

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Traditional Leaders in South Africa: Yesterday, Today and
Tomorrow

Mini thesis submitted in partial fulfillment of the
requirements for the

M Phil degree



Prepared by

UNIVERSITY of the
DOLLY BIZANA-TUTU
WESTERN CAPE

Supervisor: Professor F A de Villiers

Year: 2008

ACKNOWLEDGEMENT

Firstly, I would like to thank the God Almighty who is the possessor of the Universe for having strengthened me through thick and thin, while I was studying with the University of the Western Cape. His power has taken me from strength to strength. I give him honour and praise

At this point my heart felt gratitude to my supervisor, Prof F A de Villiers. I am indebted to him for his enormous assistance, guidance and encouragement until the completion of this mini thesis. Gratitude is also extended to my late parents Edgar and Clara, my husband and children especially Zoliswa and Sive, for their prayers, love and support throughout my studies.



	Page No.
<u>TABLE OF CONTENTS</u>	3
ACKNOWLEDGEMENT	2
INTRODUCTION	6
CHAPTER ONE	8
1.1.1 Traditional leaders of the past	8
1.1.2 Conquest, indirect rule and apartheid	9
1.1.3 Colonial Government rule	13
1.1.4 Effective methods of protesting against unpopular rulers	15
1.1.5 Extension of council system	15
1.1.6 Case on dented powers of traditional leaders	16
1.2 Land tenure	17
1.3 Conclusion	20
CHAPTER TWO	21
2.1 Introduction	21
2.2 Traditional leaders of today	21
2.3 Appraisal of traditional leaders	22
2.4 Constitutional negotiations and Interim and Final Constitutions	23
2.5 Traditional leadership under Constitution of South Africa	25

2.5.1 How traditional leaders are accommodated under Chapter XII of Constitution	25
2.5.2 Effect of Constitution on traditional leaders	26
2.5.3 Effect of Constitution on customary law	28
2.5.4 Traditional leaders and issues of discrimination	30
2.5.5 Traditional leaders and judicial function	32
2.5.6 Role and powers of traditional leaders	34
2.5.7 Section 211 on role of traditional leaders	35
2.5.8 Role of traditional leaders in New South Africa	36
2.5.9 Houses of traditional leaders	37
2.5.10 National House of Traditional Leaders	38
2.5.11 Provincial Houses of Traditional Leaders	41
2.5.12 Local Houses of Traditional Leaders	42
2.5.13 Powers of National House of Traditional Leaders	43
2.5.14 Privileges and immunities	44
2.5.15 Local government	45
2.6 Communal Land Rights Act 11 of 2004	48
2.7 Conclusion	50

CHAPTER THREE	53
3.1 Future of traditional leaders	53
3.2 Legal context of transition	54
3.3 Traditional leaders and political transition	54
3.4 Reform strategy of institution of traditional leadership	56
3.5 Communal land	59
3.6 Latest developments	62
3.7 Conclusion	62
BIBLIOGRAPHY	65



1. INTRODUCTION

Traditional leaders were individuals occupying communal political leadership positions sanctified by cultural mores and values who enjoy the legitimacy of particular communities to direct their affairs. Their basis of legitimacy is tradition, which includes the whole range of inherited culture and way of life, a people's history, moral and social values and the traditional institutions which survive to serve those values.¹

As stated by Bennett, the structure of tribes contained no more than a few thousand individuals. Members were assumed to be related by a tie of kinship and due to their common ancestry, they were a homogenous group.² There were three rungs in the hierarchy of traditional leadership, the Kumkani (King), the Nkosi (or Chief, a term the traditional leaders do not like, because it is of colonial imposition), and the lowest rung called the Headman or junior traditional leader.³

Leadership falls to its most senior member as chief. A chief is a traditional leader of a specific traditional community who exercises authority over a number of headmen in accordance with customary law, or within whose area of jurisdiction a number of headmen exercise authority.⁴

Traditional rulers required no special training as they were qualified for office by their ancestry alone; a king is a king because he is born to it. Furthermore, the all inclusive powers of government were not differentiated, in the Western manner, into judicial, administrative and legislative categories. In South Africa the office was hereditary

1 Bennett TW (2004), Customary Law in South Africa, p101

2 Ibid

3 Holomisa SP (2005), Old Traditions, New South Africa: Interviewed by Turko, New Agenda, First Quarter

4 Mamdani M, Citizen and Subject, p79-82, in Bennett, op cit, p104

according to the principle of primogeniture in the male line. There was a duty to consult councillors and to act for the benefit of the people.⁵

Even though many of the issues of traditional leadership were similar across the country, it must be accepted that traditional leadership is the expression of different nations. Each African nation had a different system of customary law and different models of traditional societal organization in which traditional leadership plays different roles. If the grip of traditional leaders on the masses of the people were not broken, it would not be easy for the colonial powers to get a listening ear from the people and, therefore to govern as they saw fit.⁶

It is against this background that the role and possible options for the future of traditional leaders in South Africa will be examined.



⁵ Letsealo, p18, in Prinsloo MW (1983), *Inheemse Publiekreg in Lebowa*, Pretoria Van Schaik, referred to by Bennett, op cit, p106

⁶ Bennett, op cit, p120

1.1 CHAPTER ONE

1.1.1 Traditional leaders of past

As stated by Mabutla, South Africa was for many years before the White settlers, ruled by a succession of kings such as Shaka, Makhado and Sekhukhune who were regarded as the sole source of political power. They governed through a hierarchy of territorial chiefs, who held office by their favour and their gift. Each chief had to give tribute and service either directly to the king, or indirectly through the chief next above him in the hierarchy. The higher chief had to attend the king's court on invitation. Traditionally, this state of affairs seemed to have been acceptable to everyone although it was not always the case. The system was justified by both myths and rituals, and conflicts were handled in terms of values which were shared by both rulers and subjects. According to Mabutla the system was not democratic at all.⁷

Bennett affirmed that traditional leaders were regarded as the fathers of the nations who had to care for their people. There was also a duty to consult councilors and to act for the benefit of their people. As the ruler of the tribe traditional leaders had the power to allot land; the land was theoretically his property which he held as the trustee for the people. He reiterated that the all inclusive powers of government were not differentiated, in the Western manner, into judicial, executive and legislative categories. The rulers were not subject to the scrutiny of an independent judiciary.⁸

In terms of the Black Authorities Act of 1951 the government grafted new local authorities on to the existing structures of traditional leadership. The respective traditional leaders and authorities became responsible for the peaceful and orderly administration of their areas of jurisdiction. The outcome was the development of the so called homelands in which the traditional leaders played a significant legislative and political role.⁹

⁷ <http://www.ecu.edu/African/sersas/papers/MabutlaFGMar0.1htm.8/4/2005> p5of 17

⁸ Bennett, op cit, p105

⁹ Originally named Native Authorities Act 68 of 1951

A traditional leader was formally appointed by the South African government and subsequently by the homeland governments for each community in terms of subordinate legislation. The conferment of criminal and civil jurisdiction on the vast majority of formally appointed traditional leaders was the responsibility of the Minister of Justice. This was the consolidated position for South Africa as a whole when the Black Authorities Act was made applicable to South Africa in its entirety. This used to be the legislative context pertaining to traditional leadership and institutions in South Africa until recently.¹⁰

The Black Homelands Constitution Act¹¹ gave the President power to create a legislative assembly for an area in which a territorial authority had been established under the Black Authorities Act. Transkei was granted independence, and followed by Bophuthatswana, Venda and Ciskei.¹²

The Homelands saw the powers of traditional leaders to a large extent restored. Chiefs ex officio occupied half of the seats in the homelands' legislative assemblies, thereby ensuring leading parties a solid basis of support. In the various homelands the presidents, prime ministers and many ministers of state were traditional leaders. During this period therefore the sun was really shining at the homes of traditional leaders.¹³

It is against this background that the role and possible options for the future of traditional leaders in South Africa will be examined.

1.1.2 Conquest, indirect rule and apartheid

The forces introduced by colonial conquest undermined the checks and balances of traditional government inevitably. The Cape Colony was marked by a brand of paternalism. Since chiefs were regarded as the main obstacles to the mission of civilization by Britain, a conscious attempt was made to eliminate them when Ciskei was annexed. When colonial rule was extended

10 Olivier NJJ and others (2004), *Indigenous Law, The Law of South Africa*, Volume 32 (First Reissue), Durban LexisNexis Butterworths, p46-47

11 Originally named Bantu Homelands Constitution Act 21 of 1971

12 1976, 1977, 1979 and 1981 respectively – see Bennett, op cit, p110

13 Bennett, op cit, p111

beyond the Kei river, a modified form of government was imposed on the Transkeian territories.¹⁴

This is because traditional authorities were used by White government to control the indigenous people. The philosophy behind the introduction of the Black Administration Act is made clear by the stated purpose of the Act that it had to provide for the better control and management of “native affairs”.¹⁵

It is also accepted that the aim of the recognition of traditional leaders by the white government was primarily to implement the principle of indirect rule. The result of this approach was the manipulation of the institution of traditional leadership, and the vesting of final control in the government of the day, together with the appointment and deposition of traditional leaders.¹⁶

A completely different policy unfolded in Natal,¹⁷ where Shepstone persuaded the colonial administration to give chiefs governmental and judicial powers.¹⁸ This is where the Lieutenant-Governor was deemed Supreme Chief of the African people. This means the colonial government could rule African subjects by executive decree, rather than the normal legislative process.¹⁹

In most parts of South Africa, the customary powers of traditional leaders remained more or less intact.²⁰ The Orange Free State was an exception to this rule. Although the Moroka Ward and Witzieshoek were treated as reserves under the control of traditional rulers, there was no particular policy that was formulated by the government in this regard. Chiefs continued to be the main providers of law and order for their subjects, although legally

14 Bennett, op cit, p106

15 Originally named Native Administration Act 38 of 1927

16 Olivier NJJ, in Bennett, op cit, p106

17 Brookes E (1930), *The History of Native Policy*, Nasionale Pers, Cape Town, p25

18 Bennett, op cit, p107

19 Welsh D (1968), *Acta Juridica*, p 89-90

20 Native [later Black] Administration Act 38 of 1927

they were subordinate to settler governments. The subtle of give and take of traditional government was gradually supplanted by a more authoritarian rule in spite of the structure of indirect rule. This was the policy that Britain later implemented throughout Africa.²¹

According to the South Africa Act²² control was vested in the Government General in Council regarding native affairs. It henceforth assumed all the special powers previously held by the governors of the colonies. A national Department of Native Affairs was fashioned from earlier colonial departments and this body became the executive authority of the Governor-General. The task of the new Department was to devise a uniform policy of local government for rural Africans. The Native Affairs Act²³ represented a high water mark in the policy of Cape paternalism, providing for the extension of the Cape Glen Grey Council system nationwide, acting on the advice of the Native Affairs Commission.

The Council formed under the Native Affairs Act was expected to attend to all duties that were performed by municipalities, inclusive of sanitation, provision of water supplies, suppression of diseases and noxious weeds, the building of schools and hospitals and the improvement of agriculture. The Council had authority to make by-laws, prescribe fees for the services they rendered and levy rates on adult males ordinarily resident within their areas of jurisdiction²⁴

This new policy of 1920 resulted from the central government's aim to retribalise the African population and resurrect traditional rule. The ultimate aim was to eliminate any vestiges of African participation in central government. This goal was achieved when the Representation of Natives Act²⁵ removed Africans from the common voter's roll. In 1927 the Native

21 Elias TO, in Kuper H and Kuper L (1965), *African Law: Adaptation and Development*; and Robinson (1949), *International Journal of African Administration*, 162-75, for the East and West African variants of indirect rule. French and Portuguese colonial policy was described as "direct rule" by the metropole for legislative and administrative purposes.

22 Section 147 of the South Africa Act of 1909

23 Native [later Black] Affairs Act 23 of 1920

24 Council was on an advisory body of independent experts (presided over by the Minister) which had been established under ss1-4 of the Native Affairs Act 23 of 1920.

25 Native [later Black] Land and Trust Act 18 of 1936

Administration Act gave chiefs civil and criminal jurisdiction over disputes arising within their areas of jurisdiction and made the Governor-General Supreme Chief acting through the Department of Native Affairs.²⁶ He further had full authority to create and divide tribes as well as appoint any person he chose as a chief or headman.²⁷ The outcome was a compliant cadre of traditional leaders who provided the personnel needed to realize an increasingly unpopular state policy.

