

'Two Bulls in a Kraal'

- Recognising cultural difference
in post-Apartheid South Africa



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Abstract

This thesis addresses the dilemmas that might occur when one introduces liberal strategies for accommodating difference in a society with deep cultural cleavages. In the last few decades there have been an exhaustive debate in the western democracies on multiculturalism. The questions addressed are whether liberal democracy not only should recognise people because they are, but also for who they are. Four normative theoretical thinkers are presented, who all seek to provide strategies for how it is possible to make the right to cultural protection compatible with the right to equality.

The empirical analysis is an in depth study research of the South African process of accommodating difference. How and why did African traditional authorities become recognised in the new South African constitution of 1996, and to what extent was this recognition followed by the political action aimed at both reforming these institutions and clarifying their position in the democratic future?

There were three dilemmas from a liberal point of view, connected with the recognition of traditional authorities. 1) Traditional authorities were not compatible with the right to equality. 2) Recognition of traditional customs and practices might force an identity upon members of rural traditional communities. 3) Traditional authorities were not compatible with democratic structures and principles. There were however three aspects that influenced the traditional leaders position in the negotiations prior to the signing of the constitution. These were the centre-periphery aspect, the ethical aspect and the strategic aspect.

The conditioned recognition seemed difficult to implement, and the government promised to address the questions through official statements and initiated legislations, but few bills have been enacted. The prerequisites founded by the liberal perspectives applied were not present to a sufficient degree. The consequence of this inability to deliver on promises has caused the problem of ‘Two Bulls in a Kraal’¹, which implies that in rural traditional communities double structures of both political and judicial authorities are functioning without any clear rules for how both democracy and traditional institutions are to coexist.

¹The ‘Two Bulls in a Kraal’ situation is presented in Oomen, Barbara, *Traditions on the Move – Chiefs; Democracy and Change in Rural South Africa*, NiZA-cahier No. 6, Amsterdam, 2000. See <http://www.niza.nl/nl/publications/006/intro.htm>

Acknowledgements

While I am sitting here writing the last pages of this thesis, I suddenly remember an incident I once had at a market in Southern China. I saw a lovely red shirt, but unfortunately, I told the saleswoman, I could not buy it because the size was wrong. The woman asked me to wait, ran away and came back 10 minutes later with a new shirt in my size. However, it was blue, not red. So I told the woman that I would not buy it because the colour was different. She got angry and said: “It is same, same, but different.” Still, I insisted that this difference was the most significant one. But she thought of me as ignorant of all those aspects that made the two shirts equal, and said once again: “Same, same, but different”. We did not part as friends. Our conflict remained unsolved, since we could not agree on what influence this difference ought to have on the outcome of the bargain.

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Abbreviations

African Christian Democratic Party	ACDP
African National Congress	ANC
Afrikaner Einheitsbeweging	AEB
Afrikaner Volksfront	AVF
Afrikaner Weerstandbeweging	AWB
Azanian People's Organisation	AZAPO
Concerned South Africans Group	COSAG
Congress of Traditional Leaders	Contralesa
Conservative Party	CP
Democratic Alliance	DA
Democratic Party	DP
Federal Alliance	FA
Freedoms Front/Vryheidsfront	FF/VF
Inkatha Freedom Party	IFP
Minority Front	MF
National Party	NP
New National Party	NNP
Pan Africanist Congress	PAC
South African Law Commission	SALC
Transkei, Bophuthatswana, Venda and Ciskei	TBVC
United Christian Democratic Party	UCDP
United Democratic Party	UDM

1. Introduction

The object of this research is to ask which dilemmas that might occur when one introduces liberal strategies for accommodating difference in a society with deep cultural cleavages. The empirical analysis is an in depth study of the process of recognising difference in the post-Apartheid South Africa. Core empirical questions are: How and why did African traditional authorities become recognised in the new South African constitution of 1996, and to what extent was this recognition followed by political action aimed at both reforming these institutions and clarifying their specific position in the democratic future.

At the inauguration of the National Council of Traditional Leaders in Cape Town the 18th of April 1997, president Nelson Mandela on behalf of the ANC addressed the traditional leaders and kings: “I feel truly humbled to officially open the National Council of Traditional Leaders; to stand before my leaders, at last to acknowledge their status and role as full participants in national affairs; as part of the corps of leaders in the reconstruction and development of our country.”² As late as in 1988 the African National Congress (ANC) had declared in their constitutional principles that traditional leadership was anachronistic to their modernist vision and that the organisation would be abolished with the advent of democracy.³ Why had the ANC changed their view so significantly?

Few attempts have been made inside the scholars of political science to sort out the question regarding the role of African traditional authorities in the democracies of post-colonial Africa. Do we, as the ANC did, view them as feudal anachronisms ready to be swept away by the advent of liberal democracies? But why do they still exist in most contemporary African democracies? My research thus rest upon two presumptions: 1) Due to their mere existence, I think it is important to analyse traditional authorities role and functions in the African democracies, since they seem to possess more influential power than only symbolic. 2) Attempts to sort out the multifaceted issues regarding traditional authorities might provide for a broader understanding of the challenges that affect the democratisation process in Africa. I am not making a value judgement on these institutions, I only aim at analysing which dilemmas are connected to them from a liberal democratic perspective.

² Mandela, Nelson, speech at the Inauguration of the Council of Traditional Leaders, 18th of April 1997.

³ Jacobs, Sean The politics of traditional leadership, Epolitics Issue 11, Cape Town: Idasa, 2000:2.

1.1. Theoretical perspective

The last ten years have marked a dramatic change in the political landscape of the world. The world is becoming increasingly globalised, at the same time people have sought to be recognised for their particularities and difference. Stressing cultural and religious distinctions have been regarded as important for groups trying to gain specific rights due to their particularities. This phenomenon has also created an exhaustive theoretical debate on multiculturalism and the right to also be recognised for *who you are*, not only *that you are*. The problem connected to accommodating these claims is that it challenges the old liberal vision of state neutrality in matters regarding the good. In a liberal society one must remain neutral to the good life, and restrict oneself to ensure that no matter how one sees things, different citizens ought to deal fairly with each other and the state ought to deal equally with all.⁴ The state needs to be colour-blind in regard to individuals' particularities.

But does this benign state neutrality necessarily provide justice between different cultural groups in a heterogeneous society? In this thesis I will present different normative theoretical thinkers inside the liberal tradition who have aimed at finding strategies that challenges the old dichotomies of universalism and particularism in a liberal democracy. The theoretical questions I seek to answer are: Which suggestions do the different theories put forward to make difference compatible with the right to equality? How are these theories able to both securing the right to be equal, and at the same time protect the right to be different?

1.2 Empirical perspective

By analysing the empirical case of the South African process of accommodating difference I intend to shed some light on dilemmas that might occur when one see the importance of recognising traditional authorities in a newly established liberal democracy. The debate inside the liberal tradition regarding the accommodation of difference is challenged by the cultural experiences of South Africa. South Africa is a country that so ruthlessly has experienced what politics designed to cultivate cultural difference can be. Sometimes the line is thin between cherishing cultural particularity and stigmatising entire groups of people due to their

⁴ Taylor, Charles, "The Politics of Recognition" in Gutman (ed.) *Multiculturalism*, New Jersey: Princeton University Press, 1994:57.

otherness. The new constitution of 1996 did however to some extent recognise traditional African authorities, both political and judicial.

But, how and why did the traditional leaders' claim of cultural recognition become entrenched in the constitution, and not others policies aimed at accommodating the cultural diversity of South Africa? What influenced the negotiators preferences due to cultural accommodation? This recognition of traditional authorities was conditioned, and only to take form if they managed to adapt in to a new political structure based on liberal notions. The ANC was founded as a rejection of the politics of separation engineered to discriminate the African majority. With a probability amounting to almost certainty they knew they were going to be the majority party after the first free elections. How were they going to address the rural communities still living under traditional authorities when they obtained political power? Were they able to implement the requirements established in the new constitution in regard to the recognition of traditional authorities, or was this recognition nothing more than a façade presented to gain legitimacy in rural areas?

In order to answer these questions it is important to understand the specific context where the claims of cultural rights were introduced. In the subsequent part of this chapter, I am going to present the cultural mixture of the population and the historical background of the present political situation. In the process of accommodating difference in South Africa the legacy of the past was always omnipresent. Centuries of colonisation and decades of Apartheid have made the questions of cultural difference extremely sensitive. South Africa is a multicultural society, but in some regards one might argue that the vast cultural cleavages that seems to exist today are to a large extent constructed by earlier segregation policies. These legacies have two significant effects on the contemporary situation. First, it says something about people's sentiments toward policies aimed at accommodating different cultures, and further something about the political preferences in the transition. Secondly, it says something about the political, cultural, legal and economic institutions already operating in society. Political change cannot be separated from the existing social, cultural and economic institutions of a society. For instance, the ability to deliver political actions to implement new policies in the aftermath of a transition is always influenced by the functioning institutions of the society.

1.3 Legacies of the past

“It will not help us if we pretend that the past does not continue to define the present, because it does. I think a recognition of that would enable us to deal with racism properly”.

Thabo Mbeki⁵

In Cape Town until the mid 1990s: Close to the parliament of South Africa, two main historical museums are situated. The first one is the Museum of Cultural History, the latter the Museum of Natural History. In the Museum of Cultural History you can follow the South-African history from the first Dutch settled at the Cape, until the late eighties urban life of Cape Town. Only the cultural histories of white population are presented, together with the ancient cultures of Greece and China. In the latter Museum of Natural History South Africa’s different “native tribes” are presented together with an impressive collection of the South African wild life. In neither of the museums is the urban history or life of African people presented, neither any signs of a modernised rural life.

In Cape Town in the late 1990s: The Museum of Cultural History has recently been expanded with the sections of the history of the museum building and the History of District Six. The first uncovers the buildings history of enslavement and forced prostitution of Africans. The latter the history of forced movement and total levelling of a district with a mixed population in the city centre of Cape Town. A mixture looked upon as unsuitable by the Apartheid government, and forced to move from the city centre to the outskirts and townships surrounding the city. Since no people of African, Coloured, Indian or Muslim origin were allowed to live in the urban city centres. The exhibitions in the Museum of Natural History are kept as an illuminating example of the apartheid policy, with only a few signs to remind us of how one viewed difference in the past.

1.3.1 A cultural mixture

Most people living in South Africa regard themselves as primarily South Africans, with a South African identity.⁶ Being South African means that you have another identity than if you

⁵ Extract from a debate in Parliament on racism in *The Mail & Guardian* the 2. Of October 2000.

were a citizen of a neighboring state. It is also different from being Dutch or British. No matter what your origin is, you are a South African, and a part of the “rainbow nation”⁷, no matter how you view your own, or other citizen’s cultures, traditions and colors. But this does not mean that the mixture of cultures, traditions and colors are viewed as unproblematic. South Africa is the beloved country,⁸ but it is not a country with a history of recognition, accommodation and respect for difference.

Normally one divides the South African population into four different groups according to ethnicity. These are also the four main racial categories recognized by the South African governments of the twentieth-century. As pointed out later, this is a simplistic stratification, and does not give a thorough presentation of the South African heterogeneous society. The first group is the Africans. This is the indigenous South African population that inhabited South African soil before the European settlements. The Africans are again divided into several language groups and cultures, which consists of the Xhosa, Zulu, Pedi, Ndebele, North Sotho, South Sotho, Swazi, Tsonga, Tswana and the Venda people. In a census done in 1996 by Statistics South Africa more than three quarters, 77%, of the total South African population of 40.58 million people, nearly 31 million people classified themselves as African.⁹

The second group is considered to be the population of European origin. The first group to settle in what is now known as South Africa, was of Dutch origin, and founded the Cape Colony in 1652. They soon started to view themselves as Afrikaans, and created their own language based on the Dutch language. They were also called the “Boers” by the English speaking population. The British colonists occupied the Cape peninsula in 1795 to prevent it from falling into the hands of the French. They later founded other ports, but the majority of settlements were in the Natal Province. 11% of the total population classify themselves as white, who in number are 4.3 million citizens.

⁶ For a discussion on South African identities, see Maharaj, Gitanjali (ed.) *Between Unity and Diversity – Essays on Nation-Building in Post-Apartheid South Africa*, Cape Town: Idasa, David Philips Publishers, 1999: 3-72.

⁷ The word “Rainbow nation” and even “Rainbowism” has been frequently used as a metaphor for the South African plural society in the process of nation building in the aftermaths of the Apartheid regime. See *ibid*:3-7.

⁸ *Cry, My Beloved Country* by Allan Paton is one of South Africa’s most known literary novels.

⁹ Statistics South Africa, Population Census '96. New Statistics from Census 2001 are in progress. The results are to be published in 2003.

The third group is the Cape Coloured. The biological and cultural differences among the Coloured are immense. Many have Khoikhoi ancestors, the people that lived in the Cape Peninsula before the Dutch settlement. Others descend from people who were imported as slaves in the late seventeenth century. Only a few imported slaves were Africans, and then mostly from Mozambique. The rest were imported from other Dutch and British colonies like Indonesia, Ceylon and India. The Coloured also consist of a mixture between these groups and Dutch settlers. They are estimated to be 3.6 million citizens, and are counted as 9 % of the total population.

The last group is the population of Indian and Asian origin. In the 1860s some white landowners started to produce sugar, and they could not attract sufficient African laborers to do the labor demanded. The Natal and the Indian governments made certain agreements, and Indians began to arrive in Natal in 1860s on a five-year labor contract. Most of them stayed in Natal after the contracts ran out. The Indian/Asian population group is the smallest at 3%, slightly more than 1 million citizens classify themselves as belonging to this group.

Even though these groups are considered as the main categories of people, there are also a quite extensive number of Jews, of Chinese, of immigrants from other African countries like Nigeria, Namibia, Zimbabwe etc., and people that descend from German, Scandinavian, North American, Greek etc. ancestors.

1.3.2 Parliamentary supremacy

Until the South African 1993 interim constitution the political system was highly influenced by the principle of the supremacy of the Parliament. The system was influenced by Blackstone's *Commentaries on the Laws of England*, which contained statements like "if the legislature positively enacts a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, which is vested with the authority to control it"¹⁰. The philosophy further states that the Parliament can "do everything that is not naturally impossible," and that its power is "absolute and without control"¹¹.

¹⁰ In Dugard, John, *Human Rights and the South African Legal Order*, New Jersey: Princeton University Press, 1978:16.

¹¹ Ibid: 16

This tradition was introduced when The Union of South Africa was established in 1910 with the fusion of the four different colonies, Transvaal, Natal, Orange Free State and the Cape Colony. At the time when the idea of the union of the four British colonies in South Africa came to be mooted, there were several constitutional traditions upon which to draw in the drafting of a new constitution. First, there was the Orange Free State's experiment with a rigid American-type constitution, with guaranteed rights, although largely for the population of European heritage. Second, there was the Transvaal history of the rejection of a rigid constitution in favor of *Volksraad* supremacy, coupled with firm adherence to the principle of racial inequality. Third, there was the Natal experience of British parliamentary institutions and racial superiority, with the Rule of Law confined largely to the white population. Fourth, there was the Cape liberal tradition premised on a flexible constitution, the Rule of Law for all, and a colorblind, but not income blind, franchise.¹²

The liberal aspect of the Cape tradition has been severely disputed, and the rights of the Coloured and African population in the colony are regarded as quite ambiguous. In 1853 the British government provided the Cape Colony with bicameral parliament empowered to legislate on domestic matters subject to a British veto, while the executive branch continued to be filled with officials responsible to London. The parliamentary franchise was open to any male adult inhabitant, irrespective of race or ethnicity, who occupied property valued at £25 or who earned either a salary of £50 or a salary of £25 if board and lodging were provided. In principle this constitution had been a victory for the liberal point of view, especially since the principle of non-racialism was incorporated. In practice, however, the white population always dominated Cape politics. The other groups were always handicapped by poverty and by white control of the press and of the machinery to register voters and conduct elections. Non-whites never amounted to more than 15 percent of the colonial electorate and never produced a member of the colonial parliament.

Even though some of the Cape delegates in 1910 spoke for a liberal constitution, the final draft of the Constitution for the Union of South Africa became the British-Kruger notion of parliamentary supremacy, subject to the rights reserved to the Imperial Parliament of Westminster. No attention was paid to the need for a bill of rights to protect the freedoms of the vast non-franchised, non-white population from the whims of an all-white legislative. This

¹² Ibid: 25.

also meant that the South African courts should have no power of judicial review. The four colonies became provinces of the union, but the central government was legally supreme over all local institutions. Powers were divided within the center. As in Great Britain, the executive was responsible to a majority in the lower house of parliament, named the House of Assembly, the Senate, the upper house, was indirectly elected and weaker in several respects. With two exceptions, simple majorities in both houses of parliament could enact laws amending the constitutions in the same way as other laws. The judiciary thus had scarcely any scope for testing the validity of acts of parliament. The system of winner take all, devoid of checks on the legal competence of a majority party, was to have devastating consequences especially for the non-white population of the union.¹³

The two exceptions later became a subject of a bitter constitutional dispute. The first exception was the protection of the franchise laws in the Cape Province. Some of the Cape delegates, who had black as well as white constituents, proposed a uniform franchise on the Cape colonial model, but the other three delegations remained adamantly opposed to that proposal. The outcome was a compromise. Membership in parliament was confined to white men, but the franchise laws of the earlier colonies remained in force in each of the new provinces. To protect the rights of the Africans in the Cape Province, any bill altering those laws would require the support of two-thirds of both houses of parliament in a joint sitting. The other exception, which also caused high discrepancies, was Section 137 in the constitution, which guaranteed the equal status of English and Afrikaners. To alter this section also needed a two-thirds majority vote of both Houses of Parliament in joint meeting.

In following the British Example, the South African constitutional drafters ignored the flexible character of the British Constitution, with its respect for constitutional conventions, political compromises and its willingness to meet the needs of the comparatively homogenous British people. The essence of the South African problem was an extreme heterogeneity, and the colour consciousness of most whites and the national exclusiveness of most Afrikaners were potent enough to override any feelings for conventions, for compromise, and for the liberties of others. Since a flexible Constitution provides no legal safeguards against arbitrary government, it was the very worst prescription for the South African multicultural society.¹⁴

¹³ Thompson, Leonard *A history of South Africa*, New Haven: Yale University Press, Revised Edition, 1995:150.

¹⁴ Thompson, Leonard, *The Unification of South Africa 1902-1910*, Oxford: Clarendon Press, 1960:174 –75.

Pass laws, expropriation of land, non-franchise, withdrawal of rights to business ownership and forced movements have been a part of South African multicultural policy since the time of the first settlement. The Constitution of 1910 made it possible for the majority in parliament to pass the legislation of its desire. When D.F. Malan and his National Party became the majority party, elected by the Afrikaner population, and formed government in 1948, the parliamentary supremacy made the politics of apartheid both possible and legal. Due to this, the racial history of South African segregation and discrimination was not merely socially condoned, but legally endorsed in a carefully constructed legal order premised on racial separation. The argument of the Apartheid Government was that it was simply a policy of constructive differentiation - "differentiation without inferiority" - rather than discrimination.

1.3.3 Indirect rule

White Supremacy must nevertheless be distinguished from the politics of segregation. There is of course disagreement about how and why the politics of segregation emerged, but a key problem was how the colonial powers were to answer the "Native Question". In the beginning the process of developing a system of cultural cohabitation had a character of muddling through. The problem solving seemed like instant actions to the concrete problems that emerged. Only later after the South African war and the unification of the four provinces, there seemed to emerge a concrete ideology and an overarching plan of segregation.¹⁵ A plan that later has been characterized as a system of indirect rule.

In the beginning of the nineteenth century it became clear that the colonial powers needed to have a political strategy towards the African people and their institutions and traditions. The British occupation of the Cape Colony in 1806 was the first sign of a distinct policy towards customary law and other African institutions in South Africa. Britain confirmed the system of Roman-Dutch law already operating in the colony as general law, since it was deemed to be a suitably "civilized" system, but as the application of indigenous law would have subjected a portion of the population to an inferior brand of justice, customary law had no official recognition. In one way this strategy was quite liberal, since it was supposed to view everyone as equal, and thus, subject to the same law. Though it is important to comment that it was not

¹⁵ Worden, Nigel, *The Making of Modern South Africa*, third edition, Oxford: Blackwell, 2000:82.

a tolerant law that recognised diverging beliefs and way of life, since customary law had no official recognition.¹⁶

After the conquest of the Zulus in Natal in 1843, the British government changed their policies towards African culture and traditions. In Natal the white population was surrounded by a vast and increasing numbers of Africans. By 1870, the African population of the colony was estimated to be fifteen times as numerous as the white population. The Natal colonial government tried because of this to place the Africans in reserves, which they called locations, leaving the rest of the colony available for white settlement. A method for controlling the African population became a system of indirect rule, a system that later became applied in colonial tropical Africa. The key in this Shepstone system was the use of African chiefs as subordinate officials, made responsible in the last resort not to their own people but to the colonial government. The Natal province also imposed a dual legal system. Customary African law, codified by the Natal government, prevailed among the Africans. The colonial Roman Dutch law, taken over from the Cape Colony, applied by whites and in relations between Africans and Whites.¹⁷

The same manner of reasoning influenced the politics towards the African population when the liberal Cape Colony annexed Transkeian territories. The cost of imposing alien law would have been high in terms of preserving the tranquillity of a potentially hostile population. Imposing Roman-Dutch law on the entire population would have caused tremendous practical problems in this area, and the Cape government, like the colonial powers in Natal, was forced to rethink its approach. The Transkei was geographically remote, its people had not been subjugated nor had they been demoralized by white rule. Furthermore, in this area settler immigration was restricted. While all these factors favoured applying customary law, the colonial conscience balked at unqualified recognition of customary law. Hence the annexation proclamations gave the courts authority to apply customary law only if it was compatible with “the general principles of humanity observed throughout the civilized world”.¹⁸ This repugnancy clause is still debated in recent politics, but nowadays the terminology has been changed to “compatibility with the universal Human Rights”.

¹⁶ Discussion Paper 76:5.

¹⁷ Thompson, 1995:98.

¹⁸ South African Law Commission “*The Harmonisation of the common Law and the Indigenous Law: Conflicts of Law*” Discussion Paper 76, Project 90, Pretoria, 1998.

In the drafting of the new unified constitution of 1910 one needed to develop one cohesive strategy towards the African population, and the question was whether to abolish African customary law, or to recognise it with a repugnancy act entrenched. By 1910 all different politics and views toward cultural diversity had caused an unintended multiple legal system with excessive difference between the old provinces. The most influential notion of the African population had been a liberal view combined with the idea of assimilation. The colonial powers had regarded Western law as a birthright in much the same way as Roman law had been the right of a Roman citizen wherever he happened to be in the Empire. Western law could not, however, be imposed wholesale on the local population, since it was considered to be far too complex and sophisticated to be understood by Africans.¹⁹ It was however important to make the exemption that Africans who were considered to be suitably “detrribalised” could apply to be subjected to the common law.²⁰ Colonial secretary Lord Milner uses these words when he argues for a separation of people of European origin and the Africans,

“On the one hand the policy [segregation] does not impose any restriction on one race which is not applicable to the other. A European is as strictly prohibited from living in the native reservation, as a native is from living in the European Quarter. On the other hand, since this feeling exists, it should in my opinion be made abundantly clear that what is aimed at is a segregation of social standards, and not a segregation of races. The Indian or the African gentleman who adopts the higher standard of civilization and desires to partake in such immunity from infection as segregation may convey, should be as free and welcome to live in the civilized reservation as the European, provided of course, that he does not bring with him a concourse of followers. The native peasant often shares his hut with his goat, or sheep, or fowls. He loves to drum and dance at night, which deprives the European of sleep. He is sceptical of mosquito theories. “God made the mosquito larvae,” said a Moslem delegation to me, “for God’s sake let the larvae live.” For these people, sanitary rules are necessary but hateful. They have no desire to abolish segregation.”²¹

This quotation illuminates how people who regarded themselves as liberal viewed the accommodation and recognition of difference. Difference in social standard caused by different levels of civilisation should be segregated, but if people from uncivilised cultures adopted the European beliefs, customs and behaviour, they should be regarded as equal regardless of “racial” origin. In other words, liberalism was premised on white superiority, but

¹⁹ Bennett, T. W, *The Application of Customary Law in Southern Africa*, Cape Town: JUTA & Co, Ltd, 1985:5.

²⁰ Discussion Paper 76:7.

²¹ Perham, Margery, *Colonial Sequence, 1930 to 1949*, London: Methuen, 1967: 65.

it acknowledged the possibility that a small number of Africans could be admitted to the circle of civilized. Other “uncivilized” people would be much more at ease in their own uncivilised, cultural surrounding. Legal assimilation was seen as a desirable goal on a distant horizon, an objective that would one day replace indigenous institutions.²²

However, in 1910 when the new republic’s constitution was to be signed, another notion of segregation started to emerge. This idea has been called protectionist segregation, and it started to get substantial support from a variety of different angles. Anthropologists acted as advisors for the government’s politics since they strongly supported segregation politics on the grounds that they protected Africans from detribalisation. Protectionist segregation was theoretically supposed to reject notions of the African as essentially inferior and also to discard the assimilation approach that destroyed the basis of the African systems.²³ Nevertheless this notion of the African was rather exotic. The anthropological studies developed in South Africa, and in other parts of the world, presented the image of a cohesive and unchanging African rural culture.²⁴ The essentialists viewed the African people as belonging to a static culture, almost outside of history. They had an imagination of Africans as living in unchanging societies, in which the present was the way things had always been, and in which the past defined the future.²⁵ This segregationist discourse provided an insincere celebration of cultural differences and a future of continuing, and appropriate, legal segregation. Africans would realize themselves through perpetual otherness, not eventual sameness.

The differences and distance between the state’s regulatory order, and the way people actually do things, are a part of every society. And especially in the South African context, a great gap developed between the idea of the African as belonging to a tribe and the reality of Africans living in an industrializing society. The policy, though, was a Janus faced endeavour. On the one hand the new policy was to foster an indigenous native culture or system of cultures,²⁶ on the other hand, the policy was implemented to avert a growing threat to white hegemony. Africans now formed a sizable urban proletariat and had developed independent political and labour associations. The government thus began to revive traditional institutions in the hope

²² Chanock, Martin, “*Law, State and Culture: Thinking About Customary Law After Apartheid*”, South Africa: Acta Juridica, 1991:53.

²³ Ibid:88.

²⁴ Worden 2000:88.

²⁵ Chanock 1991:53.

²⁶ Worden, 2000:85.

that the energies of an increasingly competitive class of people would be deflected towards a “tribal culture”. In 1913 the Natives Land Act laid down a territorial framework for segregation. Africans were thereafter prohibited from buying or leasing land outside certain areas. This act has been known as the first pillar of Apartheid, and drew a clear division between rural reserves and the white-owned urban areas and farmlands.

Not until the commencement of the Black Administration Act 38 in 1927 did the government of the new republic pass any specific provision for the recognition and application of customary law and traditional institutions. This Act was introduced as an attempt to establish a national system for inter alia recognition and application of customary law and the creation of a separate court structure.²⁷ The Act gave the Traditional Courts a formal status, and they were given authority over both private and criminal jurisdiction. However, the customary courts were limited by different provisos that functioned as control mechanisms. For instance, a general reservation in favour of public policy and natural justice, the repugnancy proviso, was inherited from the colonial period. It is also important to mention that women were excluded from any positions of authority in the customary court structures. Women were regarded as minors under the guardian of a father or husband and hence were not to represent the court nor even represent *themselves* in court. The court structure and rules for recognising and applying customary law, which was settled in Black Administration Act 38 of 1927, lasted until the 1980s. Only when the Law of Evidence Amendment Act was passed in 1988, a series of reforms were initiated.²⁸ But still, the customary law was subjected to some important provisos, which, as I later will debate further, even exist today.

In this new institutional structure traditional leaders came to play the role of the development facilitator, the executive and the judiciary in African communities. Traditional leaders also became responsible for claiming taxes from Africans under their control, and at the same time they became subject to a more codified single system of “Native Law”. The customary law was then supposed to be the regulation of non-market relations, in land law, in personal, family law and in community affairs. A problematic feature of segregation, however, was the urban claim for labour. This feature resulted in the idea that it was only when the whole family migrated from the tribal home, and out of the “tribal” jurisdiction, that the traditional system would fall into decay. Because of this it was the migration of the native family, of the

²⁷ Olivier, N. J. J. et al, *Indigenous Law*, Durban: Butterworths, 1995:190.

²⁸ Discussion Paper 76, Conflicts of Law, 1996:12.

females and children, to the farms and the towns that should be prevented. This turned the male African population into semi-migrant workers, living in male compounds in the townships, but belonging to their rural community, later labelled, the homelands.

Although the government's ostensible purpose was to rejuvenate African tradition, its actual intention was to establish a segregated system of justice to match segregation in land and society. British colonial practice came to be the mode of domination over a "free" peasantry. Indirect rule signified a rural tribal authority. It was about incorporating natives into a state-enforced customary order, and a system where the urban power spoke the language of civil society and civil rights, the rural power, the language of community and culture.²⁹ The 1927 Act marked a rejection of the notion of political assimilation of Africans into the Union. It clearly backed the Natal principles of bolstering "traditional" authorities in the reserves under the "Supreme Chief". In 1936 the Representation of Natives Act was passed, removing the Cape franchise. Segregation of African administration and political power was now complete.³⁰

1.3.4 The Apartheid rule

As described earlier the policies of former governments and rulers had developed a legacy of discriminating institutions and laws prior to the Apartheid Era. So was Apartheid simply segregation by another name? One can argue that this was essentially so, but the Apartheid ideology developed the idea further. Apartheid introduced a more ruthless system of labour control,³¹ more thorough laws on the immorality of mixed marriage and sexual relations, and a system of separate freedoms where the rights to movement was especially restricted.³² The latter developed into a system of homelands and regulation of urban African residence into townships. One of the greatest causes of racial humiliation in South Africa and maybe one of the most symbolic description of the policy, was simply the sign, "Slegs Blankes", or in English, "Whites Only". These signs were justified by the policy of separate facilities, which were supposed to provide separate facilities for different racial groups. Separate but equal.

²⁹ Mamdani, *Mamhood Citizen and Subject, Contemporary Africa and the Legacy of Late Colonialism*, New Jersey: Princeton University Press, 1996:18.

³⁰ Worden, 2000:85.

³¹ Worden, 2000:105.

³² Dugard, 1978:63 – 78.

The separate but equal ideology was based on the idea of separate development, but the ideology has been understood as merely propaganda more than a sincere interest for the protection of authentic cultures in an industrialising world. The term Apartheid, which is the Afrikaans word for apartness, soon developed from a political slogan into a drastic, systematic program of social engineering. From now on the new government applied Apartheid in a plethora of laws and executive actions. Thompson³³ has pointed out that Apartheid policies were based on four different ideas. First, the government had an idea that the population of South Africa comprised four “racial groups” – White, Coloured, Indian and African- each with its own inherited culture. Second, Whites, as the civilized race, were entitled to have absolute control over the state. Third, white interests should prevail over black interests. The state was not anymore obliged to provide equal facilities for the subordinate “races”. Fourth, the white racial group formed a single nation, with Afrikaans and English-speaking components, while Africans belonged to several distinct nations or potential nations. This formula made the white population the largest in the country.

The idea of different nations became the fundament in the Grand Design of separate development, more known as the foundation of the Homelands. The Grand Design of separate development was supposed to end in the creation of separate independent nation states for the various ethnic groups in South Africa. They were intended to eliminate the racial friction and discrimination by allowing each ethnic group the right to self-determination within its own territory. In 1951, the government abolished the only official countrywide African institution, the Natives Representative Council. Then it grouped the reserves into eight, eventually ten, territories. Each such territory became a “homeland” for a potential African “nation”, administered under white tutelage by a set of “Bantu” authorities, consisting mainly of hereditary chiefs. In its homeland, an African “nation” was to “develop along its own lines,” with all the rights that were denied it in the rest of the country.

The first self-governed district became Transkei, and the Transkei Constitution Act 48 of 1963 constituted it as a self-governing territory within the Republic of South Africa. In these self-governed areas citizens had dual citizenship, with black people being designated as citizens of these national states while retaining their South African citizenship. Self-governing areas were given the own flag, anthem and official language. In 1976 Transkei was

³³Thompson 1995:190.

declared independent by the South African government, followed by Bophuthatswana in 1977, Venda in 1979 and Ciskei in 1981³⁴. With this declaration of independence blacks who became citizens in these new states lost their South African citizenship. Citizenship of Transkei, for instance, depended on the ethnic origin and not necessarily upon residence, domicile or the choice of the individual concerned. Many Transkeians living in urban areas in South Africa, who were born there and had lived there all their lives, lost their South African citizenship in this way.³⁵

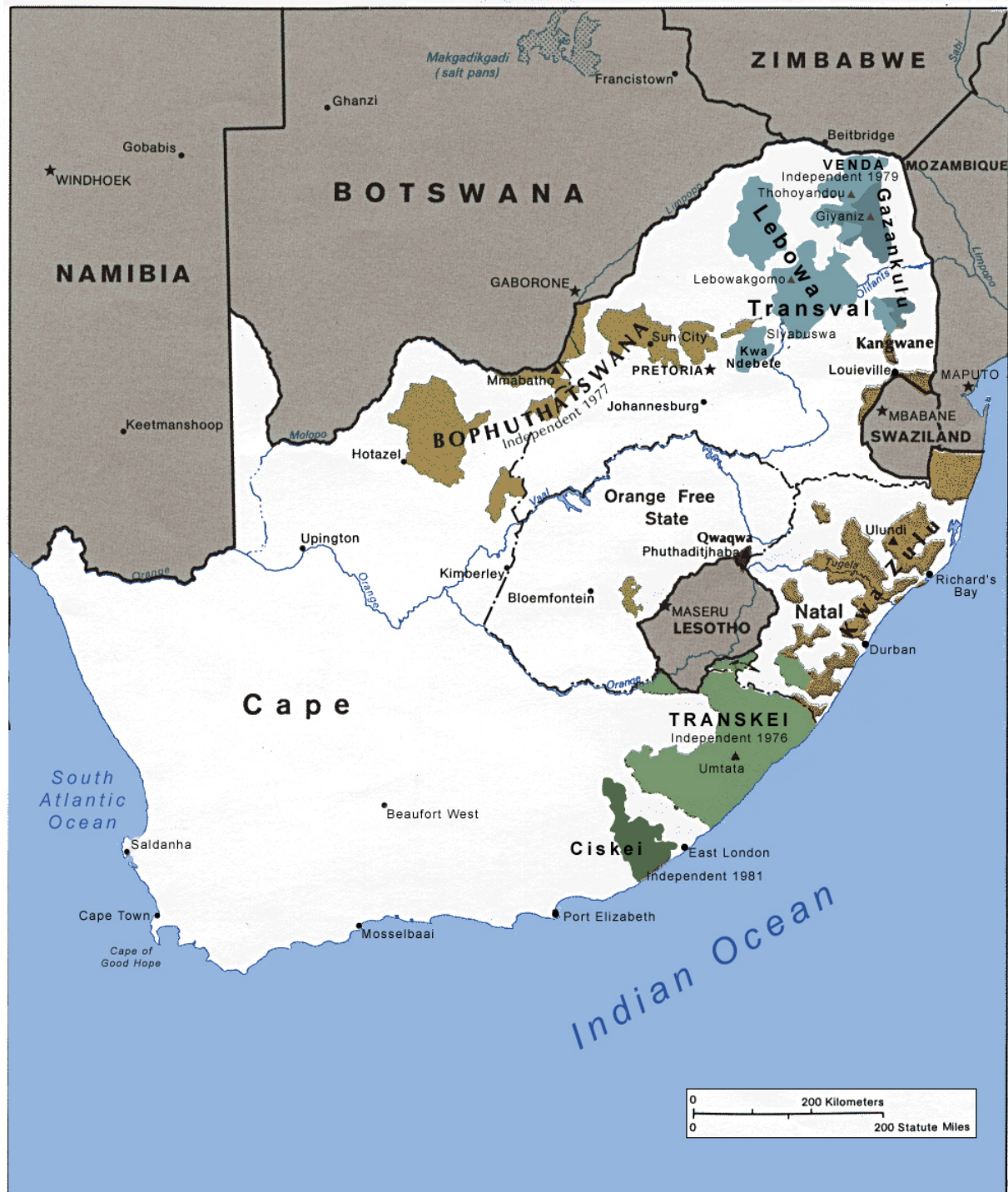
Most of the self-governing territories were direct legacies of the haphazard system of reserving certain lands for African use during the final stages of white settlement. Nearly every Homeland consisted of several pieces of land, separated by white-owned farms. Bophuthatswana had nineteen fragments, some hundred miles apart. KwaZulu comprised twenty-nine major and forty-one minor fragments. For an illustration of these fragmented homeland areas see the map in figure 1.1. The names of the homelands established by the Apartheid government are Transkei (Xhosa), Ciskei (Xhosa), KwaZulu (Zulu), Bophuthatswans (Tswana), Lebowa (Pedi/North Ndebele), Venda (Venda), Gazankulu (Shangaan/Tsonga), Basotho Qwa Qwa (Sotho), Kangwane (Swazi) and KwaNdebele (Ndebele). It was also forbidden for white capitalists to directly invest in Homelands, and the governments of the Homelands depended on subsidies from Pretoria. As a consequence of this policy the Homelands could provide full subsistence to a smaller and smaller proportion of the African people. Consequently, the economic incentives for Africans to leave the Homelands in favour of the great industrial complex around the largest cities grew more powerful than ever.

At the same time the government tried to herd nearly all Africans into the Homelands, except those whom white employers needed as labourers. The Department of Bantu Administration and Development stated in 1967 that the “Bantus” were only temporarily resident in the European areas as long as they offered their labour there. As soon as they no longer were fit for work or superfluous in the labour market, they were expected to return to their country of origin. All non-whites needed passes with a special permit to stay in the urban centres.

³⁴ Until 1978 the self-government areas were known as Homleand. In 1978 the terminology was changed by a statutory amendment as to be called national state. This term caused confusion since the national states were a part of the Republic of South Africa.

³⁵ Chaskalson, Arthur, “The right of Black Persons to seek Employment and be Employed in the Republic of South Africa”, in Bennett (ed.) *Urban Black Law*, Cape Town: JUTA& Co, 1984:34.

Figure 1.1: Map of Homelands designed by the government



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Source: The Perry-Castañeda Library Map Collection, Historical Maps of Africa, The University of Texas at Austin, 1986.

Hundreds of thousands of Africans had been born and bred in the towns, and nearly as many African women as men were living there. Still the government persisted in treating all urban Africans as visitors whose real homes were in the Homelands and whose leaders were “tribal” traditional chiefs.³⁶ If a person had no real link to any self-governing territory, as for instance was the case for thousands of urban Africans, he or she should become a citizen of the territorial authority area to which he was attached by birth, domicile or cultural affiliation.³⁷ Both Africans living in the self-governing territories and those living in the common areas were deprived of the rights to vote in the South African parliament, since they had their own national or local governments in which they were free to participate.

