

# GROUP RIGHTS IN POST- APARTHEID SOUTH AFRICA THE CASE OF THE TRADITIONAL LEADERS<sup>1</sup>

Barbara Oomen

## Introduction

Group rights are increasingly put forward as a solution to what is seen as the growing fragmentation of national states. By legally affirming cultural pluralism, it is held, states can ensure political stability and at the same time grant individuals citizenship in a more meaningful way. Thus, surprisingly, cultural heterogeneity seems to take the place of the homogeneity propagated in previous debates on modernisation, democratisation and state formation. Another surprise of our times is the fact that these group rights are not only championed in countries such as Canada and Australia, but that even South Africa, with its specific history of group-based discrimination has chosen to include them in its first democratic Constitution. After the strict segregation of 'blacks and whites' under Apartheid, the new Constitution offers a bright patchwork of rights to cultural, linguistic and religious communities, to people who wish to found a separate state, and to traditional communities. In this context it is interesting to note that the new South Africa once again recognises traditional leadership and customary law, two institutions that also played an important role in the implementation of Apartheid policies in the bantustans.

---

<sup>1</sup> This paper was presented at the 14th International Congress of Anthropological and Ethnological Sciences, in Williamsburg, Virginia, July 1998. I am indebted to Adriaan Bedner, Johan Beukman, Stephen Conn, Kristin Henrard, Gerti Hesselning and Herman Lelieveldt for their constructive comments. Nevertheless, I remain solely responsible for the ideas contained herein.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

South Africa's transition from Apartheid to multiculturalism enables us to critically examine the modernity of the concept of group rights. Why did South Africa, of all countries, opt for the legal recognition of cultural pluralism? And how does the present - supposedly emancipatory - recognition of group rights differ from the oppressive recognition of these rights under Apartheid? Such a comparison makes possible an assessment of the differences between the legal recognition of culture as part of a policy of indirect rule and as a result of the present enthusiasm for multiculturalism.

This article will concentrate on one particular group right, the enforcement of a group's traditional code by the dominant system, in trying to understand the modernity of post-Apartheid multiculturalism. In order to come to such an assessment, I will first briefly discuss the rise of the notion of group rights, the classification of these rights and the debate on their merits. Next, I will focus on the way in which South Africa has recognised certain group rights and the reasons for this recognition. This enables us to assess the character of the post- Apartheid state in a subsequent section. After these general observations I will focus on the specific case of the recognition of traditional leadership and customary law. What does this recognition mean in practice? After an outline of the main legislation and policies in fields such as land, local government and customary law we can then return to the main question: to what extent do group rights in the new South Africa differ from those under Apartheid?

### The Group Rights Debate

The concept of 'group rights' is used here to emphasise the - hypothetical - connection between past and present South African policies with regard to cultural plurality. A variety of other terms could have been used instead. Minority rights, rights to culture, cultural rights, or third generation rights are but a few of the denominations used to designate what is more or less the same subject matter.<sup>2</sup> An important distinction in this field is that between group rights and collective rights. Group rights are allocated to an individual as a member of a group. In the South African legislation to be discussed, for example, individual rights prevail but are sometimes granted to individuals as group members. Collective rights, in contrast, are granted to a group. An example is the right of peoples to self-determination. The notion of group rights presupposes the existence of more than one group within a given polity and the cultural dominance of one of these groups. The

---

<sup>2</sup> For an overview of this topic and an insight into the colourful assemblage of synonyms for group rights see Kymlicka (ed.) 1995.

groups concerned are mostly cultural, ethnic, religious or linguistic communities. Members of these groups are granted rights in order to protect interests which cannot be safeguarded merely by individual rights as contained in non-discrimination clauses.

Whatever name and definition may be given to them, in recent years group rights have gained popularity in international and domestic law, whilst at the same time giving rise to spirited academic debate. Mother of all group rights in international law is without doubt Article 27 of the 1966 International Covenant on Civil and Political Rights.<sup>3</sup> This article declares:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The article contains a group right and not a collective right: it is concerned with persons belonging to minorities, as opposed to minorities per Se. However, the recent Draft Universal Declaration on Indigenous Rights speaks of the rights of indigenous peoples as groups, thus showing the subsequent evolution in legal thought (UN 1994). In addition to this document, published by the United Nations Working Group on Indigenous Populations, many other international bodies have taken up a standpoint on the subject of minority rights.<sup>4</sup> Apart from the debate on the rights of indigenous peoples, the possibility of recognising a Right to Culture in international law is also considered (cf. Berting 1990).

A similar shift from individual to group rights can be seen in national legal systems. There are, naturally, many ways in which a national state can give legal recognition to cultural diversity. A helpful and illustrative classification has been put forward by Levy, who distinguishes eight categories of what he calls "cultural rights-claims" (Levy 1997: 25). The first set contains exemptions from laws which penalise or burden cultural practices. An example is the case in which members of

---

<sup>3</sup> This is not to say that the ICCP contains the first legal recognition of cultural plurality. The British colonial policy of indirect rule, for instance, although it might have been motivated by a different ideology, largely amounted to the same principle.

<sup>4</sup> Cf. the Proposal for a European Convention for the Protection of Minorities and the ILO Convention 169 revising the ILO Convention on Living and Working Conditions of Indigenous Populations. See the overview in Marquardt 1995.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

the Inkatha Freedom Party in South Africa attempted to exempt traditional weapons from the general weapons ban (Mtimkulu 1996). The second category includes claims to assistance to do those things that the majority can do unassisted, for instance through multilingual ballots or affirmative action. A third category comprises claims to self-government for ethnic, cultural or 'national' minorities, and can include secession rights but also strong federal rights. The strongest African example of a nation granting these rights is that of the Ethiopian 'ethnonationalism' (Abbink 1997). A fourth category consists of external rules restricting non-members' liberty in order to protect the culture of members of the group. In Quebec, for example, the use of the English language is legally restricted. A fifth group of rights sees to the recognition/enforcement of a traditional legal code by the dominant legal system. This 'state legal pluralism' (to use the term introduced by Griffiths 1986) can be found in most African countries, in the form of the recognition of customary law and communal land tenure. Levy's sixth category is that of rules to ensure representation of minorities in government bodies. In post-independence Zimbabwe, for example, the white population was allowed to take twenty percent of the seats in parliament. Next, there are the symbolic claims to acknowledge the worth, status, or existence of a group. The recognition of public holidays is an instance. A last category differs slightly from the previous, in that it is not concerned with rights granted to groups by national or international law but with the recognition of the internal rules formulated by groups for members' conduct and enforced by ostracism or excommunication. The dispossession of children marrying outside the group is an example of this group-based right.

The rise of group-based rights, as opposed to individual rights, can be linked directly to what might be the most surprising facet of social reality at the end of the twentieth century: the fact that the globalisation process and increased interdependence between nations have not only led to an increased uniformisation but also to a strengthening of local cultures (Appadurai 1996; Chatterjee 1993). Long gone are the days of Grotius, when political theory could revolve around nations and individuals. The new national state is only one of the many communities to which people feel attached, and has to compete with a variety of local and supranational communities. Parts of the Ghanaian community in the Netherlands, for instance, not only generally feel a stronger link to the worldwide Pentecostal community than to the Dutch state, but can also maintain close contacts with this community by using planes, telephone calls, faxes and e-mails. Satellite-television enables German Turks to closely follow, and to relate to, political events in Turkey. The World Wide Web, with sites such as the East Timor Action Network, the Umunne Igbo Cultural Organisation or the Indigenous Peoples Environmental Action network, to name but a few random examples,

provides a platform for local groups to articulate and develop a distinct identity.<sup>5</sup> Culture, it appears, has obtained a new salience and “new regional, national and local identities are emerging, built around a new prominence of rights to roots (as opposed to rights to options)” (de Sousa Santos 1992).

