

When the King can do a lot of Wrong: Some Reflections on *S v Dalindyebo* 2016 (1) SACR 329 (SCA)

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Abstract

In this note, the author discusses the trial of King Buyelekhaya Dalindyebo of the AbaThembu tribe, his conviction and sentence—and the aftermath thereof. He examines the legal and constitutional parameters of the immunity of traditional leaders from criminal and civil liability in the exercise of their official functions. The author also attempts to answer some of the questions that are raised by the judgment, albeit tangentially, about the relevance and applicability of the maxim *rex non potest peccare* in South Africa. The note also examines the maxim's British historical roots and its points of contact with the pre-colonial, South African version. The author's conclusion is that despite South Africa having been a British colony at some point, the maxim has never been part of the country's legal history and constitutional framework. Even if it were to be assumed that the maxim was an integral part of pre-colonial South African constitutional jurisprudence, such as it was, he contends that it would now be palpably inimical to the values that are embodied in the Constitution and the Bill of Rights.

Keywords: Constitution; customary-law practices; traditional leaders.

Introduction

Buyelekhaya Dalindyebo, the king of the AbaThembu tribe, was sentenced in December 2015 after protracted criminal proceedings.¹ There are many legal and constitutional questions that were raised by the judgment of the Supreme Court of Appeal, that still need to be resolved. This is because it brought into sharp focus the jarring relationship between the Constitution of the Republic of South Africa Act (the Constitution)² and the status and role of traditional leaders. The main purpose of this note is to examine whether modern-day South African traditional leaders may, with impunity, injure, maim, or destroy the property of the members of their community—in the name of culture and tradition. Put otherwise, the question is whether the South African constitutional framework allows for a parallel legal system which is insulated from the tenets and prescripts of the Constitution, and where the English maxim *rex non potest peccare*³—or its pre-colonial African equivalent—applies. While the Constitution clearly recognises customary law, the status of traditional leaders and related institutions, such recognition is clearly circumscribed.⁴ Needless to say, the Constitution is the supreme law of the country, and every other law, rule or practice is subsidiary to it.⁵ But, therein lies the country's constitutional paradox. The framers of this seminal document sought to fit into a modern-day Constitution (including the Bill of Rights ensconced in it) age-old customary law institutions and practices. This conundrum is further exacerbated by traditional leaders who insist that they should be exempt from criminal or civil liability for acts performed in the exercise of their powers and functions.⁶ The crux of their contention is that they ought to be accorded all the immunities that their ancestors enjoyed in pre-colonial times.⁷ The decision of the Supreme Court of Appeal in *S v Dalindyebo*⁸ serves as a good foil for this purpose.

The Facts

The facts of this case demonstrate how abuse and wanton destruction could be visited on vulnerable communities under the guise of culture and tradition. The case itself

1 Despite the fact that King Dalindyebo has now been released from prison, the principles discussed in this note still remain relevant, for posterity.

2 Act 108 of 1996 (the Constitution).

3 The phrase means, 'the king can do no wrong'.

4 See s 211 of the Constitution.

5 Section 2.

6 In fact, the Congress of Traditional Leaders of South Africa lodged an application in the Western Cape High Court, Cape Town, for an order compelling the Speaker of Parliament and the House of Assembly to pass a piece of legislation along these lines. However, that application was dismissed with costs—see *Congress of Traditional Leaders of South Africa v Speaker, National Assembly and Others* [2016] ZAWCHC 206 (*Contralesa v Speaker*), the court holding that the application had no foundation in both fact and law, para 44–49, 65.

7 *ibid.*

8 2016 (1) SACR 329 (SCA).

involved King Buyelekhaya Dalindyebo of the AbaThembu community. The crimes that he was charged with arose from acts of assault and maiming of some of the members of his community. Despite the fact that Dalindyebo was only arraigned in the Eastern Cape High Court, Mthatha, in 2009, the events leading up to the trial appear to have taken place between 20 July 1995 and 28 July 1995. The charges preferred against him comprised three counts of arson; three counts of attempted murder; one charge of murder; seven counts of kidnapping, and two counts of ‘defeating the course of justice’ in terms of section 40(a) of the Transkei Penal Code of 1983.⁹

The allegations were that Dalindyebo had burnt down the house of Mbuzeni Makhenkewana and threw his belongings in a nearby open veld, alleging that he had killed one of the members of the community. Dalindyebo also set on fire two dwellings that belonged to the brothers Stonkwana and Wayiya Sonteya, alleging that their sons had committed various crimes of rape and house-breaking in the area, and that they ought to be evicted from his land. As a result, some young men—including the sons of Stonkwana and Wayiya—were assaulted so severely that people in the crowd could not bear to watch the beatings for long. One of the young men, Lunga Pama, became mentally impaired. However, it is not clear whether the resultant mental illness could be attributed to the injuries he sustained. Another, Saziso Wofa, died from the injuries. The perpetrators of these crimes seem to have been Dalindyebo's ‘supporters’ and were, at all material times, acting on his instructions. When Dalindyebo suggested that the young man’s body be thrown into the nearby river, the elders of his community advised him against that. They told him that that would be ‘against the very fabric of customary law’; and he heeded their advice in order ‘not to offend against tribal practice’. Dalindyebo also proceeded to Stonkwana’s house and ordered his wife and children to follow him to his palace—‘the Great Place’.¹⁰ His design seems to have been to coerce Stonkwana to follow his family to the palace.

It is important to note that the one count of ‘defeating the course of justice’ arose from the fact that Dalindyebo had unduly tried to influence Mbuzeni to withdraw the charge of arson that the latter had laid against him. The other one flowed from Dalindyebo coercing Wofa to withdraw the charge of murder that he laid for the killing of his son.

The Legal Questions

The main legal questions that arose for determination were: (1) whether Dalindyebo had received a fair trial; and (b) whether he could properly be charged with arson since all

⁹ Section 40(a) of the Transkei Penal Code of 1983.

¹⁰ The term is used in the judgment in reference to King Dalindyebo’s residence.

the dwellings that he was alleged to have burnt down were his own property, and that the complainants were ‘his subjects’¹¹ living under his jurisdiction.

