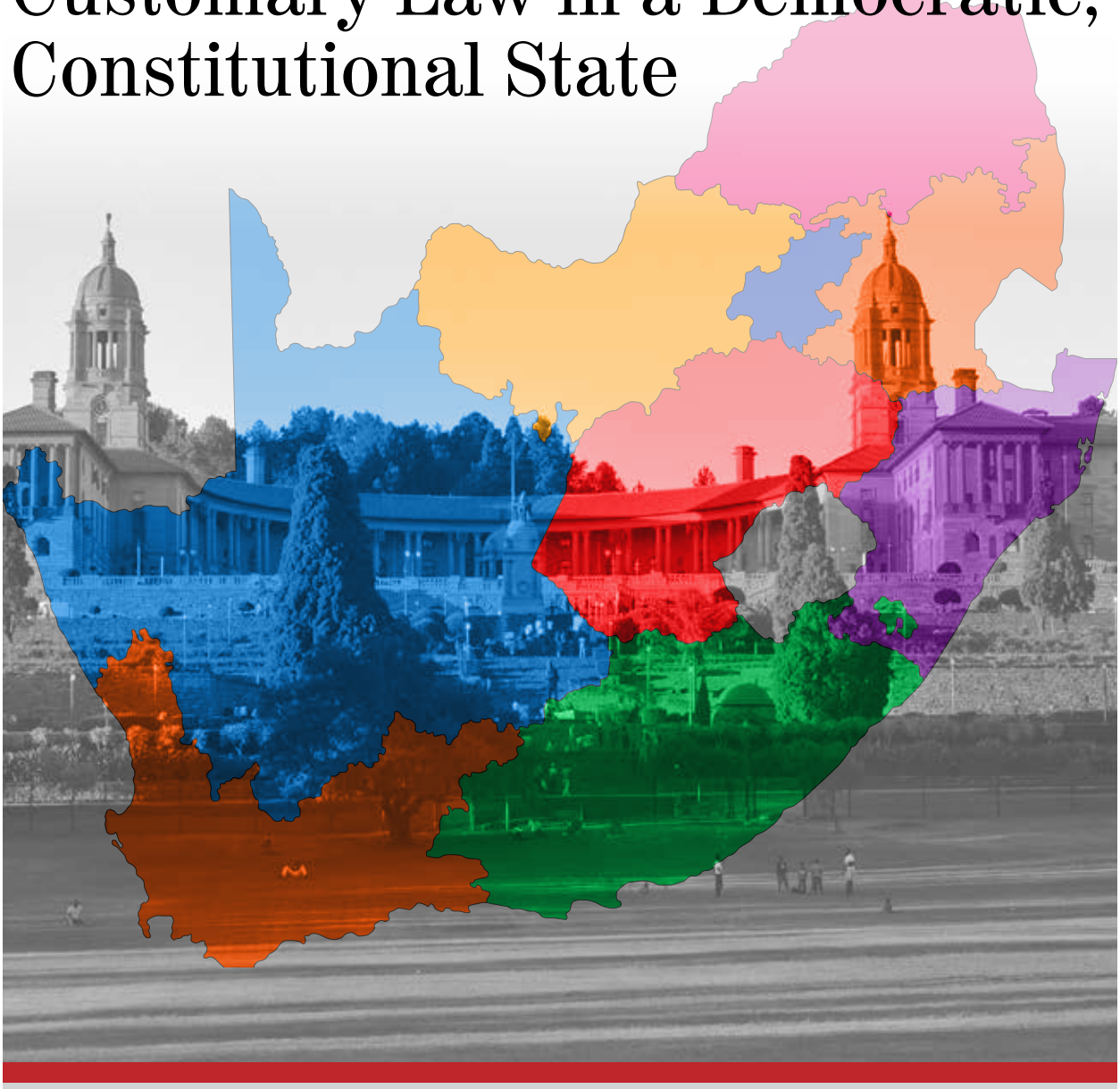
FEDERALISM WITH SOUTH AFRICAN CHARACTERISTICS?

Traditional Authorities and Customary Law in a Democratic, Constitutional State



On the one hand federalism is seen as a mechanism which further institutionalises the inequalities in society and, on the other hand, it stands in the way of the radical restructuring of society through the use of state power.