This emergence, or maybe even resurgence, of local identities is of course acutely relevant in many African countries. Here, traditionally, weak states go hand in hand with strong local communities. Nowhere is the observation by the Comaroffs about our times, in which “tradition’ and ‘tribalism’ enjoy a renewed salience and face down the confident universalisms of modernity, as religion thrives and the nation-state sickens” more true than on this continent (Comaroff and Comaroff 1997: xiv). African political philosophers have therefore pleaded for a political agenda that recommends, in their own words, affirmative diversity as the way forward in a multicultural world.

Empowerment is an intentional, ongoing process centred in the local community, involving mutual respect, critical reflection, caring, and group participation, through which people lacking an equal share of valued resources gain greater access to and control over these resources (Odhiambo).

In the vision just depicted group rights are considered a necessary means to accommodate the changing socio-political reality of increased pluralism in the global playing field. In addition, supporters of the concept of group rights underline the moral justification of these collective rights. Two lines of thought can be unravelled within these conimunitarian arguments. The first emphasises the importance of group membership for individual identity. Taylor, for instance, holds that human identity is created dialogically, in response to our relations and in actual dialogues with others and that these shared identities should therefore be publicly recognised (Taylor 1992: 17). Or in the words of Kymlicka: “People’s membership in their own societal culture does play an important role in enabling meaningful individual choice and supporting self- identity” (Kymlicka 1995: 43). A second line of thought stresses not the fact that certain group rights cannot be reduced to individual rights but the importance of groups in public life. Groups, as separate actors, in this view have the right to maintain themselves and to pursue their distinctive courses, for instance through a right to self-preservation (Johnston 1995: *passim*).

---

<sup>5</sup> <http://www.etan.org/>, <http://www.umunne.org/>, <http://www.alphacdc.com/ien/> respectively.

Opponents of group rights found their argument not only in liberal theory but also on the level of practicalities. Their arguments generally revolve around issues such as: the problems of inclusion and exclusion in the group, the uneasy balance between recognising difference and recognising equality, and the fact that it is precisely the act of granting rights to a group that could spur individuals to reconstitute themselves in groups and underline differences. In discussing this issue for indigenous rights, it has for instance been asserted that, whilst in the old days every western anthropologist would have his own tribe, nowadays every tribe in its quest for resources seems to have its own anthropologist.

### The Recognition of Group Rights in Post-Apartheid South Africa

There are thus a variety of practical, political and philosophical reasons for the present popularity of group rights. Nevertheless, the fact that even a country such as South Africa with its distinctive past has chosen to include such rights in its first democratic constitution might raise eyebrows. Was the system of group-based rights not one of the important foundations of Apartheid? This section will consider how certain group rights came to be included in South Africa's 1996 Constitution (Act 108 of 1996), and which group rights are included. In the next section I will then dwell on the reasons why South Africa sought to legally reaffirm its cultural diversity and on what this teaches us about the post-Apartheid state.

South Africa has experienced a negotiated revolution (Waldmeier 1997). The four years between the release of Nelson Mandela from prison in 1990 and the first democratic elections in 1994 were filled with tense negotiations between the powers-that-were and the powers-to-be. The axis in these talks was formed by the African National Congress (ANC), sure of its democratic majority and in favour of a strong, centralist government and the National Party (NP), unwilling to give up all the power assembled under Apartheid and in favour of a federal system with strong checks and balances. But there were other parties to take into consideration, such as Buthelezi's Inkatha Freedom Party (IFP), which was also in favour of a federal state with large powers for stronghold KwaZulu. And there were the right-wing Afrikaner parties who, in various alliances, threatened to destabilise the negotiation process.<sup>6</sup>

---

<sup>6</sup> For a brief overview of the negotiations see: Ottaway 1993: 1-19; Faure and Lane (eds) 1996: 1-10.

The outcome of these negotiations in late 1993 surprisingly enough was not a memorandum of understanding or another form of contract but a full-fledged Interim Constitution (Act 200 of 1993). The most important part of this Interim Constitution - itself clearly a product of political compromise, pressing deadlines and unresolved debates - was probably its tail: the Constitutional Principles (Schedule IV, Act 200/1993). These Constitutional Principles were to be adhered to by South Africa's first democratic parliament (which at the time still had to be elected) when formulating a definite constitution. They provided the general framework of that future constitution: one sovereign state, common citizenship, a three-tiered democratic system of government, a bill of rights, an independent judiciary and a variety of other prerequisites.<sup>7</sup>

The Constitutional Principles also bound the future South African legislature to a number of group-based rights. They stated that "the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged" (CP XI). Also "collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected" (CP XII). In addition, "Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy" (CP XIV). Moreover, the idea of a Government of National Unity, in which the major parties would be represented during the first five years of democratic government was part of the negotiated deal (CP XXXII).<sup>8</sup>

All these provisions recognise South Africa's cultural diversity but put the main emphasis on democracy and equality. Still, it proved necessary to grant much stronger rights to minority groups in order to achieve political stability before the April 1994 elections. Two parties, the IFP and the Afrikaner right-wing alliance, had practically continuously boycotted the negotiation process. Buthelezi wanted, as Waldmeier puts it, a tribal kingdom with a state ideology of Zulu ethnicity (Waldmeier 1997: 243). The Afrikaner alliance on the other hand claimed a Volkstaat, a kind of territorial homeland with great autonomy. Both far-reaching demands were met before the elections, but only at the last minute. As it turned

---

<sup>7</sup> An overview of the process is given in van Wijk 1995.

<sup>8</sup> This was but one of the 'sunset clauses' seeking to protect the vested interests of the white population. Others were job guarantees for white civil servants and security force members; pension protection; and amnesty for apartheid crimes (Waldmeier 1997: 213). In addition, Art. 229 of the Interim Constitution provided that all existing laws would, subject to the constitution, continue in force.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

out, the IFP only agreed to take part in the elections a week before they took place (forcing their name to be stuck onto the ballot paper at the last moment). An agreement about the Volkstaat was struck three days before the poll. Two additional Constitutional Principles were included. The first (CP XIII) not only recognised traditional leadership and customary law, as was agreed upon earlier, but also enshrined the institution, role, authority and status of a traditional monarch. The second (CP XXXIV) introduced the “notion of the right to self-determination by any community sharing a common language and cultural heritage, whether in a territorial entity within the Republic or in any other recognised way”.

In this manner the Constitutional Principles in the Interim Constitution laid the foundation for the recognition of certain group rights in the definite Constitution. This definite Constitution was signed into law by President Mandela on the 10th of December 1996, Human Rights day, in a symbolic place, Sharpeville.<sup>9</sup> Like its predecessor, it is an extensive document, with an elaborate Bill of Rights. The supremacy of the Constitution is affirmed in the first section. It is definitely a document in the liberal democratic tradition, based first and foremost on individual rights and with freedom and equality as its central - at times competing - principles.<sup>10</sup> Nevertheless, a number of Levy's cultural rights-claims can be found.

