and apartheid abuses. She uses a disputed chiefly lineage to leapfrog back to the wars of conquest, and the spatial arrangements of that time. Current government officials continue to resurrect and exploit the historical rivalry between amaMfengu and amaXhosa. AmaHlathi community's articulation of its customary law is in line with the notion of living customary law, as embraced and developed in the Constitutional Court's jurisprudence. The state's actions in this case have the opposite effect to the Court's interpretation: they ignore and stifle living customary law, and supplant it with a more authoritarian and top-down version of customary law and traditional leadership.

Luvuyo's 2004 claim to the senior traditional leadership of AmaHlathi followed hard on the heels of the enactment of the 2003 Framework Act, illustrating the impact of ANC policy on local struggles. The Eastern Cape government seems to habitually side with senior traditional leadership, even in the face of serious community contestation, and without any attention to the accountability of the chiefs. This has a significant impact, given the state's role in recognising traditional leaders and the rights and resources that flow from such recognition. This has become even more significant since the 2009 amendment of the

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67 Confirmatory affidavit, *Kiva*.

68 Court order, 27 June 2017, *Kiva*.

Framework Act made decisions of the Commission on Traditional Leadership Disputes and Claims purely advisory, giving the president and the premiers final decision-making authority. The politicisation of chieftaincy struggles and the state's apparently indiscriminate siding with officially appointed traditional leaders<sup>69</sup> gives communities no option but to resort to courts to claim their rights. This requires substantial community organising as well as assistance from legal aid centres. And even when communities win in court, this case shows they have not necessarily won in practice, as the state often ignores such rulings. All of this is clearly illustrated by the second case study of the Cala reserve community.

## Disputes over Village Leadership in Keiskammahoek South

Before discussing the Keiskammahoek case study, we situate it in the context of disputes over the appointment of headmen in other parts of the Eastern Cape. The enactment of the Framework Act and the Eastern Cape Governance Act,<sup>70</sup> followed by ANC statements that *iiNkosana* had been brought back,<sup>71</sup> has led to struggles over who has the right to select village heads.<sup>72</sup> '*iNkosana*' means prince in *isiXhosa*, and it is the term the Eastern Cape Governance Act uses for headman in section 18: '(1) Whenever the position of an ... *iNkosana* is to be filled – (a) The royal family concerned must ... with due regard to applicable customary law – (i) identify a person who qualifies in terms of customary law to assume the position in question.'

Chiefs and traditional councils argue that the law signifies that headmen should be selected by the royal family, from members of the royal family. Legally, there is no basis for the argument that only royal family members can become *iiNkosana*.<sup>73</sup> The term *iNkosana* is, however, potentially ambiguous. A local activist told us: '*iNkosana*, that is a ... false construction. *iNkosana* means prince, male child of a chief. With this term they change headmen, *iizibonda*, into princes. Through a linguistic construction'.<sup>74</sup>

While chiefs and councillors refer to this section in support of their attempts to impose royal candidates on villages with a long history of self-elected leaders, they opportunistically ignore another aspect of the provision, namely its reference, twice, to the applicable customary law.<sup>75</sup>

Struggles over the 'royalisation' of previously elected village leadership are occurring in many Eastern Cape villages. One such case led to a high-profile court case: Cala reserve, in the Xhalanga region in the former Transkei part of the Eastern Cape. The following summary is based on the scholarly work of Fani Ncapayi and Tom Boyce as well as on

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69 For example, the recently deceased amaXhosa king Mpendulo Zwelonke Sigcawu had been trying to impose Xhosa chiefs in traditional authorities that fall traditionally under amaMfengu (Lubabalo Ngcukana, 'Tribal Tensions Brew an Eastern Cape Land War', City Press, Johannesburg, 3 December 2017).

70 Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act no. 4 of 2005).

71 Interview, ward councillor, AmaHlathi Local Municipality, 27 May 2017.

72 See also F. Ncapayi, 'Whether You Like it or Not, It Is the Royal Family that Will Decide on Headman Here', provincial seminar on 'The Meaning of Democracy in Post-1994 Rural South Africa', East London, 26–27 August 2015; F. Ncapayi and L. Ntsebeza, 'The Re-Emergence of Rural Resistance and the Role of Organic Intellectuals with Specific Reference to the Xhalanga District in the Eastern Cape' (unpublished paper, September 2015).