The government also removed African squatters from unauthorized camps near the cities, placing those who were employed in segregated townships, and sending the rest either to the homelands or to farms where the white owners required their labour. Under the Group Areas Act of 1950 the government divided urban areas into zones where members of one specified race alone could live and work. In many cases, areas that had previously been occupied by Blacks were zoned for exclusive white occupation. Some of the most notorious removals were Sophiatown, an African area four miles west of Johannesburg centre, and District Six, a vibrant Coloured community in the centre of Cape Town. The homes were razed and the inhabitants relocated, but still the government claimed that the removals were voluntary. Nevertheless, in the urban ghettos, Africans mingled regardless of ethnicity. For example, they ignored the government’s attempt to carve up the townships into ethnic divisions. Many married across ethnic lines, and members of the younger generations identified themselves as Africans rather than Xhosa, Zulu, Sotho, Pedi or Tswana.³⁸

1.3.5 The institutional legacy

There are several explanations of why the Apartheid state found itself in a crisis in the 80s. Both internal and external events influenced the position of the Apartheid government. Internal explanations are for instance that, in quantity the white population was further and further outnumbered by the groups of people they ruled. The Africans became steadily more

³⁶ Thompson 1995:195.

³⁷ Dugard 1978:92.

³⁸ Thompson 1995:201.

educated and shared growing percentages of the country's disposable income.³⁹ Apartheid was due to its social engineering an extravagance, with its grand designs of segregation, large military and security establishments.⁴⁰ Haunted by internal revolt, foreign boycotts and mass demonstrations, the Apartheid government collapsed. The end of the Soviet Union had two effects in South Africa. One, it deprived the ANC of its main source of support, and second, the NP could not claim to protect South Africa from a communist onslaught.⁴¹

It soon became evident that the elements of a future democratic state needed to be negotiated. But how were the diverging parts of this plural society to agree upon rules for their further democratic coexistence? The South African institutional legacy, which combined the idea of parliamentary supremacy and a tradition of indirect rule, had been devastating for the multicultural society of South Africa. Parliamentary supremacy gave tremendous power to those in government. With no judicial review or Bill of Rights the government could pass every law of their own desire, if they had enough forces at their hand. This had paved the way for an enormous project of social engineering, based on the idea of protectional segregation.

In a speech at the opening of parliament the 2nd of February 1990, the new president and leader of the NP, F. W. de Klerk legalised the ANC and opened for negotiations: "On its part, the Government will accord the process of negotiation the highest priority. The aim is a totally new and just constitutional dispensation in which every inhabitant will enjoy equal rights, treatment and opportunity in every sphere of endeavor - constitutional, social and economic."⁴²

But which kind of political structure was to be the outcome of this negotiation? How was one to view cultural difference in the future? The speech reveals that in the mind of de Klerk and the National Party, cultural difference was not something one could simply neglect.

"The formal recognition of individual rights does not mean that the problems of a heterogeneous population will simply disappear. Any new constitution which disregards this reality will be inappropriate and even harmful. Naturally, the protection of collective, minority and national rights may not bring about an imbalance in respect of individual rights. It is neither the Government's policy nor its

³⁹ Thompson 1995:242.

⁴⁰ Ibid.

⁴¹ Ibid:243.

⁴² DeKlerk, F. W., Speech at the Opening of Parliament, Cape Town, the 2nd of February 1990.

intention that any group -- in whichever way it may be defined -- shall be favoured above or in relation to any of the others.”⁴³

The future was, however, to be negotiated, which did imply that the ones that were so ruthlessly discriminated due to their cultural difference were to have a say in the shaping of the future political system. Special policies designed to accommodate cultural groups did probably not sound as exotic to the ANC as it does to many western thinkers. How was the legacy of centuries of colonisation and decades of Apartheid to mark the future? As mentioned in the introduction the African traditional law, authorities and institutions became recognised in the new constitution. How and why was this the outcome of the negotiations? Was the recognition followed by sufficient political action in order to meet the requirement of the constitution?

1.4 The further design of the thesis

In the next chapter I am going to present different theoretical contributors to the debate on how it is possible to secure both the right to be equal, and the right to be recognised for who you are in a liberal democracy. In the last decades several attempts have been made that confronts the old two dichotomies of universalism and particularism, and I am in the next chapter going to present some of the main thinkers in this debate on multiculturalism. Which suggestions do the different theories put forward in order to make difference compatible with the right to equality?

In the subsequent chapter, Chapter 3, I am going to present my methodological approach. In this chapter I will present the data material used in my analysis of why the role and the functions of traditional and customary law became recognised in the South African Constitution of 1996, and to what extent this recognition resulted in a political will to fulfil these constitutional obligations. The key topics introduced are: why did I decide to apply a single case approach and which sources of evidence have been analysed?

Chapter four is an empirical analysis aimed at trying to explain why traditional leaders found themselves in a relatively strong position in the negotiations towards the drafting of the interim constitution? Secondly, I will address the question of why the traditional leaders’

⁴³ Ibid.

influence on the process diminished from the drafting of the interim constitution to the signing of the final constitution of 1996?

Chapter five analyses whether the conditioned recognition given to traditional authorities was followed by political action aimed at both reforming these institutions and clarifying their specific position in the democratic future? Which political and judicial powers were the traditional authorities to possess? Was there any political will to clarify the traditional leaders functions and roles through official statements? Which legislations were initiated? And what influenced this process?

2. Theoretical approach: Liberalism and cultural recognition

The scope of this part of the analysis is to present disparate advocates of the accommodation of difference inside the liberal democratic discipline. The idea is to put forward different theoretical solutions and strategies to the question of difference in a liberal democracy, in order to be able to analyse these attempts empirically later. The questions I will seek to answer are: Which suggestions do the different theories put forward in order to make difference compatible with the right to equality? How are these theories able to secure both the right to be equal, and the right to actually be recognised for who you are through the protection of cultures and different ways of life?

In order to increase the capacity of liberal democracies to accommodate different cultures, there have been attempts to go in-between the old dichotomies of universalism and particularism in normative political theory, and find solutions that in theoretical terms are able to make the two different principles compatible. The question raised is which kinds of cultural recognitions a liberal democracy can accommodate without jeopardising its own foundation. Several groups have in the last decades claimed the right to self-government and special treatment because their culture is different from the majority population. But what is at stake by giving into these claims? In philosophical terms liberalism and its ideas of universalism, have always stressed that all human beings should be treated as equal because of their capacity of simply being. Due to this, the state should always treat its citizens with neutrality and impartiality. Are cultural recognition and the liberal ideal of equality compatible? Is it possible for the liberal tradition to respect people because they *are*, without also recognising *who* they are?

A concern that occupies many liberal thinkers is if we do acknowledge the right to certain cultural protections, how can we at the same time assure that some autonomous individuals are not being sacrificed in the name of cultural survival? Others have argued that if liberal democracy is not able to accommodate difference, universalism reduces itself to a dominant hegemonic idea of civilisation, unable to recognise human beings for their different beliefs, ways of life or diverging ideas of the good. This has raised the question of whether or not the right to be treated as an equal because of your mere existence is incongruent with the right to

be protected for who you are. But is this conflict inescapably unsolvable? Are the rights of the autonomous individual and the right to cultural survival necessarily incompatible?

The concessions made to accommodate difference, are however, quite variable in extent, and in my further theoretical analysis I am going to present some of the major liberal thinkers in this field as well as some of their critics. First, I will concentrate on two thinkers, both of which stress that new answers need to be anchored in the liberal tradition of state neutrality and the individuals right to equality, John Rawls and Jürgen Habermas. Rawls argue that cultural rights should always be subject to constitutional principles, such as basic human rights and political rights. Habermas argues that if one are to recognise cultural practices, one need a thorough deliberation process where all parts are consulted and do have their opportunity to voice. Subsequently, I am going to present two thinkers who argue that one in some cases might provide certain groups differential treatment in order to protect certain cultures. The former, Will Kymlicka, highlights that these group rights needs to be neutral, while the latter, Charles Taylor, argues that neutrality not necessarily needs to be a presupposition for liberalism.

2.1 The origin of the debate

Even though the discussions of recognising cultural difference within liberalism have been thoroughly debated in the last few decades, the conflict between the idea of the autonomous individual and the right to cultural survival have been debated for centuries. Both Rawls and Taylor make use of Kant's and Herders work when they argue for the best way to organise society in order to make it just and legitimate for different citizens. The Enlightenment philosophers have been highly influential in the development of modern liberal thought, but its limitation in acknowledge the significance of particularity and diversity has been criticised since the onset of Romanticism.

2.1.1 The origin of the autonomous subject

The traditional liberal effort to accommodate difference is inevitably anchored in the right of the autonomous individual. The liberal idea is that in order to treat all human beings as equal, the states should not favour certain beliefs, cultures or religions. Citizens will regard the state as legitimate, because everyone knows that they have the same opportunities as everyone else

no matter what they believe in. But who is the autonomous individual? To answer this it is useful to start with the Enlightenment. One of the most influential thoughts of Enlightenment philosophy was an emphasis on the use of reason to critically examine all issues, including the conception of human nature. Immanuel Kant was one of the philosophers who were preoccupied with reason, and argued that all men are equally endowed with the capacity to reason, and that this capacity is identical in all men. It is this capacity, rather than the results of exercising it, that is the most fundamental to the dignity and worth of human beings.⁴⁴

Even though early liberalism did not necessarily view all humans as autonomous individuals, Kant emphasised that one needed a universal law that treated all humans as equal. So how was one to agree upon such a universal law? Kant answered that to agree upon a moral law the autonomous individuals needed to use their will and follow practical reason. If the individuals used practical reason they would understand that in order to make stable and fair societies the citizens needed to behave and live by rules which all would agree upon as universal.⁴⁵ Only such a law of practical reason, which Kant call the categorical imperative, is able to provide a universal standard of morality that can be recognised by all humans. In consequence all humans need to distance or transcend their particular allegiances, such as to be able to participate in an ideal, unconditioned society completely independent of the citizens social and psychological inclinations.⁴⁶ In other words, all citizens ought to leave their differences in beliefs, conceptions of the good and ways of life behind, in order to acknowledge the universal law that is reached by deducing what is the best for all. Something viewed as divergent from rules and laws based upon what is the best for some of the citizens' particular interests.

So what is the political implication for liberal democracy? As the subject is prior to its ends, so the right is prior to the good. Society is best arranged when it is governed by principles that do not presuppose any particular conception of the good, for any other arrangement would fail to respect persons as being capable of choice.⁴⁷ In other words, a liberal society must remain neutral on the good life, and restrict itself to ensuring that however they see things, different citizens ought to deal fairly with each other and the state ought to deal equally with all.

⁴⁴ Mulhall S. and Swift, A. *Liberals & Communitarians*, Oxford, UK: Blackwell, 1992:43.

⁴⁵ Kant, Immanuel, *The Moral Law*, translated by H. J. Paton, London: Routledge, 1989.

⁴⁶ Sandel, Michael, "The Procedural Republic", in Avineri, S. & de-Shalit, A, *Communitarians and Individualism*, Oxford: Oxford University Press, 1992:16 – 17.

⁴⁷ *Ibid*: 17.

Because human dignity consists largely of autonomy, and each person is able to determine their own view of the good life.⁴⁸ It has thus been normal in the liberal tradition to view the state as a contract between undifferentiated individuals where no account is taken of the customs, tradition and institutions, which may constitute a particular people prior to the social contract. The state is a voluntary association between individuals, and can only claim to be legitimate if it has the consent of the governed.⁴⁹ But as pointed out earlier, is this benign state neutrality based upon the idea of universal rights for all citizens a sufficient criterion to accommodate the rich diversity in most democratic countries?

2.1.2 The Romantic quest for cultural survival

Kant and other philosophers of the Enlightenment were heavily criticised by contemporary thinkers, especially those regarded as the Romantics. This movement aimed at highlighting the value and pervasiveness of diversity, rather than view diversity as equivalent to human's particular self-interests. Herder was one of the most important of the Romantic philosophers, and to understand why he viewed cultural survival as vital, it is important to understand his conception of two different levels of originality.⁵⁰ The first level is the person among other persons. Each person has his or her original way of being human. There is a certain way of being human, that is my way. If I am not being true to myself, I miss what being human is for me. Being true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am realizing a potentiality that is properly my own. It is this idea that has been the background for contemporary understanding of authenticity, and the goals of self-fulfilment and self-realization.

To look at the political implications of this thought one need to look at Herders second level of the conception of originality. At this level he applies his concept of originality to the culture-bearing people among other peoples. Just like individuals, a *Volk* should be true to itself, which is to be true to its own culture. Germans shouldn't try to be derivative and second-rate Frenchmen, and European colonialism should be rolled back to give the peoples of these territories their chance to be themselves unimpeded.⁵¹ By this he attacked the

⁴⁸ Taylor, Charles, in ed. Gutman 1994:57

⁴⁹ Baumeister, Andrea T. *Liberalism and the 'Politics of difference'*, Edinburgh: Edinburgh University Press, 2000:26.

⁵⁰ Taylor 1994:30.

⁵¹ Taylor 1994:31.

universalism by stressing the unique character and value of diverse and incommensurable cultures. In demanding that we abandon the natural bonds of language, history, habit and tradition, which bind us to a specific culture and community, the individualists asks us to shed those characteristics that make us most human. In this way Herder asks if it is possible to fully value all human beings if we do not also recognise who they are, and since culture is important for all humans' self understanding, it is vital that we protect the opportunity for different cultures to survive. If not, one actually argues that some cultures are more meaningful than others.

This last argument was also something that occupied Nietzsche. His argument was that by suggesting that all human beings must obey a universal rule of reason, philosophers such as Kant, rather than show humanity the road towards emancipation, merely make man subject to yet another “guardian”. The advocates of universal reason fail to recognise the historical specificity of their own principles. He argues further that an attempt to construct a universally applicable system of rational principles, in practical terms makes liberalism unable to appreciate and respond to genuine diversity and deep value conflicts.⁵² According to Nietzsche such value-conflicts are inevitable, and he points out that Kant by drawing a distinction between universal reason and the multitude of human desires and life-styles, regards reason as essential and real, and the multitude of lifestyles merely contingent and apparent. In real life the transcendental self is not prior to the empirical self, and, thus the subject cannot abstract itself from its own affections; “thinking is an activity, to every activity pertains one who acts, consequently”.⁵³

These criticisms of traditional liberalism question the idea of a human being that is able to abstract itself from its own particularities in order to see what is the best for all of us. Because no matter who you are, culture and conceptions of the good influences your way of thinking, and, more important, this should not be regarded as a human deficiency, but simply what it means to be human. In the next pages I will present contemporary theoretical perspectives on the possibility of making these diverging ideas of diversity compatible.

⁵² Baumeister 2000:12.

⁵³ Nietzsche, Friedrich, *Beyond Good and Evil*, trans. W. Kaufmann, New York: Random House, 1967:4.

2.2 Contemporary strategies for accommodating diversity

In contemporary political thought the challenges of multiculturalism and democratisation have required a debate, which forces the liberal democracy to accommodate diversity to a much further extent. But how many compromises is it possible for the liberal school to agree upon without stretching the boundaries to far? Should one give some groups cultural rights in order to survive or should one always secure the individuals' autonomy? Different theoretical thinkers provide diverse answers to this question, and put forward different strategies on how to make these cultural rights and the right to equality compatible in modern constitutions and jurisdictions. First, I am going to present strategies anchored in the tradition of the unquestionable right to equality, second, I will present some theoreticians who argue that liberalism not necessarily presupposes state neutrality, but that the state can legitimately promote particular conceptions of the good life, provided it respects the fundamental rights and liberties of all citizens, including those who do not share the public definition of the good.⁵⁴ The liberal state is thus not marked by a commitment to cultural neutrality, but by a sense of tolerance and respect vis-à-vis the cultures and values of minorities.

2.3 Neutrality and impartiality

Both Rawls and Habermas have sought to re-emphasise the traditional commitment to neutrality and impartiality. For both of them the most important foundation of society is the legitimate state created by free, autonomous individuals, and their strategies towards the question of recognising difference is somewhat impeded by this. But how do their strategies open for recognition of difference? In the next paragraphs I will present their diverging answer to this question. Rawls' project to accommodate difference has been to stress the importance of a just society for all, while Habermas has stressed the importance of deliberation in society. Both theories are regarded as very distinguished normative theories, and have been of major importance in the western debate on the politics of difference. Nevertheless, both theories have been challenged by the question of whether their attempt to recognise difference is sufficient when it comes to solving disputes and provide protection for minorities in culturally divided societies.

⁵⁴ Baumeister 2000:134.

2.3.1: Rawls - accommodation of difference through justice

To Rawls one of the most central question in this debate is: “How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines”?⁵⁵ This denotes that Rawls’ occupation with difference is inspired by the urge to settle conflicts in a divided cultural society, rather than cherishing difference and protecting cultures from obliteration. In order to settle these conflicts, Rawls draws on Kant. Based on his philosophy Rawls introduces the idea of the original position, and tries to present a practical solution to the potential conflict diversity generates, by adopting the tools of liberal contract theory. With a strong commitment to each individual’s right to equality and liberty in mind, he tries to make the diverging principles of cultural rights and the right to equality compatible by establishing the basic principles of justice in a society and the order between them.

So how does one establish the basic principles of justice in a society? Rawls answer to this is that if the constitutional principles and the political institutions in a democracy are the outcome of a process of free and fair bargaining, all the different groups and individuals in a society will regard the political system as just. Different cultural groups will then be able to coexist since they share the vision of the society as just, despite distinctive life-plans and conceptions of the good. He reaches this answer through his idea of the veil of ignorance presented in *A Theory of Justice* (1971). The veil of ignorance is a thought experiment that puts forward the argument that what would be a just or fair organisation of society is to imagine what principles people who were denied knowledge of certain particular facts about themselves would agree to.

Principles of justice such as rights and duties, and how to distribute social and economic advantages, should emerge as a hypothetical contract arrived at by people ignorant of particular aspects of their beliefs and circumstances, the original position. In the initial position, people would agree on a contract which protects fairness and equality for all, because if people don’t know who they are going to be, then it will make sense for them to choose fair or just principles to regulate their society.⁵⁶ This argument can be characterised as Kantian, since the parties in the original position regard themselves as autonomous agents and

⁵⁵ Rawls, John, *Political Liberalism*, New York: Columbia University Press, 1993:4.

⁵⁶ Mulhall, Stephen & Swift, Adam, *Liberals and Communitarians*, Oxford: Blackwell, 1992:3-5.

do not “view themselves as inevitably tied to the pursuit of the particular conception of the good that they affirm at any given time”.⁵⁷

Since the autonomous agents in the original position are deprived of their own particular allegiances, but maintain their powers of reason and their capacities of judgement, thought and inference, Rawls argues that the parties in the original position would adopt his two principles of “justice as fairness”. The first guarantees each citizen an extensive system of basic equal liberties; the second is divided into two sets of principles. While the former principle ensures equality of opportunity, the latter stipulates that social and economic inequalities are to be arranged so as to benefit the least advantaged.⁵⁸ In other words any rational agent deprived of the knowledge of who he or she is will define a just distribution of goods in any social order in terms of the two principles and a rule for allocating priorities when the two principles conflict. The first principle has priority over the second; liberty is to be restricted only for the sake of liberty.⁵⁹ These principles were first presented in *A Theory of Justice*. Afterwards he has made a few changes, but the ordering of principles are the same:

(a) Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

(b) Social and economic inequalities are to satisfy two conditions. First they must be attached to offices and positions open to all under conditions of fair equality of opportunity, and second, they must be to the greatest benefit of the least advantaged members of society.⁶⁰

The political strategy Rawls offers is that governments in a liberal democracy should agree upon certain fundamental principles that ought to be entrenched in the constitution. This includes the political process’ constitutional structure, such as the legislative, the executive and the judicial powers, and specification of the basic individual liberties and rights. In order

⁵⁷ Rawls , *Kantian Constructivism in Moral Theory*, Journal of Philosophies , Vol. 77, NO. 9, 1980:539.

⁵⁸ Baumeister, 2000:52.

⁵⁹ MacIntyre, Alasdair, ”Justice As Virtue: Changing Conceptions” in Avineri, S. & de- Shalit. A. (eds.), *Communitarianism and Individualism*, New York: Oxford University Press, 1992:55.

⁶⁰ Rawls, 1993:5-6.

to avoid conflict he also argues that the governments can agree upon certain social and cultural rights provided these do not deprive any individuals of their basic rights. By this I understand that the principle of social justice is a moral guidance, which the governments themselves are free to decide whether they will support or not. It is a political question, similar to other moral questions, and should not necessarily be adopted as a part of the issues concerning the basic democratic structure. In this way Rawls argues that social rights such as the right to cultural protection does not necessarily need to be entrenched in a just constitution. What is most important is to make non-discriminating basic liberal political structures which all can agree on, no matter how their beliefs and ways of life diverge.

At the deep end of the ocean, Rawls does not make many concessions to the ones who argue that cultural difference ought to be protected politically. Rather he urges diversity to flourish in the non-political sphere if the members of the society wish for it. His idea of social justice tries to combine formal equality with real equality,⁶¹ but still, Rawls stresses that considerations of social justice only come into play when the basic constitutional rights are fulfilled.⁶² Only when these are provided to the individuals of the society, is it possible to discuss and accommodate differential treatments of the least advantaged. However, in such societies deep-seated claims for self-government and cultural protection are not likely to develop according to Rawls. In *Political Liberalism*, he argues, “so long as there is firm agreement on the constitutional essentials and established political procedures are reasonably regarded as fair, willing political and social cooperation between free and equal citizens can be maintained”.⁶³

2.3.2 Rawls’ circular argument

When it comes to securing cultural rights, Rawls is criticised for not securing these at an adequate level. Proponents of multiculturalism have accused him for being more concerned with how to avoid conflicts between different groups of people rather than with the recognition of difference. Chantal Mouffe has argued that Rawls like other proponents of liberal pluralism, generally starts by stressing what they call the fact of pluralism and then proceed to find procedures to deal with difference, procedures which in the end actually

⁶¹ Lane, Jan –Erik, *Constitutions and political theory*, Manchester: Manchester University Press, 1996:228 – 230.

⁶²Rawls 1993:228.

⁶³ Rawls 1993:230.

render those differences irrelevant and relegates pluralism to the sphere of the private.⁶⁴ Rawls for instance, stresses the importance of gaining support for a political conception of justice in a society despite equal citizens' diverging "reasonable religious, philosophical, and moral doctrines". But as Mouffe asks, what is this if not an indirect form of asserting that reasonable persons are those who accept the fundamentals of liberalism?

In other words, the distinction between reasonable and unreasonable helps to draw a frontier between those who accept the liberal principles and those who oppose them. To call the anti-liberals unreasonable is a way of stating that such views cannot be admitted as legitimate within the framework of a liberal democratic regime. Rawls subsequently gets caught in a circular form of argument: political liberalism can provide a consensus among reasonable persons who by definition are persons who accept the principles of political liberalism.⁶⁵ Can one argue that in Rawls' sense the liberal society is just another conception of a good society?

2.3.3 Habermas – distributive justice

When it comes to the question of recognising difference, Habermas, like Rawls, argues that one need an impartial and neutral state. Unlike Rawls, however, he does not believe that it is possible to create a legitimate democratic society by abstracting the individual from its particularities, and simply move these particularities to a non-political private sphere. In order to accomplish understanding between diverging beliefs and conceptions of the good, Habermas argues that in multicultural societies one need to use a discourse theoretical strategy. In a discourse individuals voluntarily communicate with each other in order to form a legal community of free and equal consociates. Drawing on a Kantian perspective, Habermas argues that equal protection under the law is not enough to constitute a constitutional democracy. The citizens not only need to be equal under the law, they must also understand themselves as the authors of what binds them.⁶⁶ In contrast to the subjects of Rawls and Kant, Habermas states that the authors are not transcendental selves in a thought experiment, gathered in order to make social contracts. The authors are individuals with beliefs and conceptions of the good, who gathers in order to decide which laws that are to be in force in their own society.

⁶⁴ Mouffe, Chantal, "Culture, Identity, Democracy", in Benhabib (ed.), *Democracy and difference, Contesting the Boundaries of difference*, New Jersey: Princeton University Press, 1996:246.

⁶⁵ Ibid.

⁶⁶ Gutman, Amy ed. *Multiculturalism*, New Jersey: Princeton University Press, 1994:ix.

But on which grounds does Habermas argue that this is a strategy which both secures the individual rights and protects cultural difference? His answer is that we need to make a distinction between two philosophical phenomena', morality and ethical life – *Sittlichkeit*. Moral questions are based upon questions of justice. These questions have priority in legislative politics, and concern how a matter can be regulated in the equal interest of all.⁶⁷ Consequently, to Habermas, there are some unavoidable and universal presuppositions regarding rules of practical discourse in society. The reason for this is that there must be certain rules that organise the discourses in society, if the involved participants are to resolve normative disputes. These rules of practical discourse are supposed to function as structures that ensure discursive equality, freedom and fair play, and they settle the right of every subject who share the same competence to speak and act, to take part in discourse. A discourse where everyone is allowed to question or introduce any assertion, everyone is allowed to express their attitudes, desires and needs, and no one may be prevented by internal or external coercion from exercising these rights.⁶⁸

The force of the best argument is then what settles a dispute between equal individuals in a fair structure of communication. In order to make sure that the state is neutral and impartial, the constitution ought to ensure that the rules of practical discourse are observed and institutionalised as legal norms, legal norms that are only legitimate if they safeguard the autonomy of all citizens to an equal degree.⁶⁹ Unless all citizens participate in public debate and express their specific needs, there is a real danger that the needs of socially disadvantaged groups will be misunderstood, which in turn may undermine the capacity of such groups to pursue effectively their own conception of the good.⁷⁰

In this way Habermas grants all individuals the right to participate in discourses regarding their own particular interests. The questions debated in these discourses are questions which Habermas refers to as *Sittlichkeit*, - ethical questions. Ethical questions are questions related to the conceptions of the good life. These ethical questions cannot be evaluated from the moral point of view of whether something is equally good for anyone, these are questions

⁶⁷ Habermas, Jürgen, "Three Normative Models of Democracy" in Benhabib, ed. 1996:25.

⁶⁸ Baumeister 2000:79.

⁶⁹ Habermas 1994:121.

⁷⁰ Baumeister 2000:83.

which modes of behaviour are open to influence by the distinct societies' political goals.⁷¹ Questions regarding the recognition of difference are thus seen as ethical discourse, as opposed to moral practical discourse. These discourses, which are aimed at achieving self-understanding for members of a special nation or group, are aimed at discussions of which traditions they will continue and which regulations they will agree upon regarding the treatment of minorities and marginal groups.⁷²

To recognise particularity and difference, one needs to ask if a specific norm is the most appropriate one in these circumstances. The impartial application of norms therefore requires attention to the particular needs of actual persons and socio-cultural groups. Hence it is important that social groups organise themselves politically so as to articulate their differences and political needs. Yet such participation and organisation may only be possible if groups are granted special cultural and social rights. "For historic reason, in many countries the majority culture is fused with general culture that claims to be recognised by all citizens... This fusion must be dissolved if it is to be possible for different cultural, ethnic and religious forms of life to coexist and interact on equal terms within the same political community."⁷³ According to Habermas, battles of recognition arise whenever a state fails in this task. If minorities perceive the existing arrangements as discriminatory, they will demand these arrangements changed to take into account their interests and needs.

The controversial part of this is that not only questions of the politics of difference are regarded as ethical, but also human rights cannot be paternalistically imposed on a sovereign legislator. Human rights may be quite justifiable as moral rights, yet the "addressers of law would not be able to understand themselves as its authors if the legislators were to discover human rights as pre-given moral facts that merely need to be enacted as positive law."⁷⁴ Human rights are thus not to be regarded as prior to popular sovereignty, since they are positive laws decided by a political legislature. The human rights as other laws needs to be procedurally enacted, because only a democratic process is able to legitimatise them.

⁷¹ Habermas, in Gutman 1994:122 – 124.

⁷² Habermas, in Benhabib, 1996:24.

⁷³ Habermas, Jürgen "The European Nation State: On the Past and Future of Sovereignty and Citizenship, p. 408, cited in Baumeister, 2000:85.

⁷⁴ Habermas, Jürgen, 1996, "Postscript to Between Facts and Norms" in DeFlem (ed.), *Habermas, Modernity and Law*, London: Sage Publications, 1996:141.

In this analysis, an important feature of Habermas' theory is that he sets no limit for what is to be regarded as an appropriate topic for public discussion. Unlike Rawls he does not demarcate between what should belong to the public as opposed to the private sphere. Hence, what is regarded as political questions needs to emerge from an ongoing, actual debate, not discovered theoretically.

2.3.4 Discourse ethics as the provider of difference

But is this protection of culture sufficient to solve practical disputes between diverging cultures? Gutman argues that Habermas' cultural rights are individual rights of free association and non-discrimination, and as such do not guarantee survival for any culture.⁷⁵ This objection is somehow supported by Habermas himself in his response to Charles Taylor's defence of cultural recognition in *Multiculturalism*.⁷⁶ In this article he stresses that the political project of preserving cultures as if they were endangered species deprives cultures of their vitality and individuals of their freedom to revise and even to reject their inherited cultural identities, but they guarantee survival to none. Because, according to Habermas, cultures survive only if they draw the strength to transform themselves from criticism and recession.⁷⁷

This argument shows that Habermas is deeply rooted in the liberal tradition, where culture is regarded as something that only is legitimate if the individuals share personal rights. This has led opponents to criticise Habermas for being unable to make solutions for deeply divided societies, holding that Habermas' preoccupation with autonomy leads him to equate toleration with the liberal principle of individual freedom of conscience. These critics have emphasised that all accounts of justice are rooted in the values and judgements of specific cultures and that different communities will value different goods. It is thus, as for instance Wranke notes,⁷⁸ impossible to separate justification and application of laws, as Habermas attempts to with his demarcation between morality and ethical norms. Wranke argues that if our normative judgements are inevitably tainted by our evaluative assessments, it is unlikely that we will always be able to resolve our normative differences via the force of the better argument.

⁷⁵Gutman 1994:x.

⁷⁶ Gutman 1994:130.

⁷⁷ Habermas, in ed. Gutman, 1994:130.

⁷⁸ Wranke's criticism is presented in Baumeister, 2000:89 - 90.

In a practical discussion it is often difficult to reason about what the best argument is. Since what seems to count as the better argument for the most participants always involves values, sensibilities, cultural traditions and conceptions of the good. If a society is genuine plural, it is almost inevitable that people will frequently disagree about what constitutes the better argument. Habermas presents a theory that provides an invitation for the participants to leave behind their particular experiences and interests in their search for the common good, but the problem is that in this situation the perspectives of the privileged are likely to dominate the definition of the common good. Habermas may thus be criticised for not being able to secure the right of all individuals to partake in discourses that concerns them. Differences in social power often make members of the dominant group able to assert that their experiences and perspectives on social events are impartial and objective. This, it is argued, clearly marginalizes groups that lack the social power to frame the terms in which the debate is conducted.⁷⁹ Baumeister has stressed that the problem with Habermas's discourse theory is that he fails to recognise the extent to which differences in social power may undermine the ability of participants in practical discourses to take part in debate on equal terms.⁸⁰

2.4 The right to cultural survival

Some proponents of cultural difference argue that in order to provide accommodation of difference to minority cultures, it is important to not only grant individual rights, but that in some cases group rights are desirable. Group rights are corporate rights, and whereas personal cultural rights apply to group members individually, the collective as a whole exercises corporate group rights. Given the traditional liberal emphasis on individual rights, many liberals view demands for corporate rights with suspicion. Among the theories that defend group rights, there are quite immense differences. I am first going to present Kymlicka who gives some practical strategies for how it is possible to recognise difference without jeopardising the traditional liberal commitment to equality of respect, individual freedom and the state neutrality. Secondly, I am going to present Taylor who argues that a liberal state can actively pursue particular collective goals and support specific conceptions of the good, as long as they respect the fundamental rights.⁸¹

⁷⁹ Baumeister, 2000:92.

⁸⁰ Ibid.

⁸¹ Baumeister, 2000:103.

2.4.1 Kymlicka - citizenship and difference

While both Rawls and Habermas operate on a very abstract normative philosophical level, Kymlicka use a more practical approach in his defence of group specific rights for ethnic minorities. In *Liberalism, Community and Culture* he argues that liberals have wrongly assumed a homogenous society in their theories. In order to strengthen liberal democracy, states need to recognise the differences of their populations, and provide justice between different ethno-cultural groups. Societies are not necessarily homogenous, and in order to secure freedom of choice for all, it is essential to deliver a fair and just context in which to make the choice. This indicates that in order to be free as a person, one must also be able to express oneself as a member of a group or a certain culture. According to Kymlicka this is often not so in multicultural societies. If a culture is not generally respected then the dignity and self-respect of its members will also be threatened. The reason for this is that people do not make choices as atomistic individuals, but as a part of a societal culture that is institutionally embodied, tends to be territorially concentrated, and based on a shared language.⁸² Since the viability of a culture promotes people's self-identity and thus their autonomy, he argues that in multinational states, some people's cultural membership can only be recognized and protected by endorsing group-differentiated rights within the state.⁸³

Kymlicka suggests that there are certain kinds of group differentiated rights which the state can grant groups in order to recognise culture and secure justice in society. He presents three different versions of group-differentiated rights that can be provided in order to incorporate groups into the political community. He acknowledges that different kinds of groups need different kinds of rights. Some groups only need to get temporarily rights in order to achieve *de facto* equality in a differentiated society. Others claim rights that recognise who they are in order to protect distinctive cultural identities from disappearing.

The first kind of group-right Kymlicka introduces is the right to special representation. Special representation within the political process of the larger society should be given to members of marginalized and disadvantaged groups, and are regarded as temporary since the aim of these groups is to be at an equal footing with those in power. What necessitates these

⁸² Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, New York: Clarendon Press, 1995.

⁸³ Ibid: 125.

rights is that the political process in many states are unrepresentative in the sense that it fails to reflect the diversity of the population. Group-representational rights are often defended as a response to some systemic barrier in the political process that makes it impossible for the group's views and interests to be effectively represented.⁸⁴ These rights are viewed as a response to conditions of oppression, and they are most plausibly seen as a temporary measure on the way to a society where the need for special representation no longer exists. Society should seek to remove the oppression, thereby eliminating the need for these rights.

The next type of group rights is concerned with the right to self-government. In some of the most common claims for self-government, such as the reservation system of the American Indians, the demand for group rights is not seen as a temporary measure. It is misleading to say that group rights are a response to a form of oppression that we hope someday to eliminate. Aboriginal peoples and other national minorities like the Québécois or Scots claim permanent and inherent rights grounded in a principle of self-determination. These groups find themselves within the boundaries of a larger community, but claim the right to govern themselves in certain key matters. This right ensures their full and free development of their culture and the best interests of their people. What these minorities want is not primarily better representation in the central government, but rather the transfer of power and legislative jurisdictions from the central government to their own communities.

The last form of group rights concerns those who claim multicultural rights. Many ethnic groups and religious minorities have demanded various forms of public support and legal recognition of their cultural practices. Their demands include public support of bilingual education and ethnic studies in schools and exemptions from laws that disadvantage them, given their religious practice. These measures are intended to help immigrants express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society. Like self-government rights, these rights may not be temporary, because the cultural differences they promote are not something we hope to eliminate. But unlike self-government rights, multicultural rights are intended to promote integration into the larger society.

⁸⁴ Kymlicka, Will, "Three forms of Group-Differentiated Citizenship in Canada" in Benhabib, (ed) *Democracy and Difference, Contesting the Boundaries of the political*, Princeton University Press, New Jersey, 1996:158.

There are many reasons why some groups claim these kinds of special rights. However, Kymlicka argues that despite their differences, these claims are basically of two different characters. One is more compatible with the liberal democracy than the other. If the claim involves the right of a group against the larger society, they would in many cases be compatible with the liberal democratic principles. These claims are inter-group relations and are intended to protect the group from the impact of external pressures, for example the protection from political or economic decisions of the larger society. These rights are often compatible with liberal democracy, and to reduce some groups vulnerability one can give them constitutional protection through language rights, education, media, guaranteed political representation, land rights, compensation for historical injustice, or regional devolution of power.⁸⁵

If however the claim involves the right of a group against its own members, these rights might lead to situations where the freedom of individuals are in danger of being violated. These claims are internal restrictions and involve intra-group relations where for instance a group needs rights to prevent individual members from detaching themselves from traditional practices and customs. The rationale is to protect the group from destabilizing impacts of internal dissent. In these situations the most debated danger of intra-group oppression concerns the potential for sexual discrimination in minority cultures.⁸⁶ Since internal restrictions have the potential of denying some individuals their freedom, most collective rights for ethnical and national groups should according to Kymlicka be defended in terms of external protection against the larger community.

2.4.2 The problem of intra-group inequalities

Even though Kymlicka acknowledges that there actually do exist some problems with protecting justice within ethno-cultural groups, feminists like Susan Okin accuse him for being less preoccupied with this question than the question of providing fairness between ethno-cultural groups. In *Is Multiculturalism Bad for Women?* she argues that despite the fact that cultural practices in many cultures control and subordinate women, no defenders of multicultural groups rights have adequately addressed the troubling connections between

⁸⁵ Ibid: 32.

⁸⁶ Kymlicka 1996:160.

gender and culture.⁸⁷ The policies designed to respond to the needs and claims of cultural minority groups must take seriously the urgency of adequately representation of less powerful members of such groups.

She indicates two problems Kymlicka and other proponents of collective rights have when it comes to their defence of group rights for minorities within liberal states. The first problem she observes is that they treat cultural groups as monoliths, and thus pay more attention to difference between groups than differences within. The second problem is that they pay no attention to the private sphere. Religious and cultural groups are often concerned with “personal law”, these are the laws of marriage, divorce, child custody, division and control of family property and inheritance, and she argues that these are also rules in which women often are regarded as subordinate. Defence of “cultural practices” through special group designed personal laws is thus likely to have a much greater adverse impact on the lives of women than those of men. She stresses that while it is obvious that culture is about more than domestic arrangements, it has been common to view these as important cultural bearing traditions amongst contemporary cultures.⁸⁸ Liberal democratic states’ central aim should subsequently be to ensure that every human being has a reasonably equal chance of living a good life according to his or her unfolding views about what life should consist of.

Kymlicka’s response to Okin is that both of them are actually occupied with the same question of invisibility. Okin has shown how liberal theorists implicitly or explicitly operate with the assumption that the citizen is a man, and never ask what sorts of institutions women would prefer behind the “veil of ignorance”.⁸⁹ But when Okin is occupied with the invisibility of women, Kymlicka argues that he is concerned with the invisibility of minority cultures. Because of this he views himself and other proponents of multiculturalism as allies with feminist since both are engaged in related struggles. Their common struggle against the old liberal complacencies should not make multiculturalism blind to gender inequalities, but at the same time it should not make feminism blind to cultural differences, either. Okin agrees, but underlines that they do not necessarily agree on the order of priority. Okin is not just

⁸⁷ Okin, Susan, M. "Is Multiculturalism Bad for Women?", Part 1 in Cohen, Howard, & Nussbaum (eds.), *Is Multiculturalism Bad for Women*, New Jersey: Princeton University Press, 1999:20.

⁸⁸ *Ibid*: 13.

⁸⁹ Kymlicka, Will “Liberal Complacencies” in Cohen, Howard, & Nussbaum (eds.), *Is Multiculturalism Bad for Women*, New Jersey: Princeton University Press, 1999:33 - 34.

concerned with invisible women in a male dominated society, but with invisible women in invisible minority cultures, a phenomena which make the alliance far more thorny.