This was further elaborated after 1948: chiefs became instrumental in enforcing many of the apartheid controls, such as labour regulations and the duty to carry pass books. The council system persisted for another twenty years alongside this supposedly traditional form of government. In areas where no council had been established, chiefs were allowed to continue exercising their customary powers. The Native Affairs Department became more cautious about extending the council system to areas where chiefly powers were already functioning.²⁸

The 1951 Black Authorities Act further signaled the formal demise of the Council system and a return to traditional rule. This Act provided that the Governor-General could, with due respect to customary law and after consultation with the tribe concerned, establish three tiers of authority: tribal, regional and territorial.²⁹ Therefore the council set up under the 1920 Native Affairs Act ceased to exist when the new authorities were established in their areas of jurisdiction and the native authorities were grafted onto the existing council structures.³⁰

In 1959 the Promotion of Black Self-Government Act³¹ created eight national units and also provided a framework for their transition to self-government and ultimate independence. The North-Sotho authority was allotted Lebowa; the South Sotho, Qwaqwa; the Swazi, Kwangwane; the

26 Section 1 of Act 38 of 1927

27 Section 2(70) of the same Act

28 Beinart W and Dubow S (1995), Segregation and Apartheid in Twentieth-Century South Africa, p110

29 Section 2(1) of Native [later Black] Authorities Act 68 of 1951

30 Section 12 of the Native [later Black] Affairs Act 23 of 1920

31 Promotion of Bantu [later Black] Self-government Act 46 of 1959

Tsonga, Gazankulu; the Tswana, Bophuthatswana; the Venda, Venda; the Ndebele, KwaNdebele; the Xhosa, Transkei and Ciskei; and the Zulu, KwaZulu.³²

This notion of using the institution of traditional leadership to further the ideological agenda of the colonial and subsequent apartheid governments as well as that of some of the homeland governments resulted in the creation of some new chieftaincies and the banishment of some traditional leaders. Some would in terms of the customary law not have been considered as the rightful successors to traditional leadership positions.

Some of such imposed traditional leaders in the former homelands were appointed as members of the homeland legislatures concerned in order to strengthen the parliamentary majority of the then ruling homeland political party. On the other hand a group of traditional leaders opposed to the policies of the colonial, apartheid and homelands governments played a key role in the struggle³³

The Black Homelands Constitution Act gave the President power to create a legislative assembly for an area in which a territorial authority had been established under the Black Authorities Act³⁴

1.1.3 Colonial Government rule

During pre-colonial times, local power was entirely in the hands of tribal authorities. But during the period of colonialism they became increasingly the agents of government, responsible to the administration though retaining many of their powers.³⁵

The colonial government could rule African subjects by executive decree, rather than the normal legislative process. Colonial administrations were reluctant to recognize the authority of local chiefs because tribal government was regarded as primitive and despotic. Traditional rulers in KwaZulu-Natal were given both judicial and local government powers, subject to native

32 Promotion of Bantu [later Black] Self-government Act 46 of 1959

33 Olivier NJJ and others (2004), Indigenous Law, The Law of South Africa, Vol. 32, (First Reissue), p47

34 Section 1 of Bantu [later Black] Homelands Constitution Act 21 of 1971

35 Letsealo, loc cit

commissioners and the overriding powers of the State President who held the office of Supreme Chief. In most parts of Southern Africa, the customary powers of traditional rulers remained largely intact³⁶

During colonial times, the two concepts that were critical to determine thinking about African forms of government were tribes and chiefs. This indiscriminate use of the terms tribe and chief was not only glossed over a considerable diversity of political structures in pre-colonial times, but also had the effect of obscuring their true nature. The term tribe was a particular offender. Kinship was never the sole basis for membership. Political units might have been based on ties of blood, but outsiders were always being incorporated, by way of conquest, invitation or submission. From the earliest days of colonial penetration, traditional politics were being divided, merged or reconstituted in order to suit colonial policies. Modern traditional communities bear little resemblance to their pre-colonial forebears.³⁷

The Black Authorities Act³⁸ laid the foundation for the next stage in the government programme, amongst others the creation of independent homelands. In 1959 the Promotion of Black Self-government Act³⁹ that created eight, later nine, national units, provided a framework for their transition to self government and ultimate independence. All Africans fell under the jurisdiction of one of the territorial authorities and each of these authorities was allotted one or more of the reserves established under the 1913 Native Land Act⁴⁰ and the 1936 Native Trust and Land Act⁴¹ as a national homeland⁴²

36 Bennett, op cit, p109

37 As an analytical concept, it is of little value: Hammond-Tooke (1974) *Bantu Speaking People of South Africa*, London, Routledge & Kegan Paul, 2nd ed.; Mafeje ABM (1964), *Leadership and Change: A Study of Two South African Peasant Communities*, Cape Town, University of Cape Town; Boonzaaier CC (1986), *Ondersoek en Straf van Misdade by the Nkuna van Ritavi (Ganzankulu)*, *South African Journal of Ethnology*, 9(3), 1986, p 112. Tribe is additionally objectionable because it carries the connotation of “tribalism”. In a negative sense, tribalism suggests the primitive and backward; in a more positive sense, the simple and uncorrupted.

38 Native [later Black] Authorities Act 68 of 1951

39 Promotion of Bantu [later Black] Self-sovernement Act No 46 of 1959

40 Native [later Black] Land Act 27 of 1913

In the colonial era, the essential tool of civilizing the African people was that of “tribalising” them and strengthening or creating traditional leadership.⁴³

1.1.4 Effective method for protesting against unpopular rulers

The most effective method for protesting against unpopular rulers, secession, was lost when the colonial power imposed new provincial and international boundaries and thereby put an end to free movement from one chiefdom to the next.⁴⁴ The most important deliberation on intervention in traditional government was a scheme launched by the Cape Administration at the end of nineteenth century. This was mainly to excluding Africans from Parliament, while new organs of partially elected local government were introduced in the district of Glen Grey.⁴⁵

The task of the new Department after 1948 was to devise uniform policy of local government for rural Africans. The Native Authorities Act signaled the formal demise of the council system and a return to traditional rule.⁴⁶ This Act provided that the Governor-General could with due respect to customary law and after consultation with the tribe concerned, establish three tiers of authority, tribal, regional and territorial. A tribal authority consisted of a chief and his councilors operating in the lowest level. This responsibility was for administering the general affairs of the tribe, advising and assisting the government.

1.1.5 Extension of Council system into Traditional Authorities system

A council system had been extended from Glen Grey to Transkei where a General Council, or Bhunga, provided the model for future local government

41 Natives [later Black] Land and Trust Act 18 of 1936

42 Bennett, loc cit

43 Mijere NJ (1997), Traditional Leadership: Colonial and Post-Colonial, in Traditional Leadership in South Africa, Holiday Inn Summit

44 Letseale, loc cit

45 Hammond-Tooke WD (1975), Command or Consensus, p84f

46 Mamdani, op cit, p9f

in rural areas.⁴⁷ After the political changes brought about by the white government, the position of the traditional leader was often reduced to that of an efficient functionary, subordinate to the magistrate. Should a chief fail to adhere to the tasks set out by government, he could lose his income and his position. The legitimacy of indigenous leaders, their efficiency and good governance, varied from individual to individual.⁴⁸

Tribal authorities then were serving as local authorities in the rural areas. Whatever had to be done at a local level was done through the tribal authorities. Things like refuse collection and sanitation and provision of electricity did not feature. Whenever the need arose for such services to be provided, traditional leaders were to be approached since they were the local authorities. But now, during the new order, they are accused of failing to provide people with water, sanitation services and some other essential services. Traditional leaders then defend themselves by claiming that all that they have been able to obtain from government, have been provided to the people, and that they played their role to the best of their capacity.

The problem arose when it was felt that elected people could do this job better. When the local councilors are to dig trenches for water pipes on the land that belongs to the people under the traditional leaders, they were to get permission from the traditional leaders. The traditional leader in turn convenes a meeting and the message is conveyed to the community; even if a school or a clinic has to be built, the same procedure is followed.⁴⁹

The writer recommends that to avoid unnecessary tension between traditional leaders and rural councils, traditional leaders should be allocated the relevant authority while local government functions should be handled by democratically elected rural council.

1.1.6 Case on dented powers of traditional leaders of yesterday

47 Rogers H and Linington PA (1949), *Native Administration in the Union of South Africa* (2nd Ed.)

48 Mamdani, loc cit

49 Holomisa loc cit

The first case in which these provisions were put to the test is the case of *Sigcau v Sigcau*.⁵⁰ In this case Mandlonke, the Paramount Chief of the Mpondo tribe in Eastern Pondoland, died and rival claims to the paramouncy were laid by Mandlonke's apparent heirs, Chief Mpondombini Sigcau, Plaintiff, and Botha Sigcau, Defendant, respectively. It transpired that the Mpondo tribe had met independently and considered the matter and agreed in the majority, that the Plaintiff was widely recognized in terms of Native law and custom as the rightful heir to the late Paramount Chief Mandlonke by the people of Eastern Pondoland. The Governor-General, after instituting an enquiry into the rival claims to the chieftainship, appointed the Defendant, Botha Sigcau, who was the candidate for the minority of the chiefs and tribesmen of Eastern Pondoland.⁵¹

The court ruled that while the property of a deceased paramount chief devolved according to customary law, the same did not apply to the office of paramouncy which was determined according to different rules. Certainly therefore, chieftainship was no longer hereditary.⁵²

1.2. Land tenure

During the precolonial period the population of South Africa was small and land abundant. The economic activities in the region varied from area to area. This was dependent on rainfall that was the most environmental factor affecting the economy, followed by topography, soil type and the availability of ground water.⁵³

Land tenure institutions are rooted in value systems and grounded in religious, social, political and cultural antecedents which make them

50 *Sigcau v Sigcau*, 1944 AD 67. See also Mqoke RB (1997), *Basic Approaches to Problem Solving in Customary Law*

51 Koyana DS (2002), *Chieftainship and headmanship are not hereditary*, *Speculum Juris*, p151

52 See also *Buthelezi v Minister of Bantu Administration and Development and Another*, 1961 (4) SA 835 (AD), from KwaZulu-Natal; *Ratsialingwa and Another v Sibasa*, 1948 (3) SA 781 (AD), from the Venda region; *Chief Pilane v Chief Linchwe and Another*, 1995 (4) SA 688 (B), from the then Bophuthatswana; *Mbulelo Jumba v The Head, Dalindyabo, Regional Authority and Three Others*, Case 947/98 (unreported), from Transkei. See also the discussion by Koyana, *op cit*, regarding the Jumba case.

53 Bennett, *op cit*, p371

vulnerable to outside intervention. The nexus between tenure and government is found in the colonial and post-colonial belief that indigenous or traditional tenure systems are incompatible with Western or modern systems of government as well as the associated economic institutions. Both colonial and African governments have shown little respect or understanding of the land tenure systems practised by the majority of their rural people. Government need to appreciate that land tenure institutions are invariably unique and developed over time to suit the local needs.⁵⁴

African tenure systems have erroneously been explained through the notion of “tragedy of the commons”. This is because observers believed that these systems of tenure assign land rights to the community, and ultimately land users do not risk long term investment into improving the land and land based resources. Analyses of traditional tenure systems show that these are to some extent comparable with western forms of land ownership, usually for arable and residential land, as well as group rights for pastures, forests, mountain areas, waterways and sacred areas. The robustness of the tenure system is dependent on the strength of the traditional institutions in place and the degree to which state and other local government institutions interfere or supersede traditional rights and administrative processes. Community based tenure systems need to be democratic with accountability, dialogue, information sharing, consensus and natural justice.⁵⁵

Most African governments, after political independence from colonial masters, have maintained the colonial legacy of the inadvertent undermining of indigenous tenure systems. This has been so through two major approaches. Most prevalent is the practice that all land with no registered title is, *ipso facto*, state land. The second approach is the attempt to replace customary land tenure with state-imposed individual property rights to land and land based resources. This change is more compatible with the intensification and commercialization of agriculture. Formal title does not mean an increase in tenure security.⁵⁶

It is accepted that traditional leaders themselves may have claims to be awarded ownership or other forms of tenure over tracts of land, whereafter

⁵⁴ Moore, B (1966), *Social Origin of Dictatorship and Democracy*, Boston, Beacon Press

⁵⁵ Ibid

⁵⁶ Roth, Barrows, Carter and Kanel (1988), *Land Ownership Security and Farm Investment*, Economics, 71, p211

they too should then be at liberty to deal with such land according to the rights and the duties attached to their tenure.⁵⁷

In the traditional system, the role of traditional leaders with regard to land is to distribute or allocate land to his subjects. This he does not do in person, but through ward heads or clan heads, unless such officials, for various reasons, are not in a position to execute such a function. Land is allocated for residential, cultivation and grazing purposes. Even though the traditional leader is the overall controller of land who claims control over it, ownership vests in the person to whom such piece of land is allocated. This ownership continues from one generation to the other as long as such generations belong to the same family. Where foreigners or members coming from outside a particular tribe would want to settle within a tribe, application to settle is done through the traditional leader.

Such groups of people have to be allocated a clan within the tribe to which they will belong. There is, however, a certain fee called *Sehuba se Kgosi* in Setswana, which these members have to pay as a tribal levy. Once such members have been allocated land, be it for residential, arable or grazing, ownership vests in such new members and there is no legal document proving ownership, except in some tribes where an official register is kept only as an indication of who has been allocated land in a particular region.⁵⁸

Where a member for any reason leaves land which has been allocated to him, he loses ownership, but the traditional leader cannot reallocate such land, though he can authorize use of such land by any other male person. This situation does not pertain to residential land but to arable and grazing land.⁵⁹

57 Nel W (1997), Mthatha summit

58 Balatseng D (1997), Mthatha summit

58 Balatseng D (1997), Mthatha summit

59 Balatseng op.cit

1.3 Conclusion

It must be remembered that we are in Africa, we are of Africa and the Government we produce must also be of Africa. Our future political dispensation shall fail if it does not reflect who we are and where we come from.