73 The Eastern Cape Governance Act defines *iNkosana* as 'a headman or headwoman of a traditional community as defined in section 1 of the Framework Act'. The Framework Act defines a headman or headwoman as 'a traditional leader who (a) is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law; and (b) is recognised as such in terms of this Act'.

74 Interview with NGO representative, 30 May 2017.

75 See also Interview, NGO Ntinga Ntaba kaNdoda, 26 May 2017.

court documentation.<sup>76</sup> When Cala reserve's headman retired in 2012, the community wanted to elect a new headman, as was their custom. Most community members favoured the retiring headman's right-hand man, Gideon Sitwayi, who had been acting as Fani's replacement when the headman's health started to deteriorate. Some community members, however, preferred someone from the Gcina royal house. At a community meeting it was decided, with support from all but one of the villagers present, that Mr Sitwayi should become the new headman. This decision was not received favourably by the KwaGcina Traditional Council (KTC). They refused to accept Mr Sitwayi as the new headman, and a month later, KTC delegates came to the community to inform them that the KTC had instead selected a Mr Yolelo as the new headman. Mr Yolelo was a member of the royal family who was mostly based in Cape Town, where he owned a taxi.

The majority of community members expressed strong discontent with the candidate and the process, and argued that it was custom for the community to choose their own headman. The KTC responded that the election of headmen by communities 'has stopped since the new law [the Eastern Cape Governance Act], which instructs that the royal family elects the headman',<sup>77</sup> and added 'whether you like it or not, it is the royal family that decides on the headman'.<sup>78</sup> Only if the proposed candidate was a criminal could the community reject him.

When appeals to several governmental and traditional bodies proved ineffective, the Cala Reserve Planning Committee brought the dispute to the Bisho High Court and, after appeal by provincial officials, the case was heard by the full bench. There, the Planning Committee argued that the KTC breached section 18 of the Eastern Cape Governance Act, which states that the royal family must identify a person for the position of *iNkosana* (headman or headwoman) 'with due regard to applicable customary law'. Lawyers for the appellants – the chief, the KTC and Eastern Cape government – argued that customary practice had been taken into account since the candidate hailed from the royal family. They stated that the laws did not require that the views of the community be taken into account.<sup>79</sup>

Based on the expert witness's statement that communities in the Xhalanga district have elected their own headmen for more than a hundred years, the full bench concluded that 'the practice of electing headmen in the Xhalanga district is part of the customary law of the Xhalanga community'.<sup>80</sup> The appellants conceded in court that the result of their argumentation would be that the Cala reserve community 'enjoyed greater democratic rights in respect of the identification and appointment of headmen under homeland rule than they do under a democratically elected government'. In the full bench's opinion, this does not square with the fact that both acts<sup>81</sup> stipulate that the institution of traditional leadership must be transformed 'so that democratic governance and the values of an open and democratic society may be promoted'.<sup>82</sup>

More than a hundred people from other rural communities picketed outside the courtroom when the Cala reserve case was heard on appeal. By 2015, 25 Eastern Cape communities had contacted the civil society organisations involved in the Cala reserve case for help and

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76 F. Ncapayi, 'Emerging Rural Struggles Against Unelected Traditional Leaders and the Role of the Courts: Lessons from Rural Villages of the Eastern Cape' (unpublished paper, 2017); F. Ncapayi and T. Boyce, 'Democratisation of Rural Government Towards Responsible and Responsive Rural Governance' (unpublished paper, 2015).

77 Ncapayi, 'Emerging Rural Struggles', p. 6.

78 See also *Premier of the Eastern Cape and Others vs Ntamo and Others* (169/14) [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 All SA 107 (ECB) (18 August 2015) (hereafter *Ntamo*), section 12.

79 *Ibid.*, sections 13 and 16.

80 *Ibid.*, sections 48–9.

81 Preamble Framework Act; section 3(2) Eastern Cape Governance Act.

82 *Ntamo*, sections 78 and 82.

guidance.<sup>83</sup> These communities either demanded the election of headmen or wanted to fully withdraw their status as traditional communities. The Legal Resources Centre attorney who represented the Cala reserve community has also been inundated with calls from communities requesting information ‘about how to replace their existing systems with the democratic systems used’.<sup>84</sup> In 2017, Ncapayi writes about ‘a groundswell of rural resistance’ across the Eastern Cape centring on the right to elect their own leaders.<sup>85</sup> ‘People are still screaming and kicking about *iiNkosana* chosen by the chiefs’, says an *iiNkosana* and amaNtinde traditional councillor.<sup>86</sup> In many villages, there are now both elected village heads as well as imposed *iiNkosana*, both supported by a part of the community. In others, the chief has withdrawn the imposed headmen.

