

Succession to Kingship in the Bapedi Ethnic Group – Cultural Intricacies of Post-conquest South Africa and the Impact of the Constitution

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Abstract

African kingdoms have existed for centuries predating colonialism and continue to be significant despite assertions that they are autocracies. These claims stem from the fact that kings do not ascend to power through Western democratic means such as elections. Democracy, however, exists in African kingdoms, because communities are afforded opportunities to participate in decision-making. Furthermore, African kingships are often accused of patriarchy since women are not always allowed to ascend to royal thrones. This critique of African kingships is rather hypocritical, because Europe is the bedrock of patriarchy, but this is ignored when accusations are levelled at African kingdoms. The biggest problem that kingdoms in South Africa experience today is that they do not enjoy the separate and independent identity that they enjoyed in the past since they are now subject to the Constitution as the supreme law of the land. This state of affairs is problematic as it denies South Africa a decolonial option and does not achieve restorative justice. The move to a constitutional democracy has led to considerable changes in South Africa, such as the dissipation of important roles that African-style courts used to fulfil, and the powers enjoyed by kings may also wane because of a lack of title to sovereignty over their kingdoms. This article discusses the right of succession to kingship in the light of the Bapedi Kingdom succession dispute, where the Commission on Traditional Leadership Disputes and Claims and courts recognised the descendants of Kgosi Sekhukhune as the rightful successors to the Bapedi throne. This ruling was important because the usurpation of the throne through bloodshed, although not common, was recognised as a legitimate way to usurp kingship.

Keywords: kingdom; sovereignty; Bapedi; democracy; Constitution

Introduction

The Traditional Leadership and Governance Framework Amendment Act 41 of 2003 (Framework Act) was promulgated to regulate traditional leadership affairs in order to restore their integrity and legitimacy based on an African value system as determined by customs and practices.¹ This was done in accordance with the objective of chapter 12 of the Constitution of 1996, which recognises traditional leadership.² The Commission on Traditional Leadership Disputes and Claims was established based on the Framework Act. The Commission's functions include investigating and making decisions on traditional leadership disputes concerning entitlements to kingship dating from September 1, 1927. The Commission must solve such disputes by giving effect to the customary law of the communities concerned (s 25). This is an important step in the post-constitutional era considering that under the colonial and apartheid administrations, courts avoided giving effect to community practices and applied common law to disputes to which African customary law should have been applied (Bennett 2004, 68). The Framework Act brought welcome changes in that respect. The changes have further been confirmed by the Constitutional Court judgment that disputes must be resolved based on laws that communities observe.³ Apart from providing for the establishment of the Commission, the Framework Act provides for the duties of traditional leaders, which include supporting municipalities and identifying their needs, facilitating the involvement of communities in development, and ensuring the participation of communities in the development of policy and legislation at the local level.

The President appointed to the Commission persons who demonstrated knowledge of African customary law and carried out their functions objectively (*Bapedi Marota* para 17). One of the key areas where the work of the Commission has been notable is its decision, of its own accord, to investigate the kingship of the Bapedi tribe. It is argued that the right *kgosi* was recognised in line with the customary laws and practices of the Bapedi tribe.

The objective of this article is to critique the role of the traditional leadership institution in a democratic state and during a constitutional dispensation in South Africa. It argues that the decision in the *Bapedi Marota* case was not satisfactory as far as kingship in South Africa is concerned, because under the constitutional dispensation, kings do not enjoy the title to sovereignty since the Constitution is the supreme law of the land. Section 211(1) provides that the institution, status, and role of traditional leadership, according to customary law, are recognised subject to the Constitution (Constitution of the Republic of South Africa, 108 of 1996). Section 211(2) provides that a traditional authority that observes a system of customary law may function subject to any

1 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2015 (3) BCLR 268 (CC) para 15.

2 Section 211 and 212 of the Constitution, Act 106 of 1996.

3 *MM v MN* 2013 4 SA 415 (CC) para 48.

applicable legislation and customs, which includes amendments to, or repeal of that legislation or those customs. Furthermore, section 211(3) states that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The above constitutional provisions highlight the view that kingship, although recognised by the Constitution, does not enjoy the title of sovereignty and that kings can only exercise their roles and functions in affairs falling within their jurisdictions only subject to the Constitution. This is also the reality in situations where traditional leaders have to exercise their typical traditional functions, particularly those involving dispute resolutions, including determining cases of succession to kingship, hence the present *Bapedi Marota* case. This article analyses the role of customary law on succession to kingship in a constitutional democracy with specific reference to customarily recognised Bapedi tradition and practice of usurpation of kingship by bloodshed as it happened in the *Bapedi Marota* case.

