

History versus customary law

Commission on Traditional Leadership: Disputes and Claims

Jeff Peires*

peires@polka.co.za

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This article examines the practices of the Commission on Traditional Leadership: Disputes and Claims, set up under the Framework Act of 2003 to 'cleanse' the institution of traditional leadership by ridding it of the illegitimate traditional leaders installed during the colonial and homeland eras. Close analysis of the Commission's hearings and determinations with regard to kingship claims by the Western Mpondo and Mpumalanga Ndebele shows that the Commission violated not only the historical past but even the limited constraints of binding legislation, in order to impose its own preferences in the name of custom. The experience of the Commission therefore highlights one of the most fundamental deficiencies in the Framework Act, namely insisting on the guiding role of 'custom' while failing to define the meaning of the term and its implications.

The Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003),¹ intended to resolve the hiatus in the 1996 Constitution with respect to the role of traditional leadership, has imploded in a welter of inconclusive legislation, more especially because its implications in terms of land rights and judicial authority have proved unacceptable to both rural communities and the Constitutional Court. However, the judicial debates around the Communal Land Rights Act² at least did manage to produce consensus with regard to the validity of 'living customary law', as opposed to the discarded and discredited colonial version sometimes referred to as 'official customary law'.³

One facet of the Framework Act that has hitherto escaped attention is its attempt to regulate the institution of traditional leadership by defining the

categories of traditional leadership; more precisely, identifying the traditional leadership positions to be recognised, and settling disputes between rival claimants to specific positions. In former years, such decisions had been taken by the Department of Bantu Affairs or the homeland administrations, but the demise of the old order left this particular loose end unattended, leaving government in areas such as Sekhukhuneland paralysed by rivalry between competing factions. In addition, discrepancies in the jurisdictions – and the pay slips – of the traditional leaders in different provinces urgently needed to be addressed, with 11 recognised paramount chiefs of other provinces aspiring to the privileges and perquisites of the Zulu king.

It was, moreover, common cause in government circles that the institution of traditional leadership had been tainted by its association with colonialism and apartheid; that many legitimate traditional leaders had been deposed in favour of compliant stooges; and

* Jeff Peires is Adjunct Professor of History, University of Fort Hare, and was a member of the Commission on Traditional Leadership: Disputes and Claims from 22 October 2004 to 11 April 2007.

that the very kingships themselves, such as that of Matanzima in Western Thembuland, required further scrutiny. Since the entire thrust of President Thabo Mbeki's policy, as reflected in the Framework Act, was to empower traditional leaders and augment their authority, it was deemed necessary to 'cleanse' the institution of its colonial accretions so as to officially recognise traditional leaders as shining lights of pre-colonial African democracy.

In Chapter 6 of the Framework Act, this cleansing function was assigned to a Commission on Traditional Leadership: Disputes and Claims, usually referred to as the Nhlapo Commission after Professor Thandabantu Nhlapo, its first chairperson. Twelve commissioners were appointed on the basis of being 'knowledgeable regarding customs and the institution of traditional leadership'. The judicial status of this Commission rendered it entirely independent of government, in line with the thinking of Section 5.10 of the White Paper,⁴ which had noted the tendency of former commissions to be influenced by vested interests. The National House of Traditional Leaders, which would have much preferred to settle all traditional disputes according to its own discretion, regarded the Commission with deep suspicion, and there was a general perception that Mbeki had set it up to serve his own purposes while preserving the fiction of deniability, which was such a hallmark of his political style.

Although Section 5.10 of the White Paper noted that 'the customary law of African communities was characterized by a lack of effective mechanisms to deal with claims and dispute resolution',⁵ Section 25(3) of the Framework Act nevertheless instructed the Commission to 'consider and apply customary law and the customs of relevant traditional communities' and to be 'guided by ... customary norms and criteria'.⁶ 'Custom' was never defined in the Framework Act, and 'customary institution or structure' was defined merely as 'institutions or structures established in terms of customary law', a solipsistical pronouncement of classic proportions. The problem of applying 'customary law' to historical events was left to the commissioners to work out for themselves.

It has to be said that the Commission was singularly ill equipped to meet this challenge, although Nhlapo had been chair of the Project Committee on Customary Law at the South African Law Commission. Of the 11 other commissioners, six specialised in law, three in language and culture, one in education and one (myself) in history.⁷ Besides myself, the only person attached to the Commission who had any background in politics, sociology or anthropology was Welile Khuzwayo, an anthropologist seconded from the National Department of Traditional Affairs, who, being a seconded official, was excluded from the deliberations of the Commission.

Two kingdoms of the same lineage?

This article will concentrate on one specific category of the Commission's cases, where the kingships called into question dated back to the pre-colonial period or the period where any kind of colonial intervention was demonstrably absent. The case of Western Mpondoland goes back to the 1840s, a full 50 years before the colonial annexation of Mpondoland in 1894. The case of the Transvaal Ndebele goes as far back as the early 17th century, long before Jan van Riebeeck first set foot on African soil. I will argue that customary law is entirely inappropriate in such cases, and that the Commission's determinations in this respect are utterly invalid and lacking all foundation.

Western Mpondoland

The Western Mpondo claim to kingship dates back to the reign of the great King Faku (c. 1815–1867). Faku's original Great Place was located at Qawukeni east of the Mzimvubu River, but following two Zulu invasions in the 1820s he was driven back to the Mngazi River, which is west of the Mzimvubu. After the Zulu threat had subsided, Faku returned to Qawukeni but some time in the 1840s, his Right-Hand Son Ndamase again crossed the Mzimvubu to establish – as far as the claimants are concerned – the kingdom of Western Mpondoland. According to Chief Victor Poto, Ndamase's great-grandson:⁸

One morning, when Faku had gone out with his shield-bearer, he emerged from the bush to see someone lurking around the small calf-kraal. When

he realised that it was Ndamase, he called him and asked where he had come from. Before Ndamase could explain, Faku said 'Yes, my boy, I am aware that you will be killing me.' With that they went inside the house, and Faku advised Ndamase to leave Qawukeni, saying this would have to be done because Ndamase's people were clashing with those of the Great Place, and this would become even worse because Mqikela (Faku's heir in the Great House) was just approaching the age of manhood.

