

NOTES

- 1 W Schärf, *Non-State Justice Systems in Southern Africa: How Should Governments Respond?* Institute of Criminology, University of Cape Town, 2003, p 80.
- 2 State of the Province address by Sello Moloto, the premier of Limpopo Province, delivered on 27 May 2004.
- 3 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.
- 4 See W Schärf op cit for a more detailed discussion in this respect.
- 5 B Oomen, 'We Must Now Go Back To Our History, Retraditionalisation in a Northern Province Chieftaincy' *African Studies*, 59,1, 2000, p 74.
- 6 Chapter 12, Republic of South Africa Constitution Act 108 of 1996.
- 7 The establishment of these houses is provided for in section 212 (2) of the Constitution (Act 108 of 1996).
- 8 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.
- 9 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 House of Traditional Leaders Act 10 of 1997, which replaced the Council of Traditional Leaders Act 31 of 1994.
- 10 See section 2 (a) (i)-iv) of the House of Traditional Leaders Act 10 of 1997, as amended. Nkosi Nonkonyana, the provincial chairman of Congress of Traditional Leaders of South Africa (CONTRALESA) in the Eastern Cape, laments the limited influence of the house by equating its role to that of a toy cell phone, M. Nonkonyana, *Addressing the Concerns of Traditional Leaders*, paper delivered at the Conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 11 Traditional authority has a right to run a court on the basis of the provisions of section 166(e) of the Constitution which bestows status of a court to 'any other court established or recognised in terms of an Act of Parliament.....'.
- 12 See, for example, the article written by A Thom titled 'Limpopo – Limping Behind in Health Care', online at: <www.csa.org.za> (10 February 2005).
- 13 A paramount chief is a senior traditional leader under whose supervision other traditional leaders fall. There is such a traditional leader in Sekhukhune, Limpopo.
- 14 Throughout South Africa 30 out of 47 district municipalities have traditional authorities within them, while 114 out of 231 local municipalities contain traditional authorities. See D. Hornby (ed.), *Traditional Leaders - A KwaZulu-Natal Study: 1999-2001*, Independent Projects Trust, 2001.
- 15 Indeed this is not only the case among traditional leaders but also among criminologists. See LW Sherman et al, *Preventing Crime: What Works, What Doesn't, What's Promising*, A Report for the United States Congress Prepared for the National Institute of Justice, 1996, available on <www.ncjrs.org/works/chapter2.htm>, last accessed on 10 November 2004.