First, the significance of African kingship and whether it can exist in a democratic state is examined since kingship is criticised as not being consistent with democracy. Thereafter, the dispute regarding the Bapedi kingship and the findings of the Commission are examined to argue that the right descendants were recognised to ascend to the Bapedi kingship. The study engages an analysis of the case that dealt with the Bapedi royal dispute and how it was resolved.

In the final analysis, this article argues that taking disputes that relate to African kingship to Western-style courts is problematic, because it denies South Africa a decolonial option. The Bapedi royal dispute was resolved in a Western-style court, where the Constitutional Court concluded that succession to traditional leadership through bloodshed was legitimate in the Bapedi custom (*Bapedi Marota* para 15). The matter was thus not taken to a traditional court to be resolved in terms of indigenous law and, therefore, as stated above, a decolonial opportunity was denied.

Significance of Kingship

The history of kingship can be traced back to pre-colonial societies where African customary law was first established as an immemorial system of law that evolved to meet the socio-economic changes of communities (Bekker 1991, 11). Historically, kings had important duties and responsibilities that included attending to the social, economic, and moral needs of communities. They ensured that their people had land for agriculture, which ensured the survival of communities and secured their socio-economic interests. A *kgosi* (king) is significant in African communities. Before the arrival of the colonists, every community had a *kgosi* who was at its helm and ruled based on the needs of that community. He was a *kgosi* because there were people to rule, that is, *kgosi ke kgosi ka batho* (one is only a king through the will of the people). The king was the most senior leader in the community and as such, was respected by all. With the support of other leaders in the community, he served as the mouthpiece of

the entire kingdom (Pereis 1981, 32). The duties and responsibilities of the king were clearly defined, and a hierarchy existed where the king and his *indunas* were at the top and the council comprised headmen or kraal heads (Ayittey 1991, 44). Traditional African law functioned on the premise of finding consensus in all disputes. The main objective was to bring restorative justice, conciliation, and mediation. This approach served the interests of African communities so well that they were able to withstand threats to their continued existence. For centuries, Africans were happy with the system of kingship, and it was the only form of authority they had until the emergence of colonialism.

Title to territory was important to succession. This title implies that land is significant and necessary to kingship. One of the roles of a *kgosi* was to allocate and distribute land to his subjects (Ramose 2007, 312). A *kgosi* passed the land to his subjects to further their economic activities. Kings believed that land is an important aspect of a person's identity. As evident in South Africa, the land issue is dominant in the current political dialogue. This is because a person without land can be regarded as not having an identity that his ancestors can recognise (Biwul 2014, 18). The land is not only important for agricultural purposes, but serves other important roles for the indigenous people such as a cultural role. Manthwa and Ntsoane argue as follows:

Cultural and religious beliefs demand that a person be buried in his or her ancestral land because of the attachment to that land. Land in Africa is important because it gives a person a stamp of identity, belonging, and recognition in the society. African law values group solidarity and communal life above anything and reconciles this with burial traditions to keep the living and the dead in the land where relations can be protected. Failure to do this is likely to be met with rejection by ancestors, family, and the community. If a person is buried in a foreign land, it can break ties and impact the lineage and future clan of that person. This is seen as an unforgivable act that justifies punishment (Manthwa and Ntsoane 2020, 615).