The right to assistance in what others can do unassisted is clearly visible in a subsection of the equality clause, that allows for affirmative action “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination” (s. 8(2), Act 108/1996). Although this provision does not speak of groups but of categories of persons, the subsequent legislation is frequently based on the idea of racial groups. For the public service, for instance, the aim is to include fifty percent black people at management level by 1999 (South Africa n.d.a). The much-debated Equal Opportunities Bill (South Africa n.d.b, expected

---

<sup>9</sup> The place where in 1960 the police fired on a crowd of unarmed people, leaving 67 dead and creating an international uproar. Before the Constitution could be adopted the Constitutional Court had to certify that it was in accordance with the Constitutional Principles. After having partially disagreed with a first draft, it finally certified its approval in *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the amended text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SA 97 CC*.

<sup>10</sup> For a discussion of the libertarian and egalitarian foundations of the Constitution see du Plessis 1997

to go through parliament in 1998) even requires private employers to set targets in terms of employment of different racial groups.

Another form of assistance is that given to language groups. South Africa recognises eleven official languages, and the Constitution requires the state to take “practical and positive measures to elevate the status and advance the use of these languages”. For this purpose, a Pan South African Language Board is created (Pan South African Language Board Act, 59/1995). This Board is also responsible for the promotion of a number of other languages, including sign language (s. 6, Act 108/1996). The importance of language for group identity was emphasised in a case on the acceptability of the use of language tests in Afrikaans in admitting children to schools (*Er Parte Gauteng Provincial Legislature in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (1996) SA 165 CC. The case was decided upon on formal grounds.) Justice Sachs held that “the Afrikaans language, like all languages, is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa” (para. 47).

The rights of cultural, religious and linguistic groups in general are protected by a number of clauses. S 185, for instance, makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Here there is explicit mention of communities, in contrast to two provisions in the Bill of Rights, sections 30 and 31.<sup>11</sup> Section 30 states that “everyone has the right to use the language and participate in the cultural life of their choice”, subject to the Constitution. Section 31, in a somewhat inelegant attempt by the legislator to lay emphasis on neither the individual nor the group, provides:

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

---

<sup>11</sup> For an excellent discussion of the question, how far the subjects of constitutional protection are individual members of communities or communities per se, see Currie 1998.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The possibility of self-government is of course one of the most far-reaching rights allocated to groups. The aversion of the ANC majority in parliament to the concept of a Volkstaat can be deduced from the fact that it is only introduced in section 235, in more or less the same phrasing as in the Constitutional Principles. A Volkstaat Council was established in 1996, with the competence to “gather, process and make available information with regard to possible boundaries, powers and functions and legislative and other structures of such a Volkstaat” (s. 184B (1) (a), Act 200/1993; cf. Volksstaat Council Act 30/1994). The Volkstaat itself has not been established yet.

Another, limited, form of self-government is made possible through the recognition of the “institution, status and role of traditional leadership” (s. 211(1), Act 108/1996). Here we enter the ambit of Levy’s fifth group of rights, the recognition or enforcement of a traditional code by the dominant legal system. For it is not only the traditional leadership that is recognised, but also the system of customary law that these leaders observe. Courts, in addition, must apply customary law “when this is applicable” (s. 211(3)). I will later look extensively at this recognition of traditional leadership and customary law and the discussions it has evoked. In the following section, however, I will first turn to the reasons for the partial recognition of group rights described above, and to what they teach us about the character of the post-Apartheid South African state.

### The South African State: Centrifugal and Centripetal Tendencies

Two informing principles appear to underpin the text of the South African Constitution. Firstly, a firm belief in individual rights and equality and a fear of all that the group-based ideology of Apartheid brought about. And secondly, as described above, an understanding of the fact that South Africa is a plural society and that affirmation of this plurality is not only necessary, but also beneficial. Why were these principles included in the Constitution, and what does this say about the character of the South African state?

In this context it is necessary to emphasise the distinction between nations and states.

The term nation or tribe suggests an affinity group that has placed certain values high on its agenda: shared genealogical

origins, language and historic myths, as well as cultural and, perhaps, religious compatibility. It infers a popular preference for 'like being with like', and a high degree of social conformity. In sharp contrast, the multicultural state reflects quite different social values: a civil society sharing a preference for the civic virtues of liberty and material wellbeing, as well as a desire to associate for protection and security. (Franck 1996: 362)

Nation and state might overlap, but this is often not the case. Various actors in the political debate that informed the South African Constitution not only belong to different affinity groups but also hold different views about the relation between nations and the state in the country.

The differences between these views, or competing nationalisms, are eloquently set out by John Comaroff (1996), who distinguishes three current ideological formations: euronationalism, ethnonationalism and heteronationalism. Euronationalism is based on notions such as that of a secular state founded on the universalist principles of citizenship and social contract, with the political community corresponding with the territorial borders. As an ideology it is essentially forward-looking, based on a vision of national unity. Such nation-states are rare, but an example put forward is that of Botswana. Ethnonationalism, in contrast, is based on cultural distinctiveness, spiritual ties, primordial roots and membership by ascription, and allows for transnational membership. Its unifying force lies thus not in the future, but in history, in tradition. The Jewish diaspora can be seen in this light (Comaroff 1996: 175- 177). A third ideology emerging dialectically out of the former two seeks to absorb "ethnonational identity politics within a Euronationalist conception of political community" (Comaroff 1996: 177). Multiculturalism, accommodating diversity in a society with equal citizens is central to this ideology, that appears to straddle recognition of a formative past with a future vision.

Comaroff, writing in 1994, detected these three ideologies in South Africa: euronationalism in the ANC policy; ethnonationalism with the IFP and the right-wing Afrikaners; and heteronationalism with the former government and their discourse of separate development (Comaroff 1996: 179). How, one might wonder, have these positions developed over the past four years?

The ANC, which won the elections with a vast majority, continues to promote diversity, but only subject to the overriding objective of national unity. In debating the future of traditional leadership, for instance, the necessity of a neutral, non-tribal, non-political stance of the chiefs is emphasised: "the chiefs will continue to have an important role in unifying our people" (Nelson Mandela, in his address on

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

his release from prison, 1990<sup>12</sup>). The 'national question' is however heavily debated in ANC circles, mostly from the socialist perspective that the choice of terminology suggests. A discussion document on nation-formation and nation-building states: "The national question ... is fundamentally a continuous search for equality by various communities which have historically merged into a single nation-state, or the struggle for self-determination and even secession by communities within such states" (ANC 1997: 1). How is the ANC or, as it is called here, the National Democratic Revolution to act? "The main thrust of the NDR is not to promote fractured identities, but to encourage the emergence of a common South African identity." Here "the challenge is to maintain a healthy equilibrium between centrifugal ('disintegrative') and centripetal ('integrative') tendencies." The report concludes with the suggestion to put in place a programme aimed at speeding up the deracialisation of South African society in all respects (ANC 1997: 4-5).

Although the ANC-ideology still carries many of the features put forward by Comaroff - the aim of national unity, territorial integrity, a constructivist approach to identity - the designation of ethnonationalism could well be replaced by afri-nationalism. 'African Renaissance' is the mantra of the ANC's new South Africa. It started with future president Thabo Mbeki's sweeping oration at the adoption of the new constitution in 1996; an oration in which he commenced with the already famous exclamation "I am an African", glided over the history of South Africa and its people, and concluded that the constitution just adopted "constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender or historical origins" (Mbeki 1998a). The African Renaissance has since come to refer to many things<sup>13</sup> among which are the revival of Africa as a continent, South Africa's foreign policy, the emancipation of African women and youth, democratisation and sustainable development (cf. Liebenberg 1998; Mbeki 1998b).

In contrast to the afri-nationalism of the ANC there is the ethnonationalism of the two factions that seem so far apart, but that do have a lot in common. The IFP and the Afrikaner Right Wing parties such as the Freedom Front (FF) manifestly base their claims on, respectively, their Zulu and Afrikaner support bases.

