

## HERE TO STAY

# Traditional leaders' role in justice and crime prevention

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Although legislation exists to govern the incorporation of traditional leaders into the post-1994 democracy, intense debates on the issue continue. Traditional leaders contribute to several spheres of governance, but their role in crime prevention and the administration of justice is more pronounced. The key question should not be whether traditional leaders should perform such functions, but how they can participate in the delivery of local safety.

**I**n South Africa, as in other African countries, the system of traditional leadership is firmly entrenched. Historically, traditional leaders served as governors of their communities with authority over all aspects of life, ranging from social welfare to judicial functions. Many countries in Africa retain a system of traditional leadership and several have gone a long way in incorporating traditional leaders into democratic forms of government.<sup>1</sup>

Nonetheless it is acknowledged that traditional leadership presents a challenge to a constitutional democracy. Creating a home for traditional leadership within the modern democratic dispensation remains one of the most difficult areas of policy for African states.<sup>2</sup>

In exploring some of these issues, and in particular the role of traditional leaders in the administration of justice and crime prevention, this article draws on research conducted between March and August 2004 in the Limpopo province.<sup>3</sup> The study was undertaken in collaboration with the provincial department of safety, security and liaison, the regional office of the department of justice and constitutional development, and the provincial

department of local government and housing (traditional leaders unit).

Most of the research took the form of participant observation, with researchers sitting in as cases were dealt with in the traditional court. In-depth interviews were also conducted with traditional councils, police officers, traditional leaders, judicial officers, leaders of the provincial House of Traditional Leaders, and community members.

### **Democracy and traditional leadership**

Like many other African countries, after 1994 South Africa had to consider how it was going to accommodate the system of traditional leadership in the new democratic order. This was not an easy issue to deal with, especially for a new government that had to address many other challenges related to the overhaul of the whole state machinery.

Moreover, many regarded the institution of traditional leadership as having been so influenced by colonial and apartheid policies, that it was in many respects more a reflection of those policies than of the traditional or cultural practices of South Africans. Even the African National Congress (ANC) is said to be undecided on the issue of traditional leaders. In

words attributed to Albie Sachs, "the discussion on traditional leaders cuts the ANC in half".<sup>4</sup>

Whatever the reasons, it is common knowledge that traditional leadership has remained at the periphery of transformation in the country. Even the South African Constitution, which devotes one of its shortest chapters to traditional leaders, fails to sufficiently outline the leaders' constitutional status, powers and duties.<sup>5</sup>

Significantly, this chapter of the Constitution does provide for the establishment of Houses of Traditional Leaders. Six of the nine provinces have such houses,<sup>6</sup> and these are represented in the single National House of Traditional Leaders.<sup>7</sup> The Houses of Traditional Leaders have been given an important role as the effective custodians of African tradition and culture. They act in an advisory capacity (both nationally and provincially) on issues that affect traditional communities, traditional leadership and customary law.

Despite the legislative provisions for traditional leadership, however, an intense debate is raging around their place in a democracy. Government's response has consistently been that of cautious support. A realistic approach seems to be the one that seeks to fit traditional leaders into the current democratic system. This approach appreciates the uncomfortable relationship between democratically elected organs of governance and the traditional (mainly hereditary) structures of social ordering. Its point of departure is that South Africa's democracy does not align with the traditional forms of governance as practiced by Africans. The approach recognises that it would be problematic to subject some sections of the community (such as "traditional communities")<sup>8</sup> to a system of governance different from the rest of the country.

The Traditional Leadership and Governance Framework Act 41 of 2003 underscores this approach by providing the context within which local municipalities and traditional leaders can operate. The Act, in sum, recognises the role of both institutions. Moreover, it goes further than any of the Acts that preceded it by obliging the state to protect the institution of traditional leadership.

### **Traditional Leadership and Governance Framework Act 41 of 2003**

In the quest to deal with the issue of traditional leadership, parliament passed the Traditional Leadership and Governance Framework Act 41 of 2003. Unfortunately, the Act was passed nine years after the first democratic elections in 1994, with the unintended consequence of increasing the uncertainty regarding traditional leaders and their roles.<sup>9</sup> The Act is arguably the most significant document that deals with traditional leadership after 1994.

The Act goes a step further than the Constitution by placing a specific obligation on government to protect and promote the institution of traditional leadership. The pertinent part of the preamble states:

the state must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa.

It goes further by specifying a framework within which relations between traditional authorities and elected authorities should be governed, as illustrated in the box below.