The Judgment

Mthatha High Court

In his judgment, Alkema J found Dalindyebo to be ‘self-righteous, at times discourteous and even discourteous to the court.’¹² The judge also found him to be a ‘poor witness’ and that part of his evidence was so improbable that it might as well ‘be rejected as false’.¹³ His version of events, the judge observed, changed with every legal representative that he engaged; he refused to answer questions; contradicted himself, and made a poor impression on the court.¹⁴ With regard to the assault of the three young men, Dalindyebo conceded that the matter did not fall within his power and jurisdiction; that he had no authority to order the killing of the members of his community by ‘his supporters’. The court also found the reasons for his failure to report the incidents to the police as ‘fanciful, nonsensical and incomprehensible’,¹⁵ and that his evidence was so improbable that ‘it might as well be rejected as false’.¹⁶ Insofar as his defence to the charge of arson was concerned, the court said that it is ‘trite that when developing the common law, including criminal law, the court must promote the spirit, purport and objects of the Bill of Rights¹⁷ in accordance with s 39(2) of the Constitution.’¹⁸ The court also said that unlike the interim Constitution,¹⁹ section 26 of the Constitution specifically provides that everyone has the right of access to adequate housing.²⁰ Subsection 3 in particular, states that no one ‘may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.’²¹ Alkema J proceeded to state that the South African Criminal Law, as it is today, states that arson is committed ‘even if a person sets his or her (own) immovable property on fire with the intention of injuring another.’ The judge also stated that ‘injury’, in this context, is not limited to ‘patrimonial loss, but it also includes the deprivation of [another person of his or her] constitutional rights to housing and not to have his (or her) home demolished or destroyed without an order of court.’²² And,

11 This term is used throughout the judgment of the Supreme Court of Appeal. However, it is not clear whether the court took its leaf from the indictment, as prepared by the state or the heads of argument and contentions submitted by counsel on both sides.

12 Paragraph 51.

13 *ibid.*

14 *ibid.*

15 Paragraph 53.

16 *ibid.*

17 Paragraph 58.

18 The Constitution of South Africa Act 108 of 1996.

19 Constitution of the Republic of South Africa Act 200 of 1993.

20 *ibid.*

21 *ibid.*

22 *ibid.*

Dalindyebo's defence—that he could not be convicted of arson because he had set alight his own property—was rejected,²³ and he was sentenced on all the charges, to an effective sentence of fifteen years' imprisonment.

Supreme Court of Appeal

The Supreme Court of Appeal began by disposing of the preliminary question whether Dalindyebo had received a fair trial, in light of the time it took the state to arraign him, and stated that Dalindyebo was responsible for the delay in that he 'was obstructive and employing dubious means to thwart the administration of justice.'²⁴ The SCA per Navsa JA and Baartman AJA (Ponnan, Saldukar and Mathopo AJA concurring), described the members of Dalindyebo's community as the 'vulnerable rural poor' who were 'victims of his reign of terror.' The court stated that the Constitution did not countenance such behaviour, emphasising the point that South Africa is a 'constitutional democracy in which everyone [including traditional leaders like Dalindyebo] is accountable and where the most vulnerable are entitled to [constitutional] protection.'²⁵ The court also considered the question whether Dalindyebo had, in law, committed arson in relation to the dwellings of the complainants which had been built on what he regarded as 'his own property'. Part of the conundrum was the fact that the dwellings in question were built on land, which is registered in Dalindyebo's name, albeit subject to certain restrictions as stated in the title deed. Two of the restrictions are that the land in question may not be transferred or alienated without the approval of the Governor²⁶ and that of the new owner; and that such land shall not be devisable by will.

According to the SCA, the effect of the conditions was that Dalindyebo held the land in question, not for himself, but as a hereditary monarch²⁷ and for the benefit of his community.²⁸ This means that, unlike his forebears who were monarchs in the real sense, Dalindyebo was not the final arbiter on matters of land.²⁹ He was accountable to

23 On the nature of ownership of land in customary law, see Alastair Kerr, *The Customary Law of Immovable Property and of Succession* (Butterworths 1990) 49–53; see also Taslim Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 163–164.

24 See para 14 of the judgment under discussion.

25 Paragraph 59. For instance, see George Barrie, 'The King can do no Wrong: The Imprisonment of the AbaThembu King Buyelekhaya Zwelibanzi Dalindyebo – Some Comments on South African Customary Law and Australian Parallels' (2016) TSAR 746 752. Barrie says that South Africa's constitutionalism 'is dominated by a liberal political philosophy and by the principle of equity.' However, it is important to note that equality is not the only consideration. As per the preamble, dignity, freedom, and social justice also come into the equation.

26 The 'Governor', as mentioned in the original piece of legislation—section 24 of the Glen Greys Act of 1894—has since been substituted by the premier of the relevant province or the 'Director-General' in the national (and provincial) Department of Rural Development and Land Reform, and the Department of Cooperative Governance and Traditional Affairs.

27 See below for an elaboration on the meaning and import of the term.

28 Paragraph 62.

29 *ibid.*

the state³⁰ for the appropriate use and allocation of land that falls under his jurisdiction. After considering relevant literature and case law on arson,³¹ the court held that a person can be found guilty of arson even if he or she has wrongfully or maliciously set fire to his or her own immovable property, either with the intention to injure, or to defraud another person.³² The court also stated that the act of burning one's own immovable property may not necessarily be unlawful, but that the intention with which such an act is committed, may turn an ostensibly innocent act into an unlawful one.³³ The crime of arson, therefore, is committed even in instances where a person, being the owner of an immovable property, sets it on fire 'with the intention to prejudice the proprietary interests of another person.'³⁴ The court came to the conclusion that Dalindyabo had the requisite intention to injure the proprietary interests of the complainants Stonkwana and Wayiya Sonteyo, and Mbuzeni Makhenkewana, and that the conviction on three counts of arson was well-founded.³⁵ But, the SCA set aside the conviction of culpable homicide on the basis that the state had not proved (beyond a reasonable doubt) that Dalindyabo was directly involved in the killing of Wofa; and his sentence was accordingly reduced to twelve years' imprisonment.

Can the King do no Wrong? A Discussion

Before dealing with the *rex non potest peccare* (the king can do no wrong) maxim, it is important to note that when the incidents leading up to the arrest, conviction and sentence of Dalindyabo occurred, the Prohibition of Corporal Punishment Act³⁶ had not yet come into operation. This Act is aimed at amplifying the provisions of the Constitution, particularly section 10 (on the right to human dignity); section 12(2) (on the right to, and protection of, the security of the person, and extends the protection to bodily and psychological integrity), and section 28 (on the paramountcy of the interests of the child where such interests are to be adjudicated upon). It expressly abolishes corporal punishment in the courts, including the traditional courts. It is also important to note that in KwaZulu-Natal—where corporal punishment could even be administered to adult married women—relief only came in 2009 when this practice was declared unconstitutional by the Constitutional Court.³⁷ It is also important to note that the civil and criminal jurisdiction of the traditional courts³⁸ was, and still is, severely limited and

30 Particularly the officials in the departments of Rural Development and Land Reform, and Cooperative Governance and Traditional Affairs.