This incongruence between protection of minority culture and securing the right to equality of all its members is a conflict that has occupied theoretical thinkers such as Azizah Y. Al-Hibiri. In her response to Okin, which she has called, *Is Western Patriarchal Feminism Good for Third World / Minority Women?* she questions whether this necessarily is an unsolvable conflict. Such theories of conflict, as is common in the liberal approach to the question, tend to have stereotypical views of the “Other”. Her argument is that one needs not necessarily view all other traditions than that of liberal western universalism as oppressive, and in cases of oppression, the idea of liberalism is not the only “salvation” for non-western women. Ideas like these tend to change western feminists into the patriachs they fight in their own society, and view minority women as misled women who chose oppressive lifestyles because they do not know anything better. Al-Hibiri argues that contrary to view all non-western cultures as oppressive, and as a result abolish all non-western traditions that might seem discriminating, one should rather examine these traditions and try reinterpreting them by separating the customary from religious and cultural practices. In this way one can try to change cultures’ discriminating features, and keep the essence of the religion and culture, since the essence seldom is intended to discriminate against groups of people.⁹⁰

2.4.3 Taylor – and the politics of recognition⁹¹

Charles Taylor, writing from a Canadian perspective, approaches the question of whether the institutions of liberal democracy are able to make room for distinctive cultural traditions, from another angle than that of the earlier discussed theorists. He does not view the question of diversity as something one needs to turn to in order to create stable democracies, but views the recognition of difference as the essence of liberal democracy. In Taylor’s opinion, liberalism does not have to be distinguished in terms of a commitment to cultural neutrality. On the contrary, he maintains that a liberal society can legitimately promote the collective

⁹⁰ Al-Hibiri, Azizah Y., "Is Western Patriarchal Feminism Good for Third World/Minority Women?" in Cohen, Howard & Nussbaum (eds), *Is Multiculturalism Bad for Women*, New Jersey: Princeton University Press, 1999:43.

⁹¹ “The recognition of difference” theorists as Taylor are also often described as Communitarians. This is however a less specific designation which embrace quite an extensive set of diverging theories and approaches. Especially it is important to stress that Taylor view himself as a liberal, while others proponents of communitarians, such as Sandel and MacIntyre, are more relativistic in their approaches.

goods associated with a particular conception of the good life, provided it respects the fundamental liberal rights of all citizens and grants equal citizenship to all members of society "including all those who do not share public definitions of the good".⁹²

Taylor argues that the problem with the liberal notion of universalism is that it has started to confuse universalism with sameness. It is this feature that according to Taylor creates the problem of making liberalism compatible with diversity and cultural difference. Human particularity and distinctiveness have been ignored, "glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity".⁹³ As a consequence Taylor argues that one needs to have a totally different conception of universalism if one is to make liberal democracy compatible with difference. He suggests that universalism might imply something radically different from what is the common view among liberals, since it might just as well be understood as the right of everyone to be recognised for his or her unique identity.

This concern with the recognition of difference draws on Herder and his articulation of the ideal of authenticity. His effort is to combine Herder's ideas with an analysis of modernity and the development of modern conceptions of the self. By this he presents a context with distinctly modern conceptions of individual identity based upon the ideals of authenticity and equal dignity. This ideal of human dignity demands that all people be treated as free and equal. Yet, once this ideal is combined with the idea of authenticity it points in at least two directions. While on the one hand it implies the protection of the basic rights of individuals as human beings, it gives rise, on the other hand, to the demand that the particular needs of individuals as members of a specific culture be acknowledged.⁹⁴

But how is he supposed to achieve support for this new kind of universalism? Taylor argues that the idea that one actually might treat some people different in order to create equality is nothing new in the liberal tradition. In order to change individuals' socio-economic inequalities, one used the idea of equal dignity that did not accept second-class citizenship in a liberal democracy. This paved the way for socio-economic redefinitions, and hence justified social programs that were highly controversial in order to achieve social, economic justice.

⁹² Taylor 1994:59.

⁹³ Ibid:38.

⁹⁴ Ibid:39.

Around the world many groups and individuals experience that their particularities are not being recognised by the majority culture. Is this not also a kind of second-class status in society? The only difference is that this time liberals fail to acknowledge that cultural groups often are exposed to unequal recognition. One should rather begin to understand identity as something formed by exchange, respect groups and individuals for who they are, and thus give them certain rights aimed at conserving their cultural identity.

However, Taylor underlines that there are of course immense differences between the arguments defending these policies. Reverse discrimination is defended as a temporary measure that will eventually level the playing field, and allowing the old “blind” rules to come back into force in a way that does not disadvantage anyone. The cherishing of distinctiveness is on the contrary of course not just for a short period, but something that supposedly is going on forever. If one fails to stress this distinction, one might do the same mistake that western liberals have been doing with their notion of “the other”. Western theoretical thinkers are often criticised for not only suppressing, but also failing to appreciate other cultures. As an example of western arrogance, Taylor quotes Saul Bellow as saying something like “when the Zulus produce a Tolstoy we will read him”.⁹⁵ This statement is taken as a quintessential statement of European arrogance, not only because Bellow is being *de facto* insensitive to the value of Zulu culture, but also because it is seen to reflect a denial in principle of human equality. First, there is the implicit assumption that excellence has to take forms familiar to ours. It is an aim that the Zulus should actually make a Tolstoy. Second, we are assuming that their contribution is yet to be made. These two assumptions obviously go hand in hand. If they have to produce our kind of excellence, their only hope is in the future.

The example of the Zulu Tolstoy can also be used as an allegory for the politics of multiculturalism and the liberal democracy. It implies that we already have the standards to make the perfect, just, society. This standard is western liberalism, and when other cultures build liberal communities, we will be more than happy to accommodate them. From this point of view, the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. It views itself as neutral, but as it turns

⁹⁵Taylor underlines in “The recognition of difference” 1994:42, that he does not know whether this statement actually was made in this form by Saul Bellow, or by anyone else. He reports it only because it captures a widespread attitude.

out, only the minorities and the suppressed cultures are being forced to take alien form. The political society cannot remain “neutral” between those seeking to maintain cultural traditions and those wishing to “cut loose” to promote individual self-interests. Both cases should be accepted, and it should be acknowledged that these are different subject matters. One should thus distinguish between two levels of rights: 1) One level of basic or fundamental rights construed along the line of liberal universalism, and 2) one level of cultural rights that permit public regulation. While the former requires uniform treatment and should never be infringed, the latter allows for cultural diversity.⁹⁶ The latter should, however, be accepted as a good, and a preservation for both present and future generations, not just an individual right which one might follow in one’s private life. By not accepting diverging conceptions of the good, we actually fail to recognise their equal human dignity.

2.4.4 Just another kind of liberalism?

As other proponents of the politics of difference that tries to present new suggestions for how it is possible to make liberal democracy compatible with the recognition of culture, Taylor is also criticized for not being able to provide a solution that satisfies either side. The liberal critique is of course almost inevitable. In their view a preoccupation with cultural identity may not only restrict the freedom of future generations, but may also prove oppressive vis-à-vis existing group members. Even if individuals’ rights are respected, a politics of cultural survival may lead to pressure being placed upon the individual to define itself primarily in terms of its cultural membership rather than a whole host of alternative criteria that may shape his or her identity.⁹⁷

Taylor is also criticised for failing to address some of the most challenging aspects of the demand of recognition. His concrete willingness to actually recognise non-liberal cultures, is questioned. Is his defence of cultural survival and his politics of recognition just a different wrapping, which actually entails the same as the liberal universal rights? The reason for this criticism is that Taylor developed his defence of the right to cultural survival in the context of a discussion of the constitutional crisis in Canada surrounding the status of Quebec. His suggestion is therefore seen as a dispute between two particular conceptions of liberalism. While English-speaking Canada is wedded to the liberalism of universal rights, Quebec

⁹⁶ Dallmayr, Fred, “Democracy and Multiculturalism” in Benhabib, 1996:287.

⁹⁷ Baumeister, 2000:143.

favours a conception of liberalism akin to his politics of recognition. Although these two models of liberalism differ with regard to the status of certain collective goals, both recognise fundamental liberal rights and acknowledge the importance of individual freedom. This dispute of multiculturalism is thus regarded as quite “thin”, and one questions this theory’s ability to work in societies of severe structural diversity.

According to Baumeister, Taylor appears to be caught in a dilemma: “While in the eyes of liberals and advocates of thin multiculturalism his approach fails to provide adequate safeguards for key liberal values such as autonomy and equality of moral worth, non-liberal minorities fear that his approach remains too wedded to liberal values to accommodate the depth of complexity of diverse characteristics of contemporary liberal societies.”⁹⁸ This is a dilemma that can easily be applied to all the different theoretical approaches presented in this theoretical chapter, when they try to put forward answers to how it is possible to make liberal democracy compatible with the accommodation of cultural diversity. The question is whether it is actually possible to get any further in this debate without examining more empirical cases.

Theoretically there seems to be an almost unsolvable conflict regarding the right to equality for all and the rights of certain groups to protect their difference. The reason for this is as we have seen, that at once you grant groups the right to cultural protection, there is always a danger of violating the rights of some subgroups inside the cultural groups. However, these questions do exist, and one needs to find answers in many liberal democracies all over the world. The debate on multiculturalism in the western world is at a very abstract philosophical level, and in most cases it is based on empirical studies of Canada, the European Union and the challenges of western democracies regarding immigration. In my further presentation I am going to see if these western philosophical attempts to solve the question of cultural diversity are able to provide any solution for one concrete example of cultural diversity, that of the post-apartheid South Africa’s new democracy.

⁹⁸ Baumeister 2000:147.

2.5 Analytical model of further thesis

The question is now how it is possible to apply these different solutions of compatibility on the concrete empirical case of post-Apartheid South Africa. Which dilemmas might occur when one introduces these liberal strategies in a society with deeper cultural differences than those exposed on the surface in western democracies? In the South African context it is important to remember the legacy of colonisation and apartheid that I discussed in chapter 1.3. Rawls and Habermas stress the importance of state neutrality on the question of the good life. Neither the colonisers nor the Apartheid governments had been neutral to the good life. To illustrate this I can use the quotation of the colonial secretary Lord Milner presented in chapter 1.3.3: “The native peasant often share his hut with his goat, or sheep, or fowls. He loves to drum and dance all night ... They have no desire to abolish segregation.” What this implies theoretically is that the earlier judicial and political system was based on an idea that different groups had different conceptions of the good. The “natives” were only happy if they were left alone doing what “natives” normally do.

Rawls stresses that one cannot simply decide that all individuals in this “native” group had a completely different conception of the good than that of the government. Behind the ‘Veil of Ignorance’ it would have been possible to comprehend that though you might cherish a culture, you would not view this as your most important right. Deprived of the knowledge of who you are, you would have argued that it is important to decide yourself as a rational individual if the cultural practice is important to you. This implies that one need to regard a fair political structure and basic universal rights, as more important than cultural rights. You might be happy to live in a hut with your goat, but the state ought not to interfere with this desire. Due to this, Rawls advocates for a priority of rights, where individuals are the bearers of rights not groups.

Habermas argues that you do need an impartial and neutral state, but it cannot achieve legitimacy through abstracting the individual from its particularities. The problem with the Apartheid vision of culture was that the people itself did not claim cultural segregation. The governments without a thorough consultation with the people decided that this was a desired political structure due to the people’s different ideas of the good life. These considerations were done without any system of rules that ensures discursive equality, and hence, the African, Indian and Coloured population were deprived of their *Sittlichkeit* – the right to

discuss ethical questions, such as their conception of the good.⁹⁹ The Apartheid state had no legitimacy since the people was not the author of the law. If, however, all citizens participate in the public debate and express their specific needs, one can discuss which cultural traditions that ought to continue and which regulations that ought to be applied towards cultures. But in order to be legitimate, the people who practise the culture need to understand and decided what the good is to be, not the state. The state structure must, however, make sure that the practices agreed upon do not deprive any individual of their freedoms.

Kymlicka and Taylor on the other hand do stress that in order to provide accommodation of difference for minority cultures, one might sometimes offer them group rights. In South Africa many cultural groups might have been constructed in a vast social engineering program, this deprived many groups of people from their political rights, but can one in the aftermaths of this regime act like differences do not exist? Though people should not be forced to live in accordance with stereotypical images of themselves, like a “Native” with his goat in a hut, there might be reasons why groups of people claim the right to be treated differently due to their culture.

As argued in 2.4.1, one of Kymlicka’s main concerns is that in a liberal democracy one ought to provide justice between different ethno-cultural groups. Societies such as South Africa are not homogenous, and in order to deliver a fair and free context for all, one must respect all cultural groups equally. He thus presents three different strategies for how different cultural groups can be incorporated into the society. To sum up 2.4.1 these are special representation in the political structure, the right to self-government for some groups in certain matters and the claim for multicultural rights, which is for instance bilingual education and exemptions from laws that are incompatible to their religious believes etc. By accommodating these concerns in a multicultural society as South Africa, all groups would be able to exist together since no group discriminate towards another, and therefore no group becomes invisible in the larger society.

Taylor is also sceptical to attempts to glossing over cultural differences, and accuses liberalists for equating universalism with sameness. We all deserve respect because we are, but liberalism cannot require that we all have the same conception of the good. To neglect a

⁹⁹ It is important to stress that the Apartheid system put sanctions on the Afrikaans and English as well, but not to the same degree.

groups difference, can be just as discriminating as forcing an identity upon a group of people. Of course one should not oppose the right of those that do want to cut loose from their culture and traditions, but as a liberal society one should also accommodate those who want to remain true to their culture and traditions. In South Africa, all people ought to be free to embark a liberal western way of life, but if people chose to live by African traditional values this must be recognised. But how is one to provide for the right to choose between ways of life? By the freedom of choice, or by territorial delineation?

All these attempts to go in between the two old dichotomies of universalism and particularism, and try to develop a strategy to accommodate both, have been criticised. For theoretically they fail in both. First, you have those who criticise these strategies since they do not secure all individuals right to equality. Secondly, they are also criticised because, how can these liberal attempts to recognise different cultures be applied in societies with deep-rooted cultural differences. Many of them draw on western empirical experiences and western perspectives, but how can they accommodate cultures with different beliefs in what a just institution is, what it is that make an authority legitimate, and what is it that ought to form our ways of life?

So, is it possible to apply these theories to South Africa? Which theory has most similarities with the final outcome of the constitutional bargaining in South Africa? Which diverging claims of accommodation was presented, and how can one view these preferences in the light of the different theoretical perspectives? When the constitution was to be implemented, was one able to meet the requirements of both securing the right to equality and at the same time recognise cultural difference?

3. Methodological approach

The scope of this chapter is to present the data material applied in my analysis of why the role and the functions of traditional and customary law became recognised in the South African Constitution of 1996, and whether this recognition resulted in a political will to fulfil these constitutional obligations. The key topics introduced are: Why did I decide to apply a single case approach? Which sources of evidence have been analysed, and why did I use documents, interviews, literature, statistical data and observation as evidence in the investigation? I will also address the question of how one can assure a sufficient validity and reliability in a cases study.

3.1 A single case study

Doing a case study is but one of several ways of doing social science research. Robert Yin has argued that one of the main reasons for selecting this methodological approach springs from “a desire to understand complex social phenomenon”.¹⁰⁰ In order to understand a social phenomenon, contextual conditions might be highly pertinent, and a case study research makes room for investigating unclear boundaries between the phenomenon and the context.¹⁰¹ One decides upon this approach with the intention to place the case centre stage, and not necessarily the variables.¹⁰² One can choose to use either single case studies or multiple-case studies. In this research I have chosen to apply a single case approach. To account for why I have chosen this design in my research, I will turn to Yin’s three rationales for using a single-case approach.

First, studying a **unique case**. Sometimes one is interested in analysing a phenomenon that is regarded as an exemption. There are not any known cases having significant similarities with the case under investigation, and one decides to analyse the deviances of this case. Is the South African process of accommodating cultural difference a unique case? All cases are somehow unique, and it has been quite normal in the political science tradition to view South Africa as an exceptional case. Westernised, but still in Africa, with a legacy of Apartheid. If

¹⁰⁰ Yin, Robert, *Case Study Research, Design and Methods*, Second Edition, California: Sage Publications, 1994:3.

¹⁰¹ Ibid: 13.

¹⁰² Ragin, C.C. “Introduction: Cases of ‘What is a Case?’ ”, in Ragin and Becker (eds.) *What is a Case? Exploring the Foundations of Social Inquiry*. Cambridge: Cambridge University Press, 1992:5.

one turns to the question of accommodating traditional African institutions in a new democracy, South Africa is in the same situation as other earlier African Commonwealth states.¹⁰³ The question of what to do with these traditional institutions and the plural system of law in a democratic state is not unique in an African setting.

However, one might say that the outcome of the transition and the process of implementing cultural rights are unique in an African context. But is this result unique if one conceptualises traditional African institutions as cultural institutions? Does the case then have similarities with cases in other parts of the world? The answer to the question of the South African uniqueness is in many ways a question of operationalisation. I think one can argue that South Africa is both unique and still not. It depends on the perspective of the analysis, and the reasons for using a single case approach must be justified by other considerations than those of its uniqueness.

Secondly, another rationale for choosing a single case study approach is the **revelatory case**. This situation exists when a researcher has an opportunity to observe and analyse a phenomenon previously inaccessible to scientific research.¹⁰⁴ The case does not have to be unique, but there have not been any similar studies on the subject earlier. Is then my case a revelatory one? In regard to studies done by political scientists, I would almost argue that this is in many ways so. In both recent and present time, there have been various studies on traditional African institutions and customary law. Most of them have been judicial studies, and have been carried out by social anthropologists. T.W Bennett has for instance done exhaustive researches on the subject of Customary Law. Especially his work *Human Rights and African Customary Law*¹⁰⁵ gives an excellent presentation of the key challenges related to customary law under a system of universal constitutional rights. Little research has been done within the field of political science. Barbara Oomen has, however, done a study on traditional leaders and democracy presented in *Traditions on the move – Chiefs; Democracy and Change in Rural South Africa*.¹⁰⁶ In one chapter of their book *The politics of transition – A hidden*

¹⁰³ See Mamdani 1996 for an excellent discussion on this subject.

¹⁰⁴ Yin, 1994:40.

¹⁰⁵ Bennett, T. W. *Human Rights and African Customary Law*, Kenwyn, South Africa: Juta, 1995.

¹⁰⁶ As mentioned in the abstract, Oomen presents the “Two Bulls in a Kraal” situation in Oomen, Barbara, *Traditions on the Move – Chiefs; Democracy and Change in Rural South Africa*, Amsterdam: NiZA-cahier No. 6, 2000.

history of South Africa's negotiated settlement, Spitz and Chaskalson¹⁰⁷ describe how the chapter on traditional leaders was negotiated prior to the interim constitution. Other studies have been carried out, but these are sporadic, often descriptive works on the system of customary law.

Since it has been difficult to draw support from earlier studies in my investigation, I have valued the relevance of contextual sensitivity highly. If one tries to grasp too much in one project one might be in danger of jeopardising the importance of understanding a phenomenon on its own premises. Thus, I decided to concentrate my attention to a sequence of events in one particular case, rather than comparing a case at a certain stage with other cases. In this way it was possible to have a more open strategy in my search for a fuller understanding of the process. The problem with this is that it makes it more difficult to draw significant generalisations on basis of the analysis. It is thus fruitful to look at the last justification of using single-case study as an approach.

Finally, a last rationale for applying this type of research strategy is when the case represents a **critical case** in testing a well-formulated theory. A single case study can thus be used to illuminate strengths or weaknesses in an existing theory. The single case study does not have the power of refuting an existing theory, but it might be able to point at some parts of the theory that needs reconsiderations or clarify aspects earlier neglected. The single case can then be used to determine whether a theory's propositions are correct or whether some alternative set of explanations might be more relevant.¹⁰⁸ The theories discussed in the previous chapter, is based on empirical studies of western democracy, and they are at an abstract philosophical level.

My intention with using South Africa as a case is predominantly to analyse whether these theories are interesting in explaining some of the incidents in a South African context. Furthermore, I am interested in analysing how normative theories can be used as a tool for investigating practical processes. Hence I will analyse questions of whether the exhaustive, western theoretical debate on multiculturalism revolves around topics relevant for challenges

¹⁰⁷ Spitz, Richard and Chaskalson, Matthew, *The Politics of Transition – a hidden history of South Africa's negotiated settlement*, Oxford, UK: Hart Publishing, 2000.

¹⁰⁸ Ibid: 38.

Figure 3.1: Three rationales for single-case designs

	Unique	Revelatory	Critical
The South African Case	- (+)	+	+

exposed in a specific case. Is the outcome of the South African process for accommodating difference in accordance with these theories? In this way the project is to compare different theories in light of one empirical process, rather than to compare different empirical processes in light of one theory. Figure 3.1 shows that the present study does to some extent fulfil two of the rationales for employing a single case study. Few studies have been done on the implementation of cultural recognition in South Africa, and the study also tries to shed some light to whether the challenges exposed in the theoretical debate is different from the challenges discovered in an empirical case. Though it might not stand as a critical case capable of rejecting an entire theoretical debate. The South African case might have some similarities to the experiences of other countries. In order to be able to study the phenomenon on its own premises, I have chosen an in depth study of one case, even though it would have been interesting to compare the south African experience with other countries in an more far-reaching study.

3.2 Multiple sources of evidence

One of the major strengths of case study data collection is the opportunity to use many different sources of evidence. By using *multiple sources of evidence* one can gather and analyse the findings from different sources in order to address a broader range of historical, attitudinal and behavioural issues.¹⁰⁹ In my study I wanted to understand why traditional leaders became recognised in the new constitution, and whether this recognition actually ended in political action aimed at clarifying their position. It was important to investigate different sources of evidence to see which kinds of aspects that affected this process. By examining multiple sources I could increase the *construct validity* of the analysis, by trying to test my assumptions of what influenced the courses of events in my case. Yin has defined

¹⁰⁹ Yin 1994:92.

construct validity as the establishing of correct operational measures for the concept being studied.¹¹⁰

My object was to understand the process and not just one single event, and different sources uncovered information from different stages of the process. Sometimes interviews were important to gather information about something that was absent in other sources of evidence. Other times it was important to use multiple sources to check if information derived from one source actually correspond with information from other sources. By doing this I was able to use converging lines of inquiry in order to provide more convincing and accurate findings. For instance, when an informant argues: “the government is only interested in the situation of the traditional leaders because it is soon election “, one needs to investigate other sources to be able to present this claim as valid.

In my research I ended up employing 5 different sources of evidence; documents, interviews, literature, statistical data and observation. Some of them revealed more important evidences than other; these were documents, interviews and literature. Others such as statistical data and observation were mostly used to achieve a better understanding of the context in which I did my research. Before I present the sources employed in my investigations of the process of recognising cultural difference, I am going to centre my attention on the reliability of the project. Reliability refers to the extent to which different operationalisations of the same concept produce consistent results. High reliability means that two procedures yield the same outcome, or the same procedure reapplied over time shows high agreement.¹¹¹ To increase reliability it is important that the data material is transparent for the purpose of making the reader aware of how and under what circumstances the information was gathered.

By making my data transparent it is possible for others to control whether my assumptions are biased or if I actually have done some errors in collecting my data. For instance, I am going to analyse bills initiated by the government as a source. Suddenly it seems like a Bill has vanished from the process, and I decide to present this as an evidence of “lack of interest” to amend it. The truth might on the other hand be that the name of the Bill was changed to something completely different, and then tabled in parliament. This means that the research

¹¹⁰ Ibid:33.

¹¹¹ Bohrnstedt, George, W. and Knoke, David, *Statistics for Social Data Analysis*, Third Edition, Inc. Illinois: F. E. Peacock Publishers, 1994:14.

reliability is weakened because I fell short in being sufficiently precise in my data collection, and therefore did a careless mistake. I have presented the process of collecting data below.

3.2.1 Collecting the data material

Most of the data analysed in this research were collected in South Africa from late January until August 1999. In the first period, January until the mid of March, I did some background research in Cape Town. Documents and literature were collected at the South African Library and the Parliament of South Africa. Historical secondary sources from the Apartheid era were also collected in second hand bookshops. Two periods were spent in the capital, Pretoria. The first lasted from the mid of March until the mid of April. In this period I collected literature at the Library of the University of Pretoria, and I also did some informal interviews with Peace Corps Volunteers from the United States of America. The volunteers were living in different rural communities in the northern part of the country, and I interviewed them to get an impression of the degree of authority the traditional leaders possessed in these communities. To understand the process of accommodating cultural difference further, I decided to do a short field observation in a rural area. This was done in KwaZulu-Natal in Eshowe and some of the villages in the surroundings (8 –17 of May).

In my second period in Pretoria (late May until late June) I did one interview with Prof. Thandabantu Nhlapo at the South African Law Commission. At the 22nd of June I went with the Law Commission to one of their Workshops on “Traditional Courts and the Judicial Function of Traditional Leaders” in Kwamshanga, Mpumalanga. At the Law Commission I also collected documents. Documents, reports and literature were also collected at the Department of Constitutional Development. At the department I also had informal talks with some of the departments researchers in the section of Traditional Affairs.

The last period was spent in Johannesburg (late June until August). In Johannesburg I did two interviews. One with the deputy director of the Rural Women’s Movement, Popi Ngema and one with Likhapha Mbatha at the Gender Research Project, Centre for Applied Legal Studies, University of Witwatersrand. In Johannesburg literature was collected from various libraries at the University of Witwatersrand¹¹² and at the Konrad-Adenauer Stiftung. Documents and

¹¹² More specific, the Libraries used at the University of Witwatersrand were the William Cullen Library, the Wartenweiler Library and the Library at Centre for Applied Legal Studies.

reports were also collected at the offices of the Commission of Gender Equality. To fill in some gaps in the data collected in South Africa and also to remain updated on recent developments, literature have since August 1999 been collected in Norway, at Chr. Michelsen Institute Library and University of Bergen Library, and some reports and documents have been downloaded from the Internet. In the following, I am going to present the different sources of evidence used in this research, with the purpose of visualising the construct validity of this research and avoid biased conclusions.

3.2.2 Documents

Documents are often known as primary sources. In this analysis documents are an important source of evidence. I have categorised the documents into two sets. The first set consists of legal documents, such as constitutions, Bills and Acts. These documents are outcomes of a political debate. They uncover what politicians view as important issues to decide upon, and are often to be interpreted as normative, since they tell us what politicians think that ought to be done with a subject matter. They thus tell us something about “what” is agreed upon and “when” this is agreed upon. These document are interesting for the process since they tell something about priorities and changes in priorities over time. As with the interim Constitution of 1994 and the final constitution of 1996, one can see that changes in priorities have occurred. They also lay down guidelines for how policies are supposed to be implemented in the future. The succession of the Bills and Acts also tells something about the priority of issues, and what it is possible to decide upon. Sometimes it becomes interesting to find that a Bill is not enacted though other sources tell that this is intended. While legal documents may reveal the “what’s” and the “when’s” of a process, they seldom give any certain evidences on “how” the process was or “why” this was the outcome of a process. The content of a legal document is often interesting to analyse. They are, however, seldom viewed as findings in themselves, but serve to find clues for further investigation.

The next set of documents is more descriptive. This set of documents includes public progress reports, newspaper articles, submissions, speeches and public statements. These are documents that can help us to investigate “why” and “how” something occurred, since these are the opinions and views of persons involved in the process under investigation. For example, a Discussion Paper on the process of harmonising common law and customary law includes submissions from important figures in the debate. In this way they both tell us

something about the visions of the people affected by the process, important NGO's, academic researchers and also the recommendations of the South African Law Commission. The most important strength of this kind of evidence is that it is unobtrusive – meaning that the evidences is not created or influenced by the case study. It tells me something about what the interests of different actors are at a certain point of the process, but does not directly answer to questions that I find interesting, as is the case in interviews. The documents denote the arguments made in the din of battle, and are not influenced by belated wisdom or the wish to appease the researcher. Due to this, one needs to have an open eye on the events, and sometimes one is forced to change earlier comprehensions of ones suppositions.

The weaknesses of using documents as a source of evidence, are that it sometimes might be difficult to uncover the biases of the document under investigation. Public reports often only give the answers to what the government views as important findings, and newspapers have tendencies of paying more attention to extreme statements than views most people approve of. Because of this it is important in reviewing any document to understand that it was written for some specific purpose and some specific audience other than those of my case study. For instance, a public speech by government officials tends to be severely coloured by the circumstances in which a speech is held. A speech by Mandela at the opening of the House of Traditional Leaders certainly give traditional institutions a higher value, than what would be the case if the speech were held at a Women's Convention.

In my research I have tried not to view documents as objective evidence devoid of bias. All accounts revealed by documents are contextualised, and must be analysed in this way. Though I am aware of this it is of course difficult to know the exact context of a document, and further how much the document influenced the final outcome of the process. However, the greatest difficulty was to make a representative selection of documents. How to cover all the different agents without making a too extensive dataset? The main purpose of analysing documents thus became to corroborate the findings with the information gathered from other sources. Other sources of evidences were also important since not all opinions and events are possible to get hold of in documents. To be able to make my data explicit and open to different interpretations, I have listed all documents analysed in the appendix.

3.2.3 Interviews

Two different kinds of interviews were used to gather information about the process of recognising cultural difference in South Africa. The first type of interviews I regard as *focused, formal interviews with informants*. The aims of these interviews were that the informants would give information about their participation and their insights into certain events in the process. All interviews were open ended, but they did follow a certain set of questions derived from my case study protocol. Since my aim with the investigation is to understand the process, I tried to make the interviews as open as possible. The positive side of this was that the informants came up with facts, events and information that I was not acquainted with previously. In this way I got a better understanding of the process. The negative effect was that questions that I had planned to ask sometimes were left out of the interview. During the interviews I had to decide upon which questions that were the most important. In my transcription of the interviews I became aware that some interesting questions suddenly were left out. All in all I do think the positive sides of using an open strategy stem the negative consequences.

Three focused, formal interviews were done with a tape recorder. The interviews were few, but well selected. The first was done at The South African Law Commission on the 17th of June 1999. This interview was with Prof. R.T. Nhlapo. He was at the time the leader of a project, which aim to harmonise common law and indigenous law. The Law Commission has arranged several workshops in relation to the implementation of cultural rights. The Law Commission is an important organ in the initial stages of new law reforms. Before a law is debated in the legislative, the commission gathers information about the Bills. In order to secure community participation at an early stage, the commission publishes an issue paper with the intention of making room for a public debate. After the public debate the Commission drafts a discussion paper with both submissions from diverging contributors and recommendations to be discussed in parliament. Prof R.T Nhlapo was selected because he had an extensive knowledge about both the political debate and the different events of the process.

The next interview was with Likhapha Mbatha on the 2nd of June 1999, a researcher at the Gender Research Project at Centre for Applied Legal Studies, University of Witswatersrand. Mbatha had done some research into the process of harmonisation and had also written comments on Bills to be enacted by parliament. Discussions with other researchers help to

increase the construct validity of the analysis. Since I did not have the time to write any report to be reviewed by other South African researchers, I decided to both test some of my assumptions together with asking my questions from the case study protocol, in this interview. One criteria for getting a fresh commentary on the topic, is that the interviewer appear as naïve as possible.¹¹³ In this interview I might not have accomplished this criteria. One always needs to be sensitive when asking questions, and since I tried to test some of my assumptions, I might have seemed predetermined. Especially since this was our first meeting, and earlier contact had only been through emails. This impression of a small hostility might however been caused by an unwillingness of the informant to answer questions outside her domain of research. Which of course is very understandable.

The last interview was with Popi Ngema, the deputy director of the Rural Women's Movement on the 16th of July 1999. The Rural Women's Movement have participated as an NGO on several Workshops held in relation to the process of harmonising common law and customary law. They have also produced an extensive set of submissions to the Discussion Papers. The Rural Women's Movement has been an important contributor to the understanding of the process since they somehow seems to operate between old established dichotomies, such as modern feminism vs. concern for rural traditions. All though, the RWM was an important contributor at the workshop, it was difficult to gather sufficient information about their views and ideas from other sources than that of the Law Commissions Papers. It was also interesting to get an opinion of someone from the civil society, since they participated on many workshops, but had a different opinion on the process than the Law Commission and the state.

There are two different groups of people that would have been interesting to interview. The first groups are formal interviews with traditional leaders. As I am going to discuss in 3.3 many view the subject under investigation as very sensitive. It did take time to achieve confidence, and it is difficult to get permission to interview the most important traditional leaders. At the end of the stay my acquaintances at the Department of Judicial Affairs and Constitutional Development did open many doors for me, but unfortunately I needed to return to Norway at that point. A second group that would have been interesting to interview was key politicians. It was important to do my data collection as early in the process as possible

¹¹³ Yin 1994:85

since it was difficult to gather information in Norway. In the beginning it was difficult to both find out who the key politicians to interview would be, and secondly, if I was to interview elite politicians, I needed to have a clear vision of the total process. I thus decided that I needed to draw on other sources to get these groups vision of the process. The interviews are available on request.

The other type of interviews I did was *informal interviews* with *respondents*. My intention with these interviews was to receive an improved understanding of the phenomenon under investigation. No information gathered in these interviews is used directly in the analysis as findings, and I did not use a tape recorder or a strict interview guide. The information did however give me some clues on where to look and how to interpret some of the events. In informal interviews a respondent is more likely to speak more openly, and they will be less likely to hesitate in exclaiming their assumptions and judgements. Like for instance in informal interviews with researchers at the Department of Constitutional Development, the respondents would put forward views contrary to the department's official statements. If these judgements are interesting, it is the investigators role to use other sources of evidences in order to provide them with support.

Informal interviews can also help to gather information from another perspective than views originating from a classical top down standpoint. As for instance, the Peace Corps of the United States of America started a project in 1997 where different volunteers live in South African rural villages. Since these volunteers were living in rural areas in the northern part of the country I decided to ask ten volunteers questions about the power and legitimacy of the traditional leaders and institutions in their villages. By doing this I would get an enhanced idea about the phenomenon from a bottom up perspective. Some of the respondents lived in areas with strong traditional authorities, others lived in areas where the traditional leaders played a marginal role. One, however, told about a situation of total confusion in relation to the subject. The traditional leader in the village was growing old. He had only one heir, but he lived a modern life as a policeman in Pretoria. Was the village supposed to call this successor home to do his duty as a traditional leader, or should they just let the traditional institutions in the community wither away with the old leader? Practical problems like these opened my eyes to a different view of the consequences of this process in rural areas.

Both formal and informal interviews might be biased. The selection of the informants may not represent all views and the asking of questions might be leading. Both these facts are important when one draws conclusions out of the data material. The data material, which I have collected, is not intended to represent all opinions related to the issues. It is also important to be aware of the reflexivity of the data collected through interviews. The respondents and informants only answer the questions directed to them, and seldom respond with objections to the relevance of the questions. However, in a situation where I am trying to gather information about my assumptions, interviews are useful both since they are on the target and give insights to the assumptions under investigation. No support for an assumption might be just as relevant for the outcome of an analysis, as if all your assumptions are approved.

3.2.4 Literature

Skocpol has remarked that the “comparative historical sociologists have not so far worked out clear, consensual rules and procedures for the valid use of secondary sources as evidence”.¹¹⁴ Nevertheless, a rationale for using secondary sources is that it enables case study researchers to present evidences of past conditions.¹¹⁵ As I view past conditions as important to understand the current process of recognising cultural rights, it has been necessary to rely on secondary sources. The problem with this strategy is the possibility of inaccurate historical accounts, something that can be quite fatal in understanding such sensitive subject as cultural accommodations in South Africa.

Another rationale for using secondary sources is to make sure that rival interpretations of the phenomena is considered. By using diverging secondary sources it is easier to achieve historical and political sensitivity, since one can test different opinions and assumptions against each other. Regarding the question of traditional leaders’ position in South Africa, this question brings with it dark shades of past discrimination. Still, it is sometimes difficult to distinguish the well-intended studies of the phenomenon from analysis aimed at justifying politics of cultural segregation. A secondary source considered unbiased by first glance, might after advanced knowledge of the phenomena disclose a hidden agenda. This has made it

¹¹⁴ Skocpol, Theda “Emerging agendas and recurrent strategies in historical sociology” in *Vision and method in historical sociology*, Skocpol (ed.), Cambridge: Cambridge University Press, 1984:382.

¹¹⁵ Neuman, Lawrence, W. *Social Research Methods, Qualitative and Quantitative Approaches*, Third Edition, USA: A&B, 1997:398.

difficult to evaluate the bias of phenomenon presented as “objective analysis of mere facts” in secondary literature. It is nevertheless important to stress that literature presented as “neutral” might be an important source of evidence if one manage to uncover the concealed agenda. To uncover the bias in secondary literature, I have always tried to ask, why was this text written, who published it, which type of language is used, and in which context was the text presented? However, to chase all ghosts of bias in the field of secondary South African political sources might turn out a ceaseless endeavour.¹¹⁶ Though it remains an extremely important aspect to linger on.

3.2.5 Statistical data

Statistical evidence is used to achieve a further understanding of the process, and it consists of elections results and demographic information. The demographic information is gathered by Statistic South Africa, and they are based on *The South African Population 96' Census*.¹¹⁷ One often regards statistics as reliable sources of evidence. In regard to statistical measures of the South African population in the period 1970 to 1996, Stats SA used a demographic model to adjust the census count. This model was influenced by government politics, and it is important to know that the earlier homeland of Transkei, Bophuthatswana, Venda and Ciskei (The TBVC states) were excluded from the model since they were declared independent by the government. Separate censuses were conducted in the TBVC states, but no attempt was made to use these counts to estimate the size of the total population of South Africa.

The demographic model used to count the African population within South Africa, was to use groups of enumerators to sweep the population within rural self-governing territories. This was done without any demarcated boundaries or lists. In 1991 aerial photographs were used to count the number of dwellings in particular informal settlements, such as shantytowns. These were then used to estimate the size of the population, by estimating the average household size per dwelling out of small-scale surveys on the ground. In the 96' Census this strategy was rejected, and the numbers and percentages presented are based on empirical evidence. Both the actual count and the adjustments by a post-enumeration to avoid an ‘undercount’, were arrived at by visiting households in enumerated areas throughout the country, as well as

¹¹⁶ For an extensive, deconstructive reading on the topic see Taylor, Rupert and Orkin, Mark “The Racialization of Social Scientific Research on South Africa” in *The Politics of Social Science Research. 'Race' ethnicity and social change*, Ratcliffe & Palgrave (ed.), UK: University of Warwick, 2001:61-84.

¹¹⁷ A Census 2001 is under production, but the results are not to be launched until 2003.

hostels and institutions, and by that figure out how many people that used to live in them. There are thus reasons to believe that Census'96 provides more accurate measures of the population.¹¹⁸

The Electoral Institute of Southern Africa provides information on local, provincial and national election results. Together with the Census' 96 these election results may be used to reflect upon questions concerning the ability of the traditional leaders to mobilise a political vote. I have also used a survey done by the Afrobarometer on *Popular Attitudes to Democracy, Selected African Countries, 1999 – 2001*. The statistical data are presented to support certain assumptions, but they give few interesting findings in themselves. Because of this they only shed light to assumptions made by drawing conclusions from other sources of evidences. Largely they can only be used as presentations of facts.