Ndamase left with his people; men, women and children, taking all their possessions and burning their houses on the eastern side. Faku went with him to make sure he never came back. When they got to the Mzimvubu River, Faku said that each of them should keep to his own side, and he granted Ndamase authority over all the minor Mpondo chiefdoms who were already living to the west of the river.

The essence of the above oral tradition is amply confirmed by independent sources. Ndamase was a renowned warrior who had led the Mpondo armies against the Zulu regiments. Although junior in rank as the son of the Right-Hand Wife, Ndamase would always be a threat to Mqikela, his much younger brother of the Great House, and was therefore encouraged to exercise his undoubted talents elsewhere. Ndamase ruled Western Mpondoland for about 30 years, subjugating his cousins, defeating his neighbours and greatly expanding Mpondo territory. It would be fair to say that the Kingdom of Western Mpondoland was more the creation of Ndamase than the gift of Faku.

When Mpondoland was annexed by the imperial power in 1894, two treaties were made on two different days in two different places, one with Eastern Mpondoland and the other with Western Mpondoland, and each of the two kings was recognised as a 'Paramount Chief'.⁹ Nevertheless, a strong case can be made – and the Great House of Eastern Mpondoland did make it – that only one king should have been recognised. The case rests on the fact that, when Ndamase died in 1876, the Great House of Mqikela asserted that the authority conceded by Faku had been entrusted to

Ndamase on a personal basis only, and that this authority had automatically expired with Ndamase's death. Upon which, Nqwiliso, Ndamase's heir – shameful to relate – obtained colonial recognition of his kingship by literally selling his territory of Port St Johns to the intruder.¹⁰

Two years after Faku's death, the Governor, Sir Philip Wodehouse applied personally to Ndamase for the cession of the Port and was met by a distinct refusal ... In 1878 renewed efforts were made by the Government, and Ndamase's son, Nqwiliso, was more easily persuaded than his father. An agreement was made with him through Major Elliot, the Chief Magistrate at Umtata, whereby the chief ceded to the Cape Colony all the sovereign rights which he then possessed over the water and navigation of the Umzimvubu ... He was in recognition of this, to be acknowledged as independent of Mqikela, from whose attacks he was promised protection, so long as he maintained friendly relations with the Cape Government.¹¹

The Commission hearing on Western Mpondoland

Chaired by Advocate D Ndengezi, the Commission sat at Libode on 17 August 2005.¹² The initial presenter for the Western Mpondo was Bishop Joseph Kobo, not a royal, but seemingly respected as a learned man. As the hearing proceeded, members of the royal family became increasingly uncomfortable with the Bishop's inability to respond adequately to the questions of the Commission. Kobo was followed by Prince Mlamli Ndamase, much younger, but much more fluent and determined.

It soon became apparent that the commissioners really wanted to elucidate the conditions under which Ndamase established his authority west of the Mzimvubu River. According to the Western Mpondo claim, Ndamase was definitively established as an independent king by his father Faku. The Commission found it difficult to understand how two kingdoms could be created within the same family, more especially during the lifetime of the reigning king. Unfortunately for the Western Mpondo, they initially shied away from the somewhat shameful story (Faku's being frightened at the sight of his own son) recorded by Victor Poto. They further embellished

Poto's narrative by implying that Ndamase could have succeeded to the kingship of the whole Mpondoland, had he chosen to do so. The probing of the Commission exposed several such petty contradictions, causing the Western Mpondo to shift their ground more than once and putting the credibility of their argument in question.

Bishop Kobo: When Ndamase arrived in this part of the area, he went back to report to his father King Faku, and Faku came over and anointed him as king. Faku was delighted that his son was so courageous to be able to subdue various tribes that lived in the area between Mzimvubu and Mthatha rivers. Ndamase voluntarily decided against contesting the kingship of his father at Qawukeni, though he would have had a legitimate claim. He decided against contesting allowing the next in line or his brother Mqikela to take over the kingship. At that time, Mqikela was nineteen years old. But Ndamase, because he was a warrior, he said to his father, I will go and establish my own kingdom. I will fight and fight and establish myself. I don't want to interfere or worry my brother.

Commissioner Ndou: Is that according to your culture for the father to install the son whilst he is still alive?

Bishop Kobo: It is not a custom that is followed [today] but on this particular occasion it was a new kingdom, not part of the kingdom of King Faku ...

Commissioner Ndou: I just want to know whether the son and the father were on the same status, on the same kingdom?

Bishop Kobo: According to the tradition, Sir, it is always common knowledge that the father is always senior to the son. And I think that tradition and that custom have been observed throughout the history of the existence of the Nyandeni [i.e. Western Mpondo] Kingdom. There was never a time where the son or his kingdom would challenge the decision of the Qawukeni [i.e. Eastern Mpondo] Kingdom.

Commissioner Poswa-Lerotholi: Are you saying that Ndamase was the rightful ... or had a legitimate claim to the kingship in that he was the

first born, or are you saying that it was by some other means that he had a legitimate claim?

Bishop Kobo: I am saying, Sir Commissioner, that he could have had. He could have staged a claim to the kingship, because he was the eldest son and had the advantage over his younger brother because he was also a warrior ... But he was aware of the fact that there is a younger brother, which was Mqikela, who is the legal one who should be succeeding his father Faku.¹³

The good Bishop has been caught contradicting himself. The Commission pounces.

