

THE TRADITIONAL LEADERSHIP AND GOVERNANCE  
FRAMEWORK ACT, 2003, AND ITS SUBSEQUENT PROVINCIAL  
LEGISLATION

—

A CRITICAL REVIEW OF ATTEMPTS AT INTEGRATING TRADITIONAL  
LEADERSHIP INTO THE NEW DEMOCRACY IN SOUTH AFRICA

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## **Keywords**

- Code of conduct
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- Presidential and premier recognition
- Provincial legislation
- Traditional communities
- Traditional council
- Traditional leader



## **Abstract**

### THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT AND ITS SUBSEQUENT PROVINCIAL LEGISLATION

The subject of this research paper is the analysis of the recent national and provincial legislation on traditional leadership. Within the new constitutional dispensation the legislature had to retain traditional leadership pursuant to Chapter 12 of the Constitution of the Republic of South Africa, 1996. It was unclear how to change institutions that are based on customary law and at the same time, recognize them as they are. The legislative branch of government provided its answer through the national and provincial Acts. Precisely this answer forms part of the research paper. I focused the analyses on this object by purely letting the legislatives words and implications 'speak'.

Traditional leadership has a prominent position within customary law. The new legislation defines a new position of traditional authorities and creates a legal framework by the state. The deeper meaning is to harmonize traditional authorities and customary law with the constitutional imperatives. Capacitating the traditional authorities for governmental function such as service delivery on local sphere is the further and practical aim.

Traditional authorities act in the local sphere. With due regard to this condition I analyse the national legislation. The close look entails mostly subjects that the Traditional Leadership and Governance Framework Act, 2003 regulates.

Furthermore I draw out the legislative mechanisms of the national Act for the subsequent provincial Acts.

The second focus pertains to the provincial legislation. Statutes in the six respective provinces have been adopted in 2005. Each provincial Act has to deal with certain subject matter as set out in the national Act. Nevertheless they differ in details, supplements, language ect. Therefore I draw out the main particularities of the individual Acts in order to enhance a better view on constitutionalizing and harmonizing the traditional communities, leaders and councils with the constitutional imperatives.

## **Declaration**

I declare that *THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT, 2003, AND ITS SUBSEQUENT PROVINCIAL LEGISLATION – A Critical Review Of Attempts At Integrating Traditional Leadership Into The New Democracy In South Africa* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete reference.

Alexander Kamieth

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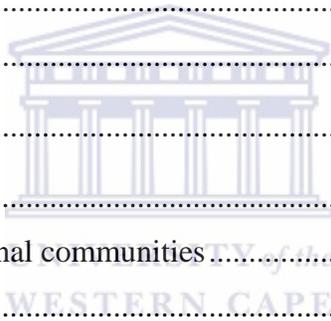
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## **1. Introduction**

*The Traditional Leadership and Governance Framework Act, 2003*<sup>1</sup> and related provincial legislation<sup>2</sup> are current developments on national and provincial levels related to traditional leadership.<sup>3</sup>

In the light of Sec. 211 and 212 of the Constitution of the Republic of South Africa, 1996<sup>4</sup> traditional authorities were entrusted exclusively with customary law.<sup>5</sup> The provisions do not foresee any other role.

Recently the Parliament of the Republic of South Africa adopted an Act in terms of Sec. 212 of the Constitution, to provide a national framework for traditional leadership.<sup>6</sup> About one third of the South African population lives within traditional communities.<sup>7</sup> The recognition of traditional communities, introduction of traditional councils, identification and recognition of traditional leaders, organization of houses of traditional leaders and a code of conduct are the main components of the new legislation. Besides a unified and transparent statute in each province with traditional communities was established and old scattered provisions were repealed. Advocates of and objectors to the new legislation agree upon the significance of the Act at this transitional stage of South Africa.

The concern expressed by Currie ‘There is little in the final Constitution to prevent the new political order, should it wish to do so, from subjecting customary law to the same repressive

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<sup>1</sup> Act No. 41 of 2003 [later referred to as the TLGF Act, 2003].

<sup>2</sup> Six provinces have adopted legislation related to the TLGF Act, 2003.

<sup>3</sup> Traditional leadership for the purpose of this research paper is an organisational structure and is subjected to the traditional community as the foundation. It shall not reflect any hierarchy or value judgements.

<sup>4</sup> Later referred to as the Constitution.

<sup>5</sup> Himonga, C. and Bosch, C. (2000), p. 307 (313)

<sup>6</sup> TLGF Act, 2003.

<sup>7</sup> White Paper on Traditional Leadership and Governance (2003), p. 49.

tolerance that it endured under the old',<sup>8</sup> certainly must be considered. On the other hand academic writers argue that the new legislation '... leaves change in the hands of communities...'<sup>9</sup> My analysis of the new legislation shall reflect upon the *status quo* of the legal framework of traditional leadership in its interplay of traditional or customary law, the constitutional role and the constitutional dispensation.

Another discussion on traditional leadership stresses the contentious relation of customary law and the Bill of Rights, particularly with regard to the equality clause.<sup>10</sup> For this paper the legitimacy of traditional leadership as laid down in the Constitution is presupposed.<sup>11</sup> The statutory legislation is thereby charged to resolve this tension.

The Constitution affords space for traditional leadership to re-emerge and develop, that it can adequately position itself in the Post-Apartheid democracy. Considering solely the new legislation, academics praise the new step towards an integration of traditional leadership into the new democracy.<sup>12</sup> Integration should not imply the mere fusion of governmental concepts but a consolidation thereof for a coherent legal system in South Africa.<sup>13</sup> The paper will first and foremost analyse the new legislation, its respective role within South African constitutionalism, and its impact on the addressed institutions.<sup>14</sup> One cannot reduce traditional leadership to the functions of executive, judiciary and legislature on a local sphere. This would be a pure western approach and is deemed to fail in the South African context.<sup>15</sup> Nevertheless this paper is based on

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<sup>8</sup> Currie, I. (1999) Sec. 36 - 3.

<sup>9</sup> Bennett, T. W. and Murray, C. (2005), Sec. 26 – 66.

<sup>10</sup> Sec. 9 of the Constitution.

<sup>11</sup> Chapter 12 of the Constitution.

<sup>12</sup> *E.g.*: Bekker, J.C. and Boonzaaier, C.C. (2006), p.129: 'The government had no option and our impression is that it has done a magnificent job to bring two worlds together.'

<sup>13</sup> For an integration of legal and social cultures into the new democracy see Du Plessis, L. (2002), p. 367 (369).

<sup>14</sup> Traditional communities, traditional leaders, traditional councils.

<sup>15</sup> *E.g.* The Human Rights Commission on the judiciary: '...the judiciary in some instances seems to still be suffering from an apartheid and colonial hang-over and has a tendency to look at African cultures from a Western or European perspective - a perspective that generally has no proper understanding of African cultures and values. The Prince and Bhe judgments and the dissenting judgments of some of the judges of the Constitutional Court therein are a reflection of this concern.' South African Human Rights (2006), p. 183.

western views of constitutionalism<sup>16</sup> and will not pretend to establish an overarching analysis, including the historically developed views of South African traditional leadership. It will remain work for others to engage into and reflect about the perspective of the traditional communities. This paper shall only provide the legislative analysis, a rather theoretical approach.<sup>17</sup> The legislation on traditional leadership in part restates and legislates customary law.<sup>18</sup>

The subsequent provincial legislation has emerged from its national 'mother'. The Act obliges provincial legislation to regulate certain fields and encourages to do so in others. What is mandatory and what is imperative will be highlighted. Then a close look at the provincial legislation may provide with an insight on how the provincial government integrates the traditional community and its traditional leadership. Lastly the variations to induce or stipulate provincial legislation are acknowledged and addressed.

## **2. The national legislation – TLGF Act, 2003**

The aim of the Act is to harmonize the institution of traditional leadership with the new constitutional democracy. Sachs has stated 'We should not seek to traditionalize democratic institutions, nor should we set out to democratize traditional ones. The objective is not so much to democratize traditional institutions as to constitutionalize.'<sup>19</sup>

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<sup>16</sup> The supreme law, the Constitution, resembles mostly western concepts of democracy and human rights, checks and balances, e.g. the stressed African concept and value of *ubuntu* did not only loose frame but also recognition in the constitutional jurisprudence. For a constitutional interpretation of the traditional value of *ubuntu* see Mqoke, R.B. (1996) p. 364. See also Currie, I. (1999), Sec. 36-1 footnote 3.

<sup>17</sup> The subject will need substantial field research in order to establish the factual state of traditional leadership, *i.e.* a restatement of the customary law on traditional leadership under the new legislation.

<sup>18</sup> *E.g.* The candidate for the *inkosi*, the highest traditional leader, is identified in Mpumalanga in accordance with customary law right after her or his birth pursuant to Sec. 18 Mpumalanga - TLG Act, 2005. The provision is of little relevance for the recognition of the *inkosi* and is not required by the TLGF Act, 2003. Presumably the provincial legislature restated the actual customary rule. It is one example how customary law is being restated and legislated.

<sup>19</sup> Sachs, A. (1992), p. 78.

Is there an antagonism to democratizing and constitutionalizing<sup>20</sup> traditional leadership? The question must be answered in the negative. Chapter 12 of the Constitution provides for broad general recognition of traditional leadership within the new constitutional dispensation.<sup>21</sup>

The legislature had to articulate what constitutes traditional leadership in the view of constitutional democracy, which encompasses *inter alia* human rights, the rule of law and accountability of the democratically elected organs. It does so by establishing new institutions<sup>22</sup> and mechanisms.<sup>23</sup> The flipside of the coin and the unexplored part will remain in the realm of customary law. First the motivations and consideration as pronounced in the Preamble will be analyzed. Secondly the addressed institutions and their functions, and the new mechanism form part of the main scrutiny. Special attention is paid to the institution of traditional councils and traditional leaders.<sup>24</sup> Lastly the specific provisions inducing provincial legislation will be identified and categorized.

## 2.1 Preamble

The opening of an Act renders relatively little legal content, but it exclaims the spirit in which the law has been written. Especially for uncertain terrain and contested arguments jurists allude to general principles and the Preamble.<sup>25</sup> The main aim as set out in the Preamble of TLGF Act, 2003 is a transformative<sup>26</sup> one within the tension of the constitutional dispensation and traditional

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<sup>20</sup> 'Constitutionalize' amounts to giving founding principles according to the current state, Oxford American Dictionary, under the premise of transformative constitutionalism in the South African context.

<sup>21</sup> The Constitutional Court has affirmed this position with the following words: '[The Constitution Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.' *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (2) SA 97 (CC), para. 197.

<sup>22</sup> E.g. traditional councils, commission on traditional leadership disputes and claims.

<sup>23</sup> E.g. recognition by the premier, affirmative action for women's representation, formal co-operation of traditional council and municipality, code of conduct, formal inquiries.

<sup>24</sup> The houses of traditional leaders is not addressed, because this institution has specific Acts and is not the focal issue of the TLGF Act, 2003.