One of the areas where such struggles are taking place is Keiskammahoek South, which is our second case study area. Like AmaHlathi, this is an area where groups of amaMfengu people settled after the War of Mlanjeni, in 1853. After the promulgation of the Bantu Authorities Act they were first constituted as a community authority, in recognition of the fact that the area did not have a chief. However, in 1979 Sebe converted the community authority to Ngqika (Keiskammahoek South) Tribal Authority and imposed a chief on the area. During the following decade the area was characterised by strong opposition to Ciskei rule, which included resistance against the chief and the imposition of unpopular headmen.<sup>87</sup> When Brigadier Gqozo after his coup against President Sebe abolished headmen, this was eagerly taken up in Keiskammahoek South. When Gqozo tried to reinstate the headmen a short while later, this was violently resisted. According to Cecil Manona, the traditional authority was by then virtually non-existent on the ground.<sup>88</sup>

This history explains why the people in this area regard the imposition of *iiNkosana* to be about much more than the right to freely select their own village head, without restrictions on eligibility. The underlying, much more fundamental, issue is the recreation of overarching traditional identities and the reimposition of the power of senior traditional leaders over these largely administratively autonomous village communities. The imposition of *iiNkosana* is a key tool to achieve the reconstruction of traditional authority in these communities where chiefs played a real role only for a decade or so during the violent period of internal self-government of the bantustans. In Keiskammahoek South, most villagers had very little to do with the chief after the apartheid system’s demise. The position of *iizibonda* – headmen connected as elders to a chief – had been wiped out and replaced by elected village heads in the early 1990s.<sup>89</sup> With the exception of a decade, villagers in Keiskammahoek South have selected their own village leaders since their arrival in the 1850s. While the position of the chief survived officially, it meant very little for many people, and had limited practical impact on their lives. Elected village heads worked with civic associations and ward councillors.<sup>90</sup> The current attempt by chiefs and royal families to transform downwardly accountable, elected leaders with five-year terms into leaders for life who are upwardly accountable to chief and traditional council forms a crucial step in the (re)construction of tribal identities, and the reshaping of rural villages as ‘traditional

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83 Ncapayi and Ntsebeza, ‘The Re-Emergence of Rural Resistance’, p. 6.

84 W. Wicomb, ‘Victory for Democracy in Rural Eastern Cape’, GroundUp online news agency, 19 August 2015.

85 Ncapayi and Ntsebeza, ‘The Re-Emergence of Rural Resistance’, p. 5; C. Rickard, ‘People’s Rights Upheld in Landmark Cala Ruling’, *Daily Dispatch*, East London, 20 August 2015.

86 Interview, amaNtinde Traditional Councillor, 27 May 2017.

87 Manona, ‘The Collapse of the “Tribal Authority” System’, pp. 57–61.

88 *Ibid.*, pp. 64–5.

89 See also Ntsebeza, ‘Traditional Authorities and Democracy’, pp. 84–5.

90 For an explanation of the historical role of civics in South Africa, see T. Blom Hansen, ‘Civics, Civility and Race in Post-Apartheid South Africa’, *Anthropological Theory*, 18, 2–3 (2018), pp. 296–325, at pp. 305 and 306.

communities'. Two village elders comment: 'the issue is that the *iNkosana* works according to the law and custom of the royal family. But we want someone that would listen to the people. If that person does not listen to the people, then they should be removed'. 'If the position of *iNkosana* is for a lifetime, that would be dangerous. ... We also don't want someone who will say the chiefs own all the land'.<sup>91</sup>

The Framework Act appears to allow communities to choose whether they want to be a traditional community or not. In practice, this is not what happens. Instead, by operation of the transitional mechanism in section 28 of the Framework Act, the 'tribes' of old are deemed to be 'traditional communities' and the tribal authorities of old are deemed to be traditional councils, as long as they include one-third women and 40 per cent elected members. During interviews, people reported that they did not want to form part of a traditional community, but had never been given the opportunity to say so. They feel they were not consulted regarding the Framework Act, and many villages boycotted the elections of the 40 per cent of elected traditional councillors that the Framework Act provides for. The imposition of royal *iiNkosana* is felt to be a pivotal step in the imposition of traditional leadership over these communities. As such, this is yet another case of legislation altering custom and taking power from the people, in a style reminiscent of colonial and apartheid-era governance.

