

HISTORY, LAW AND TRADITIONAL LEADERSHIP: THE POLITICAL FACE OF THE UNION OF SOUTH AFRICA

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1. INTRODUCTION

The 1910 Constitution of the Union of South Africa revealed a critical clause, which excluded the traditional leaders in particular and the black population in general, from the Union government. The constitutional dispensation of the Union of South Africa was designed in such a manner that it excluded traditional leaders and their communities from the electoral process in Transvaal, Orange Free State and Natal. It was for this reason, among many others that the traditional leaders were greatly disappointed about the 1910 constitutional settlement. As a result, the traditional leaders throughout Southern Africa initiated and formed the political movement namely, the Southern African Native National Congress (SANNC) (later known as African National Congress-ANC) to defend the rights of the black majority in South Africa.

The primary objective of this article is to examine and discuss the history and politics, which influenced and shaped the institution of traditional leadership within the constitutional and legislative frameworks of the Union of South Africa. Colonialism in the Union of South Africa had a long history, which had a tremendous impact on the institution of traditional leadership and governance. This article will also discuss the impact of various pieces of legislation on communal land systems, traditional leadership and administration. These pieces of legislation and policies issued by the Union government disintegrated the powers of traditional leaders in South Africa.

2. BACKGROUND

The Peace Treaty of Vereeniging set the stage for social, political and economic reconstruction of South Africa after 1902. After the signing of this Treaty, the British imperial government in London withdrew Britain's political power from South Africa and gave all power to white minorities (English and Afrikaans).¹ These white groups were given a blank cheque by Britain to determine the political future of South Africa.² The total colonization of South Africa was fundamental in the creation of a racist South Africa regime, and in fact, if it were not for Britain, the colonial racist situation in South Africa would not have been there.³ As Ronald put it, the debate on black rights and the position of traditional leaders in the contemplated Union of South Africa now shifted from Britain to the former four colonies themselves.⁴ The political leaders of these colonies hoped that by setting up the Union they would put an end to the dispute, which caused the Anglo-Boer war and promoted the economic and political development of South Africa as a whole. They believed that this could be attained without the participation of the black leaders both political and traditional in the running of the government.⁵ An agreement or contract was written into the so-called South African Act of Edward VII C 9 of 1909.⁶ This agreement marked and endorsed the continuation of the methods and practices of exploitation of black people by whites in the former Boer republics⁷ and revealed the white's intention to bar black representation in parliament permanently and to retain the existing system of discrimination.

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¹ Basil D Modern Africa: A Social and Political History (Pinelands 1975) 37.

² Anon Document issued by the Policy Research Unit of ANC Youth League (2005) 2.

³ Anon Document issued by the Policy Research Unit of ANC Youth League (2005) 2.

⁴ Ronald O et al Africa Since 1800 (United Kingdom 1967)178.

⁵ Ronald O et al Africa Since (United Kingdom 1967) 1800 178; De Crunchy Church Struggle 3. These two white groups agreed to work together on a terrain where the indigenous black population would not be party to the Union political and constitutional dispensation. All what was left to blacks was to be kept under white domination and to be used by them in whatever manner they saw fit. As Crunchy noted, in withdrawing from South Africa, Britain left behind a caste-like society by its white minority. The prize of unity and conciliation between the Boers and Britons was the institutionalisation of white supremacy.

⁶ South Africa Act of Edward VII C 9 of 1909. Hereafter referred to as the 1910 Constitution of the Union of South Africa. Section 4 of Act of 1909 proclaimed the Union of South Africa and provided that the King with the advice of the Privy Council had powers to declare the colonies of the Cape of Good Hope, Natal, the TVL and the OFS united under the name of the Union of South Africa.

⁷ Mbeki T The Historical Injustice 2001 Umrabulo 53. See also 3.2 and 3.3 above.

Black leadership responded by sending a multicultural delegation to London to protest against this agreement but they were unsuccessful. In March 1909 traditional leaders and black elites convened a South African Native Convention (SANC) in Bloemfontein to oppose the Draft Act of the Union as proposed by whites in their own Convention. Still, their efforts to oppose the Draft Act became a fruitless exercise.⁸ Although the whites of the former four colonies disagreed in many ways, they were firmly united against the blacks and to deny black communities social, political and economic opportunities, which might be provided by the Union. According to Basil, many Afrikaners (not necessary all) were racists by doctrine, habit and tradition. Many English speaking whites were in practice just the same or else if they were new immigrants soon became racists. These two white groups, generally agreed with each other in passing laws for the whole Union, which reduced or eliminated rights and opportunities for black people and their traditional leaders.⁹

Consequently, all the deliberations, which led to the said agreements between the British and the Boers, were articulated at a National Convention (NC) in Durban from 12 October 1908 to 1909, thus being a remarkable process of reconciliation between these two white groups. Of great significance with regard to this historic development was the fact that traditional leaders who represented the majority of Black population were not invited at the NC to decide the future of the envisaged Union of South Africa. During deliberations, the important question of franchise for Blacks, a delicate matter that underlined all South African politics, was raised.¹⁰ When this important issue of franchise was debated, the negotiators were unanimous in their opposition to black participation in the mainstream politics in the Union of South Africa. The reason for this was that white negotiators felt that white and black races in South Africa could never be amalgamated. Odendaal stated that delegates in the National Convention argued vehemently that the history of the world showed that traditional black communities were incapable of civilization. Therefore, it was decided that a franchise for blacks should be based on a laborious civilization test only in the Cape.¹¹

Finally, it seemed, delegates in the National Convention reached a compromise by which the first Union parliament¹² was to be elected on the basis of the existing franchise. This meant that qualified blacks and traditional leaders in the Cape would retain the vote, whereas blacks in Natal, the TVL and OFS would have no political rights.¹³ However, membership in the new parliament was restricted to whites. This meant that the Union parliament was the parliament of the whites only. This compromise was enacted in the Constitution of the Union of South Africa:¹⁴

(1) Parliament may by law prescribe the qualifications, which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the Province of

⁸ Ronald O et al *Africa Since 1800* (United Kingdom 1967) 179.

⁹ Basil D *Modern Africa: A Social and Political History* (Pinelands 1975) 37.

¹⁰ Odendaal A *Vukani Bantu: The Beginnings of Black Protest Politics in South Africa to 1912* (Cape Town 1984) 137.

¹¹ Odendaal A *Vukani Bantu: The Beginnings of Black Protest Politics in South Africa to 1912* (Cape Town 1984) 137. However, the civilisation test was also applied in Natal but the authorities administered it in such a way that blacks could not vote.

¹² Section 19 of Act of Edward VII C 9 1909 vested the legislative power of the Union in the Parliament of the Union that consisted of the King, a Senate and a House of Assembly.