3.3 Observation – obtaining cultural closeness

As a researcher it is important to project oneself as a neutral observer of certain social facts. But, especially in studying foreign cultures, one inevitably becomes aware of the cultural background one possesses. In order to be aware of the scope of my cultural bias, I tried to come closer to the phenomenon through observation. By doing this it is easier to understand the process, and observation as evidence is often useful in providing additional information about the topic being studied.¹¹⁹ For instance, all though you read in a book that traditional leaders, and especially the royal leaders, are very honoured among their people, you might underestimate the effect they have on others. As a Norwegian I know that the Norwegian monarchs are very highly valued among the Norwegian people. However, when I read about the 11 South African Kings and Paramounts who are still recognised in the new constitution, it was easy to forget that in many communities they are almost more respected among their people than the Norwegian king is in Norway.

In the Workshop in Kwamshanga, Mpumalanga, where I met the Ndebele King C N Mahlangu (Mayisha II), I made the entire delegation from the Law Commission and the Department of Constitutional Development hold their breath in anxiety. They had just introduced me as a Norwegian researcher, when they suddenly realised that I probably did not

¹¹⁸ See press statements from Statistic South Africa on the findings in Census'96 launch on 20 October 1998.

¹¹⁹ Yin 1984:87.

know that it would be extremely rude to put out my hand to initiate a handshake. Since I was not of royal blood that gesture would have been a severe offence. I do not know why I choose not to do this mechanical gesture, but in the car on our way back to Pretoria, the government officials burst out in a relieved debate on what might have happened with the entire meeting if I had offended him. So, although I had attended the Workshop to get information about different groups of people and their argument on the Discussion Paper, the experience turned out to be an observation of customs and power structures.

The Workshop was predominantly on Zulu, QwaNdebele and Setswana, and the government officials were only able to give me sporadic translations. The meeting became extremely important in order to comprehend how consultation was arranged and also to provide an indication of the actual authorities of the traditional leaders I am analysing. It also became clear that the researcher can in some cases have an effect on the event under observation, and the event might proceed differently because it is being observed. This leads me to the next topic, that though you feel you are transparent, you might not be so in relation to the people observed.

In all studies and especially in studies of a foreign context it is important to remember Van Maanens words; “While the fieldworker is undertaking a study of others, others are undertaking a study of the fieldworker”.¹²⁰ During my stay in South Africa my background as a western, white woman became very apparent, an observable fact reinforced since my interest was to study a somewhat sensitive subject for many involved in the process. After I had spent some time together with people involved, many said to me “I became so anxious the first time you came her, asking question about the process of recognising African traditional institutions. I thought why is she interested in this? Is she going to understand what we are trying to do? Will she go back to Norway and tell crazy stories about those mad people down in South Africa?” The fact that they told me about their first impressions, made me feel that I managed to be trusted, at least by some informants. However, it is obvious that when you enter the field, just interested in gathering sources of evidence, people are studying you. Due to the legacy of earlier regimes many Africans are quite sceptical towards a white person, and in regard to multiculturalism many female researchers are known as liberalist suspicious of culture and traditions originating from outside the western countries. It is apparent that many

¹²⁰ Van Maanen, John, “Fieldworks on the beat” in Van Maanen et al. *Varieties of qualitative research*,. California: Sage Publication, 1982:110.

asked themselves; “is she a racist, is she a feminist, is she as a western person able to understand our customs?”

To not always be known as “the Norwegian researcher” and also to get firsthand information about rural communities, I did a field study in a rural area. I was pretending to be an accidental tourist, with no further interest in traditions and customs other than that of normal curiosity. In a village outside Eshowe in Zululand this turned out to be quite enjoyable when I visited a traditional leader together with my male companion. The traditional leader always turned to my companion when he spoke of the doings and customs of the village, and only turned to speak with me once: when he told me how to be a nice, submissive wife! Observations are of course always biased, and one should not read this event as a representative evidence of traditional leaders’ views of women. I do, however, think that the table had turned in this situation if I had introduced myself as a Norwegian researcher studying traditional African institutions. Observations done in the country under investigation, are of course ever-present. As for instance, many urban young people that I by chance met did not know about the process of recognising cultural difference. To realise this was another interesting information in my venture to grasp the full perspective of the case studied.

4. A conditioned constitutional recognition of traditional authorities

The core question in the subsequent two chapters of this analysis is whether the new South African democratic order is able to both secure the right to be equal and the right to be recognised for who you are through the protection of cultures. As argued earlier, there seems to be a theoretical incongruence between these two principles, is this theoretical dilemma also prominent in the new South African constitution and the process of implementing the new democratic order?

In the South African negotiation towards a fully democratic constitution, where all shared the same political rights, the ANC became one of the strongest negotiation parties. ANC as opposed to the earlier apartheid system based on an institutional engineering of cultural cleavages, were not particular interested in giving in to claims of self-representation raised by cultural and ethnic groups. The previous systems had so ruthlessly uncovered what a policy aimed at mirroring cultural diversity could be. The new South Africa was to be colour-blind in its political set up with entrenched human rights. Knowing this, why did the traditional African leaders as the only specific cultural group manage to be recognised for their difference in the final constitution? In the final constitution their recognition was conditioned, but in the interim constitution traditional authorities and institutions were almost fully recognised. Why did the ANC compromise their views in regard to traditional African institutions and authorities? Why did the traditional leaders find themselves at such a relatively strong position in the negotiations, and why did their ability to influence the final constitution diminish? Initially, it might be revealing to present an overview of the different political negotiators and positions in the South African transition to democracy, before I center my attention to only matters concerning traditional African traditions and authorities.

4.1 An overview of the political negotiators and their constitutional proposals

Throughout the 80s there had been extensive debates in South Africa on the subject of a new Democratic order. One of the most well known works on the subject matter was Arend Lijphart's contribution to the debate, *Power-Sharing in South Africa*.¹²¹ In this work, Lijphart

¹²¹ In the context of this analysis I regard Lijpharts contribution as a source of evidence, and not as theory to be analysed. Lijphart puts forward a practical suggestion, which early in the process came to be rejected. The

presents four basic elements of consociational democracy, which he argued was the most suitable democratic model for South Africa. These elements are 1) Executive power-sharing among the representatives of all significant groups: 2) A high degree of internal autonomy for groups that wish to have it: 3) Proportional representation and proportional allocation of civil service positions and public funds and: 4) A minority veto on the most vital issues. As other models such as the majority democracy, he argued, would be “both unfair and unworkable in a society that is as deeply divided as South Africa”.¹²² Further he stated that this political system would “inevitably lead to the violation of the rights of minorities, both black and white, to ethnic and racial polarization, and to civil war and/or dictatorship”.¹²³

This model highly influenced the National Party’s (NP) proposal for the drafting of a new South African constitution in the early 90s. The NP formed the sitting government, and as Lijphart they argued that in a plural and divided society as South Africa, a majoritarian system would not provide sufficient dynamics. For instance the dynamic would be jeopardized in a democracy where the party cleavages coincide with the ethnic cleavages, since shifting majorities would not occur.¹²⁴ Spitz and Chaskalson argues that this proposal also sought to entrench the government’s place in the new constitutional order.¹²⁵ Since the NP, as the main representative of Afrikaans-speaking whites and of a large number of coloured and Indian voters, would be able to veto key ANC¹²⁶ policy decisions. Minority parties with sufficient support would be guaranteed cabinet representation, the presidency would rotate among three to four members, and national decisions would be subject to consensus in the cabinet and the presidency.¹²⁷ To secure the NP’s interests the party strived to agree upon a final constitution before the first free elections were held. Their support base was assumed to be smaller than that of the ANC, and it was important to secure as much of their interests as possible before the setting of the first National Assembly.

theories under investigation are of a more normative, philosophic character, and they shed more light to the whole process of recognition.

¹²² Lijphart, Arend *Power-Sharing in South Africa*, Policy Paper in International Affairs, no. 24, Institute of International Studies, California: University of California Berkeley, 1985:5.

¹²³ Ibid.

¹²⁴ Gloppen, Siri *South Africa: The Battle over the constitution*, Dartmouth: Ashgate, 1997:94.

¹²⁵ Spitz and Chaskalson 2000:16.

¹²⁶ All assumed that the ANC would be the largest party after the first free elections, an assumption that also came to be the correct.

¹²⁷ Spitz and Chaskalson 2000:16.

The Inkatha Freedom Party (IFP), based in the KwaZulu homeland, also supported the Consociational model, since this model implied stronger self-governmental rights for traditional institutions and their leaders, such as the Zulu chieftaincies. In theory, the IFP shared many of the government's ideas. Including both a consociational model of democracy and a market-driven free enterprise. However, as the negotiations started, it became clear that the process was primarily bilateral, with the bargaining between the ANC and the NP delegates as the leading force. IFP because of this became bedfellows with the KwaZulu Government, the Conservative Party (CP), the Afrikaner Volksunie (AVF) and the Homeland governments of Bobhuthatswana and Ciskei, in other words a quite peculiar alliance. This alliance was called the Concerned South Africans Group (COSAG), and sought to form a third political power block. COSAG's main manifesto was their oppositions to a unitary state, and required a strong system of federalism. Since this in practice would make it possible to found an Afrikaner *Volkstaat*, and strengthening the position of KwaZulu Natal and the earlier TBVC homelands.¹²⁸

However, the consociational model of democracy was abandoned as the main guideline to the new South African constitution, which were finally signed in 1996. To form a Consociational Democracy brought with it too many similarities with the past, and was anathema to the ANC. Contrary to Lijphart, ANC highlighted a majoritarian democracy instead.¹²⁹ Its readiness to make concessions in the negotiations was influenced by the awareness of the need for strong political intervention to eradicate the legacies of apartheid and transform the society into a just liberal democracy. The future was not to be in a democratic system stressing ethnic differences, it was to be in a system where everyone was regarded as equal no matter what "racial" category the apartheid government had labeled one with earlier. To secure this, one needed a strong unitary state with strong centralized power, and a strong foundation of universal human rights.¹³⁰ In the new South Africa everyone should be equal before the law, and the slogan for the new nation building process was "unity in diversity". But does this imply that no kinds of difference are recognised in the constitution?

Lijphart had argued that due the plurality of South African society, one needed a political system that mirrored this diversity. In the final outcome, however, the plurality was not to be

¹²⁸ For further information on the COSAG parties, see Spitz and Chaskalson, 2000:212 - 250.

¹²⁹ Spitz and Chaskalson, 2000:16.

¹³⁰ For further and more thorough readings on the transition to democracy in South Africa, see Gloppen, 1997 or Spitz and Chaskalson, 2000.

mirrored in the political system but to some extent in the system of law. In order to understand this unanticipated turn in the process of accommodating cultural difference, I am in this chapter going to analyse the process of drafting the new constitution of South Africa. In doing this I will first turn to the content of the interim constitution, and in accordance with this ask why did the traditional African leaders find themselves in such a strong position in the negotiations? Second, I am going to analyse the outcome of the final constitution, and ask why did the traditional leaders influence on the final document diminish after the 1994 elections?

4.2 Whose cultural institutions became protected in the interim constitution?

Before I turn to why the traditional leaders got a relatively strong position in the negotiations, I am going to analyse the content of the interim constitution with regard to culture. There are two important aspects of the question of the weight of cultural rights in constitutional matters. The first aspect is whether the cultural right or recognition is subject to other constitutional principles or subject to legislation. In regard to other constitutional principles, this aspect sorts out which right that ought to take precedence in cases of conflicts between two principles. For instance, if the right to culture is subject to the right to be equal, a woman, if she is the first-born child, cannot be denied the right to inherent property even though this is inconsistent with cultural practice. In regard to legislation, if cultural rights are not subjected to legislation, some legislation might be unconstitutional. Normal procedures in these cases are that you give a certain group the right to not be effected by this legislation. As for instance, if a medication is illegal, customary witch doctors might be given the right to use these substances in his practice due to cultural protection.

This introduces the second aspect of the weight of cultural rights, which asks whether a cultural right is regarded as belonging to a group or individuals. As for instance, if one gives a group the right to practice a customary law system, one can be given a certain territory where the people living there are under the jurisdiction of customary law. The people living there do not then necessarily have the right to take a dispute to another court, since the right applies to

Box 4.1: Interim Constitution, Chapter 3: Fundamental Rights

- protecting cultural rights

Section: 31 Language and culture

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

a group. If however the right to practice customary law is an individual right, then the individuals themselves decide which court will try their case. In order to establish a coherent universal right system it is important to clarify these aspects of cultural rights. The interim constitution was as Nhlapo¹³¹ has argued more a kind to a peace treaty, than a fundamental law, and thus it reflects that political compromises inevitably is full of conflicts and inconsistent rights. ANC and the NP had agreed on a strategy of significant consensus in matters concerning the interim Constitution. The positive side of this strategy was that the process always was pushed forward, and one did not spend too much time lingering over potential conflicts. The negative side of this, however, was a highly inconsistent document, also in regard to questions of which weight the cultural rights were to hold. Were the cultural rights to be applied to groups? Were the cultural rights subject or not to other constitutional principles or to legislation?

4.2.1 Interim constitution: Cultural recognition subject or not?

There were two different kinds of cultural protection in the interim Constitution. The first is entrenched as a fundamental right, and is not group or culture specific, it is a right all citizens share. The second is a specific recognition of traditional authorities and customary law, but this recognition is not a fundamental right. Box 4.1 exposes the words of the right as it is listed in chapter 3 in the interim constitution. If one analyses the content of this cultural right one can see that it does not mention whether it is to be subject to other principles of the constitution. Often one uses another term in regard to the subjection of cultural rights. This term state that all basic universal rights such as political rights and the right to equality and certain freedoms are regarded as the predominant rights, when cultural rights and social rights are secondary rights. Section 31 does not settle the right to culture as a secondary right, and does not sort out the answer to questions such as; what if the cultural right comes into conflicts with other fundamental rights, which ought to take precedence? Since this is not

¹³¹ Nhlapo, Thandabantu, "African customary law in the interim Constitution" in Liebenberg (ed.), *The Constitution of South Africa from a Gender Perspective*, Cape Town: Interpack, 1995:157.

Box 4.2: Interim Constitution, Chapter 12: Traditional Authority

- subject to legislation

Section 181: Recognition of traditional authorities and indigenous law

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority

(2) Indigenous law shall be subject to regulation by law.

specified, the cultural rights can be interpreted as not subject, and this implies a strong protection of the right to culture. Other liberal principles do not condition the cultural practices. An illustration of this is that in a liberal democratic society people are to have the right to elect the ones who to some extent possess political power over you. If a cultural right is not conditioned by these democratic mechanisms, a cultural group who possess some kind of power over its members might have authority based on heritance, and this practice is not unconstitutional since the cultural right is not conditioned by other constitutional principles. This implies that an unconditioned right to culture might deprive the members of a group the right to *voice*, since the power structure is predetermined by a cultural practice.

In an interview Ngema the deputy director of the Rural Women’s Movement described this dilemma with these words:

“There is a big difference between traditional leaders and the [local] governments. The governments are elected and the traditional leaders are appointed. The traditional leaders think that since they are born to it, they got the right to do everything they want. But the elected bodies need to be accountable to their constituencies. Because if the elected person is not doing what the people want him to do, the people have the right to say “No”, we do not want to elect you again. Well, the traditional leader is born into his position. So what do you do when you disagree with him? Sit down and wait for him to die? Then another takes over, and you hope that this one will fit in. So an elected government is much better than a traditional leader. There are however nice traditional leaders, and those might come. There are many traditional leaders who are leaders for their people. They are not like this. They are leaders for their people not for themselves.”¹³²

Though liberal mechanisms always emphasise the right to voice, these mechanisms might be influenced in a society where one entrench a strong protection of culture in the constitution.

¹³² Ngema, Popi, interview in Johannesburg the 16th of July 1999.

Box 4.3: Interim Constitution, Chapter 12: Traditional Authority

- their role and function on the different levels

Section 182: Traditional authorities and local government

The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall ex officio be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government.

Section 183: Provincial House of Traditional Leaders

(1) a): The legislature of each province in which there are traditional authorities and their communities, shall establish a House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province.

Section 184: Council of Traditional Leaders

(1) There is hereby established a Council of Traditional Leaders consisting of a chairperson and 19 representatives elected by traditional authorities in the republic.

(4) The Council shall, in addition to any other powers or functions assigned to by any law, be competent-

(a) to advise to any matter pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities anywhere in the Republic, or any other matters having a bearing thereon; and

(b) at the request of the President, to advise him or her on any matter of national interests.

(5) (d) If the Council fails to indicate within the period prescribed by paragraph (5b) whether it supports or opposes the Bill, Parliament may proceed with the Bill.

The second kind of cultural protection mentioned in the interim constitution complicates these dilemmas even further. These sections of the constitution settle the recognition of traditional authorities and customary law. However the question of subjection was of immense difficulty when it came to traditional authorities. With the legacy of the colonial and apartheid system in South Africa, the question of “subject” African authorities brought with it a history of western jurisprudence unable to fully recognising the African system of law. As one can see in Box 4.2 the traditional leaders recognition is subject to legislation. This might be infected by the interim Constitution’s purpose. It was only to function until a final constitution was signed, and this might imply that one at this stage saw the importance of reforming the traditional authority and customary law, but one did not reach a clear understanding of its position in the future democracy. This might imply that at the same time as one were interested in recognising traditional authorities and institutions, one was aware of the problems connected with it, such as the dilemma Ngema pointed at above. Though it is subject to legislation, it is as one can see in Box 4.3, not subject to other principles of in the constitution. In this way is a strong protection of traditional customs and institutions they

Box 4.4: Interim Constitution, Chapter 11A: A Volkstaat Council

- constitutional guarantee of the establishment of a Afrikaner Volksaat Council

Section 184: B Functions of Council

(1) The Council shall serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat, and shall for this purpose be competent –
(a) to gather, process and make available information with regard to possible boundaries, powers and functions and legislative, executive and other structures of such a Volkstaat, its suggested constitutional relationship with government at national and provincial level, and any other matter directly relevant to the establishment of such a Volksaat;

“shall continue... to perform the powers and functions vested in it accordance with the applicable laws and customs”. This section does still not abolish the Black Administration Act of 1927 see chapter 1.2.3.

However, despite the dilemmas connected to traditional authorities in a liberal democracy, Box 4.3 does illustrate that one at this stage did have a clear understanding of the functions of the traditional leaders. The interim Constitution specifies the legislative powers of the traditional leaders through an establishment of Traditional Houses at provincial and national level. It states that the legislature “shall” establish these houses in order to make it possible for traditional leaders to be consulted in issues of interest of traditional leaders, institutions and communities. Secondly, it states out the executive authority of traditional leaders at local level. In accordance to section 182 in Box 4.3 the traditional leaders shall be ex officio members of the local government. Further it is also clear on the question regarding legislative authority on local level, since it argues that traditional leaders “shall be eligible to be elected to any office of such local government”. This box 4.3 is only an excerpt of the content of the interim Constitution, but it is illustrative for my argument. The traditional authorities and institutions were recognised as partakers of the political system in the future, though certain issues, regarding the exercise and content were subject to further legislation. This implies that the traditional leaders political role in the future democratic structure is not subject to other legislature, since it states the they “shall” establish the Houses and “shall” let the traditional leader have a say in local governments.

One can however, argue that the recognition of traditional leaders was not the only specific recognition given to a certain group. The interim also gives a constitutional right for Afrikaners to establish a Volkstat Council. As Box 4.4 implies this council is to sort out what

there is to be done in order to establish a Volkstat Council. The interim constitution thus only recognises that this is to be investigated, it does not settle the right to actually establish these houses. They are only to be established if this Council make available information that a further legislative assembly can agree upon.

4.2.2 Interim constitution: Group or individual right?

Are then the rights and recognition of culture supposed to be applied to groups or individuals? This is a complex question, and the interim constitution is quite incoherent considering this matter. In regard to the cultural right in the chapter on fundamental rights presented in Box 4.1, it is stated, “all persons shall have the right to ... participate in the cultural right of his or her choice”. This implies that all cultural rights are to be held by individuals not groups. Cultural practices are then not to be imposed on any individual, it is only a freedom that individual share. It is thus the individual not the group that is the bearer of rights.

But how is this to be understood in accordance with customary law and traditional authorities? The sections listed in Box 4.3 only gives a right to certain people to partake in political structures. This is a personal right given to some individuals due to their position. If these individuals are the only ones consulted and also given rights to possess some political powers, then they are given some power to impose their understanding of cultural practise upon others. The question is as follow: do members of these groups have the formal right to *exit*, or even the possibility to exit? The interim Constitution does not specify how many percentages of the local government that actually might be *ex officio* members of the government. In a community, it is thus possible that quite an extensive part of the government is traditional leaders. This would make it difficult to exit for persons living in these communities. In regard to judicial authority in Box 4.2, the customary law is to be applied as earlier. The question is here between the right to exit and the possibilities of exit. Are there any other options available than customary courts? All areas do have a magistrate court, but is it optional to try your case in these? Formally, the right to choose between different systems of law exists, but in many rural societies this is not an optional choice in day-to-day life.

However it is difficult to answer whether this is a group right or not. It is probably intended to be an individual right. ANC’s delegate on the issue in the negotiation, Penuell Maduna, was very clear on the issue: “The new constitutional order cannot avoid placing the individual at

the centre of things. The basic unit of society is the individual. The individual is then linked to all sorts of groups - for example to a trade union, a parent-teacher association, or a church. But these entities cannot be allowed to dictate the individual's right and his or her enjoyment thereof."¹³³ It is probably intended to be an individual right, but the interim constitution is not sufficiently clear on the subject.

The protection of traditional authority and custom in the interim constitution is quite strong, even though it is quite unclear in certain matters. For the governments of the earlier homelands this result is probably less approving than desired in the beginning of the negotiation process. Diverging traditional leaders had tried to argue for the need of self-determination in the earlier homelands. When it became clear that this was not an obtainable option, they started to lobby for constitutional protection in the chapter on Fundamental Rights. One of the reasons why customary rights were not entrenched as a constitutional right was the ANC's belief in the unquestionable right of the individual. Still the recognition of traditional leaders is stronger than any other recognition of cultural authorities and institutions. However, the document seemed unclear in regard to the two measures I have discussed in this chapter. Was the final constitution to become more coherent on the subject of cultural protection? Were the agitators for cultural rights able to fasten their grip on the process, or did their influence diminish? Before I turn to these questions, it would be illuminating to ask why the traditional authorities had found themselves in such a strong position in the negotiation process? Why were their claims more vital than the claims of establishing an Afrikaner Volkstaat?

4.3 Three aspects effecting cultural accommodation

In order to answer these questions it is fruitful to put forward three different aspects that had an effect on the outcome of the interim constitution regarding cultural recognition. First, there is what I have called the **centre-periphery aspect**, which argues that these institutions are to such a high degree incorporated in the rural society, that it would create severe practical problems to actually abolish them. Secondly, there is what I have called the **ethical aspect**, which includes a recognition of institutions discriminated in the past. Thirdly, there is what I

¹³³ Interview with Penuell Maduna in Pretoria, January 1996 by Spitz and Chaskalson 2000: 391.

have called a **strategic aspect**, which is based profoundly on the potential of the traditional leaders to mobilise electoral support.

4.3.1 The centre-periphery aspect

A problem connected to the establishment of an Afrikaner Volkstaat was that no such thing existed prior to the 1994 elections. As the interim constitution stated one needed “to gather, process and make available information with regard to possible boundaries, powers and functions and legislative, executive and other structures of such a Volkstaat”.¹³⁴ Spitz and Chaskalson have argued that the AVF parties did not agree among themselves on which territory they wanted. One line of thinking was that the Afrikaner people should be empowered where they were in their greatest concentration, Pretoria and its surroundings. The alternative line saw the Volkstaat as a culmination of a process of creating a state, a state that would be developed from nothing in a designed area.¹³⁵ In both cases this meant that a Volkstaat in order to function actually had to be invented and given territorial space within the borders of the republic.

Customary Law and traditional African institutions, however, did exist. Though they in many cases represented something unclear and backward for the negotiators with predominantly urban background, a sever number of the rural population were effected by them. The question asked was; what are we to do with these institutions? Figure 4.1 attempts to illustrate the areas in which the traditional leaders probably obtained strong power. The map of the homeland areas consists of the ten territories established as “independent” or “self-governmental” by the Apartheid governments, combined with the 9 new provinces established in the interim constitution.¹³⁶

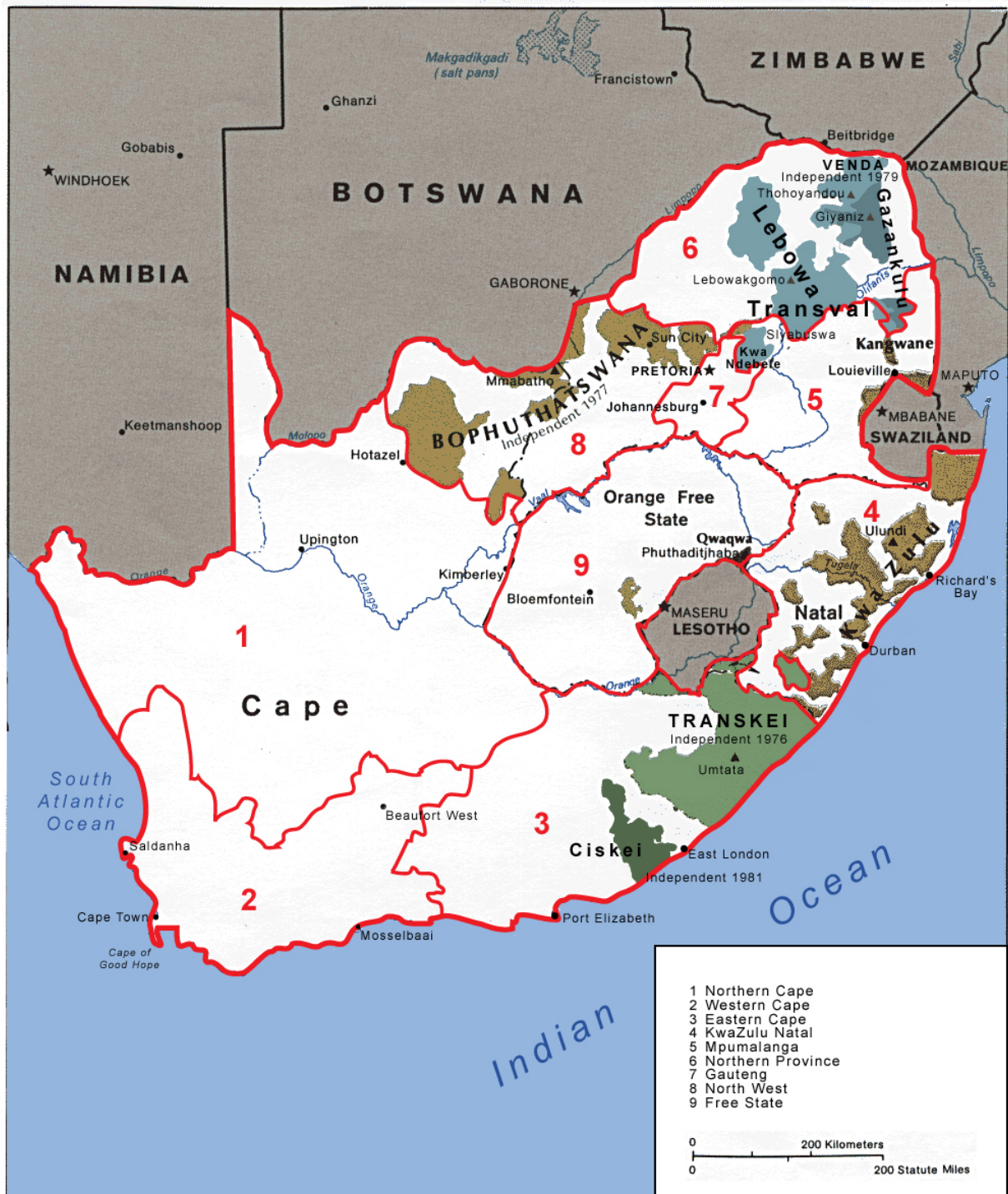
The ANC had started to find strategies towards how one were to address and infiltrate the rural areas already at a National Consultative Conference in Zambia, 1985. In a report presented after this conference it is obvious that one wanted to mobilise the inhabitants of rural areas: “Considerable attention was given to the question of the Bantustans. It was generally felt that in view of our weaknesses in the Bantustans and relative acquiescence there

¹³⁴ Constitution of the Republic of South Africa act 200 of 1993 Chapter 11A inserted by s. 9 of Act 2 of 1994

¹³⁵ Spitz and Chaskalson 2000: 228

¹³⁶ Before the first elections the names of the provinces were a little bit different, but I have presented the final names of the provinces.

Figur 4.1: Map combining the new provinces with the earlier homelands



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Source: The Perry-Castañeda Library Map Collection, 1986 and 1995

we review our policy towards Bantustans. It is no longer enough to denounce the fraudulence of these racist institutions; we must devise effective means to mobilise the people to oppose these regimes.”¹³⁷ Due to this it seems like the ANC started to be conscious of the fact that it were people in exile and people in urban areas who were the main vehicle in ANC. At this conference they viewed this as the strategy towards the rural area: “We must give consideration to opposition parties within the Bantustans, boycotts and building up ANC structures in these areas. The more notorious puppets should be eliminated whilst opposition parties in these Bantustans must be targets for infiltration and, if found suitable, assisted covertly with finance etc. Bantustan armies should be targeted for infiltration.”¹³⁸ The reports further state a strongly recommendation for specific machineries to be set up in forward areas to deal specifically with Bantustans.

The ANC strategy and rhetoric towards the Bantustans changed in the late eighties, and though many still viewed these structure as extremely racist, it seems like their awareness of their weakness to influence the rural communities made them compromise on their revolutionary character. The country was at a rickety stage, and piecemeal transformation would probably be the only way to reform the traditional communities. The National Party, who was in favour of group rights and self-determination, argued up to the negotiations that these areas were not necessarily a part of the new South Africa.

The NP’s president, De Klerk, in a speech, also mentioned in chapter 1.2.5, at the opening of the parliament in February 1990 address the question in these manners: “In recent times there has been an interesting debate about the future relationship of the TBVC countries with South Africa and specifically about whether they should be re-incorporated into our country. Without rejecting this idea out of hand, it should be born in mind that it is but one of many possibilities. These countries are constitutionally independent. Any return to South Africa will have to be dealt with, not only by means of legislation in their parliaments, but also through legislation in this Parliament. Naturally this will have to be preceded by talks and agreements.”¹³⁹ The NP was thus interested in keeping these areas as “neighbouring countries”, probably they would not be able to control and mobilise the rural areas without the support and a firm hand of the government of the homelands. Giving these territories self-

¹³⁷ African National Congress, *National Preparatory Committee Documents*, National Consultative Conference, Kabwe, Zambia, June 1985.

¹³⁸ Ibid.

¹³⁹ De Klerk, FW, Opening speech of the parliament, the 2nd of February 1990.

Table 4.1: Rural and non-rural settlement in the different provinces¹⁴⁰

	EASTERN CAPE	FREE STATE	GUTENG	KWAZULU NATAL	MPUMA- LANGA	NORTH. CAPE	NORTH. PROV.	NORTH WEST	WESTERN CAPE
Urban	36.6	68.6	97.0	43.1	39.1	70.1	11.0	34.9	88.9
Non- Urban	63.4	31.4	3.0	56.9	60.9	29.9	98.0	65.1	11.1
Total	100	100	100	100	100	100	100	100	100

governmental rights would make the African rural communities outside national policies, and the space of the NP would be larger.

The problem, however, was that both the ANC and the NP were centred in the urban areas, and did not know the sentiments of people towards traditional authorities in rural communities. As one can see on Table 4.1 there are vast differentiation between the provinces due to percentages of urban and rural inhabitants. In the population Census from 1996, three years after the drafting of the interim Constitution, 46.3% of the population lived in rural areas. There are no statistical measurers on how many percent of the population who are living under traditional authorities in the different provinces. If one looks at the map in Figure 4.1, and compare it with the percentages presented in Table 4.1, one might anticipate that quite an extensive part of the rural population in Eastern Cape, Northern Province¹⁴¹, KwaZulu-Natal, Mpumalanga and the North West live under the jurisdiction of traditional leaders. In some of the rural parts of the country, many expected the traditional authorities powers to be tremendous, and they doubted whether it actually was possible to change the social circumstances in the rural areas with a formal, constitutional abolition of customary law and traditional institutions.

According to Houston and Somadoda¹⁴² there are over 16.5 million rural people in South Africa which live under the jurisdiction of approximately 800 traditional leaders assisted by

¹⁴⁰ Statistics South Africa, Census 96.

¹⁴¹ From the 12th of February 2002 this province is called Limpopo, but it will be referred to as Northern Province in this thesis.

¹⁴² Houston, G F & Somadoda, F P, *Constitutional development and the issue of traditional leadership in rural local government in South Africa*. Paper presented at the International Conference on the new South African Constitution at the Holiday Inn, Umtata. 25-26 April 1996:1

10 000 traditional councilors. Others have estimated that the number of people living under traditional authorities might be up to 18 million people, but also down to 11 million people.¹⁴³ The number would also depend on the operationalisation of “living under traditional authority”. Studies such as those of Sandra B. Burman¹⁴⁴ have revealed that it is quite common, especially in urban areas, to actually live under both common and customary law. It depends both on the situation and what is being regarded most favorable in a certain situation. These studies also reveal that people outside the borders of the earlier homelands do live by customary traditions, it is not only a rural phenomenon of earlier Homelands. Due to this scarcity of statistical evidence, it is important to remember that the numbers presented to the political negotiators, were even more inaccurate. They did not have any statistical evidence backing their argumentation, though many believed that quite an extensive part of the population were loyal to traditional institutions. In many opinions sweeping away traditional institutions might have caused severe social problems, and recognising traditional institutions might be a necessity in accommodating rural conditions.

These reflections might also have been influenced by experiences from the neighbouring countries. It was known that even though the post-colonial governments had tried to abolish customary law and traditional institutions, this was more complicated than expected. Chanock¹⁴⁵ argues that countries with both a weak state and a weak western-trained legal elite had particular difficulties with sweeping aside traditional institutions. In Mozambique where a radical mass party took over government after a liberation struggle, the traditional institutions were abolished. However, the state was not strong enough to actually remove the institutions from rural people’s day-to-day life.

Zimbabwe has a history closer to that of South Africa, with a strong state and the legacy of a thoroughly administered and oppressive white indirect-rule. As implementers of the colonial policies the traditional leaders ended up having minimal authority in a short period before and after independence. The chiefs were replaced by an elected structure of local government, and by state-appointed judicial officials. In according to Keulder, even though the state was

¹⁴³ While some as Charmaine French in “Functions and Powers of Traditional Leaders” Occasional Papers, Konrad Adenauer-Stiftung, Johannesburg, 1994:20, argue that it is about 18 million people who are loyal to the institutions, other such as Ando Donkers and Renata Murray in “Prospects and problems facing traditional leaders in South Africa” in de Villier, 1997:40, argues that it might be 11 million.

¹⁴⁴ Burman, Sandra B. ”The Interaction of Legislation relating to Urban Africans and the Laws regulating Family Relationships” in *Urban Black Law* ed. by Bennett T. W. et al, Cape Town: JUTA & Co, Ltd, 1984:89.

¹⁴⁵ Chanock, 1991:58 – 62.

comparatively strong in regard to other African states, the policies towards traditional leaders started to change in the early 90s, and political reforms were proposed which would return many of their former powers and functions as traditional leaders.¹⁴⁶ In South Africa the politicians were afraid of doing the same mistake, and ANC knew out of other countries experiences, that if one tried to abolish the institutions, they would still exist as informal hidden structures in the rural communities. It was thus important to take charge of the situation and encourage to a deliberation around the subject; what are we to do with these institutions in the future?

4.3.2 The ethical aspect

Though it might be a social necessity to recognise the traditional authorities, the question also had an ethical side. The traditional authorities had started to point at the issue of its institutions being discriminated in the past. When it comes to the question of giving a group special treatment because of discrimination in the past, it is in most cases quite controversial. This was also the case in South Africa. The question of giving customary law and traditional institutions recognition not only created divisions between the parties, it also split the parties internally. Within the ANC the differences were particularly deep-seated.¹⁴⁷ In both the past and the present, there were both formal and informal bonds between the ANC and the traditional authorities. Leading ANC figures, like for instance Nelson Mandela,¹⁴⁸ came from a royal origin, and no matter how their relationship with these institutions had been in the past, it was apparent, that as all African people living within the borders of South Africa, they had also been through centuries of discrimination.

The reputation of traditional leaders among many young and also urban inhabitants were, however, very biased, because many accused the traditional leaders of actually having used their position in the apartheid system to secure their own particular interests. The National Executive Committee of the ANC did as late as in 1986 have this attitude towards the “collaborators” in the Bantustans: “Let us mobilise everywhere to smash the Bantustans and to isolate the puppets who continue to collaborate with apartheid. The few Bantustan office-

¹⁴⁶ Keulder, Christian, “Traditional leaders and comparative experiences” in De Villiers, *The Rights of Indigenous People: A Quest for Coexistence*, , Pretoria: Human Science Research Centre, 1997:74 - 80

¹⁴⁷ Spitz and Chaskalson, 2000:381.

¹⁴⁸ Mandela is the son of a chief councillor to the paramount chief of the Thembu in Transkei, who later became his guardian when his father died. Instead of becoming a chief himself, Mandela ran off to Johannesburg at the age of 22 partly to avoid an arranged traditional wedding.

bearers who are aligning themselves with the democratic movement are showing the real way forward.”¹⁴⁹ This official statement reveals that most of the Bantustan officials were regarded as puppets, but there was someone who started to align themselves to the democratic movement. However, the rhetoric used by the ANC in accordance to the traditional authorities started to change in the late eighties, and they soon started to be interested in accommodating traditional institutions and customs to some extent. So how much accommodation was one to give these institutions in the future?

Formal relations between the chiefs and the ANC can be traced back to 1912 when the ANC was formed. A considerable number of the founding members of this liberation struggle were chiefs. Another formal relation was for instance Chief Albert Luthuli, a minor Zulu chief, who was elected as ANC’s president from 1952 to 1967, and won the Nobel Peace Prize in 1960. However, in the 1950s the ANC had been through a decade of radicalisation, and when the National Party in government started their Homeland policies in the 50s and 60s, the relationship between the chiefs and the ANC was put to a test. Some traditional leaders did revolt as a reaction to the Apartheid policies. These traditional leaders went into exile, and the government started to offer subordinate headmen recognition if they accepted the establishment of Tribal Authorities. As Van Kessel and Oomen have put it: “Chiefs had become civil servants, to be hired, fired, paid and, if necessary, created by the government.”¹⁵⁰ As a liberation movement, the ANC did not longer perceive the chiefs as potential allies, and the proliferation of chieftaincies also eroded their legitimacy further because of the doubtful origins of many chiefs.

ANC started to consider the road to power as an urban phenomenon with urban guerrilla activity in combination with indefinite strikes and mass rising, as the main path forward. Officially the ANC never denounced the traditional institutions, but many leading figures in ANC assumed that chieftaincies would either die of its own accord or otherwise somehow be abolished.¹⁵¹ For many, such as Govan Mbeki, traditional institutions were regarded as backward: “If the Africans have had chiefs, it was because all human societies have had them

¹⁴⁹ African National Congress, National Executive Committee, *From ungovernability to People’s Power*, ANC Archive, Historical Documents, 1986.

¹⁵⁰ Van Kessel and Oomen, ‘*One Chief, One vote*’: *The Revival of Traditional Authorities in post-apartheid South Africa*, African Affairs, 1997:564.

¹⁵¹ Van Kessel and Oomen, 1997:565.