<sup>25</sup> See one of the first judgements of the Constitutional Court on the question of constitutionality of the death penalty, in *STATE v MAKWANYANE AND OTHERS* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), para 155, 262, 307.

<sup>26</sup> '[T]o transform the institution in line with constitutional imperatives, [...] the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights...', Preamble of the TLGF Act, 2003.

integrity and legitimacy. It is first and foremost recognition of the institution. This recognition itself gives substance to the constitutional recognition<sup>27</sup> and lends a higher degree of approval and certainty. At the same time the Act undermines the legitimacy of the traditional authorities of customary law, which supposedly does not require approval by the state. Hence only the traditional leadership that undergoes the transformation towards democratic constitutionalism<sup>28</sup> remains recognized and constitutional.

Looking at the preamble of the TLGF Act, 2003 Act one realizes that the legislature was very frank and formulated its motives bluntly. Traditional leadership will be shaped in accordance with the Constitution.<sup>29</sup> The mentioned transition does not only reverse the suppression and detriments of the Apartheid regime against traditional leadership.<sup>30</sup> More importantly this transition is entrenched in the assumed 'dictates of democracy in South Africa'.<sup>31</sup> Furthermore, the TLGF Act, 2003 intends to reconcile human rights and democratic imperatives with customary law and practices.<sup>32</sup>

One has to see how much traditionalism can be retained after this transformation. Nevertheless a democratic transformation should *per se* have an open ending, *i.e.* the people within traditional communities may equally decide upon the degree and result of the transformation.

## 2.2 Traditional communities and their traditional councils

Unlike the hierarchical order for traditional leadership,<sup>33</sup> the community and their representation are the first subjects addressed by the TLGF Act, 2003 Act.<sup>34</sup> Both the community as such and

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<sup>27</sup> Sec. 211 (1) of the Constitution.

<sup>28</sup> With the necessary realization of human rights and co-operative governance, see Preamble of the TLGF Act, 2003.

<sup>29</sup> Concepts like co-operative governance, gender equality, and accountability, exemplify this transition.

<sup>30</sup> This value assertion refers exclusively to the legal condition traditional leadership was retained under the Apartheid regime. It does not entail a general value judgment.

<sup>31</sup> Preamble Act 41 of 2003. The 'dictates' of the new democracy are not established yet, if they ever will be. Value judgements will render substantial content to the provisions in future.

<sup>32</sup> Especially gender based discrimination and democratic decision-making are main concerns.

<sup>33</sup> Bennett, T.W. (2004), p. 103.

<sup>34</sup> Chapter 2 of TLGF Act, 2003.

the traditional council that assists the traditional leader, are the foundation of traditional leadership.<sup>35</sup>

### *2.2.1 Recognition of traditional communities*

Pursuant to Sec. 211 (1) of the Constitution traditional leadership is subject to the Constitution. Hence its legitimacy is measured in accordance with the Constitution and the respective legislation.<sup>36</sup> Hence the legitimacy of traditional leadership and the traditional communities is not exclusively based on customary law but also on statutes.<sup>37</sup> Besides the indispensable prerequisites of the applicable customary law, the Premier of a Province pursuant to Sec. 2 (2) (a) TLGF Act, 2003, ‘may, ... recognize a community ... as a traditional community’.

Two main issues arise from this provision. Firstly, the statutory legitimacy is not founded on the factual existence of a traditional community but on the legally unqualified<sup>38</sup> decision of the Premier. Secondly, the Constitution may not indicate such legitimacy, because pursuant to Sec. 211 (1) of the Constitution traditional leadership is acknowledged and recognized in accordance with customary law.<sup>39</sup> This rather theoretical example<sup>40</sup> may illustrate some of the tensions that may arise when the legislature constitutionalize traditional institutions.

The transformative aim is set out in Sec. 2 (3) TLGF Act, 2003, towards equality. This subject might be one of the most contested within customary and statutory law by now:<sup>41</sup>

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<sup>35</sup> Having said so, it does not entail the legitimacy of traditional leadership under customary law but it reflects the order under the new legislation.

<sup>36</sup> Sec. 211 (2), 212 (1) of the Constitution.

<sup>37</sup> For previous dilemmas of legitimacy see “Discussion paper towards a white paper on traditional leadership and institutions”, p. 13: ‘Successive colonial and apartheid governments subjected traditional leaders and the institution of traditional leadership to systems of governance foreign to it and assigned powers and functions which in many instances were ‘untraditional’. This compromised and undermined traditional loyalty to the institution.’

<sup>38</sup> The provincial acts do not further qualify the decision making process. At times the Premier must furnish the decisions with her or his reasoning.

<sup>39</sup> Currie, I. (1999) Sec. 36-1; Hinz, M.O. (1995), with examples from Namibia p. 2, 3.

<sup>40</sup> The existing communities or former ‘tribes’ maintain their status within the new legislation. See Sec. 26 (5) TLGF Act, 2003.

<sup>41</sup> See Bekker, J.C. *ed. al.* (2006), p. 131; Bennett, T.W. (2004) p. 121; Bennett, T.W. and Murray, C. (2005), Sec. 26 – 66; For a case study on patrilineal succession see de Beer, F. C. (2006), p. 217 sqq.

'The traditional community must transform and adapt customary law...' <sup>42</sup> for more equality, in particular for the succession of the leadership position.

There already at the beginning lies the greatest challenge. If customary law is determined by customs rather than the community guided by its leader and the Constitution, then it finds itself within a dilemma of giving up customary law and the inherent legitimacy or jeopardizing the legislative recognition with its statutory legitimacy.

### 2.2.2 Traditional councils – the communal forum for representation

The traditional council is a constituent element of a traditional community and must be established at latest three month after the recognition by the Premier. <sup>43</sup>

It was said that traditional leadership *per se* cannot be democratic, because they do not '... subject themselves to periodical elections.' <sup>44</sup> Taking into account that representation of people is only one token of democracy, other means of democracy can be even more effective and legitimate. <sup>45</sup> For example a referendum can be far closer to the 'demo's' wishes than the transcended government policies. In the past traditional leaders continuously reassured their opinions through consultation of various councils or in public meetings. <sup>46</sup>

Parliament is the democratic organ of the state, because it is elected directly by the peoples. The Constitutional Court commented on the democratic role: "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action." <sup>47</sup>

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<sup>42</sup> Sec. 2 (3) TLGF Act, 2003.

<sup>43</sup> Sec. 3 (1) TLGF Act, 2003.

<sup>44</sup> Sachs, A. ( 1992), p.78.

<sup>45</sup> For examples on traditional democracy see de Villiers, F. (1995) p. 103 sqq.; Mqeke, R.B. (1996) p. 364 (368).

<sup>46</sup> Bennett, T.W. (2004), p. 129; Mqeke, R.B. (1996) p. 364 (368).

<sup>47</sup> *DOCTORS FOR LIFE INTERNATIONAL V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS* 2006 (6) SA 416 (CC), para. 282.

A wise leader considers and, if appropriate, decides in accordance with the advice of the councillors.<sup>48</sup> Hence an elected council does democratize traditional leadership. In relation to the prescribed quota it even introduces a substantial attempt to empower women in traditional communities to participate in governing the community. Besides, it also strengthens a democratic principle of representation of all members of a community and not only of the historically dominant.

Regarding its functions the traditional councils emerge as a linking institution of many local governments and traditional communities, *inter alia* for service delivery, development programmes, catastrophe management and cooperative governance. Further functions can be imposed by legislation<sup>49</sup> and by provincial or national legislation.<sup>50</sup> In comparing the functions and roles of traditional councils with those of traditional leaders, one can recognize a dualism<sup>51</sup> of these two traditional authorities. Thus both institutions act in checks and balances. The legislature created a starting point at which both institutions can define themselves and in co-operation with the governmental institutions develop new functions. The elevation of the traditional council entails a new positioning, in cases even on eye-level with the traditional leaders. Having said so, it becomes clearer why traditional councils receive such a prominent position within the legislation.

### 2.3 Affirmative action for gender equal representation

Sachs once argued under the premise of parallel legal spheres that the Bill of Rights applies throughout.<sup>52</sup> Although this assertion is certainly a laudable constitutional, reality might teach us otherwise. With regard to gender equality, South African developments produced institutional

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<sup>48</sup> See Discussion Paper (2000), p. 14: This is also a device to stabilize the political and authoritative position within the traditional community.

<sup>49</sup> Sec. 4 (1) (l) TLGF Act, 2003.

<sup>50</sup> Sec. 20 (1) TLGF Act, 2003.

<sup>51</sup> They may also share a friendly co-existence. Although now both institutions compete for the support from the traditional community and furthermore from the governmental support. This premise is made under the presumption of neutral state support, Sec. 6 TLGF Act, 2003

<sup>52</sup> Sachs, A. ( 1992), p. 80: 'Though change will not be forced on anyone in an authoritarian and confrontational way, every man and every woman will be entitled to enforce his or her constitutional rights if he or she so wishes.'

and legislative tokens, *i.e.* affirmative action for gender equality is attached to regulations with few enforcement mechanisms.<sup>53</sup> The political and social involvement of women in a patriarchal environment demands transformative commitment. This is not merely a question of ability to reform a community in a constitutional consistent manner, but to pursue a reform in a speedy process.<sup>54</sup>

Pursuant to Sec. 16 (3), 17 (2) (c) TLGF Act, 2003 the legislature demands an equal gender representation in the houses of traditional leaders, *i.e.* 'sufficient number of women'. Provincial legislation was to provide for implementation mechanisms. Generally speaking traditional leaders are in hereditary positions following the male line of the family.<sup>55</sup>

#### 2.4 Recognition and withdrawal of traditional leaders

A procedure for the recognition and withdrawal is introduced on all levels: queen- or kingship, senior traditional leadership<sup>56</sup>, headwoman and headman.<sup>57</sup> However the selection and nomination are competences of the traditional leadership according to customary law. Today the procedural governmental act would render certainty and elevates the status and role of such positions.<sup>58</sup> The consequence of the recognition is twofold. Firstly, the state restates the specific role and integrity of the traditional leader. Secondly, the traditional leader is entitled to remuneration pursuant to the Remuneration of Public Office Bearers Act, 1998.<sup>59</sup>

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<sup>53</sup> Sec. 9 (3), (4) of the Constitution; Sec. 187 of the Constitution; Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, No 4 of 2000

<sup>54</sup> Sec. 25 (4) TLGF Act requires traditional councils to change within one year.

<sup>55</sup> On the lowest community level the position of headwomen or headman may be filled through election. That applies only to few communities. Most commonly the 'patrilineal succession' applies to customary appointment of traditional leaders. For examples of exception see Bennett, T.W. (2004) p. 120 sqq.

<sup>56</sup> Formerly known as chieftainship, Sec. 11 Traditional Leadership and Governance Bill, 2003, transformed those due to the derogative historical implications, see. Discussion Paper, (2000) p. 14; see also Bennett, T.W. (2004), p. 102.