By Bhaso Ndzendze

The institution of traditional authority and the great import it has had on the South African experience has been the subject of intense study. From this scrutiny, traditional leaders have emerged as "decentralised despots" (Mamdani, 1996) and as the compromisers of democracy (Ntsebeza, 1999), while at the same time as not wholly irrelevant or anathema to the process of democratic consolidation in post-1994 South Africa (Williams, 2004). Moreover, that they have been seen as indispensable role players in rural development by the South African government makes it clear that the institution of traditional authority, to the chagrin and surprise of many analyses, has in some ways garnered more power in the wake of the democratic transformation, despite their historical role. They have emerged, in some sense, stronger.

What is clear is that in the successive eras of colonialism and latter-day apartheid, London and then Pretoria, were the dominant partners (Davenport, 1977: 277) in the exchange since they "wrenched away" a great deal of the autonomy which the traditional rulers once had (Hendricks and Ntsebeza, 1999: 100). In many ways,

> *…colonialism caused fundamental damage to the role of chiefs…it transformed chiefs from independent representatives of various people into government officials, appointed by the new colonial power and paid a salary. Shorn of their judicial power and prevented from performing their traditional functions, their pre-existing worlds of authority were dwarfed by the overpowering force of colonialism.*

As was the intention behind its introduction, "the Bantu Authorities Act finally rendered traditional leaders part of the state's bureaucratic machinery. The net effect of this Act was that traditional leaders became important agents in the government's strategy of extending control over Africans in the countryside, through the establishment of "reserves", "self-governing states", "homelands", and later so-called "independent states"" (Khonou, 2011: 280).

"But chiefs," Hendricks and Ntsebeza (1999: 101) observe, "have done more than merely survive." Indeed, "their revival in the 1980s and consolidation in the 1990s has led to a self-assured political posture" (Hendricks and Ntsebeza, 1999: 101). Today, these leaders or their descendants are granted more agency insofar as they are able to engage and coalesce with the government in a manner that is comparatively more on their terms than imposed and delegated from above. Arguing the case for the incorporation of traditional leaders in local governance, Ismail (1999: 5) has stated that in political terms, "it is not possible to talk about African renaissance without detailed and systemic analysis of indigenous systems on the one hand, and comprehensive prescriptions on how to integrate these into the western model of liberal democracy, on the other."

> "Instead of seeing the federal powers as vested to the provinces, the South African unit of federalism is the traditional community, the many villages under the leadership of traditional authority which in turn house more that 40 percent of the South African population."

For Ntsebeza (1999: 16), the continued existence of traditional authorities, with greater powers than they had during the colonial and apartheid years,

> *…raises questions about the legitimacy of traditional authorities and the possible resolution of the identity of rural inhabitants in the former Bantustans in post-1994 South Africa, whether rural residents will continue to be subjects under the political rule of un-elected traditional authorities, or whether they will enjoy citizenship rights, including the right to choose leaders and representatives, that the South African Constitution confers on all South Africans.*

Indeed, leading up to 1994, their days of legislative power had seemed to be numbered. For example, most rural residents of South Africa anticipated that land allocation, "in keeping with the democratic principles proclaimed in the constitution" (Ntsebeza, 1999: 15), would fall into the hands of the then incoming, newly elected councillors.

Nevertheless, rural South Africans, in line with the substantive-redistributive perception that they hold about democracy, have come to embrace the traditional leadership institution because of its linkage with the delivery of development. Traditional communities "seldom believe that they must make an either/or choice concerning democracy and the chieftaincy, but instead search for ways to combine the two" (Williams, 2004: 115).

A survey that was conducted in 1996 found that 61% of rural citizens (or perhaps subjects) believed that the chieftaincy "had a role to play in the new South Africa" while only 41% believed that there was a "conflict" between the chieftaincy and democracy (Africa and Mattes, 1996: 16). Interestingly, 50% stated that the institutions of traditional authority should have representation in local government (Africa and Mattes, 1996: 16). These findings are consistent with Williams's (2004: 120) findings in the Northern Cape, the Eastern Cape and KwaZulu-Natal where "most local communities seem to want both the chieftaincy and democratic institutions, especially if they work together to bring development." For many people living in rural South Africa, "the chieftaincy is not an obstacle to democracy, but a necessary 'intermediary' which will ensure that change occurs in an orderly and familiar way" (Williams, 2004: 121). Additionally, and importantly for the purposes of this paper, it is worth noting that "the extent to which chiefs can straddle their distinct 'official' and 'unofficial' positions in the post-colonial state depends on their ability

to act in ways consistent with the *underlying* political values in the community" (Williams, 2004: 123).