31 Including *R v Mavros* 1921 AD 19 22 and *R v Enslin* 2 AC 69.

32 Paragraph 64.

33 Paragraph 65 and authorities cited therein.

34 *ibid*.

35 Paragraph 66.

36 Act 33 of 1997.

37 See *Gumede v President of Republic of South Africa* 2009 1 SA 152 (CC) where s 10 of the Natal Code of Zulu Law (see Proclamation 151 of 1987, GG 10966) and s 10 of the KwaZulu Act on the Code of Zulu Law Act 16 of 1985 (the Codes) were declared unconstitutional.

38 Previously known as the chiefs' courts.

circumscribed.³⁹ Traditional leaders can, therefore, adjudicate only on minor offences.⁴⁰ That constitutional and legal arrangement betrays any pretensions to absolute monarchy. The constant reference to the members of the AbaThembu community (by Dalindyebo and his councillors) as his ‘subjects’ lies ill in one’s mouth. So does the arrogation of the community’s ancestral land unto himself and his family. Even though Dalindyebo’s counsel was very careful not to rely on the *rex non potest peccare* for a defence, he still contended that Dalindyebo should not have been convicted of arson. The basis of his contention was that the land on which the dwellings in question were built was his property. He also argued that Dalindyebo was the king—and the complainants, ‘his subjects’. As indicated above, the court seems to have taken its cue from counsel’s heads of argument in using phrases such as ‘his people’, ‘his subjects’, ‘his land’ or ‘his property’. This served as useful foil for the court to demonstrate how repression and cruelty continue to be visited on some South Africans, despite there being a Constitution in which is ensconced a justiciable Bill of Rights.

The Pre-colonial Era

The question remains: can the king really do no wrong? In addressing this question, it should be noted that pre-colonial communities were ruled by monarchs.⁴¹ That period was not, at all, perfect;⁴² but there was structure and order within the body politic.⁴³ Indeed, there were rulers who believed in the maxim *inkosi umlomo ongathethi manga*.⁴⁴ However, the fundamental tenet of African constitutional jurisprudence and administrative law was that *inkosi yinkosi ngabantu bayo*.⁴⁵ The essence of the latter maxim is that the monarch could only rule with the approval of his subjects, including

39 Sections 12 and 20 of the Black Administrative Act 38 of 1927; see also cl 5 and 6 of the Traditional Courts Bill (2012). But, for some reason, these clauses do not appear in the 2017 version of the Bill.

40 *ibid*.

41 Except in the case of the Zulu dynasty, or the kingdoms of Lesotho and Swaziland, colonial and apartheid administrators preferred the ‘chief’ (or *kaptein*, in Afrikaans) to address traditional leaders. Strictly speaking, these terms were pejorative and demeaning to the monarchs and their families. It is for this reason that recent legislation and legal lexicon has reverted to *inkosi* (in isiZulu or isiXhosa) or *kgosi* (in Sesotho or Setswana)—see s 1(1), 1(2) and (3) of Traditional Leadership and Governance Framework Act 41 of 2003; see also the Traditional Court Bill 2008 and all the amended versions thereof.

42 In *Gumede* para 19, Moseneke DCJ used the term ‘idyllic times’ to describe this period in South Africa’s history.

43 See also Leonard Thompson, (revised by Berat L) *A History of South Africa* (Yale University Press 2014) 26.

44 Which means that ‘the king’s word is law’; and it often found application in those nations that were characterised by tyranny—see Digby Koyana, ‘The Interaction between the Indigenous Constitutional System and Received Western Constitutional Law Principles’ in De Kock DP and Labuschagne JMT (eds), *Festschrift: JC Bekker* (Vista University 1995) 71–74, where he says despotic rulers, such as Shaka and Sekhukhune, were not subject to the law.

45 The Sesotho/Tswana translation of it is *kgosi ke kgosi kabatho bayona*.

the wise counsel of his advisors.⁴⁶ Participatory democracy and accountability, which were themselves underpinned by the foundational normative value of *ubuntu*,⁴⁷ were an essential part of the *homus politicus* and its general politico-legal make-up. This African maxim applied even to the great King Shaka Zulu himself⁴⁸—who is generally portrayed as having been a tyrant—to ensure that he adhered to the culture, customs, practices and traditions of his forebears.⁴⁹ In that way, the cohesion and resilience of his kingdom were guaranteed.⁵⁰ As Thompson puts it:⁵¹ ‘A [king’s] powers were limited by necessity as well as by custom ... He relied on the cooperation [and advice] of his councillors.’⁵² Except for a few cultural and traditional nuances, the different pre-colonial brands of customary law on this point seem to have been on all fours with the original English law.⁵³ With the exception of the BaLobedu community in Limpopo, who have been ruled by the Modjadji female dynasty since the 1800s,⁵⁴ the principle of male primogeniture has always held sway in these communities.⁵⁵ As has been the case with the British monarchy, the heir-apparent qualified ‘by reason of (his) royal blood or heritage to the throne.’⁵⁶ These attributes clothed the particular incumbent with certain legal and constitutional powers and prerogatives.⁵⁷ That legal pre-eminence accorded him a wide range of special duties, liberties, privileges, powers and royalties.⁵⁸ These rights and privileges included the immunity which flowed from the maxim ‘the king

46 See Thompson (n 43) 26.

47 This is an age-old component of African jurisprudence ‘which advocates that everyone must be given his due on account of common humanity’—see Angelo Dube and Sibusiso Nhlabatsi, ‘The King can do no Wrong: The Impact of The Law Society of Swaziland v Simelane NO & Others on Constitutionalism’ (2016) *African Human Rights Journal* 265 275; see also *S v Makwanyane* 1995 (3) SA 391 (CC) para 224; 308.

48 He had Mbopha kaSithayi, who was a friend, confidant, and personal counsellor; his aunt, Mkabayi kaJama, and King Dingiswayo of AbakwaMthethwa, who is considered to have been his father figure at all material times—see Mazisi Kunene, *UNodumehlezi kaMenzi* (University of KwaZulu-Natal Press 2017) xxxviii–xxxix. (English translation of the title ‘Emperor Shaka the Great’).

49 *ibid.*

50 *ibid.* However, see Koyana (n 44) 74.

51 *ibid.*

52 *ibid.*; see also Arthur Diamond, *Primitive Law* (Longmans, Green & Co 1935) 332–333 where he, in reference to the constitutional structure of primitive societies, says the following: ‘The local chief is not, however, an absolute monarch, and must consult with the heads of families, or elders, who are his counsellors, before taking any important action.’