<sup>57</sup> Sec. 9 to 12 TLGF Act, 2003

<sup>58</sup> *E.g.* The view of the press in BUA NEWS on 14.12.2006 'Its ultimate aim is to restore the dignity of the institution and democratise it.'

<sup>59</sup> Act 20 of 1998

In contrast, the chieftainship was the paramount position in the traditional communities.<sup>60</sup> Comparing the functions of traditional leaders and traditional councils, this supremacy appears to diminish.

## 2.5 Cooperation with municipalities and other branches of government

In future traditional leadership can play a significant role in spheres of local communities.<sup>61</sup> The traditional authorities may advise on or assist the implementation of governmental programmes, *e.g.* educational, social and economic empowerment programmes. Hence there is a great potential to seek assistance in various policies.<sup>62</sup>

Furthermore if any organ of state in all three spheres of government deems it adequate to engage with traditional leaders and councils and imposes duties and rights, there is now a procedure to do so.<sup>63</sup>

## 2.6 Dispute Resolution

One deficiency within the houses of traditional leaders on all spheres of the state had been the lack of dispute resolution mechanisms.<sup>64</sup> That causes an increase of conflicts but also a stalemate for the decision-making process. Before the new legislation only the leader chairing the judicial council on a horizontal line of competence can resolve a dispute in vertical relations. On the other hand it is a well-established custom that a chief must consult before taking any decision. Hence it provides for a flexible tool of checks and balances.

Although the Act entrenches the traditional institutions into the new constitutional democracy, it upholds the separation from the judiciary, in other words disputes must be resolved within the

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<sup>60</sup> Bennett, T.W. (2004) p.103.

<sup>61</sup> *E.g.* service delivery according to Sec. 76 (b) (iii) (cc) Local Government and Municipal Systems Act, 2000; see also Pieterse, M. (1999), p. 179 (187).

<sup>62</sup> Sec. 20 (1) TLGF Act, 2003 addresses a comprehensive list of legislative fields.

<sup>63</sup> Sec. 20 (2) TLGF Act, 2003.

<sup>64</sup> Bennett, T.W. (2004), p. 115.

traditional communities.<sup>65</sup> The wording and the concept within the TLGF Act, 2003 prioritize dispute resolution, *i.e.* the traditional leader decides after consulting the councillors, instead of litigation *in curia*.

Under the TLGF Act, 2003, a commission on dispute resolution is established.<sup>66</sup> The dispute resolution of the Commission can address the fields of recognitions of traditional communities, land demarcation and leadership succession in accordance with customary law.<sup>67</sup> The provincial governmental authorities are entrusted with the implementation.<sup>68</sup> One has to see how a national commission can cope with the various communities and their individual customary law. In addition the individual may lodge a complaint and claim, which has influence on the hierarchical structure of traditional community and cause unprecedented conflicts lead by individuals. Concluding, the commission acts as a supreme judicial organ on customary law.<sup>69</sup>

## 2.7 Codes of conduct

Another welcomed novelty is a code of conduct<sup>70</sup> for traditional leaders and traditional councils,<sup>71</sup> a safeguard for good governance.<sup>72</sup> The minimum components are set out in the Schedule of the TLGF Act, 2003. The sanctioning system on the other hand is referred to the provincial legislatures.<sup>73</sup>

Regarding traditional leadership, the main aims of the code are compliance with the law, the best interest of the community, governmental cooperation, integrity of the position, political neutrality

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<sup>65</sup> Sec. 21 (1) (a) TLGF Act, 2003. Very questionable is the hypothetical case where provisions of the Act and the customary law fundamentally clash and traditional leadership claims its recognition pursuant to Sec. 211 of the Constitution.

<sup>66</sup> Sec. 22 (1) TLGF Act, 2003.

<sup>67</sup> Sec. 25 (2) (a) TLGF Act, 2003.

<sup>68</sup> Sec. 26 (2) (b) TLGF Act, 2003.

<sup>69</sup> It comprises the decisive competence even over the Premier or the President. See Sec. 26 (2) TLGF Act, 2003.

<sup>70</sup> Sec. 27 TLGF Act, 2003.

<sup>71</sup> By its wording it does not address individual members of tradition councils.

<sup>72</sup> The Traditional Leadership and Governance Framework Bill, 2003 did not envisage such a concept, but it was added for the TLGF Act, 2003.

<sup>73</sup> Sec. 27 (3) (a) (b) TLGF Act, 2003.

and disclosure of gifts. The traditional council must also comply with principles of good governance such as transparency, efficiency, cooperation and best interest of the community.

### **3. The links of national and provincial legislation on traditional leadership**

A brief review of the linkage of the national Act and the subsequent provincial legislation shall enhance a better understanding of the restatement of the existing statutory and customary regulation and reform.

In this part the *modus operandi* of the national legislature in relation to its provincial counterparts will be examined. This perception shall purport to understand constitutionalizing traditional leadership within the decentralized parts of South Africa.

#### **3.1 The Act's prescriptions and incentives for provincial legislation**

Only in six out of the nine provinces traditional leadership pertains. Traditional communities vary amongst others in customs, rituals and traditions.<sup>74</sup> The TLGF Act, 2003 delegates parts of legislation to the provincial legislature.<sup>75</sup> Some of the referrals are framed as a legislative obligation<sup>76</sup> while other provisions are optional.<sup>77</sup> This chapter shall identify the components of each category.

A first category can be identified by a direct referral for mandatory provisions.<sup>78</sup> Secondly, the Act provides for the minimum component of a specific provision.<sup>79</sup> Thirdly, the legislature

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<sup>74</sup> *E.g.* the naming of the leaders not only differs but carry distinct meanings.

<sup>75</sup> There is no referral to traditional communities that have to implement the new legislation.

<sup>76</sup> *E.g.* the establishment of traditional councils with a prescribed function of co-operative governance and with a gender equality quota, Sec. 4 Traditional Leadership and Governance Framework Act, 2003.

<sup>77</sup> *E.g.* a code of conduct and the consequences in case of transgression, Sec. 27 Traditional Leadership and Governance Framework Act, 2003. They also function as incentives to adapt the legislation to the specific needs of traditional leadership on the provincial sphere.

<sup>78</sup> *E.g.* 'Provincial legislation must provide for ...', Sec. 16 (3) TLGF Act, 2003

<sup>79</sup> *E.g.* 'The provincial legislation referred to in subsection (1) (b) must at least provide for ...', Sec. 11 (2) (a) TLGF Act, 2003.

inspires provincial legislation.<sup>80</sup> Fourthly, it addresses indirectly to provincial legislation that might not yet exist.<sup>81</sup> These four modes to of legislative delegation differ in the degree of certainty and compulsion.

### 3.2 Specific referrals to the provincial legislature

Overall the TLGF Act, 2003, prescribes provincial legislation to regulate details, as opposed to regulate on general subjects.

The legislative delegation to provincial legislation address the following subjects:

- Procedure for recognition of traditional communities, Sec. 2 (2) TLGF Act, 2003
- Traditional councils - composition, territorial jurisdiction, equal gender representation, functions; Sec. 3, 4 (2) TLGF Act, 2003
- State support of traditional councils; Sec. 6 TLGF Act, 2003
- Withdrawal of traditional communities; Sec. 7 (2) TLGF Act, 2003
- Procedures for recognition of traditional leaders; Sec. 11 (2) TLGF Act, 2003
- Removal of traditional leaders; Sec. 12 (3) TLGF Act, 2003
- Procedures for recognition of a regents; Sec. 13 (2) TLGF Act, 2003
- Identification of a traditional leaders; Sec. 14 (2) TLGF Act, 2003
- Appointment of deputy traditional leader by traditional leaders; 15 (2) TLGF Act, 2003
- Mechanism for the increase of female representatives and representation of women; Sec. 16 (3) TLGF Act, 2003
- Code of conduct for traditional councils and traditional leaders including enforcement mechanism; Sec. 27 TLGF Act, 2003

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<sup>80</sup> In any event the provincial legislature has the competence in terms of concurrent legislation on traditional leadership pursuant to Sec. 104 (1)(b)(i) of the Constitution. *E.g.* 'Provincial legislation may also provide for...', Sec. 11 (2) (b) TLGF Act, 2003; Difficulties though arise for the conflict of the legislations. See Currie, I. (1999) ch. 36 – 16a, 17.

<sup>81</sup> *E.g.* Once the Premier has recognised a traditional community that traditional community must establish a traditional council in line with principles set out in provincial legislation, Sec. 3 (1) TLGF Act, 2003. Another legislative premise without referral is Sec. 3 (2) (d) TLGF Act, 2003.

In conclusion, the TLGF, 2003 refers subject matters to the provincial legislature through different degrees of delegation. The national Act does not *de lege* provide only for a framework that has to be furnished with the necessary details but it also legislates specific incentives and details. Hence the provincial legislature has to establish complex norms with little discretion. Nevertheless the provincial legislature can rely on its genuine legislative competence.<sup>82</sup>

#### **4. The provincial legislation**

All six provinces<sup>83</sup> with traditional communities and traditional leadership have passed the subsequent legislation guided and inspired by the Traditional Leadership and Governance Framework Act, 2003.

The outcome of this development is the second main focus of this paper. Guided by the TLGF Act, 2003 the provincial legislature have to establish provisions for the recognition of traditional communities, appointment and removal of traditional leaders, rules and function of each institution and a code of conduct for the institutions.<sup>84</sup>

The legislature had mainly two concepts. The first is to furnish traditional leadership with autonomy on the local sphere and engage with it. The second is to absorb traditional leadership into all spheres of government.

The outlines of the provincial Acts comprise predominantly subject matter of the referrals, omissions and supplements to the national Act. This outline enhances the understanding on how traditional leadership is constitutionalized in the local and provincial sphere under the legislation. This reflection does not state how traditional authorities were or can be but it merely states who the traditional authorities should be from the perspective of the legislature.

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<sup>82</sup> Sec. 104 (1) (b) (i) of the Constitution.

<sup>83</sup> Free State, KwaZulu–Natal, Limpopo, Mpumalanga, North West, Eastern Cape.

<sup>84</sup> The order of provisions is peculiar, starting with traditional councils, although the queen and king have the highest authority and ranking within traditional communities.

The legislation on the provincial level is more detailed and adapted to the prevailing traditional community. Nevertheless the transformation of traditional leadership will create coherence. More importantly the provincial legislation provides a platform for evolvement of traditional leadership in times of democratic constitutionalism.

#### 4.1 KwaZulu-Natal

KwaZulu- Natal Traditional Leadership and Governance Act, 2005<sup>85</sup> is the last enacted provincial legislation related the Traditional Leaders and Governance Framework Act, 2003. It requires particular attention. The relation between national legislation and the KwaZulu-Natal has been contentious.<sup>86</sup> In regard to the preceding provincial legislation KwaZulu-Natal had already a comprehensive statutory legal framework.<sup>87</sup> Hence the impact of the new constitutional imperatives carried by the Framework Act will be analyzed.