#### **Partnerships between municipalities and traditional councils**

5. (1) The national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures.
- (2) Any partnership between a municipality and a traditional council must:
  - (a) be based on the principles of mutual respect (and recognition of the status); and
  - (b) be guided by and based on the principles of co-operative governance.
- (3) A traditional council may enter into a service delivery agreement with a municipality.<sup>10</sup>

Significantly, the Act (section 20(1)(a-n)) recognises the role of traditional leaders in safety and security,

administration of justice, arts and culture, land administration, agriculture, health, welfare, the registration of births, deaths and customary marriages, economic development, environment, tourism, disaster management, the management of natural resources and the dissemination of information relating to government policies and programmes.

It is obvious that on the basis of the above section, the traditional authority is a multi-purpose organ operating at a local level of governance. Based on the provisions of this section, the right question to ask would be: 'what don't traditional leaders do?' There does not seem to be anything significant that they are not empowered to do as far as governance is concerned.

This would come as no surprise to those familiar with life in rural South Africa, because this is what many traditional leaders do anyway. What has changed is that this role has now been formalised in legislation. This legislative recognition is significant considering that until 2003 when the Act was passed, most of the functions performed by traditional leaders were executed on the basis of apartheid laws. The 2003 Act now endorses the role of traditional leaders as a sphere of governance at the very local level.

#### **Role in administering justice and crime prevention**

A striking feature of the interviews with traditional leaders was their feeling of impotence and marginalisation in the current democratic government. The general view among many of them is that their role and powers are being reduced in many respects, including crime prevention.

These findings stand in stark contrast with the views of South African Police Services (SAPS) members regarding the role of traditional leaders in crime prevention. The SAPS in Limpopo see the leaders as indispensable role players in the fight against crime. They attribute this to the influence that traditional leaders have in their communities. The head of the Seshego crime prevention unit – the station responsible for part of Moletji which comprises 52 villages – stated that "without traditional leaders it would be impossible to deal with crime in the rural

areas". He then went on to make the following comparison:

At this station we have problems with Seshego because it is a township. There is no chief in Seshego. A lot of crime happens there and there is no control.<sup>11</sup>

Discussions with the police officers of Seshego not only showed the high regard that they have for traditional leaders, but also the cordial relationship that exists with the traditional leaders of Moletji, especially with the *kgosi* (senior traditional leader). If the traditional leader experiences a problem in the area, he can contact the station so that the matter can be dealt with jointly by both authorities. When important events take place in Moletji, the *kgosi* approaches the police station for joint planning of the necessary security measures.

Moreover, the crime prevention unit of Seshego police station visits the traditional authority office once a week (every Friday) to attend to a satellite police station situated at the office. During these visits, which are dubbed 'taking services to the people' by the police, all services that are normally performed in a SAPS community service centre are rendered at the traditional authority. These include opening case dockets, certifying documents and generally attending to queries from community members.

According to the SAPS members interviewed, it is clear that traditional leaders currently play a vital role in crime prevention. Moreover, they believe traditional leaders should be further empowered to administer justice and help prevent crime. Suggestions in this regard included:

- Prosecutorial powers: traditional leaders should be given full powers to prosecute minor cases such as petty theft and common assault.<sup>12</sup>
- Improvement of infrastructure: infrastructure (such as roads) should be improved to make traditional communities accessible to, among others, the SAPS.
- Resources: traditional offices should be improved and equipped to enable them to deal with crime prevention.
- Training: traditional leaders and members of the SAPS should be trained on how best to work together.

### **Challenges for incorporating traditional leaders**

The challenges facing the incorporation of traditional leaders include the relationship between municipalities and traditional leaders, perceptions about who is responsible for crime prevention and crime combating, and traditional leaders' understanding of justice. Each of these challenges is dealt with below.

#### *Relations between municipalities and traditional leaders*

While the 2003 Act is laudable as a practical attempt to deal with governance at the local level, it is only the first step in the right direction. Unfortunately, the delay in the promulgation of the Act has meant that uncertainties about the institution have already impacted negatively on many communities.

A common feature in any discussion with traditional leaders is their dissatisfaction with local councillors. Equally, some councillors see traditional leaders as an obstacle to service delivery. This tension is occasioned by the fact that the roles of these two organs overlap and there have been no guidelines as to how they should interact.

It is understandable that councillors might see traditional leaders as a hindrance to their efforts. Having been elected to office on the basis of promises made to the people, it would be unfair to subject the electorate to an institution that might hinder service delivery or even challenge the authority of councillors to spearhead development. Equally, traditional leaders – at least those belonging to the Congress of Traditional Leaders of South Africa (CONTRALESA) – would prefer traditional leaders to be the only structure of governance for traditional communities.