- 16 Mokopane, Moloto and Ramokgopa.
- 17 Debate on this particular issue has been going on for some time with the former president Nelson Mandela asserting on 18 April 1997: 'But we dare say that consultation, transparency and equity were the cornerstones of the early societies from which we come. We dare issue the challenge that on matters such as gender equality, tradition – good and bad, then and now – cannot be seen as static. Our view on all these and other issues is that old and new mores were accepted by communities as such, because they regulated relations of their times. And so it should be now; so that tradition is seen not as a sentimental attachment to the past, but as a dynamic force relevant to present-day realities', Address by President Nelson Mandela at the inauguration of the National Council of Traditional Leaders in Cape Town, available on the South African government website, <www.polity.org.govdocs/speeches/1997/sp970418.html> as quoted by D Hornby, *op cit*, p 14.
- 18 Some proponents, especially traditional leaders themselves, argue that they are accountable to their communities. While that point is not contested here, accountability here refers to their accountability to the state.
- 19 At the dawn of the democratic dispensation in 1994 the country had four provinces and ten homelands (four independent and six dependent states).
- 20 Quoted by GJ van Niekerk, *The Interaction of Indigenous Law and Western Law in South Africa: a Historical and Comparative Perspective*, LLD Thesis. UNISA. 1995, p 67.
- 21 Van Niekerk *op cit*, p23.
- 22 Quoted in the 1998 Discussion Paper, p 25.
- 23 W Schärf, Policy Options on Community Justice, in W Schärf and D Nina (eds.) *The Other Law: Non-state Ordering in South Africa*, Cape Town, Juta, 2001, p 40.
- 24 Legal pluralism refers to the co-existence of more than one legal system within one country. For further discussion on legal pluralism in the South African context see B Tshehla, *Non State Ordering in the Post-Apartheid South Africa - A Study of Some Structures of Non-state Ordering in the Western Cape Province*, unpublished dissertation, UCT, 2001.
- 25 See the approach of the discussion paper on *Community Dispute Resolution Structures*, Discussion Paper 87, Project 94, August 1999 as well as that on *The Harmonisation of the Common Law and the Indigenous Law*, Project 90, August 1998.
- 26 While the name of the code may indicate that it is a law applicable to Natal or Zulu law this code had tremendous effect on the development of official customary law. Van Niekerk explained this succinctly: 'The indigenous law.....consists mostly of law established by judicial precedent or codified in the Natal Code,Until 1988, if not established by judicial or in the Natal Code, indigenous law had to be proved in the same way that custom had to be proved in that it differed from the general law of the land', in W Schärf & D Nina *op cit*, p 29.
- 27 This battle for the soul of traditional leadership has been well documented. For instance see Oomen, *op cit* and Nongonyana, *op cit*.
- 28 Quoted in Oomen, *op cit*, p 6.
- 29 10 of 1997 as amended.
- 30 This can be gleaned from the wording of section 17 (2)(a), which provides that 'the number of members of a local house of traditional leaders may not be less than five....'.
- 31 See section 28 of the 2003 Act.
- 32 Many of the traditional leaders interviewed indicated that they are in the dark as to what is expected of them in the current democratic dispensation. Indeed this is a point conceded by the president of CONTRALESA who argues that this is not to be blamed on the traditional leaders and they need to be capacitated (Answer to a question posed to him on 6 October 2004).
- 33 To the disappointment of some commentators, this means that those traditional leaders

- appointed by the colonial and apartheid governments are secured. Ironically, this leaves those traditional leaders who resisted and were punished (e.g. by being dethroned) out in the cold. This, however, is a matter left to the commission responsible for traditional leadership disputes as announced on 16 October 2004.
- 34 The Sowetan of 14 June 2004 reports that the traditional leader of Ramokgopa traditional authority abuses alcohol and neglects his functions with the result that the traditional council would have him deposed. According to *Daily Sun* of 5 July 2004, the traditional leader of Mokomi traditional authority at Malamulele charges people R50.00 for writing them a letter confirming their residency within his area of jurisdiction for the purpose of updating their banking details and according to the *Sowetan* of 5 July 2004, the chief of Bapahalane-ba-Mantserre, Ramokokastaad, defies the paramount chief with the result that he had even divided the traditional authority into two factions.
- 35 South African Law Commission, Project 90, *Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders*, presented to Parliament by Dr P Maduna, former Minister of Justice, in January 2003.
- 36 Moreover, the 1996 Constitution – in section 166 (e) and chapter 12 (sections 211 and 212) – recognise this role of traditional leaders and traditional courts.
- 37 See the 1998 report of the South African Law Commission and Oomen, *op cit*.
- 38 Living customary law is largely based on oral recollections that are passed on from generation to generation.
- 39 The royal council consists of the chairman of council, the chief councillor and three other ordinary councillors. The gender composition of the council is four males and one woman with the latter also serving as the secretary of council.
- 40 Interview with Thelma Kekana, the secretary of both the traditional council and the traditional court at Mokopane on 17 June 2004.
- 41 Names have been changed to protect privacy of the parties.
- 42 The area next to the traditional authority does not have a ntona. It falls directly under the kgosi/chief.
- 43 See Rule 6(1) of Chiefs and Headmen's Civil Courts Rules, No R2082 of 1967 Government Gazette Extraordinary No 1929. This procedure was followed in each of the cases observed at Mokopane as notes were taken down throughout the proceedings.
- 44 S P Holomisa, *Administration of Justice Under Traditional Leadership*, Paper presented in Durban at the conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 45 As an example, the head of judiciary in a court under whose jurisdiction Mokopane traditional authority falls does not recall reviewing any case from a traditional court nor does anyone of his colleagues.
- 46 This is more along the lines of what happens in Botswana. See K.C. Sharma, *The Role and Character of Customary Courts*, paper presented at the Durban conference on Traditional and Customary Leadership in Southern Africa, Durban, 6-7 October 2004.
- 47 Sherman *op cit*, Chapter 2.
- 48 See P Burton, A du Plessis, T Leggett, A Louw, D Mistry and H van Vuuren, *National Victims of Crime Survey: South Africa 2003*, ISS Monograph 101, 2004.
- 49 D Mistry, *Falling Crime, Rising Fear: 2003 National Victims of Crime Survey, South African Crime Quarterly*, No. 8, ISS, 2004, pp 17-24.
- 50 This is quite clear even from a quick glimpse at the main crime prevention documents such as the national crime prevention strategy and the white paper on safety and security.
- 51 A similar instance was raised by the chairman of the Limpopo House of Traditional Leaders who stated: "Recently our municipality wanted to build houses for people in an area where I am the traditional leader. They did not consult with me first so that I could inform the