¹³ Section 36 of Act of Edward VII C 9 1909. The qualification of parliamentary voters were intended to be the qualifications necessary to entitle persons of all races in the Cape Province to vote for the election of the members of the House of Assembly.

¹⁴ Section 35(1) and (2) of Act of 1909, commenced on 31 of May 1910. This Act was an Act of the parliament of the United Kingdom. The Act constituted the Union of South Africa. Before the 1930s the entrenched provisions in the Constitution of Union of South Africa appeared to be an effective constitutional constrain on any direct curtailment of the black franchise. This was reinforced by the decision in *R v Ndobe* 1930 484 (AD) in which it was held albeit in obiter that section 35, voting clause was binding on the Union Parliament. However, in *Ndlwana v Hofmeyer* NO 1937 AD 229 the court stated that Statute of Westminster relieved parliament of any necessity to adhere to the entrenched procedure. In *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) it was argued that because the Statute of Westminster, 1931 gave the Union of South Africa the status of an independent dominion, therefore there was a necessary inference therein that the entrenched provisions of South African Act of 1909 were repealed. See also *Minister of Interior and Another v Harris and others* 1952 (4) SA 169, where the court found accordingly that an alteration of entrenched clauses without the due compliance with the special procedure is invalid.

Cape of Good Hope who, under the law existing in the Colony of Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by a reason of his race or colour only, unless the Bill be passed by both Houses of parliament sitting together, and at the third reading be agreed to by two-third of total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have duly passed by both Houses of parliament.

(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

This section implied that the Cape black franchise was not abolished.¹⁵ It was further agreed that not even in the Cape should any black be able to stand as a parliament candidate.¹⁶ Ronald quoted General Smuts, an Afrikaner leader, saying that:¹⁷

I sympathise profoundly with native races of South Africa, whose land it was long before we came here to force a policy of dispossession on them. And it ought to be policy of all parties to do justice to the natives and to take all wise prudent measures for their civilization and improvement. But I do not believe in politics for them. When I consider the political future of the natives in South Africa, I must say I look into shadows and darkness.

3. FORMATION OF POLITICAL CONGRESS

In view of the above exposition, two years after the formation of the Union of South Africa, traditional leaders, black intellectuals, workers, peasants and clergymen gathered in Bloemfontein to establish an organisation, namely, the South African National Native Congress (SANNC) to defend the rights of black people in the Union. The SANNC was the forerunner of the African National Congress (ANC).¹⁸

According to Tambo, the SANNC turned out to be more than a negative reaction to the formation of the Union of white foreigners and conquerors.¹⁹ Instead, it became the symbol of black unity and gave black people a sense of nationhood that survived the most determined application of the policy of divide and rule.²⁰ The delegates who formed SANNC represented a wide cross-section of black public opinion in the Union. But an interesting dimension was added when the delegates from the former adjoining British Protectorates, namely, Basotholand, Bechuanaland and Swaziland attended the Bloemfontein black political gathering. Odendaal expounded that it was for the first time traditional leaders co-operated enthusiastically with the educated elites on an inter-territorial basis.²¹

¹⁵ In terms of black franchise not all blacks could vote in the Cape Colony. Blacks in the Cape were required to pass the civilisation test. This test was a requirement to be passed by all male adult British subjects including Whites. According to the civilisation test the eligible voter who could write their names, addresses and occupations and who earned at least £50 in wages a year or occupied property worth of at least £75 was allowed to cast his vote. The voters were eligible to vote in parliamentary elections. There was no colour bar as far as memberships of the houses were concerned. In Natal only male British subject could become enfranchised if he earned at least £96 in wages a year or owned property worth at least £100 a year. However, the law was administered in such a way that blacks were debarred from obtaining the franchise.

¹⁶ Ronald O et al *Africa Since 1800* (United Kingdom 1967) 127.

¹⁷ Ronald O et al *Africa Since 1800* (United Kingdom 1967) 127. Although Smuts seemed to sympathize with the black majority of South Africa in their political plight of being excluded from government of the future union, it was doubtful whether he practiced what he preached. His above statement, later appeared to be a smokescreen. White government would decide the future of blacks and their leaders only. The white parliament laws impacted directly or indirectly on the institutions of traditional leaders. Traditional leaders and black communities were not represented in the parliament, which made those laws.

¹⁸ Nigel W *The Making of Modern South Africa: Conquest, Segregation and Apartheid* 2nd ed (London 1995) 81. South African Native National Congress (SANNC) was formed in 1912 to protect the rights of black workers in particular and those of blacks in general. In 1923 SANNC was renamed ANC.

¹⁹ Tambo OR *Preparing for Power: Oliver Tambo Speaks* (London 1987) 6.

²⁰ Tambo OR *Preparing for Power: Oliver Tambo Speaks* (London 1987) 6.

²¹ Odendaal A *Vukani Bantu: The Beginnings of Black Protest Politics in South Africa to 1912* (Cape Town 1984) 270-271.

Several paramount traditional leaders were represented directly or indirectly. The most important development, noted Odendaal, in this regard was the attendance of a strong Basotho contingent. Chief Moama, Phillip Modise and half dozen followers represented Paramount Chief Letsie I. Sub-Chiefs²² also attended on behalf of Chiefs, Gaseitsewe of Bangwaketse of the Bechuanaland Protectorate and Lekoko of Barolong. Chief Mopeli and Ntsane of Witzieshoek were also present as well as many other traditional leaders from different traditional persuasions of South Africa.²³

Nkosi Sikelel iAfrika (God bless Africa) which became the black nationalist anthem was sung for the first time in Bloemfontein Congress of the traditional leaders. This anthem is translated in English as follows:²⁴

Lord our God, bless Africa our home, May her head be lifted up on high, Let your ear be open to our cry That your blessing may come, Bless the Chiefs and leaders of our land, Since you made them, may they always hear Your commandments and your name revere, Bless them, under your Lord.

The anthem made a call to the traditional leaders to guide the people towards greater goodness. Nkosi Sikelel iAfrika symbolized the black struggle intended to achieve political rights for all the people of South Africa. It reflected the political initiative and willingness by the traditional leaders to lead the oppressed black masses to freedom.²⁵

Delegates conveyed a strong message of unity and peace. Nigel is on record stating that delegates strongly agreed and believed that if the British and the Boers, despite the bitterness of a hard-fought Anglo-Boer War could come together as a united front against the black people, why could not the blacks unite and face their common problems and enemy.²⁶ It was further noted and agreed that blacks could successfully solve their problems not as individuals, separate tribes, separate traditional leaders but as a unified people. For this reason, Nigel correctly quoted an important extract from the 1912 Constitution of SANNC as follows:²⁷

To encourage national understanding and bring together into common action as one political people all tribes and clans of various tribes and races and by means of combined effort and united political organisation to defend their freedom, rights and privileges.