53 See Koyana (n 44) 74.

54 See Koyana (n 44) 73.

55 For the constitutionality of this principle in South Africa, see *Mkhatshwa v Mkhatshwa & Another* 2002 (3) 441 (T); see also *Bhe v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) and *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

56 See George Pugh, ‘Historical Approach to the Doctrine of Sovereign Immunity’ *Louisiana Law Review* (1953) 476 478; see also Koyana (n 44) 74, and *S v Gqozo and Another* 1994 2 SA 756 (Ck) 761 and the authorities cited therein.

57 *ibid.*

58 *ibid.*

could do no wrong.’⁵⁹ As indicated above, the different pre-colonial monarchs, including rulers of the AbaThembu ‘regarded themselves and were likewise regarded by their people as having derived their powers from ancestral spirits, something similar to the “divine rights of kings”’.⁶⁰ The cumulative effect of all of this was that one ‘could not put an infallible ruler on trial since, if one did, the verdict must always go in his favour.’⁶¹

The Position in England and Europe

In addition to what is mentioned in the previous rubric, in England and continental Europe, monarchical power and authority seem to have been founded on two sources: the ‘the king can do no wrong’, and the ‘divine right of kings’.⁶² The latter ‘right’ meant that the king was ‘the law-giver [directly] appointed by God’.⁶³ In practical terms, the monarch was the only representative of God on earth.⁶⁴ It also meant that the monarch enjoyed personal immunity and ‘could not be prosecuted or sued in his own court.’⁶⁵ This maxim was necessitated by the peculiarities of the feudal system in mediaeval England; and it was founded on the presupposition (legal fiction) that the king was perfect or infallible.⁶⁶ It is important to note, however, that the maxim was tempered by the ‘petition of rights’ under King Edward I, and the emergence of the nation-state.⁶⁷ This development marked the beginning of constitutional monarchy in England, and the correlative change in the meaning and purport of the maxim itself.⁶⁸ What was first regarded as the monarch’s own personal immunity was subsumed or submerged under

59 *ibid.*

60 There are several other African maxims and totems by which kings were, and are still, addressed in African communities. For instance, among the Ngunis, the terms *ingonyama* (lion) and *isilo* (tiger) are used; and among the Batswana, *tautona* (the greatest/biggest lion). The words connote invincibility and infallibility—see John Laband, *Eight Zulu Kings: From Shaka to Zwelithini* (Jonathan Ball 2018); see also Tom Bennett, *Customary Law in South Africa* (Juta 2004) 101–102.

61 For the position in the kingdom of Swaziland, see Dube and Nhlabatsi (n 47) 265 where the authors argue, persuasively, that the Swazi king often acts in two capacities; the one is governed by customary law and he is referred to as ‘Ingwenyama’ and the maxim *umlomo ongacali manga* (the Swazi equivalent of the *rex non peccare potest maxim*) applies. The other capacity is regulated by the constitution of that country and all the other laws; and he is referred to as ‘the King’. Their view is that only when the king exercises his customary law duties (at cultural events, for instance) that the maxim applies; not when he is exercising public power, or performing his executive functions as a king (such as appointing judges). In other words, Mswati III’s position is not identical to that of the British monarch.

62 *ibid.*

63 *ibid.* However, like his subjects, the monarch was also subject to the law of the land: *Quod rex no debet esse sub homine, sed Deo et lege* (‘The king ought to be under no man, but under God and the law’) Lord Coke in *Prohibitions del Roy* (1607) 12 Co Rep 63, as quoted by Barrie (n 25) 746 753.

64 See Barrie (n 25) 753.

65 *ibid.*

66 However, see Pugh (n 56) 478.

67 *ibid.*

68 *ibid.*

the concept of sovereignty, the Crown.⁶⁹ The principle began to mean that, henceforth, some or other minister of government was to be responsible for anything that the monarch would have done (or omitted to do) in his or her official capacity. And, with the passing of the Bill of Rights Act in 1688, parliament was effectively ‘vested with supremacy in order that it could shield and promote fundamental rights and freedoms of those whom it represented.’⁷⁰ The term ‘Crown’, was to have two connotations in English constitutional and administrative law. In the one sense, it would mean ‘the monarch’ in the usual sense—the king or the queen. In the other, it would connote the executive (the Prime Minister and his ministers who enjoy the majority in Parliament, and on whose advice the monarch is now supposed to rely).⁷¹ It is important to note that some of the royal prerogatives, including those that attach to the *rex non peccare potest* maxim, never formed part of South Africa’s post-colonial constitutional system.⁷²

The Intersection between Traditional Leadership and the Constitution

The Relevant Provisions of the Constitution

Another, ancillary question that remains to be answered is whether the ‘king can do no wrong’ maxim finds any application in a constitutional democracy like South Africa. Put otherwise, is there a separate, parallel and insulated legal dispensation which applies exclusively to traditional leaders and their communities? The answer to this question lies in the interpretation and application of the provisions of the Constitution itself. At face value, these provisions seem to create a constitutional paradox for all concerned. For instance, section 2 declares that ‘the Constitution is the supreme law’ against which every law, conduct or practice is to be measured for validity. But, the self-same Constitution recognises and acknowledges customary law practices and institutions, including traditional leadership.⁷³ Most of these customs and practices appear to be unconstitutional, and are likely to be challenged in future.⁷⁴ The Constitution also provides a framework and parameters within which these customs and practices should

69 See Pugh (n 56) 478; see also Diamond (n 52) 332–333, and Puteh Binti and Zahir Ahmad, ‘The Divine Rights of Kings: A Comparative Study of Medieval European Kingship and Malay World “Deveraja”’ (2016) *Social Sciences Journal* 2581.

70 See Johan van der Vyver, ‘Parliamentary Sovereignty: Fundamental Freedoms and a Bill of Rights’ *SALJ* (1982) 557–560.

71 *ibid.* The author says that parliamentary sovereignty has actually become the ‘Bill of Rights of the Westminster system of government’; see also *M v Home Office & Another* [1993] 3 All ER 537 540.

72 See *S v Gqozo and Another* 1994 (2) SA 756 (Ck) 789 where the court dealt with the English law on this topic, and its influence on South Africa’s constitutional developments; see also Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 21.

73 See s 2, 30 and 211(3); see also Constitutional Principles XIII (1) and (2) of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) on the basis of which the current Constitution was to be negotiated and drafted; see also Laband (n 60) 5–6 where he expresses the concern that the status conferred on some of the traditional leaders, by the apartheid regime ‘would fare under a post-apartheid government that was both democratic and avowedly socialist.’