- community. Every morning when they came they found that their work had been destroyed. I also do not know who did this but if they had come to me I would have informed the community properly and the work would have run smoothly from the start.”
- 52 Discussion with the traditional council of Ramokgopa on 19 April 2004.
- 53 Although police officers are not political leaders many a traditional leader see them as accountable to and therefore following instructions for political leadership.
- 54 Chief councillor of Mokopane, interviewed on 17 June 2004.
- 55 This does not point to our disbelief of the traditional leader but to the fact that he was relating what he had heard doing rounds in the community. This apparently pervasive perception was put to the station commissioner of Mahwelereng and that station's head of detectives. They both denied any knowledge of such a practice but stated that it could be true adding that in the event of it being true the community had to report such an officer or officers so that the problem could be dealt with.
- 56 Interview on 15 June 2004.
- 57 Interview on 15 June 2004.
- 58 Interview on 15 June 2004.
- 59 Interview on 14 July 2004.
- 60 A pertinent example is the function that was held on 10 July 2004. When we conducted interviews at the station on the 8th, we were told by the station commissioner that the chief had been at the station the previous day with a view to do planning with the police for the event.
- 61 Interview on 14 July 2004.
- 62 This line of thinking resonates with the restorative justice approach. For instance see D.L. Kgosimore, 'Restorative Justice as an Alternative Way of Dealing with Crime', *Acta Criminologica*, 15 (2), 2002.
- 63 Focus group interview on with headmen of Mokopane on 15 June 2004.
- 64 Focus group interview on with headmen of Mokopane on 15 June 2004.
- 65 The chief councillor drives around spotting the sign: 'Mapogo-a-Mathamaga'. This is an organisation that is known for dealing harshly with suspected criminals.
- 66 This view is, however, not restricted to traditional leaders and traditional communities. As Antoinette Louw and Anton du Plessis (personal communication) rightly pointed out, this view also pervades many other sections of society.
- 67 This is not to deny that the new dispensation also promotes harsh sentences and brought about tightening of bail legislation (as provided for by the Criminal Law Amendment Act 105 of 1997 and the Criminal Matters Amendment Act 68 of 1998, respectively). It is rather to argue that even these pieces of legislation are, strictly speaking, a misfit in the current dispensation.
- 68 Interview on 28 May 2004.
- 69 Interview on 28 May 2004.
- 70 This is a mindset that demands harsh punishment for criminals. It is evident in many jurisdictions and has had inroads into many a criminal justice system.
- 71 For instance the Black Administration Act, Black Authorities Act and importantly (as legislation produced in the current democratic dispensation) the 2003 Act.
- 72 Joel Shai, 19 May 2004.
- 73 The four pillars of the NCPS are the criminal justice process, community values and education, environmental design and trans-national crime.
- 74 CSIR, Incidence of Social Fabric Crime (SFC) in Limpopo and Strategy to Combat Social Fabric Crime (SFC), 2003.
- 75 Focus group interview with headmen of Mokopane.
- 76 Focus group interview with headmen of Mokopane on 15 June 2004.

- 77 Focus group interview with headmen of Mokopane on 15 June 2004.
- 78 K. Moul, op cit, p 36.
- 79 Interview with Dudu Setlatjile on 19 April 2004.