##### 4.1.1 Preamble

Compared to the TLFG Act which circumscribes the transformation according to ‘the dictates of democracy, the provincial Act pronounces a more reconciling approach towards the integration of traditional leadership into the democratic constitutionalism. The approach is illustrated as ‘ recognise, protect, transform, and provide an enabling environment for the development of traditional communities...’.<sup>88</sup> Traditional authorities may emerge and provide their view on their very constitution. Hence the Act intends to empower traditional authorities without determining the prescriptive outcome.

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<sup>85</sup> Provincial Act 5 of 2005 [later referred to as KZN - TLG Act, 2005].

<sup>86</sup> E.g. *PREMIER OF KWAZULU-NATAL V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA*, 1996 (1) SA 769 (CC); *African National Congress & another v Minister of Local Government and Housing & others*, 1998 (3) SA 1 (CC); see also Bua news on 14.12.2006: ‘...the KwaZulu-Natal Tradition Leadership and Governance Act, which has been widely considered as one of the most critical pieces of legislation to have been passed in the provincial parliament.’

<sup>87</sup> Eleven Acts on provincial level were repealed.

<sup>88</sup> Preamble subsection (a) of KZ-TLG Act, 2005.

#### 4.1.2 Recognition of traditional communities

As prescribed by the TLGF Act, 2003 a traditional community must apply for recognition. The KZN - TLG Act, 2005 requires also information concerning the name, size, location and *inkosi*, the senior traditional leader, who has jurisdiction over the traditional community. After the consultation of the main stakeholders, the Premier must decide. As mentioned before, an individual person or a group could appeal to the Commission pursuant to Sec. 25 (2) (a) (iii) TLGF Act, 2003 and Sec. 49 KZN - TLG Act, 2005.

#### 4.1.3 Representation within the council and its extended functions

The new formula of a traditional council instructively reflects the integration of democratic elements<sup>89</sup> and promotion of gender equal representation.

40 % of the representatives must be elected in an election *imbizo*.<sup>90</sup> Firstly a general assembly decides on the representatives. Secondly the minimum female quota of 33% of the traditional council ensures the transformation towards gender equality. The latter condition can immensely affect the first one. For example the *inkosi*, the senior traditional leader, appoints only men as council members. Then the outcome of the election *imbizo* must comprise 83 % of female members. On the other hand, if the *inkosi* appoints at least about 55 % women, than the *imbizo* has no predetermined outcome. Having said so, it apparently becomes crucial who appoints first. With due regard to customary law the traditional leader has the prerogative to appoint first.<sup>91</sup> She or he<sup>92</sup> may therefore safeguard a democratic<sup>93</sup> election by gender equal selection.

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<sup>89</sup> It is very similar to the chairing of the council. Firstly the *inkosi* has the right and in case of absence an elected deputy chair will lead meetings, Sec. 13 (1) (2) KZN - TLG Act, 2005.

<sup>90</sup> *Imbizo* is a meeting of community members in accordance with custom. The Act does not define whether all members of the community participate. Pursuant to Sec. 6 (1) KZN - TLG Act, 2005 in conjunction with the Sec. 3 KZN - TLG Act, 2005 all members of the community should form the constituency, unless the custom provides for a reasonable ground of discrimination.

<sup>91</sup> For higher councils the royal family together with the queen or king appoints. Presumably the traditional leader may appoint 60 % and she or he will have also the priority of appointing.

<sup>92</sup> The change of order of the gender is not an emphasis to advance political correctness, but it shall help to demonstrate that society, civil or traditional, will need to undergo a cultural reconstruction of the role of the woman and the man. The Acts on traditional leadership and this research paper purport to take part in this reconstruction.

<sup>93</sup> Without any gender predetermination.

The subsequent regulations on KZN - TLG Act, 2005 indicate a relative equal obligation to select and elect women, *i.e.* the *inkosi* must select at least 50 % women of the total of her or his appointees and the *imbizo* also has to appoint 50 % women of the selected candidates.<sup>94</sup> However the regulation does not oblige either selecting forum to adhere to the quota, nor does it provide for consequences in case of a breach.

In the not unlikely event where the number of female candidates is insufficient the provincial legislature opted for flexible solution. The *inkosi* must prove that a minor number of women than required are willing<sup>95</sup> to act in the council.<sup>96</sup> The Premier may lower the threshold for that specific council with an obligatory review every five year,<sup>97</sup> in other words for each established council<sup>98</sup>.

The functions of the council in KwaZulu-Natal have been extended to internal stability policies<sup>99</sup>, co-operations with other communities,<sup>100</sup> administration of justice<sup>101</sup> and cooperation with the municipality.<sup>102</sup> Within the latter function it may propose new legislation, by-laws. Here it becomes apparent how the traditional council as a traditional authority can define its roles and function on its own initiative.<sup>103</sup> Hence the provincial legislature strengthens the position of the traditional council as a legislature and councillor by prescribing general functions. Moreover the Act provides a procedure for self-definition and development.

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<sup>94</sup> See the chart in Appendix 3 of the KwaZulu-Natal Traditional Leadership Regulations, 2006.

<sup>95</sup> Read in conjunction with Sec. 3 KZN - TLG Act, 2005 women shall be encouraged to participate. It is difficult to establish a situation where an insufficient number of women are available unless customary law requires otherwise. In the royal family it is not unusual that women act as councillors.

<sup>96</sup> Sec. 6 (5) KZN - TLG Act, 2005. If allegedly there is an insufficient number of women and there is a female candidate not appointed then the electing or selecting traditional institution is in breach with the provision.

<sup>97</sup> Sec. 6 (8) KZN - TLG Act, 2005.

<sup>98</sup> Pursuant to Sec. 3 (2) (c) (ii) TLGF Act, 2003 the tenure of a traditional council is 5 years.

<sup>99</sup> Sec. 8 (1) (a) (c) (m) (n) (p) KZN - TLG Act, 2005.

<sup>100</sup> Sec. 8 (1) (o) KZN - TLG Act, 2005.

<sup>101</sup> Sec. 9 KZN - TLG Act, 2005.

<sup>102</sup> Sec. 10 KZN - TLG Act, 2005.

<sup>103</sup> In the spirit of mutual respect, assistance and cooperation the municipality must earnestly consider the proposals of the traditional council.

Any widening of functions usually requires an increase of financial and human resources. Therefore the traditional council must be capacitated. The provision for staffing is an instructive but also an optional one.<sup>104</sup> The governmental authorities have therefore a wide discretion which resources at what scale to endorse.

Finally the provincial Act prescribes a proper procedure of the meetings, including minutes, time frames and financial matters.<sup>105</sup>

Lastly, the traditional council is a juristic personality pursuant to Sec. 46 (a) KZN - TLG Act, 2005. Hence it can be held responsible in a court, but may also on its own behalf resolve disputes in a court as a last resort.<sup>106</sup>

#### 4.1.4 Traditional leadership in KwaZulu-Natal

The province has three hierarchical levels of leadership, the *isilo*<sup>107</sup>, the *inkosi*<sup>108</sup> and the *iziduna*<sup>109</sup>. While the *isilo* has the typical representative functions, the *amakosi* are subject to a strict regime. These duties include consultation of municipalities, promotion of democratic values enshrined in the Constitution<sup>110</sup> and protection of community in cases of natural disasters and diseases. Traditional leaders also have to work within law enforcement.<sup>111</sup> She or he must report to the traditional council concerned.<sup>112</sup> From this change one can deduce that the traditional leader is accountable to a certain extent to the traditional council.

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<sup>104</sup> Sec. 12 KZN - TLG Act, 2005.

<sup>105</sup> Sec. 13, 14 KZN - TLG Act, 2005.

<sup>106</sup> For disputes related to this Act traditional councils must first exhaust the remedies provided in Sec. 49 KZN - TLG Act, 2005 read in conjunction with Sec. 25 TLGF Act, 2003.

<sup>107</sup> Monarch.

<sup>108</sup> Senior traditional leaders pursuant to the TLGF Act, 2003.

<sup>109</sup> Headwomen and headmen pursuant to the TLGF Act, 2003.

<sup>110</sup> Sec. 20 (1) KZN - TLG Act, 2005.

<sup>111</sup> Sec. 20 (2) (f) sqq. KZN - TLG Act, 2005.

<sup>112</sup> Sec. 20 (2) (a) (b) KZN - TLG Act, 2005.

Although only on second rank in the traditional hierarchy the *inkosi* particularly must refrain from various political offences<sup>113</sup>, including the ‘unconstitutional overthrow of government’. These clauses ensure a peaceful coexistence and should not be viewed as rules for obedience or subordination.

The traditional leaders and other traditional authorities can pursue their roles and functions without deliberate obstruction, which is prohibited under penalty of fine and imprisonment.<sup>114</sup>

The grounds and procedures of a removal<sup>115</sup> as well as the inquiry of misconduct are very detailed and comprehensive. Hence the responsibilities of an *inkosi* are linked to a strict enforcement mechanism exercised by the designated provincial Member of the Executive Council.<sup>116</sup>

Retirement has been practised by general custom.<sup>117</sup> The *inkosi* may now decide to retire pursuant to Sec. 19 (8) (a) KZN - TLG Act, 2005.<sup>118</sup>

Finally the designated Member of the Executive Council oversees the traditional leaders, may summon<sup>119</sup>, instruct them on their functions<sup>120</sup> and may direct investigations related to misconduct.<sup>121</sup>

In brief, traditional leadership in KwaZulu-Natal may re-emerge and develop under the supervision of the provincial Government.

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<sup>113</sup> Sec. 20 (3) KZN - TLG Act, 2005.

<sup>114</sup> Sec. 51 (1) (b) KZN - TLG Act, 2005. However in comparison with other penal provisions, this provision lacks accuracy and legal certainty that is required for the imposition of a punishment pursuant to Sec. 35 (3) (l) of the Constitution, in other words the principle *nulla poena sine lex stricta* is not fulfilled.

<sup>115</sup> Sec. 21 to 24 KZN - TLG Act, 2005.

<sup>116</sup> Sec. 23 (1) (j) KZN - TLG Act, 2005.

<sup>117</sup> Bennett, T and Murray, C. (2005) Sec. 26 – 45.

<sup>118</sup> A retirement may also safeguard a proper and adequate accomplishment of the leadership duties. With regard to the complexities of modern life and community organization, these functions and roles will rather increase in the future.

<sup>119</sup> Sec. 22 KZN - TLG Act, 2005.

<sup>120</sup> Sec. 22 (2) KZN - TLG Act, 2005.

<sup>121</sup> Sec. 23 (3) KZN - TLG Act, 2005.

#### 4.1.5 Misconduct and code of conduct

The provincial legislature included an indirect code of conduct by penalizing contempt and certain behaviour such as ‘disgraceful, improper or unbecoming’.<sup>122</sup> In consequence a traditional leader could have to cease his position and status.<sup>123</sup> The terms of the disciplinary measures appear vague and susceptible to political infiltration.