74 *ibid.*

be observed.⁷⁵ The politico-legal matrix for this development was created by the Constitution of the Republic of South Africa Act of 1993.⁷⁶ It entrenched thirty four non-derogable principles on which the present Constitution was to be fashioned out. Principle XIII, for instance, was intended to guarantee constitutional recognition and acknowledgement of the institution, status and role of traditional leaders. The Constitutional Principle also sought to ensure special protection of traditional monarchs in terms of provincial constitutions, where applicable.⁷⁷ But, because their status is now proscribed and circumscribed by the Constitution and the Bill of Rights, traditional leaders consider themselves undermined and demeaned by the current constitutional dispensation.⁷⁸ In truth, they would like to possess the same power and authority that their forebears—or their English counterparts of old—had.⁷⁹ This, they believe, would ensure that they are not subjected to any criminal or civil proceedings for any act committed in the performance of their duties, and execution of their official functions.⁸⁰ However, as indicated above, the Constitution does not countenance a separate constitutional regime for traditional leaders (and their communities).⁸¹ Nor does it insulate them, or place them beyond the reach of its fundamental injunctions and imperatives.⁸² This is what the SCA had in mind when it referred to the complainants and other members of the AbaThembu community as ‘victims of [Dalindyebo’s] reign of terror’; and that the country’s Constitution ‘does not countenance such behaviour’.⁸³ In other words, there is no provision in the South African Constitution which grants Dalindyebo, or any other traditional leader, the ‘right to do wrong’.⁸⁴ Even though the judges of appeal did not say so in so many words, the judgment seems to have been

75 See in particular s 30 and 211(3) of the Constitution.

76 Act 200 of 1993. Also referred to as the interim Constitution.

77 But, see s 211(2) and (3) of the Constitution; see also the *Certification of the Constitution of South Africa Act, 1996* 1996 (4) SA 744 (CC) para 194, where the Constitutional Court said that these provisions were intended to ensure that traditional leaders exercised their powers within the framework of the Constitution.

78 This is one of the contentions that were advanced by traditional leaders in *Contralesa v Speaker* (n 6) in their application for an order compelling the National Assembly to pass a piece of legislation that would ensure that would grant them immunity for acts performed in their official capacity. The application was dismissed on the basis that it was bad both in fact and law; and that the judiciary cannot interfere in the processes of other branches of the state—para 57, 65.

79 *ibid.* Short of a revolution, followed by the election of the majority of traditional leaders, themselves, as parliamentarians, this is likely to remain a very remote possibility.

80 *ibid.*

81 See s 2, 211 and 212 of the Constitution; see also *Contralesa v Speaker* (n 6) 206 para 1–10 where the order sought by the applicants—and their averments—is set out.

82 *ibid.*

83 Paragraph 59.

84 In *Contralesa v Speaker*, the Western Cape High Court said that King Dalindyebo did not act as a king or judge in the circumstances of the case (which could have earned him immunity if he did); and that he had actually ‘brought the law, the Courts and the entire administration of justice into disrepute [and] acted as judge, jury, prosecutor and enforcement officer in his case’—see para 31, 40, 61 of Mantame J’s judgment; and para 3 of Davis J’s separate but concurring judgment.

grounded on the following provisions: section 2 (the supremacy of the Constitution) (the right to equality and the correlative right not to be unfairly discriminated against); section 10 (respect for human dignity); section 11 (the right to life); section 12 (the right to freedom and security of the person); section 21(3) (the right to enter, remain in, and reside anywhere in South Africa); section 26 (the right to adequate housing, or being evicted without an order of court); section 30 (the right to use a language, and participate in a cultural life of one's choice) and section 211 (the recognition of customary law, subject to the provisions of the Constitution). This is borne out of the following passage: 'We are a constitutional democracy in which everyone is accountable and where the most vulnerable are entitled to protection.'⁸⁵ Both the letter and spirit of the Constitution do not seem to suggest or contemplate an isolated enclave where a 'tyrannical and despotic king' is lording over citizens who cannot exercise their human rights.⁸⁶ The SCA also said that if the allegations made by the state (in the indictment) are to be believed, 'this is not a description of what occurred during mediaeval times, but it is how the appellant, King Buyelekhaya Dalindyebo, treated his subjects at a time after South Africa became a Constitutional State subject to the rule of law.'⁸⁷

It is clear from the passage that Dalindyebo imagined himself as being an African or a British tyrant of a bygone era,⁸⁸ which is both a constitutional impossibility and an anachronism in the South African context.⁸⁹ It is also important to mention that, as a corollary, 'subject' is not an appropriate appellation with which to address fellow citizens in a democratic state. First, a subject is someone who lives under a monarchy except the monarch himself or herself.⁹⁰ Second, Dalindyebo is a king of a very small community in the province of the Eastern Cape within the territorial limits and international law jurisdiction of South Africa.⁹¹ Third, he is not even a constitutional monarch in the mould of King Letsie of Lesotho, whose position is akin to that of the African rulers of old, such as King Khawuta in Dalindyebo's own region, King Shaka

85 *ibid.*

86 Paragraph 1.

87 Paragraph 1. One wishes that the court could have gone a little further and expressed its disapproval and opprobrium at the description of fellow South Africans by Dalindyebo as 'his subjects' or 'his people'.

88 See Bennett (n 60) 102–103.

89 See s 2 and 211(1) of the Constitution.

90 See the *Readers' Digest Oxford Complete Wordfinder*. Moreover, the right to equal protection and benefit of law inheres in all South Africans—see s 9.