Right-wing Afrikaner volksstaaters and Inkatha leaders claim  
that their views capture a world-wide mood, a trend which

---

<sup>12</sup> gopher: I/gopher.anc.org.za:70/00/anc/history.

<sup>13</sup> Cf. Vale and Maseko 1998, in which the authors conclude that the concept seems like "an empty vessel"

demands self-determination for ethnic minorities. Why, they ask, should their arguments not be treated as sympathetically as those of other proponents of the primordial unity of cultural groups in South Africa or elsewhere? (Sharp 1996)

Nevertheless, although both parties operate in the realm of identity politics, there are differences between them. The Freedom Front, by its own account, is a party for Afrikaners who believe in self-determination and a volkstaat.<sup>14</sup> The future of the rest of South Africa, it appears, is of no concern to the party. The IFP, in contrast, does aspire to be a national party. Buthelezi deftly combines a discourse of ethnicity, pluralism and federalism in order to reach this aim.<sup>15</sup> The ultimate objective of the party thus seems to be. to obtain the greatest possible part of the national political cake for the IFP, not Zulu autonomy per se.

The third ideology is the heteronationalism that Comaroff put forward as something of South Africa's past. It is, of course, only a few years ago that what is now South Africa was comprised of four homelands and six self-governing territories, that Pretoria hosted the embassies of Venda and Boputhatswana, that there was a Transkeian flag and a Ciskeian army, and that within South Africa four racial groups were each awarded a different kind of citizenship - all under the ideology of separate development. Fortunately, segregation has made place for integration and Apartheid is replaced by multiculturalism. Nevertheless, as we have seen, groups do still form an important element of South African political life. Difference still matters. The all-embracing politics of the past years, the championing of inclusiveness and the negotiated revolution seem to have come up with a political model that, again, strongly resembles Comaroff's heteronationalism: ethnonational identity politics absorbed in a euronationalist conception of political community. A very modern ideological formation it is, this institutionalisation of fragmentation that seems to inform so many national policies on the brink of the twentieth century. But it also poses the inevitable question regarding the difference between the former and the present heteronationalism, between Apartheid and multiculturalism, between the old and the new conception of group rights. In an attempt to answer this question I shall now turn to what was once at the core of segregation policies and is now heralded as the ultimate example of South Africa's multiculturalism: the recognition of traditional leadership and African customary law.

---

<sup>14</sup> <http://www.vrijheidsfront.org.za>. Note that the only other South African language in which the page is available is Zulu.

<sup>15</sup> <http://www.ifp.org.za> contains speeches and an overview of the IFP-policy. See especially 'constitutional affairs'.

## Recognising Traditional Leadership and Customary Law

When in 1996 the National Council of Traditional Leaders was installed, the South African parliament was filled with hundreds of chiefs and their councillors, praise singers and sangomas with their healing powers, sporting leopard skins, ki-*jobkerries* and traditional totems. Observers concluded that there is nowhere where South Africa's multiculturalism, or heteronationalism, is more visible than in the recognition of traditional leadership and customary law. The recognition or enforcement of a traditional code, as Levy calls it, has taken the form of the endorsement of a whole 'traditional system' in which traditional leadership and customary law are considered interdependent and mutually constitutive. As s 211 of the Constitution puts it:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law where that law is applicable, subject to the Constitution and any legislation that deals specifically with customary law.

The following article then rules that national legislation may provide for a role for traditional leadership at the local level, for provincial houses of traditional leaders and for a national council of traditional leaders (s. 212, Act 108/1996; Provincial Houses may also be established by provincial legislation).

In this section I will look at some of the reasons for the recognition of customary law and traditional leadership and at the way in which this recognition has taken place. The next section will then consider, on a more theoretical level, the differences between the recognition under Apartheid and in the post-1994 era.

For state support for 'traditional' administrative and legal systems is not new. Apartheid, also dubbed 'colonialism of a special type' (Zuma 1990), in its ideology leaned heavily on the notion of African people living in separate

homelands, and evoked pastoral pictures of communities living peacefully according to traditional laws and under traditional rulers. In practice, the policies derived from these notions boiled down to the forced removal of millions of people to undersized, overgrazed territories; it led to often arbitrary decisions on who traditionally belonged where and to a primacy of the Afrikaner bureaucracy in defining concepts such as chieftaincy and customary law (Beinart and Dubow 1995; Evans 1997). As in so many other African countries a type of administrative chieftaincy was forcibly construed out of a combination of raw historical material and present political demands, with chiefs acting as a hinge point between state and community (van Rouveroy van Nieuwaal 1996: 64), forced to combine 'traditional' functions such as land allocation and dispute resolution with the implementation of unpopular government policies such as cattle culling and recruiting labour for the mines.

Given this questionable past, why were traditional leaders and customary law recognised in post-Apartheid, democratic South Africa? A variety of reasons can be put forward, amongst which political pragmatism seems the most important. The ANC, at the end of the eighties, sought to form a broad democratic alliance to isolate the NP and - much to the surprise of ANC-activists who had long depicted chiefs as puppets of the bantustan regimes - started to court the chiefs. This was facilitated by the foundation, in 1987, of the Congress of Traditional Leaders of South Africa (Contralesa), an organisation that claimed to support a unitary, non-racial and democratic South Africa. (See for a more detailed overview, van Kessel and Oomen 1997). Furthermore, there were the dynamics of the negotiations. Traditional leaders were heavily represented at the first round of multi-party talks. During these talks the IFP, whose power in rural KwaZulu was largely based upon the chiefs, also fought for strong guarantees. Of additional importance was the absence of other structures in rural areas, forcing the new government to at least grant the chiefs a number of transitional local government functions. There was also the international experience: the 'remarkable resilience' of the chiefs in many other African countries. And finally, of course, the recognition can at least be partly explained by the worldwide frame of mind described above, the trend that seems to actively propagate the legal recognition of cultural diversity.<sup>16</sup>

It was thus that traditional leadership came to be entrenched in the Constitutional Principles, comparable to an alimony arrangement from a former marriage, binding also the drafters of the definitive Constitution. And the drafters of that Constitution, as we have seen, acknowledged the political sensitivity of the issue

---

<sup>16</sup> See for a good discussion of the reasons for the recognition of traditional leadership Bank and Southall 1996.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

and came up with vague and general statements. The Constitutional Court, in certifying the Act, sympathised with this position:

The Constitutional Assembly cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should be developed and be interpreted, to future social evolution, legislative deliberation and constitutional interpretation (*Ex Parte Chairperson of the Constitutional Assembly: in re certification of the amended text of the Constitution of the Republic of South Africa, 1996, 1997* (2) SA 97 CC, para [197] at 834F-GIH).

A result of the vague constitutional arrangements, however, was that their concretisation would give rise to severe political dispute in which the tension between the afronationalism and the ethnonationalism described above is clearly visible. To date, the ANC has not spoken out clearly on the issue of traditional leadership and it appears as though the party accommodates proponents of all possible positions, from strong adherents such as Nelson Mandela, to diplomatic chameleons such as Thabo Mbeki and fervent opponents such as Minister Pallo Jordan.<sup>17</sup> As the 1999 elections drew nearer, the ANC politicians seemed more and more hesitant to take a stance against traditional leadership, as this could cause traditional leaders, and their subjects, to break ranks and join the IFP or the new United Democratic Movement (UDM). The government decided to first commission a Status Quo Report on the present position of traditional leadership, and only afterwards venture into the tricky field of policy formulation. The main propagator of the interests of the chiefs is the above-mentioned Contralesa, that has urged the case for traditional leaders to be primary agents of local government, against what the chiefs consider to be the eurocentric, urban-elitist position of policy-makers (Holomisa 1996). They find a strong opponent in for instance the South African National Civic Organisation (SANCO) that holds that traditional leadership is undemocratic, prone to corruption and patriarchal, and that the institution should be replaced by democratically elected bodies as soon as possible (Houston and Fikeni 1996).