Kingship and title to territory went hand-in-hand (Ramose 2007, 323). Based on the needs of a community, each family was led by a family head as part of the king's council. This practice spread to various clans. Clans formed a village that had its council; clan heads were led by a headman (Peires 1981, 83). A *kgosi* assumed this position through inheritance from his ascendants with whom he shared a common ancestor. Succession to traditional leadership was also connected to ancestral acquiescence, and leaders were born into their positions (Bennett 1994, 123). This applies to the *Bapedi Marota* decision where Kgosi Sekhukhune and Kgosi Mampuru were the sons of Kgosi Sekwati I, meaning they could ascend to the position of traditional leadership by inheritance (para 26). An important component of the role of traditional leadership was that one ought to be accepted by the ancestors since ancestral acquiescence was important to societies and created a link between the living and the dead (Bennett 2004, 104). A *kgosi* had the power to pronounce on all political decisions that were made by an assembly or a village forum, and judicial pronouncements of the *lekgotla*, which consisted of all headmen and councillors. All important issues relating

to the economy, education, law and public administration, agriculture, and religion were addressed in the best interests of the community. The practice of ascension to traditional leadership had several requirements, which included that a *kgosi*'s eldest son should be the one to succeed him. However, there are exceptions to this requirement as some ethnic groups do not require that the successor be the eldest son; even women can ascend to the throne. The eldest son could, however, be disqualified if he was not mentally fit to take the throne (Ayittey 1991, 43). Moreover, a *kgosi*'s eldest son could only become king if he was not prohibited from succession or if he was not guilty of misconduct.

The colonists questioned the roles and responsibilities of kings and viewed them as barbaric and uncivilised and intended to replace them with Western democratic processes (Nicholson 2003, 3). This caused conflict since many Africans resisted the imposition of democratic processes and favoured their ways even though they were regarded as barbaric (Ndimma 2003, 328). The mission of the colonists, in general, was to disregard established systems and to replace them with their own, thereby wiping out the epistemology and way of life of Africans (Ramose 2007, 314). Regrettably, the institution of kingship has been under reform since the colonial era and it has been subjected to relentless criticism. As stated before, one of the criticisms levelled against the institution is that it is not consistent with democracy. However, as will be illustrated below, this criticism is a distortion of the institution.

Democracy and Kingship

The people of South Africa knew democracy long before the colonists descended on Africa. The Zulu tribe, for example, has always resolved its disputes and conflicts through its democratic means; democracy in any form is merely a procedure (Ramose 2007, 326). They consent to be guided in pursuit of a common individual and collective goal (Ramose 2007, 326). The people of KwaZulu-Natal have shown remarkable resistance to preserving their kingship and kingdom. In South Africa today, they remain the only ethnic group that has kept the name of their kingdom, KwaZulu-Natal, which they had before the colonial era (Ramose 2007, 324). The role of traditional leaders has always been confined to customs and culture, thereby enabling them to define, shape, and ensure economic prosperity for the community (Koenane 2017, 4). The significance of traditional leadership was diminished by the arrival of the colonists who forced African leaders to become enemies of their people. These leaders turned out to be extensions of the colonial framework.

The importance of a king can be highlighted with the name *inkosi* in the Zulu language. An *inkosi* is a king. This classification remains important to Africans and communities. Before contact with colonialism, each community had its own traditional leader or king who always ensured that whatever he did was for the greater good of the community that placed him in the position of authority. The king was able to occupy this position because of the grace of the community. There could never be a king without the community (Ramose 2007, 312). Prince Mashele points out that "there was considerable

pressure for the abolition of traditional leadership, yet there were those who cautioned against the exclusion of traditional leaders from modern systems of governance with the dawn of the constitutional dispensation” (Mashele 2004, 353). This seemed a point of debate in the multi-party negotiations to end apartheid in South Africa in 1992 as some within the African National Congress (ANC) argued in favour of finding a meaningful role for traditional leadership. Jackson points out that the recognition of the role and legitimacy of traditional leaders in the constitutional era came as a consequence of attempting to correct a historical injustice, where under apartheid and colonialism this institution was ignored by law reform and treated as uncivilised (Jackson et al. 2009, 47).

Africans had always adopted a participatory democracy in that village forums provided space for ordinary men and women to voice their views without fear of the authorities. Moreover, there were chiefdoms where various villages had the space to speak about community matters. A chiefdom was also headed by a *kgosi*, who is today referred to as a traditional leader. More importantly, decisions were taken based on consensus. Therefore, people agreed to have a king as their leader (Ajaji 2002, 3–8). The claim that kingship is contrary to democracy is wide off the mark, because traditional South African communities adhered to the principles of democracy long before colonialism and they were able to resolve disputes using traditional democratic means as practised and recognised by those communities. The meaning of democracy in traditional African societies is different from that of the West. In African societies, it was about upholding the interests of the community (Ramose 2007, 326).