91 The area comprises only sixteen per cent of the country's population of about 58.8 million people; and fourteen per cent of the country's territory, which is 168 966 square kilometres in extent. Dalindyebo and his councilors cannot engage in international relations or other related activities with other states; that power vests in the South African government—see Statistics South Africa, 'Statistical Release PO302: Mid-year Population Estimates 2019' <<http://www.statssa.gov.za/publication/P0302/P03022019>> accessed 11 June 2020.

of the Zulu, and King Sobhuza I of the Swati.⁹² Dalindyebo is more of a civil servant than a monarch. He is obliged to function within the parameters of the country's constitutional and legal framework.⁹³ He has to report and account to many other government functionaries, such as the Minister of Cooperative Governance and Traditional Affairs, and the Premier of the Province where he resides (or is domicile).⁹⁴ Fourth, since the late nineteenth century, traditional leadership has been such a contested terrain.⁹⁵ And, as result of the distortions and political manipulation during colonial times and under apartheid, it is not really clear who the rightful claimants to these putative royal positions are.⁹⁶ This is because the Black Administration Act⁹⁷—which was the bedrock of apartheid—gave very extensive law-making powers to the Governor-General,⁹⁸ and later, to the State President. The incumbent became the Supreme Chief of all the black people in the country;⁹⁹ and had the power and authority to either appoint, or recognise, a particular person as a traditional leader.¹⁰⁰ He could even divide different communities into tribes and sub-tribes.¹⁰¹ As a result, the rightful

92 See Bennett (n 60) 102–103. For the events that took place in the intervening period, such as the frontier wars, the capture, arrest and banishment of King Makhanda and Cetshwayo (and his son Dinizulu); the killing of King Bhambatha Zondi and King Sekhukhune of the BaPedi, see Xolela Mangcu, *Biko: A Biography* (Tafelberg 2012) 267–271; see also Tembeka Ngcukaitobi, *The Land is Ours: South Africa's Black Lawyers and the Birth of Constitutionalism* (Penguin Books 2018) 85–91 and 21–22 where he describes those explosive battles and the subsequent events as follows: 'It was on the eastern frontier that the British (first) exercised their imperial ambitions, the effects of which would irrevocably shape modern South Africa. By 1878, the Xhosa had lost their land. This was to be a blueprint for the country as a whole.' With this, the indigenous peoples of South Africa lost the right to rule themselves the same way that their ancestors had many centuries before that time. For the developments in Eswatini around the same time, see Dube and Nhlabatsi (n 47) 467–470.

93 See s 212 of the Constitution; see also *Contralesa v Speaker* (n 6) para 61.

94 For an examination of the legislative history, and current position and framework, with regard to the recognition, appointment and removal of traditional leaders, see *Umndeni (Clan) Wamantungwa and Others v MEC, Housing and Traditional Affairs KwaZulu-Natal* [2011] 2 All SA 548 (SCA).

95 This was the reason for the establishment, in 2004, of the Commission of Inquiry into Traditional Leadership Disputes and Claims. The Commission is also known as ('the Nhlapo Commission'), after Professor Thandabantu Nhlapo who was its Chairperson. The Commission has since been succeeded by the permanent, Commission for Traditional Leadership Claims and Disputes, which was established in terms of s 22 of the Traditional Leadership and Governance Framework Act 41 of 2003.

96 See 44–172 of the Nhlapo Commission Report (2011); see also Bennett (n 60) 106–111.

97 38 of 1927.

98 This constitutional anomaly was the norm in South Africa, at the time.

99 See s 1.

100 See s 2(7) and 5 of the Black Administration Act. Regents, such as Prince Mcwayizeni Israel kaDinizulu who acted for King Goodwill Zwelithini when the latter was still a minor, were appointed in terms of s 2(8).

101 See s 5(1)(a) of the Black Administration Act. Incidentally, this is what the African National Congress had committed itself to combating, after its formation in 1912—tribalism (and regionalism) within its own ranks and among all the black people of South Africa, see Ngcukaitobi (n 92) 144.

claimants, who were perceived to be rebellious and recalcitrant, were passed over for docile and pliable relatives.¹⁰²

The Current Constitutional Position of Traditional Leaders

The SCA—at least from a criminal law perspective—demonstrated that such cruelty and destruction that Dalindyebo had visited on the complainants and their families shall not be tolerated. It would, indeed, have been a contradiction in terms to speak of the Constitution as being the supreme law of the land, and permit some of the citizens, purely based on their family name or accident of birth, to treat fellow South Africans as ‘subjects’ or chattels. It also lies ill in one’s mouth to say that some sections of the population in South Africa still have ‘tyrannical despots’ lording over them, and whose words and whims should be treated as law. A delicate balance should be struck between the customary law values, such as restorative justice and conciliation on the one hand; and adhering to the country’s constitutional imperative of ensuring equality before the law and respect for human dignity, on the other.¹⁰³ It should also be pointed out that both the court *a quo* and the Supreme Court of Appeal could still have reached the same result, by applying the principles of customary law on land ownership, without resorting to the common law on arson.¹⁰⁴ Under customary law, the land belonged to the community or the nation.¹⁰⁵ Whoever was the king at a particular time, held it in trust for use and enjoyment by his subjects.¹⁰⁶ And, as soon as a piece of that land was allotted to a particular family, it belonged exclusively to that family; and that family could not be deprived of it arbitrarily.¹⁰⁷ Except for the fact that the government is now the final arbiter on matters of land,¹⁰⁸ the original customary law position does not seem to have changed much under the present South African constitutional dispensation.¹⁰⁹ The title deed referred to above, which was produced in the court *a quo*, contained conditions and restrictions—as stipulated by the Registrar of Deeds—according to which Dalindyebo was required (and still is required) to use the land under his control.¹¹⁰ Put otherwise, he could not ‘alienate the land without State approval’.¹¹¹ He did not have

102 In addition to the Nhlapo Report referred to above, this conundrum has resulted in many court cases, such as *Minister of Native Affairs and Another v Buthelezi* 1961 (1) SA 766 (A); *Mkhatshwa v Mkhatshwa and Another* 2002 (3) 441 (T) *Government of the Province of KwaZulu-Natal v Ngubane* 1994 (4) 943 (A) and *Nwamitwa and Others v Shilubana and Others* 2009 (2) SA 66 (CC).

103 On this point, see Clause 2 of the Traditional Courts Bill (2012). However, cf *Bangindawo and Others v Head of Nyanda Regional Authority* 1998 (3) SA 262 (Tk).

104 See para 75.

105 Kerr (n 23) 49–53 and the authorities cited therein; see also Elias (n 23) 163–164. However, cf *Diamond* (n 52) 335.

106 *ibid.*

107 *ibid.*

108 Through the Department of Rural Development and Land Reform.

109 For the impact of s 25 of the Constitution on land restitution, see *Msiza v Director-General Department of Rural Development and Land Affairs and Another* 2016 (5) 513 (LCC).