The 2003 Act, however, does provide a framework for cooperation between the two local spheres of governance. The challenge is for traditional leaders and municipalities to make sure that the spirit of the Act prevails. This could be done through joint initiatives that identify priority areas in local service delivery. Both traditional leaders and elected councillors should acknowledge their mutual dependence in the rural areas, and that tensions between the two institutions do their followers and constituencies no favours.

While ensuring cooperation and coordination between traditional authorities and other agencies (such as municipalities) is the main challenge, a related problem is that of holding traditional leaders accountable. The question is how to ensure that traditional leaders do not use service delivery as a weapon to force community members to abide by certain practices. Anecdotal evidence suggests that some traditional leaders require compliance with particular conditions (such as the giving of gifts to traditional leaders by community members working in urban areas) before the leaders can perform functions such as marrying a couple.

In all fairness, if a traditional leader receives remuneration from the state for services rendered and if the state is responsible for the running of the traditional office – as is the case in many areas – it is unfair to expect people to pay extra monies for specific services. This would be tantamount to double-taxation.

#### *Dealing with crime: whose responsibility?*

Asked, in a focus group discussion, whether traditional leaders should participate in SAPS activities as police reservists and/or neighbourhood watch members, and encourage their followers to do so, one traditional leader at Mokopane responded:

If they pay us we will participate. The police are paid to do their work. Why must I help them if I do not get paid?<sup>13</sup>

It is clear that this particular traditional leader does not see it as the responsibility of the community to deal with crime unless there is remuneration. This view is not uncommon: community members often take part in voluntary activities with the expectation that some benefit – whether direct or indirect – will accrue. Police reservists may, for example, expect to eventually be employed as police officers, or may participate for the purpose of enhancing their curriculum vitae.

But honest as this traditional leader's response may be, it seems to contradict complaints by many others that they are not involved enough in the fight against crime and lawlessness. It also contradicts the work that these traditional leaders do on a regular basis, for instance:

People come to us to report crime that we know we cannot handle. We call the police to come and deal with the cases. Sometimes police come and at other times they do not come.<sup>14</sup>

The core of the problem is the reluctance of some traditional leaders to get involved in the operational side of policing while continuing to serve as a conduit between the police and the community. It is the latter that they see as their core function.

#### *Traditional leaders' understanding of justice*

Some traditional leaders do not understand how the formal criminal justice system works. They expect it to act harshly against criminals through not only meting out stiff sentences, but also denying accused persons bail. Some of the traditional leaders spoke fondly of a time in the past when a criminal would not be treated with kid gloves – when police would deal with an accused in a manner that showed the might of the law. This perception, disturbingly, is quite pervasive among traditional leaders and members of traditional communities.

Needless to say, this stands in stark contrast to the ethos of the Constitution and Bill of Rights, and in particular, the presumption of innocence until proven guilty. While there may appear to be a fundamental philosophical difference between the views of traditional leaders and the criminal justice system, further probing shows that it is often little more than a misunderstanding. This is illustrated by the words of the Mokopane chief councillor:

I have a problem with the police, but I understand their difficult position. They arrest criminals, but justice [the department of justice and constitutional development] releases them. Why don't they [the two departments] work together against the criminals?<sup>15</sup>

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

Why can't they simply explain these things the way you do? All you see is police arresting

someone today and he is out tomorrow bragging and committing more crimes.<sup>16</sup>

The chief councillor's understanding of how the criminal justice system operates reflects the views of many people living in the communities administered by traditional leaders. It is apparent that a solution to this problem – or at least a step towards a solution – would be improving communication between the police, the courts, and traditional leaders.

#### **Clarifying traditional leaders' role**

The South African Constitution and other legislation<sup>17</sup> recognise the relevance of traditional leaders in many spheres of governance. However, their role has not been explicitly outlined in crime prevention policy documents such as the 1996 National Crime Prevention Strategy (NCPS) and the 1998 White Paper on Safety and Security. Traditional leaders therefore remain at the periphery of crime prevention even though they play a crucial role in such activities in rural areas.

If crime prevention consists of proactively preventing crime from occurring, and reactively dealing with offenders, then the role of traditional leadership cannot be ignored. Crime prevention through environmental design (one of the pillars of the NCPS) would, for example, benefit significantly from the active participation of traditional leaders.