As a result, the chieftaincy continues to exercise direct authority over about 45 per cent of the population of South Africa (see Williams, 2004). The central government officially recognises over 1,600 chiefs and headmen (RSA, 2003: 39). The chieftaincy does not appear to threaten the durability of the democratic regime, in some instances they even foster democracy by, for example, facilitating elections; as seen in a rural KwaZulu-Natal village with intense African National Congress (ANC) and Inkatha Freedom Party (IFP) rivalries (which could turn violent; historically they have) where one chief worked tirelessly to ensure that the 2000 elections were undertaken in a manner that was free, fair and smooth. Nevertheless, the chieftaincy "does have an enormous influence on the daily lives of millions of people" (Williams, 2004: 118). Almost half of the country is under their rule and this has profound implications for the way in which we portray South Africa and the way South Africa portrays and understands itself.

This article argues that on the basis of the Constitutional recognition of traditional authorities, South Africa's governance structure, the pathways created and realities nurtured and constructed, resemble those of a federal state. The factors which necessitate this fact are not only legal-constitutional, but are also structural in nature. A key component of this argument is that federalism is itself a diverse experience; federalism occurs in a continuum and each federal state partakes in one sort of federalism over another due to geographical, social, economic or historical circumstances unique to that country. And so therefore no two federal orders are similar.

A Federal South Africa

Federalism, as defined by the eminent Australian scholar Robert Garan, is "a form of Government in which sovereignty or political power is divided between the Central and local Governments, so that each of them within its own sphere is independent of the other" (Garan, 1929: 230). Paleker (2006: 309) expands the definition by characterising federalism as a political system which creates in a country "two broad levels of government with assigned powers and functions originating from a variety of factors and political bargains, and displaying a tendency to persist through active response to the challenges of changing environment by a process of adaptation through creative modes of institutional as well as functional relationship". Along more traditional lines, K C Wheare set the following as a pre-condition of whether a system is to be defined as a federal one or not:

"The test which I apply for Federal Government is then simply this. Does a system of Government embody predominantly a division of power between general and regional authorities, each of which, in its own sphere, is coordinated with the other's and independent of them? If so, that government is federal" (Wheare 1964:62).

> "Proponents of federalism argued that in South Africa, the central government was "far too large and far too remote to provide a forum for genuine self-government"

This is clearly, in the wake of the New Deal's introduction of social security and post-9/11 surveillance measures in the US, only partially true. Under President George W. Bush, the federal government of the US centralised and brought to the national agenda major policy areas that had previously been under the control of states and localities. Some of these areas are education testing, infrastructure, sales tax collection, and emergency management (Posner, 2007: 390). Moreover, while the German social welfare system is officially decentralised (Cox, 2001), it is also true that German federalism "does allow the national government to help poor people in poor subunits, and which does create a degree of protection against large disparities in wealth among subunits" (Sunstein, 1993: 425). It must also be taken into consideration that "modernization has replaced the static relationship of power with a dynamism that makes federalism as much a process as an institution. The process of federalism, accelerating during the twentieth century, has moved power consistently from the states to the national government, despite occasional rhetoric to the contrary" (Duncan and Goddard, 2003: 80). Thus the concept of federalism appears to occur along what may be labelled as a continuum. Indeed such illumination of idiosyncrasies is the endpoint of federalism.

The work of Pelaker offers an update and a structural corrective to the conception held by Wheare and other traditionalist conceptions of federalism. According to Pelaker (2006: 305), "if a federal polity is to be a working system, neither the general government nor the regional government can operate in isolation from the other. Therefore, some students of modern federalism prefer words like 'potentiality and individuality,' 'coordinate' and 'autonomy' to 'independence' for a more appropriate expression of the relationship between the general government and regional governments in a federation."

Historically, with regards to the modern period, the Constitution of the United States (1787) is regarded as the very first experiment in establishing a federal system of government (Paleker, 2006: 303). Subsequently, federalism as a system of political organisation was embodied in the Constitutions of many other countries such as Canada (federated in 1867), Brazil (in 1891) Australia (in 1901), and India (in 1947).