110 Paragraph 62 of the judgment.

111 *ibid.*

unfettered *dominium* over the land in question; he had to comply with the laws of the country, particularly the Constitution, in utilising and allotting it.¹¹² Dalindyebo's position is not similar to that of his forebears—and those of his peers on the continent of Africa—who ruled the continent a little more than four centuries ago.¹¹³ He and his peers are not in the same league as the *Negus* in Ethiopia, the *Ngola* of Nonga (present-day Angola) and the *Amakhosi* or *Marena* in the southern African region of that time.¹¹⁴ Any attempt to compare him to the rulers of that time would not only be stretching the meaning that the word 'king' is capable of, but it would also be disingenuous. Even the appellation 'ingonyama' or 'tautona'—the lion—sounds so condescending as to be insincere, in some contexts and situations. Another problem lies in the translation of the word 'inkosi' (or its equivalent in many African languages). Depending on the context and regional dialect, it may mean 'king', 'chief' or 'headman'.¹¹⁵ Since the end of the frontier wars in the south-eastern part of South Africa, in the eighteenth century, and the defeat, capture and banishment of King Cetshwayo kaMpande in the Cape, in the nineteenth century, no one has been able to rule his (or her) community in the same traditional, African way.¹¹⁶ All the traditional leaders in the country have been stripped of all their original, ancestral powers and privileges.¹¹⁷ Indirect rule became the norm under colonialism and apartheid: traditional leaders came to be referred to, derogatorily, as chiefs or *kapteine*.¹¹⁸ Henceforth, they would govern the communities in their designated areas in accordance with the politico-legal framework of that period.¹¹⁹ Even King Mswati of Eswatini (formerly known as Swaziland), cannot claim to be an absolute monarch in the same way that his grandfather Sobhuza I could. Not only is he a constitutional monarch subject to modern-day (constitutional) conventions, the kingdom is also a party to a number of international treaties that leave him with mere residual authority over his subjects.¹²⁰

112 *ibid.*

113 For extensive exposition of the Zulu dynasty, the rise and fall of the authentic Zulu way of governance see Laband (n 60) 1–151; Bennett (n 60) 101–106.

114 See Laband (n 60) 11; see also Bennett (n 60) 101–106.

115 See Bennett (n 60) 101–103.

116 It is important to mention that the current position of the Zulu dynasty could easily be extrapolated to what happened to the Ashante in Ghana, the Ngona in Angola or the Basotho in Lesotho and amaSwati in Eswatini, see Laband (n 60) 11–13 Dube and Nhlabatsi (n 47) 276–278.

117 See Laband (n 60) 7; see also Bennett (n 60) 106–111. However, see Dube and Nhlabatsi (n 47) 269–271, for the position in Eswatini.

118 Which is the Afrikaans word for 'chief'.

119 See s 5(2) Black Administration Act 38 of 1927 which allowed for the dicing up of the country into separate tribal enclaves for the different black communities.

120 However, see Dube and Nhlabatsi (n 47) 276–278 who argue that the courts in Eswatini have sought to constitutionalise the maxim *umlomo ongacali manga*—contrary to the provisions of s 11 of the Swaziland Constitution of 2005 which seeks to circumscribe the incumbent's powers. This, in the authors' view, conflates the king's capacities—the customary with the constitutional—thereby impeding rather than advancing constitutionalism and the protection of human rights in that country.

Also, because Dalindyebo purportedly sought to expel the complainants and their families from ‘his area’, it is important to say something about the *trekpas*. This is a banishment order which was commonly used during colonial and apartheid times—by traditional leaders, government functionaries, and local council officials—to expel black people who were considered to be ‘undesirable’ from a particular locality.¹²¹ Thankfully, there is no place for such a banishment order under the current constitutional order. As already indicated above, section 21(3) of the Constitution grants everyone the right ‘to remain in, and to reside anywhere in South Africa.’ Also, everyone in South Africa has the right to adequate housing, and may not be evicted from their home—much less have it demolished—without an order of court.¹²² And, as was the case under colonialism and apartheid, the jurisdiction of the traditional courts, which are presided over by the traditional leaders, is still severely limited and circumscribed by statute.¹²³ They can only adjudicate upon less serious, or non-complicated matters such as assault, stock theft, malicious damage to property and *crimen injuria*.¹²⁴ The cumulative effect of all these provisions is that any traditional leader who injures, maims or kills any person whatsoever or destroys his or her property, or expels him or her from a designated traditional community,¹²⁵ without any constitutional or legal basis, will be ‘doing a lot of wrong’ in terms of the Constitution. As further proof that Dalindyebo was not (and still is not) a king in the old, African sense, he could not even attend the funeral of one of his wives, Queen Nolitha, when she passed away in August 2016. He was incarcerated, and his right to freedom of movement, had been restricted (reasonably and justifiably).¹²⁶ Like many other kings or traditional leaders in South Africa, and the rest of the African continent, he can only exercise his residual powers, and whatever remains of his royal functions, within the constitutional limits that apply to every citizen and resident of the country.¹²⁷

121 This was initially done in terms of s 8 of Law 21 of 1895, and later in terms of s 5(2) of the Black Administration Act, and the Urban (Blacks) Areas Act 25 of 1945. For an illuminating discussion on this topic, see Ignatius Maithufi, ‘The Application of the Trekpas in the Indigenous Law and Protection of Human Rights in South Africa’ in De Kock DP and Labuschagne JMT (eds), *Festschrift: JC Bekker* (Vista University 1995) 143–160; see also George Bizos, *Odyssey to Freedom* (Random House 2007) 154–155.

122 See s 26 of the Constitution; see also *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) para 6–7.

123 See s 12 and 20 of the Black Administration Act 38 of 1927, s 26(3) of the Constitution, and the provisions of the Abolition of Corporal Punishment Act 133 of 1997.

124 See s 12 and 20 of the Black Administration Act 38 of 1927; see also cl 5 and 6 of the Traditional Courts Bill (2012) and the Schedule thereto.

125 As defined in s 1 (read with s 2) of the Traditional Leadership and Governance Framework Act 41 of 2003.

126 In terms of s 36(1) of the Constitution.

127 See *Contralesa v Speaker* (n 6) para 46.

Even though King Dalindyebo has now been released from prison, it is difficult to fathom how, short of a pardon by the President of South Africa,¹²⁸ he could remain eligible to be the king of his community again. This is because he was convicted of very serious crimes, and was sentenced to more than twelve months' imprisonment, without the option of a fine.¹²⁹ Moreover, his conduct, at the material time, and in the circumstances of the case, amounted to a transgression of a customary law rule or principle that requires his removal from office.¹³⁰ There is also a possibility that he may be disqualified if he should, for some reason, be declared insolvent or insane by a court of law.¹³¹

Pardon, itself, should be clearly distinguished from the expungement of a previous conviction from official record. Expungement depends on a lapse of time and the nature of the crime that was committed by the person concerned.¹³² Pardon, on the other hand, is one of the prerogatives of the president of the country, acting in his or her capacity as the head of the executive arm of government. However, even though the president will be exercising his discretion in that regard, he is still obliged to exercise it in a judicious and rational manner, within the framework of the Constitution.¹³³