Commissioner Ndengezi: You say there was Mqikela who was still young, but was in fact according to custom going to be the king. How could Ndamase also have a legitimate claim? He could not have had a legitimate claim, if Mqikela was the lawful one to succeed. They could not both be legally qualified to succeed Faku, they could not.¹⁴

The Bishop was in a corner and did not know how to get out of it. He told a story about how Chief Poto complained to the Minister of Bantu Affairs, De Wet Nel, that his salary should match that of the Eastern Mpondo king, and that Nel responded by raising his salary. The Commission was not impressed.

Commissioner Ndengezi: De Wet and the then king are not really relevant. Tell us about the seniority.

Bishop Kobo: There is a Right Hand House and a senior house.

Commissioner Ndengezi: And here in Mpondoland, which is it? Which is a Great House, which is a Small House, which is a Right Hand House ... ? So we want to know, don't assume that we know. Tell us. That is what she wants (Commissioner Pungula), and we all want that.

Bishop Kobo: I think I have clarified that, that the senior house is Qawukeni.

Commissioner Ndengezi: You did not. You did not, with due respect, explain it, Dada.¹⁵

The Western Mpondo argument was not accepted, and the Commission ruled unequivocally that there could be only one king in Mpondoland:¹⁶

5.1.11 Having made a determination that the kingship of amaMpondo as a whole resorts under the lineage of Mqikela, the only other leadership positions available within the traditional institution of amaMpondo in terms of the Framework Act are senior traditional leadership and headmanship.

If the Commission had simply ignored the Ndamase oral tradition and proceeded on the basis that the Western Mpondo kingship was nothing more than the payoff made to a colonial puppet for selling out Port St Johns, it would be difficult to fault its reasoning. This article falls short of endorsing the Western Mpondo claim to independent kingship, but it does, however, insist that the Commission was wrong to base its determination on the single argument that 'custom and tradition' precluded the possibility of two kingdoms on Mpondo soil. The Commission also discarded the Rharhabe Xhosa claim on similar grounds, again applying its perception of customary law to historical events and again ruling out the possibility of two legitimate kingdoms emerging from the same royal lineage.

Transvaal Ndebele

The most important event in Transvaal Ndebele history, in the view of the Commission, took place some time between 1620 and 1680, in all probability before 1652, the year of the first Dutch settlement at the Cape.¹⁷ During the reign of King Musi, the third in line to the reputed founder of the Transvaal Ndebele kingdom, his junior son Ndzundza stole the succession from his senior brother Manala by underhand means.¹⁸

The mother of Ndzundza said to him, 'Get up early, because your father is dying, and he wants to hand over the chieftainship to Manala'. Then next morning Ndzundza was aroused by his mother, who told him to go to his father ... his father said, 'Who are you?', he replied, 'It is I, Manala.' Ndzundza deceived his father by having put on skins with the hair on the outside on his hands, since Manala was hairy on the hands, so his father thought it was he who touched him, because

he was blind. He [Musi] said, 'O, there, take the chieftainship here,' and gave him the *namxali* [a kind of oracle, which only the king was entitled to consult].

Heard this before? The Commission was certainly not slow to recognise that this was a Transvaal Ndebele version of the Biblical story of Esau and Jacob (Genesis, Chapter 27). But the story does not end there. Manala was understandably furious and Ndzundza judged it wiser to decamp, not forgetting, however, to take the *namxali* with him. Three wars were fought between the two brothers before peace was made at the Bhaluli (Oliphant) River through the mediation of a wise man named Mnguni. It was resolved that (1) Manala was to rule west of Bhaluli and Ndzundza east of it; and that (2) in a conscious deviation from the normal exogamy rule, Manala could marry a wife from Ndzundza and Ndzundza could marry a wife from Manala. The issue of seniority remained something of a grey area. On the one hand, the story makes it clear that Manala was the rightful heir to Musi; on the other, the Ndzundza seem to have succeeded in holding on to the *namxali*.

By the 1830s, Manala and Ndzundza had sufficiently reconciled to combine their forces against the invasion of Mzilikazi, who took everything they had, including the name 'Ndebele'.¹⁹ Sibindi of the Manala died in battle, while Magodongo of the Ndzundza suffered a lingering death on Mzilikazi's orders, impaled on a stake for two days and two nights. The *namxali* disappeared, never to be seen again. Both kingdoms were destroyed, but the Ndzundza survived under their capable leader, Mabhoko:²⁰

The Ndzundza ... developed fortified mountain strongholds. By the 1860s, their capital, Erholweni, was probably the most impregnable single fastness in the eastern Transvaal. The security and the resources which the chieftdom offered attracted a steady stream of refugee communities to settle within its boundaries ...

Conflicts flared with the Ndzundza refusing Boer demands for labour and denying their claims to ownership of the land ... the Ndzundza also secured large numbers of guns ... A number of Boer attempts to subdue the kingdom failed, and by the late 1860s many farmers who had settled

in the environs of the Ndzundza trekked away in despair. Those who remained recognized the authority of the Ndzundza rulers and paid tribute to them.

The Ndzundza kingdom survived longer than its Pedi neighbour, but by 1883 it had been defeated and Nyabela, Mabhoko's successor, jailed in Pretoria for 15 years. After the British victory over Paul Kruger's republic, Nyabela attempted to return but was arrested, this time by the British, and told that he could never go home again.²¹ Unlike, for example, the Pedi or the Venda, the Ndebele were left without even the shred of a 'native reserve' and were forced into slave-like indenture on white farms. Nevertheless, despite their dispersion, the Ndzundza Ndebele clung to their historical culture, as exemplified in their distinctive beadwork and wall decorations. Matsitsi, Nyabela's brother, managed to re-establish male initiation and its associated age-regiments. Informal headmen were recognised on every farm with a significant number of Ndebele households. These 'headmen' negotiated with the farmers, adjudicated internal disputes and referred difficult cases to the royal court. They met every year at the site of their 1883 defeat, to keep alive their hopes of restoring the ancient Ndzundza kingdom. Although entirely lacking in legal status or formal authority, the Ndzundza kingdom thus succeeded in surviving as a meaningful political entity throughout the first half of the 20th century, a truly remarkable achievement. The Manala, on the other hand, never recovered from their destruction by Mzilikazi, though remnants of the group maintained a precarious existence at Wallmansthal Mission.²²