Decentralisation, a primary feature of federalism, has been the main route through which public goods and services have been delivered to South Africans. A 2014 report by the Public Affairs Research Institute (PARI) entitled 'The Contract State' notes that:

> *the procurement of public goods and services takes place through a system that is highly fragmented and decentralised. In some cases, the*

> *very outsourcing is itself outsourced. In other words, in South Africa today there are literally* tens of thousands *of sites and locations where tenders are issued and awarded and where contracts are managed for the performance of all manner of services and functions* (2014: 44; emphasis added).

PARI found that, for example, in the Eastern Cape province alone, there are over 4000 sites for the procurement of certain goods and services. On this basis alone, where the government has handed over such a delicate task to the various localities, South Africa would certainly be classified as a federal republic. Indeed, even a proclaimed federal republic as is Brazil has a more centralised approach to service delivery. According to Item XVII of Article 22 of its constitution, the federal government of Brazil has the exclusive power to legislate on the rules relating to the bidding process as well as the ensuing contracting carried out by government agencies, public enterprises and corporations, its federal bodies, municipalities, districts and states. In practice, therefore, the government sets out the general rules for public-private partnerships (PPPs) of the states and municipalities (although some states, such as São Paulo and Rio de Janeiro have their own laws on PPPs).

Kriek (1995) has measured the South African constitution using the three different models, the compact model (federalism that rests and acts on the notion that the federal government is only a creation of the states, and thus they are more powerful), the dual (federalism that is characterised by a distinct federal-state level government) and the co-operative model (as seen where there is more federal involvement in state matters). He argued that the interim constitution of South Africa, which was the basis of the present one, could be described as a federal one since it corresponded quite closely to the co-operative model (Kriek, 1995). In his view, not only is South Africa federal, but "if you put the South African procedure on the index, it could rank very high; more or less as high as the Australian and American cases" (1995: 86). The line of reasoning employed by Kriek is based on the fact that "there are bodies outside parliament that must concur to change the constitution in some respects; the connection with the powers, functions and boundaries of provinces." While this paper agrees with Kriek's take on the constitution, it nonetheless expands the scope of the extent of South Africa's federal standing. And while basing its central claim on *de jure* notions, it also incorporates non-constitutional realities where relevant.

William S. Livingston (in Osaghae, 1995), classifies a society as federal insofar as it displays a territorial delineation of various social cleavages such as, for example, culture, language or ethnicity. For him, the essence of federalism lies in the nature of the society it serves, and not necessarily the written constitution. Livingston is recognised, therefore, to be the first exponent of the "sociological theory" of federalism. The central thesis of the sociological approach is that it is the federal nature of society that gives birth to the federal political system. One important condition laid down by Livingston is that diversities must be territorially grouped, in order to result in the formation of a federal union. Livingston, for example, redefines a federal government as "a form of political and constitutional organisation that unites into a single polity a number of diversified groups or component politics so that the personality and individuality of component parts are largely preserved while creating in the new totality a separate and distinct political and constitutional unit" (1956: 9).

Another exponent of the sociological approach is Wildavsky. Wildavsky uses Australia as an example of structural federalism, a framework, in his view, that had been devised and adopted so as to retain the unity of the Australian people as a single nation. The United States, on the other hand, serves as an example of "social federalism" since it was adopted largely due to the pluralism observed in "the social make-up of territorial, religious and other diversities located in distinct geographical areas, corresponding roughly to boundaries of the States which united under the Constitution of 1787 to form the federation of the United States" (Paleker, 2006). Another example is India where most state borders are drawn along "linguistic" lines (Stern, 2003: 107).

Thus this article adopts the essential aspects of both Kriek and Livingston's theses. Importantly, however, it does not take the traditional unit of federation (the provincial/state level) to be the unit of federalism in the South African context. Instead of seeing the federal powers as vested to the provinces, the South African unit of federalism is the traditional community, the many villages under the leadership of traditional authority which in turn house more that 40 percent of the South African population.

The collapse of old orders has never failed to present creative windows for social engineering. For the French Civic Code to come into being, the *ancien régime* had to be swept away by the revolutionaries, and a unified Germany could not have emerged as it did were it not for the weakening of Hapsburg dominance in central Europe. And so, when it came to be that the apartheid regime was disappearing from the South African landscape, many scholars, political elites and policymakers presented various takes on what the new South Africa ought to look like. Federalism was one of the many systems proposed.