The institution of traditional leadership is often criticised for being autocratic. The hypocrisy is clear in the criticism of kingdoms when one considers that kingdoms also existed in Western societies, where they occupied pagan kingdoms, principalities, and lordships and dispossessed African people of their land and personal property. This was at a time when slavery – as a colonial creation – was at its peak (Mudimbe 1985, 315). The criticism against kingship in Africa as a danger to modern democracy carries elements of hypocrisy. This is mainly because the critics deliberately ignore the fact that in other jurisdictions outside Africa, such as the United Kingdom, Spain, and the Netherlands, monarchies and royal families exist, and in these jurisdictions, ordinary people could not directly participate in enacting legislation (Dodo 2013, 31). The view is that the colonists did not come to Africa to civilise the continent, but their main intention was to steal Africa’s riches (Pakenham 1991).

Succession to traditional leadership has also been criticised for its lack of gender equality. Critics argue that the institution of kingship is autocratic because it does not allow women to ascend to power (Mireku 2010, 522). Royal succession is often associated with patriarchy (Nkasawe 2009). The foundation of this view is that the voices of women are silenced and they are not allowed to participate or succeed to thrones (Rautenbach 2018, 25). It is no surprise that attention in the post-conquest era has focused on achieving gender equality as evidenced in cases such as *Shilubana v*

Nwamitwa 2009 (2) SA 66 (CC), where the Constitutional Court of South Africa approved the resolution of a royal house to appoint a woman as a *kgosi* (king) although this was traditionally not a recognised position. This decision has been celebrated as a step towards the reform of the institution of kingship. Following this ruling, communities and other judicial pronouncements have recognised females as traditional leaders, which is significant because jurisprudence has often been accused of being a patriarchal arrangement.⁴

However, gender-defined roles in African customary law were not a reflection of manhood, but were complementary to suit the interests of the societies of yesteryear (Diala and Kangwa 2019, 198). More importantly, the depiction of African customary law as patriarchal is a colonial distortion of African law since women have always played significant roles in African law, succeeding to important roles such as queen-mother or mother of the family (Mahao 2010, 325). The key to the appointment of a person to a throne is not gender, but whether a particular person has the character traits expected in a leader of the community (Diala and Kangwa 2019, 198). Another important aspect in the succession to a throne is that, unlike in Europe, succession in an African society is closely linked with ancestral acquiescence – a man does not become a king unless he shares a common ancestor with his ascendants, and he should be accepted by ancestors to serve. Africans are often cognisant of this and do not risk the wrath of their ancestors by adopting foreign democratic elements that do not further an African value system.

In the African culture, a king's ancestry is important for him to be able to execute his duties. If the traditional system is changed by appointing someone as king when the ancestors do not approve of that person's appointment, the kingship could be harmed. Changes must be communicated and accepted by the ancestors (Manthwa and Ntsoane 2020, 616). This also applies to the appointment of women as rulers in cultures that have not recognised female leaders before. Critics ignorantly use gender to critique the institution of kingship. Moreover, in the future, it will not be surprising if a female claims the right to succeed to the Bapedi throne on the grounds that the Bapedi system of kingship is discriminatory because it has, so far, not recognised a female as a *kgosi*.

African kings do not ascend to power through elections, that is to say, kings are not democratically elected (Wicomb and Smith 2011, 427). Yet, this system of kingship allows for the participation of the community to determine who is a suitable successor. For example, in the case of the Bapedi Kingdom, as highlighted below, a *timamollo* (candle wife or great wife) was nominated from the king's wives by his royal advisors and the community (para 71).

4 *Mphephu v Mphephu-Ramabulana*: (948/17) [2019] ZASCA 58.