Conclusion

From the foregoing, it is clear that South Africa is a constitutional democracy where the Constitution is the supreme law. While the Constitution recognises customary practices and the institution of traditional leadership, it also enjoins everyone to observe such practices within the framework of the Bill of Rights and the Constitution itself. Traditional leaders cannot, therefore, rely on customary law institutions and practices as a defence against any criminal or civil liability arising from the ostensible performance of their official functions. The crux of the judgment in *S v Dalindyebo* is clear and crisp: South Africa is a country where everyone is equal before the law, and has the concomitant right to equal protection and benefit of the law—irrespective of

128 In terms of s 84 (1)(j) of the Constitution.

129 See s 23(5)(a) of the Traditional Leadership and Governance Framework Act; see also s 20 of the Traditional Leadership and Governance Framework Act (Eastern Cape) Act 4 of 2005, and 21(1) of Traditional Leadership and Governance Framework Act KwaZulu-Natal (Act 5 of 2005).

130 It could be on the basis that he himself, or through the agency of others, destroyed the homes of some of the members of his community; and ruptured the bonds that existed among them, contrary to the country's foundational value of ubuntu.

131 See s 23(5)(c) and (d).

132 He can only apply to the Minister of Justice and Correctional Services ten years after he or she was convicted for the particular crime—see s 271(B)(1) of the Criminal Procedure 51 and 1977, and the Regulation made thereunder.

133 See *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51 para 2–3 where the Constitutional Court said that the president should not be unnecessarily constrained in the exercise of his powers. However, he is obliged to do so 'within constitutional bounds and in the interests of all our people.'

race, sex, gender, or social background. In sum, Dalindyebo is not the kingly figure that his ancestors, and those of his counter-parts on the continent, were about four hundred years ago.

References

- Barrie G, 'The King can do no Wrong: The Imprisonment of the Abathembu King Buyelekhaya Zwelibanzi Dalindyebo – Some Comments on South African Customary Law and Australian Parallels' (2016) *Tydskrif vir die Suid-Afrikaanse Reg*.
- Bennett TW, *Customary Law in South Africa* (Juta 2004).
- Binti PN and Ahmad ZB, 'The Divine Rights of Kings: A Comparative Study of Medieval European Kingship and Malay World "Deveraja"' (2016) *Social Sciences Journal*.
- Bizos G, *Odyssey to Freedom* (Random House 2007).
- Carpenter G, *Introduction to South African Constitutional Law* (Butterworths 1987).
- Diamond AS, *Primitive Law* (Longmans, Green & Co 1935).
- Dube A and Nhlabatsi S, 'The King can do no Wrong': The Impact of *The Law and Society of Swaziland v Simelane & Others* on Constitutionalism' (2016) *African Human Rights Journal* <<https://doi.org/10.17159/1996-2096/2016/v16n1a12>>
- Dugard J, *International Law: A South African Perspective* (Juta 2011).
- Elias OT, *The Nature of African Customary Law* (Manchester University Press 1956).
- Kerr AJ, *The Customary Law of Immovable Property and of Succession* (Butterworths 1990).
- Koyana DS, 'The Interaction between the Indigenous Constitutional System and Received Western Constitutional Law Principles' in De Kock DP and Labuschagne JMT (eds), *Festschrift: JC Bekker* (Vista University 1995) 71.
- Kunene M, *UNodumehlezi kaMenzi* (University of KwaZulu-Natal Press 2017).
- Laband J, *The Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (Jonathan Ball 2018).
- Maithufi IP, 'The Application of the Trekpas in the Indigenous Law and Protection of Human Rights in South Africa' in De Kock DP and Labuschagne JMT (eds), *Festschrift: JC Bekker* (Vista University 1995).
- Mangcu X, *Biko: A Biography* (Tafelberg 2012).
- Ngcukaitobi T, *The Land is Ours: South Africa's Black Lawyers and the Birth of Constitutionalism* (Penguin Books 2018).
- Pugh GW, 'Historical Approach to the Doctrine of Sovereign Immunity' (1953) *Louisiana Law Review*.

Statistics South Africa, 'Statistical Release PO302: Mid-year Population Estimates 2019'
<<http://www.statssa.gov.za/publication/P0302/P03022019>> accessed 11 June 2020.

Thompson L, (revised by Berat L) *A History of South Africa* (Yale University Press 2014)

Van der Vyver JD, 'Parliamentary Sovereignty, Fundamental Freedom and Bill of Rights'
(1982) *South African Law Journal*.

Case Law

Bangindawo and Others v Head of Nyanda Regional Authority 1998 (3) SA 262 (Tk).

Bhe v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC).

Congress of Traditional Leaders of South Africa v Speaker, National Assembly and Others
[2016] ZAWCHC 206.

Gumede v President of Republic of South Africa 2009 1 SA 152 (CC).

Law Society of South Africa and Others v President of the Republic of South Africa and Others
[2018] ZACC 51.

M v Home Office & Another [1993] 3 All ER 537.

R v Enslin 2 AC 69.

R v Mavros 1921 AD 19 21.

S v Dalindyebo 2016 (1) SACR 329 (SCA).

S v Gqozo 1994 2 SA 756 (Ck).

S v Makwanyane 1995 (3) SA 391 (CC).

Msiza v Director-General Department of Rural Development and Land Affairs and Another
2016 (5) 513 (LCC).

Umndeni (Clan) Wamantungwa and Others v MEC, Housing and Traditional Affairs KwaZulu-Natal [2011] 2 All SA 548 (SCA).

Legislation

Black Administration Act 38 of 1927.

Constitution of the Republic of South Africa Act 200 of 1993.

Constitution of the Republic of South Africa Act 108 of 1996.

Correctional Services Act 111 of 1998.

Criminal Procedure Act 51 of 1977.

Kwa-Zulu Act on the Code of Zulu Law Act 16 of 1985.

Natal Code of Zulu Law (Proclamation 151 of 1987, GG 10966).

Prohibition of Corporal Punishment Act 133 of 1997.

Remuneration of Public Office Bearers Act 20 of 1998.

Traditional Leadership and Governance Framework 41 of 2003.

Traditional Leadership and Governance Framework Act (Eastern Cape) Act 4 of 2005.

Traditional Leadership and Governance Framework Act (KwaZulu-Natal) Act 5 of 2005.

Urban (Blacks) Act 25 of 1945.

Proclamations

Proclamation 151 of 1987 (GG 10966).

Bills

The Traditional Courts Bill (2012).