In addition to the prescribed code of conduct the provincial code has a much more compressive application.<sup>124</sup> The code subjects all traditional authorities to a very comprehensive list catalogue of disclosure of interests. Furthermore the assigned member of the Executive Council may amend the code of conduct and change the enforcement procedure.<sup>125</sup> Such a power over the traditional authorities must be carefully used, that internal deficiencies of the traditional authorities are resolved. At the same time the executive governmental power of the province could invade the discretion and the political space that the traditional authorities need for their re-emergence and self-development.

A breach of the code of conduct can be penalized.<sup>126</sup> The severest penalties are suspension<sup>127</sup> and the removal from the office pursuant to Sec. 21 (1) (d) KZN - TLG Act, 2005.<sup>128</sup> Consequently the ode of conduct won’t turn into a dead letter and may prevent severe and detrimental mischief.

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<sup>122</sup> Sec. 23 (1) KZN - TLG Act, 2005.

<sup>123</sup> Sec. 21 (1) (f) KZN - TLG Act, 2005.

<sup>124</sup> Sec. 42 (1) KZN - TLG Act, 2005.

<sup>125</sup> Sec. 42 (4), (5) KZN - TLG Act, 2005; So far the MEC has not made use of this competence.

<sup>126</sup> Removal of *induna* Sec. 27 (5) (e) KZN - TLG Act, 2005; fine, suspension of any traditional leader, Sec. 23 (11) KZN - TLG Act, 2005.

<sup>127</sup> Sec. 24 (1) KZN - TLG Act, 2005, even with suspension of the remuneration.

<sup>128</sup> The offence or transgression must be severe and deliberate as a reason for removal, according to Sec. 21 (3) (4).

#### 4.1.6 Oath of affirmation

Like many constitutional organs of state,<sup>129</sup> members of the houses of traditional leaders and members of the traditional council swear or affirm to uphold the Constitution as a sign of reassurance. The wording of the oath reflects a hierarchy of references:<sup>130</sup>

‘A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and the Province of KwaZulu-Natal and will obey, respect and uphold the Constitution and all other law of the Republic of South Africa, and I undertake and solemnly promise to hold my office as a member of (insert Provincial House of Traditional Leaders or name of applicable Local House of Traditional Leaders or traditional council) with honour and dignity; impartially and without bias, fear, or favour or influence, and to perform the role and function of my office conscientiously and to the best of my ability.

(In the case of an oath: "So help me God".)’

The formal act underlines the integration of traditional leadership in the democratic state.<sup>131</sup> Only few provincial Acts entail such formal procedure. But nevertheless it demonstrates the control and competence the state assumes over traditional authorities. The oath omits a reference to the traditional community and customary law. Both are the source of traditional authorities in our legal system.<sup>132</sup>

#### 4.1.7 Subsequent regulations

The KwaZulu-Natal Department for Local Government, Housing and Traditional Affairs has adopted regulations on several procedures.<sup>133</sup> It addresses *inter alia* elections for the traditional council and the female quota.

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<sup>129</sup> Such oath improves the awareness of the dignity, independence and impartiality that such an office entails. For comparisons see Sec. 48 of the Constitution for Members of Parliament; Sec. 62 (6) of the Constitution for the delegates of the NCOP; Sec. 87 for the President; Sec. 95 for the Ministers; Sec. 174 (8) for all judges and judicial officers, all of these in Schedule 2 of the Constitution.

<sup>130</sup> Sec. 43 KZN - TLG Act, 2005 and Schedule 2 of KZN - TLG Act, 2005.

<sup>131</sup> Others may opine that an oath underlines dictates of democracy and traditional leaders become servants of the state apparatus and may lose their customary integrity.

<sup>132</sup> Hinz, M.O. (2006) p. 281.

<sup>133</sup> KwaZulu-Natal Traditional Leadership Regulations, 2005.

## 4.2 Mpumalanga<sup>134</sup>

### 4.2.1 Preamble

The legislature alludes in brief to the necessary transformation and resurrection of customary traditional leadership. Noteworthy is also that the provincial Government proclaims to be the source of transformation.

### 4.2.2 Recognition of traditional communities

Further mechanisms to ensure the validity and legitimacy of a community application are particularities of the Act. The Premier may conduct a formal inquiry<sup>135</sup> and a referendum<sup>136</sup> and may consider the recommendation of the Provincial House of Traditional Leaders.<sup>137</sup> Despite the optional nature of the procedures, the panoply of references is unique so far. Thereby the Premier can synthesize the will of the broader traditional community and the various stakeholders to ensure the credibility of the decision and avoid potential disputes.

The same procedures can ensure the withdrawal of the recognition in accordance with Sec. 4 of Mpumalanga TLG Act, 2005. The Premier must also pay due attention to the pre-constitutional enforced mergers and separation of traditional communities.

### 4.2.3 Traditional councils

The selection by the senior traditional leader and the election in the election meeting of the community is not yet conclusive.<sup>138</sup> As many wards as feasible shall be elected and appointed.<sup>139</sup>

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<sup>134</sup> Mpumalanga Traditional Leadership and Governance Act, Act 3 of 2005 [later referred to as Mpumalanga - TLG Act, 2005].

<sup>135</sup> Sec. 3 (2) (c) Mpumalanga - Mpumalanga - TLG Act, 2005.

<sup>136</sup> Sec. 3 (2) (d) Mpumalanga - TLG Act, 2005.

<sup>137</sup> Sec. 3 (3) Mpumalanga - TLG Act, 2005.

<sup>138</sup> The provincial Act is not more specific than the TLGF Act, 2003, but the provincial Executive may provide a election procedure pursuant to Sec. 4 (7) Mpumalanga - TLG Act, 2005.

Thereby the patriarchal and hierarchical structure could be reinforced to the detriment of the concept of a democratic election and gender equity. Considering the obligation to aim for gender equal representation, women must increasingly now be appointed as head of a community. Otherwise the provincial Act lapses in two aspects. It would not provide for gender equal representation and a democratically elected council and therefore fail to achieve the general purpose of transforming the traditional leadership in order to harmonize it with the imperatives of the Constitution.

Candidates can be excluded for incapacity<sup>140</sup> and for incompatibility with other positions in traditional authorities and organs of state.<sup>141</sup>

Members of the traditional council may be dismissed for the same reasons.<sup>142</sup> Sec. 7 (1) (f) Mpumalanga TLG Act, 2005, allows an unfettered discretion<sup>143</sup> for the Premier to remove members of the council.

Alluding to the statutory right that the community members may permanently address the council and issue petitions, the traditional council will be highly democratic.<sup>144</sup>

The traditional councils have overseeing, executive and legislative functions in the local sphere of government, within their jurisdiction and also inter-communal functions.<sup>145</sup> Particularly, the

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<sup>139</sup> Sec. 4 (4) Mpumalanga - TLG Act, 2005.

<sup>140</sup> The TLGF Act, 2003 prescribes a democratic election. Any limitation on candidates and the constituency must be justified. While the age limitation could be justifiable, the requirement of South African citizenship for traditional council candidates might not pass scrutiny of a democratic election, because the members of the council are mandated and legitimized by the community and not appointed by the state like other state officials. The terms of reference must rather be the membership of the community. Therefore the community must also be able to select non-citizens. The related question whether the candidates must be members of the community, another genuine precondition, was not addressed yet, but it could be inferred. Also a previous conviction pursuant to Sec. 7 (c) Mpumalanga - TLG Act, 2005 can bar the candidature. Without further limitation it remains a questionable limitation.

<sup>141</sup> Sec. 7 Mpumalanga - TLG Act, 2005.

<sup>142</sup> Sec. 8 Mpumalanga - TLG Act, 2005.

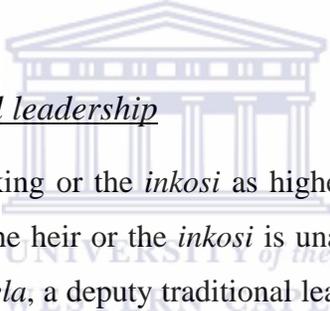
<sup>143</sup> ‘...[i]n the best interest of the traditional community...’ does not render legal certainty or even guidance because the Premier has to support equally all traditional authorities.

<sup>144</sup> Sec. 12 (2) Mpumalanga - TLG Act, 2005; Thereby the council is obliged to adequately respond to questions and petitions.

<sup>145</sup> See Sec. 9, 11 Mpumalanga - TLG Act, 2005.

traditional council is entitled to receive the necessary resources granted by provincial legislature.<sup>146</sup> With due regard to its panoply of functions, the traditional council could claim a considerable amount governmental powers. Certainly, budget decisions are politically entrenched into continuous negotiations. Nevertheless, the Act furnishes the traditional council with a strong position<sup>147</sup> to articulate and request the necessary means for its operational and institutional mandates. The members might receive an allowance in future and can reimburse their expenditures.<sup>148</sup> Hence councillors become financially more independent and can operate more independently.

Finally, the territorial jurisdiction of the lowest sphere of traditional leadership is linked to the traditional council instead of the traditional community itself,<sup>149</sup> which certainly underlines the importance of the traditional council under the new legislation.



#### 4.2.4 Traditional leadership

The Premier recognizes queen or king or the *inkosi* as highest traditional leader after the royal family has selected the heir.<sup>150</sup> If the heir or the *inkosi* is unable to act in her or his capacity an acting *inkosi*, referred to as *libambela*, a deputy traditional leader can be chosen and appointed in the same manner.<sup>151</sup>

In case of doubt whether the *inkosi* was selected correctly and in accordance with customary law and although the national dispute committee on traditional leadership has jurisdiction on the subject matter pursuant to Sec. 25 (2) TLGF Act, 2003, the Premier is not obliged to refer the matter to the national dispute commission.<sup>152</sup>

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<sup>146</sup> Sec. 10 Mpumalanga - TLG Act, 2005.

<sup>147</sup> The traditional authorities will compete or at least co-exist with the local government to a certain extend.

<sup>148</sup> Sec. 16 Mpumalanga - TLG Act, 2005.

<sup>149</sup> Sec. 6 Mpumalanga - TLG Act, 2005.

<sup>150</sup> Sec. 19 (1) Act, 2005.

<sup>151</sup> Sec. 23 Act, 2005.

<sup>152</sup> See Sec. 19 (4) Mpumalanga - TLG Act, 2005. The Premier must refer the matter to the royal family and to the Provincial House of Traditional Leaders.

The royal family decides over a potential removal of a traditional leader given the fact of a transgression provided in Sec. 21 (1) Mpumalanga TLG Act, 2005.

On the next hierarchical sphere, the *inkosi* appoints and removes the *induna*, the 'village head'.<sup>153</sup> There is no third level of traditional leaders.

The Act does not recall the functions of traditional leaders from the TLGF Act, 2003 nor does it set out any further functions. Hence the legislature in Mpumalanga retains its traditional leaders according to customary law and the TLGF Act, 2003.