Constitutional Impact on the Kingship

The succession to kingship in South Africa has experienced significant changes post the constitutional dispensation. Today, this institution is affected by the dictates of the Constitution, which recognises the system of African customary law; however, customary law is subject to the Constitution as the supreme law of the land (ss 211 and 212). The Constitution further promotes amendments or reform of applicable legislation to promote the functions of traditional leaders, provided that those functions are exercised in accordance with applicable legislation and the Constitution. Kingship is an independent source of norms that derive their originality and identity from the needs of society (Ncapayi and Ntungwa 2018). The Constitution does not directly refer to kings as such, but refers to the concept of traditional leaders. However, it can be accepted that the concept of the king is recognised by the Constitution, albeit under a different name. Ramose (2007, 324) argues:

It does not necessarily follow from this that [a *kgosi*] is a monarch exercising sovereign, complete, integral, comprehensive and independent control of a territory and its people in such a manner and to such an extent that it qualifies for a separate identity, this is today in reference to *kgosi* under the Constitution...

Kingdoms are thus not treated as separate or independent sovereign territories, but have been integrated under a single state where they form part of South Africa. As a result, they do not enjoy “original sovereignty” and are not afforded an independent title to sovereignty. This in effect makes kingship a second-class leadership authority in dealing with the affairs of the communities, kings lead and thereby denying South Africa a decolonial opportunity. The role of kings in utilising customary means and practices in resolving disputes and conflicts in their communities is diluted by subjecting these functions to the supremacy of the Constitution. While the post-conquest era has been welcomed with positivity because it signalled the end of colonialism and apartheid, full title to sovereignty that kingdoms enjoyed before colonial interruption has not been restored. Ramose further points out that only defective sovereignty was afforded to the indigenous people of South Africa conquered in the brutal wars of colonialism (Ramose 2007, 312).

Today, kingships in South Africa are recognised by the Constitution; however, several issues still affect the space of kingships such as accusations that they represent resistance to change and hinder community development.

An Analysis of the *Bapedi Marota* Case

The dispute concerned the determination of the rightful king of the Bapedi traditional community.⁵ The case was brought by the applicant, Bapedi Marota Mamone, a traditional community in Limpopo. The President of the Republic of South Africa; the

5 *Bapedi Marota* para 1.

Minister of Provincial Affairs and Local Government; the Mhlaletsi Traditional Authority; Bapedi Acting King, Kgosisgolo Kgagudi Kenneth Sekhukhune; and the Commission on Traditional Leadership Disputes and Claims were cited as respondents. The Commission opposed the application (para 2). The case commenced as a review application in the High Court of Pretoria, where the applicant challenged the Commission's decision that the kingship of the Bapedi traditional community resorted under the lineage of Kgosi Sekhukhune 1. The Commission recognised that the role of a traditional leader – known as an *inkosi*, a *Morena*, or a *kgosi* – as the head of a community was common in pre-colonial times (para 4). Problems started when the colonial British administration interfered with the traditional government of the Bapedi tribe by passing a law that declared the Governor of the Transvaal as the supreme chief over all African communities in the Transvaal and appointing magistrates as administrators (para 5). The Commission argued that during that period, the British established a Department of Native Affairs, which was responsible for the affairs of Africans. According to the Commission, when the Transvaal gained independence, it passed a law that declared its president as the supreme chief with powers over Africans (para 7). The supreme chief had the power to replace traditional leaders or chiefs with other chiefs of his choice, and even had the power to imprison them if they refused to follow government policies (para 9). It can be concluded that the African traditional leadership functioned according to a clear structure that benefitted Africans before the colonial state's regulation of the institution.

In terms of section 25(1) of the Framework Act, the Commission “is empowered to decide on any traditional leadership dispute and claim contemplated in subsection (2)” arising anywhere in the country. Moreover, the Commission has the authority to investigate, either on request by any affected party or of its own accord, a dispute concerning the right of succession to a throne. Section 25(2) of the Framework Act lists matters that can be investigated and decided by the Commission. These matters are as follows:

- Cases where there is doubt that a kingship, senior traditional leadership, or headmanship was established in accordance with customary laws and practices.
- Instances where the title or right of the incumbent in a traditional leadership position is contested.
- Claims by communities who seek to be recognised as traditional communities.
- Cases regarding the legitimacy of the establishment or disestablishment of tribes.
- Disputes resulting from the determination of traditional authority boundaries and the merging or division of tribes.
- Any other matters relevant to the matters listed above, including the consideration of events that may have arisen before September 1, 1927, if there are good grounds for the consideration of those events.