For its defenders, federalism would promote "the right of voice in political life by supplementing national political institutions with smaller local ones, in which self-government can readily occur" (Sunstein, 1993: 422). Giving greater import to Osaghae's (1995: 7) observation that "the popular perception of it [federalism] as a solution to the problems of governing multi-ethnic and deeply divided polities", considerations of the country's ethnic and racial diversity and a recent history of hostility along tribal, linguistic and racial lines was more of a reason for federalism to be put under consideration. Federalism had proven somewhat successful in the ethnically and religiously diverse nations of India, Switzerland, Canada and Nigeria; it might well prove successful in thwarting the very high possibilities of ethnic warfare in South Africa. As Sunstein

(1993: 422) put it, "in South Africa, the risk of ethnic and racial strife is a conspicuous one, and it is important to create federal institutions particularly intended to counter this risk." Another aspect of the federalist argument is South Africa's size. Proponents of federalism argued that in South Africa, the central government was "far too large and far too remote to provide a forum for genuine self-government" (Sunstein, 2004: 437); this is a point which forms a large part of at least one of the oppositional parties in South Africa, the Inkatha Freedom Party (also champions of greater powers being granted to traditional authorities) (Ngubane, 1995).

Interestingly, federalism had been even earlier considered as an applicable system for South Africa – as further back as the pre-1910 period. However, the counter-argument made by General Smuts, that "a federation would not buttress the spirit of unity in the different white communities after the war and unity was needed to fight the "native question"" (Kotze, 1995: 56), won the day.

Sunstein summarises the basic benefits of federalism and the role it can serve in attaining democratic goals in four distinct ways (Sunstein, 1993: 422-437):

- By promoting local government.
- By proliferating the points of access to government. The federal system assures one group – whether defined in ethnic, political, or religious terms – that is, if it loses in one place, it may nonetheless win in others. It allows groups to attain local victories even if they are often or sometimes national losers. Control of the centre therefore becomes far less urgent.
- By creating competing power centres. Federalism promotes the right of voice in political life by supplementing national political instruments with smaller local ones, in which self-government can more readily occur.
- By allowing people to "vote with their feet", and thus flee tyrannical government.

But for reasons of nation-building, particularly along the lines of the rainbow nation rhetoric, the unitary system proved more readily adoptable. Furthermore, seeing that the agenda had to take into consideration the issue of redistribution, substantive citizenship had to take the fore in the institutional design of the new South Africa and since federalism "might make it more difficult to carry out desirable redistribution of resources and opportunities" it became clear that it was not a viable option. Kotze puts it thus: "on the one hand federalism is seen as a mechanism which further institutionalises the inequalities in society and, on the other hand, it stands in the way of the radical restructuring of society through the use of state power" (Kotze, 1995: 1-6). Hence, South Africa did not officially become a federal state, and thus to date Nigeria remains the only federation in the African landmass (although Cameroon, Uganda, Ethiopia, and the now defunct Rhodesia-Nyasaland and Senegambia had experimented with the federal system).

> "While the chief needs the elected councillor's connections to acquire resources and information, the elected councillor needs the permission of the chief to carry out his duties."

Federations have several features which differentiate them from their unitary counterparts. The various differences seen between era and era as well as between countries are differences in degree, but not in kind. And in fact, these highlight a certain characteristic of federalism; responsiveness and malleability in the general direction of the demands of the age and the demands it places upon the locality. This is in line with the German philosopher Georg Hegel as well as American president Woodrow Wilson's later notion of the "living constitution" (Mirengoff and Johnson, 2005). Indeed, it has been observed that "federal experiences are the product of the history, economy and society of individual countries" (Osaghae, 1995: 7). Overall, there are about three defining features of federalism which South Africa has.

As stated, the single most defining characteristic of a federal state is the two-level government. That is, both the central government (at the federal tier) and regional government possess a range of powers that the other cannot encroach upon (Heywood, 2007: 169). A typical example is the United States of America where "each state believed itself to have established its own identity in colonial times and wanted a system to protect its sovereign power while limiting national power" (Duncan and Goddard, 2003: 25). The most workable solution, after the initial introduction of the Articles of Confederation which proved themselves incapable of affording the Union of the former colonies with enough power (Sunstein, 1993), was the American Constitution. Its tenth amendment which clarifies that "the powers not delegated to the United States by the Constitution, now prohibited to the states, are reserved to the states, or to the people." As a result, each of the 50 states has a mandate over such things as their own educational systems, voting requirements, driving and marriage laws and so on. The outcome has been, for example, the teaching of evolutionary theory with varying levels of emphasis and criticality between states, the differences in voting ages were different from state to state until the ratification of President Nixon's Voting Rights Act of 1965 (not without resistance from the state level, however; see Cultice, 1992), as well as a lack of a national speed limit (and the legality of same-sex marriage in some states and not in others until 2015).