But, although the reasons for recognising chieftaincy might be 'post-Apartheid', the way in which the institution takes shape is strongly determined by the past.

---

<sup>17</sup> The ANC did adopt a resolution on traditional leadership at its 50th annual conference in Mafikeng in December 1997, but this was mostly an overview of issues to be resolved

Part of the constitutional arrangements made in 1993 provided that old legislation would, subject to the Constitution, continue in force (s. 229, Act 200/1993).<sup>18</sup> Thus, Acts determining the position of traditional leadership and customary law such as the Black Administration Act of 1927 and the Black Authorities Act, no 68 of 1951, continue to apply, even if supplemented with new legislation.

What, now, are the subjects that this new legislation deals with and that affect the position of the groups that we are concerned with here, the 'traditional communities'? The main issues in the recent political, parliamentary and legal debate are the position of traditional leaders in land tenure, local government and customary dispute resolution. In addition, the remuneration and the authenticity of chiefs are subject to discussion.

It is not surprising that access to land is one of the most important elements in the debate over the future of traditional leadership and customary law. By far the largest part of the land in the former homelands, which in themselves cover about thirteen percent of the South African territory, is communal property. Traditional leaders are still responsible for the allocation of this land. Here the position of the chiefs does not differ much from that of the leaders of 'indigenous communities' in other parts of the world. As one traditional leader puts it:

The essential feature of traditional communities is self-administration of land assigned by the community, via the action of traditional leadership, to each of its members to meet his or her needs (Mdletshe 1998).

However, opponents point out how easy it is for chiefs to abuse this function. These adversaries, surprisingly, do not propagate a substitution of communal tenure by individual titles, but a democratisation of this communal property.<sup>19</sup> The Communal Property Associations Act (Act 28/1996), introduced by the Department of Land Affairs in 1996, for instance provides for the allocation of communal land by a democratically elected board. The same department also considers the

---

<sup>18</sup> The Constitutional Court can determine the constitutionality of Acts, but only does so in specific cases brought before it.

<sup>19</sup> The reason behind the hesitation in introducing freehold titles in the 'communal areas' might well be the fear that holders of these titles will immediately borrow on their security, leading to massive expropriations when they are unable to pay back their mortgages. This 'Kenyan scenario' is to be avoided

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

possibility of a family title to land, or the replacement of tribal ownership by other forms of group ownership (Department of Land Affairs 1997: 3 1-33). It is needless to say that these attempts have been severely criticised by the traditional leaders.

The possibility to dispose of land is also of vital importance in the relation between traditional leaders and the recently installed, elected local government. Before 1994, the traditional authorities were the only structures of local government in the homelands. In the words of Mamdani:

The authority of the chief thus fused in a single person all moments of power: judicial, legislative, executive, and administrative. This authority was like a clenched fist, because the chief stood at the intersection of the market economy and the non-market one. (Mamdani 1996: 23)

All this ended with the introduction of ‘wall-to-wall’ local government throughout South Africa. The present situation is one of an overlap of functions between the traditional authorities, who still legally have a variety of administrative functions, and the elected local councils, who are responsible for issues such as democratic government, social and economic development and the provision of services (s. 152, Act 108/1996). This overlap is problematic, as is the present legislation based on the mixing of the two systems of government (Ntsebeza 1998). For instance, the constitutional provision granting traditional leaders the right *ex officio* to sit in elected local councils (s. 182 Act 200/1993, s. 26(1 )(b) of the Transitional Arrangements Act, 108/1996) has been boycotted by chiefs as well as councillors. A similar rule, stating that traditional leaders can make up a maximum of ten percent of rural councils (amendment VA to the Local Government Transition Act no 209/1993), has in some instances led to the creation of councils with hundreds of members.<sup>20</sup> The most recent solution, to come into the effect after the November 2000 local government elections, is that in which “traditional authorities can participate in the proceedings of the council” subject to the condition - again - that they do not form more than 10% of that council (s. 81(2)(b) Municipal Structures Act 117/1998). The Act assigns to the provincial MEC (Member of the Executive Committee) responsible for Local Government the right to determine the details of the mode of participation by traditional leaders. Generally politicians shy away from incorporating this sensitive issue in discussions on the future of local government. The White Paper

---

<sup>20</sup> These enormous councils were created in e.g. KwaZulu/Natal and the Eastern Cape.

on Local Government, for instance only restates the present situation, acknowledges its problematic character and leaves actual decisions to a future White Paper on Traditional Leadership (Ministry for Provincial Affairs and Constitutional Development 1998: 75-78).

There has also been little change in the recognition of the customary courts. The traditional leaders are still responsible for settling disputes in their areas (e.g. under s. 20 Black Administration Act 38/1927). In a Discussion Paper on Traditional Courts and the Judicial Functions of Traditional Leaders the South African Law Commission proposes that these traditional courts should be retained in the areas where they already exist and that they should be regarded as courts of law and given the status and respect of courts of law. Traditional leaders and headmen should preside over these courts. (South African Law Commission 1998). An important step in bringing written customary law into line with the constitution has been the adoption of the Customary Marriages Act (120/98) which gave customary marriages legal recognition and thus abolished outdated provisions like s.11(3) of the Black Administration Act (38/1927). This proclaimed that a black woman who was a partner in a customary union “shall be deemed to be a minor and her husband shall be deemed to be a guardian”.

The remuneration of traditional leaders is another point of controversy. An issue that came up shortly after the 1994 elections was: who was to pay the traditional leaders? The subject turned into a true quest for patronage between the ANC, with its national majority, and the IFP with its majority in KwaZulu/Natal. Although the Interim Constitution declared traditional authority to be a function of provincial competence, the national government adopted an Act on the remuneration of traditional authorities in 1995 (Remuneration of Traditional Leaders Act 29/1995). The KwaZulu/Natal provincial government responded by re-enacting an existing law with a new section prohibiting traditional leaders from accepting payments from the national government (KwaZulu-Natal Amaithosi and Iziphankanyiswa Amendment Bill **1995**).<sup>21</sup> Ultimately traditional leadership was declared to be a shared competence of provincial and national authority in the definitive Constitution, enabling the national government to keep control over this sensitive issue. A subsequent question was of course the height of the salaries of

---

<sup>21</sup> The Constitutional Court ruled this bill to be in line with the Interim Constitution in: *Ex parte speaker of the KwaZulu-Natal provincial legislature: in re Kwazulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995 / Ex parte speaker of the KwaZulu-Natal provincial legislature: in re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995*, 1996 (4) SA 653 CC

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

traditional leaders. Following a report by the Steyn Commission, the government has now decided on a standardisation of salaries for Kings and Chiefs. Chiefs, for instance, will earn R 7,000 per month. After a protracted national debate, it has also been decided that traditional leaders are public office bearers, with the same fringe benefits as other officials (Remuneration of Public Office Bearers Act 20/1998).

Finally, the authenticity of traditional leaders is subject to ongoing debate.

When the National Party government was in power, it was not uncommon for government officials to play 'king-maker', influencing the succession of traditional leaders, particularly in politically sensitive areas, as a means to control rural politics (Edmunds 1997).