Box 4.5: Contralesa and the ANC using the ethical aspect in an appeal to traditional leaders in August 1989¹⁵²

The future of our motherland lies in the hands of the people, the victims of oppression and dispossession, and the courageous fighters against this evil system. Among these multitudes are hundreds of patriotic chiefs: deposed, harassed and even killed, but forever unbowed. We salute these brave patriots, deserved heirs of the glorious tradition of no surrender shown by our forebears in the wars of resistance of past centuries.

Our traditional leaders feel very keenly the effects of the apartheid system. The very institution of chieftainship has been overturned and abused by the racist rulers. From leaders responsible and responsive to the people, you are being forced by the regime to become its paid agents. From being a force for unity and prosperity you are turned into perpetrators of division, poverty and want among the oppressed. The so-called homeland system, land deprivation, forced removals and the denial of basic political rights - all these and more are the anti-people policies that the white ruling clique forces the chiefs to implement on its behalf.

at one stage or another. But when a people have developed to a stage which discards chieftainship, when their social development contradicts the need for such an institution, then to force it on them is not liberation but enslavement.”¹⁵³ Conversely, even though the new generation inside the ANC started to regard the traditional institutions as ghosts from the past, they still existed. And even more important; in 1987 a self-declared ANC-aligned organization of chiefs was launched, called the Congress of Traditional Leaders (Contralesa).

Contralesa was met with an ambivalent response; could “progressive chiefs” actually organise themselves and fight for a unitary, non-racial and democratic South Africa? The answers were sceptical, but in February 1988 the ANC gave Contralesa its blessing, and welcomed the “chiefs back to the people”.¹⁵⁴ Box 4.5 is an excerpt from a joint communiqué between Contralesa and the ANC where they urge traditional leaders to join the democratic movement. The traditional leaders, who ANC just a few years earlier had characterised as collaborators, were now patriotic victims of the apartheid system. This was the defining moment of the ANC’s attitude towards the traditional authorities, and it marked the start of a quite ambiguous ANC policy towards them. On one hand, members that represented Contralesa in the negotiations to democracy, such as Stella Sigau and Patekile Holomisa, were also prominent ANC politicians. Further, ANC also acknowledged the need for recognising

¹⁵² Joint Communiqué by Contralesa and the ANC, “Appeal to all Traditional Leaders of South Africa” 19th of August 1989.

¹⁵³ Mbeki, Govan, *The Peasant Revolt*, (1964; Defence and Aid Fund, London, 1984:47) cited in Van Kessel and Oomen, 1997:565.

¹⁵⁴ Zuma, Thando, *The role of the Chiefs in the struggle for liberation*, *African Communist*, 121, 1990:65-76.

institutions that had been discriminated in the past, especially since these institutions represent valuable, old African traditions. On the other hand, ANC worked to achieve a thorough transformation of the apartheid society and the political system. Brief historical moments of sporadic chief involvement in the liberation struggle were certainly not a sufficient aspect for the ANC's official policy to recognise conservative and, in many ways, illiberal institutions such as customary law and traditional authorities.

The ethical aspect might have influenced the position of the traditional leaders, but it could not be the only aspect that gave the traditional leaders a relative strong lobby power in the negotiations. As a contrast, the ones that argued for an Afrikaner Volkstaat could not use this argument. Conversely, they anticipated that there were high probabilities of being discriminated in the future. In a democratic order based on liberal ideas, this argument was not welcomed by the ANC, since their main venture was to transform the society into a just place to live for all in the future.

4.3.3 The strategic aspect

Since the African population of South Africa had never been a part of the electorate, it was difficult to postulate how much potential the traditional leaders had in mobilising political support. Diverging incidents indicated that the potential of traditional leaders was difficult to estimate. According to Spitz and Chaskalson both the ANC and the NP out of electoral consideration tried to act like they paid attention to the destiny of the chiefs. The parties believed that if they involved themselves in matters such as customary law's position in the new constitution, traditional communities would support them.

The NP's strategy was to work for self-government rights through a system of federalism. De Klerk highlighted in his main features of a constitutional transition that one needed to provide for self-representation for cultural groups in the new constitution. In regard to regional governments he stated: "If some of the present regional authorities still exist when the Transitional Constitution comes into effect, they will continue to exist for the time being; provided that a TBVC state may participate in the transitional dispensation by undergoing a

Table 4.2: Provincial Legislature results 1994 elections (percentages)¹⁵⁵

	EASTERN CAPE	FREE STATE	GAUTENG	KWAZULU NATAL	MPUMA- LANGA	NORTH. CAPE	NORTH. PROV.	NORTH WEST	WESTERN CAPE
ACDP	0.5	0.5	0.6	1.0	0.5	0.0	0.4	0.4	1.2
ANC	84.4	76.7	57.6	32.3	80.7	49.7	91.6	83.3	33.0
DP	2.1	0.6	5.3	2.1	0.6	1.9	0.2	0.5	6.5
IFP	0.2	0.5	3.7	50.3	1.5	0.4	0.1	0.4	0.4
NP	9.8	12.6	23.9	11.2	9.0	40.5	3.3	8.8	53.3
PAC	2.0	1.8	1.5	0.7	1.6	0.9	1.3	1.7	1.1
FF/VF	0.8	6.0	6.2	0.5	5.7	6.0	2.2	4.6	2.1
Other	0.2	1.4	1.3	2.2	0.5	0.2	1.0	0.2	2.7
Total	100	100	100	100	100	100	100	100	100

(ACDP=African Christian Democratic Party, DP=Democratic Party, PAC=Pan Africanist Congress, FF/VF= Freedoms Front/Vryheidsfront)

transformation of status beforehand from independent state to self-governing territory.”¹⁵⁶ The NP’s eagerness to constitutionalise minority rights was regarded as an attempt to secure its position in the new South Africa more than a concern for African traditional authorities. ANC’s former revolutionary strategy could have intimidated the chiefs, but if they turned towards them in reconciliation they could appeal to the more progressive ones. With a probability amounting almost to certainty, ANC argued that they would be the majority party after the elections, and thus an important strategic alliance in the future.

For the ANC it was important to secure this majority, and they were conscious of the fact that militant ANC youth groups in the 80s had alienated not only the tribal hierarchies but also large sections of the adult population in the rural areas.¹⁵⁷ In a new negotiated democratic future the ANC needed as much support as possible. At the same time various chiefs started to adapt to a new future, and many aimed at being regarded as democratic strategic alliances, rather than relics of a feudal past.¹⁵⁸ The reason for this was their strategic weapon, - the delivering of a “block vote”. An example of this was a statement in 1990 by a Zulu chief, Mhlabunzima Maphumulo, who was a prominent Contralesa member: “Once a chief has identified himself with us, then we know that the whole tribe or the majority of the people in that area are now with the progressive forces.”¹⁵⁹ Contralesa became an important rural

¹⁵⁵ The Electoral Institute of Southern Africa.

¹⁵⁶ De Klerk FW, Letter to Nelson Mandela, Annexure F, Regional Government, the 2nd of July 1992.

¹⁵⁷ Van Kessel and Oomen, 1997:571.

¹⁵⁸ Ibid.

¹⁵⁹ Payze, Catherine, “The elimination of political opponents: the Maphumulo assassination” in Minnaar et al. *Patterns of violence: case studies of conflicts in Natal*, Pretoria: Human Science Research Council, 1992:247 – 258.

Table 4.3: Home language by province (percentages)¹⁶⁰

	EASTERN CAPE	FREE STATE	GAUT- ENG	KWAZU. NATAL	MPUMA- LANGA	NORTH. CAPE	NORTH. PROV.	NORTH WEST	WESTERN CAPE	SOUTH AFRICA
Afrikaans	9.9	14.5	16.7	1.6	8.3	69.3	2.2	7.5	59.2	14.4
English	3.7	1.3	13.0	15.8	2.0	2.4	0.4	1.0	20.3	8.8
IsiNdebele	0.0	0.2	1.6	0.0	12.5	0.0	1.5	1.3	0.1	1.5
IsiXhosa	83.8	9.4	7.5	1.6	1.3	6.3	0.2	5.4	19.1	17.9
IsiZulu	0.4	4.8	21.5	79.8	25.4	0.3	0.7	2.5	0.1	22.9
Sepedi	0.0	0.2	9.5	0.0	10.5	0.0	52.7	4.0	0.0	9.2
Sesotho	2.2	62.1	13.1	0.5	3.2	0.9	1.1	5.1	0.4	7.7
SiSwati	0.0	0.1	1.3	0.1	30.0	0.0	1.2	0.5	0.0	2.5
Setswana	0.0	6.5	7.9	0.0	2.7	19.9	1.4	67.2	0.1	8.2
Tshivenda	0.0	0.1	1.4	0.0	0.1	0.0	15.5	0.4	0.0	2.2
Xitsonga	0.0	0.5	5.3	0.0	3.5	0.0	22.6	4.7	0.0	4.4
Other	0.2	0.3	1.3	0.5	0.4	0.8	0.3	0.5	0.6	0.6
Total	100	100	100	100	100	100	100	100	100	100

partner in the ANC's broader strategy to isolate the NP's support base, and many chiefs started to view Contralesa as the best forum to safeguard their interests under a future ANC-led government. In Northern Province¹⁶¹ Contralesa managed to recruit a quite considerable number of chiefs, and if one looks at Table 4.2 one can see that in the Provincial Elections in 1994 Northern Province proved to be the most solid ANC bastion, with nearly 92% of the total vote. As pointed at in accordance with Table 4.1 on rural settlement, this is also the state that has the highest percent rural population.¹⁶² ANC's wooing of chiefs seems to have given results also if one look at another rural province, the Eastern Cape. In this area the ANC had used historical persons to increase its support. A reburial of Dalindyebo¹⁶³ was organised in 1989, and this event turned out to be a demonstration of mass support for the ANC in the countryside. In Table 4.2 one can see that in the Eastern Cape the ANC mobilised 84% of the total vote in the Provincial Elections of 1994.

In KwaZulu-Natal where the IFP support was assumed to be considerable, the memory of the ANC president Chief Albert Luthuli, a minor Zulu Chief elected in 1952, was used for two diverging purposes. First by the chiefs to establish a continuity of the traditional leaders in the liberation struggle, and secondly it could be used by the ANC to establish its firm base among

¹⁶⁰ Statistics South Africa, Census 96.

¹⁶¹ This province was during the elections called Northern Transvaal, but changed name shortly after the first settings of the New National Assembly.

¹⁶² The statistics on rural vs. urban settlement are based on a survey two years after the elections, and of course the percentages might have changed. If it however has changed, there are strong reasons to believe that the population is slightly more urbanised after the 1994 elections.

¹⁶³ A chief who linked up with the ANC in exile in the 1960s.

the Zulu people.¹⁶⁴ The latter was an important assent for the ANC when contesting Inkathas monopolisation of Zulu tradition. As we can see in Table 4.2, ANC gained just over 32% of the total vote in KwaZulu-Natal, while Inkatha became the largest party with just over 50% of the total vote. KwaZulu-Natal was then the province with the lowest level of ANC votes in the country. It is difficult to know what the frequency of ANC support would have been without these attempts to gain support.

Another interesting feature is that except the strong IFP province KwaZulu-Natal, the lowest level of ANC support is in the urban provinces Western Cape (88.9% urban) and Gauteng (97% urban). The tendency suggests that the rural population of South Africa is important for the strength of the ANC, and thus, since traditional authorities are highly valued in these areas, ANC needed to accommodate them. If one analyses the election results, one might also say that the National Party's policy on accommodating traditional authorities did not result in electoral support from the rural population. If one looks at both Table 4.2 and 4.3 one can see that the National Party gained most support in the areas with a profoundly percentage of the population speaking Afrikaans, a language also most frequently spoken among Coloured.

Table 4.1, 4.2 and 4.3 might suggest a tendency of an African speaking population living in rural areas voting for the ANC, while the NP might draw support from an urban electorate with Afrikaans as their home language. However, this might just be a tendency, and not something that one can tell explicitly by looking at aggregate numbers. After the first election it was obvious that ANC's support in the rural area was exhaustive. One might however suggest that this reveals a strong correlation between "election results" and "language spoken" (ethnic background), and following, that the rural-urban dimension was not significant. ANC's accommodation of chiefs might however to some extent have secured the election results. It is however important to illuminate that this is only a tendency, not necessarily an absolute. Though the results sometimes show a high tendency of correlation between the percentage of a language spoken in a province and the percentage voting for a party, one does not know what it is that have this exact effect on the outcome. It seems then likely that the traditional leaders' argument of being a strong vote provider did have an effect on the outcome of the 1994 elections, even though it is difficult to tell whether their

¹⁶⁴ Van Kessel and Oomen, 1997:564.

judgement did influence their communities' electorate. The traditional leaders did deliver their votes, but did the ANC keep their part of the bargain after they came to power?

4.3.4 The destiny of the Afrikaner Volkstaat

The followers of an Afrikaner Volkstaat could not to the same extent use the same arguments as the traditional leaders. Both in regard to the ethnical and the centre-periphery aspect, they emerged weaker than the traditional leaders. But when it came to the strategic aspects, did the claim get support from the Afrikaner population? During the negotiations, an umbrella body of Afrikaner political parties and organisations formed the Afrikaner Volksfront (AVF). Out of strategic reasons the AVF joined the COSAG alliance, and argued that along with the recognition of earlier traditional authorities of the homelands, the establishment of a Volkstaat should accommodate the Afrikaners as a cultural group.

In the negotiations the ANC doubted how much support these right wing Afrikaners actually had. While the AVF worked for a guarantee for the establishment and recognition of the Volkstaat in the Interim Constitution of 1993, the ANC argued that this question ought to be finally settled after the election. The AVF tried to threaten with militant revolts, but as the ANC delegate, Penuell Maduna, in the talks on the subject matter argued; "if they win an overwhelming support for a *Volkstaat* they've got it".¹⁶⁵ The ANC and also the NP were not interested in jeopardising the negotiations and the process forward, by giving in to threats of militant uprisings and even civil war.

The Bophuthatswana Coup became a test of both the support of the chiefs' and the AVF's ability to mobilise support for a Volkstaat. Before the "Bop coup" in March 1994, there had been few incidents that measured in reality the potential of the chiefs to mobilise support, and also few situations that tested the strategic alliance between the Afrikaner right wing and the government of the homelands. The "Bop coup" started with a strike by civil servants employed in the homeland governments, which would cease to exist once the interim Constitution came into force. The homeland leader, Lucas Mangope, announced further that there would not be any elections in Bophuthatswana. In protest to this, students started a counter demonstration, and severe unrest broke out. The government were in jeopardy, and

¹⁶⁵ Quoted in Business Day, 26. Jan. 1994, cited in Spitz and Chaskalson, 2000:243.

appealed to the Afrikaner right wing leader, Constand Viljoen, to send in armed men, but expressively not members of the neo-Nazi Afrikaner Weerstandbeweging (AWB). But the AWB ignored this plea, and went into the homelands capital, where they murdered black bystanders. In response Mangope's own soldiers and police officers revolted. In one particular incident, which received saturation television coverage, a black Bophuthatswana policeman executed three AWB members. The South African Defence Force had to move in, and both Mandela and De Klerk persuaded Mangope to resign.¹⁶⁶

According to Spitz and Chaskalson the "Bop coup" thus tested different strategic aspects in the negotiation process.¹⁶⁷ First, it showed that the support for the homelands' further existence was dubious, and that many people wanted to get rid of the system based on segregational development between cultures. The consociational democratic model was weakened, since many people obviously were not interested in a political system based on cultural cleavages. Second, the contradictions between the different COSAG parties became apparent. When the AWB entered the revolt, the black leaders of the alliance were embarrassed, including the IFP leader Chief Buthelezi. Third, for the Afrikaner right it became clear that a civil war was not a romantic endeavour in search for self-determination. The realisation of this drew Viljoen into the elections, since civil revolts no longer seemed like a desirable solution to solve political discrepancies. Viljoen had always been identified with respectful Afrikanerdom, but the "Bop coup" illustrated that the rank and file members of the AWB might have other views of Afrikaner nationalism. The main AVF political party in the 1994 elections was the Freedoms Front/Vryheidsfront (FF/VF).

Even though the AVF had managed to achieve a Provision for an establishment of a Volkstaat Council in the Interim Constitution, the VF/FF did not achieve enough seats in the National Assembly elected in 1994 to secure this provision in the Final Constitution of 1996. As one can see in Table 4.5, VF achieved just above 2% of the total vote in the election, something that gave them 9 seats in the National Assembly of a total of 400 seats. Table 4.5 also indicates that the NP, who had proven to be more willing to commit themselves to compromises, gained about 20% of the total vote, which gave them 82 seats. Because of this it

¹⁶⁶ Spitz and Chaskalson, 2000:244-245.

¹⁶⁷ Ibid.

Table 4.4: National election results 1994

PARTY	%	VOTES	SEATS
African Christian Democratic Party	0.45	88 104	2
African National Congress	62.65	12 237 655	252
Democratic Party	1.73	338 426	7
Freedom Front/Vryheidsfront	2.17	424 555	9
Inkatha Freedom Party	10.54	2 058 294	43
National Party	20.39	3 983 690	82
Pan Africanist Congress	1.25	243 478	5
Other Parties	0.71	139 845	0
Residual	0.11	19 451	0
Total	100	19 533 498	400

seems like the majority of the Afrikaner population voted for the NP, who also got a considerable number of the Coloured and Indian votes. The Traditional Leaders had therefore been a stronger electoral support provider than the AVF. How strong is as mentioned difficult to measure, because it is difficult to prove that people in the rural areas would have voted for another party, if their chiefs had not officially given ANC their blessing.

4.3.4 The three aspects considered

When ANC's attitudes towards the traditional leaders changed from the mid to the late eighties, this must be viewed in context with the broader picture. ANC from being a radical liberation movement turned into a political party with the aim of governing the new South Africa. Mandela in particular stressed the importance of reconciliation, over a strategy of revenging earlier misdeeds. In this light, reconciliation with African "collaborators" was even more likely than the negotiations between the former apartheid government and the ANC. However, in other parts of the negotiation, the ANC did not compromise on their classical liberal notions towards cultural difference. Mandela himself very well defended this compromise on the status of traditional authorities, as you can see in Box 4.6. The ANC Youth League and the Woman League were not necessarily sympathetic towards this twist by the ANC leadership, and in his address to the Youth League, Mandela tries to explain why this is important.

As illustrated in Box 4.6, he first stresses (A) the long line of links between the ANC and the chiefs, and also stresses that traditional leaders due to their position deserve respect. With

Box 4.6: Mandela uses all three aspects in defending why ANC must join forces with traditional leaders in his address to the Youth League in 1990¹⁶⁸

A. Mandela is first using the ethical aspect:

I have touched on the question of homeland leaders and traditional chiefs. It is not the policy of the ANC to condemn the chiefs as such. These are our traditional leaders, some of whom have an impressive record in the fight against apartheid. We say we must give them the respect that they deserve as traditional leaders.

B. Secondly, he turns to both the Centre-periphery and strategic aspect:

You must remember that it is going to be difficult for our organisation to take root and be strong in the countryside unless we are able to work together with them in their respective areas. And those who feel that we have nothing to do with the chiefs do not know the policy of the ANC and have no idea how to strengthen the organisation in the countryside.

In fact, the National Party detected this weakness on our part, of not having strong organisation in the countryside. That is how they succeeded in forcing the homeland policy on the masses of our people....

C. Thirdly he employs the Ethical aspect again:

In our custom and history. The chief is the mouthpiece of his people. He must listen to the complaints of his people. He is the custodian of their hopes and desires. And if any chief decides to be a tyrant, to take decisions for his people, he will come to a tragic end in the sense that we will deal with him....

Finally, I wanted to appeal to you not to be unnecessarily hostile against the homeland leaders. These men are our flesh and blood and we want them to join the struggle. We know that some of them went into this system honestly, thinking that it was an effective option for us. But those who have discovered their mistakes and are prepared to come over to the liberation movement, let us welcome them with open arms. There is no need to say because a man has made a mistake before, we should no longer work with him....

Those who confess their mistakes, those who are prepared to listen to the people now must go to the people in their areas and settle their problems. When they do that, we will welcome them with open arms....

other words he uses an ethical aspect as an argument. Secondly, he argues that there are strategic, rational reasons to this (B), since the ANC is in need of a stronger organisation in the rural areas. By this he admits that the ANC have problems with mobilising the periphery with its urban and centralised organisation structure. He then turn to a reconciliation argument, which bear resemblances with the ethical aspect (C), where he argues that though there might be chiefs which “collaborated” with open eyes, one must let all have the

¹⁶⁸ Nelson Mandela’s address to the youth, Official Statement, KaNyamazane, 13 April 1990. The aspects were not included in the statement, but are mine additions.

opportunity to have a second thought. If they now embrace the new democracy, ANC is to welcome them.

All things considered, the traditional leaders managed to achieve a relative strong position in the negotiations, compared to other proponents of cultural groups. 1) The traditional leaders were anticipated to be able to mobilise the electorate, and therefore considered an important alliance due to their ability to mobilise extensive support. The main political opponents to the ANC, such as the NP, were interested in giving the traditional leaders their own self-governmental areas. This might have resulted in the ANC's will to compromise on its own slogan "Unity in Diversity". On the contrary, the traditional leaders' position in the negotiations might never have been so influential if they had been regarded as a strong political power. The political arena in South Africa is profoundly urban, and the traditional leaders operating in the rural areas are at the periphery of the political system, though they were able to mobilise extensive support for the ANC. When the aspect of centre-periphery actually might have influenced the outcome, it is also because these were institutions not on the "first priority list" in the transformation of society.

The Afrikaners on the other hand, would have been too strong politically. Even though the election results for the FF were quite low, the symbolic effect would have been tremendous. Other groups, as Muslims and Indians, operating in the urban areas, would not be able to mobilise enough votes to be heard. The strength of the traditional leaders seems to be influenced by 1) their potential of mobilising support was too strong to sweep them under the carpet. 2) Their political power was too peripheral to be a threat to the central state. Combined with an ethical aspect of pointing to the discrimination in the past, the traditional authorities became able to voice quite decisive arguments for their prevalent existence in the future.

This is interesting because the traditional leaders by their alliance with the ANC managed to influence the political party, which is most skeptical towards policies designed to accommodate cultural groups, see Figure 4.2. Since ANC became the majoritarian party, this was an extremely important negotiation partner for the chiefs. Figure 4.2 presents the different key negotiators and their view in questions related to cultural rights and traditional authorities. I have divided the negotiators by two different measures. The first group is parties with a holistic negotiation program, and consists of ANC, NP, DP and IFP. The latter group consists of negotiators with specific cultural interests, which are FF/VF, TBVC-governments and

Figure 4.2: Key negotiators and their view on cultural and traditional matters

	HOLISTIC PARTY PROGRAMS				SPECIFIC CULTURAL INTERESTS		
	ANC	DP	NP	IFP	FF/FV	TBVC	CONTRALESA
Executive System	Majority Rule	Power Sharing	Power Sharing	Power Sharing	Voluntary Confederation	Confederation	National: Majority Rule. Local Communities: Trad. Councils
Division of Power	Centralised	Federalism	Federalism	Federalism	Self-determination.	Self-determination	Centralized but with traditional bodies at local rural level
Electoral System	PR	Majority	Majority	PR/ Majority	Majority	National level: Majority. Local/Prov.: Diverging views between delegates	National level: PR. Local: Executive: trad. Councils. Legislative: elected.
Group Rights	Individualism	Individualism	Group Protection	Group Protection	Individualism	Group Protection	Group Protection
Traditional Authorities in their communities	Symbolic	Voluntarily association in civil Society	Symbolic, Judicial and some political powers	Symbolic, executive, legislative and judicial	Symbolic, legislative, executive and Judicial	Symbolic, legislative, executive and judicial	Symbolic, judicial, executive and consultative
Customary law a constitutional right	No	No	Yes	Yes	Yes	Yes	Yes

Contralesa. However, one can argue that the IFP is predominantly a Zulu party situated in KwaZulu-Natal, but they did also aim at mobilizing support at a national level. FF/VF also aims at mobilizing support at a national level but their main political manifest is to promote the rights of the Afrikaner population. Of the former group, the ANC is the most sceptical party in terms of policies aimed at differentiating between cultural groups. DP was also founded on the importance of universal rights, and their claim for federalism was not founded on strong desire to separate diverging cultural groups. The NP was strongly in favor of minority rights, but was willing to compromise. IFP on the other hand, was not interested in compromises, and did boycott various phases of the talks.

The latter group, the FF/VF, TBVC and Contralesa, had specific cultural interests and did not always specify their attitudes towards policies that were not in direct interest of their group. On the other hand in questions that concerned their groups, they had a very detailed

Figure 4.3: Tendencies in attitudes toward policies of cultural accommodation

		ANC	DP	Contralesa	NP	IFP	FV/VF	TBVC
National Level	Volkstaat	No	No	No	Yes	Yes	Yes	Yes
	Power-sharing	No	Yes	No	Yes	Yes	Yes	Yes
	Federalism	No	Yes	No	Yes	Yes	Yes	Yes
	Group-rights	No	No	Yes	Yes	Yes	Yes	Yes
Traditional Authorities	Symbolic power	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Customary law as a right	No	No	Yes	Yes	Yes	Yes	Yes
	Executive power local level	No	No	Yes	Yes	Yes	Yes	Yes
	Legislative power local level	No	No	Yes	Yes	Yes	Yes	Yes
	Consultative power	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Judicial power	Yes	No	Yes	Yes	Yes	Yes	Yes

political vision. For instance Contralesa did not, as far as I can see, have any outspoken policy on the division of power at a national level, as long as the traditional leaders received some judicial and political authority on provincial and especially local level. This makes it difficult in Figure 4.2 to simplify their attitude towards some matters.

To get a clearer general impression of the tendencies see Figure 4.3. This figure is an attempt to order the divers attitudes of negotiators from sceptical to promoters of cultural rights. The most difficult negotiator to locate is Contralesa. They were concerned with the traditional leaders position in the future democracy, but were not especially interested in federalism, power-sharing and stressed the importance of traditional leaders to enter into a democratic future. The policies of the parties naturally contained more nuances than those presented in Figure 4.3, but this figure only aims at presenting a simplistic illustration of the diverging attitudes of the different parties. It is also important to mention that many of the negotiators which had strong visions about policies at “national level”, did not have strong visions of policies regarding traditional authorities, and vice versa. This is especially important in the negotiators I referred to as the ones with specific cultural interests in Figure 4.2. However, the most important feature that Figure 4.3 illustrates, is that except ANC and to some degree the DP, most parties are in favour of some kinds of special policies designed to accommodate the difference of cultural groups. ANC did get the majority of the votes, and they had a firm hand on the wheel for the further policies toward cultural accommodation in the years to come.

4.4. Settling cultural rights in a the final constitution

Were the traditional leaders able to maintain their position in the final constitution signed by an elected Constitutional Assembly dominated by the ANC? The interim constitution has been regarded as a quite disjointed document. The final constitution, however, needed to be a more coherent document. Knowing that the ANC emphasised the ideals of universalism with its principles of a neutral state, how did this influence the traditional authorities' position in the final constitution? To analyse this question I am going to compare the interim constitution with the final constitution by using the same two measures of self-determination employed in analysing the interim constitution. First, is the cultural protection subject to the legislative and other constitutional principles? Secondly, are the cultural protections to be interpreted as individual or group rights? After I have analysed the differences between the interim and the final constitution, I am going to ask why these changes occurred.

4.4.1. Final constitution: Cultural protection subject or not?

As in the interim constitution there are two different parts of the final constitution that accommodates cultural difference. First, there are cultural rights protected in Chapter 2 on the Bill of rights. These rights are presented in Box 4.7. Whereas the interim constitution did not clarify whether the right to culture was to be understood as subject to other parts of the Bill of Rights, the final constitution is not uncertain on the matter. It is obvious that in cases where there might be a conflict between cultural rights and other rights, the cultural right is to be interpreted as secondary. This is specifically stated: "... but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

As Box 4.7 illustrates, compared with the interim constitution the chapter on traditional leaders is less specific. Whereas the interim constitution goes into specific matters, for instance on how the different Houses of Traditional Leaders are to take form and how they are to be consulted, the final constitution settles a more open mandate. An open mandate which gives the legislative the power of being in charge of the further process of accommodating traditional leaders and institutions. The interim constitution established that Councils of Traditional Leaders were to be formed at all three levels of government, the final constitution only states that the national or provincial legislation "*may*" provide for this establishment. The section in the final constitution which recognises the institutions, status and role of traditional

Box 4.7: Final Constitution, Chapter 2: The Bill of Rights

- individual cultural rights subject to other constitutional principles

Section 30: Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31: Cultural, religious and linguistic communities

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

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

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

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

leadership, according to customary law, is further subject to the constitution. In this regard all parts accommodating culture in the final constitution is either subject to the legislative or the constitution. This implies that both legislative organs and other constitutional principles condition the cultural recognition. This have created a need for a thorough reformation of the customary law.

4.4.2. Final constitution: Group or individual rights?

On the topic of group or individual cultural rights, the final constitution signed in 1996 is however much more coherent regarding which kinds of rights that are entrenched. While the interim constitution only has one section regarding culture entrenched in the Bill of Rights, the final constitution has two, see Box 4.7. Despite the stressing of subjection of cultural rights, the first section is more or less the same. One section is however added on “Cultural, religious and linguistic communities”. Box 4.7 shows that section 31 establishes that “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community a) to enjoy their culture, practice their religion and use their language; and b) to form, join and maintain cultural religious and linguistic associations and other organs of civil society.”¹⁶⁹ In this context traditional institutions are supposed to be regarded as organs of the civil society, individuals should not be denied to participate in them or form them. This does not denote that the groups themselves have the right to culture and existence. It is established that the individuals are the bearers of rights, not the cultural groups.

¹⁶⁹ The Constitution of the Republic of South Africa, Act 108 of 1996, section 31.

Box 4.8: Final Constitution, Chapter 12: Traditional Leaders

- conditioned recognition of customary law and traditional leaders functions and role

Section 211; Recognition

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

Section 212; Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.

In the interim constitution the formulations in the section of cultural rights combined with section 181 on the recognition of traditional authorities, made it possible to understand traditional authority as a group right. In the final constitution all parts of the Chapter on traditional leaders, see Box 4.8, make it clear that practicing these customs is only a free choice of the members of the communities, and nothing which is supposed to be imposed on them.

Figure 4.4 illustrates the difference between the interim and final constitution in regard to the two different applied measures of cultural protection. In this figure one can see that cultural rights are more restricted in the final constitution. The cultural rights entrenched in the Bill of Rights are now subject to other constitutional principles, whereas the interim constitution did not specify what ought to take precedence in case of conflicts. In the new constitution it is explicitly stated that this is an individual right. It is also specified that the traditional authorities are subject to other parts of the final constitution, and since the other parts of the constitution stresses that all rights are individual, these are also individual. No group is to be the bearer of rights. Traditional authorities are also subject to legislation. The legislative might only establish Traditional Houses, and consult them if they find this desirable. It is not something they “shall” do, only “might” do. This implies, as mentioned in chapter 4.4.1, that the cultural protection of traditional leaders is no longer conditioned by other constitutional principles.

Figure 4.4: Difference in measures of cultural protection between the interim and the final constitution

	Interim Constitution		Final Constitution	
	Cultural Subjection	Form of right	Cultural Subjection	Form of Right
Cultural Rights	Not subject	Individual Right	Subject	Individual Right
Traditional Authorities	Subject to legislation	To some extent a Group Right	Subject	Individual Right

There are at least three interesting features of this development of the process. One, why did the position of traditional authorities diminish? Two, this is a conditioned recognition which implies that the traditional institutions and customs need to be reformed in order to be compatible with a liberal vision, were there any political will and ability to initiated these reforms? Thirdly, did one manage to clarify what the recognition of traditional leaders in the end was meant to entail? The two latter questions will be addressed in the next chapter. Until then, I will try to answer question one, why did the traditional leaders authority become more conditioned?

4.4.3. Why did the constitutional protection of traditional authorities diminish?

As written earlier the interim Constitution was quite incoherent, and the new government needed the final outcome to be more consistent on its principles and guidelines. During the first years of the new National Assembly the forces against the preservation of traditional authorities grew stronger. In the following I am going to present three different reasons for this change.

First, the problem of making the accommodation of traditional leaders compatible with women’s right to equality. A strong women’s lobby was one of the main reasons why traditional leaders did not manage to entrench customary law as a fundamental right in the interim Constitution. The women’s lobby was based on a cross-party coalition, Women’s National Coalition (WNC), created to secure women’s right in the new Democratic order. WNC was formed at a Woman’s League (ANC) initiative, and consisted of 92 national organisations and 13 regional coalitions, covering most political parties, rural women’s

Table 4.5: Women in Parliament after the 1994 elections¹⁷⁰

Party	Seats	Women	Men%	Women%	Total
African National Congress	252	90	64.3	35.7	100
National Party	82	9	89.0	11.0	100
Inkatha Freedom Party	43	10	76.7	23.3	100
Pan Africanist Congress	5	1	80.0	20.0	100
Democratic Party	7	1	85.7	14.3	100
African Christian Democratic Alliance	2	0	100	0	100
Total	400	111	72.5	27.8	100

organisations, and religious and professional organisations.¹⁷¹ In the negotiations the WNC pointed to women's subordinate positions under customary law. Women under customary law were regarded as minors under the guardian of a father or a husband, and they enjoyed no *locus standi*¹⁷², they did not have the right to inherent or own property, sign any legal contracts etc. Because of this women argued that customary law and other traditional institutions needed to be subject to the Bill of Rights, in order to prevent discrimination of women living in traditional communities.

Women were able to prevent the customary law of becoming a right or be exempted from the interim Fundamental Right, but they were not strong enough to impede the recognition of the traditional leaders power and functions. However, after the 1994 elections, as a consequence of ANC's 30 percent women quota, the number of female delegates in the National Assembly became one of the world's largest in percentages. As presented in Table 4.5, women held 111 out of the 400 National Assembly seats, or close to 28% of the total, where a considerable number of these are from the ANC. This compares with less than 3% of female delegates prior to South Africa's first democratic elections.

Whereas the traditional leaders had found themselves relatively strong in the negotiations, the women lobby had managed to transform their mobilisation movement into political representation in the legislative body. As we can see in Table 4.5 women had managed to be a part of the political forum in charge of the political future and the signing of the final constitution. In this they worked for a subjection of the accommodation of traditional

¹⁷⁰ Convention for the Elimination of all forms of Discrimination Against Women, First South African Report, Cedaw 3 1997.

¹⁷¹ Geisler, Gisela, "*Parliament is another terrain of struggle*": women, men and politics in South Africa, The Journal of Modern African Studies, UK: Cambridge University Press, 38, 4, 2000:613.

¹⁷² *Locus standi* is the right to appear in court and argue a case.

Figure 4.5: Prominent members in Parliament 1994 with traditional background

Name:	Position:	Party:	Connection:
Nelson Mandela	President	ANC	Distanced himself from his traditional background as chief in the 1940's.
Ben Ngubane	Minister of Arts, Culture, Science and Technology	IFP	Family involved in the traditional government of the Zulu Homeland.
Chief Mangosuthu Buthelezi	Minister of Home Affairs	IFP	Heir to the chieftainship of the Buthelezi tribe in Zululand.
Stella Sigcau	Minister of Public Enterprises	ANC	Daughter of a Paramount Chief. Political career in the Transkei Legislative Assembly where she worked for the empowerment of women in traditional communities.
Bantu Holomisa	Deputy Minister of Environment Affairs	ANC	Son of a Chief. Earlier Minister of Defence and Audit in the Transkei Government 1988-94.
Patekile Holomisa	Member of Parliament and the President of Contralesa	ANC	Heir to the Holomisa Chieftainship in the Thembu Nation in Transkei.

authorities under the Bill of Rights. Traditional leaders became somewhat outdistanced in the main political, democratic body, since few had joined political parties. As Figure 4.5 point at, some prominent politicians had traditional origin, but it was not all of these who considered this as one of their most important mandate. Figure 4.5 gives a short presentation of some of the most prominent South African parliamentarians with traditional background.

Secondly, a quite extensive part of the ANC delegates opposed the idea of forcing an identity of “Africaness” upon the rural communities. Experiences in the past had made them sceptical of group rights. The Apartheid government had equated “Africaness” or African culture with the African traditional authorities, their institutions and customary law. Being African was regarded as a person living in a “kraal”¹⁷³ in membership with his or her tribe, guarded by a lineage of chiefs. As this of course was a part of a cultural heritage, it did not mean that all black people living within the borders of South Africa understood their identity in resemblance to this definition of “Africaness”. Many people’s identity were just as much related to centuries of liberation struggle and a fight to be regarded as a people capable of

¹⁷³ A homestead.

developing liberal, democratic institutions, or related to just being a urban person living a day to day life trying to make ends meet. Having suffered racial stigmatation in the past, many ANC delegates did not appreciate the thought of traditional authorities imposing their particular beliefs on rural communities. The individual ought to have the right and possibility to exit traditional customs. In the negotiations Penuell Maduna expressed it this way: “There is a tension between a Western-oriented society, as some people want to impose upon us, and a pure African, “Africanist” society. I think we are a mixture of all sorts of things, but essentially, we place the individual at the center of human activity”.¹⁷⁴

The ANC was in the beginning formed to unite the African people in the struggle for equality, and over the years they had developed to embrace non-racialism. In the negotiation the ANC valued universalism, and worked for a new constitutional order based on a united, non-racial, non-sexist and democratic society. ANC regarded itself as a non-racial party. It did not represent the values of only “black” people. The ANC needed to accommodate the cultural institutions of the traditional authorities in accordance with this train of thought. In his speech to the Constitutional Assembly on the adoption of the new constitution, Nelson Mandela illuminated the importance of non-racialism:

“We are dealing with a situation in which if one talks to Whites, they think that only Whites exist in this country, and they look at problems from the point of view of Whites. They forget about Blacks, namely Coloured, Africans and Indians. That is one side of the problem. However, we have another problem. When one talks to Africans, Coloured and Indians, they make exactly the same mistake. They think that the Whites in this country do not exist. They think that we have brought about this transformation by defeating the White minority and that we are dealing with a community that is now lying prostrate on the ground, begging for mercy, to whom we can dictate. Both tendencies are wrong. We want men and women who are committed to our mandate, but who can rise above their ethnic groups and think in terms of South Africa as a whole”.¹⁷⁵

As ANC became the major political party in the Constitutional Assembly, the diminishing power of the traditional leaders is not unexpected. If one look at Figure 4.2 and Figure 4.3 in chapter 4.3.4, which both sums up the different negotiators view on cultural accommodation, one can see that ANC is one of the parties most sceptical to considering cultural differences as a political significant. In regard to the NP and their considerations on the matter, it is obvious

¹⁷⁴ Interview with Penuell Maduna in Pretoria, Januar, 1996 by Spitz and Chaskalson 2000: 391

¹⁷⁵ Mandela, Nelson, Speech to the Constitutional Assembly on the occasion of the adoption of the new Constitution, Cape Town, 8 May 1996.

that though they regarded cultural differences as important, they were more concerned about the future of the white population. Since the rural population had not given them any profound support in the elections, they might have lost interest in the case.