Our history must not begin from 1652 or 1910; it goes beyond that. The truth is that the people who were robbed of their land and their authority to rule were none other than the traditional leaders.

Before the advent of colonial rule in South Africa, traditional leaders were rulers of their territories. They were vested with all the powers of state, legislative, administrative and judicial powers. The communities participated freely at all traditional meetings. These principles are firmly entrenched in our communities and that is why the institution of traditional leaders has survived colonial rule.

Traditional leadership in South Africa still represents the institutions that are vibrantly portraying the enormous culture of this nation. Societal challenges that have indirectly and directly affected the role and functions of traditional leaders are Western civilization, modernization, democracy, capitalism and the process of urbanization. The existence of traditional leaders in most African traditional communities depends on the latter's loyalties. However, we cannot underestimate the hardships these institutions have gone through that left them disorganized and confused and distracted them from matters of importance. The life span of traditional leaders is characterized by a severe and untrustworthy transformation over the last century and a half.

Solutions to African land tenure problems were largely found in its historical heritage of rural institutions. African culture and traditions are the glue that holds people together and allows communities to function. Land tenure was the burning issue of the future in Africa and holds the key to social, economic and political progress. These tenure systems have survived more than a century of neglect, abuse and exploitation by colonial and

contemporary governments (ie the current government). Tenure systems require support to strengthen local institutions and empower local communities in administering tenure, including the ability of the tenure system to evolve over time.

2. CHAPTER TWO

2.1 Introduction

It is generally recognized that traditional leaders and their authorities have a significant role to play in South Africa. The role of traditional leaders as custodians of tradition and culture must be recognized and institutionalized. The institution must be adapted accordingly since the socio-political environment in which they are to operate has changed considerably. There cannot be any reasonable doubt that traditional leaders are influential, and have a significant role to play in the future development and related processes in South Africa. The Congress of Traditional Leaders of South Africa (CONTRALESA) believes that provision should be made for effective participation of traditional leaders at all spheres of government.

2.2 Traditional leaders of today

South African traditional leaders claim to have been forced to form their own political party in opposition to government. A few years ago the National House of Traditional Leaders said that there had been no progress in negotiations with government on the powers and functions of the Amakhosi within the country's new municipal structures. Members of that House were being denied facilities within Parliament to perform their duties. Traditional leaders were excluded from the drafting of a White Paper on their function which is about them and for them and they were also barred from holding meetings at Parliament. "Government appears to have no intention of treating us as leaders of this country", said Chief Mpiyezintombi Mzimela.⁶⁰

Apart from the various components and aspects which form part of the development process in a national and international context and apart from the requirements derived from the idea of development in an African context, the process requires the presence of duly empowered community

⁶⁰ Daily Dispatch, October 12 2001, p4

leaders who are prepared to drive the process. A number of factors have a marked effect on the traditional leaders in council.⁶¹

According to Act 41 of 2003⁶² a provision is made that the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa. It further states that the institution of traditional leadership must be transformed to be in harmony with the Constitution and Bill of Rights. The state should recognize the need to provide appropriate support and capacity building to the institution of traditional leadership.

2.3 Appraisal of traditional leaders

The new provincial divisions were designed to obliterate memories of the past regime.⁶³ In 1994, the homelands were abolished and re-incorporated into South Africa. However, the existing chiefs retained their positions with a special provision in the Interim Constitution for the preservation of traditional rule.⁶⁴

At the time of the Interim Constitution, views on this sector of government were ambivalent. The chieftaincy was said to have encouraged tribalism and ethnic division and it represented the interests of traditionalist males, rather than women, youth, farm workers or the landless. Politically chiefs had the reputation of being government stooges and some had contested the regime. Chief Luthuli, who was elected ANC president in 1952 and the group that formed Contralesa and the Inkatha Freedom Party, were notable examples.⁶⁵

61 Holomisa, op.cit

62 Act 41 of 2003 : Traditional Leadership and Governance Framework Act, 2003

63 Section 181 of the Interim Constitution Act 200 of 1993

64 Ibid

65 Mafeje A and Kuper L (1963), *The New African Bourgeoisie*. In addition, many had been abusing the generous powers they enjoyed under customary law, such as imposing taxes and demanding free labour for public works. See Oomen B and Van Kessel I (2000), *Tradition on the move: Chiefs, democracy and change in rural South Africa*, Netherlands Institute for Southern Africa, Leyden

Many had been implicated in apartheid politics and are now vigorously opposed by new democratic organizations that had sprung upon during the 1980's, such as the UDF and the urban civic associations. Many rulers were considered too conservative or lacking financial and managerial skills required to perform the tasks of public officials.⁶⁶

Such adverse opinion was surprising as chiefly rulers are expected to play difficult and contradictory roles of traditional patriarchs and state bureaucrats.⁶⁷ Dissatisfaction with traditional rulers was peculiar to South Africa. Few of the newly independent states could afford to dispense with traditional authorities and even when attempts were made to relegate them they continued to thrive.⁶⁸

The Traditional Leadership and Governance Framework Act provides that the State should set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance. These will transform the institution in line with constitutional imperatives to restore the integrity and legitimacy of the institution of traditional leaders in line with customary law and practices.⁶⁹

The premier of the province may by notice in the Provincial Gazette in accordance with the provincial legislation, recognize a traditional community. Traditional communities must transform and adapt customary law and customs relevant to the application of the Act, so as to comply with the Bill of Rights in preventing unfair discrimination, promoting equality and seeking to progressively advance gender representation in the succession to traditional leadership positions.⁷⁰

2.4 Constitutional negotiations and Interim and Final Constitutions

66 The South African Mayors' Forum on Sustainable Development of South Africa (2002), p375

67 Miller C and Weinrich AKH (1971), The changing role of African Chiefs and Councils in Rhodesia

68 Van Rouveroy van Nieuwaal (1991) on traditional rule in Swaziland

69 Traditional Leadership and Governance Framework Act 41 of 2003

70 Bekker JC on Traditional Leadership and Governance Framework Act 41 of 2003

The Convention for a Democratic South Africa (CODESA) met in 1991 to negotiate a new constituency. It transpired that traditional leaders had no formal status. Their interests were represented by the IFP delegation from the KwaZulu homeland and individual members of political parties. In 1993 constituencies of traditional rulers were formally admitted to the multi-party negotiating process largely as the result of bargains struck with the National Party and the ANC.⁷¹

Given the nature of the Interim Constitution, as a result of a negotiated settlement between various groups in society, including political parties, the drafters decided to include Constitutional Principles, which, in terms of section 71 had to be complied with by the final Constitution for it to be certified by the Constitutional Court. The Interim Constitution section 181 to 184 in particular gave effect to the protection of the institution on the one hand, preserving some institutions that would promote it via the National House of Traditional Leaders and also determined that traditional leadership was within the concurrent domain of provincial and national legislatures. This provision also relates to the institution, role, authority and status of a traditional monarch which shall be recognized and protected in the Constitution. This principle sought to address the institution of traditional leadership.⁷²

In the first place, Section 181 (1) of the Interim Constitution provided that an existing traditional authority would continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority. In the second place, traditional rulers were given new positions in all three spheres of elected government: local, provincial and national. At local level, Section 182 of the Interim Constitution gave traditional rulers ex-officio membership of the municipal structures in their areas. Legislatures of provinces that contained traditional authorities were obliged to establish Houses of Traditional Leaders at provincial level. A similar provision obliged Parliament to create a Council of Traditional Leaders at national level. These new organs did not enjoy plenary legislative powers. They could propose legislation, but they could not

71 Corder (1991)

72 Olivier NJJ, loc cit

generate bills of their own accord. Traditional rulers obtained a guarantee that their status would be specially protected in the final constitution.⁷³

2.5 Traditional leadership under Final Constitution

2.5.1 How traditional leaders are accommodated under Chapter 12 of the Constitution

Traditional leadership is in terms of the 1996 Constitution dealt with in chapter XII and has now been shortened to two sections, namely section 211 and 212.⁷⁴ Section 211(1) gives recognition to the institution, status and role of traditional leadership according to customary law, and this is subject to the Constitution.⁷⁵ This means that traditional authorities may function accordingly, but must observe applicable legislations and customs⁷⁶

Section 212 of the Constitution deals with the role of traditional leadership at both national and provincial level. It uses permissive and not mandatory language. Section 212(1) provides that national legislation may provide for the role of traditional leadership as an institution at local level on matters affecting local communities.⁷⁷

Section 212(2)(a) of the Constitution provides that national or provincial legislation may provide for the establishment of Houses of Traditional Leaders to deal with matters relating to traditional leadership. This encompasses the role of traditional leaders, customary law and the customs of communities in observing a system of customary law.⁷⁸

73 Section 181 of the Interim Constitution Act 200 of 1993

74 Constitutional Principle XIII captured in the wording of Sections 211 and 212 of the Constitution of the Republic of South Africa, 1996

75 Ibid, Section 211(1)

76 Ibid, Section 211(2)

77 Ibid, Section 212(1)

78 Ibid, Section 212(2)

Although both these sections are now couched in permissive language, the Constitutional Court regarded them as complying with Constitutional Principle XIII of the Interim Constitution, This stipulates that the institution of traditional leaders was to be recognized and be protected.⁷⁹

Finally, recognition is given to customary law, which must be applied by the courts. Such application is subject to the Constitution and any legislation that specifically deals with customary law⁸⁰

2.5.2 Effect of Constitution on traditional leaders

The superimposition of the 1996 constitutional framework, amounting to the constitutional scheme of the three spheres of government, as well as the constitutional distinction between national, concurrent national and provincial, exclusively provincial, and local government functions. The existing statutory framework regulated the powers and functions of traditional leadership institutions. This leads to the inevitable conclusion that very few of those powers and functions are, legally speaking, inherently still vested in the institution of traditional leadership⁸¹

The implementation of the final phase of elected local government and the final implementation of Schedule 4 (part B) and 5 (part B) of the 1996 Constitution, read with the provisions of the Local Government: Municipal Structures Act⁸² on 5 December 2000, finally confirmed the fact that the local government functions previously allocated to traditional leadership and institutions have by and large been taken away, and have been vested in elected local government. With regard to all other statutory functions and powers outside local government allocated in terms of pre-1994 legislation to traditional leadership and institutions, it is indisputable that all such powers and functions have with the commencement of the 1996 Constitution, been vested in the national and the provincial spheres of government Although on account of the arrangement of the relevant pre-

79 Constitutional Principle XIII, as contained in the Interim Constitution 200 of 1993

80 Section 211(3), op.cit

81 Keulder, Traditional Leaders and Local Government, p291f; Currie I, in Chaskalson M and others (1996), Constitutional Law, items 36-8 and 36-10

82 Provisions of the Local Government: Municipal Structures Act 117 of 1998

1994 legislation, these are still, at least in theory, being exercised by traditional leadership and institutions.⁸³

A conflict between traditional leaders and democratic structures of government has indeed been brewing since the advent of the new constitutional dispensation. This conflict was not a new one. It had been seen on the attainment of democracy in (1) Mozambique, (2) Zimbabwe and (3) Namibia, to mention but a few African countries. The conflict clearly emanates from the leaders of the democratic establishment who, for some unknown reason, appear to see the traditional leaders as posing a threat of some kind to the new democracies. This is borne out by a speech of the Prime Minister of Namibia, wherein he argued during their Traditional Authorities Bill Debates on 10 January 1995:

“If the kings and chiefs are going to have power, there is going to be a conflict of two power bases, legitimate political power which is represented by us in Government after independence, and the chieftainship who will also try to control a certain power base. There will be conflict. We are not going to have the unity we are fighting for.”⁸⁴

Strained relations between the new South African Government and traditional leaders also came to the surface in the High Court case of *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape, and Others*⁸⁵ In this case the complaint of the traditional leaders was that the Local Government Transition Act,⁸⁶ which provided the machinery for the transition from a racially based system of local government to a non-racial system, was being applied to rural areas in the Eastern Cape in a manner which deprived traditional leaders of their powers in terms of existing legislation. These powers had been entrenched in the Constitution in so far as traditional leaders were recognized and expected to play a role in the new dispensation.

83 Olivier and others, op.cit.

84 See d’Engelbronner-Kolff FM (1998), The people as law makers: The juridical foundation of the legislative power of Namibian traditional communities, in d’Engelbronner-Kolff FM, Hinz MO and Sindano JL (Eds), *Traditional Authority and Democracy in Southern Africa*, University of Namibia, Windhoek, p67

85 1996 (2) SA 898 (Tk)

86 Local Government Transition Act 209 of 1993

The application was dismissed due to the technical point that Contralesa as an organization was not affected by the proclamation in any way whatsoever. There was not a single function of local government that was vested in Contralesa and the organization could not, therefore, bring an action on behalf of the affected traditional leaders, who should have claimed relief in their own names. The question as to whether or not the proclamation in issue was being applied in the Eastern Cape in a manner which deprived traditional leaders of their existing powers was not gone into. The concerns of the traditional leaders were, therefore, neither satisfied nor even addressed in the case.