### **Law, Politics, Power and Democracy: A Conclusion on the Reconstruction of and Resistance to Traditional Authority**

This article draws attention to successive ANC governments' concerted efforts to impose a model of traditional authority that empowers senior traditional leaders, even in contexts where local communities strongly contest this model, arguing that it contravenes their custom and history, and their preference, as well as their democratic rights to choose their leaders. In the case of AmaHlathi, the government supported the claim of the Maqoma senior traditional leader, despite clear evidence that that traditional authority did not exist before its imposition on the community by Sebe's Ciskei government in the 1980s. They initially continued to do so even after a court decision in favour of AmaHlathi community. In the Cala reserve court case, the acting Director-General of the Department of Local Government and Traditional Affairs blatantly claimed that the selection of any royal family member as new *iNkosana* is by definition in accordance with customary law. Eastern Cape government officials are similarly supporting the 'royal candidate' in many other contested village headships in the former Ciskei, such as in Keiskammahoek South. Traditional leadership is reintroduced at all levels, and powers of senior traditional leaders are centralised, regardless of the historical development of leadership structures of the community, and resistance against imposed chieftaincies both during the present, and the apartheid era. The option to not identify as a traditional community is not available to rural communities in practice.

Eastern Cape rural community organisations feel that 'the state is increasingly acting in ways that roll back the democratic gains of 1994'.<sup>92</sup> The Eastern Cape government in its policies and action – as well as inaction – clearly places strengthening the position and role of senior traditional leaders above safeguarding the democratic rights of its constituents. Lawyers appearing for the provincial authorities in the Cala reserve case maintained that the community has no decision-making power whatsoever regarding their village heads and that their views do not even need to be taken into account. As the full bench in the Cala reserve case pointed out, this would mean fewer democratic rights for the community than during apartheid and would directly oppose the stipulations in the Framework Act and the Eastern

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91 Interview with SANCO chair and two members, Ngumeya village, 30 May 2017.

92 Rickard, 'People's Rights Upheld'.

Cape Governance Act that traditional leadership must be transformed so that democratic governance and the values of an open and democratic society may be promoted.

This article highlights the enduring legacy of apartheid constructions, and the powerful role of the post-apartheid state in their recreation. New laws are an important tool in this process. They are used to ‘effectively “retribalize” the countryside and minimize rural democracy’, and project and embolden an authoritarian conception of customary law.<sup>93</sup> The new traditional authority laws have an ahistorical, authoritarian understanding of customary law and customary leadership – as something to be defined and imposed on rural communities by senior traditional leaders and their royal families. This is directly opposed to the Constitution’s emphasis on transformation of traditional leadership in order to promote democratic governance and society, as well as to the Constitutional Court’s interpretation of customary law as something to be determined with reference to practice from and acceptance by the people whose customary law is under consideration. In the context of unequal power relations, the authority to define customary law can substantially affect access to services, goods and, particularly, natural resources. Only with serious efforts of community mobilisation and support can local communities successfully access the courts to challenge the actions taken by the alliance of chiefs and state. Even court victories do not guarantee compliance from government to allow communities to determine their leadership structures.

The state’s agenda to empower traditional authorities seems to have shifted with the 1998 White Paper on Local Government, which defined a role for traditional authorities in local development.<sup>94</sup> In the 1996 Constitution, traditional authorities were recognised without being granted any defined powers and functions, with only a ceremonial role. Since the White Paper, consecutive ANC governments have made legislative attempts to give traditional leaders power over land.<sup>95</sup> Over the years it has become increasingly evident that the state’s agenda to strengthen the power of traditional authority is connected to the commercial exploitation of natural resources.<sup>96</sup> Chiefs present a gateway to land and extractive resources via their custodial authority over land belonging to rural people in ‘traditional communities’, even while this custodial authority is hotly contested. Sonwabile Mswana and Gavin Capps describe how chiefs conclude deals with mining corporations on behalf of ‘traditional communities’ that they formally represent and how this leads to many community conflicts over the decision to mine as well as the resulting revenue streams.<sup>97</sup>

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93 *Ibid.*

94 Ntsebeza, ‘Chiefs and the ANC’.

95 It has been speculated that the shift was an outcome of a deal between government and traditional authorities, as it occurred immediately after a meeting with Deputy President Jacob Zuma, King Zwelithini and Mangosuthu Buthelezi (*Ibid.*, p. 255).