Another particularity is embedded in the grounds for removal. A traditional leader can be removed for a conviction with a punishment of 12 months imprisonment.<sup>154</sup>

#### 4.2.5 *Dispute resolution*

Disputes are generally resolved within the traditional community, as Sec. 21 (1) (a) TLGF Act, 2003 suggests. A further remedy as contemplated in the TLGF Act, 2003 and recalled by the provincial legislature<sup>155</sup> is the claim to the national dispute commission.

#### 4.2.6 *Misconduct and code of conduct*

Members of traditional councils must comply with the basics principles of good governance and obedience to law.<sup>156</sup> The traditional leader must furthermore not abuse her or his powers and functions or commit a criminal offence.

The penalties or punishments, as set out in Schedule 2 of Mpumalanga - TLG Act, 2005, are considerably severe and range from a warning, order for a rehabilitation programme, to a fine with a maximum of R 5000 for council members and a maximum of R 10 000 for traditional leaders, to suspension or removal. The disciplinary procedure renders sanctions that are

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<sup>153</sup> See Sec. 1 definitions Act, 2005; The position might range between a traditional leader and headman.

<sup>154</sup> See Sec. 22 (1) (a), 20 (1) (a), 24 (2) (a) Mpumalanga - TLG Act, 2005.

<sup>155</sup> Sec. 6 (3) Mpumalanga - TLG Act, 2005.

<sup>156</sup> Clause 3 of Schedule 2 Mpumalanga - TLG Act, 2005.

comparable to punishment for criminal conduct. It is questionable whether such severity surpasses the purpose of the Act and unduly limits traditional leadership as such.

### 4.3 North Western Province<sup>157</sup>

#### 4.3.1 Preamble

Here the legislature repeated the Preamble of the national Act and added an emphasis on collaboration of traditional authorities with all spheres of government.

#### 4.3.2 Recognition and withdrawal of traditional communities

The recognition follows the prescribed procedure by the TLGF Act, 2003. In addition it deals with requests to define the area of a traditional community.<sup>158</sup>

In contrast to the other provincial legislation, firstly, the Premier has 12 month to decide upon the application<sup>159</sup> and, secondly, must withdraw the recognition if the traditional community no longer meets the initial conditions.<sup>160</sup> Hence the recognition remains conditional and depends on the adherence to customary law and the leadership over this group. It is the only provincial Act that allows an *ex post* refusal of the recognition. In other words, the Act allows a withdrawal of the recognition by the Premier.<sup>161</sup> In all other provinces the traditional community exclusively has the right to withdraw the recognition.

This qualified recognition bears the advantage of a consistent reflection of the community on the customary law and its leadership. As opposed to this flexibility, the recognition receives a degree

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<sup>157</sup> North West Traditional Leadership and Governance Act, Act 2 of 2005 [later referred to as NW - TLG Act, 2005].

<sup>158</sup> Sec. 5 NW - TLG Act, 2005.

<sup>159</sup> The other Provinces, except the Eastern Cape, have a timeframe of three month for the Premiers considerations. With due regard to the right for recognition pursuant to Sec. 211 (1) of the Constitution and Sec. 2 (1) and (2) TLGF Act, 2003, the Premier may not unreasonably delay a recognition. It is questionable whether the provision is still consistent with Sec. 2 (b) (ii) TLGF Act, 2003.

<sup>160</sup> Sec. 4 (5) NW - TLG Act, 2005.

<sup>161</sup> It is a *de jure* withdrawal pursuant to Sec. 4 (3) NW - TLG Act, 2005.

of uncertainty and constitutional vulnerability. Sec. 5 NW TLG Act, 2005 merely states ‘...if it is subsequently established...’ Thus the Act does not provide details on who decides on what basis for a withdrawal of statutory recognition. One can only hope that the decisive authority bears in mind the constitutional guaranteed recognition and the interests of the traditional community concerned.

### 4.3.3 Traditional councils

Traditional councils receive little appreciation from the North West provincial legislature. For example, there is no procedure in case not enough women participate in the council.<sup>162</sup> In contrast, the list of ‘disqualification’, the exclusion from candidature or membership, is very comprehensive.<sup>163</sup> Furthermore, the exclusion from candidacy for an office is indeterminate for the traditional council and for ‘holding any office’. Such provision is inconsistent with the TLGF Act, 2003 with respect to a democratic election, and, as a limitation, this would presumably be inconsistent with the Constitution, due to its legal vagueness.

Looking at the functions, the provincial Act lists in part similar functions as the TLGF Act, 2003, itemized. Other functions are not mentioned but referred to in a general clause.<sup>164</sup> However, the traditional community via the traditional council can engage, *inter alia*, in development programmes.<sup>165</sup> For these purposes, the executive branch of the provincial government oversees and capacitates the traditional council.<sup>166</sup>

The provisions<sup>167</sup> on oversight by the Government over, and, the accountability of the traditional council, as well as the *kgosi* or *kgosigadi*, the traditional leaders are an instructive example of what Currie refers to as ‘the same repressive tolerance that it [customary law] endured under the

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<sup>162</sup> See Sec. 6 NW - TLG Act, 2005. The Sec. 3 (2) (d) TLGF Act, 2003 requires provincial legislation on how to determine a lower threshold. One can only wish that at least one third of the council members are female. Otherwise, the provincial legislature may be accused to act negligently.

<sup>163</sup> Sec. 7 NW - TLG Act, 2005 includes insolvency, conviction, misconduct and mental incapacity.

<sup>164</sup> Sec. 9 (1) (d) NW - TLG Act, 2005.

<sup>165</sup> Sec. 33 (3) NW - TLG Act, 2005 with regard to service delivery.

<sup>166</sup> Sec. 34, 35 NW - TLG Act, 2005.

<sup>167</sup> Sec. 9 (2) NW - TLG Act, 2005.

old [political order]'.<sup>168</sup> While other provincial Acts speak of an 'enabling environment', the North West Act incorporates traditional authorities into the governmental spheres.<sup>169</sup> For example, no other provincial Act provides for an absolute right of the executive to address to the traditional council.<sup>170</sup> In contrast the traditional council has no specific right to address the executive branch of government. Thus the legislation does not reflect mutual understanding and respect.

#### 4.3.4 Traditional leadership

The identification and appointment, as well as removal, are regular, *i.e.* the royal family decides and appoints according to custom and the Premier issues or withdraws a certificate of recognition. The position of a *kgosi*, the traditional leader of a traditional community, is incompatible with a full-time occupation in organs of state.<sup>171</sup> The array of functions entails mediation, dispute resolution and representation to and for the organs of state.<sup>172</sup> Furthermore, the *kgosi* receives legislative protection and support.<sup>173</sup> The *kgosana*, the headwoman or the headman, is bestowed with the function of dispute resolution.<sup>174</sup>

There is a general and pragmatic commitment by the provincial organs of state to introduce traditional leadership into the development programmes.<sup>175</sup> The royal family shall convene formally and decide or make recommendations on customary law, policies regarding traditional communities and inheritance.<sup>176</sup> Unlike their equivalents in the other provinces, the royal family

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<sup>168</sup> Currie, I. (1999) Sec. 36 - 3.

<sup>169</sup> *E.g.* The Premier may withdraw any officer or employee who was seconded assigned for the traditional authority, Sec. 12 (3) NW - TLG Act, 2005. All financial matters must be reported annually to the Premier instead to the traditional community, according to Sec. 30 (5) NW - TLG Act, 2005.

<sup>170</sup> See Sec. 11 (5) NW - TLG Act, 2005.

<sup>171</sup> Sec. 17 (1) NW - TLG Act, 2005.

<sup>172</sup> Sec. 18 (1) NW - TLG Act, 2005.

<sup>173</sup> 'A *kgosi/ kgosigadi* shall be entitled, in the lawful execution of his/her functions, to loyalty, respect, support and obedience of any member of the traditional community.' See Sec. 18 (3) NW - TLG Act, 2005.

<sup>174</sup> Sec. 23 (d) NW - TLG Act, 2005.

<sup>175</sup> Sec. 36 NW - TLG Act, 2005.

<sup>176</sup> Sec. 25 NW - TLG Act, 2005.

may engage into substantive matters besides the selection of traditional leaders and their successor.

#### 4.3.5 *Dispute resolution*

The Premier must enforce a decision of the national commission for dispute resolution pursuant to Sec. 37 NW TLG Act, 2005 in conjunction with sec 26 TLGF Act, 2003.

The province establishes a commission of inquiry that acts concurrent to the national Commission for Dispute Resolution.<sup>177</sup> Its mandate comprises mainly the appointment and conduct of traditional leaders. Apart from these specific mandates, the traditional themselves leaders shall preferably resolve any disputes concerning customary law and the NW TLG Act, 2005.<sup>178</sup>

#### 4.3.6 *Code of conduct*

Pursuant to Sec. 27 NW TLG Act, 2005, traditional leaders and the traditional council members must adhere to the provincial code of conduct. As provided in Schedule 2 of NW TLG Act, 2005, both codes entail only provisions of good governance and cooperation. Suspension and removal pertain the only consequences in case of a breach.<sup>179</sup>

### 4.4 Free State<sup>180</sup>

It is comparable to the KwaZulu-Natal TLG Act, 2003, but it was legislated *mutatis mutandis*, in other words both provincial Acts comprise the same main features and regulations.

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<sup>177</sup> Sec. 38 NW - TLG Act, 2005.

<sup>178</sup> Sec. 18 (1) (b), 25 (d) NW - TLG Act, 2005.

<sup>179</sup> Sec. 7 (e) 14 (1) (d), 20 (1) (d), 27 (3) NW - TLG Act, 2005.

<sup>180</sup> Free State Traditional Leadership and Governance Act, No. 8 of 2005 [later referred to as FS - TLG Act, 2005].

#### 4.4.1 Preamble

The Free State Act is the shortest and most concise of its kind. The preamble spells out and remains at the obligation imposed by the TLGF Act, 2003. It anticipates what could be referred to as minimalist legislation.

#### 4.4.2 Recognition of traditional communities

On application, the community must indicate the number, region, and name of the senior traditional leader, as well as the name of the community.<sup>181</sup>

Concerning the withdrawal of the recognition and besides the application by a community, the Act focuses on the reversing of forced mergers or separations of traditional communities prior to 1994.<sup>182</sup>

#### 4.4.3 Traditional councils

The Premier determines the number of council members<sup>183</sup> and its territorial jurisdiction.<sup>184</sup> Here, first the *morena* or *kgosi*, the senior traditional leader, selects 60 %<sup>185</sup> announces the results at the *pitso*, the assembly of the traditional community, which then may select democratically the remaining 40 % of council members.<sup>186</sup> Hence the prerogative of the traditional leader prevails over the democratic election in a *pitso*.

Remarkably and unlike other provincial legislation, the provincial Act distinguishes between the vacancies of elected and selected members. Appointments of candidates are made accordingly.<sup>187</sup> However no mechanism has been introduced to implement minimum female representation.

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<sup>181</sup> Sec. 3 (3) FS - TLG Act, 2005.

<sup>182</sup> Sec. 5 (2) FS - TLG Act, 2005.

<sup>183</sup> Sec. 6 FS - TLG Act, 2005.