As the Bantustan project took off, some Ndebele areas found themselves incorporated into Lebowa, others into Bophuthatswana. In July 1974 the Ndzundza Tribal Authority was excised from Lebowa and reconstituted as KwaNdebele. Three more Tribal Authorities (two Ndzundza plus the single Manala area) from Bophuthatswana were added in 1977. The question of the two paramountcies was problematic from the very earliest stages of this consolidation. The Manala faction, knowing its numerical weakness, initially evaded a vote, but a compromise was eventually reached by the KwaNdebele Traditional Authorities Act 1984 (Act 6 of 1984),²³ which

recognised four 'tribes' (three Ndzundza and one Manala), and two kings – one for Ndzundza and one for Manala.

Independence, scheduled for December 1986, was approved by the KwaNdebele legislature but opposed by the Ndzundza Royal Family, allied with youth organisations and the United Democratic Front. More than 160 people were killed in the bloody civil war of mid-1986, which pitted the pro-government Mbokotho vigilantes against the Ndebele youth. In July 1985 the KwaNdebele government withdrew its recognition of the Mahlangu chiefship. Prince James Mahlangu was repeatedly detained, and the future Ndzundza King Mayitsha III was briefly imprisoned. Many leading Ndzundza royals went into hiding in Pretoria and the East Rand until, with the advent of the democratic transition, Mahlangu took over as Chief Minister in May 1990.

The role of the Manala family was, sadly, rather less glorious:²⁴

When the independence issue emerged in the early 1980s, members of the [KwaNdebele] cabinet promised to make the present Manala paramount – previously a taxi driver in Pretoria who had opened a number of businesses in KwaNdebele – supreme paramount of the Ndebele on the basis that the land where KwaNdebele was created was historically Manala land. In early 1986, Rhenosterkop, previously under the Ndzundza regional authority was handed over to the Manala tribal authority ... the Manala paramount was both a businessman and an enthusiastic member of Mbokotho ...

The headman [of Rhenosterkop] was forced to sign papers agreeing to move to Manala under the 'threat of a sjambok.' Shortly thereafter the headman and his council were deposed ... Young men were expected to join the Mbokotho and older men the Manala.

Commission hearings on Ndebele

The first hearings of the Commission were held at KwaMhlanga in Mpumalanga Province, taking a full week from 17 June 2005. The Manala speakers were straightforward and smooth. They had a good case, and they made the most of it.

Ndzundza took *namxali*, and when Manala discovered that, he chased after him, and caught him at Masongololo. All these things were happening while the old man [King] Musi was still alive ... the old man said to Manala, go and catch up with Ndzundza and bring him back here. Should he refuse, then you should kill him. It was difficult to do that, to kill him in actual fact ...

Here comes Manala, he is returning home to Ngwenyama [the King]. And Ndzundza is remaining there in Bhalule and even crossing the Olifants River. On his [Manala's] arrival at home, the old man asked him, where is Ndzundza? Manala responded by saying that, by now I believe he has already crossed the Olifants River. You know the old man screamed out of surprise.

Now this is a question, according to the culture, is it possible that the king should rule whilst another king is still ruling? By the time when Ndzundza was crossing the Olifants River, the fact was that Musi was still alive. I am still repeating myself on the question that, is it possible that somebody else, whether Ngwenyama or Inkhosi, take over the reins to rule whilst another one is still alive, is that possible? History is telling us clearly that by the time Musi died, Ndzundza was no longer nearby by then. Which clearly means that the child who buried Ngwenyama, his father, was Manala ...

Because they were the ones who remained in the royal kraal, in the headquarters. While Ndzundza proceeded with Ubukhosana or Ubukhosi on the other side of Bhalula.²⁵

Thus, according to the Manala, there could be only one kingship (*UbuNgwenyama*). Ndzundza had departed with nothing more than chiefship (*UbuKhosi*).

It was a strong argument, which the Ndzundza did not even try to contest seriously. The Ndzundza king, Mayisha III, shrunken and congested, said very little and – a significant omen, this – died in his chair the very evening of the Commission's departure. The Sokulumi, Litho and Pungutye branches of the Ndzundza had acquired their own lands independently of the senior Ndzundza line and were primarily concerned with maximising their autonomy.

Even worse was the ghostly presence of Mahlangu, hero of the anti-independence struggle and pro-ANC Chief Minister of KwaNdebele during the transition to democracy. He had moved to Cape Town in 1994, under the impression that then President Nelson Mandela had promised him a seat in the national cabinet. Returning home disappointed and empty-handed, he had visions calling on him to assume the Ndzundza kingship, despite his junior status within the Ndzundza royal house. His attempts to establish his own political party failed, and he attended the hearings in a state of visible emotional disturbance. Absorbed in their own troubles, the Ndzundza let their case go, almost by default.

The majority of the Commission had no qualms about embracing the Manala position in its entirety. Its determination for the Ndzundza – apart from the proper names – is identical to that for the Western Mpondo:²⁶

5.1.10 Having made a determination that the kingship of amaNdebele as a whole resorts under the lineage of Manala-Mbhongo, the only other available positions of leadership within the traditional institution of amaNdebele in terms of the Framework Act, are senior traditional leadership and headmanship.

The Commission's eventual determination on the Ndebele case is an excellent illustration of its line of approach, and is worth quoting at length:

10.3.9 The Commission finds that:-

- a) It is improbable that Manala could have cowered upon catching up with Ndzundza at Balule River as claimed by the Ndzundza-Mabhoko in that:
 - i) he pursued Ndzundza with the clear intention to take him back alive to Ingwenyama Musi or kill him if he resisted.
 - ii) Ndzundza never returned home but settled across the Balula River.
 - iii) Manala had no kingship to surrender as Ingwenyama Musi was still alive. Therefore, Ndzundza could not receive ubuNgwenyama as it is common cause that a successor cannot reign while the incumbent is still alive.