96 The political and vote-brokering power of chiefs is referred to as another reason for states to align with chiefs, perhaps increasingly in South Africa due to its transformation from a de facto one-party state to a competitive multi-party democracy. While vote-brokering powers of chiefs have been posited by scholars, their existence has been hard to prove. In recent elections, the causality between chiefs and votes may even be reversed in provinces with mining activities in traditional communities. In the 2016 local elections, the ANC suffered setbacks in provinces with traditional communities living in former homelands, up to an 18 per cent decline in North West province ‘where the “state capture” is, according to researchers, most pronounced’: E. Stoddard, ‘Protests Test Traditional Authority on South Africa’s Platinum Belt’, Reuters, 20 September 2017, available at <https://www.reuters.com/article/us-safrica-platinum-insight/protests-test-tribal-authority-on-south-africas-platinum-belt-idUSKBN1CD06E>, retrieved 5 February 2021.

97 S. Mswana and G. Capps, ‘No Chief ever Bought a Piece of Land!’ *Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province* (Society, Work and Development Institute, University of the Witwatersrand, 2015), p. 6; see also S. Mswana. ‘Mineral Wealth – “In the Name of Morafe”?’ Community Control in South Africa’s “Platinum Valley”’, *Development Southern Africa*, 31, 6 (2014), pp. 826–42; D. Huizenga, ‘Governing Territory in Conditions of Legal Pluralism: Living Law and Free, Prior, and Informed Consent (FPIC) in Xolobeni, South Africa’, *The Extractive Industries and Society*, 6, 3 (2019), pp. 711–21.

Neoliberalism and the exploitation of extractive resources provide ample space for manipulation and corruption by traditional, political and economic entrepreneurs.<sup>98</sup> Claassens and Boitumelo Matlala perceive mining resources as the main motive behind the new laws expanding the power of traditional authority.<sup>99</sup> What is interesting in our Eastern Cape case studies is that even in areas without mining or other high-value resources, the Eastern Cape government aggressively pushes for more power of chiefs. This seems to indicate that the current alliance between the state and chiefs is strong, and generates governmental back-up for most claims and actions of traditional leaders, regardless of direct gains in the form of valuable natural resources.

This article urgently shows that traditional leadership as it is taking shape in South Africa, sustained by the legislator's and administration's autocratic notions of customary law, is incompatible with the democratic ideal of post-apartheid South Africa and rural citizens' own conceptions of traditional leadership. Was the promise of the new South Africa not that it should be up to the people, including those living in the former homelands, to decide for themselves who they would like to be governed by, and to be able to hold those leaders to account for their actions? Did this promise not also include the undoing of the apartheid's distortions of customary law and traditional authority? The people of the former Ciskei speak plainly on this issue with their resistance against the current attempts to reconstruct top-down traditional authority structures.

By linking debates about the differing conceptions of customary law – of legislators, administrators, judges, rural communities – to struggles over the reintroduction of traditional authority, this article highlights that studies on traditional leadership need to pay closer attention to the democratic or autocratic conception of the customary law underlying the powers of such chiefs.<sup>100</sup> If customary law is conceived as a system that develops through practice and acceptance of the community – and this includes their acceptance of the institution of traditional authority as well as specific traditional leaders – there is a strong check on the functioning of traditional leaders that renders the institution much more easily compatible with democratic state-forms. If, on the other hand, customary law is conceived as developing by sovereign command, traditional leaders will have wide discretion to act as they please and disregard their own communities. This negatively affects commitments to democratic norms and practices.

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98 J.L. Comaroff and J. Comaroff, 'Chiefs, Capital, and the State in Contemporary Africa: An Introduction', in J.L. Comaroff and J. Comaroff (eds), *The Politics of Custom: Chiefship, Capital, and the State in Contemporary Africa* (Chicago, University of Chicago Press, 2018), pp. 1–48.

99 A. Claassens and B. Matlala, 'Platinum, Poverty and Princes in Post-Apartheid South Africa: New Laws, Old Repertoires', *New South African Review*, 4 (2014), pp. 116–39.

100 See literature in footnotes 17–19.

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