It is important to underscore the fact that SANNC was far from being a mass movement at its early formative years. Although it included some of the main traditional leaders and rural leaders, its members were still primarily middle class men who feared being thrust back into a rank of rural and urban poor by the legislation of the Union. The initial tactics of SANNC were accordingly moderate. As a result, its leaders hoped to exert influence by petitions, delegations and journalism.²⁸ The SANNC posed a serious threat to the continued political and economic domination of the country. It is for this reason that the white rulers of the Union of South Africa and their successive governments employed a variety of measures to eradicate it. Tambo explained that the Union regime intimidated and victimized traditional leaders, teachers and government employees who supported the organisation.²⁹ The regime also engaged the services of informers and agent provocateurs and encouraged the foundation of splinter and opposition groups to confuse the people, to undermine their struggle for national emancipation and in that way to perpetuate oppression and exploitation.³⁰

²² Sub-Chiefs is a term used during both the colonial and apartheid regimes to refer to the subordinate traditional leaders who were not Paramount Chiefs. Again the term Paramount Chief was used in pre-colonial times to refer to the principal traditional leaders. This breed of traditional leaders occupied the highest position in traditional authority as compared to sub-Chiefs and headmen.

²³ Odendaal A Vukani Bantu: The Beginnings of Black Protest Politics in South Africa to 1912 (Cape Town 1984) 270-271.

²⁴ Leach G South Africa: No Easy Path to Peace (South Africa 1986) 20. This anthem is sung in Zulu, the other parts in Sotho and Xhosa.

²⁵ Leach G South Africa: No Easy Path to Peace (South Africa 1986) 20.

²⁶ Nigel W The Making of Modern South Africa: Conquest, Segregation and Apartheid 2nd ed (London 1995) 81-82.

²⁷ Nigel W The Making of Modern South Africa: Conquest, Segregation and Apartheid 2nd ed (London 1995) 81-82.

²⁸ Nigel W The Making of Modern South Africa: Conquest, Segregation and Apartheid 2nd ed (London 1995) 81-82.

²⁹ Tambo OR Preparing for Power: Oliver Tambo Speaks (London 1987) 6-7.

³⁰ Tambo OR Preparing for Power: Oliver Tambo Speaks (London 1987) 6-7.

Since the union government had been intimidated by the growth and strength of the SANNC it tried to divide its leadership and the blacks in general as a means to crush the unity and power of the organisation. Some of the traditional leaders were infiltrated by the regime to betray the movement. This was done through bribery, favours and better opportunities. Some of the traditional leaders were recruited to spy on the activities of the SANNC. The primary aim of this arrangement was not only to use traditional leaders as pawns but to diminish the strength and unity of the entire black population as well.³¹ Despite gallant efforts of the SANNC to negotiate issues around the political participation of blacks in the Union government, it appeared that the government was not prepared to include them into the government. Instead, the Union government did everything within its powers and might to consolidate and perpetuate segregation and oppression.³²

A point of significance is that traditional leaders did not sit idle and watched the political events as they unfolded in the Union. They refused to be relegated to positions of mere spectators. Instead, they led the struggle by example and action. They exerted concerted effort to oppose all forms of segregation and oppression of blacks by whites.³³ Therefore, it is necessary to underline the fact that the first two years of the Union, united blacks throughout the country more than ever before. What remained to be seen was how traditional leaders tackled the question of segregation and their political exclusivity in the future Union of South Africa.

4. POLITICS OF LAND AND TRADITIONAL LEADERSHIP

4.1 The Implications of the Black Land Act, 1913

The land issue was initially strongly debated.³⁴ In view of all these debates, the parliament passed the Native Land Act,³⁵ (later known as Black Land Act) on 26 of June 1913. This Act was an attempt to make South Africa a white man's country. The Act had profound effects and implications for communal land administered by traditional leaders. The Union government did not consult the traditional leaders to get their views when it passed the Land Act. People who were forced to leave their farms went to occupy the traditional authorities' areas thereby exacerbating the problem of overcrowding and poverty. The Act provided for the purchase and lease of land by blacks and other purposes in connection with the ownership and occupation. The Act restricted blacks from entering into agreement or transaction for the purchase, lease or the acquisition from whites.³⁶ Whites were also not allowed to buy or lease land from blacks. Any agreement entered contrary to the provisions of this Act was declared null and void ab initio.³⁷ It also stated that no black person might own land outside the reserves.³⁸

Black landowners who resided outside the reserves were forced to leave their land. It is also significant to state that not only individual black land owners lost land but also tribes. The Registrar of Deeds registered tribal land in the name of the relevant Minister that was registered in, for example the names of tribes under their traditional leaders. Many traditional communities therefore lost land.³⁹

³¹ Tambo OR Preparing for Power: Oliver Tambo Speaks (London 1987) 6-7.

³² Hennis JC United Nations Versus South Africa: A Legal Assessment of UN and UN Related Activities in Respect of South Africa (Johannesburg 1986) 318. Hennis is of the view that the Union government refused to integrate blacks into the mainstream of politics because they believed that it was impossible to include South African's heterogeneous populations with their desperate culture in the same constitutional framework. According to the Union government such a move would lead to such internal stress and strain that it would be impossible to gain political stability, economic and social developments.

³³ Hennis JC United Nations Versus South Africa: A Legal Assessment of UN and UN Related Activities in Respect of South Africa (Johannesburg 1986) 318. It is evident that the gallant efforts of traditional leaders to represent the aspirations and interests of their people through the formation of ANC could not be left without commendation.

³⁴ Pheko SEM "Constitutional Reconstruction of South Africa" 1987 LLJ 156-157. The first step the government embarked upon was to turn United South Africa into what Pheko termed a white man country. Pheko justified his assertion when he quoted Colonel Sir Wool Sampson, Member of Parliament (MP) for Braamfontein, telling the House of Assembly that: "to the best of his recollection during the recent elections in the Transvaal the majority of honourable Members declared themselves in the most positive terms their determination to make this a white man's country. He hoped a vote would be taken on this matter, so that the people should be able to see who were prepared to make South Africa a white man's country, and those who were prepared to make it a black man's country".

³⁵ Black Land Act 27 of 1913. Hereafter referred to as 1913 Land Act.

³⁶ Section 1(a) of Act 27 of 1913.

³⁷ Section 4 of Act 27 of 1913.

³⁸ Cope Bind the Nation 18.

³⁹ Cope Bind the Nation 18.