<sup>184</sup> Sec. 17 (1) FS - TLG Act, 2005.

<sup>185</sup> Sec. 7 (2) (c) FS - TLG Act, 2005

<sup>186</sup> Sec. 7 (2) (d) FS - TLG Act, 2005

<sup>187</sup> Sec. 7 (6) (a) FS - TLG Act, 2005.

The functions and cooperation with municipalities correspond with the TLGF Act, 2003. The social peace and cohesion within and amongst communities are emphasized.<sup>188</sup>

The prospects for financial and human resources provided by the provincial government appear to be generous, as, pursuant to Sec. 11, 12, 16 FS TLG Act, 2005, the provincial government must supply the traditional councils with the means to fulfil their roles and functions. The line of reporting and accountability of the staff remains within traditional authorities.<sup>189</sup> Hence, traditional councils gain a considerable degree of financial and operational independence.

#### 4.4.4 Traditional leadership

The leadership consists of three spheres: *morena e moholo*, queen or king, pertains to the highest sphere, followed by *morena* or *kgosi*, the senior traditional leader, and finally *morena wa motse* or *kgosana*, the hereditary position of headwoman or headman. Also introduces positions of *moemedi*, an acting traditional leader, during vacancies, and the *motlatsi*, as substitute for the respective traditional leader.

Besides these regular hereditary leadership positions, the community elects the *ramotse*, the elected headwoman or headman.<sup>190</sup> With regard to the gender equality policy and the absences of a hereditary disposition, primarily women should pursue the position of a *ramotse*.

No supplementary functions or roles have been assigned to traditional leaders.

#### 4.4.5 Code of conduct and misconduct

This extensive part of the provincial Act deserves some attention. Only the traditional leaders and members of the traditional councils are subjected to the code of conduct. There are various forms of misbehaviour addressed under the umbrella of misconduct, such as breach of code of conduct,

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<sup>188</sup> Sec. 15 FS - TLG Act, 2005.

<sup>189</sup> Sec. 7 (2) (c), 12 FS - TLG Act, 2005; In other provinces, like the North West, the reporting line goes back to the executive branch of government.

<sup>190</sup> Sec. 21 (1) FS - TLG Act, 2005.

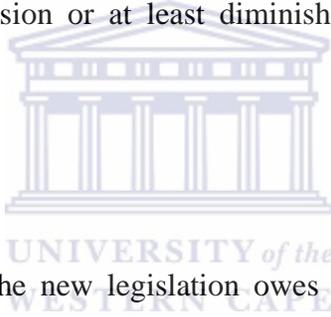
drug and alcohol addiction and negligence to discharge duties.<sup>191</sup> According to the findings of on inquiry, the Premier decides within her or his discretion to impose a penalty.<sup>192</sup>

If a traditional authority or its member is found guilty of a Schedule 1 offence of the Criminal Procedure Act, 1977,<sup>193</sup> or any similar convictions determined by the Premier. The convict can be subjected simultaneously to the statutory penalty pursuant to Sec. 29 (5) FS TLG Act, 2005.<sup>194</sup>

The code of conduct, disclosure of interests and declaration of gifts is regulated outstandingly<sup>195</sup> because it enforces basic principles of good governance like transparency and cooperation.

#### 4.5 Eastern Cape<sup>196</sup>

The Act has no preliminary definitions and explanations on the various institutions. This omission could cause some confusion or at least diminishes the understanding of traditional institutions in the Eastern Cape.



##### 4.5.1 Preamble

According to the provincial Act the new legislation owes its existence solely to the national legislative endeavour. It does neither speak of the necessary transformation of traditional leadership nor of the re-establishment of customary institutions.

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<sup>191</sup> Sec. 28 (1) FS- TLG Act, 2005.

<sup>192</sup> Sec. 29 (4) FS- TLG Act, 2005; It encompasses moderate penalties and harsh punishments, *e.g.* the fine does not exceed ZAR 200 as opposed to two years of suspension of remuneration.

<sup>193</sup> Act 51 of 1977.

<sup>194</sup> *Prima facie* if a traditional leader has been convicted then the conviction of misconduct with a fine, pursuant to Sec. 25 (4) (c), (d) FS- TLG Act, 2005 appears to be rather a second punishment than a penalty due to inadequate behaviour while on duty.

<sup>195</sup> See Schedule 2 of Act, 2005.

<sup>196</sup> Eastern Cape Traditional Leadership and Governance Act, No. 4 of 2005 [later referred to as EC - TLG Act, 2005].

#### 4.5.2 Recognition of traditional communities

Similar to Mpumalanga, the procedure for the recognition of traditional communities includes public involvement.

Prior to the recognition of a traditional community, the Premier must invite the public to comment on the application for recognition in the newspapers and she or he must consider the comments before taking a decision.<sup>197</sup> Other traditional authorities like the local or provincial house of traditional leaders are not involved, but may also submit comments accordingly. The decision must be taken within 12 months,<sup>198</sup> which appears reasonable with regard to the extensive hearing process.

#### 4.5.3 Traditional councils

When establishing a traditional council, the traditional community must elect and must adhere to the imperative of female representation.<sup>199</sup> The traditional community and the traditional leader, presumably the *inkosi*, determine the number of council members to be between 9 and 30.<sup>200</sup> The rule on excluding candidates is flexible and optional and refers to previous serious convictions, citizenship, age and membership of the traditional community.<sup>201</sup> In regard to vacancies the Act distinguishes between elected and selected members when filling a vacancy.<sup>202</sup>

Absence from meetings may hinder the functioning of a traditional council. Therefore the explicit duty of attendance requires council members to fulfil their basic functions properly.<sup>203</sup> Meetings

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<sup>197</sup> Sec. 5 (2) EC - TLG Act, 2005.

<sup>198</sup> Sec. 5 (2) EC - TLG Act, 2005.

<sup>199</sup> Sec. 6 (2) EC - TLG Act, 2005; both selecting forums, of the traditional leader and of the election meeting, must ensure the required female representation.

<sup>200</sup> Sec. 6 (2) (a) EC - TLG Act, 2005.

<sup>201</sup> 'A Member of the traditional council shall be a person who-...', Sec. 6 (3) EC - TLG Act, 2005.

<sup>202</sup> Sec. 8 (2) EC - TLG Act, 2005.

<sup>203</sup> Sec. 8(1) (c) (d) EC - TLG Act, 2005.

and the general forthcoming of the traditional council have also been formalized in support of good governance.<sup>204</sup>

#### 4.5.4 Traditional leadership

Three hierarchical spheres constitute the traditional leadership: *iKumkani* as king, *iNkosi* or *Morena* as senior traditional leaders, *iNkosana* or *Morenana* as headman or headwoman of a traditional community. The traditional leaders have general functions related to the pursuit of social peace, stability and economic progress of the traditional community.<sup>205</sup>

#### 4.5.5 Misconduct and code of conduct

The code of conduct is identical to the one of the TLGF Act, 2003. It serves as a yardstick for the determination of misconduct.<sup>206</sup> Within the charges the assigned traditional authority must then narrow down and distinguish what amounts to a breach of a code of conduct and what amounts to a penalized misconduct that demands a severe sanction.

In case of an assumed misconduct by a traditional leader the royal family decides within its own discretion to pursue an inquiry.<sup>207</sup> The chairperson as well can decide within her or his discretion over an assumed misconduct.<sup>208</sup> Pursuant to Sec. 20 (4) EC TLG Act, 2005, the Premier formally approves the decision after she or he has considered all presented facts and arguments.

The sanction can range from a fine not exceeding R 1000 to a suspension of salary for two years.<sup>209</sup> Either procedure reflects some autonomy of traditional authorities from governmental

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<sup>204</sup> See for example the prescribed and fixed agenda, record of the minutes and further disclosures, code of conduct, Sec. 9 (2), 10 EC - TLG Act, 2005.

<sup>205</sup> Sec. 27 (7) EC - TLG Act, 2005.

<sup>206</sup> See Sec. 19 (1) EC - TLG Act, 2005.

<sup>207</sup> Sec. 19 (1) EC - TLG Act, 2005.

<sup>208</sup> Sec. 19 (1) EC - TLG Act, 2005.

<sup>209</sup> Sec.19 (1), (4) EC - TLG Act, 2005.

interference. Since it is their duty to ensure the good governance and functioning of these very institutions, these may well lead the quasi-judicial inquiries.

#### 4.6 Limpopo<sup>210</sup>

It entails a specific protection for a individual against expulsion from a traditional communities. Particularly the Act has an extra-ordinary regulation on membership in traditional community.<sup>211</sup>

##### 4.6.1 Preamble

The spirit of the legislation turns to the necessary changes of traditional leadership, which must embrace unity, co-operative governance, enhancement of culture and tradition.

##### 4.6.2 Recognition of traditional communities and withdrawal thereof

The applying community has to submit the regular information, including the names of traditional leaders concerned, the number of community members, and the area of residence.<sup>212</sup> The Premier does not only issue the recognition of the traditional community but also determines the boundaries of the jurisdiction of the community.<sup>213</sup> The Premier must also consider reversing mergers or separations of communities prior to 1994.<sup>214</sup>

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<sup>210</sup> Limpopo Traditional Leadership and Institutions Act, No. 6 of 2005 [later referred to as Limpopo - TLI Act, 2005].

<sup>211</sup> See Sec. 19 Act, 2005; community membership can be viewed similar to the status of citizenship.

<sup>212</sup> Sec. 3 (2) Limpopo - TLI Act, 2005.

<sup>213</sup> Sec. 3 (6) Limpopo - TLI Act, 2005.

<sup>214</sup> Sec. 13 (1) (b) (c) Limpopo - TLI Act, 2005.

### 4.6.3 Traditional councils

The provincial legislature omitted to provide for a mechanism to improve political and social representation and engagement of women within the traditional council. The senior leader convenes an election meeting.<sup>215</sup>

With regard to the conceptualization by the legislature, one has to presume that the female quota will be applied rather as an exception than as a rule.<sup>216</sup>

The Premier, the majority of a council or the traditional leader can expel members on various grounds.<sup>217</sup> This competence has political connotations and entails a unique power of the traditional leader. These provisions do not only render the council a politically dependent institution unduly subordinate to traditional leaders and the provincial executive institution, but may also run counter to the principle of democratic elections and representation within traditional communities. For example, according to Sec. 4(1) (c) TLGF Act, 2003, the traditional council assists to identify the needs of its traditional community. Needs may result into governmental programmes and service delivery which can be a vital political issue in a community. Traditional leaders have neither by national nor provincial legislation any concurrent function, but may, by the *de jure* powers deriving from this provincial legislation over traditional councils decide upon such substantive matters.

The provincial Act does not entrust traditional councils with further functions or rights like the other five provinces.<sup>218</sup> Within the chapter on traditional leadership in the Act refer to ‘The traditional councils must uphold traditional African values.’<sup>219</sup>

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<sup>215</sup> Sec. 4 (3) Limpopo - TLI Act, 2005. Interestingly there seems to be no constitutive meeting of the traditional community.