Thus, many of South Africa's 800 traditional leaders were created by the bureaucracy, in order to suit the Apartheid need for co-operative chieftaincies. One of the aims of the White Paper on Traditional Leadership is therefore to perform a national audit of traditional leaders, tracing genealogies and establishing the historical legitimacy of the present chieftaincies (Ministry for Provincial Affairs and Constitutional Development 1998: 76). The auditors will have to work through hundreds of succession disputes in establishing genealogical legitimacy. This is a practically impossible task as tampering with successors for political reasons is not really something that was invented under Apartheid.

In conclusion it can be said that many 'traditional' structures have continued to exist for other reasons than merely the constitutional dedication to multiculturalism. The absence of viable alternatives is one of those reasons, as are the political clout of traditional leaders and the belief that the rural communities concerned have other needs than those of the rest of the country. Although there is a clear tendency in land and law reform, not to stimulate individualism, but nevertheless to democratise communalism, it seems as though little has changed in the practice of law and administration in the rural, 'traditional' communities. The recognition of traditional leadership and customary law, presented as a prime example of South Africa's multiculturalism, thus strongly resembles the recognition of these institutions under, and as a constituting element in, Apartheid. In the following section I will further elaborate on this paradox, and examine what may be the differences between the recognition of group rights under Apartheid and in the democratic South Africa, and to what extent these differences are visible in reality.

### Modern Multiculturalism or a Prolongation of Past Policies?

Now that we have considered the general ideology behind the rise of group rights, the way in which group rights have been embraced and recognised in post-Apartheid South Africa and the practicalities of the recognition of those group rights involving traditional leadership and customary law, we can return to our central question: should the recognition of this traditional legal code be considered as part of the essentially modern trend to legally recognise cultural diversity, or should it rather be seen as a prolongation of past, discriminatory policies? In order to come to such an assessment I will here make a distinction between the constituting elements of the ideologies underpinning the two types of recognition (see Table 1). This enables us to assess, in respect of each element, the modernity, or the continuity of South African practice.

First, a few remarks on the vast differences between the ideologies underpinning the recognition of group rights. Apartheid was based on the belief that each race and nation has a unique, divinely ordained destiny and cultural contribution to make to the world, and that they should be kept apart so that each can develop to the full along its own inherent lines (Omer-Cooper 1996). By contrast, multiculturalism, or heteronationalism, is all about accommodating diversity in a society with equal citizens. The aim of Apartheid was inequality, the granting of different rights to different categories of citizens, and - although this aim was never stated as such - the oppression of a large part of the population. The infamous slogan 'no more black South Africans' signified a policy in which the majority of the population was destined to live in separate homelands, under separate laws. Multiculturalism, on the other hand, seeks to emancipate and empower citizens to achieve equality, especially for groups that were discriminated against in the past. Whilst Apartheid thus entails a negative approach, multiculturalism constitutes a positive approach to groups. With the arrival of the 'new South Africa' the bantustans and the traditional authority areas have been reintegrated within the South African territory, but there are still enormous demographic, social and economic differences between former 'white' and former 'black' areas. Although the new state ideology may be that of multiculturalism, the differences engraved by Apartheid are still very much the everyday reality of the country.

There is also a difference in the basis of these ideologies. Apartheid, as did many comparable forms of colonial administration, relied heavily on a system of indirect rule. Mamdani, in his analysis of the bifurcated state that is the institutional legacy of the colonial and Apartheid system, emphasises the 'containerisation' of Africans (Mamdani 1996: 22). Through their statesupported chiefs they were governed as

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

	Under Apartheid	After <b>1994</b>
Ideology	Apartheid	Multiculturalism
Aim of the recognition	Oppression Legal inequality	Emancipation Achievement of equality
Basis	Community	Individuals as members of a community
Result of recognition	Containerisation; communities central in ideology	More meaningful individual identity through recognition of group membership
Internal control within groups	Traditional rule	Democracy
Decision on membership of a group	Predetermination. Ascription by politics, bureaucracy and traditional leaders as 'gate-keepers'.	Self-determination. Individual identification with 'exit-option'
Relation between groups	Separate development	Mixing; possibility of multiple identities
Dichotomies in discourse	Traditional - modern Black - white	Rural - urban African - European Decentralisation - centralisation
Ethnicity	Constituting element	Unintentional side-effect
Determination of limits of recognition	Repugnancy clause; if contrary to natural justice or public policy	Unconstitutionality; application subject to the constitution

*Table 1: Varying ideologies behind the recognition of traditional leadership and customary law*

tribesmen, members of communities, being made into subjects instead citizens (Mamdani 1996). Individuals were considered, first and foremost, as members of communities. By contrast, the ideology of multiculturalism as formulated by for instance Kymlicka departs from an ideology of individual rights, and argues that it is by recognising group membership in addition to individual rights that this individual identity becomes more meaningful (Kymlicka 1995). Turning to present-day South Africa the question arises whether people living in 'traditional communities' are seen as individuals or as community members. On this point Mamdani argues that true democratisation requires the detribalisation of customary power, consisting also of the abolition of administratively driven customary justice (Mamdani 1996: 25). In this view, the mere continued existence of institutions such as communal land tenure and an administratively defined chieftaincy with strong powers constitutes continued containerisation.

A lot depends, of course, on whether individuals are free to decide if they want to belong to a group. Who determines group membership? Under Apartheid, as we have seen, it was to some extent the politicians but to a greater degree the bureaucrats (largely Afrikaner) that possessed this power of definition. The 'invented traditions' they presented were not created entirely in a top-down manner, with no bearing on reality, but dialogically, in discourse with the tribes concerned (Chanock 1985). Or rather, with the people speaking on behalf of the tribes - often the traditional leaders - who would present that vision of traditional norms and customs that best suited their interests. Ideally, multiculturalism substitutes for this predetermination, self-determination, allowing individuals to decide whether they wish to be considered members of a certain group, and what that membership entails. Women who do not agree with the customary laws of the community that they would 'traditionally' belong to, for instance, thus have an 'exit-option'. Which picture, now, best suits the present position of members of South African traditional communities? This calls for a nuanced answer. On the one hand, democratisation has brought a great deal of freedom for people living in rural communities: they can now freely move to the cities to look for work and in doing so possess the same rights as other citizens. But what about the people who choose to remain in their village? They are still governed by a legal and administrative code based on "culture, tribe and chiefdom" (Bennett 1991: 34). Moreover, in formulating changes to these codes consultation often only takes place with 'gate-keepers' as the traditional leaders.<sup>22</sup> Just as was the case in the

---

<sup>22</sup> The policy formulation processes in fields such as local government, the future position of traditional leadership and the future of customary law rely heavily on the input by individual traditional leaders, the provincial Houses of Traditional Leaders, their National Council, and organisations such as Contralesa.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

past, they are the ones to formulate the concerns of their communities, stating for instance that “any adult African person who has grown up in an African community knows that the traditional leader is central to the socio-economic political order of the community” (Holornisa 1998).<sup>23</sup>

Furthermore, bureaucrats and other officials are still in a position to define tradition. It is the day-to-day contact between traditional leaders, government anthropologists and officials of the various Departments of Traditional Affairs that determines which traditional leader gets appointed, how many councillors the leader gets paid for having, how the ‘tribal levies’ should be administered and many other defining characteristics. In addition, magistrates and other judges also possess this power of definition. That this is not merely a remnant of the past but something that might well be inherent to the recognition of a traditional code by a dominant legal and administrative system becomes clear in the discussion on the future of customary marriages. In a discussion paper on the topic, the South African Law Commission suggested that, if spouses did not indicate whether they wanted a customary or a civil marriage “a court may apply the law that is consonant with their cultural orientation (as indicated by their lifestyles and other relevant factors) and with the rites and customs governing their marriage” (South African Law Commission 1997: iv).<sup>24</sup> Also, in deciding what are the best interests of a child, “cultural expectations may be accommodated by courts” (South African Law Commission 1997: 29). Thus there remains a degree of ascription and predetermination in the post-Apartheid recognition of customary law, with important legal consequences for individual citizens.