The authority of the Commission was justified because of the historical basis in which the system of traditional leadership found itself. Colonial powers manipulated and

diluted African customary law of succession and customs in general. In this regard, the Commission traced interference with the traditional government of Bapedi to the period when the British ruled the area then known as the Transvaal from 1877 to 1881.

Findings of the Commission

The Commission had to determine whether succession to the throne should fall under the descendants of Kgosi Sekhukhune or Kgosi Mampuru. Kgosi Sekhukhune and Kgosi Mampuru were the sons of Kgosi Sekwati I (para 79). The Commission instituted the issue *mero motu* (para 70). The Commission found that there are two ways in which kingship can be attained: through violent means (bloodshed) and through lineage, that is, through birth by a *timamollo* (a woman married to the royal house to give birth to a successor). The Commission held that Kgosi Sekhukhune had become king by bloodshed, therefore, the kingship of the Bapedi tribe resorts under his lineage (para 31).

It had become common for the Bapedi kingship to be usurped by bloodshed. In the 16th century when King Diale was the first king of the Bapedi tribe, leadership passed to the first son of the king or from father to son. Kingship had always passed from father to son until Kgosi Dikotobe was killed by his younger brother who then became king. Evidence of this was produced (para 72). As far as the attainment of kinship through birth by a *timamollo* is concerned, the Commission was able to establish, based on the Bapedi culture of 1861, that if a *timamollo* was unable to bear an heir, a *hlatswadirope* (a woman, traditionally a sister to the *timamollo*) would step in to ensure that the duties of the *timamollo* – giving birth to an heir – were carried out. She would act as a surrogate mother (para 26). In the case of the Bapedi kingdom, the heir to the throne was the first-born son of a *timamollo*. This rule of succession entitled Kgosi Mampuru to be a successor to Kgosi Sekwati I. However, this did not happen, because Kgosi Mampuru fled after he had been challenged to a fight by Kgosi Sekhukhune I, who thereafter became King of the Bapedi tribe (para 32, 35 and 88). The Commission found that Kgosi Sekhukhune had ascended to the throne in line with the customs and practices of the Bapedi, as evidenced in the living law of the community. He usurped power by challenging Kgosi Mampuru to a fight and since he had a right to the throne, this right passed to his descendants.

Kgosi Sekhukhune I was the king of the Bapedi tribe until he was imprisoned by the colonial government. The incarceration of Kgosi Sekhukhune I presented an opportunity for Kgosi Mampuru II to return and take power as the king of the Bapedi tribe. Kgosi Sekhukhune, however, reclaimed his position after his release from incarceration. Kgosi Mampuru later returned to kill Kgosi Sekhukhune I with the assistance of Chief Nyabela but did not take over the kingship, opting to flee again. The reliance on African customs and practices in the Bapedi kingdom dispute highlights a marked departure from the pre-constitutional era and a welcome development for African jurisprudence. It demonstrated the importance of adopting customs and practices of traditional communities in resolving traditional disputes and conflicts,

particularly on matters relating to succession to kingship as opposed to a Western-styled (constitutional) approach.

The applicant was not satisfied with the Commission's finding that the killing of Kgosi Sekhukhune by Kgosi Mampuru to usurp power and Mampuru's subsequent decision to flee were inconsistent with an intention to conquer or take over kingship. The applicant was granted leave to appeal to the Constitutional Court. The appellant insisted that the Commission had ignored relevant facts in recognising succession by usurpation and that no evidence had been provided to substantiate this finding (para 39). The appellant's case was that the Commission was obliged to apply the Bapedi customary law of succession in terms of section 25(3) of the Framework Act but had not done so (para 42 and 64). Section 25(3) of the Framework Act entails that a commission must, when considering a dispute, consider and apply the customary law and customs of the community that were in use at the time the dispute arose. The Constitutional Court found that the Commission had been correct in concluding that Kgosi Mampuru II had not usurped power following the killing of Kgosi Sekhukhune I, because he fled without taking over the kingship of the Bapedi tribe. This, according to the court, does not illustrate an intention to succeed in being a *kgosi*. The applicant did not dispute that Sekhukhune and his descendants were also entitled to usurp power by bloodshed (para 99).