Overlap occurs, of course and has many times. Many authorities are shared; here the federal and state governments have mutual and complementary roles. Examples include environmental law, labour law, and the provision of welfare and public assistance (Sunstein, 1993: 435). But a distinctive feature of federalism is a general understanding that the states will exercise at least concurrent and probably exclusive authority over activities within their territory – unless

and until the national government has explicitly ruled otherwise. (Sunstein, 1993: 434). Basic law-making is left to them. Until the national government has acted, almost all regulation is for the states to choose (subject to the Bill of Rights).

Furthermore, the US Indian Reserve polity does nothing if not further compound the federal character of the United States. Much like the state courts, tribal councils in the US are granted the judicial capacity to, *inter alia*, settle disputes, hear complaints, as well as decide on how to spend the revenue generated from tribal enterprises or distributed to them by the federal government under the auspices of the Department of the Interior's Bureau of Indian Affairs (Duncan and Goddard, 2003: 49). Furthermore, through the efforts of Neal McCaleb, then Assistant Secretary of the Interior for Indian Affairs, the early 2000s saw the instigation of tribal enterprises and entrepreneurship with less U.S. government involvement; the outcome can only be the heightening of the fiscal autonomy of some of the Reserves (Duncan and Goddard, 2003). These enclaves of federalism will become more federated.

For reasons central to their policy of creating what Mamdani (1996) has labelled a "bifurcated state", the successive colonial and apartheid regimes did not provide much development in terms of services and infrastructure in rural areas (see Mamdani, 1996). In contrast to their urban counterparts, there were no local government structures in rural areas. Following 1994, this resulted in traditional leaders assuming a role of facilitating development as well as supplementing administration in their areas. As such, Section 211 of Act 168 of 1996 provides that the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the constitution.

The co-existence of the institution in tandem with a central 'mainstream' government has led Ray and van Rouveroy von Nieuwaal (1996) to note that for the two institutions to co-exist, it is crucial that the task and functions of each institution to be clearly defined and identified. Beyond this, each institution, they argue, must be willing to forgo some powers rather than to concentrate all the functions in one authority. This sharing of power between a central government and its localised counterparts is, as we have seen, a key characteristic of federal governments seen in the US and elsewhere. But rather than being a phenomenon waiting to be put into practise, it is already occurring in South Africa. It has long been observed that "one of the most important characteristics of the chief has continued to be his active involvement in judicial matters in spite of efforts by both the colonial and post-colonial governments to reduce and marginalise this traditional position" Ray and van Rouveroy von Nieuwaal (1996: 32).

The constitutional recognition espoused in the aforementioned Act carries a number of implications for the nature of South Africa. In particular, its granting to traditional authorities the power to apply customary law in carrying out law-making in their communities, a point again made clear by the White Paper on Traditional Authority in stating that a traditional authority must ensure that he/she "manages an efficient, effective and fair dispute resolution system through customary law courts for traditional local communities" (RSA, 2003), differentiates traditional communities not only from the otherwise standardised procedure and codes of legality, but from each other as well. For in rendering their judgements, traditional authorities "rely more upon internal powers that reflect the ideas, rules and institutions rooted in pre-existing community norms, practices, or so-called 'traditions'" (Williams, 2004: 117). Not unlike other places on the African continent, "these norms and 'traditions' are not static, but are under constant pressure from local communities who desire and expect change" (Williams, 2004; see also Williams, 2001).

To be sure, Mamdani has argued strongly that there were a variety of diverse as well as contradictory models of customary authority at the time of colonial conquest in Africa in the nineteenth century (Mamdani, 1996: 38-48). In South Africa a somewhat common norm is that a woman can never assume the position of the chieftaincy (or equivalent thereof), she can only serve as a temporary regent (RSA, 2003). This is, in both legal and rhetorical terms, a wide divergence from the law of South Africa and is in contradiction to much of the discourse on the empowerment and emancipation of women in the country. The government has made its intention to change this, stating:

> *The recognition of custom cannot reduce the effect of hallowed and entrenched principles of human rights, which include equality and non-discrimination especially on the basis of gender and status… custom and customary law should be adapted and transformed so as to comply with the principle of equality in the Bill of Rights"* (RSA, 2003).