Third, one needed to make the traditional institutions compatible with the elected local bodies. Traditional authorities represented illiberal customs, which in many ways were not suitable in a democratic society. In ANC's Constitutional Proposals dated 15 of June 1995, it is argued: "the institutions of chieftainship (...) have an important role to play in unifying our people and perform ceremonial and other functions allocated to them by law".¹⁷⁶ If ANC were to accommodate the institutions of traditional authorities, they wanted to have the opportunity of reforming the institutions by subjecting them to National Legislation. The traditional authorities were based upon a system of illiberal inheritance of positions. As in other monarchical democracies, royals and aristocrats may have a symbolic role to play, but it has been proven difficult to grant them a significant political power base. The traditional leaders in South Africa under the Apartheid regime resembled the exalted absolute monarchs known in European history, with the executive, legislative and judiciary power in one man, this could not be justified in a democratic system. As in the rest of society, illiberal institutions needed to be transformed, and one needed to give a definition of what would be the role of the traditional leaders compared to the elected local governments.

When the interim constitution had been unclear regarding whether the traditional authorities were subject to the Fundamental Rights and the national legislation, the final constitution was much more coherent on these matters. If one desires to make a simplistic answer to the complex process, one can argue that the problem of making the traditional protections compatible with the right to women's equality, made the customary law subject to the Bill of Right. The problem of forcing an identity upon the members of rural communities made it difficult to grant any groups rights. The problem of defining what ought to be the role of traditional authorities compared to the role of the elected, local governments, made it subject to national legislation. In this way one had accommodated traditional leaders, their institutions and customary law, if these cultural institutions were able to reform.

¹⁷⁶ ANC'S Constitutional Proposals "Traditional Authorities and Cultural Bodies", 15 of June 1995.

4.5 A theoretical perspective on the transition

I will now turn to the questions presented at the end of chapter 2, where I asked how one could analyse the transition in light of the discussed theoretical perspectives. The questions I asked in regard to the process of accommodating cultural difference in the constitution were: Which theoretical perspective was most similar to the final outcome of the constitutional bargaining? Which diverging claims of accommodation were presented, and how can one view these preferences in the light of the different theoretical perspectives?

To turn to the former question first. The theoretical perspective, which has most similarities with the final outcome of the transition, is that of Rawls. As Rawls, the ANC, which became the strongest part in the bargaining process, was not willing to compromise on the liberal visions that emphasises the importance of a state to remain neutral in questions of the good. The final constitution, as Rawls suggests, does present a priority of rights. This implies that cultural rights and cultural recognitions are only to be claimed if they are not in conflict with other constitutional principles, such as the right to equality and the democratic political set up. The accommodation of cultural difference is never to be granted at the expense of state neutrality, and in cases where the secondary cultural rights causes a conflict with the constitutional essentials, the constitutional essentials are to take precedence.

The emphasis on the neutral state also required that all rights were to be held by individuals. It was always the individual, not the group that was to be the bearer of rights. No people in the name of culture ought to impose upon others practices or customs that they did not choose themselves as free, autonomous individuals. The legacy of Apartheid made the ANC sceptical to cultural claims of differential treatment, and as the majority party they tried to minimise the powers offered to cultural agents. The traditional leaders however, became recognised, but this recognition was conditioned, which indicates that in order to enjoy this recognition they needed to reform their institutions and customary law.

Which considerations might have influenced the different preferences in according to accommodating difference? The legacies of colonialism and Apartheid did influence the outcome to which degree cultural difference were to be reflected in the constitution, and it also influenced whose difference that became accommodated. If one is to draw some simplistic lines in the different negotiators vision on the subject of cultural accommodation,

there were three main claims represented, 1) a claim for a neutral state, 2) claims for specific accommodation of Afrikaners, and 3) claims of recognising traditional authorities. First, it was the ANC and to some extent the DP, which emphasised individual universal rights and insisted on a neutral and impartial state. This is a vision that resembles that of Rawls strategy of accommodating cultural difference. ANC was founded as a liberation movement and the DP was the earlier Liberal Party. The DP was before the transition a party that gained support from mainly liberal academics and intellectuals. These parties were, as Rawls, the least willing to compromise on liberal notions in regard to the protection of culture. However, the ANC though true to the ideas of neutrality was willing to compromise in the question of traditional leaders. Something that illustrates that ANC was not exactly behind a 'veil of ignorance' in the negotiations. Behind a liberal 'veil of ignorance', deprived of all knowledge of who you are, would you have recognised 'illiberal' traditional authority rather than Lijpharts' consociational model of democracy? My point here is not that the latter is better than the former, but that the legacy of the past is always omnipresent in a transition.

The second group that claimed special group protection was the ones that agitated for the minority rights of Afrikaners. The most vocal of these claims, was the NP who claimed special representation, almost in line with one of Kymlicka's kind of group-differentiated rights, see chapter 2.4.1. Second, it were also diverging small parties such as the FF/VF who claimed self-representation, also in line with Kymlicka's vision of group-differentiated rights. When these claims were not accommodated this might have been influenced by the fact that few others than Afrikaners themselves viewed this group as marginalized or disadvantaged, as Kymlicka put forward as a precondition for special group representation. Neither did one approve of the argument that these groups needed self-government in order to ensure the full and free development of their culture. As the designers of the grand Apartheid an accommodation of their cultural difference would have too many ties with earlier regimes. Many viewed their claims as attempts aimed at maintaining political power rather than claims from a culture bordering on extinction. Due to the past, an accommodation of these claims was not accepted.

The third group that claimed special protection of their culture was the ones that agitated for recognition of traditional authorities, institutions and law. Unlike the Afrikaners these could argue that they were both marginalized and disadvantaged in the past, see presentation of Kymlicka's approach chapter 2.4.1. However, there were great difficulties attached with

recognising traditional authorities. Because as this case reveals, it is not necessarily a connection between those who deserves to be recognised due to past discrimination and those groups that are suitably liberal in the eyes of the theoretical perspectives presented in chapter 2. In the case of South Africa the key negotiators sentiments towards a group seems more important for the outcome than their degree of “liberalness”.

Even though Taylor has argued that the recognition of difference is the essence of a liberal democracy, he also argues that only liberal groups are to be given self-representation. It is consequently difficult to apply his perspective on the accommodation of traditional authorities, and it does imply that it is difficult to use this theory in cases of deep cultural cleavages. On the one hand, one cannot in a liberal democracy accommodate illiberal institutions. In the case of South Africa this indicates that one is only able to accommodate groups with different language or ethnicity, but not groups following different ways of organising society. This signifies that it is of course possible to accommodate a request for education facilities in both Afikaans and Zulu, since these are on-the-surface differences. The theory does not, however, give any answers to cases where diverging groups have conflicting perspectives on how to organise institutions of society.

It is also difficult to apply Kymlicka’s theory, which stresses the importance of giving specified group-rights to ethnic minorities. An essential question in this regard is: Can one regard traditional authorities as a minority or an ethnic group? If about 18 million people are living under traditional authorities, this is quite an extensive part of South Africa’s population. Further, though many Africans have relatives in rural areas, it would be somehow difficult to view the traditional customs as only a matter of ethnicity. It is rather a question of whether one should accommodate other ways of organising society than that of liberal ones in a democracy. This is just as much a conflict between the rural and the urban ways of life, or in other words the modern and the traditional, than a question of ethnicity. It is thus more cultural than ethnical.

The problem with Kymlica’s ideas of group-rights is that they do not take into account that most groups claiming the right to be different also claim some kind of authority. In a liberal democratic perspective, one is interested in only giving them a symbolic role, or perhaps also a right to form democratic institutions in their own communities. The problem in this case was that traditional leaders claimed the right to political power, but not as politicians in

elected democratic bodies. Traditional leaders in strength of their position as royals, claim that they ought to be given the right to be in charge of traditional institutions and customary courts in their communities. These are in many ways, illiberal claims, which put traditional leaders in a position to impose their particular beliefs and conceptions of the good on the members of those societies. In such cases, it is difficult to apply Kymlicka's idea of cultural group rights, since there in these societies are sub-groups which do not have the power to elect the people who govern them, and maybe more important, share the same individual rights to equality as people not classified as belonging to any group.

Despite the difficulties of recognising traditional leaders, in the negotiations they had what Habermas would have called 'a better argument' than other advocates of special cultural group rights. They emphasised their discrimination in the past, they were able to mobilise votes, and they possessed knowledge on how the rural areas functioned. Many also exposed a willingness to change and adapt to the new liberal democratic order. In the negotiations before the interim constitution they were able to express their specific needs in the debate. This debate was however held behind closed doors, and mainly based on bilateral talks between the NP and ANC. ANC had been the traditional leaders alliance prior to the elections, in the period between the elections and the signing of the final constitution, the influence of the traditional leaders had diminished. Did the traditional leaders 'arguments' still possess some weight in the public debates in the new democratic South Africa?

Consultation with the people had in the past regimes been scarce. The mobilisation of the people before the first free and fair election in 1994 marked a breaking point in inviting the people to be the "authors of the laws that binds them", see Habermas chapter 2.3.3. Would people living in rural traditional communities accept the recognition given to traditional authorities in the transition as legitimate? When the constitution was to be implemented, was one able to meet the requirements of both securing the right to equality and at the same time recognise cultural difference? And did ANC have enough political will and possess strong enough institutional means to implement the reforms of traditional authorities, institution and law as required by the constitution? What were to be the function and role of the traditional leaders in the future?

5. Implementation of cultural recognition

The South African final constitution to some extent recognised cultural difference, but this concession was only made if the cultural institutions were able to adjust to the new liberal democracy. First, the traditional African authority was to be subject to both the legislative and other constitutional principles. Second, the right to culture should always be interpreted as individual rights, and thus cultural authorities cannot impose their views and ways of life on other individuals. The constitution thus recognises cultural difference, but it falls short in providing for traditional leaders and institutions specific role in the new democratic society.

If the African traditional institutions were to be viable in their communities, they did not only need constitutional protection, they also needed room within the state to perform their role. Were there in South Africa political will to specify and enforce the judicial and political authority of traditional leaders? Or was the recognition of cultural differences nothing more than a façade presented to gain legitimacy in rural areas? To analyse political will I am going to employ two different measures. Was there any initiative from the government to 1) Clarify their policies in official statements? 2) Initiate new legislation? Did this result in an unambiguous set of structure and powers that defines the role and functions of the traditional leaders? Which aspects influenced the process?

5.1 The challenge towards traditional authority

To provide a role and function for traditional leaders necessitates a willingness to delegate authority beyond symbolic power. In analysing what kind of power they were to possess in the new democratic order, I find it constructive to operate with two different kinds of authority: 1) Judicial authority and 2) Political authority. Where the latter can be divided into executive and legislative powers. In doing this, it is important to notice that prior to the transition the traditional leaders' powers were not precisely defined. Executive, judicial and legislative functions were not differentiated, and their authority was both diffuse and all-inclusive.¹⁷⁷ That there is no separation of power has been problematic concerning traditional authority.

¹⁷⁷ Bennett, TW, "The Constitutional base of traditional rulers in South Africa" in d'Engelbonner-Kolff et al. *Traditional Authority and Democracy in Southern Africa*, Namibia: New Namibia Books, Center for Applied Social Sciences, University of Namibia, 1998:29.

Traditional leaders had in the earlier regimes been functionaries of the state, and a part of the administrative apparatus.¹⁷⁸ They did enjoy some judicial, executive and legislative powers but these were connected to the delegated administrative powers. But what kind of powers did they possess, how were their institutions structured and which challenges did this create for the recognition of customary law and traditional leaders role and functions in the new political system?

5.1.2 Political authority

Under Apartheid, the traditional leaders constituted local government in rural areas. How could democratic institutions be established and still recognise the functions and roles of traditional leaders in the same communities? I am first going to turn to the question of legislative power. The legislative branches in a democracy derive its powers from periodic and popular elections, but most offices in the African political system are hereditary. There are large differences between different communities, but there seem to be some resemblances. The chief is the head of the communities' councils, and the other councillors are either appointed by the chief himself or co-opted by being elected by those who are already part of the structure. The traditional leader can because of this remain the head of the councils for years. Since an ordinary mechanism of checks and balance of power is absent, the system is often vulnerable to corruption and abuse.¹⁷⁹

During the previous regimes, traditional leaders had unspecific powers at the local level in relation to the process of law making. Bennett has argued that if national legislation decides to establish houses of traditional leaders at the different levels of the political system, this gives traditional leaders a political power of which they did not seize prior to the transition. Since these houses make traditional leaders a part of the law making process, where they have the right to advise, be consulted and make proposals to the legislative. Nevertheless, these organs have only limited power. They may advise and they may insist on being consulted about bills concerning customary law, but they have no further power than delay the passing of an act.¹⁸⁰ Jones in his studies of the former "independent" homeland Bophuthatswana, has argued that at government level these states actually did have some law making powers. He states that

¹⁷⁸ South African Law Commission, Project 90, *Harmonisation of the common law and the indigenous law: Traditional courts and the judicial functions of traditional leaders*, Discussion Paper 82, 1999:14.

¹⁷⁹ *Ibid*: 5.

¹⁸⁰ Bennett 1998:31.

prior to the transition, “Bophuthatswana was not simply a puppet but had its own specific political, cultural and economic agenda.”¹⁸¹ There are thus reasons to believe that in some cases the legislative powers have declined, but the constitution reveals an opportunity for the traditional powers to partake in the legislative process on all levels. In this situation, the traditional leaders ability to put some force behind their arguments is probably more important than their formal status.

The second kind of political authority of traditional leaders, the executive political powers, was more specific. They represented their people in all relations with the outside, and they also had several administrative functions in their society. Prior to the transition, they for instance organised the allocation of land held in trust for small-scale farming, grazing and residential purposes. The Apartheid government did not allow commercialism in African communities. Other functions they obtained were to provide and administrate certain services at local level. These services consisted of social welfare, including the processing of applications for social security benefits and business premises. Other services were the promotion of education, such as the erection and maintenance of schools, but also the administration of access to education finance, i.e. scholarships and study loans to students.¹⁸²

What was to happen with the executive powers of the traditional leaders after the first local elections in 1995? Administrative functions in a liberal, democratic government are regulated by norms of fairness and accountability. Though traditional leaders often consulted their councillors before taking important decisions, they were as the direct link to the shades of the people’s founding fathers, in a special position to carry out arbitrary rule. The traditional leaders were then also known to have the benefit of tangible symbols of powers, such as large tribal offices, tribal cars, tribal secretaries and, even, tribal cleaners.¹⁸³ Democratisation brought the notion of wall-to-wall elected local government. Elected municipal councils would after this run traditional authority in rural areas.¹⁸⁴ The constitution said that national legislation might provide a role for traditional leadership in the future. Was there after 1996 a political will to clarify this role, or were the elected municipal councils the only organs

¹⁸¹ Jones, Peris Sean, *From ‘Nationhood’ to regionalism to the North West Province: ‘Bophuthatswananess’ and the birth of the ‘new’ South Africa*, African Affairs, 98, 1999: 510.

¹⁸² Mokgoro, Yvonne, *Traditional Authority and Democracy in the Interim South African Constitution*, Occasional Papers, Konrad-Adenauer Stiftung, Johannesburg, 1994: 4.

¹⁸³ Van Oomen 2000: 4.

¹⁸⁴ Ibid.

responsible for the development, services and other tasks formerly carried out by traditional authorities?

5.1.3 Judicial authority

Customary law, common law and civil law makes out the three components in the South African mixed legal system. The official policy towards customary law fluctuated from time to time and from area to area. With examples of both complete rejections, complete recognition and a number of intermediate positions.¹⁸⁵ The final Constitution of 1996 did recognise customary law, but this required that it needed to be compatible with other principles in the constitution and also subject to legislation. But what kind of authority had customary law possessed prior to 1996 and how were the traditional courts structured?

Traditional courts are established in rural areas where they are presided over by chiefs and headmen under the Black Administration Act, No 38 of 1927, but also under various statutes of the TBVC states. The Black Administration Act determined that these courts had discretion to apply African customary law in instances ‘involving questions of custom followed by blacks’, as long as such law was not ‘opposed to the principles of public policy or natural justice’.¹⁸⁶ In presiding over traditional courts, chiefs and headmen are assisted by their councillors. Since 1986 appeals from these courts could go to magistrates’ courts and further appeals may be taken to the high Courts and Supreme Court of Appeal.¹⁸⁷ In regard to the question of punishment, the courts were not permitted to impose death, mutilation, grievous bodily harm, imprisonment or fine in excess on R 40.¹⁸⁸ ¹⁸⁹ The fines in reality exceed these numbers by far, and the use of corporal punishment was often exercised, particularly to rebuke youngsters. The use of corporal punishment is now prohibited, something which has created an immense debate.¹⁹⁰

¹⁸⁵ Zimmermann, Reinhard and Visser, Daniel, “Introduction, South African Law as Mixed Legal System” in Zimmermann and Visser (eds.) *Southern Cross, Civil and Common Law in South Africa*, Oxford: Clarendon Press 1996:12.

¹⁸⁶ Ibid.

¹⁸⁷ South African Law Commission, Discussion Paper 82, 1998:16.

¹⁸⁸ In 1996 this would have been approximately 43 NOK.

¹⁸⁹ Bennett 1995: 79.

¹⁹⁰ As for instance, an Afrikaner religious school tried the right to corporal punishment in front of the Constitutional Court, and argued that it should be a religious freedom to practice it, since it is in accordance with the punishments used to rebuke the ones you love in the Bible.

Customary courts vary in size and content. A customary court can consist of a small gathering between two families, a group of men discussing cases under the shade of a thorn tree, or a more bureaucratised get-together in a tribal office.¹⁹¹ The first is often referred to as the 'living law', while the latter is often understood as the 'official law'.¹⁹² The 'official law' formed a part of the Apartheid judicial law enforcement and traditional authorities were allowed to try cases such as petty theft, family disputes and land matters, against which appeal at the magistrate's court was possible.¹⁹³

It is important to notice that this right to appeal to a magistrate court did to a high degree restrict the authority of traditional courts and the traditional leaders prior to the transition. As Mbatha argued in one of my interviews:

“Because if you look at the power, for example, of the traditional courts, you would find that even traditionally the power of these institutions was limited. They had the power to deal with customary disputes, and as far as this is concerned, they were forced to it. It was not necessary to get the conflict sorted out in a customary court, because if you disagreed in their judgments, you could go straight to the magistrate court. I think to understand the process now, one need to know the functioning of the magistrate courts. The Magistrate courts did not have to ask what were happening in the traditional court. [Everyone] ...came there a fresh. This was the power that the traditional courts enjoyed.”¹⁹⁴

The judicial authority of traditional leaders was in other words conditioned by both limitations on which cases it was allowed to precede and by other judicial structures. Pre-1994 laws continue to be applied until new legislation is amended in parliament. This implies that traditional courts currently have both civil and criminal jurisdiction. In regard to this one has particularly been interested in asking the question of whether traditional courts should continue to exercise criminal justice. The reason for this is that the rights of the accused under section 35 of the constitution gives the right to be presumed innocent, the right to remain silent and also the right to choose and be represented by a legal practitioner. It has been suggested that customary procedure is based on an inquisitorial system that leaves no room for the right to silence.¹⁹⁵ When this is coupled with the prohibition of legal representation in

¹⁹¹ Oomen 2000:4

¹⁹² South African Law Commission, Project 90, *The Harmonisation of common law and customary law, Customary Marriages*, Discussion Paper 76, 1997:12.

¹⁹³ Oomen 2000:4

¹⁹⁴ Mbatha. Likhapa interview in Johannesburg the 2nd of June 1999.

¹⁹⁵ South African Law Commission, Discussion Paper 82, 1998:29.

traditional courts, it is questioned whether the accused is afforded a fair trial. Should the right to try criminal cases then be removed from the traditional judicial authority?

However, there are also debates on the authority of traditional courts' in civil cases, e.g. cases of family and personal law. These debates are often related to questions of the patriarchal aspects of traditional law, since women do not have proprietary or contractual capacity. Women are regarded as minors under the guardian of her husband or father, or even uncle, son or brother-in-laws. This patriarchal view is also represented in the compositions of courts, since women are neither allowed to preside over nor participate in the proceedings of traditional courts except as litigants assisted by men.¹⁹⁶ This contravenes the individual rights entrenched in the constitution, and features like these has engaged amongst other the Rural Women's Movement to work for a change of women's position under traditional courts. Ngema did in an interview argue, "The chief must not have the power to overrule legislations" and further "Chiefs should not interfere in family matters".¹⁹⁷ A reasons for this is:

"You know, we have these traditional courts were there are trials, and women are not represented. So men discard women. (...) Maybe your husband have said something wrong or done something to you, and there are only men to represent you. They might not have the same feeling of what it is that have been done. It is not that they do not try, it is just that a women is not represented in any of those cases that is important for her. So that people can see things from her perspective. The constitutions says that we are all equal, so the women should be represented."¹⁹⁸

There are with other words a variety of reasons why traditional courts and customary law need be transformed in order to be compatible with the new constitution. In the discussion paper on *Traditional Courts and the Judicial Function of Traditional Leaders*, the South African Law Commission have nevertheless presented three arguments in favour of the maintenance of this law system. First, it is a part of the cultural heritage of African people. Traditional leaders themselves often use this argument. Secondly, traditional courts are useful and desirable mechanisms for a speedy resolution of dispute, since it is easily accessible, inexpensive and a simple system of justice. Thirdly, it is argued that the shortcomings of the system are not beyond repair, and the courts and procedures might well be able to adapt to

¹⁹⁶ Ibid: 4.

¹⁹⁷ Ngema, Popi in interview Johannesburg the 16th of July 1999.

¹⁹⁸ Ibid.

changing circumstances and the requirements of the constitution.¹⁹⁹ But has the government shown any political will to clarify the judicial authority of the traditional leaders? Have they initiated reforms aimed at transforming the customary law system into a vital court of law?

5.2 The political will to transform and clarify traditional authority

In the negotiations the traditional leaders had been in a relatively strong position. This position did however to an extent diminish after the first free elections in 1994. One of the main reasons for this was ANC's ambiguous and sceptical view of traditional authorities. With ANC behind the wheel of the implementation of the constitutional principles, how did this affect the position of the traditional leaders? Would it result in a further curtailment of their powers, or were they to be transformed into viable institutions? In order to evaluate this it is important to ask which kind of political will the government had to clarify the role and the functions of traditional leaders. I am going to use two different measures of political will. Was there any initiative from the government to 1) Clarify their policies towards judicial and political traditional institutions in official statements? 2) Initiate new legislation?

5.2.1 Political authority: Official statements

There are often vast discrepancies between governmental promises exposed in official statement, and promises that turn into political action. Is this also the case according to the relationship between promises and actions delivered by the ANC government in questions of traditional authorities? Valli Moosa the prior minister of Judicial Affairs did state in 1994, "as long as there are people out there ... especially in rural areas ... who recognize, support and respect traditional leaders, so long will the government support and respect traditional leaders because we are a people's government."²⁰⁰ But how far would they go in actually providing a specific political authority for traditional leaders?

At the opening of the National Council of Traditional Leaders in April 1997, Nelson Mandela in his inauguration speech argued: "Your Majesties; When the new constitution was drafted,

¹⁹⁹ South African Law Commission, Discussion Paper 82, 1998:1.

²⁰⁰ V. Moosa (ANC) Debates of the Senate, 10.11.1994. Deputy Minister for Provincial and Constitutional Development in the South African Government, 1994–1996. Minister for the department 1996–1999. Sited in de Villiers, Francois, *Selected South African Legislation on Customary Law and Traditional Authorities*, Occasional Papers, Konrad-Adenauer Stiftung, Johannesburg 1998:5.

there concerns were that it did not define in sufficient detail the status and role of traditional leaders; that it did not, unlike the interim constitution, oblige government to set up this council. But we argued as the majority party and the government that we would be true to our word, true to our South Africanness, true to the traditions that form part of our nation.”²⁰¹ However, though ANC tried to seem like they took high interest in matters concerning traditional institution, they have been severely criticised for neglecting the process of implementing traditional political bodies. Nhlapo argued in an interview in 1999 that the will to provide for a political role of the traditional leaders, were not especially high:

“Regarding the implementation of the constitution, the ANC stalled, and stalled and stalled on so many things; the establishment of the Traditional [Provincial] Houses and the establishment of the [National] Council of Traditional Leaders. They stalled to the point that the Council of Traditional Leaders wanted to take them to the Constitutional Court (...) because even though the draft constitution said that the Councils should be established, it had yet not been established. At the same time a lot of the laws that were to be submitted was unconstitutional because they had cultural or a customary law element. Yet the traditional leaders had not consulted, since the Houses and Councils had not been set up. They were beginning to say, when you eventually want to make these laws operational, we are going to challenge the process, because they are not constitutional. There were reasons for these delays, however. Especially due to the establishment of Traditional Houses, since questions like “how many seats are there to be, and how many should be given to women etc.” were debated. These delays, however, made the relationship between the traditional leaders and the ANC very strained. It came to that extent that the traditional leaders declared in our workshops and in public statements that they were now in a state of dispute with the government. It came to that stage.”²⁰²

The matter that has created the most immense conflict between the ANC and the traditional leaders is the problem defining the role and the functions of the traditional leaders in local government. At the 50th National Conference of the ANC in December 1997, often referred to as the Mafikeng, a resolution argued that there is a need to clarify the role of traditional leaders at local level: “Local government in rural areas will be restructured in order to achieve a clear definition of roles between elected councils and legitimate traditional leaders in a manner that eliminates existing uncertainty and friction, that allocates the performance of municipal functions to elected local government; that upholds the principle of democratic

²⁰¹ Mandela, Nelson, speech at the inauguration of the National Council of Traditional Leaders, Cape Town 18 April 1997.

²⁰² Nhlapo, Thandabantu, interview, Pretoria, 17th of June 1999.

Box 5.1: Excerpt from Local Government: Municipal Structures Second Amendment Bill, 2000. “The functions of traditional authorities” as presented by the government prior to the local elections.

Functions:	<ul style="list-style-type: none"> A. To collect and administer all fees and charges which are according to custom payable to the traditional authority within the traditional area of that authority B. To receive fines and fees collected with regard to the exercise of customary law: C. To administer any funding allocated to it from any source D. To make recommendations in connection with the appointment of headmen E. To perform such functions as may be delegated to it by municipal council F. To provide direction and leadership in cultural activities G. to be the custodian of culture and function H. To attend to matters relating to witchcraft and divination within communities I. To carry out all orders given to it by competent authorities J. To make known the requirements of any new laws to the community K. To convene meetings of common members L. To promote the interest and well being of residents in its traditional area M. To control the holding of initiation ceremonies N. To facilitate the gathering of firewood O. To coordinate first fruit ceremonies P. To coordinate rainmaking ceremonies; and Q. To coordinate the clearing of fields to ensure good harvest.
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government and that extends the notion of democratic governance to include the constructive role to be played by legitimate traditional leaders.”²⁰³

Few actions however followed the intention of this resolution. The interim constitution had established that the second free national elections of South Africa were to be held before the end of 1999. The local government structure outlined for these elections, made the traditional leaders raise their voices, since it did not provide any specific functions for them in the municipalities. Secondly, the new municipal boundaries went across traditional communities, as a consequence of this the traditional leaders argued that it would make them lose control over various functions which they traditionally performed. It became apparent to the government that they needed to clarify the position of the traditional leaders before the election date could be announced. The announcement was delayed three times as a technical team comprising of traditional leaders and officials from the Department of Provincial and

²⁰³ ANC 50th National Conference Resolutions, Post-Conference Documents, *Role of State and Governance; Traditional Leadership*, Mafikeng, 16-20 December 1997.

Box 5.2: Excerpt from Local Government: Municipal Structures Second Amendment Bill, 2000. “The role of traditional leaders” presented by the government prior to the local elections.

Roles:	<p>A. Officiating at the opening and closing ceremonies of municipal councils</p> <p>B. Presiding over the opening of customary proceedings</p> <p>C. Liasing, on behalf of municipal councils, with communities in respect of matters which affect the communities concerned</p> <p>D. Presiding over traditional, customary axed wedding ceremonies</p> <p>E. Participating in burials</p> <p>F. Mediating during ancestral worship: and</p> <p>G. Presiding over the inauguration of headmen.</p>
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Local Affairs sought to determine the impact of the new local government dispensations on traditional authorities.²⁰⁴

Mbeki needed in this situation to find interim solutions to the question, with the promise of soon-to-be final solutions. This made him agree on a decision to double traditional leaders’ representation in local municipal council, from 10 to 20 percent. This concession was not sufficient for the traditional leaders, and on the other side, the opponents of traditional rule, rejected it deeply. Zakes Hlatshwayo, the director of the National Land Committee, spelled out his view in an article in Sowetan, where he argued that Mbeki had given in to tradition with a compromise “hatched behind close doors, without any proper consultation”.²⁰⁵

On the other hand, this concession was not sufficient to convince traditional leaders that the government would soon provide them with specific roles and functions in the local government. On the 3rd of November the government tried to ease the situation by drafting a Bill which clarified the role of the traditional leaders. Box 5.1 and 5.2²⁰⁶ presents the content of the intended Bill, and as one can see, it does not particularly clear up the situation of the traditional leaders. Box 5.1 states in function E that traditional leaders might if they wish perform tasks which the municipal councils delegate them. Apart from this they are to enjoy

²⁰⁴ Smith, Koos, Strategic Manager in the Free State Government Association, in *Traditional leaders: Their participation in local government*, Local Governmental Bulletin , Volume 2 No. 4 December 2000:1.

²⁰⁵ Hlatshwayo, Zakes, *Mbeki gives into tradition: Compromise decision was hatched behind closed doors, without any proper consultation*, Press Article Sowetan, the 4th of September 2000.

²⁰⁶ Government Gazette, Ministry for Provincial and Local Government, *Local Government: municipal Structures Second Amendment Bill*, Vol. 425, No. 21727, the 3rd of November 2000.

predominantly ceremonial and cultural functions as for instance function O, coordinate first fruit ceremonies. However, function N states that they do have the power to facilitate the collection of firewood. The roles of traditional leaders presented in Box 5.2 did not accomplish more than settling the ceremonial authorities of the traditional leaders. As for instance role A specifies the role of the traditional leaders to officiate at the opening and closing ceremonies of municipal councils. The Bill was heavily criticised in the short consultation process from the 3 of November until it was to be tabled in parliament, the 19th of November.

Of enormous concern for the ANC was the disagreement from Contralesa, which started to highly disapprove of the government's inability to clarify traditional leaders role. The ANC's Premier of the Northern Province, Ngoako Ramathodi, needed to woo the traditional leaders in a speech full of promises. First, he marks out the government's position: "It is (...) abundantly clear that the ruling party accepts the reality that, the institution of traditional leadership is here to stay. Of particular significance is our recognition of an active role for this institution in matters of governance." Secondly, he states the importance of standing together: "So, fundamental to our approach is the belief that, the institution of traditional leadership and democratic structure must complement each other, rather than stand in opposition to one another. In this principle lies the future of our governance. Implementation of the principle would result in a unique structure of governance, which does not water down any of the institutions." Then, the apology: "However, we are aware that the proceeding with these elections without addressing the legal systems of the interim, might result in an unintended reduction of the powers of traditional leaders." And, at last an invitation to enter the elections with the ANC: "As champions of their people traditional leaders, should be at the forefront ensuring that the poor, the majority of whom are rural and African, have the opportunity on 5 December to vote for Councillors that will ensure a better life for the poor."²⁰⁷

The Bill has not yet been tabled in the parliament. In a media statement from the 1 of June 2001 the minister of Provincial and Local Government, Mufamadi, again asked people to be patient, since the matter under discussion is severely delicate. "In clarifying government's position on the issue, one has to understand and take into account the history and complexities surrounding the role and function of institutions of traditional leadership in a

²⁰⁷ Ramathodi, Ngoako, speech at the provincial conference of Contralesa, 11 November 2000.

democracy”. He states further that the matter is not just in the interest for the government and the traditional leaders. There are by far many other stakeholders to consult, and consulting takes time.²⁰⁸ The government have given an impression that it is interested in clarifying the specific political authority of traditional leaders. However, in the case of local government the government seems very inefficient in delivering political actions to implement the traditional leaders position. On national and provincial level the government has been more efficient. In Chapter 5.2.3 I am going to present initiated and amended legislation concerning the question of traditional leaders political authority. Before this I will centre my attention of the official statements regarding judicial authority.

5.2.2 Judicial authority: Official statements

It is difficult to find any sources that clarify the government’s specific ideas on judicial authority of traditional leaders prior to late 1998. Prior to this, it seems like ANC’s concerns about judicial African traditional concerns women’s right to equality under customary law. In a resolution presented after the 50th National Conference of the ANC, December 1997, the only matters related to judicial authorities are the ones who reflect concerns for women’s rights. In accordance with customary law, the resolution argues that in order to avoid “inequality between men and women” and also to make certain that “an inferior status for women [not] continues to be entrenched through customary law” one needs “... to campaign for the review of all laws, customs, traditions and any other discriminatory and oppressive practices which are totally against the equality clause in the Constitution”. Further this resolution also argues that “the ANC includes in its own political education programme a component to raise awareness among our people, especially in the rural areas, on these discriminatory customs, traditions and practices.”²⁰⁹ These statements seem to be in line with a report of the ANC Women’s movement National Conference in April earlier the same year. It therefore seems like there is a political will inside the ANC to provide for a reform of the customary law in order to protect women’s right to equality.

In the beginning, the process seemed to be influenced by normative aspects regarding the choice of law and to transform discriminating aspect of the law. In late 1998 there was a shift

²⁰⁸ Mufamadi, Fholisani, Sydney, *Budget Speech in Parliament*, media statement, the 1st of June 2001.

²⁰⁹ Resolutions presented under “Building ANC” based on The 50th National Conference of the ANC, Mafikeng, 16-20 December 1997.

in this strategy. Minister of Justice, Moosa (ANC), after confrontations by different ANC opponents, started to stress the importance of a more holistic solution to the question of the judicial power of the traditional leaders. In addition to not only focusing on piecemeal reforms, Moosa also required a more time efficient process occupied with practical questions rather than abstract philosophical considerations.²¹⁰ This indicates that ANC now presented a political will which did not only concern matters related to constitutional protection of individuals, but also paid interest to topics regarding clarification of the judicial function and role of traditional leaders in the future.

If one is to consider both the government's initiations in the legal process and the content of official statements, there seems to be a shift in the political will towards traditional authorities late 1998. Later in this chapter I am going to discuss why this shift occurred. However, it is important to estimate that "not initiate new laws" also could be understood as an acceptance of the judicial authority of courts and laws. In cases where new laws are not passed the pre-1994 laws continue to apply, in order not to create a legal vacuum. It was thus decided that laws before 1994, would continue to apply if they were not in conflict with the constitution including the battered 1927 Black Administration Act and its counterparts.²¹¹

5.2.3 Political authority: Initiated legislation

The first initiative to clarify the role of the political authority of the traditional leaders was the Council of Traditional Leaders Act assented the 5th of April 1997. This council was formed with the object of promoting the role of traditional leadership within a "democratic constitutional dispensation" and to "enhance unity and understanding among traditional communities". The Council "might" also "advise the national government and make recommendations relating to traditional leadership, the role of traditional leaders, customary law, and the customs of communities observing a system of customary law."²¹² The act states further that the council might "investigate and make available information on traditional leadership, traditional authorities, customary law and customs," but it shall, "at the request of the President, advise him or her in connection with any matter referred to in this section; and

²¹⁰ I have not succeeded in presenting any primary sources for these statements, but the ministers views on the further process is presented in the SALC's Discussion Paper 82, 1999:xi.

²¹¹ Van Oomen 2000: 3.

²¹² Council of Traditional Leaders Act No 10 of 1997.

present an annual report to Parliament”.²¹³ Thus the government accommodated the advice of the constitution in establishing houses of traditional leaders at a nation level.²¹⁴ The traditional leaders thus received some limited legislative authority.

Houses of traditional leaders were also established in the Provinces due to this legislation. Houses are eventually established in six of the nine provinces, have different sizes and enjoy different degrees of authority due to legislation by the provincial governments. Five houses explicitly make provision for studying legislation dealing with traditional law and customs. The Houses have 30 days to comment and failure to comment may result in the Bill being passed. If objections are raised, the Bill may not pass for a period of 30 days. There is however no indication of how objections raised ought to be dealt with, since there is no obligation for the provincial legislators to take these comments into account. However, the KwaZulu-Natal and the North West give more detailed expositions of the functions of the houses. Both Houses states that all functions and powers of Traditional Leaders, which existed prior to 1994, still remain in force. In the case of KwaZulu-Natal these powers and functions can only be withdrawn by a resolution of the House based on a two-third majority.²¹⁵

In accordance with the Remuneration of Public Office Bearers Act of 1998, all traditional leaders, in the National or Provincial Houses and also others, shall be paid allowances as other public official holders. By this it is established that they are recognised as having a function in the state. So the question is actually after 1998, *what* role they ought to play, not *if* they have a role to play in the state apparatus. This is interesting since there is no description or definition in the legislation of the relationship between the Houses and other state departments, except in regard to their consultative role in questions of legislation. But since there are no obligations for the parliament or other legislative organs to consult, the Houses have no real powers to influence legislation dealing with traditional authority. Du Plessis and Scheepers have argued that from the establishment of the National House until late 1999, only two Bills were discussed in the House.²¹⁶ These were the Recognition of Customary Marriages Act of 1998 and the Succession Amendment Bill of 1998, where the latter was soon withdrawn from

²¹³ Ibid.

²¹⁴ For the record, one and a half year later the Council changed its name by an amendment to “National House of Traditional Leaders”.

²¹⁵ Du Plessis, Willemien and Scheepers, *The House of Traditional Leaders: Role, problems and future*, Seminar Report, Konrad-Adenauer Stiftung, Johannesburg, 2000:7.

²¹⁶ Ibid: 3

parliament. Both these Bills also seem to have been introduced to the houses by the Law Commission, not the government.²¹⁷

An act, which profoundly influenced the role of the traditional leaders, was the “Municipal Structures Act” of 1998. This is an example of an act that probably would have prevented some of the problems referred to in chapter 5.2.1, had it been introduced to the traditional houses at an earlier stage. This act sets out the main features of local government in South Africa. The act states that traditional leaders may participate in the meetings of the municipal councils, but leaves the details for provincial premiers to decide, if this is considered necessary. All executive powers are, as on the provincial and national level, in the hand of the political elected governments. All administrative and political functions have thus fallen under the role of elected officials. This act also tries to settle the boundaries of the local districts, which has proved to be a contentious issue. The traditional authorities have protested vehemently against the process of municipal demarcation, since these borders often split their communities in two, leaving each half to fall under a different elected local government, see chapter 5.2.1.

However, even though the traditional leaders were not consulted in the process of amending the powers and structures of the local government, the government had in 1998 initiated a process of determining the place and role of traditional leaders. First, researchers from the “traditional affairs” section at the department of justice and constitutional affair produced a Status Quo Report on traditional leadership and institutions.²¹⁸ In which they held workshops and travelled around the country in order to find answers to practical questions such as; how many traditional leaders are there? Which types of traditional leaders do we have? What are their remunerations? Which functions did they perform in their society? Following a draft discussion document towards a white paper on traditional leadership and institutions were presented the 26th of April 2000.²¹⁹

The white paper was to mark the beginning of a process aimed at “engaging South Africans in a dialogue regarding the institution of traditional leadership, in terms of affirming it and

²¹⁷ *ibid.*

²¹⁸ Department of Justice and Constitutional Development, *Status Quo Report on Traditional Leadership and Institutions*, Draft 1, 1999.