There are other cases which have come before the courts, affecting traditional leaders in the Province of KwaZulu-Natal; one in 1996 relating to the question of remuneration of the Zulu King,⁸⁷ the other one in 1998 relating to the ex-officio membership of traditional leaders in terms of the Local Government Transition Act.⁸⁸

2.5.3 Effect of Constitution on customary law

Traditional leaders have from time immemorial been custodians of customary law. The abrogation of customary law would mean the removal of one of the main pillars on which the institution of traditional leadership rests. It is, therefore, not surprising that during negotiations for the new Constitution at the World Trade Centre in Johannesburg the traditional leaders put up a strong fight for the outright recognition of customary law as a legal system in its own right. Customary law is recognized subject to the Constitution and more specifically, to the Bill of Rights chapter therein. While our Constitution clearly recognizes the existence of customary law as part of our new legal system and as part of the promotion and protection of cultural diversity, the hallmark of a free and open society, according to the Constitution⁸⁹ the balancing of customary law and the rest of the Bill of

87 Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995, 1996 (4)SA 653 (CC); African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others, 1998 (3) SA 1 (CC)

88 Local Government Transitional Act 209 of 1993

89 Section 211 of the 1996 Constitution

Rights and other developments is and will continue to be a great challenge, especially for the existence and survival of customary law. This challenge has been recognized in *Christian Education South Africa v Minister of Education*,⁹⁰ where the Constitutional Court said:

“The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom have to be regarded with appropriate seriousness. This is with regard to how far such democracy can and must go in allowing members of religious and other cultural and linguistic communities to define for themselves which laws they will obey and which ones they will not obey. Such society can cohere only if all its participants accepts that certain norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, whenever possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of law.”⁹¹

The question arises whether customary law or the Bill of Rights is to prevail when specific disputes arise. Unfortunately the Constitution does not indicate in detail how this question is to be answered. However, already in the 1993 Constitution there were provisions which showed that fundamental rights would prevail over customary law viz:-

- a) Section 41(1) declared that the Constitution is supreme
- b) Section 7(2) provided that the chapter on fundamental rights applies to “all law in force” (which would include customary law):

Act 41 of 2003 stipulates in no uncertain terms that the Constitution recognizes the institution of traditional leadership, status and role of traditional leaders taking into consideration the customary law and traditional authorities that observe a system of customary law. The institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that democratic governance and values of an open and democratic society may be promoted. Gender

90 2000 (4) SA 757 (CC); 2000 (10) BCLR 105 (CC)

91 See also *Prince v President of the Law Society of the Cape of Good Hope*, 2002 (3) BCLR 231 (CC)

equality within the institution of traditional leadership may progressively be advanced⁹².

2.5.4 Traditional leaders and issue of discrimination

The issue of gender equality has an effect on traditional leadership, marriage and family law, and succession and inheritance. In the case of traditional leadership, succession to such leadership is based on the principle of male primogeniture in terms of which only the eldest male child is supposed to succeed although this succession is subject to appointment by the head of state.⁹³

The reason behind this used to be that the eldest son would step into the shoes of his father, and was responsible for continuing after him. Women were expected to get married and might not be able to do this effectively. This would also lead to traditional leadership being transferred to where she would be married, something which was unacceptable. There is however, no doubt that in the light of the Constitution, the eldest daughter might challenge such succession.⁹⁴

Since the advent of the Interim Constitution customary law has been described as a legal and cultural system. In the case of *Mthembu v Letsela and Another*, the argument was that the rule of customary law providing for inheritance by the eldest son (or nearest male relative) discriminates on the basis of gender and should therefore be struck down so that the eldest child, whether son or daughter, should inherit as a rule of customary law. Le Roux J. fully understood the reasons for the rule and he dismissed the application.⁹⁵

The respect for African values is also important for the dignity of African people, and for them to regard the Constitution as the Constitution that they are willing to defend. The Constitution then becomes more than a document. It becomes a cohesive element that binds the nation together.⁹⁶

⁹² Traditional Leadership and Governance Framework Act 41 of 2003

⁹³ Olivier NJJ, Bekker JC and Olivier (1995), *Indigenous Law*, p162

⁹⁴ Dlamini CRM (2002), *Speculum Juris*, p38

⁹⁵ *Mthembu v Letsela and Another*, 1997 (2) SA 936 (T), at 944B

⁹⁶ Dlamini, *loc cit*

Generally speaking, men enjoy a dominant position over women traditionally. Such dominant position has been noted from time to time, especially with reference to husbands' marital power over their wives. However, such dominance has for such a long time been too strenuous and been resisted by women, asserting a position of equality with men, if not veiled superiority, with the result the dominance of males was at the end of the day more apparent than real.

In some instances men in position of authority have acknowledge the leading role played by their wives.⁹⁷ In this regard the remark of the Greek leader of classical times, Plutarch, in his work "The Life of Cato the Censor", quoted by Horwitz J in *R v Koale*,⁹⁸ is informative. He says:

"The Athenians govern the Greeks, I govern the Athenians, you my wife, governs me."

When it comes to the customary law scenario, the dominant position of men over women flows more from the role allocated by society to males. The role allocated to females is domestic and cushioned. Partnership between municipalities and traditional councils will further create an opportunity for women on an equal footing to exercise their rights and contribute towards rural development. The institution of traditional councils creates an environment wherein women can be elected as members and thereby participate in the decision making processes.⁹⁹

Act 41 of 2003¹⁰⁰ provides that at least one third minimum representation of women of the members of Traditional council. This ensures that traditional councils will comply with pieces of other legislation, such as the Promotion of Equality and prevention of unfair discrimination. The Act further provides for measures that can be put in place and be followed in case a traditional council would reflect an insufficient number of women¹⁰¹

97 2000 4 SA 757 (CC); 2000 10 BCLR 1051 (CC)

98 Quoted by Maqutu WCM (1992), Contemporary Family Law in Lesotho, Roma, National University of Lesotho, p214

99 Ibid

100 Traditional Leadership and Governance Framework Act 41 of 2003

101 Ibid

The Act further stipulates that for the abovementioned partnership to bear fruit, it must be strengthened through systems and other measures that are based on the principle of mutual respect and the recognition of the status and roles of the parties involved. There must also be a wisdom and the realization of challenges around rural development. Both the national and provincial governments must play their crucial roles in effecting the principle of democratic centralization.¹⁰²

The homelands system of South Africa which had been ushered in by the Native [now Black] Authorities Act of 1951 unexpectedly brought with it some emancipation of black women. This is evidenced by a legal entitlement for them (women) to hold governmental and administrative positions that had previously been preserved for men. The plethora of Homeland legislative measures that followed guaranteed the position of black women for the first time, becoming members of parliament, cabinet ministers, chieftainesses in charge of tribal authorities, and heads of administrative areas side by side with their male counterparts. The Transkei example is similar to what happened in the other former homelands. A survey by the University of Transkei concluded in May 1998, showed that in the Xhora District alone there were three females who were heads of tribal authorities, each one holding sway over men who are headmen in the various administrative areas that constituted the tribe. In the same district there were two females who were heads of administrative areas their headship having come about as a result of their election. These women sat side by side with their male counterparts in the tribal council which constituted the executive body or the 'cabinet' of the tribe.¹⁰³

2.5.5 Traditional leaders and judicial functions

While the judiciary, especially the Constitutional Court, has played and will continue to play an important role in the promotion of cultural diversity in the context of the Bill of Rights, it needs to be more sensitive in handling

102 Ibid

103 See Koyana DS and Bekker JC (1998), *The Judicial Process in the Customary Courts of South Africa*, p258f. The study shows that in all the eleven Transkeian districts which the research team visited viz Umtata, Mqanduli, Port St Johns, Libode, Mount Frere, Qumbu, Mount Fletcher, Maluti, Herschel, Umzimkulu and Tsomo, there are female chiefs of tribes and female heads of administrative areas. This leaves no doubt that in the other seventeen districts of the Transkei the position is similar. Research funds are not easily available but it is indeed necessary to have this Transkeian survey completed, to establish whether women of the other regions were also represented.

customary law and other non-Western cultures. In this regard, the minority judgment of Judge Ngcobo in the Bhe judgment should be noted and strongly considered by the Parliament and all relevant stakeholders. The Judge said, in his dissenting judgment in response to the majority decision of the Constitutional Court:

“Ours is not the only country that has a pluralist legal system in the sense of common, statutory and indigenous law. Other African countries that face the same problem have opted not for replacing indigenous law with common law or statutory laws. Instead, they have accepted that indigenous law is part of their laws and have sought to regulate the circumstances where it is applicable. In my view this approach reflects recognition of the constitutional right of those communities that live by and are governed by indigenous law. It is a recognition of our diversity, which is an important feature of our constitutional democracy.”¹⁰⁴

The influence of the legacy of colonization, segregation and apartheid on our judiciary and in the thinking of key decision makers in our society thus needs to be taken into account and addressed when this important balancing of customary law and the Bill of Rights is done.

The recognition of customary courts during the colonial era was seen as a necessary part of colonial administration under the policy of indirect rule. Such recognition was vital from the point of view that it allowed the various governments to exercise influence and control in rural and far lying areas where they would not have been able to easily control due to lack of manpower. The government’s intention was to establish a separate system of justice to match segregation in land and society which had been established under the Native Land Act of 1913.

Since the advent of the Interim Constitution customary law has been described as a legal and cultural system.¹⁰⁵ According to some, the Interim Constitution guaranteed people the right to live according to the legal system applicable to their particular cultural group and place of a concomitant law. Kaganas and Murray were also of the view that the reference to culture in

104 Op. cit.

105 See the comments of Le Roux J, in *Mthembu v Letsela and Another*, 1997 (2) SA 936 (T), at 944B

Section 31 of the Interim Constitution carries a broader meaning than some people had expected.¹⁰⁶

In a line of decisions the judiciary has given recognition to the existence of legal pluralism in this country, thereby giving customary law a status equal to that of the common law. In the exercise of their judicial functions traditional leaders could be faced with another challenge, that of legal representation, which is not allowed in their courts, whereas legal representation in terms of the Constitution is part of the right to a fair trial.¹⁰⁷ It is submitted that legal representation is not warranted in a traditional court. The reason is that in a traditional court there is no specialized law where there is a sharp cleavage between law and what an ordinary person regards as fair and just. In a traditional court a person is tried by his peers and there is no distance between him/her and the court.¹⁰⁸

2.5.6 Role and powers of traditional leaders

Traditional leaders continued to perform the duties that they always performed with some difficulties though. On the issue of social grants they help to identify those who qualify to the relevant departmental officials in the nearby towns. With the introduction of the local government system in the rural areas, some councilors tend to believe that this is their sole responsibility though they are not readily available and not knowledgeable about the personal circumstances of the applicants. They are not even known by the communities they represent as they are given large areas to oversee as councilors. Traditional leaders interact on a daily basis with their communities; they know who qualifies better than other people. When local councilors were appointed their role was basically the role that traditional leaders were playing and, precisely, rivalry occurred. Councilors realized that for all meetings to form a good quorum, traditional leaders have to be engaged. Traditional leaders have the authority to call people to attend

106 Kaganas F and Murray C (1994), *The Contest between Culture and Gender Equality under South Africa's Interim Constitution*, *Journal of Law and Society*, 2, 409, at 412-413

107 Section 35(3) of the 1996 Constitution

108 Dlamini op.cit.

meetings and such people will then attend at the homestead of that particular traditional leader.¹⁰⁹

The role of a traditional leader with regard to land is to distribute or allocate land to his subjects for residential, cultivation and grazing purposes. This he does not in person, but through ward heads or clan heads, unless such officials for various reasons are not in a position to execute such a function.

The Traditional Leadership and Governance Framework Act¹¹⁰ provides that traditional leadership must promote freedom, human dignity and the achievement of equality and non-sexism. Traditional leadership must derive its mandate and primary authority from applicable customary law and practices. Traditional leadership must strive to enhance tradition and culture and also promote nation building and harmony and peace amongst people.