But the traditional institution is still based on the idea of heredity being justification for assumption of office: a manner of attaining office seen nowhere in the non-rural South African public service.

The White Paper on Local Government explains the roles of a traditional leader at local government. These are to:

- act as head of the traditional authority and as such perform certain limited legislative, executive and administrative powers;
- preside over customary law courts and maintain law and order;
- consult with traditional communities through Imbizo/lekgotla;
- assist members of the community in their dealings with the state;
- advise government on traditional affairs through the Houses of traditional leaders;
- convene meetings to consult with communities on needs, principles and provide information;
- protect cultural values and provide a sense of community in their areas through a communal social frame of reference;
- be the spokesperson generally of their communities;
- be a symbol of unity in the community; and
- be custodian and protector of the community's customs and general welfare.

In its foreword, the White Paper on Traditional Leadership and Governance set out a broad policy framework that laid the basis for the drafting of the national framework legislation especially concerning the institution of traditional leadership. The future legislation will, in turn, "set norms and standards that will inform the drafting of provincial legislation necessary to deal with *peculiarities* prevailing in various provinces" (RSA, 2003; emphasis added). One of the points affirmed in this White Paper is the continued existence of the National Houses composed of traditional authorities.

According to the document, "the National Houses are intended to give a role to the institution at the highest level of government and to promote co-operative relationships." Their functions, *inter alia*, include:

- ensuring a smooth flow of information within and between government communities, with a view to enhance the implementation of policy and programmes;
- ensuring that a deeper understanding of customary law, the prevention of conflicts and disputes instigated; and
- advising governments on matters affecting traditional leadership, traditional communities and customary law.

The composition of Provincial Houses themselves differs from province to province (RSA, 2003). Whereas in some provinces headmen can be members, in others they are not qualified for membership. It is also the case that in some provinces, the premiers and/or MECs have to nominate persons as members of the House, in others they do not. Again, the equivalence to a federal system is apparent. There is no uniformity; either in the way of doing things, and in the devising of the hierarchical structure of governance.

The 1998 White Paper on Local Government was an initial attempt to deal with the issue of traditional authority. The White Paper, in broad terms provided for "a cooperative model within which traditional leadership could co-exist with municipalities, in terms of this, traditional leaders were allowed to participate in debates in municipal councils but were not allowed to vote" (RSA, 1998).

There is yet another dimension which speaks directly to the enclave-like nature of rural areas, and this has profound implications for the argument made in this article. And that is the idiosyncratic nature of the position of the headman, induna. The White Paper on Traditional Leadership on Governance notes that "the level of headmanship was substantially different from area to area. Whereas in some areas headmen were appointed in accordance with custom, in some they were elected. In some areas they were closely related to a traditional leader and formed part of the royal family. In others, individuals without any link to the royal family could be nominated to become headmen" (RSA, 2003).

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It can be deduced from this and the declaration made by the same document that "the remuneration of headmen, given the peculiarities relating to their appointment, recognition, …numbers, status and role from community to community, should be dealt with by provincial governments, taking into consideration these peculiarities" that the institution of traditional leadership is a blanket term for forms of governance which manifest themselves in ways born out of localised systems, needs and traditions (assigners of roles and therefore justifiers of payment where relevant). These themselves stem from the socio-historical conditions and experiences about which no generalisation can be made between localities.

This greatly contributes to the claim being made in this article. For it fundamentally impacts the hierarchical structure as well as the dynamics of intra-communal organisation and governance and greatly differentiates each community from another. And even attempts to regulate this institution do nothing if not lend greater gravitas to the federal tilt of South Africa. For in its projected attempt to reel this position under its control, the White Paper on Traditional Leadership on governance has declared that "criteria for the recognition of a kingship, chieftaincy or headmanship will be provided for in national/provincial legislation, and these will be based on *the customs and traditions of the relevant communities and other relevant principles* (RSA, 2003; emphasis added).