²¹⁹ Department of Provincial and Local Affairs, *A Discussion Document towards a White Paper on Traditional Leadership and Institutions*, 11 April 2000.

defining it, and clarifying its role in democratic governance.”²²⁰ The white paper, however, did not clarify the political authority of the traditional leaders, but it certainly did engage South Africans in a dialogue. As Box 5.1 and 5.2 revealed the rushed Bill on the functions and role of traditional leaders in the wake of the white paper, did not specify the authority of traditional leaders, but it did mark the start of a belated debate on what exactly the function of the remunerated traditional leaders were to be. The Local Governmental Law Bulletin, did just in time of the election, print an article on the present rights and position of the traditional leaders. This article stated that all traditional leaders who were to possess offices needed to be identified. Then the number of traditional leaders could not exceed 20 percent of the community council, where they enjoy the opportunity to express themselves and participate in all faces of a legislative debate, but they are not to vote under any circumstances. They are not to be remunerated, since they already receive allowances from national level. Finally, the Municipal Elected Councils should not until more specific legislation is amended, try to “change the roles of traditional leaders too much.”²²¹

It thus seems like the government has in some way tried to initiate legislation aimed at clarifying the political authority of the traditional leaders. The main process did, nevertheless, not start until late 1998, and though many features are under investigation, few acts have passed through the parliament. This gives an impression of the government’s great challenges in solving the question of what the political authorities of the traditional leaders are to be in the future democracy. There might be some political will to initiate legislation, but the government seems to await the implementation until it sorts out the multifaceted consequences of creating a role for traditional leaders in the liberal democracy.

5.2.4 Judicial authority: Initiated legislation

The first initiatives to provide for a new legislation in matters related to traditional judicial institutions were taken even prior to the final signing of the new constitution the 10th of December 1996. The South African Law Commission on an initiative from the government formed a project 90 called the “Harmonisation of Common Law and Indigenous Law”. The committee presented Issue Papers on two subjects in relation to this project in June 1996. The Issue Papers presented were first, the Customary Marriages and secondly, The Conflict of

²²⁰ Ibid:3.

²²¹ Smith 2000:6.

Personal Laws. In the Law Commissions annual report of 1996 on the question of customary marriages they argue: “The new constitution now presents an opportunity to rethink the legal dualism of the past”.²²² The questions posed further are if there is a need for a common law on marriage in South Africa, or whether indigenous marriages are to be dealt with in separate legislation. If so would indigenous practices, such as polygamy and bride wealth (lobola) be compatible with the new constitution, and if so, in what specific way?²²³

This signifies that on this initial stage, it is not decided whether a dual legal system is to be kept. It is to be debated. Doubt about the future of the customary law system is also represented according to the issue of conflicts of law. The Annual Report of 1996 states: “At present it is far from clear when indigenous law is applicable, for the rules on application are fragmented, vague, badly drafted and out of date”.²²⁴ The committee states further that this is also a question of “choice of law”. Is which law applied to be attributable to persons or territories? In order to answer this, the committee argues that one need rules which reflects the fact that litigants are subject to particular legal regimes because of personal qualities such as cultural orientation. There was in other terms political will to investigate the relationship between common law and customary law, and also to clarify issues where customary law conflicts with other principles entrenched in the new constitution.

This might denote a political will to sort out some normative questions of whether it is possible to make the traditional judicial institutions compatible with the constitutional rights entrenched in the constitution. The process of reforming customary marriages got extensive attention both in civil society and in media. The Recognition of Customary Marriage Act 120 of 1998 was passed through the parliament at the 20th of November. The questions related to the conflicts of law, did not create such an extensive attention. It remained mainly an academic debate within the legal branch. Through the process started at the same time as the process of recognising customary marriages, it proved to be more difficult to draft legislation on the matter. At the 27th of November 1998 the Law Commission considered a draft report on the conflicts of law. Not until almost a year later did the minister submit the draft report. The act is still not annexed by the parliament.

²²² South African Law Commission, *Annual Report*, “Project 90 – Harmonisation of common law and Indigenous law”, 1996: 51.

²²³ Ibid.

²²⁴ Ibid.

Through the process of recognising customary marriages it became evident that the dual law system was to exist in the future. The government thus initiated two other legal reforms in regard to the subject of harmonising common law and indigenous law. The first Issue Paper presented was on the subject of succession in customary laws.²²⁵ This question was related to the question of recognising customary marriages, since it profoundly represented the right to inheritance for women living under customary law. The second Issue Paper was on “Traditional courts and the judicial function of traditional leaders”. Even though the three first reforms were related to questions of constitutional rights and viewed as reforms aimed at protecting citizens living under customary law, this is the first reform that directly relates to the function and role of the traditional leaders. While the three first reforms provide for liberalisation of traditional authority, the latter intend to specify and establish a role of the traditional leaders in the future legal system.

As I will discuss later, the intention to draft a bill on the subject of customary succession caused severe conflicts. It was presented to the parliament in late September 1998 only to be withdrawn, and sent back to the Law Commission. A bill concerning the question of succession has not yet past through the parliament. The process of specifying the role of traditional courts is still not legislated, but this process somehow became absorbed in a wider process of settling the functions of traditional leaders.

The government also initiated a Bill concerning the administration of estates belonging to traditional communities in according to the Black Administration Act of 1927. The South African Law Commission published a Discussion Paper in December 2000.²²⁶ A Bill is to be tabled in parliament during 2002, but it has already caused controversy. The Bill, which is to recognise African traditional communities as legal persons capable of acquiring property, has caused discussion both within and outside the ANC. For instance, the ANC MP Lydia Ngwenya rejected the idea that state land was to be transferred to communities, as embodied in a draft Bill on Communal Land Rights. On this matter the ANC MP and Contralesa president, Chief Phathekile Holomisa and IFP MPL Hulumeni Gumede backed the Bill. While Ngwenya argued that individuals should hold the right to land, Holomisa stated that the legal land right ought to be communal, in the title of a relevant traditional authority: “Not to

²²⁵ The Law Commission changed the name of the process in 1998. Instead of using the word indigenous law, one now started to use the term customary law.

²²⁶ South African Law Commission, Project 90, *Customary Law: Administration of Estates*, Discussion Paper 95, 2000.

do so would amount the further erosion of the role of traditional leaders in the life of our people, and would serve to cut the ties between the land, the people and their ancestors who bequeathed the land to us”.²²⁷ The Bill will however probably not be amended before the Department of Provincial and Local Affairs have tabled a complete white paper report on the Role of Traditional Leaders.

On the subject of judicial authority, the government’s political will to provide for a clarification of the customary law and courts position in the future seemed to be hesitating. In the beginning the government focused on reforming aspects of the customary law of which were regarded as incompatible with the constitution. Thus it also indirectly approved of customary law. Not until late 1998 however, did the government attempt to start a process of specifying the judicial role of traditional leaders. A process still not finished, but at the list of “soon-to-be-presented-in-parliament” laws at the Department of Justice and Constitutional Affairs. The Bill on Succession in Customary Law and the Bill concerning conflicts of law, the Application of Customary Law Bill, share the same fate.

The government has also initiated law reforms, which influenced the process, though they were not directly on the topic. The most important one of these were the “Promotion of equality and prevention of unfair discrimination Act of No. 4, 2000”. This Act states that the new democracy “requires the eradication of social and economic inequalities, especially those who are systemic in nature, which were generated in history by colonialism, apartheid and patriarchy...” It does not mention legal institutions, but it does expose the liberal view of the government, and a specification of the importance of equality and non-discrimination in society.

For the record, I can also mention that there are other interesting pieces of initiated legislations relating to cultural recognition that do not have specific influence on traditional leaders. There is an initiated process of legislation on Islamic Marriages and related issues.²²⁸ A process has also started to establish a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. This commission was established in the constitution as a concession to vocals of Afrikaner rights. In August 2001, the Minister

²²⁷ Cited by Laspreet, Kindra, in Daily Mail & Guardian, *Land affairs officials push for ‘African way of life’*, the 6th of December, 2001.

²²⁸ For further information see for instance the South African Law Commission Annual Report 2000.

for Provincial and Local Government tabled legislation to establish this Commission and regulate its powers. The bill is now discussed in the affected Parliamentary committees. The Afrikaner Volkstaat Council is however repealed by an Act of the 23rd of November 2001.²²⁹ The establishment of a Volkstaat Council was recognised by the interim constitution but failed to be entrenched in the final constitution. Internal conflicts and the government's attitude towards it made the process complicated.

5.2.5 Traditional authority by 2001

If one is to find any pattern in the political will of the government, there seems to be two different features that they needed to adjust to. The constitution entrenched a conditional recognition of the traditional authorities. The fact that it was “conditioned” implied a need for reforming traditional institutions and customs into a more liberal vision of universal rights. The fact that it was “recognised” signified that traditional leaders ought to be given a function and role in the new Democratic order. As illustrated in Figure 5.1 the first law enacted after the signing of the constitution, is the law of establishing a council of traditional leaders. This gives a clarification of power, but it is not a reform due to reforming tradition. Nhlapo, as mentioned in chapter 5.2.1, has argued that the establishment of the houses were delayed, and one might suggest that it was not established as a direct result of the government's initiative. One might rather believe that forces outside the government pushed on for an enactment of this Act. The remuneration Act established that traditional leaders in and outside the houses were to achieve allowances. This implies that one does regard the traditional leaders as still having a function as other public office bearers such as the presidency, ministers etc.

However, the traditional leaders were remunerated by the state prior to this Act, and it might have caused problems to take away the income of a group of people recognised by the constitution. The next Bill enacted is the Customary Marriage Bill, which highly was initiated by the government, and this act is aimed at reforming the customary traditions into a more liberal vision. A suggestion might be that the reformation process was more in line with the ideas of the government than the clarification of roles and functions, particularly when one

²²⁹ Repeal of Volkstaat Council Provisions Act [No. 30 of 2001].

Figure 5.1: The status of important initiated legislations concerning traditional authority

Stage in process	Initiated reforms	Reforming of traditions	Clarification of power
Legislated	Council of Traditional Leaders Act 1997	No	Yes
	Remuneration of Public Office Bearers Act, 1998	No	Yes
	Recognition of Customary Marriages Act 1998	Yes	Yes
	Local Government: Municipal Structure Act 1998	Yes	No
	Local Government: Municipal Structures Amendment Act 1999	Yes	No
	Local Government: Cross-boundary Municipalities Act 2000	No	Yes
	National House of Traditional Leaders Amendment Act 2000	No	Yes
Initiated Bill	Bill Local Government: Municipal Structures Second Amendment Bill 2000	No	Yes
White Papers	A Discussion Document towards White Paper on Traditional Leadership and Institutions, 11 April 2000	Yes	Yes
Bills at the table of Department of Justice	Traditional Courts Bill	Yes	Yes
	Succession in Customary Law Bill	Yes	No
	Application of Customary Law Bill ²³⁰	Yes	Yes
	Communal Land Rights Bill	No ²³¹	Yes

notices that the three Acts on governmental structure and boundaries do not mention the role of traditional leaders at local level. In 2000, two years later, an Act on Cross-Boundaries was enacted. This Act mentions several communities that need to be restructured, and hence in line with the borders of some traditional communities. This Act represents that the earlier acts on local government did not address the question of the clarification of traditional leaders authority at local level in a very specific manner, and a public debate was needed to put forward a clarification what happened to the power of traditional leaders if their communities were divided by different municipal borders.

As figure 5.1 also signifies, there are quite a few bills which have not been tabled in parliament, and also some has been withdrawn because of the need for further investigation. Both the Bill on Local Government: Municipal Structures Second Amendment and the Succession in Customary Law Bill, has been introduced to parliament, but withdrawn. The

²³⁰ Earlier known as SALC project 90: *Harmonisation of Common Law and Customary: Conflicts of Personal Law*.

²³¹ By February 2002 it seems like it is not going to limit the authority of traditional leaders.

first Bill aimed at clarifying the role and functions of traditional leaders was withdrawn because it did not to a sufficient degree accommodate the traditional leaders, who rejected it. A consequence of this is that the role and functions of the traditional leaders in the municipal councils established after the 2000, is still very unclear. See box 5.1 and 5.2 on page in chapter 5.2.1.

The Succession bill was in line with the government's campaign of reforming traditional customs. The withdrawing of this bill is close to a watershed in the process on reforming traditional customs. In an interview Nhlapo argued that the government rushed this bill since they were "very keen to enact as much fundamental and radical legislation as possible before the elections."²³² The Bill consisted on very sensitive subjects for traditional leaders, and it was passed by the cabinet and presented in the public hearings of parliament when the consulting by the law commission had just started. The traditional leaders became very hostile towards it. It was withdrawn both because it entailed principles that still required negotiations, and because the government was afraid that the hostility might upset the process of passing the Bill on customary marriages. Nhlapo has argued that it might be more the way the process had turned, than the principles in the Bill, that opposed the traditional leaders: "One interesting feature was that many chiefs were not opposed to the principles of the Bill in some ways. They said; 'The last time we saw that project was when the Law Commission asked for our views on it.' Open-ended questions in the Issue Paper. 'We have just started to take these questions and recommendations to our people, and now all of a sudden we see the discussions have reached the parliament. We do not like that!' So it was withdrawn."²³³

After this Bill was withdrawn, no Bills aimed at reforming the traditional customs and institutions have been passed by the parliament. They are all, as we can see in figure 5.1, still at the table of the justice department. In 2000 the researchers at the section of traditional affairs was moved from the Department of Justice and Constitutional Development to the Department of Provincial and Local Affairs. By this the white paper on traditional leaders and institutions, which aim at clarifying traditional leaders role and functions in society, also moved with it. This gives an impression of a change in governmental attitude towards the process. Until late 1998 the government exposed a political will to reform the institutions and customs of traditional communities into a more liberal notion. After 1999 it seems like all

²³² Nhlapo in interview 1999.

²³³ Ibid.

Bills initiated are of a more practical kind, which aims at clarifying the role of traditional leaders especially in the political system, but also in the judicial. It is thus interesting to see what happens after the white paper on traditional leaders and institutions are finished. Is the aim of the government to only seek clarifications of some practical aspects of the traditional authorities, before it once again turns to questions of reforming the institutions and customs in line with the constitution? Or was this endeavour nothing more than initiatives inspired by a normative constitutional process?

However, to put this discussion in to a wider perspective one can use quantitative measures. Out of 551 new Acts amended from the opening 1996 to the closing 2001 of parliament, five Acts directly mention traditional leaders role and functions. One Act regards judicial authority, The Customary Marriage Act. Two Acts regards legislative powers of traditional leaders in consultative organs, The Council of Traditional Leaders Act and National House of Traditional Leaders Amendment Act. One Act regards executive powers, since it settles the right of traditional leaders to achieve allowances for their holding of public offices, The Remuneration of Public Office Bearers Act. One Act is an amendment of an earlier restriction of power, the Cross-boundary Municipal Amendment act. At least six Bills are initiated which intends to specify the powers of traditional leaders and customary law, however, these Bills will probably not be tabled in parliament before the white paper on traditional leaders and institutions are finished.

5.3 What influenced the political will?

As a conclusion to the empirical discussion of this paper, it might be interesting to point at some tentative explanations of what have influenced the process of implementing the traditional recognition entrenched in the constitution. I have decided to divide the process into three different periods, and try to explain which aspects that affected the process. First, here is the process from 1996 until late 1998, which represents the period of reforming traditional institutions and customs. The second period represent the watershed of the process in late 1998, why did a change occur in the government's action? The third period represents a will to clarify the traditional leaders roles and functions from late 1998 until 2001.

5.3.1 The venture of reform 1996 to 1998

As a liberation movement the ANC had always stressed the right to be equal, and it severely stressed the value of non-racism and non-sexism. Traditional institutions and customs to some extent represent both these two features. The women's league inside the ANC stressed that the traditional recognition was conditioned by the constitution, and in order to find their place in the new free South Africa, the traditional authorities needed to adapt to this. The process of recognising customary marriages became a unique process in the South African system, since the government initiated a free and fair consulting process where everyone could participate.

The official customary law had remained virtually unchanged since the Black Administration Act in 1927, and its vision of women did not represent liberal values of equality. The Law Commission embarked on a new approach of consulting in law making reform. The new vision was "if you are going to make laws, you have to make them with the people, not just for the people".²³⁴ On the process of recognising customary marriages, the Law Commission arranged different workshops from early 1996 until 1998. By doing this people from the traditional communities were invited to participate in the reforming of their institutions and customs. A very interesting product of this process was that the debate between traditional leaders and especially younger women, often representing women's NGO's, did mark out some interesting nuances in the old dichotomised tradition vs. feminism debate. Through these debates it became obvious that women did not necessarily want to abolish the traditional authorities, they more insisted on reforming them. This was not due to the constitutional protection of them, but as with many men, women identified themselves with these cultural traditions.

Mbatha has argued that the reform process needed to be understood in a context. Which meant that the customary law had been denied to develop along with the people's wish because of Apartheid legislation. For instance, though people entered into western marriages, they did still pay lobola (bride wealth). This did represent a wish to identify with African culture and tradition, but also an interest for the property consequences in western law. Since women were denied the right to property in customary law, they did not agree to marry under it. She further argues: "It is very important that the law should draw from what people are

²³⁴ Nhlapo interview 17th of June 1999.

doing in practice. In practise people are complaining about marriage accordance to both customary law and western law. And why do they complain? Because neither is based on their culture as they know it.”²³⁵

The challenges for customary law as it was introduced in workshops pointed at other implications than those one had addressed from an intellectual and academic viewpoint. As Mbatha in the case of paying lobola “Older women said that they would like to keep the tradition of lobola to continue. Younger people were saying that they did share the sentiments, but faced with the problem of unemployment they could not afford it. So at the end of the day the issue was whether the practice was one thing that one could afford.” Ngema rather focused on the importance of discussing the patriarchal features of certain practise “Like *lobola* for instance, it was something a family was given as ‘thank you for haven taken care of this woman’. It was not regarded as a price. With the generations this have changed, and now it is more like if someone pays the *lobola* to your parents, it is like your price. It was not like this in the old days. Now they are saying that you are my property. I have paid for you. We cannot say that *lobola* must be taken away, but something need to change...” The hope was then that one by consultation and discussions would be able to eradicate the discriminating features of traditional institutions and customs. Consultation was regarded as important since if the reforms were to have any consequences people needed to understand why these reforms were introduced.

Oomen had argued that this consultation process was too urban, and that since they were city people, they did not to a sufficient degree have an idea of what were going on in the rural areas. She has argued that when information is needed on life in traditional authority areas, policy-makers generally turn to the Houses of Traditional Leaders, or to other organisations that represent them. The consequence of this is that these “traditional leaders, just like many of the anthropologists consulted by government, have an interest in painting a conservative picture of culture, one in which traditional leadership is immensely important.”²³⁶ This might be a vital point to notice, since if one is consulting with traditional leaders they do have a tendency to overestimate the importance of traditional culture and custom in day-to-day life. Nhlapo has argued that these consultations had another important function than that of asking of people’s advises in a law-making process. The consultations were also educational, as a

²³⁵ Mbatha interview 1999.

²³⁶ Oomen 2000:7.

means to teach people, and then particularly the traditional leaders, about liberal values.

This period then seems to be influenced by the normative debates stirred by the transition to democracy. In 4.3.2 I argued that the women's position in parliament was one of the reasons why the power of traditional authorities had diminished between the interim and the signing of the final constitution. After the constitution was signed, it seems like the women represented a force behind the reformation of the traditional institutions. These forces concentrated on the judicial authorities and did not seem very interested in the clarification of traditional leaders role and functions. The ANC MP, Pregs Govender, who chaired the Joint Standing Committee on the Improvement of the Quality of Life & Status Women, roused a public debate by arranging workshops around the country, sometimes together with the Law Commission. It seems like the recognition of marriage law became one of the key topics for the women delegations, together with questions like domestic violence, maintenance and labour laws.

An enactment of the recognition of customary marriages Bill represented a symbol of the powers of the women's movement, and due to its consultative aspect it might also have been an important Act for the government in illustrating the fairness and openness of the new political system. The female MP's influence might be important, because a Bill on the Conflicts of Law, which was initiated at the same time, has not yet been tabled in parliament. However, this bill might also have reflected a new aspect of influence which up until this time had not been as visual, the need to actually clarify the role and function of the traditional authorities. Before settling how to reform these institutions, it became apparent that it was important to address the questions: What are these institutions? Was there a point in reforming traditions and institutions that one actually tried to do away with?

5.3.2 The watershed of 1998

1998 somehow marks a watershed in the process, since the government from having focused on the importance of reforming the traditional institutions and customs, started to embrace a more pragmatic strategy of clarifying the roles and functions of traditional authorities. It was the year when the Recognition of Customary Marriage Bill was enacted, but a few months earlier the government had started auditing traditional leadership in an effort to develop a

Box 5.3: Speech by Bantu Holomisa in Umtata, Eastern Cape, in his speech at the 1-year celebration of UDM, September 1998.

You will remember that I mentioned that the UDM is the political home of all South Africans. It is in that spirit that Traditional leaders and Religious leaders feature so prominently in our activities. These leaders are in their own respective ways guardians of that values that we espouse in our vision and mission. The centrality of their role in the UDM is reflected in their involvement in all our structures.

coherent and new government policy on the issue. When the crises between the traditional leaders and the government raised by the government's effort to rush the process of enacting a bill on succession, it seems like the government even further started to denote the importance of clarifying the traditional leaders role. At least in initiations, though it might not have been followed by political action. An aspect, which might have affected this, was that when the traditional leaders voiced their hostility towards the bill, a rejection also supported by the women's movements, they knew that they soon could play their old joker, their ability to mobilise votes in the elections. In chapter 4.3.3 I argued that the traditional leaders' expected ability to mobilise votes, made them a strategic alliance. ANC hooked up with Contralesa, which has its most predominant foundation in the Northern Province. After the elections ANC received 91.6 percent of the total vote in the provincial elections. ANC also managed to get a high percent of votes in other rural areas.

Except the reluctant establishment of the Councils of traditional leaders, the government had not been doing much in clarifying the role and functions of traditional leaders. As for instance when the structures of the new local government were enacted, the houses had not been consulted. Though the new government wanted to get as many fundamental laws as possible enacted, they also wanted to secure the opportunity to get two-thirds of the votes. If they gained a two-thirds majority this enabled them to change principles entrenched in the constitution. The need for the ANC to address the traditional leaders became more important since a new party entered the scene. In the 1994 elections ANC had been almost the only alternative for the regular African voters. IFP was strictly based in KwaZulu-Natal and PAC was regarded as too limited. In 1997 a new party was formed, the United Democratic Party (UDM). The UDM aimed at challenging ANC's position, and in their 1999 election campaign they tried to woo the chiefs, by pointing to the inefficiency of ANC to deliver on their promises regarding traditional leaders. UDM was an alliance between prior ANC MP Bantu

Table 5.1: 1999 election results for the National Assembly by provinces²³⁷

	EASTERN CAPE	FREE STATE	GAUTENG	KWAZULU NATAL	MPUMA- LANGA	NORTH. CAPE	NORTH. PROVINCE	NORTH WEST	WESTERN CAPE
ACDP	1.1	0.9	1.2	1.8	1.1	1.6	1.1	0.9	3.1
AEB	0.2	0.4	0.3	0.1	0.4	0.5	0.4	0.5	0.2
ANC	73.9	81.0	68.2	39.8	85.3	64.6	89.3	80.5	42.6
AZAPO	0.2	0.2	0.1	0.2	0.1	0.4	0.5	0.1	0.1
DP	6.4	5.9	17.7	9.8	5.0	5.8	1.7	3.7	14.2
FA	0.2	0.8	0.9	0.3	0.8	0.7	0.4	0.6	0.6
IFP	0.3	0.5	3.5	40.5	1.4	0.4	0.3	0.5	0.2
MF	0.0	0.0	0.0	1.5	0.0	0.1	0.0	0.0	0.1
NNP	3.3	5.0	3.9	4.0	2.4	22.5	1.7	2.4	34.4
PAC	1.0	1.0	0.7	0.3	0.6	0.6	1.2	0.7	0.5
UCDP	0.1	0.7	0.2	0.1	0.2	0.3	0.1	7.5	0.1
UDM	12.9	1.7	2.2	1.3	1.4	0.9	2.6	1.4	3.1
VF/FF	0.3	1.8	1.1	0.2	1.3	1.6	0.5	1.2	0.7
Other	0.2	0.2	0.2	0.3	0.1	0.2	0.2	0.1	0.3
Total	100	100	100	100	100	100	100	100	100

Holomisa²³⁸ and former Minister for the NP Roelf Meyer. The party was announced as a non-racial opposition to the ANC, and argued that they wanted to focus more on pragmatic questions than ideological. As pointed out in Figure 4.5 Bantu Holomisa is of royal origin, and it was anticipated that he would get support from the traditional communities in Eastern Cape, because of his position and the party's more conservative and practical orientation. The party also started to talk directly to traditional leaders in their speeches, where they pointed at the importance of traditional leaders involvement in politics, see Box 5.3.

ANC MP and leader of Contralesa Patekile Holomisa had announced in Mail & Guardian in October 1997 that he planned to cut ties with the ANC and join the UDM. He said that his organisation "felt betrayed by the ANC government" and now had to consider seeking new political alliances.²³⁹ The constant threat of the UDM might have influenced the ANC's will to initiate reforms aimed at clarifying traditional leaders functions and role in the political system. When the relationship between the government and the traditional leaders was further strained by the government's policies and procedures in regard to the process of enacting the Succession Bill, this situation was brought to a climax. As presented in 5.2.2 the government according to judicial authority launched a more pragmatic reform on traditional courts and

²³⁷ The electoral Institute of Southern Africa.

²³⁸ Expelled by the ANC in 1996 due to some economic and personal feuds with Stella Sigcau in the former Transkei Government.

²³⁹ Mbhele, Wally *Betrayed chiefs cut ANC ties*, Mail & Guradian, the 3rd of October, 1997.

Table 5.2: Difference in ANC election results for the Provincial Legislation 1994 and 1999²⁴⁰

	ANC Vote %		
	1994 elections	1999 elections	+/-
Gauteng	57.5	67.9	+10.3
Eastern Cape	84.4	73.8	-10.6
Northern Province	91.6	88.3	- 3.3
North West	83.3	79.0	- 4.3
Mpumalanga	80.7	84.9	+ 4.2
Free State	76.7	80.8	+ 4.1
Northern Cape	49.7	64.3	+14.6
KwaZulu Natal	32.2	39.4	+ 7.2
Western Cape	33.0	42.1	+ 9.1
Total	62.7	66.4	+3.7

raditional leaders' judicial roles. On political authority it started the Status Quo Report investigations, which intended to end in the white paper on traditional leaders functions in the democracy. In other words, less ideological and more pragmatic, aimed at clarifying not just reform traditional institutions and customs.

As Table 5.1 reveals the UDM managed to get 12.9 percent of the votes in the provincial elections in the Eastern Cape in 1999. The UDM thus became the largest party in opposition in this province. The ANC managed to get 73.9 percent of the vote, which is normally considered a nice result, but as Table 5.2 illustrates this is 10.3 percent less than in the last election in Eastern Cape. Only one year earlier there were indications of a much lower ANC support, so probably they were able to win back some trust in initiating a new strategy. For instance, Patekila Holomisa decided to keep his associations with the ANC. According to Table 5.1 the United Christian Democratic Party received 7.5 of the votes in the North West. This is an interesting feature since this is a Christian Regionalist party, which is the earlier Bophuthatswana homeland leader Mangope's Party. Both in the Eastern Cape and the North West some percentages of the votes moved to more conservative parties, who voiced their sentiments for traditional leaders.

However, Table 5.2 demonstrates that the ANC increased its total vote with 3.7% in the 1999 elections. If one adds the provincial result, the result suggests that the ANC had

²⁴⁰ The Electorate Institute of Southern Africa.

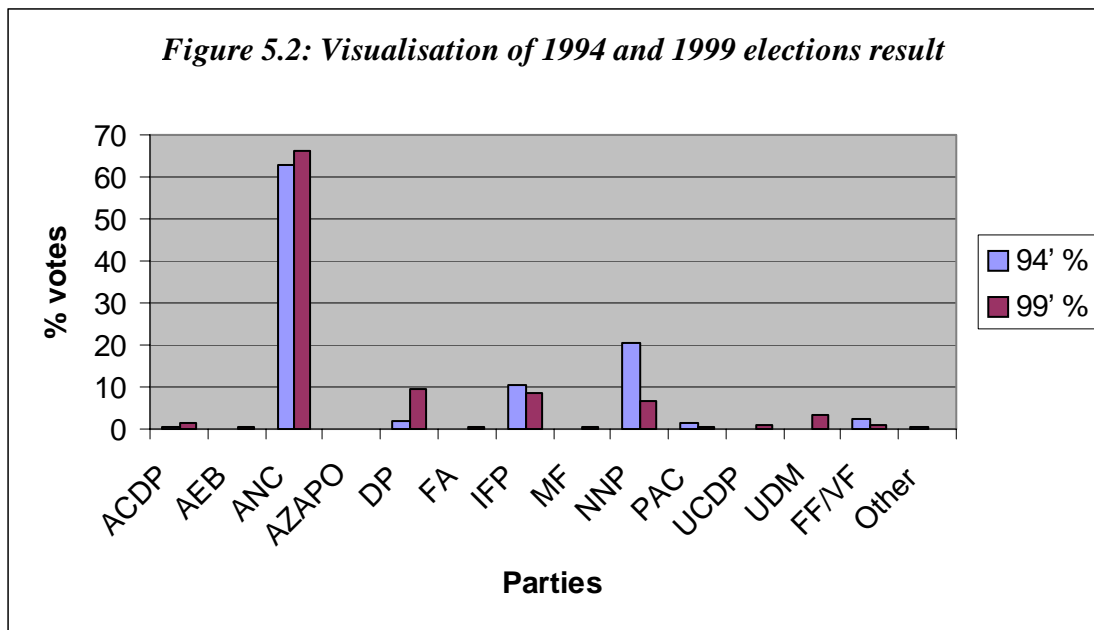
Table 5.3: National election results 1999²⁴¹

PARTY	%	Votes	Seats
ACDP	1.4	228.975	6
AEB	0.3	46.292	1
ANC	66.4	10.601.330	266
AZAPO	0.2	27.257	1
DP	9.6	1.527.337	38
FA	0.5	86.704	2
IFP	8.6	1.371.477	34
MF	0.3	48.277	1
NNP	6.9	1.098.215	28
PAC	0.7	113.125	3
UCDP	0.8	125.280	3
UDM	3.4	546.790	14
FF/VF	0.8	127.217	3
Other	0.2	28.866	0
Total	100	15.977.142	400

strengthened its position. In the old ANC bastion, Northern Province, Table 5.2 illustrates that ANC lost 3.3 percent of the votes. ANC strengthened its position in urban provinces, such as the Gauteng and Western Cape. This suggests a tendency of the ANC getting more trust in urban areas, while loosing some of its former firm grip on rural areas. As table 5.1 reveals, even though Mongopes party, the UCDP, got 7.5 percent of the vote, the ANC lost only 4.3 percent of support compared with 1999. UCDP had not taken votes only from the ANC.

The national election results presented in Table 5.3 indicates that there are more parties represented in parliament after the 1999 elections. An important element in this regard is that many of these new parties have some kind of cultural foundation. Even tough UDM was a non-racial party, they did try to mobilise votes due to the ANC “betrayal” of traditional leaders. UCDP is a “Bophuthatswana” regionalist party. Azanian People’s Organisation (AZAPO) is a Black Consciousness party. Minority Front (MF) is a Muslim party, mainly Indian, which gets most of their votes in KwaZulu-Natal. FF/VF was the only representative of the Afrikaner Right in 1994. In 1999 the Afrikaner Einheitsbeweging (AEB) also became represented in parliament. The Federal Alliance (FA) is regarded as Populist Party, and stresses the importance of strong traditional authorities to crack down on crime in rural areas. IFP lost about 10% of their share of the vote in KwaZulu-Natal compared with the 1994

²⁴¹ The Electoral Institute of Southern Africa.



elections.

According to Table 5.3 the New National Party was not the main opposition party after the 1999 national elections. There are probably two main reasons for this. First, they might have lost some votes due to their legacy as the former Apartheid party. The earlier Liberal Party, now the Democratic Party, is the main opposition party, and Figure 5.2 visualises that this party had increased its share of the votes most since 1994. On the other hand, some voters might have turned against the National Party because they gave into too much in the negotiations. These voters have probably turned to AEB and FA. But these parties might have gotten more support on behalf of the FF/VF.

After the 1999 elections ANC entrenched its position as the majority party. Table 5.2 suggests volatility in the electorate by province. The ANC has lost some of its extremely predominant role in rural areas such as Eastern Cape and Northern Province. These are also according to Nhlapo the houses with strongest Houses of Traditional Leaders. ANC gained support in urban provinces such as Western Cape and Gauteng. The Democratic Party, which is the party with the highest increase in its percent of votes, is as mentioned in chapter 4, see the discussions of Figure 4.2 and 4.3, also a party with liberal notions, and in many ways sceptical towards cultural rights. It thus seemed like most of the voters viewed liberal ideas as important, while the old vocals of a political system based on cultural cleavages, have less support and have been further fragmented. Did the election result again put the reforming

forces on the agenda, or did the ANC maintain on its more pragmatic strategy aimed at clarifying the role of traditional leaders? And if so, what influenced these choices?

5.3.3 In search for practical solutions 1998 - 2001

Though the 1999 elections illustrated that ANC was not necessarily vulnerable to the traditional leaders ability to mobilise vote, the following events did not give an impression of a will in the ANC to return to their approach based on reforming of illiberal aspects of traditional customs and institutions. This approach more resembled their vision of traditional leaders and institutions up to the point when they obtained political power, why did they not return to the process of reforming traditional authorities?

The first aspect that might have had an effect is the centre-periphery aspect introduced in chapter 4.3.1. It became obvious that the ANC had not addressed the reality of rural South Africa in a sufficient manner in its first years of governance. Even the consulting process in regard to the reforming of the customary law was predominantly held at provincial level. The traditional houses at provincial level seemed to work more or less, and it is important to emphasise that the former “independent” and “semi-independent” institutional structures could be used as a foundations for the new Houses. In regard to a workshop held on the process of recognising customary marriages, Nhlapo argued in an interview in 1999:

“It was a rush. I think we just rushed, and we was criticised for that. Another thing we were criticised for was that it was all in the urban areas (...). We never attended at a single village meeting. Asking questions like, do you think culture should be a secondary right, and so on. In fact I have a feeling that consulting like this is never going to happen because of time limits. We just have to bear it in mind, try to think what kinds of different views there are.”

When the rural area was not addressed in a sufficient manner this might be a consequence of both 1) that they did not have the political will to put the clarification of the rural leader conflicts at the top of their agenda, something which had resulted in conflicts and a political vacuum. 2) They did not have satisfactory institutional means to make this possible. The prior governments had neglected the institutional developments in rural, traditional areas. The doings of these areas were regarded as “tribal affairs” outside the interest of the apartheid government, as long as they did not activate themselves politically. Institutional bodies at

Box 5.4: An illustration of rightist populist rhetoric on traditional leaders: Political Manifesto of the Federal Alliance

The Reality - The ANC through their civic associations undermined the authority of traditional and natural leaders. Various ANC leaders rejected traditionalism as archaic and claimed that traditional leaders do not have a place in a modern society. The ANC's eagerness to destroy ethnicity contributed to the undermining of traditional leaders. The so-called rural local councils denied the existence of traditional leaders and their influence in their communities. This had a direct influence on the youth in the rural areas rejecting the discipline and authority of traditionalism. The subsequent result of this is the growing crime and lawlessness in the rural areas.

Effective governance - by the FEDERAL ALLIANCE will acknowledge and promote the role and authority of traditional leaders. The FEDERAL ALLIANCE accepts and acknowledges that traditional leaders are the legitimate trustees of tribal land and must therefore be involved in each and every decision relating to their land as well as the inhabitants of this land and must be remunerated for their services. The FEDERAL ALLIANCE will promote the role of the Provincial Councils for Traditional Leaders and will give them the necessary authority. The role of traditional and natural leaders in interpreting and executing indigenous law will be accepted and promoted by the FEDERAL ALLIANCE and in this we will assist in compiling and codifying the applicable indigenous law.

local level were as an outcome of this scarce. The planning of the local elections was an illustration of how the rural areas somehow had been neglected. Though one had established community councils in local areas, no one had addressed the question of what exactly the position of the traditional leaders was in these areas. Due to this, the ANC needed to stick to the process of clarifying the traditional leaders role and functions, since the traditional leaders now seemed to find themselves in limbo. At national and provincial level, this would only have implied less power to the traditional leaders. At local level this meant that nobody knew who were to do what. An illustrating picture often used is that there were 'two bulls in a kraal'²⁴²: trying to get attention, do their duties and perform the power they were meant to possess, with all the conflicts and confusion this might bring.

This event not only denotes that the government had problems with grasping the challenges of the rural area, it was probably also affected by the aspect presented in 4.3.2 regarding the problem of making the traditional institutions compatible with elected local bodies. The ANC might have found themselves in a situation where they out of liberal democratic reasons did not want to grant the traditional leaders a significant political power. At the other hand the

²⁴² See Oomen 2000.

traditional leaders were not satisfied with only possessing symbolic authority and the power to “facilitate the gathering of firewood”, see Box 5.1 function N. If they were to have some role and functions in the future society this was regarded as an insult. The ANC was by far a centralist government that disliked delegating power. It must therefore have been an inconvenient situation to be at the wheel of the process of recognising traditional authorities, which so many required. Many conservative and right wing parties for instance back the process of recognising traditional leaders. This is not without reasons. If the traditional leaders gain some kind of self-governmental rights, this paves the way for other groups to once again stress the importance of regionalism. Box 5.4, which presents the Federal Alliance political manifest, sheds light on the old notion that the “tribal” Africans need a firm hand of authority to be able to function as “civilised”. Secondly, the will to grant them political authority might be addressed out of the idea that this will fragment the political power of the ANC. Seen from this point of view the process was deemed to be fumbling.

When ANC thus stays on these roads, it might also be influenced by the fact that they want to be understood as “the broad church”.²⁴³ And consequently, a broad church wants to include several opinions and aspirations. Nhlapo argues that the leadership is as a product of this, “most concerned with how to balance between many different issues. One of the issues, which has been proved difficult, is the issue of custom”. The organisation has at the one hand a lot of intellectuals, “who think the whole idea of African traditions has been overtaken by time, feudal anachronism that should not be part of a democratic consociation.” But as argued previously, they still have a lot of support in rural areas, often due to mobilisation by traditional leaders. In regard to the change in the ANC attitude towards the rural areas Nhlapo has argued:

“This urban alliance [intellectuals and women delegation] did not like traditions and traditional leadership, and they seemed to be winning. I suspect, however, that somebody disobeyed with this strategy towards the rural areas. Nobody in Africa has with the intentions to abolish the traditional leadership and customary law, has reached something else that disaster (...). Okay, how can I put this carefully? I think that among the people gathered in parliament, the ones who belong to the ANC, there are no enmities to pro-African culture. I think the debate always will continue, but I am saying that it is no universal agreement on that it is time for African culture to pass. So in the broad church again, there are those who with a very strong language, who will stand up in the parliament and speak Xhosa, because the people who speak Afrikaans or English offend them. It is a mixture of representatives from

²⁴³ Nhlapo in interview 1999.