Traditional leaders must promote the principles of co-operation governance in its interaction with all spheres of government and organs of the state. They must also promote an efficient, effective and fair dispute resolution system and a fair system of administration of justice, as envisaged in applicable legislation¹¹¹

2.5.7 Role of traditional leaders

In the first place s181(1) of the Interim Constitution provided that an existing traditional authority would continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs. This is subject to amendments or repeal of such laws and customs by a competent authority¹¹²

109 Peter G (2005), Judicial systems in the Black Administration Act, Johannesburg Conference on Traditional Leaders held on 1 and 2nd November

110 Traditional Leadership and Governance Framework Act 41 of 2003

111 Ibid

112 The applicable laws in this clause referred, inter alia, to the various enactments by the homeland governments specifying the powers and duties of traditional rulers, such as the Transkei Authorities Act 4 of 1965, Bophuthatswana Traditional Authorities Act 23 of 1978, Venda Traditional Leaders Administration Proclamation 29 of 1991, Ciskei Administrative Authorities Act 37 of 1984, Qwaqwa Administration of Authorities Act 6 of 1983, KwaNdebele Traditional Authorities Act 2 of 1984, and KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990, quoted in Bennett, op cit, p113

In the second place, traditional rulers were given new positions in all three spheres of elected government, i.e. local, provincial and national. At the local level, s182 of the Interim Constitution gave traditional rulers ex officio membership of the governmental structures in their areas. At provincial level, the legislature of each province having traditional authorities was obliged to establish a House of Traditional Leaders. At national level a similar provision obliged Parliament to create a National House of Traditional Leaders. These new bodies had the power to advise and make proposals to provincial legislatures or to the national Parliament on matters concerning traditional authorities and customary law as they choose.¹¹³

It is therefore contended that the legitimacy and survival of the institution of traditional leaders will in future depend on the service and the quality thereof which they can provide and their impact on the lives of those whose interests they claim to represent, and not so much on a constitutional provision. If traditional leaders are to promote the interests of their people by initiating measures for their material, moral and social well-being, they could only successfully do that within the context of Ubuntu. It is from this foundation that a viable project of nation-building and a project of consolidation of democracy could be realized.¹¹⁴

2.5.8 Role of traditional leaders in New South Africa

Ngubane argued that although the issues of traditional leadership are similar across the country, each African nation has a different system of indigenous and customary laws and different models of traditional societal organization in which traditional leadership plays different roles. His argument is based on that the score that the KwaZulu-Natal strong traditional structure and communities are anchored within the parameters and the laws of their Kingdom in which traditional leadership exercise a fundamental role.¹¹⁵

The role and place of traditional leadership in a democratic South Africa had been substantially clarified with the publication of a government White

¹¹³ Sec 183(1)(a) (b)(c), Sec 183(2), Sec 184(4)d of the Interim Constitution of 2003

¹¹⁴ Sindane J (1997), at the Mthatha summit on Traditional Leaders in South Africa held on 16-17 April

¹¹⁵ Ngubane NJ (1997), The Perspective of Traditional Leaders and their Role in the New South Africa, at the Mthatha summit on Traditional Leaders in South Africa, held on 16-17 April

Paper and draft bill on traditional leadership and governance. The ANC and the Congress of Traditional Leaders of South Africa agreed to establish a standing joint task team to co-operate in spelling out how elected structures of governance should work with the institution of traditional leaders to encourage social and economic development across the country, particularly in areas falling under the jurisdiction of traditional leaders.¹¹⁶

The White paper said that traditional leaders should be the custodians of tradition and culture. Their role should be advisory, supportive and promotional in nature. Traditional leaders should also be involved in nation-building initiatives, while promoting the right of cultural, linguistic and religious communities.¹¹⁷

2.5.9. Houses of Traditional Leaders

In 1994 and 1995 a National and six Provincial House of Traditional Leaders were established.¹¹⁸ All the Houses of Traditional Leaders, whether provincial or national, are suffering from common problems of lack of finance, facilities and support staff. There are many gaps and inadequacies in their constitutive statutes. The most serious problem in this regard is the overlapping membership of the Houses, accountability of members to their constituencies and the relationship between the Provincial Houses and their Provincial Premiers or MECs.¹¹⁹

If you look at the various chapters in the Constitution the shortest of them all is the one dealing with traditional leadership. The Interim Constitution stated that relevant pieces of draft legislation affecting the area of traditional leadership had to be referred to the House. It also granted seats to all heads of traditional authorities that are iinkosi in local councils. What this implies is that the policies and laws that had a direct impact on the areas of traditional leaders would take to account the views of the traditional leaders. The present Constitution does not define what role these Houses would play.

116 Sindane, op cit

117 ANC Today (2003), Vol 3(29), 18 July

118 Council for Traditional Leaders Act 31 of 1994

119 Du Plessis W and Scheepers TE (2000) : Role, problem and future of the House of Traditional Leaders

It does not provide that legislation has to be referred to the Houses of Traditional Leaders.¹²⁰

A national house of traditional leaders and provincial houses of traditional leaders as provided for in sect 212(2)(a) of the Constitution and the local houses of traditional leaders established in accordance with the principles set out in section 17¹²¹. A house of traditional leaders and its resources may not be used to promote or prejudice the interest of any political party.¹²²

2.5.10 National House of Traditional Leaders

The National Council of Traditional Leaders was established and formally inaugurated on 18 April 1997 in terms of the National House of Traditional Leaders Act of 1997.¹²³ In 1998 the name of the National Council was changed to the National House of Traditional Leaders. This was for the object and functions of the House. The National House of Traditional Leaders consists of 18 members. Its membership is made up of three members of each of the six Provincial Houses of Traditional Leaders, elected by the respective Houses. The National House's six committees consists of six members each one from each Provincial House of Traditional Leaders. The six committees are those for management, rules, constitutional development, internal arrangements, social development and the Committee on Traditions, Customs and Culture.¹²⁴

This House may advise the national government and make recommendations on matters relating to traditional leadership. The House may also advise about the role of traditional leaders, customary law and the customs of communities observing a system of customary law.¹²⁵

120 ANC Today, op. cit.

121 Constitutional Principle XIII

122 Traditional Leadership and Governance Framework Act 41 of 2003

123 Act 10 of 1997 See also Currie loc cit; Devenish GE, Commentary, p299

124 Olivier and others, op cit

125 National House of Traditional Leaders Act 10 of 1997, replacing the original Council for Traditional Leaders Act 31 of 1994

The Interim Constitution of South Africa served as the point of departure, because it clearly made provision for this legitimate body. Traditional leaders' participation in governmental issues was identified. The National House of Traditional Leaders was to serve as part and parcel of policy making. The National House was also to serve as a forum of traditional leaders of the various tribes of the land who were forced to live apart from one another under the Homeland Act.¹²⁶ Despite the general efforts of the Congress of Traditional Leaders of South Africa, tribalism does still pervade the many perspectives of traditional leaders. It would be very wrong to exterminate tribalism by trying to sideline traditional leaders rather than to deal with the facts and reality of it.¹²⁷

Section 211(1) of the current Constitution recognizes the status and role of traditional leaders. The Constitution also provides for the establishment of an institution realizing such leadership. The establishment of a National Council of Traditional Leaders in 1994 and re-organised in 1997 is a subsequent culmination of imperatives contained within the Constitution. The National House of Traditional Leaders Act¹²⁸ is an amendment of the 1997 Act. It is important for the interests of traditional leaders of the provinces to be heard and responded to in respect of matters relating to traditional leadership.¹²⁹¹³⁰

The National House of Traditional Leaders Amendment Act was an amendment of the 1997 Act that sought to provide both a deliberate and casting vote for the presiding officer at a meeting of the National House of Traditional Leaders. The Act provided members of the National House of Traditional Leaders with tools to remove the Chairperson out of office through a majority vote if they so wish. Again the Act provided the National House of Traditional Leaders with members who will attend full-time to its matters and gives the President, in consultation with the very House, the power to determine such members. The Act also effected changes that are

126 Act 21 of 1971

127 Interim Constitution Act 200 of 1993

128 National House of Traditional Leaders Act 10 of 1997

129 Constitutional Law of South Africa (1999), 5th revised edition, Juta, Cape Town

130 Constitution Act of 1996

textual to the 1997 Act, relating to the names of the new portfolios and matters concerned therewith.¹³¹

The Act gave the Chairperson of the National Traditional House the right to have an influence on deliberations taking place. It therefore ensures that the Chairperson who also represents a province adequately plays his role on behalf of the province. The Act aimed to give the Chairperson at a meeting of the National House of Traditional Leaders the privilege of not only a casting vote, as is the general rule for people presiding within government structures, but also the deliberative vote. The underpinning reason was the fact that the Chairperson of the National House of Traditional Leaders does not cease to be a member of whatever provincial House of Traditional Leaders that so led to his/her nomination.¹³²

The Act sought to provide the National House of Traditional Leaders with the power to remove the Chairperson from office if so decides. This can happen only when such a decision enjoys the majority of support within the National House. The other purpose was to empower the President with the right to choose those members who will be full-time members in the National House of Traditional Leaders. The Act also effected changes that are textual and semantic so that it may reflect the terminology of existing political office bearers.¹³³

The Act ensured that where members of the National House are not pleased or lack confidence in the performance of the Chairperson or Deputy Chairperson they can vote him/her out of office. This removal from office, is not only be at the behest of the Chairperson or Deputy Chairperson's resignation or through any other way stated in Section 6 of the 1997 Act, but also through the dissatisfaction of the majority of members in the National House. The process should be transparent and there must be communication and feedback between members and Chairperson. This guarantees the National House of Traditional Leaders some stance of critical introspection at itself.¹³⁴

131 See B15B 2000 Development, Training and Local Government Committee

132 Ibid

133 Ibid

134 Ibid

The Act also decided that the Chairperson and Deputy Chairperson be full-time members of the National House so they can attend fully to its matters. On these grounds therefore the Act allows for conditions where the President, in consultation with the National House shall so determine. The realization of the Amendment Act was an outcome of the consultation with bodies such as the National House of Traditional Leaders and the Ministers/MEC consortium (MINMEC) on traditional affairs. This also encapsulated the aspirations of traditional leaders too.¹³⁵

The fact that the House enjoys the power to veto the Chairperson out of office must not be allowed to deteriorate into a witch-hunt. Co-operation should be sought at all times or else the National House will end up becoming an ineffective institution that is not viable and with no real power.¹³⁶

2.5.11 Provincial Houses of Traditional Leaders

Since the system of co-operative government had been developed in acknowledgement of the diversity of the needs and concerns of the population of South Africa, the Constitution established the right of communities living under traditional law and custom to influence the way in which the country is run.¹³⁷

Houses of Traditional Leaders have been established at national level and in six provinces to carry out an advisory role in government. There are provincial Houses of Traditional Leaders in six provinces viz: Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North West. Each provincial House nominates three members to the National House of Traditional Leaders, which elects its own office-bearers.¹³⁸

The Interim Constitution of 1993¹³⁹ had stated that that the legislature of each province in which there are traditional authorities shall establish a

135 See Mabutla FG (2001), The Fate of Traditional Leaders in Post Apartheid South Africa, Southeastern Regional Seminar in African Studies (SERAS) Spring meeting of 6 and 7 April

136 Ibid

137 See above

138 See also Mabutla, op cit

139 Interim Constitution Act 200 of 1993 Section 18(1)

House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province. This Constitution stipulated certain basic principles concerning the establishment, composition and function of such house. Traditional authorities are recognized as primary unit of traditional leadership, as the House consisted of representatives emanating from traditional authorities. The 1993 constitution made mention that all provincial Bills pertaining to traditional authorities, customary law, or such or any matter related to, had to be referred to such House for its comment before it could be passed by such legislature. Provincial level institutions are not homogenous in terms of tribal composition of the said House. It is of paramount importance that the government should use the house of traditional leaders as an instrument of unity across language and cultural barriers. Rural development is supposed to work in conjunction with the House of Traditional Leaders, which will advise the provincial government on the priorities of the developmental needs and coordination of its delivery plan.¹⁴⁰

Provincial Houses of Traditional Leaders are entitled to advise and make proposals to provincial legislature or government in respect of matters relating to traditional authorities, customary law or the traditions and customs of traditional communities within the province. Any matters having a bearing thereon shall be referred by the Speaker of the provincial legislature to the Provincial House for its comments before the Bill is passed by such legislature.¹⁴¹

2.5.12 Local House of Traditional Leaders

According to the Constitution, national legislation must provide for the role of traditional leaders at local level on matters affecting local communities. The White Paper on Local Government also proposed a co-operative model of rural government in which traditional leaders have representation and a role to play. The role in the development of the local area and community includes making recommendations on land allocation and the settling of land disputes, ensuring that the traditional community participates in decisions on development and contributes to development cost, considering and making recommendations to authorities on trading licences in their areas in

¹⁴⁰ Interim Constitution Act 200 of 1993 Section 18(2)

¹⁴¹ Ibid

accordance with the law.¹⁴² Act 41 of 2003 provides for the establishment of a house of traditional leaders in accordance with provincial legislation for the area of jurisdiction of a district municipality or metropolitan municipality where more than one senior traditional leadership exists in that district municipality or metropolitan municipality.