Currently, and by custom, a traditional leader is likely to remain in their position for life. The national government is attempting to change that (in line with the democratic discourse that defines the country). A key area has been establishing grounds for dismissal from the position. One of the grounds for dismissal that the government is currently trying to enforce is that of "misconduct". But in the same White Paper, it betrays a characteristically federal sentiment, conceding that "conduct that constitutes misconduct… will be elaborated upon in…provincial legislation" (RSA, 2003).

For Williams (2004: 121), while in some instances the chieftaincy lobbies the government on behalf of its residents, in other cases it acts authoritatively to distribute resources and make and enforce rules. The ability of chiefs to 'link' the state with society, as well as their ability to act at times autonomously from the state or serve at other times as functionaries of the state, are the chieftaincy's most intriguing features. Von Rouveroy (1996: 46) notes that they "dispose of two different bases of legitimacy and authority. This permits [them] them to operate differently towards the state and [their] people. A kind of hinge point, a chief tries to connect both worlds"

Another characteristic which defines a state as federal is the ability of each level of government to influence the other particularly in terms of policy. For

example, in Germany and Australia a system of "administrative" federalism operates in which central government is the key policymaker, and each province is charged with responsibility for the details of policy implementation. Additional responsibilities speak directly to their influence on development. These include their ability to:

- make recommendations on land allocation and settlement of land disputes;
- lobby government and other agencies for the development of their areas;
- ensure that the traditional community participate in decisions on development and contribute to development costs; and
- consider and make recommendations to authorities on trading licenses in their areas in accordance with law.

On the other hand, according to the White Paper on Traditional Leadership and Governance, traditional councillors can "recommend appropriate interventions to government to bring about development and service delivery" as well as "participate in the development of policy and legislation local level." Williams (2004: 131) notes that "while the chief needs the elected councillor's connections to acquire resources and information, …the elected councillor needs the permission of the chief to carry out his duties." Besides declaring that "at the local level, traditional councils, as established by custom, will promote cooperate relations with local municipalities," the White Paper also states that "the institution of traditional leadership can also participate in the municipal ward committees established in terms of national legislation." Furthermore, "traditional leaders will also continue to participate in municipal councils in terms of section 81 of the Municipal Structures Act No. 117 of 1998, until legislation providing otherwise is introduced." The document also lists the following as within some of the roles and functions of the District Houses (composed of traditional leaders):

- to advise district municipalities in developing the rules and bylaws impacting on rural areas;
- to advise district municipalities in the development of planning frameworks that impact on rural communities;
- to participate in local programmes geared towards the development of rural communities; and
- to participate in local initiatives meant to monitor, review and evaluate governmental programmes in rural areas.

To reiterate, their considerable level of control over land makes them all the more central to policy implementation in rural areas as they have the power over land allocation, indeed it makes them supersede the "advisory" role to which they are confined by the White Paper. Thus in policies related to land usage, their role is central.

Conclusion

Voltaire's famed characterisation of the Holy Roman Empire as "neither holy nor Roman nor an Empire" may house more than a signpost of French subversive wit and embody a fact worth exploring. The history of the world is filled with institutional cenotaphs. Institutions have attempted to portray as being one thing, only for empirical analyses to uncover incongruence. That is, like empty tombs, they rarely possess the individuals whose names appear on the gravestones; such was France. One of King Louis XIV's legacies is his famous pursuit of "one king, one law and one faith", the second of the three being most relevant to a large portion of the large claim made in this article. One may question the extent which he managed to unify France and thus realise his aims (Ogg 1951: 7) but a sure signifier of his capacity for reform was his recognition that France was not as unitary as perceived, that large portions of his state were in effect ran by others, dukes and lords, in accordance with their own preferred laws (see Martin, 1948). As Napoleon Bonaparte later recounted, it was "a chequered France, lacking in unity of laws and of administration, more like twenty kingdoms assembled than a single State" (Martin, 1948: 180). "Under Louis XIV, France learnt to know herself," as Bousset put it (Martin, 1948: 162). The central argument made in this article has been that the same is, to varying degrees, taking place in South Africa: that the republic is more federal, in principle as well as in law, in theory as well as in practice. How long this may continue remains to be seen and hinges on the amount of power accorded or wrested from the traditional authorities. Following the persistence of the Congress of Traditional Leaders of South Africa (CONTRALESA) in lobbying for a pardon for one of their members, Chief Buyelekhala Dalindyebo, there are indicators that these stakeholders have come to believe that the national government is overextending its legroom at the expense of their own. ■

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