<sup>216</sup> Sec. 4 (6) (a) Limpopo - TLI Act, 2005. ‘...must be women, unless...’

<sup>217</sup> See Sec. 6 (1) (2) Limpopo - TLI Act, 2005: best interest of the community, negligence for duties, ‘disgraceful’ conduct.

<sup>218</sup> This omission approves the intended limited role of traditional council under the Limpopo Act. It shall first and foremost advise and council the traditional leader.

<sup>219</sup> Sec. 18 (4) Limpopo - TLI Act, 2005.

Expenses for this mandate are ensured through several sources.<sup>220</sup> Besides the usual funding through the provincial government, traditional councils may, with the consent of the Premier, impose levy on all taxpayers within its jurisdiction.<sup>221</sup> This competence affords the council with stable financial independence but may also pose a contested political field within traditional authorities.

#### *4.6.4 Traditional leadership*

The Act recognizes only senior traditional leaders, headwoman and headman as selected by the royal family and recognized by the Premier.<sup>222</sup> There is no provision for the recognition of the queen or king although both are mentioned in the provincial legislation.<sup>223</sup> Nevertheless if the royal family decides not to remove a traditional leader although grounds therefore exist, the Premier may suspend the remuneration of such a traditional leader.<sup>224</sup> Thereby the Premier may intervene in cases of an undue protective royal family in the mentioned scenario.

The position between traditional leadership and positions in other organs of state are incompatible. Traditional leaders must promote and act in the best interest of this traditional community, announce new legislation and attend to further functions allocated by organs of state.<sup>225</sup>

#### *4.6.5 Dispute resolution*

In addition to the national dispute resolution commission the Premier, may also resolve a dispute concerning the boundaries of traditional communities.<sup>226</sup>

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<sup>220</sup> Sec. 11, 22, (1), 24, 25 Limpopo - TLI Act, 2005.

<sup>221</sup> Sec. 25 Limpopo - TLI Act, 2005.

<sup>222</sup> Sec, 12 Act, 2005.

<sup>223</sup> *E.g.* Sec. 15 Act, 2005. In comparison to other provinces it might amount to a negligent omission, which discredits queen and kingship.

<sup>224</sup> See Sec. 13 (5) Act, 2005.

<sup>225</sup> Sec. 18 (1) Act, 2005. That constitutes a *carte blanche* to incorporate the traditional leaders into other organs of state and could conflict with the constitutional recognition of traditional leadership.

<sup>226</sup> Sec. 20 (1) Limpopo - TLI Act, 2005.

#### 4.6.6 Code of conduct<sup>227</sup>

The code of conduct for members of traditional councils comprises good governance, a comprehensive list of interests to disclose, gifts received, subjects of confidentiality, attendance and protection of communal property.<sup>228</sup> The code equals the code of conduct for councillors of municipalities.<sup>229</sup>

The Act refers the procedure of sanctioning to the traditional council that shall ensure attendance.<sup>230</sup> It is a seldom example that a competence to regulate is delegated to the traditional authority. The Act emphasises on creating awareness on and the display of the code of conduct.<sup>231</sup> It exemplifies a remarkable enforcement mechanism besides the usual sanctioning. In the case of a breach the traditional council itself shall investigate and decide upon a sanction.<sup>232</sup> The 'convict' may appeal to the Premier against the decision.<sup>233</sup> Therefore, the traditional council may resolve disputes internally and an appellate mechanism warrants a higher degree of certainty.

In contrast, traditional leaders must adhere to a less strict code. Only undue behaviour and conviction of a violent crime pertain to misconduct. The inquiry and decision process for breaches constitutes also a novel mechanism. The traditional council may bring a potential misconduct to the Premier's attention. Then the Premier must consult all stakeholders, including the royal family, with due regard to the various consultations before she or he delivers a decision.

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<sup>227</sup> Sec. 23 Limpopo - TLI Act, 2005.

<sup>228</sup> See Clause 1 to 10 Schedule 2 Limpopo - TLI Act, 2005. One can recognize the similarity with changes *mutatis mutandis*.

<sup>229</sup> See Schedule 1 Local Government and Municipal Systems Act, 2000.

<sup>230</sup> Clause 4 (3) Schedule 2 Limpopo - TLI Act, 2005.

<sup>231</sup> See Clause 11 (4) Schedule 2 Limpopo - TLI Act, 2005.

<sup>232</sup> Clause 11 (6) Schedule 2 Limpopo - TLI Act, 2005. Sanctions are request to the Premier for removal, a fine without any statutory limitation and suspension from the office.

<sup>233</sup> Clause 11 (7) Schedule 2 Limpopo - TLI Act, 2005

#### 4.6.7 Oath

Members of the traditional council must affirm their loyalty to the community by an oath. This specific oath pinpoints the imposes legal reference for traditional authorities:

*'OATH OF OFFICE: I, A.B., do swear to be faithful to the \_\_ traditional community and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the traditional community; to obey, observe, uphold and maintain the customary laws of the traditional community and all other laws of the Republic of South Africa; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice unto all; and to devote myself to the well-being of the traditional community and its people. May the Almighty God by His grace guide and sustain me in keeping this oath with honour and dignity. So help me God.'*<sup>234</sup>

The addressed subjects reflect the legitimizing authority. The council members are responsible and accountable to the traditional community, the very basis of its legitimate existence.



## 5. Conclusions

With the acknowledgement of traditional leadership, the drafters of the constitution sent a laudable and candid signal to traditional communities and their leaders and councils. Traditional leadership is part of the constitutional framework, which requires a continuous integration of its surrounding traditional institutions and an adaptation of customary law in this regard. The notion of parallel legal systems<sup>235</sup> is redundant, because 'indigenous law has for over a century become

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<sup>234</sup> Sec. 5 (2) in conjunction with Schedule 3 of Limpopo - TLI Act, 2005, the religious implications may seem inappropriate and as the case may be unconstitutional.

<sup>235</sup> See Sachs, A. (1992), p. 77, '... it would be inappropriate to attempt to 'democratize' the chieftainship. Chiefs and chieftainesses can work democratically and should be encouraged to do so. The institution of traditional leadership, however, cannot be democratic.' Also described in Vorster, L.P. (2002), p. 127, where traditional and democratic system would only operate aptly in separate spheres.

closely interlinked with and influenced by statutory law.<sup>236</sup> The new legislation is taking this development a step further. In fact it attempts to democratize traditional communities, leadership and councils.

Within the academic spheres, the legislation at hand also attempts to conceptualize the diverse legal systems in South Africa.<sup>237</sup> The outline of the national and provincial legislation on traditional leadership highlights the different attempts to constitutionalize and integrate traditional communities, leadership and councils. It is the first attempt by the state and its institutions since the advent of democratic government in 1994.

The aim of the legislation was to bring traditional communities, leaders and councils in line with the democracy under the new constitutional dispensation. It mainly formalized governmental control over the traditional authorities. Certainly some provincial Acts create a forum for the traditional authorities to establish self-government and self-determination within the new framework. But traditional communities must respond to this process, *i.e.* they must give their answer to the integration of traditional communities in the new democracy. The provincial legislation is seldom encouraging or instructive to build up a new vital traditional leadership entrusted with traditional values, culture and community-life.

Communal management such as service delivery is the major focal point in the near future. One main focus is the integration of women into traditional leadership. Apart from the woman quota in traditional councils, neither national nor the provincial legislatures have introduced mechanisms to enforce such gender equality policy. From a legalistic point of view, traditional communities, leaders and councils have gained no further autonomy and little independence. But social and political powers could rectify the imbalances between the old and new.

The legislation can also be described as strong-arm integration enforced by the state instead of prompted by traditional communities. For example, the consequences of conviction are severe.

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<sup>236</sup> *EX PARTE CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: IN RE CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA*, 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), para 191.

<sup>237</sup> On the process of conceptualizing customary and constitutional law see Himonga, C. and Craig, B (2000) p. 307 (318 sqq.)

Members of traditional councils may be expelled or traditional leaders be discharged from their positions as a result of these.

The provincial codes of conduct the provinces criminalize certain acts, thereby establishing a very strict regime. Investigations and proceedings are of an administrative nature. Even if misconduct is dealt within the community, one can concede a judicial settlement of misconduct would be more adequate in the light of such harsh consequences. In appropriate circumstances, the executive is afforded with powers to inquire and decide. That position is in conflict with its role as a partner and its oversight function.

Certainly the new legislation has not addressed all potential conflict zones of traditional leadership.<sup>238</sup> But it can certainly give guidance for further supplementary legislation, also from the local sphere, and the practise.

The implementation of the Acts can only succeed within the sphere of inter-governmental relation and with a sincere engagement with traditional communities, leaders and councils.<sup>239</sup> The main Act provides an incomplete answer of what constitutes traditional leadership within the new constitutional dispensation, because the addressed institutions are local and regional ones. Whether legislation has a 'one way' effect only, from the constitutional democracy impacting upon traditional communities, leaders and councils, or whether the latter now form an integral part of the constitutional democracy in South Africa, remains a question for the future.

In any event the restatement and constitutionalization of the respective positions of traditional, communities, leadership and councils, is remarkable achievement in itself.

Concerning gender equality in the traditional leadership little has been done through the legal framework. Only some integrated representation of women on traditional councils has been provided for, in addition to allowing, for example, 'queenship' or 'headwomanship'. Traditional

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<sup>238</sup> Bennett, T.W. and Murray, C. (2005), ch. 26-1 sqq.

<sup>239</sup> See Olivier, N. (2006), p. 86.

communities and their authorities themselves must implement these new policies to allow women in leadership position.<sup>240</sup>

The Acts vary considerably for certain respect, but do not address customary law. The divergence is not necessarily based on distinct traditional leaderships positions or the underlying customary law. The provincial legislatures rather spelt out what they wanted traditional leadership to be.

Looking at the listed functions of the traditional leader and their councils, one can see that these surpass the mere preservation and development of customary law. The new roles are not yet absolutely predetermined or defined as yet. Traditional communities exist next to modern western society in a rapidly changing constitutional state. The new legal system allows traditional leadership based on customary law to re-emerge properly and integrate itself.

The provincial legislation has brought about several improvements and details for traditional communities and their leadership. The codes of conduct are comprehensive and contain enforcement mechanisms. However, the main challenges with regard to the implementation of gender equality have not been attended to. The provincial Acts mostly repeat the national Act without giving further substance in this regard. For example, no mechanism encouraging women to pursue traditional leadership and councillorship positions, has been created by any of the provincial legislature.

Looking at traditional councils and their traditional leaders, generally their competences, functions and dispute resolution received some clear content through the provincial legislation. Thus one can assume the provincial Acts are going to support the successful modernization and integration of these traditional authorities within the democratic constitutionalism.

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<sup>240</sup> The pursuit of gender equality through the courts would not suffice because they could only reconcile what has been brought forward to them. In order to reconcile the customary law with the new constitutional dispensation, continuous reforms and interpretations are necessary. A court decision by its nature cannot substitute such reforms.

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