The number of members of a local house of traditional leaders may not be less than five and may not be more than 10, or such other higher number not exceeding 20 as may be determined by the Minister where there are more than 35 traditional councils within the area of jurisdiction of a district municipality or metropolitan municipality. Members of a local house of traditional leaders are elected by an electoral college consisting of all kings or queens, or their representatives and senior traditional leaders residing within the district municipality or metropolitan municipality in question. The electoral college referred to must seek to elect a sufficient number of women to make the local house of traditional leaders representative of the traditional leaders within the area of jurisdiction in question.¹⁴³

2.5.13 Powers of National House of Traditional Leaders

The powers of the National House were originally laid down in the Interim Constitution and its constitutive Acts. The principal function of the National House is to advise government or the President and to make recommendations on questions of traditional leadership, customary law and the customs of communities observing system of customary law.¹⁴⁴

As has been set out above, that there are three types of houses of traditional leaders today, that is: National House, provincial houses and local houses. The national and provincial houses continued in terms of section 212(2)(a) of the Constitution and their own constitutive Acts. In the areas of jurisdiction of some districts or metropolitan municipal areas there may be more than one traditional leader. In each such case local house of traditional leaders must be established.¹⁴⁵

142 Department of Provincial and Local Government (2000), Draft Discussion Document towards a White Paper on Traditional Leadership and Institutions

143 Traditional Leadership and Governance Framework Act 41 of 2003

144 Sec 72 of Act 10 of 1997

145 See also Bekker, op.cit.

2.5.14 Privileges and immunities

As stated at the National Revenue Act among the hallmarks of a democratic parliament is its members' protection from undue interference especially interference by the executive. It is affirmed therefore that this is achieved by guaranteeing the member's salaries, controlling entry into the House and giving members immunity from arrests or legal proceedings for defamation. The Acts constituting the Houses of Traditional Leaders provide for some of these protections. On the issue of remuneration, remuneration of traditional leaders provoked considerable controversy. This was due to the remuneration of Traditional Leaders Act that gave the national government responsibility for paying the salaries and allowances of traditional leaders. The Act provides that members must be paid directly from the National revenue funds.¹⁴⁶

In provinces where nothing has been said about these privileges and immunities, the question could arise whether they may be claimed on the basis of the common law. However the final Constitution is the ultimate source of authority on this matter, and the accepted privileges derived from the common law and parliamentary practice are given to members of the National Assembly, and National Council of Provinces, namely freedom of speech, immunity from civil or criminal proceedings, arrest, imprisonment or damages for anything said or revealed in the National Assembly or National Council of Provinces (NCOP).¹⁴⁷ Section 161 further provides that provincial legislation within the framework of national legislation may provide for privilege and immunities of municipal councils and their members that could include traditional leaders.¹⁴⁸

The 1996 Constitution reiterated the principle of democratic and accountable local government and at the same time declared that elected local authorities were to be created for all parts of South Africa. The principle of wall to wall municipalities was adopted. The Constitution also guaranteed the existing position of traditional rulers – albeit in the very general terms of section

146 Act 1 of 1995

147 Section 58(1) and 7(11) of the 1996 Constitution

148 See also Sec 117(2)

211(1) confirming their ex officio membership of TRC'S and rural councils.¹⁴⁹

Section 212 of the Constitution states that national legislation will provide for a role of traditional leadership as an institution at local level on matters affecting local communities.¹⁵⁰

Strained relations between the South African Government and traditional leaders came to the surface in the High Court case of *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape, and Others*¹⁵¹ In this case the complaint of the traditional leaders was that the Local Government Transition Act,¹⁵² which provides the machinery for the local transition for a racially based system of local government to a non-racial system, was being applied to rural areas in the Eastern Cape in a manner which deprived traditional leaders of their powers in terms of existing legislation, which powers had been entrenched in the Constitution in so far as traditional leaders were recognized and expected to play a role in the new dispensation. The application was dismissed due to the technical point that Contralesa as an organization, was not affected by the proclamation in any way whatsoever.

2.5.15 Local Government

The Traditional Leadership and Governance Framework Act¹⁵³ compels the National Government and all provincial governments to promote partnerships between municipalities and traditional councils through legislative or other administrative measures.¹⁵⁴ Such partnerships should be based on mutual respect and recognition of the respective status and roles of

149 Section 211(1) of the 1996 Constitution

150 Section 212 of the 1996 Constitution

151 1996 (2) SA 898 (Tk)

152 Local Government Transition Act 209 of 1993

153 Act 41 of 2003

154 Section 5(1) of Act 41 of 2003

the parties concerned, and must be guided and based on the principles of co-operative governance.¹⁵⁵

Provision has been made for the conclusion of a service delivery agreement by traditional councils with the relevant municipality in accordance with the Local Government: Municipality Systems Act ¹⁵⁶ and other applicable legislation.¹⁵⁷

Traditional leaders are eligible for democratic election to any sphere of government. Arguments advanced by Peter on local government at its Indaba meeting, were that the Local Government Municipality Structure Act¹⁵⁸ provided for the participation of traditional leaders in the affairs of a municipality. He went on by saying that the Act requires a municipality to consult with traditional authorities on any matter that directly affects the power or jurisdiction of a traditional leader. A case in point was the dispute over the demarcation of traditional community boundaries by the Demarcation Board. The Act requires the Demarcation Board to take into account areas falling under traditional leaders when it determines the demarcation of municipal boundaries. Conclusion was reached on the basis that the board adopted a policy position not to interfere with traditional authority unless the situation so dictate.¹⁵⁹

The positive paradigm shift as brought about by democracy is a move away from a base of unilateralism to an inclusiveness approach towards development. A public partnership (PP) is a contract between two public institutions, in which the involved parties strive for integrated and co-ordinated development towards the betterment of the people's lives by using available resources. In rural areas and under traditional rule, the developmental partnership between elected municipalities and traditional councils as an objective vehicles to service delivery, is clearly demonstrated in the government's intention to legislatively foster it. This was

155 Chapter 3 of the 1996 Constitution and Traditional Leadership and Governance Framework Act 41 of 2003 s5(2)

156 Local Government: Municipal Systems Act 32 of 2000

157 Traditional Leadership and Governance Framework Act 41 of 2003 s5(3)

158 Local Government: Municipal Structures Act 117 of 1998

159 Peter, op cit

demonstrated by the enactment of the Traditional Leadership and Governance Framework Act.¹⁶⁰

The other important legislative development that sought to cater for land administration in rural areas was the enactment of the Communal Land Rights Act.¹⁶¹ This Act also seeks to ensure that traditional councils act in partnership with municipalities to contribute in creating co-operative and supportive relationships towards improved service delivery, as well as the attainment of secure and safe rural areas.¹⁶²

Whilst the spirit and purpose of these pieces of legislation sought not only to enhance and capacitate institutions of traditional leadership, they also bring on board governance by acknowledging them as state organs and thereby enabling them to play a supportive and a complementary role to governance at local level. These, however, elicit intense ideological debates between and amongst various stakeholders. The environment created therefore enables traditional councils to enter into partnerships and service delivery agreements with district and local municipalities or with government at any sphere. The envisaged partnership is premised on the enhancement and the promotion of development.¹⁶³

For partnerships to assist in bettering the lives of people through the acceleration of service delivery, there must exist in rural areas, synergised systems and structures that will ensure that the Local Houses of Traditional Leaders, traditional councils, and municipal ward committees are functioning in an integrative and synergised approach towards rural development. As a challenge, it is therefore incumbent upon all stakeholders to jointly develop such systems and structures that will be used as vehicles for improved services delivery. Important obstacles should be addressed; the attitude towards the stated objective such as rural development, should change. A new value system that will be a long term solution must be created and realized. Partners or role players should not operate in an exclusive form but in an integrated manner and as part of a whole. What

160 Act 41 of 2003

161 Act 11 of 2004

162 Ibid

163 Nonkonyana M (1997), The Perspective of Traditional Leaders and their Role in the New South Africa, Summit on Traditional Leaders in South Africa, Mthatha, 16-17 April

this means is that there must be a common platform and co-operation for all partners who should see themselves as part of the same value chain.¹⁶⁴

2.6 Communal Land Rights Act¹⁶⁵

Church claimed that in a process of transformation various concepts and terms used in a previous dispensation have been re-defined. In terms of the legislation the word “tribe” and “tribal” are replaced by “communal” and “community”. She further affirmed that in the context of land tenure “community” is defined as a group of persons whose rights to land are derived from shared rules that determine access to land held in common by the group subject to the rules or customs of that community. An “old order” right is defined by the Act as being formal or informal, registered or unregistered if recognized by law, including customary law, practices and usage and which exists immediately prior to a determination by the Minister of Land Affairs.¹⁶⁶

The purpose of the Communal Land Rights Act¹⁶⁷ is to give secure land tenure rights to communities and persons who occupy and use land that the previous government had reserved for occupation by the African people. Most of this land is currently registered in the name of the State or is held in trust by the Minister of Land Affairs or the Ingonyama Trust in KwaZulu-Natal for communities. The land tenure rights available to the people living in communal land areas are largely based on customary law or on insecure permits granted under laws that were applied to African people only.

These rights do not have sufficient legal status and the holders of such rights cannot use them to enter the financial market, for example, as security on which to apply for loans with which to farm or develop the land. The Act seeks to reverse this historical legacy of colonialism and apartheid by strengthening the land tenure rights of the people living in these communal

164 Masilela S (2005), Traditional Leadership Conference, Durban, 20-23 September

165 Communal Land Rights Act 11 of 2004

166 Church J (2004), Land Tenure, in Olivier NJJ and others, *Indigenous Law, The Law of South Africa*, Vol. 32 (First Reissue), LexisNexis, Butterworths

167 Ibid

land areas and to give their land tenure rights the full protection of the law.¹⁶⁸

Land issues are central to traditional leadership and to the traditional model of societal organization as well as to the definition of the cultural and social equilibria of the new South Africa. Traditional communities, as well as traditional mores, are based on the shared ownership of land. It is land that defines a community and one would not be remiss in saying that a mystical relationship ties together past, present and future generations. The shared ownership of land is at the basis of our social communalism, our culture of Ubuntu and our deep seated sense of social solidarity. The essential feature of traditional communities is the self-administration of land, which is assigned by the community via the action of Land Administration Committees, to each of its members to meet his/her needs.¹⁶⁹

Balatseng in a summit on traditional leaders in South Africa on 16-18 April 1997, stated that it is the duty of the government when redistributing land to allocate more land to traditional communities. This is meant to make it possible for communities to improve their standard of living and to alleviate poverty since traditional leaders and traditional communities are vested with survival skills, by way of crop production or animal rearing. These were designed to encourage communities to open marketing with other provinces as well as the world at large. Traditional leadership is pro-development and what is not needed is government dictating how they should develop. She further reiterated that Government should educate by way of training officers within traditional settings on financial and development management skills. Government should guide and make accountable those communities, through their leaders, as to the areas of development and also provide finances where possible.¹⁷⁰

168 Ngubane, op cit, p91

169 Ibid

170 Balatseng, op cit

2.7 Conclusion

African historical dynamics, including the period of colonialism and the apartheid regime in South Africa, employed strategies that tactically were aimed at dismantling the traditional institutions all over the subcontinent. Failing to realize their shameful goal, the apartheid government adopted a conciliatory stance that would at the same time serve their government's course. The homeland policy was introduced whereby most traditional leaders were assigned to be part of the establishing of independent states only recognized by the South African government. This was done under the pretext that they were accordingly recognized as rulers of their people.

When the new government of South Africa came into power in 1994 their main task was to make corrections and adjustments to the traditional institutions in the country. The 1996 Constitution, in chapters 11 and 12, made provision that it fully recognizes the traditional leaders, but the same pieces of legislation fails to clarify their role and function in their respective communities.

As long as customary law and matters relevant to traditional leaders and customary law procedures are subject to the Constitution, there is a real danger of traditional institutions suffering severe blows of unconstitutionality and invalidity from time to time until there is absolutely nothing left of them that is legally valid. Even legislation that Parliament may pass making the position of customary law and traditional leaders "a bit better" will still remain open to being challenged as promoting ideals which are in conflict with the liberating spirit of the Constitution or "the theme of an open and democratic society based on freedom and equality." Traditional leaders will always be subject to the Constitution. When a traditional leader sits to adjudicate in a case, he must bear in mind what the customary law is on the point, instead of having to simultaneously bear in mind whether the custom in question has been amended or repealed, as required by section 211(1) of chapter 12.

It is necessary to emphasise the need to create collective development opportunities in traditional community areas in order to address problems

and to tackle present and future challenges. A prerequisite for achieving this goal is a suitable and appropriately contextualised development management model for traditional leadership in South Africa.

It seems unlikely that the required cultural values can be incorporated appropriately in any development management model not developed with traditional leadership as point of focus. The development process of present-day South Africa calls for many facets to be managed in accordance with a clearly defined policy and development law framework.

The failure or success of this rural development management process will depend on the degree to which the communities concerned are prepared to take up ownership, and the degree to which traditional leadership is capable and empowered to add value to the whole process as leader in the African and modern meaning of development management and development leadership.

Traditional communities have to be empowered to play a specific role in the development management process. The basis of empowerment must be a positive organizational climate within which enabling structures are created, accommodating and caring for community values, such as collective solidarity of the traditional communities. There is a need for the understanding of the situational realities of communities functioning under traditional authority and leadership, and to use these realities and circumstances as a basis for proactive and challenging community based planning structures and strategies.

The empowering process will thus involve a synthesis of Western and African managerial concepts and challenges. This will inevitable call for the creation of new structures, placing the focus on interdependence and not on either independence or domination by either statutory or traditional authority structures.

There cannot be any reasonable doubt that traditional leaders are influential and have a significant role to play in the future development and related processes in South Africa. It is clear that the role and responsibility of traditional leaders as defined under the colonial and apartheid periods is under significant threat. Some would even say that the issue of traditional leaders has become a “political football”. Although there are often reports of significant roles and responsibilities of traditional leaders, there seem to be no real consensus on the status and role of traditional leaders according to customary law.

The process of transition has made very little progress in the institution of traditional leadership in South Africa. The national government is to be blamed since it has thus far initiated laudable institutional changes in other spheres such as the South African National Defence Force and the civil service, yet no definite process for the transformation of the institution of traditional leadership has been developed. The centrality of traditional leadership in African culture in South Africa suggests that traditional leaders can play an important and constructive role in nation-building if the appropriate institutional framework for that role is developed by the South African central government. The success of that process requires the participation of chiefs themselves and society at large, particularly rural communities.

Only a democratic institution of traditional leadership will be able to play a significant role in South Africa in the future.