Blacks were allowed to remain on white-owned land only if they stayed on as paid labourers or tenants.⁴⁰ The Act was to be laid down that in future all black tenants performing labour services for the landowner and that all other types of black tenancy on white owned land would be phased out.⁴¹ The Act had far reaching consequences for black communities in the sense that it made provision that all black people living on farms either had to leave the farms surrendering them to white farmers or live on the farms not as co-cultivators but as farm labourers working for white farmers. For these reasons, it was an offence for white persons to have black people on their farms if they were not labourers.⁴² The aim of the 1913 Land Act seemed to finally destroy the black tenant farmer and turned him or her into the labour market. The outcome of the Act was to create reserves of cheap labour on tribal land and to keep the status quo of areas outside the reserves.⁴³ The result of the Act was that blacks were left with 12.5% of the total land area, which was mostly some traditional authority land, while the whites had 87.5% to themselves.⁴⁴

Another consequence of the Act was the establishment of social, economic and territorial segregation in rural areas and also the reduction of the ability of blacks to maintain rural economic independence. It also freed them to become wage labourers either on white farmers or in urban areas. Rural women and men were forced to migrate to the so-called whites farms and industries for employment. Consequently the traditional leaders in rural settlements lost direct control over their subjects.⁴⁵ The whole process of migration also disintegrated family life as men left wives and children behind or vice versa.

It is important in view of the foregoing to note that the Land Act did not result in people being removed from tribal land but rather from farms they bought and land they lived upon as labour tenants. The land in the so-called scheduled areas was tribal authority land. As a result of the dislocation of families and movements of people from farms to other unknown areas various traditional communities were established with new leaders.⁴⁶ It was under this period of land dispossession that a new breed of traditional leaders emerged. It may be deduced that the Land Act directly or indirectly created a class of opportunists who under these pressing circumstances made themselves traditional leaders. The Act therefore also interfered with the existence and authorities of traditional leaders. Balatseng and Van der Walt argued that this Act is one of the reasons why South Africa has a multiplicity of traditional leaders.⁴⁷ The land dispossession led to poverty and untold suffering.⁴⁸

⁴⁰ Section 1(a) and (b) of Act 27 of 1913.

⁴¹ Cope Bind the Nation 18.

⁴² Pheko SEM "Constitutional Reconstruction of South Africa" 1987 LLJ 157.

⁴³ Cope Bind the Nation 18. These other types of tenancy to which Cope cited fell under the generic term squatting. Squatters in this context, referred to black tenants who did not supply labour but instead paid for their tenure, either in the form of cash, rent or in the form of agricultural produce.

⁴⁴ Pheko SEM "Constitutional Reconstruction of South Africa" 1987 LLJ 157. See also Callinicos L Working Life 1886-1940 (Johannesburg 1987) 18. Plaatjie, the former Secretary General of ANC reacted to the passage of the Act with a feeling of disbelief that fellow human beings, whites could be so callous about the consequence of their actions. As a result, he made reference to Plaatjie uttering that when: "he awaken on Friday morning, June 26 1913, the South African black found himself not actually a slave but a pariah in the land of his birth.

⁴⁵ Cope Bind the Nation 18. It would suffice to state that the Act laid a strong foundational stone for the disintegration of tribes and even traditional authorities. Effectively, traditional leaders became leaders without the majority of their people. This in itself somewhat stifled rural developments as there were no men to render services for their tribes. Cope quoted Dube, the former president of SANNC, saying that: "it was abundantly clear to them that the authorities knew perfectly well that the natives could not leave private lands entirely. He further stated that the Act was simply aimed at compelling natives to say they would rather remain on the white farms and live under those irksome conditions than to leave the white farms."

⁴⁶ This assertion confirms the fact that some of the traditional leaders in South Africa are not traditional leaders by birth.

⁴⁷ Balatseng B and Van der Walt A "The History of Traditional Authorities in the North-West" Unpublished Presented at the workshop on Culture, Religion and Fundamental Rights 26-27 November 1998 University of North-West 4-5; Callinicos L Working Life 1886-1940 (Johannesburg 1987) 18. Callinicos cited Caluza, a music teacher at Ohlange School in Natal, responding to the passage of Land Act with a song called, "The Land Act Song". The song ran as follows: We are children of Africa. We cry for our land. Zulu, Xhosa, Sotho. Zulu, Xhosa, Sotho unite. We are mad under the Land Act. A terrible law that allow sojourners. To deny us our land. Crying that we the people. Should pay to get our land back. We cry for the children. Who roam around the world without a home. Even in the land of theirs (Chiefs)."

⁴⁸ Balatseng B and Van der Walt A "The History of Traditional Authorities in the North-West" Unpublished Presented at the workshop on Culture, Religion and Fundamental Rights 26-27 November 1998 University of North-West 4-5; Paton A

The SANNC decided to go to England to appeal against the 1913 Land Act but was told by the British government that it was a domestic affair that had to be addressed and solved by the people who created it. The British government hereby countenanced the 1913 Land Act.⁴⁹ The Queen of England still had to sign the 1913 Land Act. The SANNC mounted a campaign against the 1913 Land Act and resolutions and telegraphic representations were made. In March 1913, the Annual Conference of the SANNC appointed a deputation to present their objections to the Union government. This deputation consisted of JL Dube, Dr WB Rabusana, Mangena, Rev L Dube, WZ Fenyane, S Msane, LT Mvabasa, D Letanka and ST Plaatje.⁵⁰ Later this delegation came back to its constituency and reported that every effort had failed. It was during this period of the Union that the pleas and petitions of the SANNC fell on the deaf ears for most of the time. Delegation after delegation told the story of disappointments and failure after another whether in dealing with Britain or the South African government. Blacks wanted to change the political situation of South Africa through peaceful and non-violent means.⁵¹

Both the SANNC and traditional leaders protested in vain.⁵² Hence, blacks were denied the right to own land even if by then they outnumbered the whites by four to one. The 1913 Land Act must be seen as a big reinforcement of the South African racist system, which later developed into apartheid. Collins observed that whites generally viewed traditional leaders whom they called native leaders in relation to land as follows:⁵³

When we westerners call people “Native Chiefs”, we implicitly take cultural colour out of our perception of them. We see them as trees walking, or as wild animals infesting the country in which we happen to cross them. In fact, we see them as part of local flora or fauna, and as men of like passions with ourselves and seeing them thus as something intra-human, we feel entitled to treat them as though they did not possess ordinary human rights. They are merely natives of the land which they occupy. Their tenure is provisional and precarious as that of the forest trees.