- 10.3.10 In accordance with customary law, kingship remained with Manala even during the colonial and apartheid eras although there was no official recognition of the institution of ubuNngwenyama ...
- 10.3.11 Officially, the institution of ubuNngwenyama for amaNdebele was created by section 6 and recognized under section 7 of the KwaNdebele Authorities Act.
- 10.3.12 Whilst official recognition of the institution of ubuNngwenyama was laudable and in line with the historical and customary evidence presented, the creation of dual kingship was irregular. This was because it was not in line with the customary practice of the community of amaNdebele.
- 11.1 In conclusion, the Commission finds that:-
- 11.1.1 The kingship of amaNdebele was established by Ndebele through conquest and subjugation.
- 11.1.2 Since Ndebele, the kingship has been passed on from one generation to another, according to the custom of amaNdebele.
- 11.1.3 At the split, Manala retained kingship of amaNdebele as a whole.
- 11.1.4 In the circumstances, amaNdebele kingship exists under the lineage of Manala.
- 11.1.5 In terms of customary law, and the Framework Act, Ndzundza-Mabhoko paramount is not a kingship.

Both the Western Mpondo and Ndzundza Ndebele kingships thus fell by the wayside. But did the Commission really have any other alternative? To answer this question, we will need to return to the question of the Commission's legal mandate and the reasons why it was established in the first place.

The Traditional Leadership and Governance Framework Act (41/2003)

For the purposes of this article, it is necessary to consider three salient aspects of this Act.

Mandate of the Commission

The preamble to the Framework Act identified its three main purposes, of which the third was especially relevant to the mandate of the Commission:

To restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

The context of this imperative was clearly spelled out in the White Paper on Traditional Leadership and Governance, adopted by cabinet in June 2003 and which *inter alia* proposed the establishment of the Commission. Although in the South African context a White Paper is no more legally binding than any other document circulated for discussion purposes, reading the White Paper in conjunction with the Framework Act makes it clear that the latter is the former's direct descendant.

Section 5.10 of the White Paper highlighted the extent to which traditional leadership had been manipulated by the colonial and apartheid regimes:

[Colonial] legislation transferred powers to identify, appoint and/or recognise and depose traditional leaders from traditional institutions to the [colonial] government. In the process, the role of customary institutions in the application of the substantive customary rules and procedures ... were substantially reduced. In some instances, not only was [sic] illegitimate traditional leaders and authority structures appointed or established. But other legitimate traditional leaders were removed and legitimate authority structures disestablished.²⁷

The homeland system carried the same processes even further:

Homeland governments, too, passed their own laws that empowered them to ... appoint and/or terminate services of traditional leaders, in some cases in a manner that did not comply with custom ... In a number of cases, the courts

were also asked to pronounce on the legality of administrative acts as well as on the application of customary rules and procedures. They held that the statutory and subsequent administrative framework superseded customary processes. They took cognisance of customary processes only to the extent that the legislation concerned provided for the recognition thereof, if at all.²⁸

Let us flag, in passing, the strong contrast drawn by these paragraphs; between the oppressive administrative acts of illegitimate regimes on the one hand, and authentic customary procedures on the other. From this distinction, the White Paper correctly infers two categories of traditional leaders: illegitimate and legitimate. But who is to tell the difference?

There is a strong body of opinion, also supported by traditional leaders and traditional communities, that an independent mechanism should be established to deal with the legitimacy and/or illegitimacy of traditional leaders. Indeed, this is the correct approach. An independent national commission should be established within the national sphere of government to address this situation.²⁸

Thus was the Commission born. It did buy into this mandate, to cleanse the institution of traditional leadership of its apartheid accretions and deformities, and to endorse only those traditional leaders recognisable in terms of customary law. As Commissioner MA Moleleki explained at the Western Mpondoland hearing:

It is common knowledge that the institution over the years has been undermined. It has been eroded and distorted by among others colonialism, repressive laws. In particular, the Black Administration Act 38 of 1927, apartheid laws which provided for among others territorial authorities, self-governing states, and so-called independent homelands.

Evidently the dignity of the institution has been affected negatively. In order to restore the dignity of the institution, the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims, and this is our official label.³⁰

The 1927 deadline

The first mention of the year 1927 occurs in Clause 25(2) (a) of the Framework Act:

The Commission has authority to investigate, either on request, or of its own accord –

(vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

The significance of this date is nowhere articulated in the legislation, but is made very clear in the White Paper:

The European colonial expansion ... significantly altered the social organization of African societies and transformed them in a manner which made them amenable to European control. To this end, various statutes were introduced in South Africa. One of them, the South Africa Act of 1909, designated the Governor-General as the 'Supreme Chief', a position that gave him the power to create and divide 'tribes' and to appoint any person he chose as a chief or headman, and to depose such persons as he deemed fit. The Black Administration Act No. 38 of 1927 consolidated these powers and vested them in the Minister of Native Affairs. The Bantu Authorities Act of 1951 finally rendered traditional leaders part of the state's bureaucratic machinery.³¹

In its Section 5.10, where the establishment of the Commission is first proposed, the White Paper's text reads as follows:

The commission may ... consider cases dating as far back as 1927. This is the year in which the Black Administration Act No. 38 of 1927 was promulgated.

This is one of the very few points on which the wording of the Framework Act, already quoted, deviates from that of the White Paper, which gave birth to it. The White Paper clearly intended that 1 September 1927, the date of the promulgation of the Black Administration Act, would be the cut-off point beyond which disputes and claims would not be entertained. The Framework Act, however, explicitly permitted the consideration of earlier events 'where

good grounds exist', thereby opened the door to the controversial decisions here under review.