In relation to land issues, many Africans would want home-grown solutions to local problems. According to them, borrowing ideas from other parts of the world has not succeeded mainly because intelligent borrowing of ideas has to be rooted in self-respect and comfort in one's own historical heritage. No nation, society or culture is perfect or without its problems. We need to understand more about what it means to be African and what the solid roots are that form the foundation of our Africanness. Land tenure rights of people is an issue that is assuming greater and greater significance in every African country and this issue will certainly be a most burning one in the 21st Century. African governments have to appreciate that transforming agrarian systems into urban industrial economies invariably requires fundamental changes in many institutions, including those of land tenure.

3. CHAPTER 3

3.1 Future of traditional leaders

Knowing who you are, where you come from and where you intend to go is about knowing your potential and capabilities and knowing how far you can go to achieve your set goal. The institution of traditional leadership is the only institution that is having a track record of governing traditional communities. This structure was tested from time immemorial and is therefore trusted by members of the traditional communities. Successive colonial and apartheid regimes turned a blind eye to the developmental needs of traditional communities. This resulted in these communities and their leadership having to fend for themselves.

The apartheid and homeland regimes recognized that traditional communities were capable of managing their own affairs and passed numerous laws and regulations confirming the original duties and functions which vested in their traditional leadership structures.

Submissions by Mabeta on the future of traditional leaders at a summit held at the Mthatha Holiday Inn were that, traditional leaders will continue to play an important role in rural, provincial and national government in South Africa. He claimed that the positive view of the future of traditional leadership is attributed to the specific provisions of the Constitution. He further stated that the past life of the institution of traditional authority under the British colonial system and the apartheid system, requires that the future of traditional leadership in South Africa be viewed in the context of an on-going process of transition which began in April 1994 with the national election. Even prior to this general election the issue of traditional leadership was an important component in the negotiations which produced the historic march by all South Africans to the voting polls ¹⁷¹

171 Mabeta M (1997), The Future of Traditional Leadership in South Africa, Mthatha summit, p163

He further elaborated by saying that there are politically loaded questions concerning the possibilities of the entrenchment of the position and roles of traditional leadership and its varied institution as they exist today.

It is feared that the government of national unity might not be able to change the non-democratic nature of the system of traditional leadership.¹⁷²

3.2 Legal context of the transition

Mabatha observed that both the Interim Constitution and the Final Constitution have given full recognition to the position of traditional leaders in all three spheres of government. He further stated that Constitutional Principle 13 has provided the institution of traditional leaders with status and role according to indigenous law and its recognition and protection in the Constitution. This further provides that indigenous law, like common law shall be recognised and applied by courts subject to fundamental rights contained in the Constitution and the legislation.¹⁷³

According to Holomisa the latter will not derogate from the provisions of Constitutional Principle 13. He stated that the House of Traditional Leaders gave force to these principles for the participation of traditional leaders in the law-making processes on matters of custom, tradition and traditional authorities.¹⁷⁴ According to authors such as Mabeta, referred to above, these constitutional guarantees were removed by the 1995 amendments to the Local Government Transition Act¹⁷⁵ which provided that traditional leaders were recognized as only one of four interest groups, together with women, farm workers and levy payers.

3.3 Traditional leaders and political transition in South Africa

According to Malatsi severe inroads were made into the institution of traditional authorities and the functions, powers and status of traditional leaders. This was done by the imposition of European political and administrative controls over customary traditional authorities; the influence

¹⁷² Mabeta, loc.cit.

¹⁷³ Mabeta, op cit, p163

¹⁷⁴ Holomisa SP (2005), Old Traditions: New South Africa, p14

¹⁷⁵ Local Government Transition Act 209 of 1993

of Western culture and religion, limited land availability and economic disruption with its resultant impoverishment. He further claimed that in many respects traditional leaders became officials of the dominating white and homelands governments. He further stated that they derive their status and powers not from traditional concepts, but from the fact that they were appointed or recognized by the government of the day.¹⁷⁶

Muendane added to these views by stating that where political or economic behaviour takes place outside of one's cultural belief and norms, it is like using an incorrect map for a territory and of course one gets lost. He reiterated that this is the reason for mediocrity, incongruency and stress in the lives of African professionals. They not only embrace European culture but also give expression to their political lives through it. He argued further that for as long as Africans put their cultural values aside they shall experience the kind of political alienation that currently characterizes their lives at present. He also stated that the Constitution gives traditional leaders recognition and the Traditional Leadership and Governance Framework Act defines their roles, powers and functions, and as such the institution hope to survive.¹⁷⁷

Nonkonyane in his contribution on the matter claimed that the top leaders of the Congress of Traditional Leaders of South Africa (Contralesa) could ensure that in their own areas all votes, without exception, went to the ANC, and that that was exactly what happened. According to him that was a good beginning, that needed to be nursed, although things have not continued to go as well as envisaged at the time.¹⁷⁸

According to an article in the Daily Dispatch, a senior provincial politician was recently reported as saying that chiefs are a creation of colonial rule.¹⁷⁹ This statement troubled traditional leaders, and the Eastern Cape Chairman of the Congress of Traditional Leaders promptly replied, declaring his outrage and disappointment. "Traditional leaders and rural local

176 Malatsi D (1997), Political Party Perspective on Traditional Leadership, at Mthatha summit, p112

177 Muendane NM (1997), Political Party Perspective on Traditional Leadership, at Mthatha summit, p113

178 Nonkonyane, op cit, p100

179 Chiefs are a creation of colonial rule (2000), Daily Dispatch, 10 March, p3

government had been in place before the arrival of the colonists, and traditional leaders had in fact fought against colonialism and were the first to be imprisoned in Robben Island” he retorted.¹⁸⁰

Secondly a recent public statement by a cabinet minister shows that there is indeed some substance in the unhappiness that traditional leaders conceive the government’s attitude to their whole institution. Declining a invitation to a ceremony to mark the signing of a memorandum of understanding between the Kingdoms of Western Thembuland and AmaRhaRhabe at Qamata Great Place early in May 2005, whereat the Minister of Arts and Culture (Mr Pallo Jordan) denounced these kingdoms as “illegitimate and declared that neither AmaRharhabe nor the Western Thembus are entitled to refer to themselves as kingdoms and their traditional heads as kings”¹⁸¹

The conflict potential of such references between these two and the Buelekhaya Dalindyabo need not be emphasized. The most telling part said that “As a republican, I don’t recognize them as kings so as I even do not recognize the kingship institution”¹⁸²

In the light of this it will be fair to conclude that the road ahead for the institution of traditional leadership is not a smooth one.

The overall bias in the study of the institution of traditional leadership in South Africa is that the institution itself has to fit into a post-apartheid South Africa as it is or be terminated. While rigorous debates were conducted on the transformation of key institutions in society, such as the army, the police, education and the Houses of Parliament as part of the transitional process in South Africa, the issue of traditional leadership remained marginal. It has been discussed in the context of its potential usefulness to party political struggles, rather than as an important national issue. It was discussed as an item which could be left aside to be unpacked along the way if the transformation process turned out to be a very smooth one. Those who gave serious attention to the matter did so for a narrow party political interests.

3.4 Reform strategy of institution of Traditional Leadership

180 Traditional leaders fought against colonialism (2000), Daily Dispatch, 13 March, p4

181 Minister stirs up Xhosa royal row (2005), Daily Dispatch, May 11, p2

182 Ibid

It is understood, especially when viewed from the angle of traditional leadership, that development is a process covering a wider area than only development administration. The process involves a total spectrum of activities best described as development management. To understand and implement the recommendations made by traditional communities and their leaders, one has to view the concept of development management from a vantage point situated in the midst of those living in accordance with rules and values as defined in African law and custom. It is therefore important to appreciate that traditional African society had its own institutions which functioned well according to certain well tried principles and practices for many years.

According to Mabeta, the centrality of traditional leadership in African culture in South Africa suggests that traditional leaders can play an important and constructive role in nation building. He affirmed that this could happen only if the appropriate institutional framework for that role is developed by the South African central government. This, he stated requires the participation of chiefs and society at large, particularly rural communities.¹⁸³

Since the dawn of democracy in 1994, the institution of traditional leadership in South Africa has been beset by challenges. The biggest of these challenges was that of defining and playing its role in post-apartheid South Africa. The discourse of sustainable rural development was elevated and pronounced in government policies and programmes after 1994. The role of traditional leaders in this broad development initiative has often been cagy and less formalized.

The ANC government embarked on the all important democratization process. In the rural areas of the former Homelands, this included attempts to dismantle the concentration of powers in tribal authorities in the form of reforms in local government and land administration. Government wanted to ensure that local government in its entirety is geared towards development. In the process, the reforms of the institution were to weaken its powers and functions to speed up the democratization processes. This strategy seeks to introduce a balance between a liberalist individual based polity and a community-based African traditional authority.¹⁸⁴

183 Mabeta, op cit, p165

184 Mabelele J (2005), Traditional Leadership Conference, 20-23 September, Durban

As proclaimed by Mabelele the process will enable each group to exercise a mutual veto over government policy in proportionality in relation to the distribution of power, ideological neutrality and independence from party political control, increased co-operation among elected officials and traditional authorities and most importantly, effective recognition and legitimacy of the authority of leaders by both elected officials and nominated traditional leaders. He elaborated by stating that the South African government is able to direct these institutional reforms without losing support from its liberation supporters..

Mabelele believe that this will be used fruitfully to destroy apartheid without destroying the value system of many traditional communities in South Africa as represented by traditional leaders. This transformation has no bearing on a loss of autonomy by either traditional leadership or the institution of local government. Since both can exist as equals and work co-operatively to promote social change, progress and stability in South African society.¹⁸⁵

Mabelele elaborated on the spheres of traditional institutions and leadership that are clearly regarded as part of the scope of the RDP since the document specifically states that elected local government with responsibility for the delivery of services should be extended into rural areas, including traditional rural areas. To him the reality of the situation is that homeland type tribal authority structures are still legally operational despite the *de facto* replacement in most communities by Sanco members. The following steps are therefore suggested by him:-

- (a) The rationalisation of the institution of traditional leadership using the criteria of a legitimacy in order to limit the number of chiefs on the official register, would effectively terminate the system of headmen which encourages chiefs to use anyone they favour to execute their responsibilities.
- (b) That members of Civil Society such as Sanco in general or more specifically a water committee, school committee and resettlement

185 Ibid

forum will no doubt be willing to accept members of the traditional leadership in local government structures without reservation¹⁸⁶

3.5 Communal Land¹⁸⁷

Church in her arguments advanced that after determination by the Minister of Land Affairs the ownership of communal land that is not state land but which is registered in the name of a person, a traditional leader or authority, communal property association or a trust or other legal entity, will vest in the community on whose behalf it was registered¹⁸⁸

According to Scheepers, of fundamental importance is the right of “communities” to express their own preferences for the type of tenure arrangements which they wish to have. He further elaborated by saying that in order to succeed, tenure reforms must be developed in a manner which solicits the participation of all affected parties and communities. His argument pertaining to agricultural growth and efficient management of natural resources that are dependent on the political, legal and administrative capabilities of rural communities to determine their own future and to protect their natural resources and other economic interests. He closed his contribution on this issue by stating that if Africa is to achieve meaningful levels of economic development and social progress, then issues of agriculture and natural resource management can no longer be divorced from issues of politics, democracy and good governance.¹⁸⁹

Transactions in respect of communal land, including new allocations or rights in such land, that arise after the opening of a communal land register,

186 Ibid

187 See Communal Land Rights Act 11 of 2004

188 Church, op cit, p83

189 Scheepers TE (2002), Traditional Leadership and the Development Process in South Africa, at South African Mayors’ Forum on Sustainable Development of South Africa, p375

must be registered in terms of Communal Land Rights Act¹⁹⁰ and the Deeds Registries Act.¹⁹¹

After the required inquiry and determination as to the land to be transferred, the Minister of Land Affairs must transfer communal land to the relevant community.¹⁹² With regard to such land the Minister must also have a communal general plan prepared, approved¹⁹³ and registered¹⁹⁴ and must have a communal land register opened. He or she must transfer the new order rights to the entitled person or persons concerned by means of a deed of communal land or other appropriate deed. The minister is further empowered to do anything that is necessary with regard to the transfer. A suitable qualified official in the Department of Land Affairs may perform those functions of a conveyancer where this is legally required. Transfer duty, value-added tax, stamp duty and deeds registration fees of office are payable in respect of any registration in order to give effect to the transfer of land, but the costs of surveying and registration may be paid by the minister from moneys appropriated by Parliament for the purpose.¹⁹⁵

Land ownership gives people a sense of being. The South African government has committed itself to redistributing of land to the landless. It is difficult to quantify the landless, but government should by now have indication that there is an overall need for land. Tied to the submission that when the restitution process is effected those traditional communities should through their traditional leaders ask for more land from government. It is therefore the duty of the government when redistributing land to allocate more land to traditional community areas, thus making it possible for such communities to improve their standard of living and to alleviate poverty.¹⁹⁶

190 Act 11 of 2004

191 Act 47 of 1937

192 Act 11 of 2004

193 In terms of the Land Survey Act 8 of 1997

194 In accordance with the provision of the Deeds Registries Act 47 of 1937

195 Church, loc cit

196 Ibid

Since traditional leaders and traditional communities are vested with survival skills by way of crop production or animal rearing, this could be the means by which communities could be exposed to open marketing as well as the world at large. Additional land can be purchased from government and where communities are unable to buy such land they can through their leaders be subjected to a rural land tax as a source of local government funds. Since the rural people have always paid tax in one form or another but lacking proper administration of such taxes this would not be something new to them.¹⁹⁷

Section 25(4) of the Constitution commits the state to legislative measures to foster conditions which enable citizens to gain access to land on an equitable basis. Government has to follow a programme of “willing seller”, “willing buyer”, where possible¹⁹⁸

Scheepers confirms that within the traditional authority areas the functions of traditional leaders is still to allocate land. Government intends to extend tenure security to all South Africans. Traditional leaders and traditional authorities should therefore not be seen to be denying those people living in their areas the legal rights to obtain individual land ownership. Since people living in traditional community areas do not have much exposure to the available tenure systems, government should, through traditional leadership, embark on an objective massive education campaign to the underprivileged communities so that when decisions are taken, such decisions are informed.¹⁹⁹

197 Ibid

198 Sec 25(4) of the 1996 Constitution

199 Scheepers, loc cit

3.6 Latest developments

After having submitted the final draft of this mini-thesis to my supervisor, four new bills dealing with customary law and traditional leaders were introduced for parliamentary consideration, and the Constitutional Court took official notice of customary law relating to the succession of traditional leaders being developed by traditional communities themselves.