Traditional leaders are at the centre of development in rural areas. This is a role that they have always played, as demonstrated by traditional leaders facilitating the building and maintenance of schools and clinics within their respective authorities. With 193 senior traditional authorities in Limpopo that have reasonable infrastructure, it would be prudent to effectively use these offices to coordinate crime prevention projects.

This is particularly pertinent given that the 2003 Act provides for accountability mechanisms for traditional leaders. For instance, traditional leaders have a code of conduct, women would enjoy at least 25% representation in the traditional council, and the traditional council would not be solely comprised of members of the royal kraal. This representation should provide the necessary checks

and balances to deal with suspicions that some traditional leaders and their courts are biased. Such bias could be against women or against those not related to the traditional leader. In a study exploring mechanisms to address violence against women, Moulton described the problem thus:

Numerous respondents expressed the opinion that women are put in a precarious position when the members of the family who are responsible for the abusive behaviour are also part of the headman's family or advisory. Not only does bringing the dispute before the headman's council put the complainant at risk of being shamed within the community for exposing what are often considered private issues, but she is often subjected to further (increased) abuse as a result of bringing such an action.<sup>18</sup>

Equally a community worker stated:

It is sad that with certain traditional leaders, justice depends on who you are – whether you are related to the royal kraal.<sup>19</sup>

The challenge is to acknowledge the indispensability of traditional leaders in rural areas and to further equip them for maximum contribution in the new democracy. While traditional leaders contribute to other spheres of governance, their role seems more pronounced when it comes to crime prevention and the administration of justice. The key question should not be *whether* traditional leaders should perform functions related to justice and crime prevention, but *how* they can fulfil their role in this regard.

#### Endnotes

- 1 This is evident from the report of the South African Law Reform Commission, which draws from different African countries in grappling with the judicial functioning of the institution of traditional leadership. Project 90, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, 1999.
- 2 See W Schärf, *Non-state Justice Systems in Southern Africa: How Should Governments Respond?* Institute of Criminology, UCT, 2003, for a more detailed discussion in this respect.
- 3 A more detailed discussion of the research results is contained in the forthcoming ISS monograph on the topic.

- 4 B Oomen, *We Must Now Go Back To Our History, Retraditionalisation in a Northern Province Chieftaincy*, *African Studies*, 59,1, 2000, p 74.
- 5 Chapter 12, Republic of South Africa Constitution Act 108 of 1996.
- 6 The three provinces that do not have houses of traditional leaders are Gauteng, Northern Cape and the Western Cape. These are provinces that did not have homelands in the pre-1994 dispensation.
- 7 Each province sends three representatives to the national house of traditional leaders. The houses of traditional leaders are established pursuant to the provisions of the Council of Traditional Leaders Act 10 of 1997, which replaced the Council of Traditional Leaders Act 31 of 1994.
- 8 In terms of section 2 of the 2003 Act a traditional community refers to a community declared as such by the premier of the province who is empowered to do so if such a community is subject to a system of 'traditional leadership in terms of that community's customs' and observes a system of customary law'.
- 9 Before the promulgation of this Act, traditional leadership and roles of traditional leaders was regulated only by statutes that belonged to the pre-1994 dispensation such as the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1951.
- 10 Section 5, Traditional Leadership and Governance Framework Act 41 of 2003.
- 11 Interview on 14 July 2004.
- 12 In terms of the law, traditional leaders are empowered to deal with these cases. See the South African Law Reform Commission's *Report on Traditional Courts and the Judicial Function of Traditional Leaders, Project 90, 2003*, which sums up the position thus: "currently, chief's courts have jurisdiction over offences at customary law, common law and statutory offences of a less serious nature. The more serious offences are excluded in terms of schedule 3 to the Black Administration Act and similar provisions in the relevant statutes of the former homelands and self-governing territories", p12. The view of police officers, therefore, is reflective of traditional leaders not taking advantage of the authority they have to deal with such cases.
- 13 Focus group interview with headmen of Mokopane on 15 June 2004.
- 14 Focus group interview on with headmen of Mokopane on 15 June 2004.
- 15 Interview on 28 May 2004.
- 16 Ibid.
- 17 For instance the Black Administration Act 38 of 1927, Black Authorities Act 68 of 1951 and importantly (as legislation produced in the current democratic dispensation) the 2003 Act.
- 18 K. Moulton, *Justice Served? Exploring Alternative Mechanisms to Address Violence Against Women*, UCT, 2004.
- 19 Interview with Dudu Setlatjile on 19 April 2004.