Land was the source of wealth to traditional leaders and their communities. Black families who were evicted from their farms began to lose their wealth and source of livelihood. Hence one of the powerful slogans in the liberation struggle in South Africa was “Izwe Lethu”.⁵⁴ Many black leaders felt bitter about their national dispossession. Biko one of the greatest leaders of Black Conscious Movement (BCM) had these words:⁵⁵

We black people should all the time keep in mind that South Africa is our country and that it belongs to us. The arrogance that the white people had to travel all the way from Holland to come and balkanise our country and shift us around has to be destroyed. Our kindness has been misused and our hospitality

Solomon Thekiso Plaatje: Memorial Lecture (University of Bophuthatswana 1987) 2. Both Balatseng and Van der Walt were also of the view that black life has been interrupted since the arrival of whites in South Africa. They further contended that since the Union of South Africa, black life was nothing but a misery. It is this misery that had been sanctioned by the Union government and the courts alike. Such misery led to a situation of untold suffering and poverty. This suffering constituted an aggression upon the dignity of the black people. Paton expressed the same sentiments when he said that poverty engendered by the process of land dispossession in South Africa dislocated the moral infrastructure of the black nation and created a feeling of inferiority. In support of his view, he referred to the experience of Plaatje about the introduction of the Land Act. Paton, therefore quoted Plaatje saying that: “he would never forget the scenes he had witnessed in the Hoopstad district during the cold sharp of July, of families living on the roads, the numbers of their attenuated flocks, emanated by lack of fodder on the trek, many of them dying while the wandering owners ran risks of prosecution for travelling with unhealthy stock.” He further stated that: “he saw the little children shivering, contrasted their conditions with the better circumstances of my own children in their Kimberley home, and when the mothers told me of the home they had left behind and that they had endured since eviction I could scarcely suppress a fear.”

⁴⁹ Balatseng B and Van der Walt A “The History of Traditional Authorities in the North-West” Unpublished Presented at the workshop on Culture, Religion and Fundamental Rights 26-27 November 1998 University of North-West 5-8. Petitions were also sent to the Native Land Commissioners from different black persuasions. These petitions came from various traditional leaders, churches and individuals.

⁵⁰ However it has to be noted that Plaatje was unable to proceed to Cape Town.

⁵¹ William B Sol-Plaatje: A Biography of Solomon Thekiso Plaatje 1876-1932 (London 1984) 165.

⁵² Collins RO Problem in the History of Colonial Africa 1860-1960 (London 1970) 241.

⁵³ Collins RO Problem in the History of Colonial Africa 1860-1960 (London 1970) 241.

⁵⁴ The phrase Izwe Lethu is a Zulu term, which means the Land is ours.

⁵⁵ Pheko SEM “Constitutional Reconstruction of South Africa” 1987 LLJ 176.

turned against us. Whereas whites were guests to us on arrival in this country they have now pushed us to 13% corner of the land and are acting as bad hosts in the rest of the country. This we must put right.

It is clear from the above that black communities and their leaders, both traditional and political were discontented about the issue of land dispossession. The 1913 Land Act inevitably laid the foundation for the broader political struggle of black people in South Africa.

4.2 Native Trust and Land Act, 1936

As a result of the negative effects of the 1913 Land Act, land was becoming more and more scarce in the reserves. The reserves were also overcrowded. After debates in the Union parliament, however, the parliament passed the Native Trust and Land Act (later known as Black Trust and Land Act).⁵⁶ With the introduction of this Act, more acres of land were added to the reserves thus making it possible for black communities to secure 13% of land for the blacks and whites ended up with 87%. The additional land set aside by this Act was solely for exclusive occupation. Hertzog, promised to furnish the Trust with liberal funds to achieve its purpose of buying and developing land for the blacks. Of the 18 million hectares released, about 3 million were Crown lands, which the Trust at once acquired. Hertzog believed that traditional leaders should have their own areas in the reserves. Therefore, blacks were denied the opportunity to live in places of their own choice. They were also denied the opportunity to live side by side with other population groups. The land of traditional leaders and their people was defined in the light of the barren reserves.

Hertzog set out his views on black policy as follows:⁵⁷

We are dealing here with the place of the native, not in native territory, but in the land of the white man where the white man shall rule and have the right to live safely and peacefully. Nobody compel the native to settle in this territory, but if he does so it is demanded from him that he shall respect the white man and obey the laws of the country. I wish to warn the natives that whoever is so presumptuous as to claim equal authority with the white man will experience the greatest disappointment and failure.

In order to control and regulate the blacks in the Trust Land, the Act introduced and established a black trust to buy up land in released areas to be occupied by the blacks under stringent supervision by trust white officials. The state president who had powers to delegate any of his powers and functions to the Minister had powers to administer the trust land, as such, a trust land was under the trusteeship of the president of South Africa.

5. BLACK ADMINISTRATION AND LEGISLATION

5.1 Black Administration Act of 1927

It has been stated earlier that the 1913 Land Act created instability and insecurity in the black communities. At that time the institution of traditional leaders was in disarray as there were no specific legislative measures or provisions in the Union, which gave recognition to customary law and in particular the institution of traditional leadership. Therefore, in 1927 the Union parliament enacted the Native Administration Act (later Black Administration Act).⁵⁸

⁵⁶ Act 18 of 1936. The Act provided for the establishment of a South African Native Trust and defined its purposes and made further provisions as to acquisition and occupation of land by blacks and other persons. The Preamble of Act 18 of 1936 made provision for the so-called released areas and further provided inter alia that the Black Land Act 27 of 1913 referred to as the 'principal Act' be construed as if it formed one Act with Act 18 of 1936 and the Governor-General may from time to time whenever he considered it in the public interest so to do, excise from any released area such land other than the land held by a black.

⁵⁷ As quoted by Williams European Community 18.

⁵⁸ Act 38 of 1927. This Act was repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. The Act provides inter alia for the repeal of the provisions of the Black Administration Act 38 of 1927 incrementally. The Preamble of the Act states inter alia that since the Constitution of the Republic of South Africa as the supreme law of the Republic is to establish a society based on democratic values, social and economic justice, equality and fundamental rights and to improve the quality of life of all citizens and free the potential of all persons by every means possible, the Black Administration Act is regarded as a law that is repugnant to the values set out in the Constitution particularly section 1 and the Bill of Rights in Chapter 2 thereof, is reminiscent of past divisions and discrimination and ought to be repealed as a matter of the utmost urgency.

The main aim of this Act was to create separate political and legal institutions for the governance of black people. The Black Administration Act was enacted as a national legislative measure *inter alia* to consolidate all administrations by the former colonies, the recognition and application of customary law and to make provision for the regulation of the institution of traditional leadership. Bennett posited that the individual colonies produced curiously diverse tribal court structures and a degree of recognition of customary law.⁵⁹ It was for this reason that the principal concern of the Union government was to improve uniformity in the application of customary law and the regulation of traditional leaders. The policy rationale behind the desire to achieve uniformity was to promote tribalism and chiefly authority. In government circles, it was believed that a return to traditional institutions could deflect the threats posed by the growing urbanized black proletariat.⁶⁰ Bennett further explained that the date of the promulgation of the 1927 Act was a decisive moment in South African legal history. This Act introduced a new structure to black legal affairs.