Bill 10 of 2008 was the first of these, containing the *Reform of Customary Law of Succession and Regulation of Related Matters Bill*. It purported to confirm the 2004 majority judgment of the Constitutional Court in *Bhe*, dealing with inheritance. In addition, it continues to allow at least two traditional institutions, viz that of ‘woman to woman’ marriages, as well as the sororate.

Bill 15 of 2008, the *Traditional Courts Bill*, although containing an entirely new version of the Traditional Courts Bill of 2003, does not seem to differ fundamentally from the latter.

Then followed the *National House of Traditional Leaders Bill B56 of 2008*, substituting the National House of Traditional Leaders Act 10 of 1997 and consolidating it with a number of updates, including that of providing for regular meetings with kings and queens as recognized in terms of the Traditional Leadership Governance Framework Act 41 of 2003.

The last bill, the *Traditional Leadership and Governance Framework Amendment Act Bill* (B57 of 2008), likewise, contains some updates, such as providing for the establishment of kingship and queenship councils.

Finally, on 4 June 2008 the Constitutional Court was unanimous, in *Shilubana and Others v Nwamitwa* (CCT 03/07, ZACC 9), in allowing the eldest daughter of a late senior traditional leader to succeed to his position as Hosi of the Valoyi Traditional Community – particularly since the development of their customary law by the latter was regarded as in accordance with the Bill of Rights as contained in the 1996 Constitution.

3.7 Conclusion

Traditional leaders should be looking at ways of improving the standard of living within their communities, thereby building the economy of the country. Without a healthy economy, no nation can survive and as a result

traditional leaders should move towards being more commercially oriented not for their own good but for the good of the people they serve.

The challenge facing government is how to effectively train and build the capacity of communities in order to enable them to face the challenges of an industrial and developing world and to transform with minimal antagonism, those institutions within which the majority of the population identifies itself without compromising peace in our land.

Government believes that progress is achieved through legislation. Through mutual respect and understanding we do not need pieces of paper to prescribe what we should or should not do. This sounds primitive but very real.

It is necessary to emphasize the need to create collective development opportunities in traditional authority areas in order to address problems and to tackle present and future challenges. A prerequisite for achieving this goal is a suitable and appropriately contextualised development management model for traditional leadership in South Africa.

It seems unlikely that the required cultural values can be incorporated appropriately in any development management model not developed with traditional leadership as point of focus.

In rural traditional authority areas it will only be possible to bring about successful development, if and when the development process is properly managed within this development law framework according to the needs and values of the community concerned. The failure or success of this rural development management process will depend on the degree to which the communities concerned are prepared to take up ownership, and the degree to which traditional leadership is capable and empowered to add value to this process as leader in the African and modern meaning of development management and development leadership.

Traditional communities have to be empowered to play a specific role in the development management process. The basis of empowerment must be a positive organizational climate within which enabling structures are created, accommodating and caring for community values, such as collective solidarity of the traditional communities. There is a need for the understanding of the situational realities of communities functioning under traditional council and leaders, and to use these realities and circumstances as a basis for proactive and challenging community-based planning

structures and strategies. The empowering process will involve a synthesis of Western and African managerial concepts and challenges.

The essence of traditional African democracy should be used as a basis for establishing and facilitating the growth of the structures, organizations and models developed to guide and harness the potential of traditional leadership towards self realisation and success as a key roleplayer in the development process of the South Africa of tomorrow.

In implementing land reform programme it should be kept in mind that there are many stakeholders who have to be consulted after each and every step of the process. Land should be made available to people who previously had no access due to a variety of factors.



BIBLIOGRAPHY:

BOOKS AND CONTRIBUTIONS TO BOOKS

Balatseng D (1997), “Traditional Leadership and Land Reform in South Africa”, in *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p131

Beinart W and Dubow S (1995), *Segregation and Apartheid in Twentieth-Century South Africa*, Routledge, London

Bekker JC (1989), *Seymour’s Customary Law in Southern Africa*, Juta, Cape Town

Bennett TW (2004), *Customary Law in South Africa*, Juta, Cape Town

Brookes E (1930), *The History of Native Policy*, Nasionale Pers, Cape Town

d’Engelbronner-Kolff FM (1998), “The people as law makers: The juridical foundation of the legislative power of Namibian traditional communities”, in d’Engelbronner-Kolff FM, Hinz MO and Sindano JL (Eds), *Traditional Authority and Democracy in Southern Africa*, University of Namibia, Windhoek, p62

Hammond-Tooke WD (1975), *Command or Consensus: The Development of Transkei Local Government*, Cape Town, David Philip

Koyana DS and Bekker JC (1998), *The Judicial Process in the Customary Courts of South Africa*

Mafeje A and Kuper L (1963), *The New African Bourgeoisie*

Malatsi D (1997), “Political Party Perspective on Traditional Leadership: The National Party”, in *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p111

Maqutu, WCM (1992), *Contemporary Family Law in Lesotho*, University of Lesotho, Roma

Miller C and Weinrich AKH (1971), *The Changing Role of Chiefs and Councils in Rhodesia*, Heinemann, London

- Moore B (1966), *Social Origin of Dictatorship and Democracy*, Boston, Beacon Press
- Mqeke RB (1997), *Basic approaches to problem solving in Customary Law: A study of conciliation and consensus among the Cape Nguni*, Grahamstown, Grocott and Sherry
- Muendane NM (1997), “Political Party Perspective on Traditional Leadership: The Pan Africanist Congress of Azania”, in *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p113.
- Ngubane NJ (1997), *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p85
- Nonkonyana M (1997), “The Perspectives of Traditional Leaders and their Role in the New South Africa”, in *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p95
- Olivier NJJ, Bekker JC, Olivier WH (1985), *Indigenous Law*, in *The Law of South Africa (LAWSA)*, Vol 32, Butterworth, Durban.
- Oomen B and Van Kessel I (2000), *Tradition on the move: Chiefs, democracy and change in rural South Africa*, Netherlands Institute for Southern Africa, Leyden.
- Prinsloo MW (1983), *Inheemse Publiekreg in Lebowa*, Van Schaik, Pretoria
- Scheepers T (1997), “Traditional Leadership and the Development Process in South Africa”, in *Traditional Leadership in Southern Africa*, Konrad Adenauer, Johannesburg, p117.

ARTICLES, INTERNET AND UNPUBLISHED MATERIALS

ANC Today (2003), Vol 3, 29 July

Bekker JC (1993), “The Role of Chiefs in a Future South African Constitutional Dispensation”, *Africa Insight*, Vol 23, p200

Centre for Policy Studies (1996), *Newsletter Synopsis*, Vol 1, 2 December, p8.

- “Chiefs are a creation of colonial rule” (2000), *Daily Dispatch*, March 10, p3.
- Dlamini CRM (2002), “The Clash Between Customary Law and Universal Human Rights”, *Speculum Juris*, p38
- Du Plessis W and Scheepers TE (2000), “Traditional Institutions”, *Potchefstroom Electronic Law Journal*, 1 [available online: <http://www.puk.ac.za/lawper>].
- Holomisa SP (2005), “Old Traditions, New South Africa”, *New Agenda*, First Quarter.
- Houston G and Fikeni S (1996), “Constitutional development and the issue of traditional leadership in rural local government in South Africa”, *Konrad Adenauer Foundation seminar report: Aspects of the Debate on the Draft of the New South African Constitution*
- Kaganas F and Murray C (1994), “The contest between culture and gender equality under South Africa’s interim constitution”, *Journal of Law and Society*, p 409
-  [http://www.ecu.edu/African/sersas/papers/mabutla_fm Mar.10 ihtm.8/4/2005](http://www.ecu.edu/African/sersas/papers/mabutla_fm_Mar.10.htm)
- Koyana DS (2002), “Chieftainship and headmanship are not hereditary”, *Speculum Juris*, p144.
- Mabelebele J (2005), “Locating traditional leadership at the centre of sustainable rural development: Is the sun setting for the institution?” Paper read at *Traditional Leadership Conference*, Durban, 20-22 September
- Mabeta M (1997), “The Future of Traditional Leadership in South Africa”, Paper read at Summit on *Traditional Leaders in South Africa*, Mthatha, 16-17 April
- Mabutla FG (2001), “The Fate of Traditional Leaders in Post-Apartheid South Africa”, Paper read at 6-7 April Spring Meeting of Southeastern Regional Seminar in African Studies (SERAS), Northern Kentucky University, USA.

- Masilela, S (2005), Paper read at *Traditional Leadership Conference*, Durban, 20-22 September
- Mijere NJ (1997), “Traditional Leadership: Colonial and Post-colonial”, Paper read at *Summit on Traditional Leaders in South Africa*, Mthatha, 16-17 April
- “Minister stirs up Xhosa royal row” (2005), *Daily Dispatch*, May 11
- Nel W (1997), “Traditional leadership in Southern Africa”, Paper read at *Summit on Traditional Leaders in South Africa*, Mthatha, 16-17 April
- Peter G (2005), “Legal Framework Affecting Rural Local Governance”, Paper read at *Conference on Traditional Leadership and Rural Local Government*, Johannesburg, 1-2 November
- Roth M, Barrows R, Carter M and Kanel D (1988), “Land ownership security and farm investment”, *Economics*, Vol 71, p 211
- “Traditional leaders fought against colonialism” (2000), *Daily Dispatch*, March 13, p4.
- Van Rouveroy van Nieuwaal EAB (1996), “The New Relevance of Traditional Authorities in Africa”, *Conference on Reflections on Chieftaincy in Africa: Future Directions*, p37
- Welsh D (1968), “The State President’s Powers under the Bantu Administration Act”, *Acta Juridica*, p81.

TABLE OF CASES

- African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others* 1998 (3) SA 1 (CC)
- Buthlezi v Minister of Bantu Administration and Development and Another* 1961 (4) SA 835 (AD)
- Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC)

Chief Pilane v Chief Linchwe and Another 1995 (4) SA 686 (B)

Congress of Traditional Leaders of South Africa v Minister of Local Government, Eastern Cape, and Others 1996 (2) SA 898 (Tk)

Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995 1996 (4) SA 653 (CC)

Mbulelo Jumba v The Head of Dalindyebo Regional Authority and Three Others Unreported Transkei High Court Case 947/99

Mthembu v Letsela and Another 1997 (2) SA 936 (T); 1998 (2) SA 675 (T); and 2000 (3) SA 867 (SCA) (ie three successive judgments)

Ngwenya v Gungubele 1 NAC (SD) 198 (1950)

Prince v President of the Law Society of the Cape of Good Hope & others 2002 (3) BCLR 231 (CC)

Ratsialingwa and Another v Sibasa 1948 3 SA 781 (AD)

Sigcau v Sigcau 1944 AD 67

TABLE OF LEGISLATION

Bantu [later Black] Homelands Constitution Act 21 of 1971

Communal Land Rights Act 11 of 2004

Communal Property Associations Act 28 of 1996

Constitution of the Republic of South Africa, 1996

Council for Traditional Leaders Act 31 of 1994

Deeds Registries Act 47 of 1937

Eastern Cape House of Traditional Leaders Act 6 of 1994

Land Survey Act 8 of 1997

Local Government Municipal Structures Act 117 of 1998

Local Government Transition Act 209 of 1993

Local Government: Municipal Systems Act 32 of 2000

National House of Traditional Leaders Act 10 of 1997

Native [later Black] Administration Act 38 of 1927

Native [later Black] Affairs Act 23 of 1920

Native [later Black] Authorities Act 68 of 1951

Native [later Black] Land Act 27 of 1913

Native [later Black] Trust and Land Act 18 of 1936

Promotion of Bantu [later Black] Self-government Act 46 of 1959

Provisions of the Local Government Municipal Structures Act 117 of 1998

Remuneration of Traditional Leaders Act 29 of 1995

South Africa Act, 1909

Traditional Leadership and Governance Framework Act 41 of 2003