The Application of Customary Laws and Practices

The article agrees with the findings of the Commission and the courts in recognising ascension to traditional leadership by bloodshed, because succession by bloodshed was in accordance with the Bapedi customs and practices. African customary law is part of South African law, operating alongside common law in a dual legal system. African customary law emerged from its former colonial position where it was only recognised if it was consistent with standards of foreign natural justice (s 11(1) of the Black Administration Act (BAA) 38 of 1927). In the post-constitutional era, courts have stated in several instances that effect must be given to the version of law found in communities, which has been referred to as "living law" (*Shilubana v Nwamitwa* para 55). Where courts were only allowed to apply African customary law when it was consistent with rules of natural justice and public policy in the past, they can now apply it to resolve African disputes based on its value system (Mqhayi 1914). The common law superseded African customary law as a legal system, with the consequence that African law was applied at the discretion of the court. The Constitution now obliges courts to apply African customary law.⁶ Consequently, the courts need to accept evidence of living practices of custom from these communities. Courts should then give effect to the practices or customs in question. The problem, however, as stated above, is that kings do not enjoy the title to sovereignty and independence as their powers are subject to the Constitution. This in effect amounts to a limited recognition of the roles and functions

6 *Ex parte: Minister of Native Affairs – In re Yako v Beyi* 1948 (1) SA 388 (A).

of kings in dealing with matters relevant to their customs and practices. Invoking the Constitution on the affairs of traditional leaders has the effect of diluting customary laws and practices of indigenous communities.

Dispute Resolution Forums

How the Bapedi kingship dispute was addressed is problematic, because it was taken to mainstream courts, which is not an African way of resolving disputes (*Bapedi Marota* para 1–15). Despite this, the dispute was resolved satisfactorily in that an African way of appointing a king was endorsed by the court. However, it is still argued that parties should be encouraged to take their disputes to traditional courts, where the concept of Ubuntu and the interests of the groups are considered. Resolving disputes in traditional courts should be preferred over the winner-takes-all approach of the adversarial system. The High Court, the Supreme Court of Appeal, and the Constitutional Court are mainstream courts, and the adjudication in these courts is problematic in that it does not reconcile differences between parties, but focuses on a winner-takes-all approach, which easily heightens tensions between families. Traditional courts remain important, because they embrace teaching, storytelling, respect, and foster continued relationships beneficial to all.

To give credence to the above, the execution of Kgosi Mampuru through the application of Western jurisprudence serves as a good example. Kgosi Mampuru was executed on November 22, 1879, by the British government's executive council after the High Court had imposed a death sentence on him for murder. He was hanged in the Pretoria Central Prison, which was renamed the Kgosi Mampuru II Correctional Centre in 2013. The punishment of death by hanging was duly recognised and justified by the Western legal jurisprudence at the time as a way of punishing a transgressor. This contrasts with the African way of resolving disputes and conflicts, including those of a criminal nature. In terms of the African way of resolving disputes of a criminal nature, a person would be banished from a community by a forum of chiefs and headmen.⁷ A death sentence was not a recognised form of dispute resolution in African jurisprudence, particularly in the case of a transgression by a king. In African jurisprudence, the norm is that a king can do no wrong (Ntlama 2020, 209). The application of this norm is rendered invalid and unconstitutional in a Western set-up and this was evident in the matter involving Inkosi Dalindyebo of Abathembu who was tried in a Western-style court and imprisoned,⁸ highlighting the impact of the common law on African ways of resolving disputes and conflicts. The trial was in accordance with section 9, which provides that everyone is equal before the law and has equal protection and benefit of the law (Constitution of the Republic of South Africa, 108 of 1996). Although it could be argued that the people of South Africa adopted the Constitution, this should not mean that indigenous value systems such as communalism and Ubuntu should be obliterated at the expense of advancing liberal values such as private property. South Africa is denied a decolonial

7 Native Administrative Act 38 of 1927.

8 *Dalindyebo v State* (2016) (1) SACR 329 (SCA).

option since dispute resolution reflects the common law principles with little or unsubstantial reference to customary law principles and practices. This again highlights the issue of subjecting the law of kingdoms, which had developed their laws regarding conflict, to the Constitution and stripping them of their independence (Ghebretkle and Rammala 2019, 325). Conflicts can arise within clans, families, and communities. However, African communities traditionally have their means of dispute prevention, management, and resolution that are free of state interference or reliance on Western forms of dispute resolution (*ibid*).