However, the principal concern of the Union government in passing the Act was to establish a form of public administration that sought to subjugate blacks in all spheres of life. In other words, the Act enforced a form of colonial relationship between the dominant white minority group and a subordinate black majority who were to be administered by them. Therefore, one of the key values promoted and held by the Act was the segregation of races.⁶¹

The provision of the Black Administration Act, which regulated the institution of traditional leaders, was laid down as follows:⁶²

The Governor General (later the state president) may recognise or appoint any person of a native tribe and may make regulations prescribing the duties, powers and privileges of Chiefs so recognised and appointed ... The Governor-General may depose any Chief so recognised or appointed.

The Act gave limited powers and roles to traditional leaders. As emphasised in the above quotation, the power to recognise, appoint and depose traditional leaders was placed in the hands of the Governor-General who was also made a Supreme Chief of all traditional leaders in the Union of South Africa.⁶³ This idea originated in Natal where the Governor-General was also the supreme traditional leader.⁶⁴

⁵⁹ Bennett TW “The Equality Clause and Customary Law” 1994 SAJHR 62.

⁶⁰ Bennett TW “The Equality Clause and Customary Law” 1994 SAJHR 62.

⁶¹ The 1927 Black Administration Act was one of the Union legislation, which laid a foundational stone for racial segregation.

⁶² Section 2(7) of Act 38 of 1927.

⁶³ Section 1 of Act 38 of 1927. In *Minister of Native Affairs and Another v Buthelezi* 1961 (1) SA 766 (A), the court held that the appointment of a Chief is made by the Governor-General as Supreme Chief. The court further stated that there is nothing in the Act or any other statutory provision, which in any way limits the discretion vested in the Governor-General in regard to the appointment of a Chief. See *Buthelezi v Minister of Bantu Administration and Another* 1961 (3) SA 760 (CLD), where the court stated that in all cases of quarrels regarding chieftainships or successions to chieftainships the Chief Native Commissioner had to make an enquiry for the information of the Governor-General in his capacity as the Supreme Chief of all Chiefs in South Africa. In *Saliwa v Minister of Native Affairs* 1956 (2) SA (AD) 310 the court stated that the Governor-General has absolute power of the Supreme Chief in native law and he had no obligation to grant a person hearing before the order of removal or dismissal is granted. See also *Sibasa v Ratsialingwa and Another* 1947 (4) 369 (TPD), where the court held that Governor-General in his capacity as Paramount Chief has legal right to depose a Chief. The court also confirmed the powers of Governor-General in respect of the traditional leaders in *Mabe v Minister for Native Affairs* 1958 (2) SA TPD where the court dealt with a matter concerning a deposition of a Chief by the Governor-General. The Governor-General relied on information put before him that a Chief was not fit to be a Chief. The Governor-General accepted that information and determined that a Chief should no longer hold an appointment as Chief. The court concluded that the Governor-General’s decision in good faith could not be set aside even if the information upon which he acted was subsequently found to be incorrect.

⁶⁴ The structure of the tribal system was modified considerably such that a traditional leader was no longer the higher authority. As stated above that the white Governor-General was appointed a Supreme Chief, the generally accepted customary practice that a traditional leader represented the highest authority in the community and became God during his lifetime as a ruler was deconstructed when the power of colonial rule asserted that it should not be taught that the policy of indirect rule was *laissez-fair*. Traditional leaders were subordinate to Governor-General and they were not necessarily sovereign authorities. The Union government recreated its own institution of traditional leaders, where the Governor-General became the King of all the black people in the provinces of the Union South Africa. Hence, Mokotong remarked

These limitations militated against the customary rules and procedures for appointing and deposing of a traditional leader. These provisions were put to test in a number of cases in South Africa. For instance, Watermeyer explained the legislative powers of the Governor-General when he said that:⁶⁵

The government in making an appointment is not bound to appoint a man who would be chief according to native custom.

Hoexter stated that:⁶⁶

There is nothing in the Act which gives the son of the hereditary Chief any claim ... to chieftainship, on the contrary, the object of the legislation appears to have been to put to an end hereditary chieftainship for the purpose of the Act.

Customary law also prescribed duties, powers and functions, which were enjoyed and bestowed on a traditional leader. The introduction of the Black Administration Act's, regulations prescribing the duties, powers and privileges of traditional leaders vested on the Governor-General.⁶⁷ The Black Administration Act undermined and interfered with the institution of traditional leaders. The Act empowered the Minister or Secretary of the then Department of Black Administration and Development to appoint any person as a traditional leader or headman.⁶⁸ A traditional leader who could not toe the line of government could be summarily deposed or dismissed by the Governor-General.⁶⁹ Furthermore, by giving the Governor-General the powers to prescribe the duties and functions of traditional leaders, indicated that the government took away the customary roles of traditional leaders and gave them to the Governor-General.⁷⁰ This was done despite that, the Governor-General was someone who was not conversant with black ways of life.⁷¹ Hence, Balatseng and Van der Walt remarked:⁷²

that the Black Administration Act appointed the Governor-General as the Supreme Chief of all Africans and gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. Later the State President who also became the Supreme Chief of all Chiefs in South Africa replaced the Governor-General. In *Moepi v Minister for Administration and Development 1965 (1) SA 533 (TPD)*, the court stated that the Bantu Commissioner represented the State President when he deposed a Chief of Bakgatla-ba-Motha tribe of Skilpadfontein. The court further stated that the State President in his capacity as Supreme Chief has legal power to appoint, recognise and dismiss a Chief. See Section 1 of Act 38 of 1927.

⁶⁵ Koyana DS "Chieftainship and Headmanship are not Hereditary" 2002 *Speculum Juris* 149. As quoted by Watermeyer in *Siqcau v Siqcau 1944 AD 67*. See also *Buthelezi v Minister of Bantu Administration and Development and Another 1961(4) SA 835 (A)*, where the court held that the conduct of the Governor-General in appointing a Chief was entirely in accordance with the statute and was unimpeachable. The court further stated that there is nothing in Act 38 of 1927, which gives the son of a Chief any claim, whatever to the chieftainship and the Governor-General is entitled to appoint a successor without any notice to him.

⁶⁶ As quoted by Koyana DS "Chieftainship and Headmanship are not Hereditary" 2002 *Speculum Juris* 149. For more information regarding the above comments by Hoexter, see *Buthelezi v Minister of Bantu Administration and Development 1961 (4) SA 835 (A)*, where the Court emphasised that the position of a Chief is not per se hereditary. The appointment and recognition of a person as a Chief resides in the hands of the Governor-General.