Why was the Framework Act so revised? I can only speculate, but it is probably safe to say that the Framework Act never intended to deviate from the purposes expressed in the White Paper and articulated in its preamble, namely 'to restore the integrity and legitimacy of the institution of traditional leadership'. The Native Administration Act was, as the White Paper pointed out, only a consolidation of prior colonial legislation, dating back to the South Africa Act of 1909, also quoted in the White Paper, or even to its direct predecessor, the Natal Ordinance 3 of 1849. The Natal Ordinance first came up with the bright idea of declaring a colonial official (in this case, the Lieutenant-Governor of Natal) the 'Supreme Chief' of the colony's African population 'with full power to appoint and remove the subordinate chiefs, or other authorities among them'.³² However, the colonial authorities in the old Cape Colony had no such powers before the passage of the 1927 Act. It was therefore necessary to allow for some degree of flexibility, though surely not to the extent of undermining the integrity and legitimacy that the Framework Act was intended to uphold.

Defining a kingdom

The Framework Act recognised three different levels of traditional leadership: kingship, senior traditional leadership and headmanship (Clause 8). For a kingship to be confirmed, it would be necessary to establish not only that the kingship was valid according to customary law, but also that the claimant in question was a king or queen rather than a senior traditional leader. The definition of kingship thus becomes of the utmost importance, and the Framework Act defines it thus:³³

- (aa) that comprises the areas of jurisdiction of a substantial number of traditional leaders that fall under the authority of such king or queen
- (bb) in terms of which the king or queen is regarded and recognised in terms of customary law and customs as a traditional leader of higher status than the senior traditional leaders referred to in subparagraph (aa); and

- (cc) where the king or queen has a customary structure to represent the traditional councils and senior traditional leaders that fall under the authority of the king or queen

This seems very simple and straightforward – too simple and straightforward, in the view of Commissioner JC Bekker, who calculated that it could open the door to at least 773 kingship claims,³⁴ but pertinent nonetheless. If these criteria had been applied, the Manala Ndebele should have been disqualified as a kingdom (having only one subordinate senior traditional leader), whereas the Rharhabe Xhosa (having a clearly defined area of jurisdiction with no fewer than 40 senior traditional leaders, every one of whom attended the Commission hearing to enthusiastically confirm their allegiance to the Rharhabe King) should not have been disqualified. The Commission, however, chose to come up with its own set of criteria, which – after several revisions – eventually looked like this:³⁵

- 6.2.1 In order to assume the position of a king or queen the person so identified must qualify in terms of the customary law of the traditional community.
- 6.2.2. Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.
- 6.2.3 The king should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.
- 6.2.4 There cannot be a multiplicity of kingships emanating from one kingship.

The Commission does not quote any legal authority of any kind in support of this extraordinary set of criteria, nor – I suspect – is there any such to be found in all the many libraries of history, anthropology, politics or customary law. The Commission was established in terms of the Framework Act. It had no right to ignore the definition of kingship embedded in that selfsame Act and substitute something entirely unsubstantiated of its own devising.

Most significant of all these criteria, and most far-reaching in all its implications, is criterion 6.2.2, which not only casts the hereditary principle in stone but elevates it to a status whereby it overdetermines any other aspect of customary law. It is therefore important to point out that the selfsame hereditary principle is similarly echoed and invoked by the Commission in its rejection of the Western Mpondo and Ndzundza Ndebele claims.³⁶

7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of amaMpondo do not allow a multiplicity of traditional leaders emanating from one traditional leader.

Let us, for the sake of progress, ignore the fact that the Commission (not a traditional institution) in Clause 7.2.5 has arrogated to itself the right to determine what traditional leaders may or may not do. Let us ponder the implications of its deification of the hereditary principle in conjunction with its rejection of the 1927 deadline. Taking as our example the three Eastern Cape kingships confirmed by the Commission, we find the hereditary principle violated in each and every case: among the amaXhosa, when Tshawe replaced Cirha; among the abaThembu, when Dhlomo replaced Hlanga; and among the amaMpondo, when Gangata replaced Qiya.³⁷ These events happened several centuries ago, but all these deposed factions have their descendants, and the logic of the Commission's criteria should surely have obliged it to restore the kingly status quo as it had been in the Eastern Cape around the year 1650, that is before the arrival of Van Riebeeck.

Moreover, in each of these three cases, the victorious faction justified its assumption of power in terms of the abuse of customary law by the deposed king. This is not the place to enter deeply into such questions but, as long ago as 1981, I had argued that the right to depose unjust rulers

was an integral part of indigenous Xhosa political culture. By subordinating all other aspects of traditional governance to the hereditary principle, the Commission entirely negates the more democratic dimensions of customary law and legitimates its despotic tendencies.

History versus customary law?

Most of the claimants disappointed by the rulings of the Commission have challenged its determinations in court. At least one of its rulings has been overturned on the basis that the Commission's proceedings were procedurally unfair,³⁹ but, to the best of my knowledge, it is the practice of the Commission that is being challenged rather than the principles on which it operated. Moreover, because each case is handled on an individual basis, neither the inconsistencies in the Commission's findings nor the fundamental flaws in its overall approach have been thoroughly grasped. In this concluding section I will attempt to critique the Commission's shortcomings; firstly in the light of my own discipline of history, secondly in terms of the broader debate on customary law.

History by its very nature is a series of unique events, whereas law seeks to define and articulate the recurrent norms and usages by which any given society tries to function. Any attempt, therefore, to apply the consistencies of law to the inconsistencies of history is bound to fail. What would have happened, for example, if the Commission had applied its version of customary law to the well-known case of the Zulu kingdom? Ignoring the 1927 cut-off date, as it usually did, the Commission would have had no difficulty going back to 1840, some years before British colonial authority was imposed on the colony of Natal. That was the year in which Mpande fled his homeland to enlist the support of the Voortrekker leader, Andries Pretorius. In February 1840, the Boers destroyed the army of Dingane and proclaimed Mpande King of the amaZulu. The Commission should have asked whether that was in accordance with Zulu customary law.