South African black people. South African black people in general are not necessarily eager to modernise African culture.”²⁴⁴

This was argued prior to the conflicts stirred by the local government but it does illustrate that some of the reasons why the ANC seems to have problems in finding a coherent policy against the challenges of traditional institutions and customs. On the one hand, it is important to remember that the government, thus heavily dominated by the ANC, is a coalition. IFP, still has a few of the ministers, and to keep the IFP inside, the ANC even though not internally divided on the subject, must as a part of this coalition compromise on intellectual views on traditional customs and institutions. On the other hand, the ANC likes to be in charge of the political transformation of South Africa, and will hesitate in delegating any political power. So why should the ANC be commanded by the wish of some traditional leaders?

To sum up this discussion, I have argued that the constitution entrenched a conditioned recognition of traditional authorities. The fact that it was “conditioned” implies a need to reform traditional authorities. The fact that it was “recognised” implies a need to reforming traditional institutions and customs into a liberal vision of universal rights. In the wake of the entrenchment of the new liberal constitution, the ANC first embarked on a process of reforming traditional customs and traditions. This process was due to both the principles of ANC as one knew them prior to the transition, and more important, this was an effect of a strong women delegation within the ANC, who had the transformation of discriminating features of customary law as one of their predominate key topics. The initiated bills at this point seems to be inspired by the intentions of making the customary law compatible with liberal notions.

Secondly, in 1998, there seems to have been something that influenced the governments approach towards traditional authorities, and they initiated a process where clarification of the traditional leaders functions and roles were put on the agenda. I have suggested that one of the main reasons for this was the anticipated power of the traditional leaders to mobilise the rural electorate. New parties as the UDM entered the scene and challenged the ANC’s reforming approach towards the traditional leaders. However, the ANC strengthened their position as the largest party in these elections, though there seems to have been some volatility in the electorate due to the results of the provinces. The ANC seems to have lost some votes in the

²⁴⁴ Ibid.

rural areas, but gained votes in urban areas.

Thirdly, the ANC after this period stays on the path of clarifying traditional leaders' functions and roles, though it does not seem like they are able to deliver any political action on the initiated bills. The local elections created great controversies in the political landscape in 2000. It became apparent that the ANC had not sufficiently addressed the challenges of dual political "powers" in local, traditional communities, and as argued in chapter 4.3.1 it seems like centre-periphery aspect in South African politics had influenced the government's ability to deliver a coherent institutional, political structure. The ability to deliver is due to either political will or institutional means.

The institutional means at local level are not particularly developed. Prior to the transition the Apartheid government had neglected political structures on the local level. Its approach was rather to use control mechanisms constructed by the establishing of the "semi-independent" and "independent" homeland governments. With the establishing of a wall-to-wall local government, there were few institutional structures to rely on. This illustrates that there were few institutional means, and the question required efficient political action to be solved. So why was the ANC not able to deliver efficient political action?

The ANC is a broad church. Their effort to take diverging considerations into account influences the question. The ANC is even in a coalition with the IFP, which is the most ethnical based party in South Africa, and they also wants to accommodate intellectuals and women delegates opposed by the traditional authorities. Thus this gives the ANC a will to deliver, but on the contrary this also might result in a reluctant delegation of political power to cultural groups. In other words, this is a thorny issue in a political scene where the opposition parties are in favour of federalism. And thus political action is hesitating.

5.3.4 Legitimacy of traditional authorities

Afrobarometer has newly released some results from a survey on *Popular Attitudes to Democracy, Selected African Countries, 1999 – 2001*. South Africa is one of the twelve selected countries, but the question related to the legitimacy of traditional leaders does not give any clear answers to the sentiments of the inhabitant's attitude towards traditional leaders. In Table 5.4 I have presented the results from five countries in regard to questions of

Table 5.4: Rejection of non-democratic alternatives, percentages of national samples.²⁴⁵

	South Africa	Botswana	Lesotho	Zambia	Zimbabwe
Military Rule	75	85	70	95	80
One Party State	56	78	51	80	74
Traditional Leaders	64	74	59	80	63
All Alternatives	41	61	34	69	49
	N=2200	N=1200	N=1177	N=1198	N=1200

peoples sentiments towards “non-democratic alternatives”. 64% of the South African sample rejects the traditional leaders as a non-democratic alternative. It is however difficult to know how many percent of the respondents that have any relationship with traditional leaders actually in their day-to-day lives. The percent of rejection might increase if the people asked did not live in traditional communities.

More important, though one might reject traditional leaders as a regime, in line with a rejection of a military rule, this does not necessarily indicate that the people asked totally disapprove of traditional authorities. People might still think that traditional leaders ought to have a function and role in local governments. They also might approve of traditional Houses at national and provincial level. They also might think that customary law is to operate in a plural law system. The results from the Afrobarometer survey does not take into account the complexity of the issues related to traditional authorities. Traditional authorities do not necessarily negate democracy. The question is what their role is to be in a democracy. For instance, people who do not approve of military rule might approve of the need for a strong military. In my opinion it is therefore difficult to decide whether the traditional authorities still have legitimacy in the people.

Another test of legitimacy is to read people’s political sentiments from election results. If one look at Table 5.5 I have presented results from all local and national elections in the period 1994 until 2000. As one can see ANC do have a vast majority of the votes, though their support is slightly less in local elections than in national election. The most interesting feature in accordance to election and legitimacy is that the voter turnouts in local elections are much lower than in national elections.²⁴⁶ This is a tendency that South Africa shares with almost all democratic countries, but in South Africa the difference is almost about 40 percent. In the

²⁴⁵ Afrobarometer, *Popular Attitudes to Democracy, Selected African Countries, 1999 – 2001*.

Table 5.5: Comparing national and local election results by party share and voter turnout²⁴⁷

	1994 National	1995/96 Local	1999 National	2000 Local
ACDP	0.5	0.8	1.4	1.2
AEB	-	-	0.3	-
ANC	62.7	58.2	66.4	59.4
AZAPO	-	-	0.2	0.3
DP	1.7	13.5	9.6	-
FA	-	-	0.5	-
IFP	10.5	8.7	8.6	9.1
MF	-	-	0.3	0.3
(N)NP	20.4	18.0	0.8	-
PAC	1.6	1.2	0.7	1.3
UCDP	-	-	0.8	1.0
UDM	-	-	3.4	2.6
FF/VF	2.2	2.7	0.8	0.1
DA(NNP/DP/FA)*	-	-	-	22.1
Other	0.7	3.0	0.2	2.0
Total	100	100	100	100
Voter turnout	87.0	48.0	89.3	48.0

(*DA= Democratic Alliance. This was an alliance between the DP, NNP and FA, but the alliance split again in 2001)

national elections of 1994, the voter turnout was estimated to 87 percent and in 1999 the voter turnout was 89.3 percent. In both the local elections in 1995/96 and the local elections in 2000, the voter turnout was 48 percent. These numbers might reveal that the people do not view the government structures at local level as clear and efficient, but it might also reveal that they do not possess enough political power to make them interesting. Due to this, it is important to emphasise that there does not seem to exist any difference in voter turnout in regard to provinces with or without traditional authorities. According to numbers presented by the Electoral Institute of Southern Africa the provinces with lowest voter turnout were Gauteng and Northern Province with about 43 percent. The highest voter turnouts were in Eastern Cape, Northern Cape and Western Cape with about 56 percent voter turnout. Unfortunately I do not have any statistical data, which compare the voter turnout between constituencies with or without traditional authorities.

It is apparent that the government needs to sort out both the structure of local governments and also sort out what the powers of traditional authorities are to be in the future. For the

²⁴⁶ All numbers are from The Electorate Institute of Southern Africa, *Southern Africa local government elections*.

²⁴⁷ Electoral Institute of Southern Africa.

moment one can argue that in regard to the question of traditional authorities in the rural areas, there seem to be what is known as the ‘Two Bulls in a Kraal’ problem. In regard to the judicial authorities, there does not exist any explicit design for how the plural law system is to function in areas where there are both traditional courts and magistrate courts. The process of clarifying this is initiated, but at the moment no legislation is enacted. In regard to political authorities, there are no explicit designs for what is to be the traditional leaders function and role in the local governments. The process of clarifying this is initiated, but at the moment no legislation is enacted. In both cases there seem to be two bulls constantly fighting each other in the same arena, but the matador is reluctant to enter.

5.4 Summing up the process with an analysis of the theoretical debate

While chapter four intended to sort out the political preferences of the diverging parts of the negotiations prior to the new constitution, this chapter has illustrated which dilemmas that might occur when one is to implement constitutional principles. In chapter 4.5 I argued that the principles entrenched in the new constitution had most similarities with Rawls’ perspective on the accommodation of difference in a liberal democracy. The cultural accommodation of traditional authorities was to be subject to both the legislative and other constitutional principles, and they ought to be viewed as individual rights, not group rights.

As I have described in this chapter the recognition of traditional authorities had two features that seem to be contradicting when they are to be implemented. First, Rawls’ idea of a priority of rights made the recognition of traditional leaders conditioned. Since many aspects of the traditional practices and customs did not to a sufficient degree secure the individual right to be equal, these traditional institutions needed to be reformed. On the contrary, the recognition of traditional authorities also required that one clarified their role in the future democracy. If one analyse the process of implementing the constitutional principle, there is a pattern that reveals a tendency of the government to initiate reforms addressing illiberal features of customary law. The customary law is a legal system primarily designed to try cases between litigants in private disputes, and the government wanted to make an effort to make it compatible with the new constitutional principles. In chapter 2.3.2 I wrote that one of the main criticisms of Rawls due to his strategy of accommodating difference, is that he view culture as a phenomenon that is to be relegated to the private sphere. As mentioned he does not view culture as something that ought to influence public structures.

In the South African case this might have influenced the government's problem with clarifying their attitude towards traditional leaders political authority. As I have described in this chapter the government seemed to hesitate in finding a place for the traditional leaders in the political structure. The traditional leaders, on the other hand, addressed this need for clarification several times. Particularly after 1998, they did not give an impression of wanting to go behind a 'Veil of Ignorance' to eradicate their position in the public sphere. They wanted to enjoy political authority as well as symbolic and judicial. When traditional leaders to a further and further degree voiced these claims, the process of accommodating traditional authorities became postponed. There are several promises of solving this dilemma through the government's official statements and initiated legislation, but few promises have resulted in political action.

One of the most important reasons for this was that in order to meet the requirements of the constitution one needed to establish in all communities: 1) both democratic and traditional political authorities. 2) Both common and customary law structures. The constitution requires that freedom of choice is to answer the delineation problem, not territories, since group rights were not granted traditional communities. This requires both double judicial and political facilities in rural traditional communities. This was a far-reaching endeavour to embark on. But why was these constitutional obligations not addressed to a sufficient degree? Why did the "Two Bulls in a Kraal" problem occur instead? As I wrote in chapter 2.3.1 Rawls occupation with difference was inspired by the urge to settle conflicts in a divided cultural society, but it do not seem like this strategy settled the conflict between diverging ways of life in the South African context.

The dilemma this empirical research uncovers is that there are three prerequisites in Rawls' theoretical perspectives that must exist to make the strategy work in a multicultural society. First, all participants need to acknowledge the liberal visions of society. In societies with deep cultural cleavages this is not necessarily the case. When the traditional authorities felt by-passed by the government, they started to be sceptical to a further reform of their traditions. Secondly, the theories also presume that ethical questions are the most predominant considerations in politics. It is in the South African case obvious that other aspects than those of ethical considerations influenced political actions. Thirdly, the theoretical perspectives do not address whether there exists sufficient institutional means to implement the ethical

considerations. As in South Africa, many groups that claim accommodation for their difference are cultures on the periphery of a state centred society. In many cases one not only needed to change institutions, one also needed to create them. When neither of these prerequisites were present to a necessarily degree, the government had problems with providing adequate mechanisms to meet the constitutional obligations.

Would these dilemmas have occurred if one had offered the traditional leaders group rights? Counterfactual questions are always difficult to answer, but it might have been a less conflicting approach, if that is an aim in regard to the question of difference. As argued in 2.4.1 Kymlicka mentioned some policies that could be addressed to protect a group against the larger society. Some of these rights are initiated in South Africa, for instance the right to education in your own language, the right to establish newspaper, radio channels in your home language etc. see chapter 2.4.1. The problem is that if group rights were given in the case of South Africa, these might have been granted groups who wanted to prevent individual members from detaching themselves from traditional practises and customs. For instance the workshops initiated by the government exposed that there were a danger of intra-group oppression in traditional communities, particularly in terms of women's status in the societies' structures. The problem of intra-group inequalities was thus present, and it was important to secure the right to equality by addressing these features of traditional communities. Kymlicka's effort to make cultural minority groups more visible might have ended in a total invisibility of the sub-groups of these communities. By entrenching a strategy similar to Rawls suggestions, traditional communities got double attention. First, by the government's attempt to reform illiberal intra-group inequalities. Two, they became visible as an effect of traditional leaders entering the public debate to voice their constitutional recognition.

Though Taylor's strategy somehow seems to provoke the same dilemmas as those of Kymlicka, it is however important to understand his stressing of identity. Because though one might disapprove of the illiberal aspects of traditional practises, one should not view non-liberal societies as nothing more than annoyances in the quest of stabilisation and modernisation. To understand the government's reluctant actions towards traditional authorities, it is important to stress that the government is to be neutral to the good, and this also mean that one need to respect traditional communities at the same level as one respect urban communities. It is important that the wish to also pay traditional communities dignity and to acknowledge that there are other conceptions of the "good" than those developed in

western countries influenced the government. When ANC is to be the broad church it is to recognise members with diverging visions of the good. The problem is that this consideration seems to get in to conflicts with other issues that the ANC was to address.

Habermas' suggestion, which emphasises free deliberations in a society, is a good point of departure to solve conflicts between illiberal aspects of cultural practices and the rights of the individuals to be equal. The people need to be the author of what binds them, and as I discussed earlier there seemed to be a valuable dialogue between traditional leaders, governmental agents and women activists in the aftermaths of the constitutions. Idealistically a transition would be an excellent occasion for discussing the further existence of traditions, since one then are negotiating between different constitutional principles. The problem is that the societies in which transitions take place are seldom stable, something that is a prerequisite for free deliberation. Often it is a great achievement that a few key agents talks, how can one then open for a discourse were all are to discuss their particular interests? In the aftermaths of a constitutional bargaining one might start consulting the people and ask for their advises, but the discussions are predetermined by the constitutional principles, which then is always the "best argument". When the best argument already is settled, the consequence might be that the participants are view the consultation as illegitimate. Since they are not the authors of what binds them see chapter 2.3.3. This might have occurred in the "break down" of talks aimed at reforming traditional traditions.

6. Conclusion

The object of this research has been to analyse the dilemmas that might occur when one introduces liberal strategies for accommodating difference in a society with deep cultural cleavages. My aim in this regard was to sort out the dilemmas that occurred in the process of recognising difference in post-Apartheid South Africa. The South African constitution of 1996 to a certain extent recognised traditional African authorities. Why did these authorities achieve accommodation of their difference? Which dilemmas did this recognition generate in the implementation of the constitutional principles?

A presumption for this research is that I view issues connected to the traditional authorities as relevant and important in an analysis of the establishment of a liberal democracy in South Africa. There have been few studies on the traditional authorities role and functions in African new democracies, and by this analysis I intend to present the multifaceted issues connected to traditional authorities from a liberal perspective. The survey from the Afrobarometer illustrates how few findings one might achieve if one does not take into account the complexity of these structures. It is important to not think of traditional authorities as a regime that negates democracy, but as mechanisms that might operate at different levels of the political set up and in the legal system within a democracy. Because of this I regarded it as important to do an in depth study of a single case, where I used multiple sources of evidence to make inquiries about this phenomenon in order to understand the case on its own premises. By employing this strategy I uncovered some of the reasons why traditional authorities tend to exist together with democratic structures in South Africa and why they also managed to be recognised in the constitution. Even though they generate many dilemmas seen from a liberal point of view.

6.1. The Dilemmas

The dilemmas presented have relevance on two different stages in the process of accommodating difference. The first is connected with the principles established in the constitutions. At this stage different solutions are discussed, and one establishes principles based on the preferences of the diverging negotiators. These outcomes provide certain requirements that need to be fulfilled in the next stage. This second stage is the

implementation of the established principles. At this stage one can analyse whether the requirements from the first stage is followed with political action aimed at implementing the constitutional principles.

6.1.1 Stage 1: Dilemmas connected to constitutional negotiation

In regard to traditional authorities there were three main dilemmas connected to the recognition of these institutions and customs in the liberal constitution of 1996.

1. Traditional authorities were not compatible with the right to equality. The customary law system did not to a sufficient degree secure the right to equality in neither the case of criminal nor civil jurisdiction. In criminal case the traditional courts do not have mechanisms that secure the right to be presumed innocent, the right to remain silent or to be represented by a legal practitioner. For instance in civil cases the women have no proprietary or contractual capacity. The compositions of the traditional courts also have mechanisms that view women as minors in legal questions.

2. Recognition of traditional customs and practices might force an identity upon members of rural traditional communities. The legacy of the past had made many South Africans sceptical of policies aimed at accommodating difference. The earlier governments had equated “African” identity with the structures and customs of “Bantu tribes”. As the traditional authorities had functioned as the earlier government’s administrative apparatus in rural African areas, many opposed recognition of these authorities in a free, democratic society where all were to be equal no matter which “cultural group” they had belonged to under Apartheid.

3. Traditional authorities were not compatible with democratic structures and principles. The democratic structure is based on elected offices accountable to the population it governs. Traditional leaders are appointed due to the lineage to their forefathers. Since all people that bear offices consisting of political power need to be accountable to their people in a democratic society, it is difficult to provide for a political role and functions of traditional leaders. From a liberal democratic perspective these authorities only ought to be consulted, in line with other associations in the civil society, in matters connected to them.

These three aspects imply that it is difficult to recognise traditional leaders in a liberal democracy since they have illiberal elements conflicting with the individual's right to equality. Why then were these authorities recognised in the new constitution of 1996? I have presented three main aspects that influenced the outcome of the constitution.

The centre-periphery aspect indicates that these institutions were to such a high degree incorporated in the rural society, that it would create severe practical problems to actually abolish them. ANC and the NP were the main negotiators in the transition, and both parties were urban centred. There were no statistical evidence on how many people who were living under traditional authorities, and due to the main negotiation parties predominant urban structures, they did not have any indication of what were the rural sentiments towards these institutions.

The ethical aspect indicates that there were sentiments of recognising institutions discriminated in the past. Both in the present and the past formal and informal ties existed between the ANC and the traditional leaders. When the ANC embarked on a reconciliation path rather than a revolutionary struggle, they invited "progressive" traditional leaders to be a part of the democratic forces. As other Africans the traditional leaders had also been discriminated in the past, though many have been accused of using their position to secure self-interests.

The strategic aspect indicates that one assumed that the traditional leaders enjoyed a great potential in mobilising electoral support. This made them an important ally in the new democratic society. The traditional leaders announced their "block vote" slogan, which promised that traditional leaders were able to mobilise whole communities in support for their allied parties. In the first election in 1994, it seemed like they managed to deliver on their promises. In the Northern Province, where ANC's alliance with traditional leaders was strong, the ANC's electoral share was 91.6 percent of the votes. It is difficult to know how much this alliance influenced the elections, but it did at least give an impression of the traditional leaders ability to mobilise support.

When these three aspects influenced the outcome and made the traditional authorities *recognised* as the only specific mentioned cultural institution, the three dilemmas presented made the accommodation of traditional authorities *conditioned*. Due to their illiberal features

it was difficult to grant them any group specific rights in accordance with Kymlicka and Taylor's suggestions. Habermas' strategy somewhat presupposes an open, deliberative society, and the constitutional negotiations were predominantly bilateral talks behind closed doors. At this stage it was difficult to have a free and open debate when diverging groups of the population agitated for civil revolts. It thus became Rawls' strategy that had most similarities with the outcome of the negotiations. The recognition of traditional authorities is in accordance with Rawls idea of a priority of rights, where this specified recognition was both subject to the democratic political set up and other constitutional principle, such as the right to equality. But the recognition was to be held by the individuals, not by groups. This vision on cultural differences implies that culture is a right that individuals share, but cultural differences are not to be mirrored in the political structures.

In regard to Taylor and Kymlicka it is important to stress that group rights have a different connotation in South Africa than in many western countries. Taylor has stressed that difference ought to be the essence of a democracy. Consequentially, particularities are not to be glossed over and assimilated to a majority identity. Kymlicka has also expressed the importance of recognising different groups in a heterogenous society. The South African experience illustrates that one in cases with deep cultural differences might rather view what it is that unite people as the essence rather than what it is that makes people different. This might imply that a cherishing of diversity requires a strong state foundation in order to make the diverging cultures coexist. Particularly in cases where the economic cleavages coincide with cultural cleavages it might be important for the new government to not delegate too much power to the cultural groups which are best off. Conversely it might be important to not leave cultural groups with scarce economic resources outside a system of redistribution due to their difference.

In South Africa the legacy of Apartheid was always omnipresent. The traditional authorities and vocals of Afrikaner rights had first claimed the right to self-government due to their difference. When special Afrikaner rights were rejected, this was because few others than the Afrikaners themselves viewed this group as marginalized or disadvantaged, as Kymlicka stresses are prerequisites for group rights. Neither were they viewed as a culture bordering on extinction. This case then reveals that it is often not desirable for the key negotiator to delegate power to cultural groups in cases with deep cultural cleavages. From a liberal point of view it is however interesting that in a constitution with a Rawlesian concern for the

individual entrenched, one recognised traditional authorities. The traditional authorities were not granted group rights, but they were given a guarantee of the state to accept their existence. Which inevitably means that their ways of life and visions of the good is to be recognised. This implies that it was not an on-the-surface difference that was regarded as significant, but a difference that did not fulfil the democratic requirements of how institutions are to take form in a democracy. This illustrates that it is not necessarily a connection between those the negotiators think should be recognised and those that are suitably liberal from a liberal perspective.

ANC had opposed most attempts to mirror the South African diversity in the new political set up, and culture was something people should have the right to enjoy as long as it was compatible with the universal rights entrenched in the constitution. The problem was that this strategy gives few political solutions for how one where to accommodate claims of political participation from illiberal authorities. How was the recognition of traditional authorities to be enforced? To use Habermas' term, the traditional leaders possessed a "better argument" in the negotiations, were the traditional leaders able to voice their concerns in the implementation process?

6.1.2 Stage 2: Dilemmas of implementing a conditioned recognition

Rawls has been criticised for regarding culture as a phenomenon that is to be relegated to the private sphere. As mentioned he does not view culture as something that ought to influence public structures. If one analyses the process of implementing constitutional principles, there is a pattern that reveals a tendency of the government to initiate reforms addressing illiberal features of customary law. Customary law is a legal system primarily designed to try cases between litigants in *private disputes*, and the government wanted to make an effort to make it compatible with the new constitutional right to equality. The other matter that needed to be sorted out was a clarification of traditional leaders role in the democracy. While the government lingered in initiating this process, the traditional leaders themselves insisted on a clarification. And they were not interested in going behind a 'Veil of Ignorance' to eradicate their position in the *public sphere*. They wanted to enjoy political as well as symbolic and judicial authority. When these claims were to a further and further degree voiced by traditional leaders, the process of accommodating traditional authorities became postponed. There are several promises of solving this dilemma through the government's official

statements and initiated legislation, but few promises have resulted in political action. Cultural recognition resulted in a claim for political authority, but the government did not want to delegate significant political power to traditional leaders. The attempts to settle their functions as "... facilitating the gathering firewood" and "Officiating the opening and closing ceremonies of municipal council" were an insult to traditional leaders, and not what they had in mind.

The analysis of official governmental statements and initiated legislation reveal that there are at least three prerequisites for implementing Rawls liberal strategies for accommodating difference in a democracy. These prerequisites are:

1. All participants need to acknowledge the liberal democracy's visions of society. The recognised cultures must approve of the process of reforming their traditions and practices, in order to make them compatible with the liberal notion of society. This also necessitates an acceptance of the notion that their cultural practises are only to take place in the private sphere. Though the traditional leaders in South Africa in the beginning were willing to discuss the illiberal features of their practices, they were also interested in being a part of the political set-up. When the consulting process seems to have achieved less legitimacy from 1998, seen from Habermas' perspective, this illustrates that the people living in the traditional communities did not feel that they were the authors "of what bind them". The best argument was already settled in the constitutional principles.

2. Ethical questions are not necessarily the most predominant consideration in politics. This argument has three effects on the South African case. First, the traditional leaders were an important ally, and though their anticipated ability to mobilise votes are not sufficiently proved, it was a weapon they could use to be accommodated. Secondly, dilemmas regarding the role of traditional authorities are only one aspect to be considered in a sea of matters that deserves attention. The inability to deliver political action in this regard might have been even influenced further since the ANC wants to be regarded as a "broad church". The ANC desired to take into consideration the sentiments and preferences of their members, which includes intellectuals, women activists and traditional leaders. Third, recognising traditional leaders political authority indicates a delegation of the government's power. ANC have always stressed the importance of having a firm grip on the wheel in the process of transforming society, and were not interested in a fragmentation of their centralised power.

3. Sufficient institutional means need to be available to implement the ethical considerations.

As in South Africa, many groups that claim to be accommodated for their difference are cultures that are at the periphery of a state centred society. In South Africa there was a distance between the centralised democratic national arena and the rural communities. The Apartheid governments' policies in regard to traditional rural communities, were that as long as they paid their duties and did not establish political organisations, the traditional leaders could do as they wanted. The infrastructure both in terms of political institutions and other institutional facilities are not developed to the same standard as those in the rest of the country. It is therefore a dilemma, that in order to fulfil the obligations of the constitutional principles, these less developed areas need to be provided with double judicial and governmental facilities. This is of course not an easy endeavour to embark on, and it requires being the most predominant priority of the government if it aims at fulfilling the constitutional obligations.

When none of these prerequisites have been present to a sufficient degree in the South African process of accommodating difference, it has resulted in a dilemma that is often referred to as the problem of 'Two Bulls in a Kraal'. The traditional leaders were not interested in only playing a role as symbolic figureheads in the private sphere, at the same time democratic structures were to be established on all levels of society. This implies that the government in order to meet the constitutional obligation sought to find rules for how both traditional authorities and local government can coexist in rural areas. It also necessitates rules for how common law and customary law are to be applied in traditional communities, and how these can be harmonised in order to meet the constitutional obligations. The government seems reluctant to solve the problems generated by this dilemma, and it has led to a process where the government postpones their decisions to the future. Being a matador is a risky venture, so why not await your entrance until the bulls have settled their differences and solved their disputes?

The dilemma generated by the implementation of the constitutional recognition was that it is not as easy to get rid of the past as one often has a vision of prior to the transition. On the one hand, there were practical problems connected with creating a "post" society. On the other hand, all societies have traditions, and it is not something one suddenly rejects with the advent of a new political regime. Taylor has argued that one cannot equate universalism with

sameness, and he therefore argues that one must value people's distinctions. The South African experience has illustrated that culture does not equate with ethnicity. Culture entails more than just the ethnical label given you by birth. More important culture entails traditions, and traditions are capable of changing and should not be understood as static, since this might result in policies which treat groups of peoples as monoliths incapable of change. To not recognise tradition as a group right, does not denote a need for wholesale rejection of tradition, but perhaps a need for challenging traditions to see which might be valuable to preserve. The South African experience does not necessarily only challenge the African traditions to be more liberal, it might also challenge the liberal tradition to adapt to new circumstances. Because ethical considerations always have a practical side, and this might twist the intended outcome of the process.

Appendix 1: Selected chapters from the interim and the final constitution

Interim Constitution of the Republic of South Africa, Act 200 of 1993

Assented to 25 January 1994

Date of Commencement: 27 April 1994

Chapter 3. Fundamental Rights

7 Application

- (1) This Chapter shall bind all legislative and executive organs of state at all levels of government.
- (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.
- (3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.
- (4)(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) The relief referred to in paragraph (a) may be sought by-
 - (i) a person acting in his or her own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
 - (iv) a person acting as a member of or in the interest of a group or class of persons; or
 - (v) a person acting in the public interest.

8 Equality

- (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
- (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

9 Life

Every person shall have the right to life.

10 Human dignity

Every person shall have the right to respect for and protection of his or her dignity.

11 Freedom and security of the person

- (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

12 Servitude and forced labour

No person shall be subject to servitude or forced labour.

13 Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

14 Religion, belief and opinion

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

(3) Nothing in this Chapter shall preclude legislation recognising-

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures.

15 Freedom of expression

(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

16 Assembly, demonstration and petition

Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

17 Freedom of association

Every person shall have the right to freedom of association.

18 Freedom of movement

Every person shall have the right to freedom of movement anywhere within the national territory.

19 Residence

Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

20 Citizens' rights

Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

21 Political rights

(1) Every citizen shall have the right-

(a) to form, to participate in the activities of and to recruit members for a political party;

(b) to campaign for a political party or cause; and

(c) freely to make political choices.

(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

22 Access to court Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

23 Access to information Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

24 Administrative justice Every person shall have the right to-

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

25 Detained, arrested and accused persons

(1) Every person who is detained, including every sentenced prisoner, shall have the right-

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention;

(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

(d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and

(e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise.

(3) Every accused person shall have the right to a fair trial, which shall include the right-

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

(b) to be informed with sufficient particularity of the charge;

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;

(f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

(g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;

(h) to have recourse by way of appeal or review To a higher court than the court of first instance;

(i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and

(j) to be sentenced within a reasonable time after conviction.

26 Economic activity

(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

27 Labour relations

(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1).

28 Property

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

29 Environment

Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

30 Children

(1) Every child shall have the right-

(a) to a name and nationality as from birth;

(b) to parental care;

(c) to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

31 Language and culture Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

32 Education Every person shall have the right-

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

33 Limitation

(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

(a) shall be permissible only to the extent that it is-

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to-

(aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).

(5) (a) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.

(b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

34 State of emergency and suspension

(1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order.

(2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

(3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

(4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.

(5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise-

(a) the creation of retrospective crimes;

(b) the indemnification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or

(c) the suspension of this section, and sections 7, 8 (2), 9, 10, 11 (2), 12, 14, 27 (1) and (2), 30 (1) (d) and (e) and (2) and 33 (1) and (2).

(6) Where a person is detained under a state of emergency the detention shall be subject to the following conditions:

(a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;

(b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Gazette within five days of their detention;

(c) when rights entrenched in section 11 or 25 have been suspended-

(i) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;

(ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

(d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;

(e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;

(f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and

(g) the state shall for the purpose of a review referred to in paragraph (c) (i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.

(7) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention.

35 Interpretation

(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

Chapter 11. Traditional Authorities

181: Recognition of traditional authorities and indigenous law

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

(2) Indigenous law shall be subject to regulation by law.

182 Traditional authorities and local government

The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall ex officio be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government.

183 Provincial House of Traditional Leaders

(1)

(a) The legislature of each province in which there are traditional authorities and their communities, shall establish a House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province.

(b) Draft legislation providing, subject to this Chapter, for the establishment, the composition, the election or nomination of representatives, and the powers and functions of a House contemplated in paragraph (a), and for procedures applicable to the exercise and performance of such powers and functions, and for any other matters incidental to the establishment and functioning of such a House, shall be introduced in a provincial legislature not later than six months after the election of the first Premier of such province in terms of this Constitution.

(c) The traditional authorities resident in a province shall before the introduction of draft legislation referred to in paragraph (b), be consulted, in a manner determined by resolution of the provincial legislature, to establish their views on the content of such legislation.

(2)

(a) A House referred to in subsection (1) (a), shall be entitled to advise and make proposals to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the province.

(b) Any provincial Bill pertaining to traditional authorities, indigenous law or such traditions and customs, or any other matters having a bearing thereon, shall be referred by the Speaker of the provincial legislature to the House for its comments before the Bill is passed by such legislature.

(c) The House shall, within 30 days as from the date of such referral, indicate by written notification to the provincial legislature its support for or opposition to the Bill, together with any comments it wishes to make.

(d) If the House indicates in terms of paragraph (c) that it is opposed to the Bill, the provincial legislature shall not pass the Bill before a period of 30 days as from the date of receipt by the Speaker of such written notification has lapsed.

(e) If the House fails to indicate within the period prescribed by paragraph (c) whether it supports or opposes the Bill, the provincial legislature may proceed with the Bill.

184 Council of Traditional Leaders

(1) There is hereby established a Council of Traditional Leaders consisting of a chairperson and 19 representatives elected by traditional authorities in the Republic.

(2) The Chairperson and members of the Council shall be elected by an electoral college constituted by the members of the Houses of Traditional Leaders referred to in section 183.

(3)

(a) Draft legislation providing, subject to this Chapter, for the composition, the election of representatives and the powers and functions of the Council established by subsection (1), and for procedures applicable to the exercise and performance of such powers and functions, and for any other matters incidental to the establishment and functioning of the Council, shall be introduced in Parliament not later than six months as from the commencement of this Constitution.

(b) Section 183 (1) (c) shall apply mutatis mutandis in respect of draft legislation referred to in paragraph (a) of this subsection, and in such application a reference therein to a provincial legislature shall be construed as a reference to Parliament.

(4) The Council shall, in addition to any other powers and functions assigned to it by any other law, be competent-

(a) to advise and make recommendations to the national government with regard to any matter pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities anywhere in the Republic, or any other matters having a bearing thereon; and

(b) at the request of the President, to advise him or her on any matter of national interest.

(5) (a) Any parliamentary Bill pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities or any other matters having a bearing thereon, shall, after having been passed by the House in which it was introduced but before it is passed by the other House, be referred by the Secretary to Parliament to the Council for its comments.

(b) The Council shall, within 30 days as from the date of such referral, indicate by written notification to the Secretary to Parliament its support for or opposition to the Bill, together with any comments it wishes to make.

(c) If the Council indicates in terms of paragraph (b) its opposition to the Bill, the other House shall not pass the Bill before a period of 30 days as from the date of receipt by the said Secretary of such written notification has lapsed.

(d) If the Council fails to indicate within the period prescribed by paragraph (b) whether it supports or opposes the Bill, Parliament may proceed with the Bill.

Chapter 11 A, A Volkstaat Council

[Chapter 11A inserted by s. 9 of Act 2 of 1994.]

184A Provision for establishment of Volkstaat Council

(1) The establishment of a Volkstaat Council is hereby authorised.

(2) The Council shall consist of 20 members elected by members of Parliament who support the establishment of a Volkstaat for those who want it.

(3) The Council shall conduct its affairs according to rules made by the

184B Functions of Council

(1) The Council shall serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat, and shall for this purpose be competent-

(a) to gather, process and make available information with regard to possible boundaries, powers and functions and legislative, executive and other structures of such a Volkstaat, its suggested constitutional relationship with government at national and provincial level, and any other matter directly relevant to the establishment of such a Volkstaat;

(b) to make feasibility and other relevant studies with regard to the matters referred to in paragraph (a);

(c) to submit representations and recommendations to the Constitutional Assembly and the Commission on Provincial Government with regard to the possible establishment of a Volkstaat and any matter in connection therewith; and

(d) to perform such other functions as may be prescribed by an Act of Parliament.

(2) The procedures to be followed by the Council in the performance of its functions under subsection (1), shall be prescribed by an Act of Parliament.

(3) The procedures provided for in this Constitution with regard to the finalisation of provincial boundaries, shall not be construed as precluding the establishment of such a Volkstaat, and in the event of the acceptance of the concept of a Volkstaat, alternative provision shall be made by an Act of Parliament for the finalisation of the boundaries of any affected province or provinces. *[S. 184B inserted by s. 9 of Act 2 of 1994.]*

31 Language and culture Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

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

As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly

Chapter 2. Bill of Rights

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12. (1) Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.

Slavery, servitude and forced labour

13. No one may be subjected to slavery, servitude or forced labour.

Privacy

14. Everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed.

Freedom of religion, belief and opinion

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance at them is free and voluntary.

(3)

This section does not prevent legislation recognising

marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Freedom of expression

16. (1) Everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to propaganda for war;

incitement of imminent violence; or

advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Assembly, demonstration, picket and petition

17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of association

18. Everyone has the right to freedom of association.

Political rights

19. (1) Every citizen is free to make political choices, which includes the right to form a political party;

to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right

to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office.

Citizenship

20. No citizen may be deprived of citizenship.

Freedom of movement and residence

21. (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.

Freedom of trade, occupation and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.
- (3) Every employer has the right to form and join an employers' organisation; and to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities; to organise; and to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Environment

24. Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

prevent pollution and ecological degradation;
promote conservation; and
secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
 - the current use of the property;
 - the history of the acquisition and use of the property;
 - the market value of the property;
 - the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - the purpose of the expropriation.
- (4) For the purposes of this section the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) 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. No legislation may permit arbitrary evictions.

Health care, food, water and social security

27. (1) Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and

social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Children

28. (1) Every child has the right

to a name and a nationality from birth;

to family care or parental care, or to appropriate alternative care when removed from the family environment;

to basic nutrition, shelter, basic health care services and social services;

to be protected from maltreatment, neglect, abuse or degradation;

to be protected from exploitative labour practices;

not to be required or permitted to perform work or provide services that

are inappropriate for a person of that child's age; or

place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

kept separately from detained persons over the age of 18 years; and

treated in a manner, and kept in conditions, that take account of the child's age;

to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

Education

29. (1) Everyone has the right

to a basic education, including adult basic education; and

to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity;

practicability; and

the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that

do not discriminate on the basis of race;

are registered with the state; and
maintain standards that are not inferior to standards at comparable public educational institutions.
(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

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

to enjoy their culture, practise their religion and use their language; and

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

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

Access to information

32. (1) Everyone has the right of access to
any information held by the state; and

any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must

provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

impose a duty on the state to give effect to the rights in subsections (1) and (2); and

promote an efficient administration.

Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right
to remain silent;

to be informed promptly

of the right to remain silent; and

of the consequences of not remaining silent;

not to be compelled to make any confession or admission that could be used in evidence against that person;

to be brought before a court as soon as reasonably possible, but not later than

48 hours after the arrest; or

the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right

to be informed promptly of the reason for being detained;

to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

to communicate with, and be visited by, that person's

spouse or partner;

next of kin;

chosen religious counsellor; and
chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay; to be present when being tried; to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be presumed innocent, to remain silent, and not to testify during the proceedings; to adduce and challenge evidence; not to be compelled to give self-incriminating evidence; to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only prospectively; and

for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency; and the legislation

is consistent with the Republic's obligations under international law applicable to states of emergency; conforms to subsection (5); and is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise indemnifying the state, or any person, in respect of any unlawful act; any derogation from this section; or any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section Number	2 Section Title	3 Extent to which the right is protected
9	Equality	With respect to <u>unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language</u>
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: subsection (1)(d) and (e); the rights in subparagraphs (i) and (ii) <u>of subsection (1)(g); and subsection 1(i) in respect of children of 15 years and younger</u>
35	Arrested, detained and accused persons	With respect to: subsections (1)(a), (b) and (c) and (2)(d); <u>the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) subsection (4); and subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.</u>

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

anyone acting in their own interest;

anyone acting on behalf of another person who cannot act in their own name;

anyone acting as a member of, or in the interest of, a group or class of persons;

anyone acting in the public interest; and

an association acting in the interest of its members.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum

must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

must consider international law; and

may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Chapter 12. Traditional Leaders

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law national or provincial legislation may provide for the establishment of houses of traditional leaders; and national legislation may establish a council of traditional leaders.

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