

A chief rules by people power

Prof Jeff Guy

14 June 2012

<http://mg.co.za/article/2012-06-14-a-chief-rules-by-people-power>

The Traditional Courts Bill is now being debated with gratifying intensity by concerned South Africans. Those who support it argue that by recognising affordable, familiar legal processes in rural areas it brings African beliefs and practices within the bounds of the Constitution.

Those who oppose it say it reinforces gender inequality and that, far from bringing tradition and custom into harmony with the Constitution, it legalises practices developed under colonialism and reinforced by apartheid.

In the *Mail & Guardian* of June 8, it was argued that “sometimes no amount of patching up can save a bad concept”. Shirhami Shirinda is even more direct when he writes that the Bill “must be scrapped and started afresh, with human rights and equality, particularly for women, at the heart of the drafting”.

But how can this be done without losing the advantages of what is called “living law” and provoking the diehard traditionalists to obstruct all reforms? A closer examination of the law as it existed in history is needed. After all, the key concepts at issue – custom and tradition – are profoundly historical concepts, even when used in the present.

The starting point has to be section 211(1) of the Constitution, which recognises the “institution, status and role of traditional leadership, according to customary law ... subject to the Constitution”. The difficulty is that the Constitution does not give any insight into precisely what traditional leadership and customary law are. It leaves it to us to give these key concepts content, and the Bill is part of this process. But, like the legislation that preceded it, it fails to do so.

Traditional communities, councils, leadership, law, justice and its values are all to be recognised and enhanced. But if you try to find out what they are, you are referred to other legislation using the same concepts – circular arguments waiting to be filled by whoever has the will and the opportunity to do so.

Colonial appointees

This is not just an academic quibble about words. It is widely recognised that, although colonial systems of customary law used features of precolonial African law, they also exploited them, and that the chiefs who implemented customary law were colonial appointees.

Yet, when under pressure, defenders of traditional leadership and customary law ignore what they were under colonialism and apartheid, and characterise them as features of a deep African past that existed before conquest.

They disregard the fact that the Bill refers to legislation under which apartheid’s tribes became traditional communities and by which tribal authorities became traditional councils. The result is conceptual confusion, with “tradition” and “custom” applied to different social systems and different historical periods, depending on the requirements of particular arguments.

The challenge is to find a benchmark by which we can distinguish between preconquest ideas and colonial systems. The historical record suggests ways to do this. There are different entry points, but a particularly useful one is marriage. Marriage lay at the centre of African societies in Southern Africa. It initiated the social and economic cycle on which they were founded. The African homestead (umuzi) was established by marriage, and subsequent marriages established additional houses (izindlu) within the homestead.

The society as a whole consisted of many such homesteads, in the charge of a husband, where the daily and seasonal tasks on which the society depended were carried out by women. Marriage took place when the husband pledged a number of cattle to his new wife's father – on condition that she proved she could bear children and carry out domestic and agricultural labour.

Wealth was accumulated and measured by cattle. However, we have to be careful not to impose what we mean by wealth today on these independent African societies. This was not the “sale of women” or the practices of societies with a “cattle complex”. Wealth was based on the value women could produce by their fertility and their labour, measured in terms of the cattle belonging to and disposed of by men.

Overriding objective

The houses and their fields were not “property” as we see it today: they were not “owned” but had to be used productively. Part of the idea of a wife was that she had fields to work, and that the products of her labour would support her house within the homestead.

In today's terms, it could be argued that she lacked civil rights, but we must note that she had economic rights: to the land on which she lived and worked and to what she produced. In precolonial societies such rights were all-important. Productivity and fertility were the goals of the homestead, the overriding objective being to build its social strength by means of the numbers of people living in it. These were not societies like those we are familiar with today, in which status and standing are measured in terms of the accumulation of objects or things (izinto). They were measured in terms of people (abantu).

Once these fundamentals are recognised, they can be extended. Abantu were given social value in ubuntu, mutual concern for people (although to see it as a principle of liberal humanism in a global society is to misapply the idea). It was a concern for your people, and might well be expressed in hostility towards those who threatened them.

To move from the building blocks (imizi) to the larger political community, again, the power, the wealth and the extent of the chiefdom (isizwe) was measured by the number of cattle and the people the inkosi had under his control.

Reciprocal

Land was held not as an individual possession but by the people who used it and who gave allegiance to the chief who granted it to them and protected them on it. The relationship was summed up in the saying common to all South African preconquest farming societies and is the key to their politics, that power was reciprocal: *inkosi yinkosi ngabantu* or *morena wamorena kabatho* – a chief is a chief by the people.

These independent African societies were invaded by very different ones and in the process were changed. Independence was lost during a century of prolonged aggression. African borders retreated, land and cattle were lost, the homestead was undermined by taxation, its self-sufficiency weakened by the need to work in a money economy in a society based on labour migrancy and by the accumulation of things, not people.

But this was conquest with an all-important twist. The sheer strength of African society, and the need for African labour, forced the colonists to retain certain features of the societies they had defeated. Limited amounts of land were left in African control. Compliant traditional leaders, now called chiefs, were given some local authority and a degree of legal autonomy, now called customary law.

The homesteads remained, valued socially as a memory of what had been home, but economically they were shells. Their dynamic essence, created by productive, independent, self-supporting people, had been forcibly replaced by the demand that wealth be created by the production of things, mined and manufactured away from home, to be accumulated by outside forces, beyond their control.

Different ideas

It took the people of South Africa another century of struggle to regain political control. Negotiators hammered out a Constitution that opened the way for further legislation representing different views, among them the recognition of traditional authority and customary law. But what could not be ignored were the effects of 350 years of contact with the world, and the different ideas, new religions and local and global economic strategies that had transformed South Africa and her peoples.

We might long for a glorious past but there is no return to it. The Traditional Courts Bill attempts to give this romantic yearning for a lost African past very sharp political teeth, yet in doing so it threatens South Africa's democratic achievements. This is not to suggest that the African past can be ignored, only that it has to be recognised for what it was. It must be reconciled with the present, then promoted in the future. This might be difficult but it is not a fantasy; the evidence is there in South Africa's past and present.

There are historical precedents for vital contemporary questions, such as whether traditional leadership should be decided by descent or by popular support; whether it is loyalty or location that defines a traditional leader's people; how to deal with patriarchy; and how to regain the economic independence colonial capitalism stripped away.

In the Constitution, power is not imposed from above but flows up from the people to those who hold office – or, to put it another way from another time, a chief is a chief by the people.

Such ideas from history, understood in their context and applied in today's, can be used to jettison the remnants of colonial and apartheid legislation. From here, we can scrap the Bill, which threatens the rights of South Africans in general and those of women in particular, and start afresh.

Professor Jeff Guy is a research fellow at the Campbell Collections of the University of KwaZulu-Natal and the author of several books, including Remembering the Rebellion: The Zulu Uprising of 1906 and The View across the River: Harriette Colenso and the Zulu Struggle against Imperialism.