⁶⁷ Section 1 of Act 38 of 1927. The traditional leaders performed their functions and exercised powers under the helmet of the Governor-General who was their supreme chief. Furthermore, by giving the Governor-General the powers to prescribe the duties and functions of traditional leaders, indicated that the government took away the customary roles of traditional leaders and gave them to the Governor-General.

⁶⁸ Section 2(8) of Act 38 of 1927.

⁶⁹ Section 2(8) of Act 38 of 1927.

⁷⁰ In *R v Ezekiel 1958 (10 SA (TDP))* the appellant was charged with contravening section 2(9) of Act 38 of 1927 in that he did wrongfully and unlawfully refuse to obey a lawful order issued by the native Chief in the lawful execution of that Chief's duties. The court stated that in circumstances where a native disobeyed order of a Chief it is essential to allege that the Chief was one appointed by the Governor-General and discharged his duties on behalf of the Governor-General as the Paramount Chief of all native Chiefs. See also *R v Buthelezi 1957 (4) SA NPD*, where the court stated it is essential to allege that the proceedings of a meeting obstructed by the accused was lawfully convened by a Chief performed duties prescribed to him by the Governor-General.

⁷¹ Balatseng B and Van der Walt A "The History of Traditional Authorities in the North-West" Unpublished Presented at the workshop on Culture, Religion and Fundamental Rights 26-27 November 1998 University of North-West 12.

⁷² Balatseng B and Van der Walt A "The History of Traditional Authorities in the North-West" Unpublished Presented at the workshop on Culture, Religion and Fundamental Rights 26-27 November 1998 University of North-West 15: Rakate PK "The Status of Traditional Courts Under the Final Constitution" Unpublished Paper Written for the Constitutional Court of

During its application the 1927 Act changed the institution of traditional authorities to a point where the institution had become the symbolic institution amongst the indigenous communities. It has eroded the institution to an extent that today there is a reigning confusion as to what traditional authorities are. If one looks at the provision of the Act, the divisions that have taken over the decades in respect of the Act, one is left with no option but to question the authenticity of the institution. Only in a few settlements does one get a feeling of what is happening but in most villages and settlements there is a lot of uncertainty.

Traditional leaders lacked effective power to take proper decisions on important matters affecting the lives of their communities and public order in their areas. They became servants of government. As a result, they were perceived by their communities as showing favouritism to government, members of their families and those who gave them bribes.⁷³ The Black Administration Act further empowered the Governor-General to create new tribes, divide existing tribes and demarcate the areas occupied by the members of the tribe.⁷⁴ The Act was an attempt by the Union government to create tribes and traditional authorities as if they were new institutions and failed to build on what was already in existence. This statute drastically and dramatically altered the original meaning of the institution of traditional leaders and caused it to evolve in a manner that did not remain faithful to its indigenous concept and communities.⁷⁵

Tribes came to be controlled by white officials with the traditional leaders aided by the government. Letsoalo pointed out that the Black Administration Act stressed the need for blacks to be retribalized under a distinct system of law and a government department.⁷⁶ Consequently, the then Native Affairs Department was given a more regulatory role, which included disciplining traditional leaders and the possibility of relocating communities⁷⁷ to fit the government notion of ethnic distribution within the reserves.⁷⁸

According to Letsoalo, traditional leaders who challenged and opposed the regulations of the department were viewed as “undisciplined” and “derogatory” to the system.⁷⁹ The rationale to impose the Native Affairs Department in the administration of the blacks was explained by Letsoalo as follows:⁸⁰

South Africa 1996 2-16. Rakate expressed the same view of Balatseng and Van der Walt when he reported that the Black Administration Act had reduced traditional leadership to a very different institution. He further commented that: “traditional leadership was a public office created by statute. Rakate argued that such a legislative arrangement is a reversal of the provision of the Chief in traditional society, in which the role of the Chief was to represent his or her people according to the dictates of customary practice. This reversal, effected by the Act, has plainly made the appointment, suspension and deposition of Chiefs ... The powers of the Governor General (later state president) under the Act to appoint, suspend and depose Chiefs have quite often been used against Chiefs who have incurred official displeasure or proved troublesome.”

⁷³ Rakate PK “The Status of Traditional Courts Under the Final Constitution” Unpublished Paper Written for the Constitutional Court of South Africa 1996 16.

⁷⁴ Section 5 of Act 38 of 1927. Mitchell, the representative of Natal South-Coast in parliament stated that: “the law as it stands, the 1927 Act lays down quite clearly what the legal position is, that when the Governor-General deems it expedient in the public interest to remove a tribe or to demarcate the areas occupied by the members of the tribe, he may order them to withdraw to some other places and to remain there. At the end of that section there is the proviso that: ‘If the tribe refuses or neglects to withdraw as aforesaid no such order shall be of any force and effect until a resolution approving of the withdrawal has been adopted by both Houses of Assembly’”. See in this regard South Africa Debates of the House of Assembly 1240. Despite what the 1927 Act laid down as a procedure for the removal of tribes for public interest, blacks were removed from their areas by the government without following proper legal procedure. It seemed that it was a government norm to remove blacks from their areas even if they objected to such removal.

⁷⁵ Zibi M “Reforming the Role of Traditional Leadership” Unpublished Paper Presented at the Conference on Traditional Leadership, April 2006 Fourways 12.

⁷⁶ Nigel W The Making of Modern South Africa: Conquest, Segregation and Apartheid 2nd ed (London 1995) 75.

⁷⁷ Section 5 of Act 38 of 1927.

⁷⁸ Letsoalo EM Land Reform in South Africa: A Black Perspective (Johannesburg 1975) 37.

⁷⁹ Letsoalo EM Land Reform in South Africa: A Black Perspective (Johannesburg 1975) 37.

⁸⁰ Letsoalo EM Land Reform in South Africa: A Black Perspective (Johannesburg 1975) 37.

The essential function of the Native Affairs Department is to assist, guide, protect and generally to subserve the interests of the large underdeveloped and, for the most part, inarticulate native population which is rapidly emerging from barbarism while at the same time its own tribal organisation, control, discipline, customs and traditions rapidly and inevitably breaking down.

The introduction of white government officials into traditional authorities disintegrated the tribal systems and organisation. The reason being that these white officials did not understand the modus operandi of the traditional authorities. That is why they were unable to develop and shape customary law and traditional leadership effectively and appropriately as traditional leaders and tribal people could.