What definitely has changed is the debate on the subject. Whilst Apartheid discourse relied heavily on such notions as traditional or tribal society these terms appear to be discarded for more politically correct forms of rhetoric. Advocates of ‘traditional’ institutions now point at the urban bias of policy makers. The director of the Council for African Thought, for instance, states that

the entire process of democratization and modernization, so far, has been a ruthless imposition upon rural people of the values and cultures of urban elites. Modern history has witnessed nothing less than a ‘holocaust’ conducted by city-based political

---

<sup>23</sup> These claims contrast with the fact that many African people live in urban communities, and that there were widespread revolts against chiefs in e.g. the Eastern Cape and the Northern Province in the 1980s.

<sup>24</sup> This report resulted in the Recognition of Customary Marriages Bill 110/1998.

parties and bureaucracies against traditional values and cultures developed by preindustrial communities. (Vilakazi 1998: 2)

Africanism, in various guises, is another ideological tool in the propagation of traditional rule. Although Thabo Mbeki never mentioned that his African Renaissance (mentioned above) was about traditional leadership, many proponents of chieftaincy have interpreted it in that way (e.g. Maphalala 1998). Finally, those wishing a strong position for traditional leadership find fertile ground in the recent debate on decentralisation (e.g. Sindane 1997; for an overview of the discussion on decentralisation see Frerks and Otto 1996).

Comparable differences can be found when looking at the position of ethnicity in the two ideologies of group rights discussed here. Apartheid was firmly based on the notion of distinctive ethnic - at the time the denomination was still 'racial' - groups. At present the parties discussing the future of traditional leadership tumble over themselves to emphasise the non-ethnic, territorial basis of the institution. Although not wishing to enter the complicated debate on ethnicity, identity and the way in which these are constituted, one must suggest that there can be doubt about the possibility of recognising traditional leadership without this having implications in the constitution of ethnic identity. If traditional claims are rewarded by the government, in one way or another, this is bound to induce people to phrase all sorts of claims as traditional, possibly leading to a form of retribalisation. Categories have consequences, or alternatively "in representing the interests of a group, law may simultaneously construct the subject holding those interests" (Espeland 1994).

The way in which the recognition of traditional leadership and customary law are limited might be the best illustration of all that has been described above. Here two systems, drawn from two different ideologies, the one oppressive and the other emancipatory, still coexist. The Law of Evidence Amendment Act still contains the South African offspring of the repugnancy proviso that was so notorious under anglophone colonial rule, providing that customary law may not be applied if it is contrary to natural justice or public policy (s. 1(1), Act 45/1988). In addition, as we have seen, customary law and traditional leadership are subjected to the constitution. These institutions, one might conclude, seem to have one foot in the old and one in the new South Africa. This is not only because the new South Africa dawned so recently but also because of general problems of predetermination and inclusion which come with the recognition of a traditional code by the dominant system, and because of the specific images of rural communities held by policy makers.

## Conclusion

The aim of this contribution has been to investigate the modernity of the recognition of group rights in South Africa. The fact that South Africa, of all countries, has opted to recognise certain group rights should illustrate the potential of these rights. To what extent, I wondered, is the enthusiasm in legal and political philosophy about group rights as a means to accommodate diversity supported by the South African experience. In conclusion, two sobering observations are in place.

In the first place it has become clear that the - limited - recognition of group rights in South Africa was not inspired by ideological reasons or a belief by the dominant parties in the moral justness of these rights. The rights were introduced out of political necessity, and arose within the specific dynamics of the negotiations as the only possible buoys to save a rapidly sinking process. Balancing the ANC's afronationalism with the ethnonationalism of the IFP and other right-wing Afrikaner parties, they were the only way to ensure political stability. The ANC, as the country's majority party, seems to consider these rights merely as a temporary means to get rid of the cleavages of the past, to be done away with in a future unitary South Africa. This also explains why little concretisation of the constitutional provisions on group rights has so far taken place

A second observation concerns the novelty of the way in which group rights were recognised in post-Apartheid South Africa. In theory, there are big differences between the ideology of Apartheid and that of multiculturalism, which here has been equated with heteronationalism and the recognition of group rights. Apartheid was based on the singling out of fixed categories of racial groups in society, and on granting these groups different sets of rights. Multiculturalism ideally offers citizens the possibility of achieving a more meaningful identity through an optional state recognition of their group membership. Nevertheless, the specific case of the recognition of traditional leadership and customary law in South Africa demonstrates that state recognition of plurality remains problematic, and can easily lead to legal inequality, exacerbation of ethnicity and the dwindling of individual identity. **It** is precisely because of its links with the past that this case points to some of the dangers of assigning rights to fixed categories of so-called cultural groups, with the power of definition in the hands of the bureaucracy and the magistrature. These dangers, of course, are not limited to this particular case. **In** the recognition of group rights it often seems as if emancipation and oppression are two sides of the same coin.

## References

ABBINK, Jon

1997 'Ethnicity and constitutionalism in contemporary Ethiopia.' *Journal of African Law* 41: 159-174.

ANC (African National Congress)

1997 'Nation-Formation and Nation Building: The National Question in South Africa', discussion document presented at the ANC's 50th National Conference. <http://www.anc.org.za/ancdocs/discussion/nation.htm>.

APPADURAI, A.

1996 *Modernity at Large: Cultural Dimensions of Globalization*. Minneapolis: University of Minnesota Press.

BANK Leslie and Roger SOUTHALL

1996 'Traditional leaders in South Africa's new democracy.' 37-38: 407-430.

BEINART, William and Saul DUBOW (eds.)

1995 *Segregation and Apartheid in Twentieth-Century South Africa*. London: Routledge.

BENNETT, Tom

1991 *A Sourcebook of African Customary Law for Southern Africa*. Cape Town: Juta & Co.

BERTING, J.

1990 *Human Rights in a Pluralist World - Individuals and Collectivities*. Westport Connecticut, The Hague and Middelburg: Meckler, Netherlands Commission for Unesco, and Roosevelt Study Center.

CHANOCK, Martin

1985 *Custom and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.

CHATTERJEE, P.

1993 *The Nation and its Fragments: Colonial and Postcolonial Histories*. Princeton: Princeton University Press.

COMAROFF, John L.

1996 'Ethnicity, Nationalism and the Politics of Difference in an Age of Revolution.' Pp. 162-183 in Edwin N. Wilmsen and Patrick McAllister (eds.), *The Politics of Difference: Ethnic Premises in a World of Power*. Chicago and London: University of Chicago Press.

COMAROFF, John L. and Jean COMAROFF

1997 *Of Revelation and Revolution: The Dialectics of Modernity on a South African Frontier*, Vol. II. Chicago: The University of Chicago Press.

CURRIE, Iain

1988 'Culture, language and education.' Pp. 349-369 in Johan De Waal and Iain Currie (eds.), *Bill of Rights Handbook*. Kenwyn: Juta & Co.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

DEPARTMENT OF LAND AFFAIRS

1997 *White Paper on South African Land Policy*. Pretoria.