The problem with Western-style courts is that they create space for individualism, resulting in people claiming rights they were not entitled to under an African value system (Ndima 2003, 328). The post-conquest environment has resulted in the collaboration of Western-style courts with African-style courts (Ghebretkle and Rammala 2019, 328).

Today, many people opt to take their disputes to Western-style courts instead of African ones, thereby creating a platform for Western dispute resolution forums to play a role in creating laws for African people. Colonialism has had an impact on how disputes are resolved in Africa because of its barbaric treatment of African law and the disempowerment of African dispute resolution forums (*ibid*). African-style courts are preferable to Western-style courts, because they encompass Ubuntu, which is a building block in dispute resolution and ensures harmony after conflict. Parties to a dispute are also likely to honour the outcomes and move on to rebuild their relationship rather than dragging the matter from one court to the next. Elders in African communities are “repositories” of functional wisdom and experience, and such wisdom and experience are relied upon in times of conflict.

An interesting question is how the Bapedi kingship dispute would have been resolved by the courts if the throne had been ascended to by bloodshed in the Constitutional era. Section 11 of the Constitution provides that the right to life should be protected (Constitution of the Republic of South Africa, 108 of 1996), and in *S v Makwanyane* 2009 (2) SA 66 (CC), the Constitutional Court concluded that this right is the most important right of all. Consequently, today, a court cannot recognise succession by bloodshed as legitimate. This leaves succession by lineage as the only way to acquire succession to traditional leadership. The article is not arguing that this is wrong. However, traditional ways of succession to traditional leadership should be recognised if communities abide by them. Leadership by bloodshed is unlikely to be recognised today, because it might be inconsistent with the Constitution (Constitution of the Republic of South Africa, 108 of 1996). Section 211 of the Constitution provides that customary law is applicable provided it is consistent with the Constitution. Section 12(e) of the Constitution also provides that everyone has the right not to be subjected to inhuman and degrading treatment (Constitution of the Republic of South Africa, 108 of 1996). This is not to suggest that succession to traditional leadership by bloodshed is inhuman, but it may be declared unconstitutional on this ground. It may also be declared

inconsistent with the right to life and human dignity when tested against the Constitution. The Framework Act applies retroactively, with the implication that all traditional leadership positions succeeded to by bloodshed should be recognised as legitimate provided it can be proved that this is an existing custom that is recognised by the community concerned as a norm for ascending to power. However, recognition of succession by bloodshed going forward depends on whether it is considered consistent with the Constitution. The Constitution is the supreme law of the land and any law or conduct inconsistent with it must be declared unconstitutional. Thus, succession to traditional leadership by bloodshed is likely to be declared unconstitutional if it happens under the Constitutional dispensation. Colonialism, with its superiority complex of European universalism, imposed its identity and sovereignty on African people and their ways of governance. It was a unilateral usurpation of epistemology and the African experience. Colonial powers replaced African knowledge and experience with their own. How the majority judgment addressed the case of Kgosi Mampuru II is not acceptable, because not much respect was afforded to him (para 88).

The Traditional Courts Bill, published in the *Government Gazette No. 30902* of March 27, 2008, attempts to make space for constitutionalising the roles of traditional leaders, but it has not succeeded. This is because of a lack of participation by ordinary people from communities since it only focuses on traditional leaders.

Conclusion

This article has argued that traditional leadership, particularly kingships, remains the most legitimate African form of governance notwithstanding all the criticisms against this traditional institution of being undemocratic. There is a need to move towards a decolonial option that aims to restore justice through the identity of traditional leadership as the true identity of Africa. This involves affording kingdoms a separate and independent identity that is not subject to the supremacy of the Constitution. Recognition on its own is meaningless if kingdoms cannot exercise power in the manner they did during the pre-colonial era. While the recognition of Kgosi Sekhukhune as the rightful Bapedi heir should be celebrated, his powers and those of his descendants over the Bapedi Kingdom should not be rendered redundant. If kings are stripped of their title to sovereignty to both their administrative and judicial powers, the recognition of kingdoms is still meaningless. Land is a key component of kingship; a king should be able to distribute it to his people and ensure their economic survival. This should also be done without the interference of the government. The duties and functions of a king should also be determined based on customs and not be limited by the government.

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