As Nigel noted, the 1927 Act marked a rejection of the notion of political assimilation of blacks into the Union. Instead this Act backed the Natal principles of bolstering traditional authorities in the reserves under the Supreme Chief, the Governor-General of South Africa, in ways, which resembled the old Shepstonian system.⁸¹ The 1927 Act also had a profound effect on the judicial authority and functions of traditional leaders. The Act recognised the judicial authority of traditional leaders subject to the authority of the Minister acting on behalf of the Governor-General.

The traditional leaders were authorised to hear civil disputes arising out of the black laws and customs between black residents within their areas of jurisdiction.⁸² However, traditional leaders were not allowed to settle disputes pertaining to nullity of divorce or separation in respect of customary marriage.⁸³ This is an example of how the government undermined the expertise of traditional leaders regarding matters of the dissolution of marriage.⁸⁴ Another factor, which really undermined the judicial expertise of traditional leaders, was the fact that government did not allow them to settle disputes between black and white litigants.⁸⁵ Traditional leaders could not summon persons who were not of African descent. Where a case involved black and white parties, even in the area of a traditional leader such a matter had to be referred to a magistrate.⁸⁶ In the area of criminal offences, traditional leaders were allowed to try to punish any black person who committed an offence in his area of jurisdiction.⁸⁷

However in terms of the Act they were not allowed to inflict punishment on matters pertaining to death, mutilation, grievous bodily harm or imprisonment or imposing a fine exceeding twenty pounds or two heads of cattle.⁸⁸ As alluded to above that the powers that were allocated to the traditional leaders by the Black Administration Act were mainly judicial in nature, it is evident that most of the customary functions of the traditional leaders vested in the office of the Governor-General.

5.2 Black Representation Act of 1936

In June 1936, both Hertzog and Smuts created the United South African National Party (USANP).

⁸¹ Nigel W *The Making of Modern South Africa: Conquest, Segregation and Apartheid* 2nd ed (London 1995) 75.

⁸² Section 12(1)(a) of Act 38 of 1927.

⁸³ Section 12(1)(b) of Act 38 of 1927. In terms of these provisions the Minister may authorise any traditional leader recognised or appointed to hear and determine civil claims arising out of black law and custom provided that a traditional leader may not have power to determine any question of nullity, divorce or separation arising out of a marriage.

⁸⁴ The Act generally implied that traditional leaders were not capable of settling divorce matters. The conclusion which literally undermined their judicial know-how concerning divorce matters.

⁸⁵ Section 12(1)(a) of Act 38 of 1927. The traditional courts were re-organised through the introduction of Black Administration Act. The traditional courts were established on the basis of authority given by government warrant. The Commissioners' Courts and Special Courts of Appeal were established. Black litigants were required to make an appeal from the traditional courts to the Commissioners' Courts and from the Commissioners' Courts to the Special Court of Appeal. These courts were established to recreate the flexibility and informality of the traditional courts which blacks were accustomed. See in this regard Bennett TW *Human Rights and African Customary Law* (Cape Town 1995) 62–63.

⁸⁶ It was unheard of a situation where a white person was tried by a traditional court in South Africa.

⁸⁷ Section 20 of Act 38 of 1927.

⁸⁸ Third Schedule of Act 38 of 1927 added by section 2 of Criminal Procedure Act 13 of 1955. This Schedule covered among other things offences such as rape, robbery, sedition, public violence, treason etc.

The first step the USANP led government took was to enact a Native Representation Act⁸⁹ (later Black Representation Act) which brought an end to the registration of qualified blacks as voters on the common roll with whites in the Cape Province.⁹⁰ After blacks in the Cape were removed from the common voters roll from both parliament and Provincial Council (PC), the government placed them on separate electoral lists from which they could elect three white representatives to the House of Assembly and three to the Cape Provincial Council (CPC). There was also a provision for four senators to be indirectly elected by blacks to the upper house. These white representatives formed Native Parliamentary Representatives (NPR). This arrangement was a sort of compensation for the disenfranchised Cape black voters.⁹¹ The traditional leaders were also represented in this Council.

The consequence of the Act was that it removed 11000 Cape black voters from the common roll and all other black voters were divided into four constituencies, which were the Cape proper, the Transkei, Natal, the Free State and Transvaal.⁹² The 1936 Act diminished the hopes of the black communities in particular and traditional leaders in general to be part of the electoral process in South Africa. This was true more especially to the blacks in TVL, OFS and Natal who had been waiting to be enfranchised. When the Cape black voters were removed from the common voters roll, the blacks in these three provinces of united South Africa found themselves in a state of despair. The blacks in the Cape and throughout South Africa who had hoped that there would be an evolution of the democratic process extending the black vote to other provinces saw the 1936 Act as a total onslaught on their remaining human rights and freedoms.

6. CONCLUSION

In view of the preceding discussion, it becomes clear that the traditional leaders especially through the African National Congress mobilised support, campaigned and protested against the injustices of the Union government. The political formation of the ANC by the traditional leaders and other sections of the civil society was an important and commendable step, which laid a foundation for a broader liberation of black people in South Africa. It is also evident from the above that a Union government enacted a considerable number of legislative measures, which influenced the institution of the traditional leadership. The premise of these pieces of legislation had been the subject of intense political debate and resistance by the traditional leaders and politicians alike. The institution of traditional leaders demonstrated resilience and much concerted efforts to resist the onslaught of the colonial administrators of the Union government. Although there were resistance by traditional leaders and traditional communities in the Union of South Africa, traditional rule did not escape the colonial contact and impact and affected.

The Union government enforced its power over the traditional leaders and their communities. These political arrangements disrupted patterns of the institution of traditional leadership and governance. The institution of traditional leadership was recognised and shaped by the Union government to suit, adopt and promote its objectives and aims of colonial oppression and domination.

⁸⁹ Act 12 of 1936

⁹⁰When the Parliament passed the Native Representation Act 12 of 1936, which removed blacks voters from the electoral rolls in the Cape Province, the legality of this Act appeared beyond doubt. Nevertheless in *Ndlwana v Hofmeyer* NO 1937 AD 229 the removal was challenged as being ultra vires the power of parliament. The basis of the challenge was that the Act did not only in reality disenfranchise blacks but merely changed the constitutional context in which they could vote. In responding negatively, the court established what was to become the most important juridical principle of the constitutional system: "Parliament's will as expressed in an Act of Parliament cannot now in this country, as it cannot in England be questioned by a court of law whose function is to enforce that will not to question it. It is obviously senseless to speak of an Act of a sovereign law-making institutions as ultra vires."

⁹¹ See generally Schapera I Southern Africa Part III: The Tswana (London 1953) 49.

⁹² When the Union of South Africa was established in 1910, black voters who resided in Transvaal, Orange Free State and Natal were disenfranchised from the beginning. Only blacks who resided in Cape Colony were allowed to vote subject to certain conditions such the required level of education, ownership of property etc.