By the criterion of customary law, all the descendants of Mpande onwards can only be seen as illegitimate, and the Commission is duty bound to replace

Zwelithini with a more legitimate incumbent. But who? Mpande's predecessor, according to customary law, was his brother Dingane. But Dingane had murdered his own predecessor, Shaka, another clear contravention of Zulu custom. Further research by the Commission would have revealed that Shaka himself had usurped the chiefship of his father Senzangakhona, leaving the Commission with no option but to identify the most senior descendant of Sigujana, Senzangakhona's rightful heir, and to place him on the Zulu throne.

The Zulu case is presented as proof of the inapplicability of customary law to pre-colonial history by means of the ancient logical argument of *reduction ad absurdum*, defined by Webster's dictionary as 'proof of a proposition by showing the falsity of its contradictory opposite; also, disproof of a proposition by arguing from it to an impossible or false conclusion'.⁴⁰ Let me spell this out: if customary law is applicable to the pre-colonial period, then the descendants of Mpande should be dethroned in favour of the descendants of Sigujana. By analogy with the logic applied in the cases of the Western Mpondo and the Ndzundza Ndebele discussed above, descendants of Mpande, such as King Goodwill Zwelithini, have no other leadership positions available to them in terms of the Framework Act than senior traditional leadership or headmanship. This is palpably absurd. Therefore customary law is not applicable to the pre-colonial period.

This article, however, takes its stand not on theoretical logic but on historical grounds. No historical event of the pre-colonial period should be adjudicated by the criteria of the post-colonial period, because the circumstances of the pre-colonial period were so fundamentally different that the fundamental assumptions of the present simply do not apply. This is clearly illustrated by one of the dialogues from the Western Mpondo public hearing. It is worth quoting again:

Commissioner Lerotholi-Poswa: Are you suggesting that the Prince over there (indicating a young royal in the audience) could also do the same, and be legitimately placed by Queen Mother Bongolwethu elsewhere?

Bishop Kobo: Under the circumstances prevailing then, [it could be done] because there were places where the consolidation and management of tribal nations was not in place. But at this present moment, it wouldn't be possible to do that. Because now everything is cut and dried, there are boundaries ... At that time there were no declared boundaries. There was a process of invading and conquest to people trying to invade new territories to expand their empires. It is no longer the case now. The boundaries have already been declared of every tribe and nation. But when nations were born, they go forward invading, trying to gain as much territory as they can.⁴¹

Although Kobo's response refers directly to only one specific aspect of the pre-colonial context, namely the greater political fluidity contingent on greater territorial fluidity, similar considerations apply across the entire spectrum of social, political and economic life. During the pre-colonial era there were no constraints of land, water and natural resources to tie traditional communities down, no territorial boundaries to constrain political expansion and innovation, no overarching national state to set out norms and standards or to demand transformation in line with constitutional imperatives. There was no Framework Act Clause 8 to reduce the great diversity of traditional institutions into three categories only. And no Commission either.

Does the case of the Nhlapo Commission hold any significance for the broader debate on customary law? In most respects, it must be admitted, the issues raised in this article are tangential to the more vigorous and significant battles that have been fought in the Constitutional Court with regard to the Communal Land Rights Act, the Traditional Courts Bill and other draft legislation, in which the customary arena has become a battleground on which chiefly elites and community interests contest power and resources.

While the protagonists appearing before the Nhlapo Commission argued historical cases going back some hundreds of years with sincerity and passion, disinterested analysts might easily reduce the importance of these struggles to nothing more than

contests between rival factions for access to the status and power of the traditional elite.

However, the Nhlapo Commission, marginal though it may be to more significant national concerns, affords us a prism through which to view the dangers posed by the nebulous and solipsistic references to 'customary norms and criteria' that appear too often in the Framework Act. Although the mantra of 'custom' is frequently invoked as a universal panacea to solve all problems and cure all ills, the experience of the Nhlapo Commission shows the extent to which it serves as a mask, or even a blunt instrument, to facilitate outcomes that are the very reverse of customary.

However much it may owe its being to the 'new South Africa', the Commission's understanding of custom has not proved itself demonstrably superior to that of Colonel John Maclean in 1858 or Professor AC Myburgh in 1985.⁴² Furthermore, as the above discussion on 'criteria for kinship' has shown, the Commission's version of custom did not even derive from 'official customary law', but was blatantly contrived by the commissioners themselves. The flaws of the Commission thus highlight and magnify one of the most fundamental flaws of the Framework Act itself, namely its failure to grapple with, much less clarify, the meaning of custom within the context of a democratic dispensation.