EDMUNDS, Marion

1997 'Government to dethrone NP's "kings".' *Weekly Mail and Guardian*  
February 21: 18.

ESPELAND, Wendy

1994 'Legally mediated identity: the national environmental policy act and the  
bureaucratic construction of interests.' *Law & Society Review* 28: 1149.

EVANS, Ivan

1997 *Bureaucracy and Race: Native Administration in South Africa*. Berkeley:  
University of California Press.

FAURE, Murray and Jan-Erik LANE (eds)

1996 *South Africa: Designing New Political Institutions*. London: Sage  
Publications.

FRANCK, Thomas M.

1996 'Clan and superclan: loyalty, identity and community in law and  
practice.' *American Journal of International Law* 90: 362.

FRERKS, Georg and Jan Michiel OTTO

1996 *Decentralization and Development: A Review of Development  
Administration Literature: in Commemoration of Dr Haile K. Asmerom*.  
Leiden: Van Vollenhoven Institute.

GRIFFITHS, John

1986 'What is legal pluralism?' *Journal of Legal Pluralism* 24: 1-55.

HOLOMISA, Pathekile

1996 'Traditional leaders.' Pp. 125-127 in Konrad Adenauer Stiftung (ed.),  
*Aspects of the Debate on the Draft of the New South African Constitution  
Dated 22 April 1996*. Johannesburg: Konrad Adenauer Stiftung.

1998 'The Constitution and Traditional Leaders', unpublished paper presented  
at 'Good governance at the local level: traditional leaders and rural local  
councillors conference', East London, 10-11 March.

HOUSTON, Gregory and Somadoda FIKENI

1996 'Constitutional development and the issue of traditional leadership in rural  
local government in South Africa.' P. 66 in Konrad Adenauer Stiftung  
(ed.), *Aspects of the Debate on the Draft of the New South African  
Constitution Dated 22 April 1996*. Johannesburg: Konrad Adenauer  
Stiftung.

JOHNSTON, Darlene M.

1995 'Native rights as collective rights: a question of group self- preservation.'  
Pp. 179-201 in Will Kymlicka (ed.).

KESSEL, Ineke van and Barbara OOMEN

1997 'One Chief, One Vote: the revival of traditional authorities in post-Apartheid South Africa.' *African Affairs* 96: 561-585.

KYMLICKA, Will

1995 *States, Nations and Cultures*, Assen: Van Gorcum.

KYMLICKA, Will (ed.)

1995 *The Rights of Minority Cultures*. Oxford: Oxford University Press.

LEVY, Jacob T.

1997 'Classifying Cultural Rights.' Pp. 22-66 in Will Kymlicka and I. Shapiro (eds), *Ethnicity and Group Rights*. New York: New York University Press.

LIEBENBERG, Ian

1998 'The African Renaissance: myth, vital lie, or mobilising tool?' *African Security Review* 7: 42-50.

MAMDANI, Mahmood

1996 *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

MAPHALALA, Jabulani

1998 'Amalothosi (renamed chiefs), the traditional leaders and government: a historical perspective', unpublished paper presented at 'Good governance at the local level: traditional leaders and rural local councillors conference', East London, 10-11 March.

MARQUARDT, S.

1995 'International Law and Indigenous Peoples.' *International Journal on Group Rights* 3: 48-76.

MBEKI, Thabo

1998a 'Statement on behalf of the African National Congress, on the occasion of the adoption by the Constitutional Assembly of the Republic of South Africa Constitution Bill 1996.' Pp. 8-13 in *A Profile of Thabo Mbeki*. The Hague: Embassy of South Africa.

1998b 'The African Renaissance, South Africa and the rest of the world', Unpublished address at the United Nations University in Tokyo.

MDLETSHI, B.N.

1998 'What is the fate of "tribal land"?' *Natal Witness* February 20: 2.

MINISTRY FOR PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT

1998 *White Paper on Local Government*. Pretoria.

MTIMKULU, Philip

1996 'Stiff test for government and ANC over Amakhosi and weapons.' *Perspectives*: March.

GROUP RIGHTS IN POST-APARTHEID SOUTH AFRICA  
Barbara Oomen

---

- NTSEBEZA, Lungisile  
1998 'Rural local government in post-apartheid South Africa.' *African Sociological Review* 2: 153-164.
- ODHIAMBO, Atieno  
1997 'African perspectives on cultural diversity and multiculturalism.' *Journal of Asian and African Studies* 32: 197.
- OMER-COOPER, J.D.  
1996 'South Africa.' P. 861 in *Africa South of the Sahara*. London: Europa Publications Limited.
- OTTAWAY, Marina  
1993 *South Africa: The Struggle for a New Order*. London: Zed Books.
- PLESSIS, Lourens du  
1997 'Die inhoud, betekenis en enkele implikasies van die handves van regte in die 1996-Grondwet.' *Politikon* June: 5-34.
- ROUVEROY VAN NIEUWAAL, E. Adriaan B. van  
1996 'States and chiefs: are chiefs mere puppets?' *Journal of Legal Pluralism* 37-38: 39-78.
- SANTOS, Boaventura de Sousa  
1992 'State, law and community in the world system: an introduction.' *Social & Legal Studies* 1: 131-142.
- SHARP, John  
1996 'Ethnogenesis and Ethnic Mobilization: A Comparative Perspective on a South African Dilemma.' P. 103 in Edwin N. Wilmsen and Patrick McAllister (eds.), *The Politics of Difference: Ethnic Premises in a World of Power*. Chicago and London: University of Chicago Press.
- SINDANE, Jabu  
1997 'The Future of Traditional Leadership, Ubuntu and Nation-Building.' Pp. 147-162 in Konrad Adenauer Stiftung (ed.), *Traditional Leadership in Southern Africa*. Johannesburg: Konrad Adenauer Stiftung.
- SOUTH AFRICA  
n.d.a *White Paper on the Transformation of the Public Service*, [http://www.polity.org.za/govdocs/white\\_papers/affirmative.html](http://www.polity.org.za/govdocs/white_papers/affirmative.html)  
n.d.b 'Equal Opportunities Bill.' *Government Gazette* 18481.
- SOUTH AFRICAN LAW COMMISSION  
1997 *Discussion Paper 74: Customary Marriages*. Pretoria: South African Law Commission.  
1998 *Discussion Paper 82: Traditional Courts and the Judicial Functions of Traditional Leaders*. Pretoria: South African Law Commission
- TAYLOR, Charles  
1992 *Multiculturalism and 'The Politics of Recognition'*. Princeton: Princeton University Press.

UN

1994 *Draft Universal Declaration on Indigenous Rights*, UN Doc. E/CN.4/SUB.2/1994/2/Add. 1, prepared by the Working Group on Indigenous Populations of the Economic and Social Council of the United Nations. New York: United Nations.

VALE, Peter and Sipho MASEKO

1998 'South Africa and the African Renaissance' *International Affairs* 74: 276.

VILAKAZI, Herbert

1998 'Amakhosi and Modernity', unpublished paper presented at 'Good governance at the local level: traditional leaders and rural local councillors conference', East London, 10-11 March.

WALDMEIER, Patty

1997 *Anatomy of a Miracle: The End of Apartheid and the Birth of a New South Africa*. London: The Penguin Group.

WIJK, David van

1995 'Introduction to the South African Constitution.' Pp. 131-170 in David van Wijk & John Dugard (eds.), *Rights and Constitutionalism: The New South African Legal Order*. Oxford: Clarendon Press. ZUMA, Thando

1990 'The role of the chiefs in the struggle for liberation.' *The African Communist* 121: 65-76.