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Notes

- 1 Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003), Pretoria: Government Printer.
- 2 Communal Land Rights Act (Act 11 of 2004), Pretoria: Government Printer.
- 3 Olaf Zenker, Judicial renegotiations of 'customary law' in post-apartheid South Africa, Max Planck Institute for Social Anthropology Working Paper No. XXX, 16. For an informed discussion on the broader context, see Aninka Claassens, Contested power and apartheid tribal boundaries: the implications of 'living customary law' for indigenous accountability mechanisms, *Acta Juridica* (2011), 174–209.
- 4 The White Paper is published in full in Department of Provincial and Local Government, *The role of traditional leadership in democratic governance: a consolidated set of policy instruments*, Midrand: Kwandza Branding and Design, 4–39.
- 5 *Ibid.*, 29–30.
- 6 Verbatim transcript by author, hearings on Western Mpondo Kingship, Libode Campus, King Sabata Dalindyebo Technikon, 17 August 2005.
- 7 The commissioners were appointed by Government Notice 2394 of 22 October 2004. I remained a commissioner until my resignation on 11 April 2007. As commissioner I was obviously privy to all the internal meetings and documentation of the Commission. I would like to stress that in this article I have respected the rules of confidentiality that normally bind official appointees and without which no government could ever function. Every statement and inference in this article is based on information already available in the public domain, including evidence given at the Commission's public hearings. Special thanks to Dumisani Tabata for helping me to source some of this material.
- 8 Victor Poto Ndamase, *Ama-Mpondo: Ibali neNtalo*, Lovedale: Lovedale Press, 1927, 20–21. For further discussion of the early history of Western Mpondoland, see William Beinart, Production and the material basis of chiefship: Pondoland, c. 1830–80, in Shula Marks and Anthony Atmore, *Economy and society in pre-industrial South Africa*, London: Longman, 1980, 120–147.
- 9 Ndamase, *Ama-Mpondo*, 42, 46; Christopher Saunders, The annexation of the Transkeian territories, *Archives Yearbook for South African History* 39 (1978), 165.
- 10 Godfrey Callaway, *Pioneers in Pondoland*, Lovedale: Lovedale Press, 39–40.
- 11 CC Saunders, "The Annexation of the Transkeian Territories," *Archives Yearbook for South African History*, Pretoria: Government Printer, 1978, 71.
- 12 Quotations taken from the official transcription by ELT Pro Transcriptions cc, M Pretorius Transcriber, dated 6 July 2006. Copy in my possession. Proper names, which obviously caused M Pretorius great difficulty, have been corrected.
- 13 Verbatim transcript by author, hearings on Western Mpondo Kingship, Libode Campus, King Sabata Dalindyebo Technikon, 17 August 2005, comment T11 R10.
- 14 *Ibid.*
- 15 *Ibid.*
- 16 The Commission's final determinations with regard to the 12 paramountcies were made on 29–30 April 2008: see Determinations on the positions of the paramount chiefs, www.gov.za/documents/download (accessed 29 September 2014). This quotation comes from Determination on the position of the paramount chief of amaMpondo aseNyandeni, 85.
- 17 Documents supplied to the Commission give the dates of Musi's reign as '1580?–1620?'. My own, more conservative estimate gives 1650, if one calculates the average reign in terms of the Ndzundza genealogy; 1680, if one calculates in terms of the Manala genealogy.
- 18 HCM Fourie, *Amandebele fan Fene Mahlangu*, Zwolle: La Rivière Voorhoeve, 1921, 33–39; NJ van Warmelo, *Transvaal Ndebele texts*, Pretoria: Government Printer, 1930, 61.
- 19 Mziki, *Mlimo: the rise and fall of the Matabele*, Pietermaritzburg: Natal Witness, 1926, 51–55.
- 20 Peter Delius, The Ndzundza Ndebele: indenture and the making of ethnic identity, 1883–1914, in Philip Bonner et al

- (eds), *Holding their ground*, Johannesburg: Ravan Press, 1989, 229.
- 21 Ibid., 245.
- 22 Edwin Ritchken, The KwaNdebele struggle against independence, in Glenn Moss and Ingrid Obery (eds), *South African review* 5, Johannesburg: Ravan Press, 1989, 426–445.
- 23 KwaNdebele Traditional Authorities Act 1984 (Act 6 of 1984), Official Gazette of KwaNdebele, No. 199, Siyabuswa, 19 October 1984.
- 24 Ritchken, The KwaNdebele struggle against independence, 440–441.
- 25 Verbatim transcript by author, public hearings, KwaNdebele Old Legislature, 26 June – 1 July 2005.
- 26 Determination on the position of the paramount chief of Ndzundza Mabhoko, in Determinations on the positions of the paramount chiefs, 108.
- 27 White Paper, Ref T9R8.
- 28 Ibid.
- 29 Ibid.
- 30 Verbatim transcript, Western Mpondoland hearings, Libode, 17 August 2005.
- 31 White Paper, 7.
- 32 David Welsh, *The roots of segregation*, Cape Town: Oxford, 1971, 17.
- 33 Framework Act, Clause 9(1)(b)(ii).
- 34 J Bekker, The establishment and the identification of kings and queens in terms of the Traditional Leadership and Governance Framework Act 41 of 2003, *PER/PELJ* XI(3) (2008).
- 35 Determination on the position of the paramount chief of amaGcaleka, 150–151, in Determinations on the positions of the paramount chiefs. The Gcaleka Paramount was recognised as a king. The same wording was used to justify the kingship of the abaThembu. See Determination on the position of the paramount chief of abaThembu baseDalindyabo, in Determinations on the positions of the paramount chiefs, 169.
- 36 Determination on the position of the paramount chief of amaMpondo aseNyandeni, in Determinations on the positions of the paramount chiefs, 89; the same phraseology is repeated word for word in Determination on the position of the paramount chief of Ndzundza Mabhoko, in Determinations on the positions of the paramount chiefs, 112.
- 37 All these cases are well documented in the relevant indigenous histories. For the sake of convenience, one need only cite John Henderson Soga, *The south-eastern Bantu*, Johannesburg: Witwatersrand University Press, 1930, 105–6, 302–3, 470–2.
- 38 Jeff Peires, *The house of Phalo*, Johannesburg: Ravan Press, 1981, 14–5, 36.
- 39 Case 2062/2011, Eastern Cape Division: Mthatha, L *Matiwane v President of the Republic and others*, Judgement of J Griffiths, delivered on 12 December 2013. Although the judge was highly critical of the Commission's blatant disregard of relevant information, his ruling was based on its neglect of the *audi alteram partem* rule, i.e. the applicants were not given an opportunity to respond to the evidence on which the Commission based its decision.
- 40 *Webster's New International Dictionary*, 2nd ed, Springfield, Mass: Merriam, 1944, 2089.
- 41 Verbatim transcript, Western Mpondoland hearings, Libode, 17 August 2005.
- 42 References to J Maclean, *Compendium of kafir laws and customs*, Mount Coke: Wesleyan Mission Press, 1858; AC Myburgh and MW Prinsloo, *Indigenous public law in KwaNdebele*, Pretoria: Van Schaik, 1985.